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COMMISSION ON PROVINCIAL GOVERNMENT

TASK GROUP ON CONSTITUTIONAL ISSUES THINK TANK

16 FEBRUARY 1995

PROVINCIAL LEGISLATIVE COMPETENCE

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CONSTITUTIONAL PROVISIONS ON DEVOLUTION AND FEDERALISM[1]

UWE LEONARDY

PROVINCIAL MATTERS

Provincial constitutional rules within the national Constitution[20]

As has been pointed out already in s 6, it would normally seem to be highly questionable that regional constitutional matters (such as the number of seats in provincial legislatures) should be regulated by the national Constitution and thus not be left within the sphere of provincial self-determination, provided of course that they are not in contradiction to basic values of the national document. In an established federal system the right of the constituent parts to organize their own constitutional and institutional bases will be respected by the national Constitution as the most noble domain of self-determination. However, in the act of setting up such a system this is naturally not possible from the very beginning, so that the initiating legislative step will have to take care of that field by itself in applying the principle of devolution. No objections can therefore be raised against including such parts in the South African 'Constitution on the making of the Constitution', as they are indispensable for its very purpose. This applies all the more since that Constitution has now made it clear by its specific part on 'Provincial Constitutions' in ss 160–162 that this right of institutional self-determination will be duly respected once and after new national and provincial governmental structures have been established. It is thus to be acknowledged that up to this point the initially necessary provisions on provincial constitutional law have to be defined by the national Constitution. After that point, however, that

20 Sections 125–154.

domination of national law in this genuinely provincial field should duly cease to exist in favour of equivalent provincial law.

That applies in particular to much detail in the provisions of Chapter 9, such as particularly many in ss 127–154 (which in addition would seem to contain numerous rules, the proper place for which would be in Standing Orders rather than in a constitutional document; this, by the way and outside the field of federal relevance, appears to be valid also for many provisions in Chapter 4 on Parliament). The Amendment Act has meanwhile taken care of most of these matters — see the postscript to remarks on ss 160–162.

Legislative competence of Provinces

When, according to the orginial timetable, the draft Constitution should already have been finalized, the Negotiating Council agreed on the rather surprising last-minute decision in the first week of November 1993 that instead of exclusive *and* concurrent powers for the Provinces, there should only be concurrent powers for them in the Constitution. The result of that decision has been s 126. It raises a variety of severe questions:

Systematical and practical problems

In every system of distributing legislative powers between the national and subnational levels, the assignment of concurrent powers logically presupposes the definition and identification of the seat of the residual powers, i e the level which shall be entitled to legislate in general inasmuch and as long as the Constitution does not specifically assign the legislative function to any other level. Thus under the American and the German Constitutions that residual power is vested in the states[21] and in the *Länder*.[22] In Canada the general power 'to make laws for the Peace, Order, and good Government of Canada' is vested in the national Parliament.[23]

Because South Africa is only just developing (or rather re-developing) into a federal or at least quasi-federal structure, the seat of the residual power can presently only be the national level. That certainly applies as long as and inasmuch as the process of devolution from top to bottom in building up a federal structure prevails. This means that laying claim to a concurrent power by a Province results legally in exercising a basically national power, i e a power of the other level. Federal Constitutions define the justifications for that act and the extent to which it is admissible on the side of that level, which lays claim to the respective part of the residual power. Thus in Germany Article 72(2) of the Basic Law states the conditions on which the Federation may lay claim to those parts of the residual powers of the *Länder*, which are enumerated in the catalogue of concurrent powers (in Art 74).

21 Article I s 1 and Tenth Amendment of the USA Constitution.
22 Article 70(1) of the Basic Law: 'The *Länder* shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation.'
23 Section 91 of the Constitution, which 'for greater Certainty' thereafter enumerates a catalogue of exclusive federal powers.

The South African Constitution attempts to work the other way round: it defines[24] the limitations under which the national level may make use of powers which are basically its own, instead of defining the circumstances under which the Provinces may lay claim to these powers. This is unsystematical and thus illogical and thus creates a series of practical problems:

- If the Provinces want to make use of these powers, they have to consider beforehand, and thus predict, whether and to what extent the national Parliament could claim that one of the five conditions enumerated in s 126(3) could in the future limit their making use of that power by then cutting it down again.
- If and as long as Parliament does not do so, the Provinces would be politically bound to consider concurrent powers as 'competitive' powers in the sense that the sooner they make use of them the more they would gain from them.
- This will naturally cause confusion because the Provinces in doing so will act as if they were the seat of the residual power in relation to the matters enumerated in Schedule 6, though in fact Parliament is.

The whole of this confusion seems to be caused by a misapplication of the notion of concurrence, which is obviously inherent in Constitutional Principle XXI(7): the allocation and the making use of concurrent powers is not a matter of 'mutual co-operation' as stated there. Instead it is the application of a strictly divisive principle laying down the conditions of claims to certain legislative powers on the background of a clear realization of the seat of the residual power. Here the circle closes. These justifications for laying claims to those powers must always be addressed to the non-possessor of the residual power. That being the Provinces and not Parliament, s 126(3) has been shaped the wrong way round. The attempt at working the system this way therefore amounts to an attempt at squaring the circle.

The described consequence of misunderstanding concurrent as 'competitive' powers will result in developments in which politically strong Provinces will win that 'competition' to the detriment of the weaker Provinces. This will produce an asymmetry in a certainly unwanted form: a preponderance of strong competitive capacities in the passing of legislation. The paradoxic result will be that, although particularly economically weak Provinces may have a specific need for differentiation in law, they will not be able to achieve this by being the losers of the 'competitive race'.

Although outside the immediate fields of the application of s 126, its misconception will have several consequences in other areas:

- Which level for instance will be the 'competent authority' for repeals of existing laws under s 230? Logically this would have to be the national Parliament as the seat of residual power. But what is to happen if Provinces have already legislated in any of their 'concurrent' fields relating to legislation which is to be so repealed? Are repeals by the national Parliament then restricted by s 126(3)? The reason for these difficulties is specifically embodied in the lack of exclusive powers for the Provinces, which would, if it existed there, clearly qualify old law in the

24 Section 126(3).

respective field as now being law of the Provinces, with the ensuing qualification for repeal by the Provinces only.

- Further severe problems arise in the assigning of executive functions:
  - Under s 144(2) a Province will have executive authority over matters in which it has lawfully exercised 'its legislative competence'. This means that until it has done so within all the confusions of s 126 no executive authority in this field will be there at the beginning.
  - The Province will therefore have to start only with matters allocated to it 'in terms of s 235 or any law, and matters delegated to it by or under any law'.[25] In the field of transitional arrangements (s 235) all of this will, however, depend on detailed assignments of such authority by the national government even in areas which are specifically excluded from the national level by s 126(3) because of the operation of s 235(6)*(b)*(i).
  - As a result of all this, the Provinces will start with virtually no executive power in their own right at all.
  - The same applies to administrative assets on account of the corresponding transitional arrangements on them in s 239(1).

All these practical problems of starting from zero in the transitional period would be avoided by the assignment of exclusive powers to the Provinces even, if need be, to a small extent, and maybe also in a step-by-step approach. In such a case the plain rule would be applicable that 'law affecting matters subject to the exclusive legislative power (of the Provinces) shall become (provincial) law in the area in which it applies', as Art 124 of the German Basic Law states it with reference to 'the exclusive legislative power of the Federation' and to 'federal law' due to the reverse provisions on the residual seat of power in the German Constitution.

Legal evaluation of withholding exclusive legislative powers from Provinces

Contrasting to these rather intricate practical problems, the legal evaluation of not granting exclusive powers to the Provinces is a surprisingly plain one: it appears to be a clear violation of Constitutional Principle XIX, demanding that 'the powers and functions of the national and provincial levels and of government shall include exclusive *and* concurrent powers'. If this Principle is to have any substance, the only possible interpretation is that it is left to the Constitutional Assembly to review and revise s 126.

Alternatives to s 126

What then could be the alternatives on which the Constitutional Assembly could shape a legally correct and more workable distribution of legislative powers?

- *Exclusive powers*, which thus need to be given to the Provinces, could — if the

25 Section 144(2).

need is felt to do so — be granted to them within limitations set out by the national Parliament in so-called framework (outlining) legislation (as defined for example by Article 75 of the German Basic Law) which would address such framework rules to the provincial legislatures. Matters which could be taken into account for such exclusive powers under the described framework limitations could be those in Schedule 6, which in s 118 of the draft Constitution of 20 August 1993 were intended to be exclusive for the Provinces, such as:

— casinos, racing, gambling, and wagering; cultural affairs, language policy; provincial public media; public transport, regional planning and development; road traffic regulation; roads; tourism; traditional authorities; urban and rural development

— plus, possibly (as contained in the previous s 118(1), but not in Schedule 6 of the Constitution), appropriation of provincial revenue and the moneys for financing the government and services of the Province; fire fighting, ambulance services, and other civil protection services; markets and pounds; delivery of water, electricity, and other essential services.

- The conditions for laying claim to *concurrent powers* should be so defined as to address the Provinces (and thus not by limitations imposed on the national Parliament's being the residual holder of these powers). The matters to be taken into account for such concurrent powers could then possibly be those in Schedule 6 not enumerated in the list above plus, possibly, taxation for provincial purposes, public works, and provincial correctional services (contained in the previous s 118(4) but not in Schedule 6).

In order to achieve a workable system of laying claim to such concurrent powers a basically political process of interaction between Parliament and the Provinces will have to be established as the decisions to be taken in the actual exercising of such claims are by their very nature political. The Provinces will therefore have to be bound by evaluations of Parliament as to whether or not their making use of these powers meets the requirement to do so under the criteria of the constitutionally defined national standards. However, this would not mean surrendering their claims to concurrent powers entirely to the discretion of Parliament. The Provinces would have to be granted the right to appeal to the Constitutional Court on the grounds and to the extent that — but only inasmuch as — Parliament obviously misapplied the national requirements. While judicial control would thus have to prevent clear abuse of Parliament's discretionary powers (serving also as a background deterrent against that), the political protection of justified provincial claims would have to be the genuine task of the Senate as the federal institution within Parliament in that process of interaction. Needless to say the political process should provide for compromise as far as possible. It should therefore be organized in certain time-limited steps of communication and negotiation between the Senate and the National Assembly.

For the purpose of demonstrating the suggested changes implied in these alternatives more clearly, a draft for the distribution of legislative powers within this concept has been annexed to this part.

Unless something along these lines is done in the Constitutional Assembly it will not be an undue prediction that the Constitutional Court will be flooded with litigation on the intricacies of s 126 from the very beginning. In having to handle these questions with all their self-contradictions, the Court will not have a very substantial guideline in Constitutional Principle XXII, demanding that 'the national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the Provinces'.

Annexure to remarks on s 126

Draft on the Distribution of Legislative Powers
(to demonstrate the suggested alternatives to s 126)

125A Residual legislative power, division of legislative competences and general rules of interpretation

(1) Parliament shall have the right to legislate in so far as this Constitution does not confer legislative power on the Provinces.

(2) The division of legislative competences between Parliament and the Provinces shall be determined by the provisions of this Constitution concerning exclusive, framework and concurrent legislative powers.

(3) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (4).

(4) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent, that they are, expressly or by necessary implication, inconsistent.

125B Exclusive legislative power of the Provinces

(1) A provincial legislature shall, subject to section 125c, have exclusive competence to make laws for the province with regard to all matters which fall within the following functional areas:

1 . . . [A catalogue of the powers to be exclusively allocated to the provinces, which will have to be determined by particular circumstances in South Africa. Subject to further negotiation, indications for them could for example be found in those powers in Schedule 6, which in s 118 of the Draft Constitution of 20 August 1993 were intended to be exclusive for the Provinces.]

2 . . .

3 . . . [etc].

(2) The legislative competence referred to in subsection (1) shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

125C Framework legislative power of Parliament

(1) Parliament shall have the right to enact framework legislation with regard to matters which fall into the functional areas of:

1 . . . [A catalogue representing restricted selection of those areas enumerated in s 125B which according to particular South African circumstances indisputably require minimum national standards.]

(d) the provincial law does not materially prejudice the economic, health or security interests of another province or the country as a whole.

(3) The legislative competence referred to in subsection (2) shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(4) A provincial law passed in the terms of this section shall, after being assented to by the Premier of the Province, be submitted to Parliament before its promulgation. It can be promulgated unless Parliament, within . . . [nine weeks], states by a Resolution that the law wholly or in parts does not meet the requirements of subsection (2). The Resolution shall contain the reasons for such a statement.

(5) In order to be passed, a Resolution in terms of subsection (4) requires the consent of the Senate to which it shall be conveyed by the National Assembly within . . . [three weeks] after the provincial law has been received by Parliament. In order to provide for compromise, the Senate shall convey an intention to refuse its consent to the National Assembly within . . . [a further three weeks].

(6) A Province to which a Resolution in terms of subsection (4) is addressed shall have the right to appeal to the Constitutional Court on the grounds that the Resolution wholly or in parts obviously misapplies the requirements of subsection (2).

Postscript relating to Amendment Act, 1994

Section 2 of the Amendment Act now gives s 126 a wording which avoids the term 'concurrent competence', thus creating the impression that it assigns exclusive legislative powers to the Provinces. Constitutional examination of the new text under the criteria of a federal distribution of legislative functions (as described above) reveals, however, that this is not the case in fact:

- Although now 'a law passed by a provincial legislature . . . shall prevail over an Act of Parliament' (instead of previously an Act of Parliament prevailing 'over a provincial law inconsistent therewith'), the national Act will have the higher rank under almost exactly the same material conditions as before (with the meaningless exception that the term 'determination of national economic policies' has been exchanged for the impediment of 'the implementation of national economic policies').
- This result is underlined by the fact that now a provincial law shall only prevail 'except in so far as' these national restrictions do not apply, while previously the national Act was to make the provincial law inconsistent with it 'only to the extent that' the said restrictions did apply. In its legal effect therefore this operation creates a constitutional merry-go-round by which the figures on it arrive at precisely the same point from which they started before.

Exclusive powers have thus not even on the face of it been granted to the Provinces by the new s 126, so that even its qualification as a cosmetic operation would go too far. In effect therefore the defects of the previous system are being maintained:

- Now, as before, there is no clarification as to the seat of the residual power (see above).

- Though the term 'concurrence' has been avoided, the new s 126 in practice tries to apply it, but, lacking a definition of the residual power and of the ensuing claims to it (see above), in fact missapplies it.
- Still, the provincial legislatures will have to display prophetic abilities if they want to determine the border-lines of their legitimate field of legislation within which the 'exceptions' in favour of national legislation do not prevail, as the conditions for their laying claim to the respective powers are neither legally nor politically definable for them beforehand.
- This is enhanced by the fact that the Constitution still lacks both a political and a judicial mechanism (such as the ones suggested above) which would enable both the Provinces and Parliament to define those border-lines in time and particularly in cases of conflict.

Altogether therefore s 2 of the Amendment Act does not seem to demand any substantial changes of the preceding remarks and suggestions on the previous s 126. That applies to what has been said both on concurrent and exclusive powers as well as to the recommendations regarding the introduction of framework legislation.

This in particular should now be all the more advisable as several subject-matters (many of them new) have now been added to the catalogue in Schedule 6. Out of its thus enlarged enumeration it should not be entirely impossible to select those most suitable for exclusive, framework, and concurrent powers.

Again, however, it ought to be emphasized that the entire system for the distribution of legislative functions requires a clear allocation of the residual power. Given the specific South African situation of a centralist structure evolving into a federal one by devolution, this power can logically only be attributed to the national level. That being so, the Constitution needs clearly to say so. Otherwise it will remain to be caught in self-contradictions.

Administration in own affairs

Reference must be made here to the problems outlined in the comments on the distribution of legislative competences (cf comment on s 126).

Administration by delegation in national affairs

When s 142(2) is compared with s 118(8) of the draft of 20 August 1993, the Constitution's provision for the empowerment of the provincial executive authorities to fulfil administrative functions in the national fields by delegation is to be welcomed. That is obviously to be understood as a fulfilment of Constitutional Principle XIX, demanding that the 'provincial levels of government shall perform functions for other levels of government on an agency or delegation basis'. This brings the distribution of administrative functions rather close to the German system. One of its characteristics is the fact that the *Länder* carry the main burden of administration even in the field of federal legislation. That accounts for many of their powers in the constitutional process of federal legislation.

What is required seems to be a clearer qualification between administration by delegation (leaving full responsibility for the delegated fields with the Provinces as matters of their own) and administration by agency (keeping full powers of supervision with the national level). A wide-ranging application of these two devices would seem to be all the more advisable as the rules of the Constitution on the distribution of

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legislative competences, particularly on the wide powers of the national level to occupy provincial fields in this area, do raise the following question: What happens to the provincial branches of the administration in such an occupied field if and whenever the national Parliament does occupy it? In order to avoid serious administrative confusion and high costs of possibly numerous and wide-ranging administrative changes in both directions, it would certainly be recommendable to employ the above devices so that a Province's government retains administrative responsibility in such fields, although they have meanwhile become matters of national legislation.

"Democracy means freedom to choose"

INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

December 17, 1994

Priority Mail
Mr Thozamile Botha
Chairman of the Commission of Provincial Government
260 Walker Street, Sunnyside
Private Bag X 887
Pretoria 0001
copy via facsimile no: 012 3438043:

Dear Mr Botha:

I am following up on the IFP participation in the provincial and local government workshop which was held in Pretoria on November 28-30, 1994 to restate in writing some of the most salient points which the IFP made during its participation in the workshop.

1. **Allocation of powers.**

Provinces shall be entitled to all the powers which they can adequately and properly exercise. This is required by the applicable constitutional principle which refers to the notion of subsidiarity. Subsidiarity means that the lowest level of government shall exercise all those powers which it is capable of adequately and properly exercise.

The notion of subsidiarity is different from the notion of the most efficient allocation of powers. For instance, Provinces can adequately and properly exercise legislative and executive competencies over property matters, even if an argument could be made that the uniform regulation of property matters under the exclusive competence of the government could be more "efficient".

The IFP believes that Provinces should be the primary government of the people and only those powers which cannot be adequately and properly exercised at provincial level ought to be devolved upward to national government. Therefore, the national constitution should list only the powers of the national government leaving all those powers which are not listed to the executive and legislative competence of Provinces.

In this context, the so-called residual powers would be left with the Provinces. Residual powers are

those powers of Parliament which do not necessarily translate into governmental line functions or powers of the executive, and they are the most important with respect to societal organization, cultural diversity and true political autonomy. They include subject matters such as property, family, inheritance, contracts, delict, commercial and criminal law.

A paradoxical situation has developed which clearly indicates the necessity of moving toward recognition of residual powers in the Provinces. By virtue of the March 4, 1994 amendments to the interim Constitution, Provinces were granted legislative and executive competence on indigenous law and customary law. In terms of Constitutional Principle XVIII (2) the next constitution cannot take away this important and essential provincial competence.

Indigenous law and customary law primarily consists of residual powers, such as property, inheritance, family, administrative and commercial law as well as other segments of law which are essential to the organization of society (as opposed to the functions that the government exercises with respect to society). For instance the components of customary laws and indigenous laws were spelt out in the KwaZulu-Natal Act of the House of Traditional Leaders of 1994.

Therefore the paradox is that for instance, in KwaZulu-Natal the Province has legislative and executive competence on some important residual powers with respect to as much as 70% of its population which identifies with indigenous law and customary law and/or lives in traditional communities. However the Province does not have the same power with respect to the rest of its population mainly consisting of Whites, Indians, Coloureds and urbanized Blacks. In fact, the Province could exercise it authority with respect to property matters related to communal land in tribal areas but not with respect to property matters in Durban.

Furthermore, the list of powers allocated to Provinces shall ensure that Provinces can exercise politically charged legislative and executive functions, which means that Provinces should be able to develop their own autonomous policy making and they should have all those powers which are necessary to guarantee such autonomy. For instance, if Provinces are competent with respect to regional urban and rural development they should also have competence over ports and harbors.

2. Relationship between powers

The degree of autonomy of a Province is not only determined by the list of powers and functions which fall within the provincial competencies but is also importantly affected by the relation between the powers of the central government and those of the Province. Simply put a Province could have an extensive list of powers and functions which are subject to the discretionary control of the central government, in which case the Province would have no autonomy and would become a mere agent and political subservient of the central government.

The IFP believes that Provinces should be politically autonomous which means that they should be able to develop and implement their own policies on any matter of their competence. Clearly, the exercise of their autonomy can be limited and circumscribed with respect to several applicable

parameters, such as national interest and the interest of other Provinces.

Reference is made to the attached extract from the IFP submission to the Constitutional Assembly which under the caption "relation between powers" lists the different types of models in which such relation can be organised.

The IFP position on this point is also mentioned in the enclosed documentation.

Reference to the enclosed documentation is also made with respect to the crucial issue of the relation between second generation human rights and provincial autonomy, which issue should receive special attention. In fact, human rights such as the right to health or the right to work or housing rights necessitate a government's action to be implemented and fulfilled. The Bill of Rights should clarify that this action is a prerogative of the Provinces within the areas of their competence.

3. **Enclosures**

Enclosed herewith is a relevant extract from the submission which the IFP made to the Constitutional Assembly. This enclosure touches on most of the points raised during the workshop.

Enclosed also are relevant sections from the draft constitution for a Federal Republic of South Africa which the IFP tabled for consideration at the World Trade Centre.

I am also enclosing for your consideration some background documentation which could offer some valuable options and alternatives. This documentation includes annexure "A", "B", "C" and "D" and "E" of the November 15, 1993 proposal of the Freedom Alliance which contain various formulations of constitutional provisions related to provincial autonomy which were developed during the course of the constitutional negotiations of that period.

Furthermore, I am enclosing Annexure "A" and "B" of the IFP Yellow Paper which contains the amendments to the Interim Constitution jointly introduced by the IFP and the South African Government during the December 1993 session of Parliament.

I would appreciate it if a copy of our submission were distributed to the other participants of the workshop and if copies of their submissions were also forwarded me.

Very truly yours,

V B NDLOVU, M.P.

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III. RELATIONS BETWEEN LEVELS OF GOVERNMENT

TYPE OF POWERS TO BE ALLOCATED

ISSUE: What are the powers and functions from which to choose in determining the powers which should be allocated to the provinces?

ALTERNATIVES: Powers could be identified on the basis of several models.

AGENDA: We should identify all relevant powers of a parliament and all relevant powers of a government. Special attention should be given to those powers of parliament which do not necessarily translate into a governmental line functions or powers of government, the so called residual powers.

IFP POSITION: It will be important to focus our attention on the fact that the most important powers, the so-called residual powers do not necessarily translate into governmental line functions or powers of government. Residual powers should be left with the provinces.

ALLOCATION OF POWERS

ISSUE: Should the constitution list the national powers, the provincial powers or both?
Moreover, once identified, should any subject matter of provincial competence extend also to judicial functions in addition to legislative and administrative functions?

ALTERNATIVES: The three possibilities of listing powers can give rise to different models depending on the allocation of the residual powers.
Moreover, provinces may have full judicial powers in the matters of their competence or reduced or limited judicial powers

AGENDA: Special attention should be given to federal models such as the United States, the European Union and Germany against models of regional/provincial states such as Italy and Spain.

IFP POSITION: The IFP believes that only the powers of the national government ought to be listed in the constitution while all other powers should be left to the provinces.
The IFP believes that provinces should have full judicial powers in all matters of their competence.

RELATION BETWEEN POWERS

ISSUE: What institutional technique of coordination should be employed to regulate the relation between national and provincial levels of government.

ALTERNATIVES: The following are generally recognized alternatives: (a) mutually excluding national and provincial exclusive powers with an open set of national interferences on provincial powers , or (b) national framework legislation with either provincial (bi) concurrent powers or (bii) exclusive powers, or (c) national overrides with either provincial (ci) concurrent powers or (cii) exclusive powers (d) national general

have the right to negotiate and execute collective bargaining agreements to be effective with force of law vis-a-vis the category of workers covered by their provisions. During these negotiations the labour organisation shall be represented on the basis of the number of their members. Trade unions shall have the right to conduct reasonable activities in the work place aimed at improving labour conditions. Member States may impose requirements on the trade unions only to ensure that they are organised and operated with full internal democracy.

54.-63. [...]

FEDERAL POWERS

64. Powers of the Federal Republic of South Africa

a. The Federal Republic of South Africa shall have the power to exercise exclusive legislative, administrative and judicial functions and powers in the following subject matters:

- monetary system, foreign credits, exchange and convertibility
- general principles of legislation to coordinate the regulation of banking, credit and insurance;
- general principles of legislation to coordinate the regulation of environmental protection of national interest;
- general principles of legislation to coordinate economic development and foster interstate commerce among the states;
- general principles of legislation to coordinate the technical regulation of equipment of communication
- legislation to provide negotiation and procedural coordination of the State's policies with national policies and the policies of other states in the field of
    - transportation,
    - energy,
    - interstate and foreign commerce,
    - economic development,
    - consumer protection,
    - banking and
    - social welfare

  in so far as they relate to the interests of the Federal Republic of South Africa. Parliament may enact legislation to empower the Government to enter into agreements with the Government of the Federal Republic of South Africa to ensure policy coordination in other fields.
- nationality, immigration, emigration, alienage and the right of asylum
- international relations
- defence against foreign enemies
- organisation and administration of the federal system of justice in the subject matters of federal prerogative
- admiralty and maritime law and regulations

- air transportation law and regulations
- protection of intellectual property rights
- external customs, tariffs and foreign trade
- legislation on weights and measures
- use of the area of exclusive economic influence
- other matters as authorised by a constitutional law of the Federal Republic of South Africa.

b. The Federal Republic of South Africa shall have the power to summon the State militia to defend the territory, freedom and liberty of the Federal Republic of South Africa from an external enemy. When entering or stationing in the territory of a member State, the armed forces of the Federal Republic of South Africa or the armed forces of other member States shall seek the approval of the concerned member State.

c. All powers not reserved by this constitution to the Federal Republic of South Africa shall belong to member States and to the people respectively. When required by this constitution to assist member States in the exercise of their functions, the Federal Republic of South Africa shall do so in a fashion which preserves the integrity of the jurisdiction of the concerned member State. However, it may condition its assistance to the compliance with reasonable criteria and directives.

65. Federal Power of Taxation

a. The Federal Republic of South Africa shall have the power to impose reasonable taxes and duties in the territory to support its functions under this constitution. In the exercise of this power the Federal Republic shall consult with the member States.

b. In providing assistance to member States, including but not limited to direct and indirect financial assistance, the Federal Republic of South Africa shall ensure that the overall amount of revenues collected in the territory by the Federal Republic, by member States and by their respective direct instrumentalities is equally distributed among the member States on the basis of their population adjusted by compelling geographical and social considerations. To achieve this purpose, the financial transfers of the Federal Republic to the member States shall be adjusted and administered so as to equalize among all member States the overall amount of revenues collected or transferred. To achieve this result, during its consultations with any member State the Federal Republic may condition transfers and financial assistance to the member states to the fact that the member States raises a certain amount of revenues in its state territory.

c. An independent Financial Equalization Commission shall receive information from the Government and from the member States on the federal transfers to the member States, including financial and non financial assistance, and shall report with recommendations to the Parliament and the Government. The report of the Commission shall accompany the

principles of legislation with either provincial (di) concurrent powers or (dii) exclusive powers.

AGENDA: Each system and each alternative should be carefully analyzed to determine how in other countries national policies are made compatible with the need to protect provincial autonomy.

IFP POSITION: There shall be separation of powers between national and provincial level of government. National government shall have no overrides and Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the powers of each level of government, based of the extension by relevancy or implication of the exclusive power of the national level of government into the areas of competence of the provinces, as in theory is the case in the U.S. (i.e. interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial

From IFP Yellow Paper

ANNEXURE A

SECTION 126

DISTRIBUTION OF POWERS AND FUNCTIONS BETWEEN THE CENTRAL GOVERNMENT AND THE PROVINCES

126. (1) The National Legislature and Executive shall have exclusive legislative and executive authority, unless and to the extent otherwise specified elsewhere in this Constitution, in respect of the following functional areas:

(a) Arbitration;
(b) Arms and ammunition;
(c) Aviation and national airports;
(d) Census
(e) Citizenship, alien control, passports, immigration and emigration;
(f) Commercial law;
(g) Consumer protection;
(h) Correctional services;
(i) Customs and excise;
(j) Currency, banking and control over financial institutions;
(k) Defence;
(l) External trade;
(m) Finance;
(n) Foreign affairs;
(o) Forests;
(p) Industrial law;
(q) Inquests;
(r) Internal movement of goods, capital, services and people;
(s) Labour law;
(t) Land, deed and corporate registrations;
(u) Marine resources;
(v) Media and communication law;
(w) Mineral resources and mining;
(x) National archives
(y) National historical monuments;
(z) National economic policy
(aa) National Intelligence;
(bb) National language policy;
(cc) National parks and national botanical gardens;
(dd) National public media;
(ee) National planning and development;
(ff) National public property;
(gg) National public works;

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(hh) National roads and railways;
(ii) National sport and recreation;
(jj) Patents, trademarks and designs;
(kk) Police, subject to the appropriate provisions of Chapter 14;
(ll) Postal service;
(mm) Postmortems
(nn) Private law;
(oo) Professional associations;
(pp) Promotion of scientific research and development;
(qq) Regulated substances and medicines;
(rr) Stock exchange;
(ss) Security of the State and the Constitution
(tt) Sports and recreation;
(uu) Taxation, subject to the appropriate provisions of Chapter 9;
(vv) Unemployment insurance;
(ww) University and technikon education;
(xx) Telecommunications;
(yy) Water law;
(zz) Weights, measures and standards.

(2) The Provincial Legislatures and Executives shall, subject to the provisions of subsection (3), have exclusive legislative and executive authority, unless and to the extent otherwise specified in this Constitution, in respect of the following functional areas:

(a) Abattoirs;
(b) Airports other than those contemplated in Item 1(c);
(c) Agriculture;
(d) Animal control and diseases;
(e) Cultural affairs;
(f) Education at all levels, excluding university and technikon education;
(g) Environment;
(h) Health services;
(i) Housing;
(j) Land use, including planning, zoning and development;
(k) Language policy and languages as languages of record for use in provincial administrations;
(l) Local government subject to the provisions of Chapter 10;
(m) Markets and pounds;
(n) Nature conservation, excluding national parks established by or under the National Parks Act, 1976 (Act No 57 of 1976) and national botanical gardens and marine resources;
(o) Police, subject to the appropriate provisions of Chapter 14;
(p) Provincial public property;
(q) Provincial public service, subject to the appropriate provisions of Chapter 13;
(r) Provincial residency;
(s) Provincial public works;
(t) Provincial sport and recreation;

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(u) Public transport;
(v) Racing, casinos, gambling and wagering;
(w) Regional public media;
(x) Regional planning and development;
(y) Roads;
(z) Road traffic regulation;
(aa) Soil conservation;
(bb) Taxation, subject to the appropriate provisions of Chapter 9;
(cc) Tourism;
(dd) Trade and industrial promotion;
(ee) Traditional authorities;
(ff) Urban and rural development;
(gg) Water management;
(hh) Welfare services.

(3) An Act of Parliament may deal with a matter referred to in subsection (2) only to the extent that:

(a) It deals with an aspect of national interest of a functional area which cannot be dealt with effectively by provincial legislation;

(b) It deals with a matter that, to be performed effectively, requires to be regulated or coordinated by uniform or minimum norms or standards that apply generally throughout the Republic;

(c) It is necessary for the maintenance of economic unity, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(d) The provincial law materially prejudices the economic, health or security interests of another province or the country as a whole.

Provided that the Act of Parliament passed in terms of this subsection shall not diminish the legislative competence of a provincial legislature, shall not encroach on the functional and administrative integrity of a province, and be reasonably calculated to meet compelling public needs

(4) The legislative and administrative competence referred to in subsections (1), (2) and (3) shall include the competence to make laws and take actions which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(5) An Act of Parliament shall prevail over a provincial law, as provided for in sub-section (3) only if it applies uniformly in all parts of the Republic.

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of this section.

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(7) In respect of all residual functional areas not dealt with in subsections 1) to 3) the National Legislature and Executive and the Provincial Legislatures and Executives shall have concurrent legislative and executive authority: Provided that -

(a) In matters affecting all or more than one province, which can only be effectively dealt with by Parliament, Parliament shall have overriding legislative authority; and

(b) In matters affecting only one province, which can be adequately dealt with by that province, that province shall have overriding legislative authority.

(8) Parliament shall have legislative competency in respect of a functional area referred to in Schedule 6 in the absence of or until the passing of provincial legislation dealing with such matter and to the extent that there is a compelling need for it to be dealt with.

(9) The National Legislature and Executive shall have concurrent legislative and executive authority in respect of all functional areas in respect of which a provincial legislature or executive elects not to exercise jurisdiction to the extent that and until such legislature or executive elects to exercise jurisdiction.

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ANNEXURE A

FREEDOM ALLIANCE

The constitution of each member state shall identify the powers, duties and functions of the member states, provided that the central government shall have the power to exercise exclusive legislative, administrative and judicial functions and powers in the following subject matters:

- enforcement and implementation of the Bill of Rights and assistance to the SPR for the implementation of human rights requiring implementing legislation and of social provisions contained in the Bill of Rights and other provisions of the constitution.
- monetary system, foreign credits, exchange and convertibility
- general principles of legislation to coordinate the regulation of banking, credit and insurance
- general principles of legislation to coordinate the regulation of environmental protection of national interest
- general principles of legislation to coordinate economic development and foster interstate commerce among the member states
- general principles of legislation to coordinate the technical regulation of equipment of communication
- legislation to provide negotiation and procedural coordination of the policies of the member states with national policies and the policies of other member states in the field of transportation, energy, interstate and foreign commerce, economic development, consumer protection, banking and social welfare in so far as they relate to the interests of the Federal Republic of South Africa. Parliament may enact legislation to empower the Government to enter into agreements with the member states to ensure policy coordination in other fields.
- nationality, immigration, emigration, alienage and the right of asylum
- public postal services
- national roads and railways
- insolvency and unemployment insurance law
- international relations
- defence against foreign enemies
- organisation and administration of the federal system of justice in the subject matters of federal prerogative
- admiralty and maritime law and regulations
- air transportation law and regulations
- protection of intellectual property rights
- external customs, tariffs and foreign trade
- legislation on weights and measures
- use of the area of exclusive economic influence
- summoning the armed forces of the member states to defend the territory, freedom and liberty of the Federal Republic of South Africa from an external enemy. When entering or stationing in the territory of a member state, the armed forces of the Federal Republic of South Africa or the armed forces of another member state shall seek the approval of the concerned member state.

All powers not reserved by the constitution to the Federal Republic of South Africa shall belong to the member states and to the people of the member states respectively. When required by this constitution to assist the member states in the exercise of their functions, the Federal Republic of South Africa shall do so in a fashion which preserves the integrity of the jurisdiction of the concerned member state. However, it may condition its assistance to the compliance with reasonable criteria and directives.

Member states shall have exclusive legislative, judicial and administrative powers in respect to all matters in which the Federal Republic of South Africa does not exercise its jurisdiction.

ANNEXURE B

FREEDOM ALLIANCE

REFORMULATION OF ARTICLE 118 ; ALTERNATIVE SUBORDINATE PROPOSAL

The following powers shall be exclusive powers of the Government of the Federal Republic of South Africa:

* defence
* foreign affairs
* currency, banking and control over financial institutions
* immigration and emigration
* external trade
  internal free movement of goods, capital, services and people
* insolvency
* air transportation
* postal service
* national roads and railways
* unemployment insurance

All subject matters not stated in the preceding paragraph and all aspects of the powers listed in the preceding paragraph which have a bearing on the member states shall be exclusive powers of the member states or powers exercised by the member states in concurrence with the Federal Government, provided that the legislation of the member state shall over-ride national legislation in the event of conflict between such concurrent powers, except where national legislation is required for:

a) maintenance of the common market and economic unity
b) maintenance of national security
c) where the matter can not be effectively regulated by a single member state
d) maintenance of essential national standards

Member states may choose to transfer to the government of the Federal Republic of South Africa any of the powers which they would be entitled to exercise in terms of this section.

NOVEMBER 5, 1993

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ANNEXURE C

FREEDOM ALLIANCE

ARTICLE 118 REFORMULATED BY THE FREEDOM ALLIANCE ON THE BASIS OF THE SAG'S RESPONSE

Unless otherwise specified elsewhere into this constitution the national Government shall have legislative, judicial and executive authority in respect of the following functional areas:

* defence against foreign enemies, including the power to summon state militia
* foreign relations
* currency, banking and control over financial institutions
* federal citizenship, alien control, passport, immigration and emigration
* administration of the federal justice system
* security of the federal state and of the constitution of the Federal Republic of South Africa
* external customs and tariffs and foreign trade
* internal movement of goods, capital, services and people
* insolvency
* air transportation, admiralty and maritime law and regulations
* postal services
* national roads and railways
* unemployment insurance

In respect of all residual functional areas the provincial government will have exclusive legislative, administrative and judicial authority unless:

(i) a matter can not be regulated effectively b provincial legislation, with specific regard to economic, health and security interests of another province or of the country as a whole; or

(ii) a matter requires to be regulated or coordinated by minimum or uniform norms of standards that apply generally throughout the Republic; or

(iii) an Act of the national legislature is necessary for the maintenance of a national common market, the promotion of economic harmony, the protection of inter-provincial commerce and of economic market in respect of the mobility of goods,services, capital or labour, or the maintenance of national security.

A province may transfer to the national government any of the powers which it would be entitled to exercise in terms of this section.

The national government shall have full concurrent legislative, judicial and administrative powers in respect to all subject matters in which a province does not exercise its jurisdiction, and only to the extent that, and until such time when that province does not exercise its jurisdiction.

NOTE: The Freedom Alliance believes that, should it be absolutely necessary, additional space for compromise and reconciliation could be found if additional powers were taken from the original reformulation of Article 118 submitted by the Freedom Alliance to the South African Government during the Bosberaad and added to the list of powers set forth in this reformulation [see Annexure A].

NOVEMBER 13, 1993

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ANNEXURE D

ARTICLE 118
[a framework]

LIST OF SPR EXCLUSIVE POWERS

The States shall have exclusive legislative, judicial and executive authority in respect of the following powers:

Abattoirs
Abortion and sterilisation
Advertising
Agriculture
Administrative Law
Air and waters environmental management
Airports
Animal control and diseases
Casinos, racing, gambling and wagering
State Civil services and organisation of offices and structures
Criminal law
Commercial law
Contract law
State Correctional services
Corporation and Partnership law
Cultural Affairs and institutions
Delict law
Education
Emergency a nd rescue services
State energy and electricity
Family law
Fishing and Gaming
Finances, taxation and budget
Health services
State Judiciary
Labour law
Land, deed and corporate registrations
Local government
Markets and pounds
Marine resources
Media and Communication law and regulation
Mineral resources, Minerals mining and quarries
Nature conservation
Personal status and records
Professional associations
State Police
Ports and Harbours
Public Works
Public property
Property law and regulation
State Public transport
regional Planing and development
Regulation of Trade and Commerce
Road traffic regulation
State Roads
State residency and citizenship

Soil conservation
Sports and recreation
Succession and trust law
Telecommunications
Tourism
Trade Union regulation
Traditional authorities and indigenous law
Water law and management
Waste Management
Welfare, unemployment, retirement and medicare services
Urban and rural development
Zoning
Implied and necessary powers

LIST OF SPR/NATIONAL GOVERNMENT CONCURRENT POWERS

The national government and the States shall have concurrent legislative, judicial and executive authority in respect of the following powers:

Air Services
Arms and ammunition and explosives
Assistance to institutions of higher learning and public universities
Consumer protection
Coordination and technical regulation of equipment of communication and broadcasting
Regulation on financial markets, financial institutions and insurance companies
Inter-SPR economic development and business assistance
Hazardous and toxic waste and pesticides
Human rights which call for implementing legislation or administrative actions
Industrial law
Inter-SPR Energy, electricity and water
Inter-SPR roads and railways
Promotion of scientific research and development
Regulated substances and medicines
Weights, measures and standards

LIST OF NATIONAL GOVERNMENT EXCLUSIVE POWERS

The national government shall have exclusive legislative judicial and executive authority in respect of the following functional areas:

- defence against foreign enemies, including the power to summon state militia
- foreign relations, including internal compliance with international law
- currency and exchange
- banking and control over financial institutions
- federal citizenship, alien control, passport, immigration, emigration and extradition
- administration of the federal justice system
- security of the federal state and of the constitution of the Federal Republic of South Africa
- external customs and excise and foreign trade
- insolvency
- air transportation, admiralty and maritime law and regulations
- postal services
- national roads and railways
- unemployment insurance
- protection and enforcement of human rights which do not require implementing legislation or administrative action

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- intellectual property rights
- federal civil service, offices and structures
- diplomatic matters, protocol and national honours
- diplomatic matters, protocol and national honours
- ocean environmental matters
- coordination of criminal law-enforcement and inter state criminality
- federal finances, taxation and budget
- use of the area of exclusive economic influence
- national emblems and symbols
- implied and necessary powers
- procedural law

MECHANISMS OF CONCURRENCE

In respect of all concurrent and residual powers the State legislation shall prevail over national legislation unless:

(i) a matter can not be regulated effectively by provincial legislation, with specific regard to economic, health and security interest of another province or the country as a whole; or

(ii) a matter requires to be regulated or coordinated by minimum or uniform norms of standards that apply generally throughout the Republic; or

(iii) an Act of the national legislature is necessary for the maintenance of a national common market, the promotion of economic harmony, the protection of inter-provincial commerce and of economic market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security.

PRINCIPLE OF SUBSIDIARITY

As far as the allocation of powers between the SPR and the national level of government is concerned, powers shall be allocated to the lower level of government which can adequately and properly exercise them. Only powers which can not adequately and properly be exercised at State level shall be allocated to the national government, and only to the extent that such allocation is necessary.

Explanatory Note:
This is the principle of subsidiarity as qualified by the notion of residuality (see Seventh report of the TC on Constitutional Issues). This type of subsidiarity differs from the mere notion of subsidiarity and it is spelled out in the XXIV Principle which relies primarily on efficiency considerations. From a practical point of view it might be the case that the unified exercise of given powers could be more efficient than their fragmentation among the various SPRs, but this would not be the test. As long as the SPRs can adequately and properly exercise such powers they shall be entitled to have them.

ASYMMETRY

The national government shall have concurrent legislative, judicial and administrative powers in respect to all subject matters in which the SPR government does not exercise its jurisdiction, only to the extent that, and until the SPR does not exercise its jurisdiction.

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CHAPTER 10

FEDERALISM: A COMPARATIVE PERSPECTIVE — BELGIUM TRANSFORMS FROM A UNITARY TO A FEDERAL STATE

PATRICK PEETERS*

INTRODUCTION

The 'fourth' state reform of 1992–93 has now been practically realized. After intensive parliamentary discussion, numerous new provisions of the Constitution have been approved and existing ones amended. The legislation implementing these provisions has also been enacted. The adjustment of the introduction of the Constitution into titles, chapters and sections, the new allocation of numbers to the articles, as well as the modification of the terminology of the provisions which have not been amended in order for them to harmonize with the new articles,[1] will most probably take place after the parliamentary recess.

The *federal* character of the state structure is solemnly proclaimed in the amended Article 1 of the Belgian Constitution: 'Belgium is a federal state, composed of Communities and Regions.' The progressive transformation of the unitary state, which was created in 1830, into a complex federal state, seems now to be completed.

Indeed, the Belgian process of federalization can be considered as 'devolutionary'. This refers to the basic distinction between two models of federalism: 'integrative' federalism and 'devolutionary' federalism.[2]

Integrative federalism refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government, with direct effect on the people inside its sphere of powers is pursued while respecting the powers of the component entities, at least to the extent that the use by the latter of their powers does not result in divisiveness.

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Devolutionary federalism, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary state among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal goal is to organize diversity within unity.

It is not possible to go into a detailed description of the new institutional structures within the scope of this paper. Nevertheless, this paper tries to present some basic characteristics of this *devolutionary federalization process* and considers several solutions to the problems typically linked to a devolutionary, bipolar federal state.

A FIRST CHARACTERISTIC: A FEDERALIZATION PROCESS IN SUCCESSIVE STAGES

The transformation of Belgium from a unitary state to a federal state did not result from one sole, global reform operation. The federal state structure was, rather, achieved progressively during several decades.

Surprisingly enough, the foundations for this federal state had already been laid long before the state reform began, ie via the enactment of linguistic legislation. Indeed, the Language Acts of 1932 and 1935 and, above all, the Acts of 8 November 1962 and 2 August 1963, established the linguistic boundaries, dividing the Kingdom into four linguistic regions: the unilingual Dutch-speaking region, the French- and German-speaking regions and the bilingual region of Brussels-Capital. In principle, all public acts in the unilingual regions must be implemented solely in the applicable language of the region. French and Dutch are on a completely equal footing only in the bilingual region of Brussels-Capital. The importance of this principle actually goes beyond the objective of the protection of the language, particularity of the various groups of the population in Belgium. By these means the *principle of territoriality* was introduced that would become the basis for the later development of the pluricentral federal state.

The federal state structure will later be built on the basis of the above-mentioned principle of territoriality in four successive stages.

During the Constitutional Reform of 1970 (which is the *first* state reform), the establishment of the so-called cultural Communities constituted a key point. Each Community was authorized to regulate by 'decree', which has the power of law, certain 'cultural' (for instance, defence and promotion of language; fine arts; radio and television broadcasting, etc) and educational matters. At the same time, various protection mechanisms were established, at the national level, in favour of the national French-speaking minority.

The *second* state reform took place in 1980. The autonomy of the Communities was then further increased: in addition to their legislative bodies, the Communities also acquired their own executive government. Their powers were also extended to the so-called 'personalized matters' ('*persoonsgebonden aangelegenheden*'; '*matières personnalisables*'). These

The new federal structure does not arouse much enthusiasm among the greater part of the population.

On the other hand, one should keep in mind the fact that this step-by-step policy and a respect of the provisions on constitutional amendment have provided, to a large extent, a guarantee for the continuity of the state apparatus and the provision of public services to the population. In the same manner, one may as well point out that the transformation of the Belgian state structure was quite *peacefully* implemented. In the light of events at the international level, this is also an important characteristic of the Belgian state reform.

A THIRD CHARACTERISTIC: A FEDERALIZATION PROCESS ON THE BASIS OF THE ALLOCATION OF LEGISLATIVE POWERS TO THE COMMUNITIES AND THE REGIONS

Autonomy of the Communities and the Regions on the Basis of the Allocation of Legislative Powers

The starting-point of Belgian state reform was the allocation, first to the Communities and later to the Regions, of the competence to enact legal rules — the so-called 'decrees' — having the same legal standing as the laws of the national Parliament.

The basic relationship between the national (federal) level and the component entities (Communities and Regions) has not been much discussed. Politicians, typically, have up to now hardly made reference to the Communities or Regions as 'states' within the Belgian federal State.

The nature of the Communities and Regions has only been discussed indirectly through the relationship between the rules enacted by the national authorities, the Communities and the Regions. These legal rules have *equal standing and are 'co-ordinate'*.

The autonomy of the Communities and the Regions was initially vested at a very 'legal' level: the recognition of the competence to enact *legal norms* which will apply in a specific territory and to specific matters. During the second stage of the state reform, it then appeared necessary also to entrust the execution of this legislation to the Community or Region concerned. Until then, the execution of the Community legislation was entrusted to the ministerial committees established within the national government.

Another example of the 'legal' perspective is the fact that state-owned movable and immovable property was transferred to the Communities and the Regions only pursuant to the Special Majority Statute of 8 August 1980 and only insofar as said properties 'are essential to the exercise of the competences of the Communities and the Regions'.[4]

The almost symbolic importance of the equivalent legal status of national, community and regional rules for the relationship between the authorities concerned, is shown by the specific place of the legal norms enacted by the Brussels regional legislator in the hierarchy of the legal norms. In this respect

it is significant to note that even a new kind of legal norm has been introduced into Belgian constitutional law. The Brussels-Capital Region exercises its powers through the enactment of 'ordinances' ('*ordonnantie*'; '*ordonnance*'). These ordinances may, like the decrees, abrogate, complete, amend or replace existing legislation in their own sphere. Moreover, the ordinances are subject to the same judicial review by the Constitutional Court ('Court of Arbitration'). The difference from the 'decrees' of the other Regions is in fact very small. Unlike decrees, ordinances are subject to limited judicial review by the ordinary courts[5] as well as, in certain cases, limited administrative control by the national authorities 'to protect Brussels international role and its function as the capital'.[6] The introduction of the special notion of ordinances can be explained only with reference to the political discussions between the Flemish and the Walloon Regions concerning the question whether or not the Brussels-Capital Region should be granted equal status with these Regions as a region in its own right. The compromise made it possible for each party to argue that its point of view had prevailed.

Mutual Exclusiveness of the Powers of State, Communities and Regions

The distribution of powers in the Belgian system is essentially based on exclusive powers entrusted to the Regions and Communities. The exclusive nature of the powers allocated both *ratione materiae* and *ratione loci* has been confirmed several times by the Court of Arbitration.

This characteristic is also closely connected with the centrifugal character of Belgian state reform. The principle of exclusiveness was intended to provide each component entity with the power to determine its own policy relating to certain matters, without the interference of another authority. In pluricentral states of the devolutionary type, the relationship between the powers' spheres tends to be mutually exclusive, given the basic distrust between the central government and the component entities.

In practice, the principle of exclusiveness means that each legal provision can relate only to one competence matter. If it is a question of more than one matter, only the most preponderant matter must be considered. Therefore, the Belgian system of mutual exclusiveness should not be confused with the concept of 'dual federalism', involving mutual independence in status and powers for the federal units (the theory of co-ordinate sovereignty) and implying an absence of common action between them. The concept of dual federalism was described by Bryce as follows:

> 'a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each doing its own work without touching or hampering the other'.[7]

The concept of dual federalism goes hand in hand with an extreme liberal concept of the states' role in socio-economic life. It seems to be discredited in American constitutional law.

On the contrary, the Belgian federal practice of essentially interwoven spheres of action made it necessary to develop co-operation between the different levels. The 1988 state reform has introduced several techniques of co-operation: joint exercise of powers and joint institutions, as examples of an evolution of the Belgian federal system toward some form of co-operative federalism.[8]

The Enumeration of Powers of the Regions and Communities

In most (integrative) federal states there is an allocation of defined powers to the centre, leaving the undefined residue of powers to the regions. This is a natural approach, since confederations of independent states (see 'integrative federalism' above) would normally cede only a few, carefully defined powers to a common body. In Belgium, however, this is not the case. As Belgian state reform is characterized by a centrifugal form of federalism, the powers of the Communities and Regions are limited to those expressly enumerated in the Constitution or in special majority legislation implementing constitutional provisions. The federal level, which is still perceived as the ordinary bearer of sovereignty, remains competent in all matters that are not explicitly entrusted to the Communities and the Regions (the 'residuary powers').

The shift of the residuary powers towards the Communities/Regions has, however, been included in the agenda of the next (ie the fifth) state reform.

Pursuant to the new Article 25*ter* of the Constitution, the powers of the federal authority, to which the residuary powers now revert, will be limited to those expressly enumerated in the Constitution.

The Communities and/or the Regions will be competent for the remaining matters 'under the conditions and in the manner as set forth by special majority legislation'.

For the time being nothing has yet changed: the residuary powers still rest with the federal authority. Pursuant to a transitional provision, the coming into force of Article 25*ter* of the Constitution depends upon the following:

(*a*) the insertion in the Constitution of a list enumerating the exclusive federal powers, to be effected during the next Constitutional reform;
(*b*) a more detailed description, provided for in a special majority law, of the manner in which the Communities and/or the Regions will exercise these residuary powers. In this respect, everything is still possible. The special majority legislator is totally free: he may decide to confer these residuary powers either to the Communities or to the Regions or he may decide to split them up ('floating residuary powers'). In addition, all kinds of collaboration, consultation and the like may also be provided for.

During the parliamentary discussions, attention was drawn to the consequences of the future shift of the residuary powers for the financing system of the Communities and the Regions.

The discussion concerning Article 25*ter* of the Constitution actually takes place in the area of tension between, on the one side, the people according to whom the present reform constitutes the final point and, on the other side, those who consider that the present situation represents only one step in the evolution towards a confederal model or even towards separatism.

A FOURTH CHARACTERISTIC: A FEDERALIZATION PROCESS WHICH GIVES THE COMPONENT ENTITIES PROGRESSIVELY MORE AUTONOMY IN THEIR INSTITUTIONAL ORGANIZATION

Contrary to most federal states, Communities and Regions in Belgium are, in principle, not competent to lay down the rules concerning their own institutions. The Communities and Regions do not have their own Constitution. The rules which determine the composition and operation of their institutions are provided for in the federal Constitution and in the special and ordinary majority legislation implementing the Constitution. This arrangement is also closely connected with the centrifugal character of the Belgian state reform.

The aforementioned determination of the rules concerning the composition and operation of the institutions of the Communities and Regions, by, or pursuant to, the Federal Constitution, did not prevent the fact that, in some cases, different institutional solutions had to be prescribed for the Flemish and the Walloon communities, in order to cope with their specific problems. They are referred to as '*Institutional asymmetries*'.

In this respect, we have already pointed out the proportional composition of the Flemish Executive as from October 1988 until October 1992.

Another example thereof is the legal possibility that institutions of the Communities may exercise the powers of the Regions. The Constitution provides that a special-majority law may empower the French Community or the Flemish Community to exercise the powers of the Walloon Region or of the Flemish Region respectively. This provision, however, was put into operation only for the Flemish Community.[9]

The latest state reform has further developed this institutional asymmetry. In that respect, one may note that the special-majority statute has made it possible — and this possibility exists only for the French-speaking Community — to transfer the powers of the French-speaking Community to the Walloon Region and to the French-speaking Community Commission of the Brussels-Capital Region respectively. Immediately after the constitutional and legal provisions in question had been approved, advantage was taken of such opportunity. In view of the political opposition to the merger of the French-speaking Community with the Walloon Region, this asymmetric institutional solution was worked out in order to face the financing needs of the French-speaking Community, in particular at the level of education.

In addition to the development of the institutional asymmetries, the latest reform of 1993 also made the first step towards the establishment of the

so-called '*constitutive autonomy*' of the Communities and Regions. The Flemish Parliament, the French Community Parliament and the Walloon Regional Parliament were conferred a specific power with respect to the composition and operation of their organs, at least within the scope and limits set forth in the amended Special Majority Law of 8 August 1980. This 'constitutive autonomy' will, among other things, apply to the following matters:

- the number of members of the respective Parliaments, in observance of specific principles, such as the principle of proportionality;
- the amendment of constituencies and their main towns, while maintaining the system of electoral alliances (the so-called '*apparentement*');
- the operation of the Government and the relationship between Government and Parliament;
- the number of members of Government, etc.

A FIFTH CHARACTERISTIC: A 'BIPARTITE' OR 'BIPOLAR' FEDERALIZATION PROCESS

We have already mentioned the existence of three Communities and three Regions. This, however, does not alter the fact that the Belgian state is essentially bipolar. 'Figures say nothing'.[8] Belgium is, together with other countries, a state made up of territorial or ethnic communities.[9] The fact that two big national communities exist side-by-side makes it difficult to obtain a stable relationship between the power of the central authority and the autonomy of the component entities.

Examining this matter from the point of view of comparative constitutional law shows that a bipolar federalism is characterized by a lack of stability.[10] Any tension between a federated state and the federation is each time inevitably reflected by a conflict between the two component entities. Duchachek summarized this as follows: 'Either the common interest is discovered or the negative attitude of one group opposing the other implies a threat of a veto or secession'.[11]

The essential 'bipolar' character of the Belgian state has also considerably influenced the manner in which the power is exercised at the federal level.[12]

The transformation of the unitary Belgian state into a pluricentral state was not limited to transferring national powers and responsibilities progressively to external regional and community institutions. The transformation of the unitary state was also accompanied by the development of *parity-based decision-making at the national level*. Strangely enough, the Flemish people had to claim autonomy in order to come into their own majority, whereas the balance of the Belgian political arena could be maintained only by neutralizing the Flemish preponderance. Belgian state reform is:

> 'a compromise between the Flemish majority on the one hand, which on the national level was somewhat neutralized in exchange for autonomy as a means to cultural and social development, and a French-speaking minority on the

other hand, which from a historically established position of power safeguarded a guaranteed participation in national government and obtained economic autonomy'.[12]

State reform, in this sense, is functioning as a way out of what has been called the Flemish version of the 'Baron Von Munchhausen' dilemma: big groups hinder themselves, small groups hinder other groups and are therefore often much too powerful.[14] The neutralization of the Flemish numerical majority at the level of federal authority takes place both at the level of legislative powers and executive powers.

The composition of both Houses of Parliament is in accordance with the population. Because the population is greater in the Dutch-language region, this is reflected by a larger number of members from the Dutch-language group than from the French-language group.[13]

The division of powers forms the basis for the protection mechanism of the 'special majority laws'. The purpose of the special majority condition is to prevent the passing of laws in matters pertaining to the autonomy status of Communities and Regions against the will of one of the language groups in Parliament. This means that in each House the majority of the members of each language group is present and that the total number of votes in favour in each of the two language groups must be two-thirds of the votes cast.

The division into language groups also forms the basis for the 'Alarm-Bell Procedure' which was introduced to protect the French-speaking minority in both Houses of Parliament. Whenever the French linguistic group is of the opinion that a Government Bill or a private member's Bill (except, however, budget laws and special majority laws) is likely seriously to impair relations between the (two large) communities, it can start the 'Alarm-Bell Procedure', by means of a reasoned motion signed by at least three-quarters of the members of this linguistic group. This motion results in the immediate suspension of the parliamentary procedure. Within a period of thirty days, the Council of Ministers must prepare its well-reasoned findings on the motion and invite the House concerned to reach a decision either on those findings or on the Bill as it may have been amended.

The meaning of this protective system becomes even more clear when one notes that the Council of Ministers, which acts within the framework of the 'Alarm-Bell Procedure' as a kind of community arbitrator, is always composed on an equal basis and that it decides on the basis of consensus.

The rule of equal composition means that the Council of Ministers is comprised of the same number of Dutch-speaking and French-speaking ministers, with the possible exception of the Prime Minister (Article 86*bis* of the Constitution). The Constitution fails to specify in which manner the linguistic adherence of the ministers should be determined. For the ministers who are members of Parliament, one can refer to the regulation of Article 32*bis* of the Constitution (the division into linguistic groups). For those who are not members of the Parliament, in the case of a dispute the confidence vote vis-à-vis the Parliament is indicative.

Decision-making according to the rule of consensus implies that the decisions are not adopted by means of a vote, but by 'consensus': through discussion an attempt is made to reach a decision with which each minister agrees. If a minister does not agree, he can either resign or accept the decision taken.

The fact that, since 1970, the protective mechanism of the 'Alarm Bell' was used only once (i e in 1985 regarding a rather minor Bill concerning university education), obviously points to the preventive, dissuasive character of this procedure. Any dispute between the Communities is either solved in the Cabinet, where the Communities are equally represented, or the motion results in the resignation of the government.

The above-mentioned rules pertaining to the composition of the Council of Ministers and to decision-making by consensus also guarantee to the French-speaking minority equal participation in the national executive power and, at the same time, in the day-to-day exercise of authority at national level. One should point out that most decrees and decisions are discussed within the Council of Ministers even when such deliberations are not prescribed by law, this being a consequence of coalition governments.

It is, above all, the splitting of the political parties along community lines that is primarily responsible for the duality of the whole political system.[14] The traditional national political parties were split up simultaneously according to the community demarcation line. As of 1968, the Christian-Democratic Party presents separate candidate lists with different programmes. In the seventies, this phenomenon also affected the Socialist and Liberal political families. Even the Green parties are divided in that way. The political parties actually operating on the national level have an exclusively regional legitimation. They act either within their own regional and community institutions or within the framework of national institutions in agreement with political parties from the other side of the linguistic border.

In federations, political parties generally play a stabilizing role because national parties are represented in all states. As in Canada and Switzerland, regional parties in Belgium are limited to the territory of one state. It is clear that these parties have but little integrating effect.[15]

Belgian state reform at present essentially means withdrawing as many powers and financial resources as possible from the parity-based national decision-making entities. The exercise of national powers is reduced to the continuous search for a compromise between the Communities, the search for the largest common denominator of the personal interests of the two major Communities. This increasingly appears to be an insufficient justification for national policy-making.

The question is whether the institutional reforms carried out up to now do not have as their result the progressive and unobserved transformation of the Belgian Constitution into a piece of contractual law between the Communities. Certain authors have already pointed to the necessity for a 'renewed study of the meaning of the text of the Constitution within the Belgian state'.

This refers to the 'confederal' roots which are already noticeable in the Belgian state structure.[16]

CONCLUSIONS

From the above, it may seem that the unitary, decentralized Belgian state has progressively changed into a federal state in successive stages of state reform. It is already clear that the most recent reform of 1993 does not represent the final point. The reversal of the residuary power and the enumeration of federal legislative powers is already on the agenda of the next reform.

This step-by-step reform was not based on a political project previously agreed upon, nor on any scientific research. Each stage was part of successive governmental negotiations. This progressive development took a considerable amount of time. The necessity for compromises to be negotiated occasionally caused the loss of sight of the eventual goal. On the other hand, this policy guaranteed the continuity of the state apparatus and of the provision of services to the population.

The Belgian federalization process can be considered as devolutionary. The autonomy of the Communities and Regions was vested on the basis of the allocation of legislative powers. Their legal rules have the same legal standing as the laws of national Parliament.

The distribution of powers is essentially based on exclusive powers entrusted to the Regions and Communities both *ratione materiae* and *ratione loci*.

Contrary to most federal states of the integrative type, the powers of the Communities and Regions are enumerated, while the national (federal) authority has the residuary powers. According to Article 25*ter* as amended during the last reform, this is going to change. Important difficulties remain, however: the exhaustive definition of the federal powers; the consequences of the shift of residuary powers for the financing system of the Communities and Regions, and transfer of the residuary powers towards the Communities or the Regions or both.

Belgium is also a 'bipolar' federal state. This has had important consequences regarding the way in which the power is exercised at the federal level. The progressive establishment of autonomous Communities and Regions was accompanied by the development of parity-based decision-making at the national level. In this respect the Belgian state is already functioning according to confederal rules.

Notes

1 See Article 132 of the Constitution, as amended.

2 Lenaerts, K. 1990. 'Constitutionalism and the many faces of federalism'. *American Journal of Comparative Law*, **38** (205) at, 206.

CHAPTER 5

Faces of Asymmetry

German and Canadian Federalism

JOAN PRICE BOASE*

'The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life.'[1]

Elazar's statement underlines how theories of federalism have evolved since A V Dicey and K C Wheare described it as a system of government in which the powers of government are distributed between two levels in a co-ordinate way.[2] That is, Dicey and Wheare believed that implicit in the constitutional division of powers that is essential to any federal system is the assumption that the 'exclusive' powers so listed will be wielded by the appropriate level independently of the other. As suggested by the Elazar quote above, however, modern federal systems can better be described as consisting of particular sets of relationships rather than institutions, although it is also true that the patterns of these political relationships are determined by the particularities of the institutions. No two federal systems are identical, nor have any two evolved in identical ways, for the unique societal circumstances (such as culture, values and historical experience) that originally underlay the specific choices of political institutions will evolve with the institutions, in reciprocal ways. One has only to examine the German, United States, Australian and Canadian federal systems to appreciate the diversity in patterns of interrelationships.

Many discussions of federal systems focus on the constitutional division of powers and the effects that the interpretive decisions of the courts have had on the evolution of these divisions and the intergovernmental relations and interdependencies that have emerged. These complex dynamics are the unavoidable entanglements of modern federal systems, and their study leads to assumptions of centralization and decentralization or the relative power exercised by the two levels of government. A second important dimension of the federal experience is '. . . the way in which regional interests and values are provided for in the structures and operations of the central governments of federations'.[3] This latter dimension, representation of the constituent parts in the central structures and processes, has been more problematical for the 'founding fathers' than the division of powers, and they have risen to the challenge in some innovative ways. As will be seen below in the discussion

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of the German and Canadian federal systems, central institutions, particularly the second chambers of the federal government, are designed to reflect different needs within the state and, when institutionalized, they exercise powerful influence on the evolution of political and social relationships.

The choice of a federal system rather than a unitary approach to the organization of governmental power is usually (but not always) because the society has cultural, political or social cleavages that cannot be accommodated in unitary structures. The United States, for example, chose a federal structure to reflect the crucial interests of the thirteen existing independent political entities. Canada, on the other hand, had not only independent political systems to consider in 1867 (Nova Scotia and New Brunswick) but also the cultural and linguistic diversity of its large French-speaking minority. Nevertheless, while manifest and entrenched cleavages may determine the choice of a federal system, there must also be an overriding sense of shared purpose and a desire to form a single political community in a transcendent sense — a federal will for self-rule, shared rule. Daniel Elazar describes this as the 'I want to go but I want to stay'[4] feeling and the desire to reconcile these centrifugal and centripetal forces is why federal systems exist.

The purpose of this paper is to examine the important asymmetrical features of federal systems that have been developed to accommodate diversity. It will discuss the 'faces of asymmetry' and relate them to the evolution of structures and processes in Germany and Canada. It is clear that, while we have much to learn from one another, circumspection is wise in the application of principles from one polity to another.

ASYMMETRICAL FEDERALISM

No federal system is perfectly symmetrical, composed of 'political units comprised of equal territory and population, similar economic features, climatic conditions, cultural patterns, social groupings, political institutions'.[5] comparable historical traditions and resource potential. In polities where these asymmetries are pronounced, a federal society will exist, requiring some accommodation in the structures and processes of government. Without effective accommodation, citizens will lack a sense of ownership, or sharing in the governmental system, or a sense of belonging to the polity and minorities will have reason to fear the tyranny of the majority. Under the general rubric of 'asymmetrical federalism', many arrangements have been contrived to address the compound problems of federal societies.

First, federacy is a form of federalism not often recognized. It is a form which 'joins separate, distinct communities of disproportionate size and resources in a political association designed to maintain the integrity of the smaller community'.[6] Often, the smaller state is a former colony of the larger state and it feels that a continued — albeit loose — associative relationship is still necessary and beneficial. This allows the smaller state to maintain its political and cultural identity while choosing to share some aspects of governing with

the larger power, for example, an economic, military or monetary association as well as citizenship. The United Kingdom has a federacy relationship with the Isle of Man, as does the United States with Puerto Rico. Associated statehood is similar to federacy, but even looser — the ties can be more easily broken. Such an arrangement is the voluntary and long-lasting one between France and Monaco, and West Germany's relationship with West Berlin prior to the 1990 reunification.

Secondly, an asymmetrical form of federalism can exist when there are multiple levels or a 'federation-within-a-federation'.[7] This was essentially the relationship that Germany had with the allied powers before full independence in 1955, and it is the relationship that is evolving within the European community for Germany as well as Belgium, which is moving towards a federal system. This type of arrangement, where a federal state has in effect delegated some of its powers to a 'higher' organization, produces its own problems, as Canada's provinces are beginning to realize as the North American Free Trade Agreement moves closer to fruition and, as Germany's states are already aware, in the European Community.

A third type of asymmetrical federalism is that which has been called a 'consociational' system, where governing is essentially founded on a system of 'elite accommodation', more formally known as a grand coalition.[8] This is a model of government devised to moderate the bluntness of majoritarian democracy in culturally and linguistically divided societies — to protect minorities from majorities. As much as possible, decision-making authority is delegated to the segments, so that they exercise autonomy over their own affairs. Mutual vetoes are granted in areas where vital interests are at stake, and a 'concurrent majority' or double majority can be required in legislative chambers. Furthermore, political representation is weighted in favour of the smaller segments. An interesting feature of consociational democracy that makes it attractive particularly for linguistically divided societies is that the segments are not necessarily territorially differentiated.

Fourthly, asymmetrical federalism, as it has been discussed particularly in Canada, can refer to the constitutional division of powers. Specifically, some segments within the federation will exercise powers that other segments do not, in an attempt to recognize and address a real or perceived need to legislate in areas of vital interest, such as culture, language and education. This, of course, conflicts with the principle of the equality of the constituent parts (although, as discussed previously, they are never fully equal) and formal, constitutional acceptance can lead to the spectre of preferential treatment, or special status. Constitutional requirements for equalization payments or sections that permit certain segments to engage in preferential policies may also address the inequalities of society and these asymmetrical provisions are more easily accepted. Asymmetry can also be realized by a constitutional provision that allows the individual units to opt in or opt out of specific federal legislation or programmes.

Accommodation can be realized by other means, if the federal government exercises its legislative powers selectively. Federations frequently have areas of concurrent jurisdiction, with federal law usually (but not always)

paramount. When the federal government chooses not to occupy a jurisdiction, it is left open to the units to legislate according to their own priorities. In fact, they can both legislate in the same area as long as laws do not conflict. By careful legislative selection, federal legislation can address the general needs of all the units, while leaving substantial room for regional variations.

Fifthly, asymmetry can be addressed by non-constitutional means as well, by focusing on process and function. If the individual units are charged with the responsibility of administering federal law (as they are in Germany), discretionary decisions allow regional variations, permitting the units to pursue their own priorities, within broad guidelines. Delegation of authority from one level to another is another process that can effect an accommodation of diversity, with asymmetrical consequences. Bilateral or multilateral agreements also have acceptable asymmetrical results, since the agreements can be made available to all while designed to accommodate the few — or the one. In Canada a 1977 agreement on immigration between Ottawa and Quebec City is an excellent example of this.

Sixthly, grossly asymmetrical geographical areas also present an option for federal states. Industrialization and urbanization have led to greatly distorted concentrations of population and, certainly with Canada, there is a perception of domination of the hinterlands by the heartlands, the major urban centres. The geographical units of federations do not have to be large and Germany's three city-states are an example of this solution. Ron Watts has suggested that it is not necessarily heresy to contemplate the division of some of Canada's large provinces into smaller units.[9]

Unequal representation in the central institutions is a seventh form of asymmetrical federalism that has many examples. Most federations have overrepresentation of smaller units in the legislative bodies and Canada has a requirement that one-third of the justices on its Supreme Court will come from the province of Quebec, which has slightly less than 25 per cent of the population. Overrepresentation of smaller units is dramatic in the Senates of the United States and Australia (equal representation), and quite asymmetrical in the second houses of other federations. Canada, for example, allows the smaller Atlantic provinces of Nova Scotia and New Brunswick ten seats each in the Senate, while Alberta and British Columbia each have only six. Asymmetrical representation of the constituent parts in one or both of the legislative bodies of the central government is perceived as being an effective way of accommodating societal inequalities.

The next section will examine to what degree Germany utilized these various asymmetrical strategies prior to unification in 1990.

Germany

Germany before 1990

In 1987 Peter Katzenstein described West Germany's political forces since 1945 as comprising a 'decentralized state and a centralized society'.[10] He

argued that state power was widely dispersed among competing institutions, in sharp contrast to German society, or the private sector, which 'is thoroughly centralized and very encompassing'.[11] Gerhard Lehmbruch feels that this unidimensional continuum is too stark and he says that the only way that the complex dynamics of German federalism can be understood is to consider how 'the differentiation of society depended on institutional structures of the German state and, therefore, was closely related to its spatial differentiation'.[12] German society, says Lehmbruch, has an embedded pluri-centric character that has been fostered and reinforced by the institutions of German federalism, facilitating the complex web of intergovernmental negotiations and linkages. His conceptualization is helpful in explaining the dependency of German federalism on intergovernmental negotiations and the success of a federal system that was not the result of territorially concentrated and divisive forces such as those that have underlain the formation of most other federal systems.[13]

Federalism was chosen as the governmental system of West Germany by the Western occupying powers in 1949 to avoid a future centralization of power such as had existed under the Nazi regime. The division of Germany after 1945 divided Berlin as well into East and West sectors, and West Berlin, although a part of the Federal Republic, was governed by the allied powers. Berlin subsequently became 'one of the strangest governmental phenomena of modern times'.[14] West Berlin was not incorporated into the Federal Republic as an original constituent unit, although Greater Berlin was listed as one of the eleven *Länder* (German states) to which the Basic Law applied in the Constitution of 1950. The asymmetric arrangement with West Berlin that evolved was that of associated state.[15] West Berlin shared most of the privileges exercised by the other *Länder*, but because of the four-power agreements, it remained outside the formal jurisdiction of the Federal Republic.[16] As an associate state, West Berlin was permitted to send twenty-two non-voting members to the *Bundestag* (legislature) and four non-voting, consultative members to the *Bundesrat* (the second chamber).

In its history since 1949, Germany has twice been subject to the federation-within-a-federation characteristics of asymmetrical federalism. The Federal Republic could not be established without the consent of the three Western occupation authorities and, when the Basic Law (the Constitution) came into effect on 23 May 1949, Germany also became subject to the Occupation Statute. This resulted in a double division of powers,[17] a consequence of the federal-state relations defined in the Basic Law and the reserved powers held by the occupation authorities and enunciated in the Occupation Statute. The latter listed subjects that were reserved for the occupying powers, such as foreign affairs, disarmament and demilitarization, and respect for the Basic Law and state constitutions. The powers of the federal government were therefore constrained until almost full sovereignty was attained in 1955 and the formal occupation was terminated, virtually ending this 'strange period of dual federalism'.[18]

More recently, Germany, as the only formally federated state within the

European Community, faces another form of 'dual federalism', which, paradoxically, appears to have led to new tendencies towards centralizing the relations between the federation and the *Land* governments.[19] With the increased complexity of governing in the 1980s, Hartmut Klatt argues that 'finding solutions to federal problems (eg tax reform, social security, EC and 1992)'[20] has caused the federal government to see the *Länder* more as obstacles that must be ignored if necessary. The continued progress towards integration with the European Community has caused a more complicated form of intergovernmental relations — what Fritz Scharpf has characterized as 'double intergovernmental relations'.[21] The *Länder* tend to be the losers as the EC becomes more dominant, but 'the importance of the federal relationship is not diminished: it merely loses its exclusivity'.[22] Interlocking politics, or *Politikverflechtung*, says Gerhard Lehmbruch, referring to the EC, 'now appears as an "institutional trap" from which interlocking governments are unable to escape'.[23]

The West German Constitution — or Basic Law — appears to give primary legislative authority to the *Länder* when it states in Article 30 that 'the exercise of government powers and the discharge of governmental functions shall be incumbent on the *Länder* in so far as this Basic Law does not otherwise prescribe or permit'. Another section states that the *Länder* are given 'the right to legislate so far as this Basic Law does not confer legislative power on the federation' (s 70(1)). Residual powers, then, appear to be in the hands of the states, although other clauses limit *Länder* power and specify the federal government as the principal legislative authority.[24]

The federal government's legislative mandate is divided into three categories: exclusive powers (listed in Articles 71 and 73); concurrent powers (listed in Articles 72, 74 and 74a); framework powers (listed in Article 75). Exclusive federal legislative responsibility applies to pan-German concerns such as national security or policy that requires broad co-ordination. These areas include defence, foreign trade, immigration, transportation, communication and currency standards. Concurrent powers are held over about two dozen areas, such as civil law, refugee and expellee matters, public welfare, consumer protection and nuclear energy. In case of conflict, federal law prevails. The framework legislative mandate allows the federal government to provide broad policy guidelines, which are then implemented by legislative initiatives at the *Land* level. These broad federal guidelines can be applied to the areas of the mass media, nature conservation, regional planning and public service regulations. An amendment to the Basic Law in 1969 added broad social concerns to the list of federal/*Land* joint tasks. These specify the shared goal of improving higher education, developing regional economic structures and improving rural conditions.

The division-of-powers constitutional provisions of the Basic Law were clearly devised to provide the framework for asymmetrical results of policy development. The concurrent and framework powers of the federal government have placed the weight of implementation of policy (to be discussed more fully below) on the individual *Land* governments, allowing policy

divergences. This conforms to the principle of subsidiarity, which means that whenever something can be solved on a lower level, it should not be dealt with on a higher level.[25] Furthermore, the broad scope of concurrent powers provides room for the federal government to exercise its powers selectively (since federal legislation is paramount), providing the *potential* for the asymmetric exercise of *Länder* power. Despite this broad potential for the development of asymmetrical federalism in the jurisdictional, *de jure* sense, other forces in Germany have reduced the probability in a *de facto* sense.

The arbitrary division of West Germany into *Länder* by the occupying forces lessened the tendency towards divisive regionalism that is so evident in many federal systems.[26] It also produced *Länder* separated by significant socio-economic differences, and the Basic Law addressed these asymmetries by calling for equality of political rights and living standards among the states, to try to equalize governmental services and living conditions across the country. The Constitutional Court has also carefully upheld the principle of uniformity in services.

The result has been that the poorer states receive financial subsidization from both the federal government and the richer *Länder*, and, as one might suspect, this has been an area of controversy and conflict. Local and regional governments are important and the system has protected political diversity while facilitating adaptation to the inevitable inequalities of development among the different states.

The strong tendency of Germany to develop into a co-operative, bureaucratic, administrative state has been greatly facilitated by many of the provisions of the Basic Law. The impressive scope of the delegated authority from the central government to the *Länder*, required by the Basic Law, is a unique feature of the German system. Delegated authority in the form of administrative responsibility for the implementation of policy determined by joint decision-making carries with it considerable potential for the exercise of discretionary judgement and decision-making, with the attendant probability of divergent results in practice. This effect can be heightened when governments at the two levels are controlled by parties with clear ideological differences.

Relations between the federal government and the *Länder* are characterized by considerable intergovernmental negotiation, bargaining, conflict and co-operation — not unlike the relations between federal and constituent governments in other federal systems. In Germany, however, interaction has become so embedded as a process that it can best be described as interlocking federalism, a term that implies far more integration than does interdependent federalism. Franz Lehner argues that the *Länder* have effectively lost many of their powers to this system of interlocking federalism and that the incorporation of these powers into the bargaining system has resulted not in increased centralization, but, in fact, is a process of unitarization.[27] Several authors have argued that Germany can be described as a 'unitary federal' system, a contradictory term that seems to capture well contemporary processes in the Federal Republic. Nevertheless, despite the unitarization that has been

evident, the nature of the administrative structures still allows for great discretion and a degree of asymmetrical results.[28]

This possibility has lessened over time. Although the Basic Law stipulates that Germany is an 'eternal' federation (Article 79), this refers to institutional structure rather than function or process. In the first forty years of German federalism, there were thirty-five amendments to the Basic Law and most of these affected federal-*Land* relations by expanding national legislative powers.[29] The federal government narrowed the legislative room that was available to the *Länder* by using its own legislative powers extensively. Several changes have resulted. First, the focus of legislative powers has increasingly been with the federal government (although the *Länder* retain broad administrative responsibility) and this effect has been intensified by the reduction in *Länder* autonomy due to EC intervention. Secondly, joint responsibility for tasks has increased, with fewer opportunities for independent *Länder* action. Thirdly, although the *Länder* have been somewhat compensated by strengthened participation in the *Bundesrat* (to be discussed below), the *Land* governments rather than the *Land* parliaments have been the winners.[30] Fourthly, the regulatory and financial powers of the federation have created a 'clear imbalance in favour of the federation in terms of powers and decision-making possibilities'.[31]

The *Länder*, according to Hartmutt Klatt, have therefore experienced 'a narrowing of flexibility in policy formulation . . . with respect to the setting of priorities and task completion . . .'[32] This aspect of asymmetry in the Federal Republic would appear to be increasingly constrained, although differences in important *Land* policy still exist, influenced by 'specific ideologies and interests of governments as well as by institutional structures'.[33]

The German states vary considerably in tradition, size, population and socio-economic resources. The population range is from less than a million (Bremen) to a population of seventeen million (North Rhine-Westphalia). All but three of the states — Bavaria and the two city-states of Hamburg and Bremen — have shallow historical roots, dating back only to their creation by the allied forces after World War II. At that time, many of their residents were refugees and expellees with no old ties to the *Land* in which they happened to reside, although their descendants have subsequently developed a sense of regional identity.[34] The states each have their own constitutions and the specific form of government 'including the decision of whether the legislature is to be uni-cameral and the executive directly or indirectly elected, is left to the discretion of the states.'[35] Only Bavaria has chosen a bicameral system. The arrangement of *Länder* proved to be least favourable to northern Germany, which was divided into four states, including Bremen and Hamburg; this region has a small population and has remained the poorest.

Perhaps the most remarkable aspect of the asymmetrical geographic division of Germany is the status of its city-states. As discussed above, West Berlin, as the eleventh state, originally had an associated state status, but Bremen and Hamburg are full self-governing and participating states, although they have a combined population of less than two and a half million

and an area just over 1 000 square kilometres. They are quite separate from the larger state that surrounds them (Lower Saxony, population over seven million) and they control their own taxes, just as the other states. They have both continued to maintain their historical continuity as former Hansa city-states and they tend to send representation to parliament different from Lower Saxony.[36] The apparently successful German experience with grossly asymmetrical geographical federalism cannot be divorced from the context in which it occurred, which was the imposition of federal boundaries by outside victorious forces.

The two chambers of the German parliament are the *Bundestag* and the *Bundesrat*. The former is similar to the American House of Representatives or the Canadian House of Commons and the latter, as a second house, is similar to the American or Canadian senate. The *Bundestag* has 496 seats which are apportioned to the *Länder* on the basis of representation by population and the election system is dualistic. One-half of the members are elected from single-member constituencies by a simple majority (first-past-the-post) and one half are appointed from party lists in the *Länder*, according to proportional representation. The outcome is reasonably close to proportional representation, although parties with less than 5 per cent of the vote are not allowed to participate.

The *Bundesrat* is the body that most clearly addresses the asymmetrical nature of the German states. It is an extremely powerful second chamber, unusual in a parliamentary system, and its members are direct representatives of the governments of the *Länder*. The prime minister of each *Land* is a member of the *Bundesrat*, and the *Land* delegates always vote as a bloc — there is no individual voting. Prior to unification, there were three classes of *Länder*, with representation determined by size. Each *Land* was guaranteed three votes, those with a population over two million received four votes and those with a population over six million received five votes. Thus, Bremen and Hamburg, with a combined population of less than two and a half million, each sent three delegates to the *Bundesrat*, out of a total of only forty-one. Unable to incorporate Berlin as a constituent state, the Basic Law gave it special legal status, with four non-voting, advisory members in the *Bundesrat*.

Representation in the *Bundesrat* is important, because this is a legitimate and powerful second house of parliament, the most powerful second house in existence.[37] As a federal institution at the national level, it 'is more than just a representation of regional interests secured by the participation of the *Länder* in national politics via Article 50 of the Basic Law which states that the *Länder* shall particpate through the *Bundesrat* in the legislation and administration of the federation'.[38] The *Bundesrat* has an absolute veto over all bills that affect the *Länder* and a suspensive veto over all other bills. Furthermore, its role is constitutionally guaranteed, for any attempt to amend the law affecting the division of the federation into *Länder*, or 'the participation of the *Länder* in legislation . . . shall be inadmissible'.[39]

The *Bundesrat* is perceived as an institution that moderates the asymmetries among the *Länder* and has a strong, effective and guaranteed voice in

policy making. As a result of these two overlapping roles, it has had a profound effect on the institutionalization of federal-*Land* relationships in Germany. As Lehmbruch has argued, the nature of intergovernmental relations in Germany is more than just a measure of centralization or decentralization — it is, rather, an example of *Politikverflechtung*, or interlocking politics, between two initially autonomous organizations — from which there may be no escape.[40]

Summary

The organization of government that was chosen for West Germany by the occupying powers in 1949 is a unique hybrid of the British and American political systems. Its evolution has shown that they perhaps chose more wisely than they knew. It has developed with the combined advantages of a parliamentary system and a federal system, and it incorporates a *sui generis* second chamber that is not only powerful and effective but infuses a measure of the separation of power that is embedded in the American governmental structures.

The allied choice was predicated on a desire to preclude a recurrence of aggressive German nationalism, centralism and militarism and the federal system that was imposed was based on mostly arbitrarily chosen constituent units. The boundaries of the units were not wholly artificial, nor was Germany a total stranger to a federal system, but there was little historical basis for the resultant structures. The British insisted on a parliamentary system which is inherently executive-dominant and could allow a dangerous concentration of power, so the *Bundesrat* was designed as a countervailing force. The strong representation of the *Länder* at the centre, combined with their extensive administrative responsibilities and the concomitant weakness of federal administrative structures has led to a balance of power between the two levels of government and a generally amicable interlocking relationship that has served Germany well, before and during the turbulence of reunification.

Unification

Perhaps the most remarkable aspect of unification in 1990 was that, as late as the autumn of 1989, no one predicted it. Even three weeks after the fall of the wall in November 1989, Chancellor Helmut Kohl 'envisioned a long period of transition — perhaps five to ten years — a transition that would involve co-operation or at most confederation between the two German states'.[41] The transition was not to be incremental, however, and the speed with which unification took place was astonishing — less than a year after the wall was opened, by October 1990, unification was complete. Another extraordinary feature of the process was the relative ease with which unification occurred, as the two states whose experiences for more than forty years had been the antithesis of one another, slid into an agreement to share social values, political and economic structures and their future. Although the union still

PUBLIC SERVICE COMMISSION

NOTES ON THE ASSIGNMENT OF POWERS AND FUNCTIONS IN TERMS OF THE CONSTITUTION

1. The assignment of powers and functions to various levels of government is of fundamental importance in the drafting of the Constitution. The delimitation of powers and functions provides the foundation upon which legislative and executive institutions will rest, and determines the effectiveness and credibility of such institutions. It also determines the relationship, and thus the balance, between levels of government.

2. Some basic considerations:

   (a) Functions differ from one another; assignment cannot be done according to a set pattern.

   (b) Many functions encompass more than one level of government. The key to a sound assignment of powers and functions is to determine which <u>aspects</u> of a function belong on each level of government.

   (c) When considering the assignment of powers and functions, all three levels of government should be looked at simultaneously.

   (d) Powers and functions (or aspects thereof) to be exercised and performed at the various levels of government, should be defined as clearly as possible. Grey areas should be kept to a minimum.

3. To achieve a sound and acceptable assignment of powers and functions, functions should be thoroughly analysed. There are two important principles to be applied in doing such analyses, viz -

(a) the subsidiarity principle, which postulates that an activity should not be assigned to a higher level of government if it can be dealt with satisfactorily at a lower level; and

(b) the empowerment principle, which postulates that where the power to decide or act in a matter has been assigned to a lower level of government, a government authority at a higher level of government should be excluded from interfering in the exercise of that power.

4. The allocation of financial means should be in full harmony with the deployment of powers and functions. The value of a carefully devised assignment of powers and functions will be lost if a level of government is placed in a position of financial subservience to a higher level of government.

PROVINCIAL LEGISLATIVE POWERS

EXTRACT FROM SUBMISSION/ARTICLE BY DR BERTUS DE VILLIERS

6.3 Self-rule by provinces

The right of provinces to constitutionally guaranteed self-rule or autonomy is the keystone of a federal-type dispensation. The word autonomy is derived from the Greek, meaning "own" (auto) and "judicial" (*nomos*), thereby indicating the judicial capability of national and provincial governments to take decisions regarding the matters allocated to them.[68]

Autonomy of subnational units within a federal framwork relates to the following:

* The **right to take and administer decisions** without undue interference by the national parliament, on those matters allocated to the provinces by the constitution;

* The **right to have their instititutional integrity** respected, including their constitutional and political structures, and government departments;

* **The right to have their territorial integrity** respected.

The South African Constitution contains the following provisions concerning three basic indicators of autonomy or self-rule of provinces:

6.3.1 Provincial powers and functions

A remarkable fluctuation occurred during the last six months of negotiations (August 1993 - March 1994) on whether provinces should have exclusive or only concurrent powers. The Constitutional Principles, which were accepted on 2 July 1993 and which are part of the constitution, state clearly that "the powers and functions at the national and provincial levels of government shall include **exclusive and concurrent** powers ..."[69] The first draft constitution did not provide for any exclusive provincial powers, but after intense negotiation the second and third draft constitutions did include substantial exclusive provincial powers in addition to concurrent powers.

However, the final draft constitution accepted by parliament in December 1993, however provided only for concurrent provincial powers, to be exercised with the national parliament. This caused widespread criticism from within the National party, Democratic Party, Inkatha Freedom Party, the rightwing and some homeland parties. Key negotiators nevertheless argued that the right of the national parliament to override provincial laws was severely curtailed, and that provinces did in fact have exclusive powers.

In March 1994 Parliament amended the Constitution by providing provinces with exclusive powers in an effort to generate more support for the Constitution, especially from the Inkatha Freedom Party and the Rightwing. Provision is made for the right of provinces to take autonomous decisions regarding a wide variety of functions guaranteed to them in the Constitution. Although a national override is possible, the Constitution determines that in other cases of conflict between provincial and national legislation in htese subject matters, the provincial legislation shall prevail."

The constitution contains the following provisions regarding provincial powers and functions:

"Powers"

The provinces have qualified exclusive to make laws within the areas specified in the constitution, including agriculture, culture, primary and secondary education, environment, health, public transport, provincial planning, road traffic, roads, tourism, traditional authorities, urban and rural development and welfare services."

A law of parliament overrides a provincial law, if such national law

i) deals with a matter that cannot be regulated effectively by provincial legislation;
ii) deals with a matter that requires uniform norms and standards throughout the republic;
iii) is necessary to set national minimum standards in the rendering of public services;
iv) is necessary for the determination of national economic policies;
v) a provincial law materially prejudices the economic, health and security interests of the republic as a whole."

National laws that override or nullify provincial legislation on the basis of these criteria, are justiciable. This means that the Constitutional Court will play a crucial role in setting standards and interpreting the criteria in specific cases. The grounds for a national override are rather vague, general and open-ended. They could enable parliament to involve itself extensively in provincial legislative matters.

RELEVANT PART OF SUBMISSION/ARTICLE BY PROF GEORGE BARRIE, RAND AFRIKAANS UNIVERSITY

Federalism in a free and democratic South Africa

The bill of rights in the 1993 Constitution makes much of freedom and democracy. A relevant question would be: what are the uses of federalism in a free and democratic society?

It cannot be denied that in this age many objectives of government require intervention at the level of central government. Foreign affairs and national defence are an obvious target area for unified policies. The promotion of economic prosperity also calls for the energies of central government.

Yet there is a nexus between self-government and freedom. Localised government, as Tocqueville (*Democracy in America* (1945) (ed Bradley) 61) said, inspires the spirit of liberty. Federalism and localised government encourage civic participation. The command of a distant capital is something different to citizens deliberating closer to the place where they live and shaping their more personal affairs of government.

Federalism distributes power among the various levels of government. If power tends to corrupt, then devices that distribute and diffuse power help guard against tyranny (Howard "The uses of federalism: the American experience" 1992/3 *Am UJ International Law and Policy* 413).

Federalism encourages and reflects pluralism as a counter to uniformity and homogeneity; it nurtures pluralism. And is South Africa not a plural society *par excellence*? Section 31 of the Constitution has found it necessary specifically to entrench the right of every person to use the language of his choice. Section 14(1) guarantees the establishment of educational institutions based on a common culture, language or religion, where practicable.

Federalism stands for the greater exploration by, and implementation of, units of self-government by pluralistic states. It stands for pluralistic doctrines and theories. It is opposed to the notion of one encompassing state sovereignty – which often ignores the aspirations of smaller groups and communities. The notion of the nation-state, a unitary entity in which one "nation" resides in one "state", is outdated and is not responsive to the pluralistic realities of countries such as South Africa, or the United States of America, for that matter. More blood has been spilled in intra-religious, intra-racial, and internecine conflicts and warfare than has been shed in wars between strangers.

Vigorously waving a newly sewn flag of democracy without balancing the rights of the multitudes of the diverse economic, cultural, and ethnic communities that make up South Africa – a modern pluralistic state – is not going to produce justice or tranquillity.

Federalism bolsters the essence of a constitutional democracy. It invites a continuing dialogue about the premises and limits of government power; about the creation of a sufficiently powerful central government and the preservation of local prerogatives. This dialogue is bolstered by sections 15 and 21 of the bill of rights of the Constitution which entrench the right to freedom of speech

Federalism promotes constitutional *innovation* and experimentation. As stated by US Supreme Court Justice Louis Brandeis in *New State Ice Company v Liebmann* 285 US 262 311 (1932),

> "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without a risk to the rest of the country".

Federalism raises the value of *choices*. Different states, by their localised governance, can have a significant impact on the quality of life from state to state. People can choose to live in one state or another with reference to quality of life concerns that are affected by the way a particular state exercises its sovereignty.

Federalism enhances the idea of national *consensus* which, in practical terms, means that if there is consensus between the central government and the various states on important questions of public policy, central government can take a stand in the knowledge that it has virtual national support.

The possibility of the federal government acting in response to a national consensus is in a sense a "safety valve" (Sedler "The uses of federalism" 1992/3 *Am UJ International Law and Policy* 413), enabling the people of the federation to decide collectively that a given matter involves a sufficient national concern to require a comprehensive national solution.

This can be illustrated by referring to the United States Federal Civil Rights Act of 1964. The Act prohibited racial and other forms of group discrimination in employment, education, public accommodations and housing. When this act was enacted by Congress, some states had already enacted anti-discriminatory laws, but a number of states, especially in the South, which had a long history of racial discrimination, had not. The result of the Civil Rights Act was a national commitment to principles of equality for racial minorities and other traditionally victimised groups in American society.

South African society is highly pluralistic with all types of traditions. Subdivisions are based upon ethnic origin, religion and territory. South African society is fragmented, it is a land of minorities. Despite these divisive aspects, there are unifying forces which give South African society a coherence and self-consciousness – forces which make South Africa a *nation* and will enable its government to function stably and effectively.

The effect of the vastness of South Africa has been to promote regional cleavages. One only has to look at the nine provinces more closely to realise this fully: each province has its own atmosphere, own economic interests, peculiar problems and own peculiar outlook deriving from their sparse populations on the one hand, to their dependence on industries on the other. It cannot be denied that the vast distances have given rise to a certain parochialism. The quality newspapers, for example, do not have much of a circulation beyond the cities in which they are produced.

Regionalism should therefore be of overriding importance and government should not be reaching outwards from the centre to the periphery and downwards from top to base. Rather, the institutions of government should be looked at from precisely the other way round – as leading upwards from the base. The system of government should rather start at the bottom and work its way to the top.

The role of the judiciary

The role of the judiciary is fundamental to a successful federal system. It is the judiciary which has to keep itself concerned with the business of regulating the constitutional separation of powers between the central government and the regional governments. Judicial monitoring by the courts is the only way to ensure fidelity to the federal constitutional structure. If one accepts that federation is the desirable structure, then one must look to the courts to achieve and maintain that structure. The role of the courts will therefore be a challenging one. The courts acquire the role of a national conscience and play the role of a national political engineer as they monitor the separation of powers. Mimicry of the United States Constitution and the role played by the United States Supreme Court in structuring the separation of powers in a federation is not likely to give South Africa all the answers, but much may be learned from an understanding of that country's experience (Kurland "The rise and fall of the 'doctrine' of separation of powers" 1986 *Mich LR* 592).

South Africa is in the advantageous position of having a constitutional court (s 98(1)) predicated by the transitional Constitution. Thus the body to adjudicate between the separation of powers in a possible South African federation will already be in place. It will also, in a few years' time, have had the experience of adjudicating in purely constitutional matters. Under the transitional Constitution, the constitutional court is the court of final instance in all matters relating to the interpretation, protection and enforcement of the Constitution. This includes decisions on whether acts and bills of Parliament and provincial legislatures are in conformity with the provisions of the Constitution. It also includes decisions on constitutional disputes at any level of government between organs of state.

Conclusion

The 1993 Constitution has seven main features (Rautenbach and Malherbe 3). First of all, the *entrenched Constitution is supreme*, which puts an end to the sovereignty of Parliament. Secondly, *equal franchise* will be enjoyed by all. Thirdly, there is a *bill of rights* to control the relationship between state and individual. Fourthly, the government is one of *national unity*. Fifthly, *nine new provinces* have been created, leading to a new regional system. The existence of the provinces, as well as the recognition of local government as a level of government in its own right, is entrenched. Sixthly, the *diversity of interests* in South African society is accommodated. Lastly, the constitution is a *transitional* one.

Features five (nine provinces and the recognition of local government) and six (accommodation of diversity of interests) form the basis of a federal constitutional structure for the future South Africa. The last feature (the transitional nature of the Constitution) is indicative of the fact that all parties to the present Constitution are still prepared to negotiate. It is to be hoped that these future negotiations which will take place in the Constitutional Assembly (s 68(1) 73(2)) which must adopt a final Constitution, will move South Africa closer to genuine federalism. Constitutional pragmatism predicates this.

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POWERS AND FUNCTIONS

EXTRACT FROM SUBMISSION BY THE DEPARTMENT OF HEALTH

I. Lawmaking powers of the new provincial legislatures[1]

i. A provincial legislature may make laws on health services. The word "services" means the supplying of the needs of persons. It would clearly cover hospital services, vaccination services and the provision of other medical services.

ii. The legislative competence of a provincial legislature includes the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

iii. It is not clear whether the provincial power to make laws on health services extends to health professionals and their registration and conduct. It could be argued that a power to make laws on health services includes the reasonably necessary and incidental power to make laws governing persons who provide health services and their registration and conduct.

iv. It is understood that the national and provincial governments have agreed that the national government will make laws on health professionals and their registration and conduct. But it has apparently been agreed that the provinces will make laws on traditional healers. If the provincial power to make laws on health services includes the power to make laws to control persons who provide health services, then a province can validly make laws on traditional healers. But if health services does not include the power to control persons in health occupations, then this intergovernmental agreement cannot give provinces a power to make valid laws on traditional healers or on other persons who provide health services.

v. It is even less clear if health services includes the regulation, in the interests of public health, of private conduct. In particular, it is not clear if it includes a power to make laws on environmental health matters such as the requirements with which restaurant kitchens shall comply, or other conditions which affect health. These and similar matters are dealt with in a chapter of the Health Act, 1977 (*Chapter V*: "Regulations" *ss* 32 to 40).

vi. To interpret "health services" in this way, so as to authorise provincial legislatures to make laws to regulate and control things in the interest of public health, would in effect confer on provincial legislatures the power to make laws on all health matters. This would amount to treating the power to make laws on "health services" as a power to make laws on "health", and ignoring the word "services". In principle no word should be treated as superfluous.

vii. The memorandum from the National Health Legislation Review Committee proposes that provincial governments should harmonise laws governing health services in the narrow sense of the provision of services and facilities such as hospitals, clinics, laboratories, family planning, ambulances and the like.

1. PRINCIPLES

1.1 Form of state/government - See Constitutional Principle (CP) i - xxxiv

1.2 Centralisation or decentralisation - See CP xxi(1)

1.3 Extent of devolution of powers -

* Principle of subsidiarity - See CP xxi
* Exclusive powers - See CP xix - xxiii
* Concurrent powers - See CP xix - xxiii and section 126(2A)
* Residual powers - See CP xxi(8)
* Self-determination for ethnic communities - See CP xxxiv
* Asymmetry
* Encroachment by national government - See CP xxii
* Precedence of national government legislation - See CP xxiii
* Safeguarding powers of provincial governments - See section 61, 62 and 73(2) and (11)

1.4 Override -

* Should central government override provinces in their areas of competence?

* Should provinces override central government in their areas of competence? - See CP xxi, xxii and xxiii

1.5 Continuity between interim constitution and final constitution - See section 164(3)(a) and (b)

1.6 Cohesiveness - build one country or one nation without undermining diversity of culture, language, etc - See CP iii, xi, xii, xxxiv

1.7 Ensuring effectiveness and efficiency of delivery of services (clean and cost-effective government) - See CP xxi and section 164(3)(d) to (g)

1.8 Bringing government closer to people and enhancement of accountability - See CP xxi(1)

1.9 Building a single economy - See CP xxi(5) and section 126(3)(d) and (e)

1.10 Establishing peace and reconciliation - See final paragraph of Constitution

4.2 Legislative competence - section 126

4.2.1 Functional areas of legislative competence - Schedule 6

Agriculture
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health services
Housing
Indigenous law and customary law
Language policy and the regulation of the use of official languages within a province, subject to section 3
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 14
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services

Tender Board - section 187

4.2.2 Agency or delegated functions - CP xix

4.2.3 Appropriate and adequate powers - CP xx

4.2.4 Basis for allocation - CP xx

* Financial viability

* Effective public administration

* Promotion of national unity and legitimate provincial autonomy and acknowledgement of cultural diversity

4.2.5 Criteria for allocation of powers - CP xxi

LEGISLATIVE COMPETENCE

APPLICABLE CONSTITUTIONAL PRINCIPLES

XVIII

1. The powers and functions of the national government an provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -

(a) for the purpose of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

PROVINCIAL LEGISLATIVE AUTHORITY

Provincial legislature

125. (1) There shall be a legislature for each province.

(2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution.

(3) Laws made by a provincial legislature shall, subject to any exceptions as may be provided for by an Act of Parliament, be applicable only within the territory of the province.

Legislative competence of provinces

126.(1) A provincial legislature shall be competent, subject to subsections (3) and (4) to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

Legislative Competences of Provinces

Agriculture
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health services
Housing
Indigenous law and customary law
Language policy and the regulation of the use of official languages within a province, subject to section 3
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 14
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services