

52/8/11/25

**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS  
6 MARCH 1996**

## CONSTITUTIONAL ASSEMBLY

### DRAFT REPORT

### SUB-COMMITTEE MEETING

WEDNESDAY 6 MARCH 1996

#### 1. OPENING

- 1.1 Mr Ramaphosa opened the meeting at 14h20.
- 1.2 The chairperson apologised for the delay in securing the venue, and ensured the meeting that steps would be taken to ensure that when the CA books a venue it is indeed allocated to the CA. He also stated that attempts would be made to secure the CA's own venue.
- 1.3 Discussions were based on the following documentation:

***Constitutional Committee Sub-committee Documentation pack for 6  
March 1996  
Third Edition of the Working Draft***

#### 2. PROVINCES

- 2.1 Regarding Section 130 of the Working Draft: Assent to Bills (Provinces)
  - 2.1.1 The NP proposed an amendment that one third or 90% of those of the minority parties' assent was required for abstract review to take place.
  - 2.1.2 The ANC stated that there was a misunderstanding about this matter from the seide of the NP.
  - 2.1.3 Regarding the 90% proposal related to abstract review, the DP indicated that this was the first time they had heard of this.
- 2.2 Regarding Section 154 of the Working Draft: Adoption and Certification (of Provincial Constitution)
  - 2.2.1 It was agreed that further bi-lateral discussions were needed on this matter.
- 2.3 It was agreed to further investigate the possibility that the homogeneity clause should be contained in a preamble to the Constitution, as it was related to all levels of government.

- 2.4 The DP indicated that they would await proposals referred to by the NP regarding co-operative government.

### 3. COMPETENCES

#### 3A NATIONAL AND PROVINCIAL LEGISLATIVE AUTHORITY

- 3.1 Discussion was based on the *National and Provincial Legislative Authority* draft formulations, dated 5 March 1996. It was agreed to begin to discuss these matters more openly, as various bi-lateral and multi-lateral meetings had taken place. It was agreed that this draft serve as a basis for further discussions, and that it would have to be discussed a number of times. It was agreed that progress had been made in that there was finally one draft that parties could look at jointly, although the draft was still not agreed to in all its detail.
- 3.2 The ANC indicated generally that they were happy to accept this compromise draft if certain words in brackets were removed. They stated that changes had been made to the draft to accommodate the DP. They indicated that if this draft were not accepted as the basis, they would revert to their earlier position.
- 3.3 The NP indicated generally that there were aspects that required further discussion amongst parties at bi-lateral and multi-lateral level. They indicated that there may be aspects in this draft that have bearing on other chapters. They indicated that one of their senior negotiators who had dealt with the details of changes to the draft was unfortunately not present. They stated in general, however, that the idea of co-operative governance should be taken into account here regarding the way that levels of government interact amongst themselves. They said that these ideas would also have an impact on the way central government would have to deal with other levels of government.

#### CLAUSE 1: LEGISLATIVE AUTHORITY OF REPUBLIC

- 3.4 It was agreed that this clause was broadly supported by the parties.
- 3.5 Regarding Subclause 1(1), in particular the question whether the National Council of Provinces should be part of Parliament, it was agreed that parties needed to discuss this matter further.
- 3.6 Regarding Subclause 1(1)(b), it was agreed that in light of the discussions on this matter, the DP would like to reconsider their position.

- 3.6.1 It was noted that the DP indicated that although they were in support

of Subclause 1(1)(b) as far as it provided for two legislative bodies being able to legislate on the same matters, they were in favour of a different construct regarding overrides. It was noted that they preferred a construction which indicated that provinces could legislate on Schedule 5 matters and national government could override, rather than letting them both legislate broadly. It was noted that they wished to have further discussions later on this matter.

The DP referred to footnote 12, which indicated that they supported a formulation similar to section 72 of the German Basic Law, which would limit Parliament to legislate on Schedule 5 matters to the extent of the Parliamentary overrides as provided in the clause.

3.6.2 In response the NP explained their position that one had to look at the question how one dealt with functional areas now listed in Schedule 5. They stated that the approach generally followed at Kempton Park was to list them as concurrent powers, and that this was an approach one found internationally too. They stated that it may be almost impossible to divide powers so there would be exclusive powers only, and in this regard referred to the example of education. They stated that because of this approach they were looking at ways to deal with the resolution of conflict, which was attempted in clause 3.

The NP stated that they were trying to achieve the following:

- i. That provinces had original powers.
- ii. That these powers would be dealt with at executive and legislative levels.
- iii. That there would always be areas of vagueness, concurrency, and competition.
- iv. That the last mentioned issue had to be regulated by bringing in the concept of co-operative governance.
- v. That generally the resolution of conflict should be dealt with outside the courts if this notion was accepted.

Regarding overrides, they emphasised that central government should not have the general right to override, except in those specific areas where overrides would occur. They stated that it was therefore important to ensure that override areas were clearly identified.

3.6.3 The ANC stated that they agreed with much of what the NP said on this matter, but that they were now unclear about the position of the DP. They stated that in light of the fact that there was a list of concurrent legislation where national and provincial had equal right to legislate, they could not understand why the DP wanted to limit

national legislation to override areas.

The ANC stated that they did not believe one could say that the Lander could legislate only when the National level could not. They stated that in the German Constitution, regarding concurrent legislation, seemed to indicate that the lander could legislate only when the national could not. They stated that if this route were followed, that there were exclusive competences it would create mistrust, disputes, and court cases, which would strip the provincial governments of their right to legislate. They stated that although they found the position referred to as attractive, because it reduces conflict, that they did not believe South Africa was ready for this, for the reasons indicated by the NP.

- 3.6.4 The technical advisers stated that as they understood this clause, it was quite clear that the national legislature could legislate on any Schedule 5 matter. They stated that overrides were also provided for, but were not limited to the matters in the Schedule, and that as long as provinces legislate, it kicks in to overrides. They stated this meant that the national legislature would be able to legislate outside the schedule only if provinces do not legislate; but as long as provinces legislate, it kicks in the possibility of overrides. They stated that it was important not to read this section in abstraction.

The technical advisers said that a practical point was that much of the legislation operative in the provinces which fell within Schedule 5 matters, were in fact national legislative functions. The provinces have the option to retain this legislation or replace it, but this would happen unevenly in the provinces. The practical effect was that provinces would have a monopoly and exercise powers as they wished. However, in twenty years or so, the provinces would have occupied the areas left over for them and the national will occupy as far as overrides. They pointed out that the difficulty would be in the intervening period, where conflicts may arise. In order for Schedule 5 legislation to be passed, the provinces would in other words have to go to the National Council of Provinces.

- 3.6.5 The DP responded that there was much legislation on the statute books already, and that they sought more clarity on what the technical advisers had said. They stated that they believed that provinces should be able to legislate on any matter in Schedule 5, and the question that arose was what would happen if the Northern Cape Province passed legislation together with all the other provinces, and there was in fact conflicting legislation enacted, which would be invading the area of overrides. They stated that this matter would have to be discussed further within the DP.

## CLAUSE 2

- 3.7 It was agreed that this clause was broadly supported by parties. It was noted that the clause had to be read with Section 154 of the Working draft, which prescribed the procedure for the adoption of a provincial constitution and the conditions to which a provincial constitution must conform, and that that section required further refinement e.g. to provide for homogeneity.
- 3.8 Regarding Subclause 2(b)(i), it was agreed that parties needed to reflect on the following positions stated:
- i. The NP still wanted the concept of framework legislation to be introduced in this subclause.
  - ii. The DP too supported the introduction of the concept and that they would provide the meeting with a list.
  - iii. The ANC stated that it was opposed to these positions, and felt that the way this clause was structured made frameworks unnecessary in view of the overrides in Clause 3.
- 3.9 Regarding Subclause 2(2), it was agreed that the wording of this may be to loose, and that the technical experts would need to attend to this.
- 3.10 It was agreed that the technical advisers would look at a technical matter raised by the ANC that the underlined prefix in " The passing of a provincial constitution and of any amendments to it is an exclusive provincial matter," may be inappropriate.
- 3.11 It was noted that Section 156 of the Working Draft was incomplete, and that this must be looked at together with other related clauses.
- 3.12 Regarding Subclause 2(4), it was agreed that the footnote which noted a concern that this provision should also specifically empower Parliament to legislate in "incidental matters" was based on a different model, and would fall away.

## CLAUSE 3

- 3.13 Regarding Subclause 3(1)(a), it was agreed to delete [*essential*] so the phrase read "*necessary for the achievement of a national objective*". It was noted that the DP was broadly stating their position and that the parties would have ample opportunity to go through the draft again.
- 3.13.1 The DP stated that they had been uncertain earlier what had been meant by the previous Subclause (e) which had now been

replaced by Section 3, and particularly what had been meant by the words "national legislation must be regarded as necessary". They stated that they had read this as qualifying the national criteria, but that the new override said that anything which applied uniformly was an override. They stated that this omnibus clause was a severe derogation of rights of provinces as they were now. They stated that they had difficulties to accept this, unless it was listed in specific terms how "national objectives" were defined. The DP indicated that "necessity" applies to the objective, not to the achieving of it.

3.13.2 The DP stated that they would not accept should provinces act jointly to remove rights of individual provinces against a national government which may have a different attitude, especially if the party that controls the province was not in the majority in the National Assembly. They stated that even if the new jargon of co-operative governance was acceptable to them, they would not accept that the national government should be entitled to override national legislation in a way that would make the powers of the provinces virtually meaningless.

3.13.3 The ANC stated that the DP was correct only in so far as the necessity test, which was the highest legal test, was concerned, and there was a residue outside of 3(2). Regarding the objective test, they stated that what it means, and this had been indicated in various court cases, was that there must be no other alternative than to achieve that objective, and that it had to be read in a strict terms.

3.13.4 The ANC stated further that if a national legislative objective was set by process of national co-operation, through the National Council of Provinces, this meant it was made with the co-operation of the provinces, so that national objective should be valid; otherwise this would deny the process by which this law came into being.

3.14 Regarding Subclause 3(2)(a), this was agreed and it was agreed to delete footnote 14.

3.15 Regarding Subclause 3(2)(b)(i), particularly on the phrase [*including minimum norms and standards*], it was agreed that the NP would consider deletion of these words.

3.15.1 The ANC stated that according to their legal advice, this phrase was already included in the preceding phrase "*norms and standards*", and that it was therefore unnecessary.

- 3.16 Regarding Subclause 3(2)(c)(iii) and (iv), it was agreed that this can be improved on technically by taking into consideration what the DP proposed, to inset the notion of activity or relationship, and that the technical advisers would reformulate this:
- 3.16.1 The DP indicated that a similar phrase to that in (iv), "the promotion of commerce across provincial boundaries" had been under discussion regarding the chapter on finances. They stated that an understanding was emerging that economic relations had developed beyond these phrases that were inherited from connotations of commerce in previous centuries.
- 3.16.2 The ANC suggested the word "economic relations" as a possible replacement for the phrases in contention
- 3.16.3 The NP requested technical advice as to whether these should be included in this subclause instead of in the description of functional areas in Schedule 5. They stated that it appeared that Sub (iv) was unnecessary in light of the overriding provisions in the Bill of Rights which deals with the notion of equality at all levels of government.
- 3.16.4 The technical advisers indicated that the list of items comes from the Interim Constitution, but that the provision regarding equality was specifically negotiated between parties now and added here.
- 3.16.5 The ANC indicated that they would not agree with the NP proposal, because one had to make the distinction between those areas where one could legislate and those areas which related to overrides. They stated that the Bill of Rights did not prevent one from making law on any aspect as long as it was not in conflict with the rights. They stated that the override provision, however, was at the heart of Sub (iii) and (iv). They stated that if national legislation achieved the national objective, all of these provisions related to giving national override over provinces if there was conflict, and therefore it was necessary to maintain them.
- 3.17 Regarding 3(2)(c), as related to the rest of Clause 3, it was agreed that the technical advisers would look at the suggestions raised by the ANC to meet the concern by the DP that the term "*in the interest of the country as a whole..*" provides little protection. It was agreed that in addressing this matter the technical advisers place the emphasis in the enquiry on the fact that one had to prove necessity, and that in the context Subclause 3(2) was



in effect excised from Subclause 3(1), and that in respect of Subclause 3(2) it appeared that the subjective test of necessity in 3(1) remained, whereas the more objective test of national objective was removed if it were "in the interests of the country as a whole":

- 3.17.1 The DP stated that the phrase "*interests of the country*" was a political judgement, and the court would say that if the National Assembly decided it was in the interests of the country, the court would take that for granted because it is the view of the democratically elected representatives. They requested the opinion of the Panel whether it was in line with the constitutional principles.
- 3.17.2 The Panel raised a particular query as to how would the central legislature pass legislation to prevent one particular province from taking certain unreasonable action, in light of the fact that it should apply uniformly.
- 3.17.3 The ANC suggested that this question could be addressed by looking at a practical, if somewhat absurd, example. They stated that suppose Gauteng acted by virtue of their lotteries law and put up a casino on the wall of the Vaal river, and the Free State also wanted to do so on the other side of the river. Should a national law now be made that casinos may not be nearer than 6 km from the borders of another province, then that national law will aim at this kind of action and uniformly.
- 3.17.4 The ANC said that the query raised may, however, require some further consideration. They stated that there may be other actions that applied to a particular province. They suggested that one could look at this being covered by Subclause 3(2)(d) which came word for word from the Interim Constitution. They suggested that if it was felt that this did not fully comply with the constitutional principles, a Subclause could be created which would indicate that in that case this would apply.
- 3.17.5 The ANC pointed out that it was not merely "*national policy*" referred to in the list which could be removed from the objective test, but it was draft to read and therefore required "*national policy which is in the interests of the country as a whole.*" They stated that therefore if one met that criteria the objective test would no longer apply; however, the draft provided an exhaustive list of matters which would fall under that criteria and on which the courts could therefore adjudicate.

- 3.17.6 The technical advisors illustrated this matter with the example of national legislation being passed requiring that the windows of vehicles be darkened. They stated that if this legislation was challenged by a province, it would be incumbent on the national government to prove that this legislation provided for "the maintenance of national security."
- 3.17.7 The DP stated that the draft therefore provided that the category component had to be tested, but not "necessity".
- 3.17.8 The NP suggested to replace "*must be regarded as necessary*" with "*is presumed to be necessary*."
- 3.17.9 The ANC opposed this suggestion, saying that in that case one would have created a presumption, and the courts required an objective test, not "presumed", but "deemed".
- 3.18 Regarding the deletion of (e), it was noted that the DP indicated that the previous version before attempting to accommodate the DP, provided (e) as an alternative category. They stated that in this free-standing override the Senate could be seen as a strategic necessity. They stated however, that the present version assumed that all legislation would have the support of the National Council of Province.
- 3.18.1 The ANC indicated that it would have been a total override, but that where Subclause (2) applied, whatever the Senate did, it would not override (a)(b)(c) or (d), and that the Senate's/National Council of Provinces' powers were now spelt out in Subclause (3).
- 3.18.2 The DP stated that if this interpretation was correct, then the role of the Senate/National Council of Provinces only had a bearing on Subclause (1). They stated that in the discussions on the previous draft it appeared that the protection for the provinces would be that provinces would have to determine that the override was necessary, before those matters were deemed necessary, and that that provision was now removed.
- 3.18.3 The ANC stated that options 1 and 2 in the previous draft had never been agreed to by the ANC and NP and (e) had been in the alternative, preceded by an "or". Therefore it was clear that it had not been put in for the protection of the provinces.
- 3.18.5 The technical advisers stated that it would have been a safeguard for the provinces, but the harm this Subparagraph (3) was addressing was that (e) watered down the justiciability

of 3(2)(a)(b)(c) and (d). They stated that this had been the objection of both the ANC and NP to the previous (e).

- 3.18.6 The technical advisers stated further that they thought the DP's position had been catered for in the first draft, but that between then and now the draft had taken a different shape, in that now the unanimous consent of the provinces was required.
- 3.18.7 The DP reiterated that there was a difference of opinion on what it means that the necessity test has fallen way, and that their view was based on the fact that it contained the phrase "*must be regarded.*"
- 3.18.8 The ANC reiterated that (e) had been removed to take account of the classical principle of the rule of law, and that Subclause 3(3) and that footnote 19 set out the position:

"This subclause replaces subsection (2)(e) and the previous options for subsection (3) and provides for a rebuttable presumption in favour of a parliamentary override where the relevant national legislation had been approved by the National Council of Provinces or agreed to in the Mediation Committee. However, its ambit has been narrowed down to national legislation

- which aimed at achieving a national objective, and
- which falls outside the categories listed in subsection (2).

By delinking subsection (2) from decisions of the Council of Provinces the adjustment ensures that the subsection (2) categories will be fully justiciable by the courts. Consequently the presumption will only apply to residual national legislation and only to the test of necessity as required in section 3(1)(a). The question whether the legislation is aimed at achieving a national objective must be proved in the normal way."

- 3.19 Further regarding Subclause 3(3), it was agreed to note the following, to be taken up further in bi-lateral discussions:
- i. The NP suggested insertion in Subclause (3) of the word "unanimously" to read "...if it has been unanimously supported by the National Council of Provinces..." and "refer to" to replace "agreed to in the Mediation Committee."
  - ii. The ANC expressed surprise at the suggestion by the NP and stated that this had not been mentioned before, and the ANC would not be amenable to this suggestion.

#### CLAUSE 4: CONFLICTS BETWEEN NATIONAL LEGISLATION AND

## PROVINCIAL CONSTITUTIONS

3.20 This was agreed to.

3.21 It was noted that an objection had previously been raised concerning this and had been dealt with.

### CLAUSE 5

3.22 This was agreed to.

3.22.1 The NP wished to defer aspects of this for further discussion, and requested that parties looked at the possibility of an independent body to decide when a province has the capacity to take on certain functions.

3.22.2 The DP also raised the question of how to determine when a province had the capacity to take on functions.

### CLAUSE 6:

3.23 This was agreed to, and the explanatory footnote 24 was noted.

## REGARDING THE SCHEDULE

3.24 The NP stated that a letter from Minister Fisser had been received which related to this matter. It was agreed, however, that discussion about the schedule would be deferred to a later stage.

## 3B NATIONAL AND PROVINCIAL EXECUTIVE AUTHORITY

3.25 Discussions were based on the *National and Provincial Executive Authority* draft, dated 5 March 1996.

3.26 It was agreed that a memorandum be prepared by the Independent Panel of Experts regarding the possible discrepancy between Subclause 1(1), which provided that the executive authority was vested in the President, and Subclause 1(2), which dealt with the what constituted the national executive.

3.27 It was agreed that Subclause 1(1) would be dealt with in another area of the Constitution, and that it was only inserted here to place the executive powers of the provinces in context.

3.28 It was agreed that the important clauses in this draft were Subclauses 2(1)(a) and (d) in terms of which other functions could be assigned by and

Act of Parliament, and that this would need to be developed once further comments had been received from parties.

3.28.1 It was noted that the DP stated that this may provide a serious intrusion in provinces, and that they would like to have a further look at the legal construct as it stands.

3.29 It was agreed that in the next draft the transitional arrangements and the refined Section 154 be included when this matter is dealt with, because it was noted that one could not understand Clause 2(1)(a) without having the transitional arrangements. It was agreed that these matters be considered holistically at the next meeting of the Sub-committee that dealt with this.

#### 4. COUNCIL OF PROVINCES

4.1 Discussion was based on the *National Council of Provinces* draft, dated 5 March 1996.

4.2 It was noted that the DP felt that this draft was coming closer to their view.

##### CLAUSE 1: COMPOSITION

4.3 Regarding Subclauses 1(2)(a) and (b), it was agreed that the numbers reflected in the respective Subclauses would be 5 members elected directly and 5 representatives appointed by each provincial legislature. It was agreed that further discussions were needed with other parties, and it was noted that the following had been agreed between the ANC and NP:

- i. That there would be an equal number of representatives per province.
- ii. That the principle of proportionality would be applied.
- iii. That members of the exco's and the legislatures would participate.
- iv. That a name everyone may be able to feel comfortable with could be "chamber of provinces".

4.3.1 It was noted that the DP proposed 7 Senators, and an undetermined number of exco members. They stated that the proportionality principle should be applied. They also stated that there was no purpose in 5 exco members attending all the time, but that the relevant ones should attend concerning the particular subject matters that were being discussed. They proposed that there for that reason should be 7 rotating exco members rotating depending on the subject matter being discussed.

4.3.2 The NP stated that there was still an outstanding issue as to whether

the National Council of Provinces should be part of Parliament or not.

## **CLAUSE 2: PARTICIPATION IN NATIONAL LEGISLATIVE PROCESS**

4.4 Regarding 2(2)(d), concerning the period of delay, it was agreed that there was no major difference between the options.

4.5 Regarding 2(2)(e), concerning the dead-lock breaking mechanism, it was agreed that further bi-lateral discussions were required.

4.5.1 It was noted that the DP felt that if the Mediation Committee were unable to resolve a matter, then it should be referred back to both the National Assembly and the National Council of Provinces.

## **CLAUSE 3: FINANCIAL BILLS**

4.6 It was noted that the DP indicated that the National Council of Provinces may have a special role to play in the allocation of revenue funds, and that it would be important to see how the financial section impinged on this clause.

## **CLAUSE 4: CONSTITUTIONAL AMENDMENTS**

4.7 It was agreed that this may require further discussion.

## **CLAUSE 5: MEDIATION COMMITTEE**

4.8 This was generally agreed.

## **CLAUSE 6: VOTING IN COUNCIL**

4.9 Regarding 6.1, in particular the phrase "*in accordance with the mandate given by*", it was agreed that unless there was a clear understanding of the meaning of "*mandate*" in this context, those formulation could be problematic.

4.9.1 It was noted that the DP suggested that the voting should be based on the mandate from the provincial legislature.

4.9.2 It was noted that the ANC appeared comfortable with the DP option relating to individual voting in regard to the "comment" bills.

## **CLAUSE 7: POWERS TO SUMMON MINISTERS**

4.10 Regarding Subclause 7.1, it was agreed that a technical error be corrected by the insertion at the end of the sentence of "*and also to the Council*

*itself."*

- 4.10.1 It was noted that the DP preferred that ministers should not have the "right" to attend, and that they should only be able to do so if invited.

**CLAUSE 8: APPOINTMENTS**

- 4.11 Regarding the National Council of Provinces' involvement in appointments, including in the confirmation of appointments of Constitutional Court judges, it was agreed that this matter needed further discussion amongst parties.

**5. CLOSURE**

- 5.1 The meeting closed at 18h00.

