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CONSTITUTIONAL ASSEMBLY

DRAFT REPORT
MULTI-LATERAL DISCUSSIONS
27 FEBRUARY 1996

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TUESDAY 27 FEBRUARY

1. OPENING

1.1 Mr Ramaphosa opened the meeting at 14h30.

1.2 The following document was used as a basis for discussion in the meeting:

Draft on National and Provincial Legislative Competences dated 26 February with Introductory Note

1.3 There was also reference to and exchange on the following document:

DP Submission on Council of Provinces/Senate and the national and Provincial Legislative and Executive Competencies dated 16 February 1996

1.4 It was noted that the meeting was a continuation of the multi-lateral meeting of the previous day. It was noted that the introductory note of the document under discussion indicated that executive competencies will be dealt with in a following draft.

2. DISCUSSION

GENERAL INTRODUCTION

2.1 It was agreed to use the draft on *National and Provincial Competencies* as the basis for discussion. It was noted that this document emanates from a trip to Germany and that the three experts who went with tried to capture the ideas emanating from the trip. It was noted that the ANC and NP agreed that this draft represented an agreed framework applicable to govern the competencies between national and provincial.

2.2 In the report from the ANC and NP bi-laterals it was indicated that this was a draft in legal form, unlike the report on the Council of Provinces tabled the day before, and that it would be important to take the parties through the draft, so that all parties could comment on the draft and indicated their reservations if necessary.

GENERAL COMMENTS REGARDING THE DRAFT

2.4 It was noted that the ANC and NP bi-laterals indicated that they did not see that legislative and executive competencies are so interrelated that the two issues cannot be dealt with separately. It was noted that in fact the way it was dealt with in the draft was to deal with legislative competencies with the NCOP/Senate because a closer link existed there. It was noted that although issues such as asymmetry, subsidiarity and other issues were raised in the bilateral, it had been agree in the bi-laterals that these issues would be dealt with at a later stage. It was noted that at no stage was executive competencies dealt with. It was noted that the multi-lateral gave all parties the opportunity to raise their views.

2.5 It was noted that the DP felt that executive competences should be an integral part of the draft. It was also noted that they stated their reservations regarding the document which in their view reduced between two parties the two options that had been presented in the working draft, and that they may have to be taken up again. The DP stated that they had a brief bilateral with the ANC where they expressed views which they hoped had been passed along, and had discussions also with the NP which was really an exchange of information rather than to see if they could consolidate their views..

2.6 The PAC commented that they held the following general convictions. They indicated that as is well know by those at the meeting, they had never seen federalism as the solution to the problems of the country. That stated that that does not mean that they were necessarily against decentralising power and creating provinces with certain powers. They stated that in the context of what as been created by the Interim Constitution and seems to have been entrenched in the principles and has to be incorporated in the new Constitution, they have maintained their position. They felt it was important when you create the system to ensure the concept of building one nation with all the institutions of the government working together in unison. They stated that the idea of recognising that the provinces were artificial creations of the Interim Constitution meant that theis concept was still being developed. They stated that they did not believe that they were autonomous or independent bodies which came together to create nation government.

2.7 The ACDP commented that they wished to have more clarity on what are provincial powers exclusively, what are national powers exclusively, and which are the concurrent powers.

Regarding Sections 1 and 2 generally

2.8 It was noted there was agreement that one has to start off by reading

Sections 1 and 2 together, because the one captures legislative authority on a national level and the other captures legislative authority on a provincial level.

2.9 It was noted that what was done in this regard was clear: At a national level there are two areas in which you have legislative authority. Firstly, the amendment of the Constitution. Secondly, in what has commonly come to be known as the concurrent powers, which are schedule 5 matters. It was noted that the rest of the document in this regard was self-explanatory. It was also pointed out than when reading Sections 1 and 2 particularly, the footnotes should be kept in mind.

2.10 It was noted that these two sections were completely tied up with the section in the working draft on the adoption of provincial Constitutions. It was noted that all parties were in agreement that there were amendments to make it clear what was being done there, for example the insertion of the homogeneity clause. It was noted that if one read words like "any exclusive provincial matter", it had to be read in this context.

Regarding Section 1(4)

2.11 It was noted that the ANC and NP were in broad agreement on Sections 1 2, but that there was one area in which more clarity was required. It was noted that the problem they had was that the Interim Constitution was that it stated that "necessary and incidental legislation" can be dealt with both nationally and provincially; however, in this draft it has been inserted only as provincially. It was noted that there were two arguments supporting this:

i. that the national will have all those powers in any case, therefore they should not have to be given further explicit empowerment in the Constitution to pass any further "necessary and reasonable" legislation.

ii. that the kind of legislation is that which would fall outside schedule 5. For example, with regard to labour matters, if a local government also has to legislate on labour matters, which is a national competency, they would have the power to do so if it is "reasonably incidental."

2.12 It was noted that this was an important area to look at, and they have been trying to find out the extent that also has to be provided for at national level. It was noted that that technical advice on this would be useful to look at and they thought that once they had that technical advice, they would be able to resolve any problems they may have had there. It was noted that the wording itself was not so important, the question was really whether that should also be inserted at the national level. It was noted that there may be

different interpretations of this particular clause.

Regarding Generally Sections 3 and 4

2.13 It was noted that these should again be raid with the footnotes, and that it was important to make sure the meeting understood that when it is an exclusive competence to amend a Constitution of a province, it is done by means of a 2/3rds majority, etc.

2.14 It was noted that the DP indicated that there were two structures: One was embodied in the Interim constitution, that for concurrent areas, wether they were framework or ordinary , that national legislature should have total power to legislate across the board, in the area of concurrency. Two, the provinces should have the same powers for that particular area, for example schools and housing. They stated that the Constitution then make provision for a conflict, saying that in the event of a conflict you must resolve it in a certain way. Their view was that this was designed for conflict, because it does not say the provinces could legislate in a certain way and the centre in another way., an override where it says both have equal powers.

2.15 They stated that the German formulation regarding concurrency stated that the Lander had the right to legislate, and as long as and to the extent that the federation had not exercised its legislative powers. They stated that in the event of a conflict, the Senate or the Courts come in. They stated that the German experience was that if you define it this way it had gone to the courts only twice. The DP stated that the other formulation was to legislate right across the board and wait for a dispute and then you have to resolve whether in fact it exceeded its authority or not. They stated that they therefore believed that the powers of the centre should be consigned to overrides and not that they should legislate right across the board.

2.16 The DP stated regarding overrides that in their original memorandum they said it should be concurrent. They stated that they had looked at it again in terms of the German Constitution and now believed they should consider framework. They stated that they thought that framework was a way to deal with concurrency which is separate from override. They stated that they were not aware of any other Contitutions having to say how you resolve conflict, because they are not designed for conflict. They stated that one can only override where national legislation was necessary to achieve certain national objective, although spelling out the objectives needed to be revisited.

Regarding Subsection 2 and 3, in particular Subsection 2(3)(2)

2.17 It was noted that this has not changed, except of course that it has one

extra area of legislative competency - it can amend its own constitution and that will of course be an exclusive competence of the province. Also, it was noted it would have powers of the schedule 5 matters, which are the concurrent matters, which is quite obvious. It was noted there is a further new area which is self-explanatory, any matters outside these functional areas that are explicitly delegated to it by national legislation.

2.18 At the meeting an ANC view was noted that the ANC would not support this formulation, but that this was a way out of the formulation. The view was that if you look at 3(2) the only way the ANC's ideas came out was if one said (a) to (d) were actually those instances in which an essential national objective was deemed to be a national objective in terms of Section 3(1)(a). Regarding the problem of "necessary", the drafters should consider an alternative perhaps of the formulation of 3(2), the introductory part, that an objective must be regarded as an essential national objective intended in 3(1)(a). It was suggested to insert a new (3) which is not included in the document,but which takes the view of the ANC and says that in the event of a dispute regarding these conflicts, such national legislation shall be deemed to be necessary in term of 3(1)(a) if such legislation has been consented to by the Council of Provinces.

2.19 An NP view was that the last mentioned ANC view was not one that had been agreed to in bi-laterals.

2.20 The DP said that they were opposed to the use of a majority of the Senate to deny individual provinces the right to get a redress if they in fact thought that parliament had exceeded it powers over the National Assembly. They stated that they held that the right of a province to get a court order in respect of an invasion of its powers should be enshrined as it is in the Interim Constitution.

Regarding Subsection 3(2)

2.21 It was noted that this was an important clause. It was noted that the draft created through this the instance where both the national and provincial legislature had passed laws and there was a conflict, and the question arose what would the court do in this regard. They noted that the drafters had tried to created a much clearer test for the courts to apply. In particular the overall test was that it should be "necessary for the achievement of an [essential] national objective." It was noted that the question arose whether it should be just the "national objective" or "essential national objective. and that was why the word "essential was in brackets; it was not a word included in the constitutional principles and this had still to be finalised by the parties.

2.22 It was noted that it was set out clearly what the test would be to assist the

court. It was noted that there was broad agreement that that was how it should be dealt with, and that (a) (b) (c) and (d) were subclauses in the alternative. It was noted that the only issues here was that there are certain parts of these causes which required clarity regarding whether they complied with the constitutional principles. This included the word "co-ordinate" and whether that would fit in with "minimum standards"

2.23 It was noted that the DP felt it was a flagrant violation of the whole concept of judicial review where it says "National legislation must be regarded as necessary" They stated that for the rest there are matters of detail as to how one should define matters of national interest that are also in the schedule, but the two main areas where they have a problem were,: first, being able to legislate right across the board, they preferring to say quite clearly provinces could legislate as long as the fact that national has not legislated gives effect to the overrides; second, they do not believe that the Senate should be used to usurp the role of the courts, in determining whether there has been and invasion of the right of particular provinces.

2.24 The DP stated further that regarding the overrides there were four things connected when looking at provincial powers: the actual powers that you give the province, the nature of the overrides, the resolution of disputes or conflicts in respect of the overrides, and financing. They stated that any one of those being deficient, the powers and the autonomy used in the loose sense of the provinces disappears. They stated further that Subsection (3) was too wide and this was where they would propose the adoption of overrides. They stated that this may render provincial functions and any degree of serious provincial autonomy in the legislative field as virtually meaningless in the hands of a national government that did not want to stand back and let the provinces use their own authority.

2.25 The ANC response to the DP was noted, that on the scale of federal models the DP's was one on the far right.

Regarding Subsection 3(2)(c)

2.26 It was noted that there was a small difference of opinion on this. However, it was noted that the NP had not strongly insisted on their view. The word in brackets "*(strategic) interes*t" was in dispute, but the problem was that there was no jurisdiction they were aware of that used a test like that, that they could attach any meaning to . It was noted that they still did not have full clarity on this.

2.27 It was noted that it has been agreed that regarding (c)(v) the NP still wanted to look at the full effect and in terms of what it would mean in the context of this clause. It was noted that more a political decision than a technical one.

Regarding Subsection 3(2)(d)

2.28 It was noted that if one looked at Subsection (d), and Subsection 126(e) of the Interim Constitution, the tests differed. This related to the sense in which they talked about a "provincial law". It was noted that the big difference between a "law" and "unreasonable action" was that "unreasonable action" could indicae executive action. It was noted that parties wanted to look at whether it should be the kind of wording in the Interim Constitution, or whether it should be the broad wording in the document. However, it was noted that the wording in the document was much broader. It was noted that they had to look at these provisions in comparison, and there were also some phrases that the NP wanted to check against the constitutional principles.

Regarding Subsection 3(2)(e) and Option 1 and Option 2

2.29 It was noted that the way it was originally drafted was that there would be a complete override, and that was that if the Senate were to agree to legislation, them being representatives of the provinces, that in that instance there should be an override. It was noted that that situation would not create further problems in the courts. It was noted that there was a feeling raised that it would be too wide and possibly not fit into the constitutional principles.

2.30 The ANC stated that they had actually indicated that they would want as wide an override as that, because if one looked at the override at the test, that it is "necessary of the achievement of a national objective, there are two components to it. One is the "necessary" which is the more subjective test which the court will make to decide whether it is necessary or not. That is a more subjective test by the judges, where they would get involved in policy decision. Two, Whether it was a national objective or not was obviously more objective, it is much more tangible in terms of looking at it objectively, and there is no policy decision that the judges would make. This would be the case if the Senate had agreed to the legislation, and of course the majority had still to be worked out. It was noted, however, that once the Senate had agreed to it , that it was the "necessity" part that the court could not look at, although they still could look at whether it was a national objective. It was noted that the NP was still looking at this matter, and that no one had agreed to it. It was noted that what was under discussion still was the role the Senate would play in the override, and when the courts could look at the matter.

2.31 It was noted that on the last point the ANC felt that the drafting did not fully capture the matter, because again it just talks of "necessary for the achievement of the objective" and that throws both of them together. However, the explanation above indicates what they had bee trying to

capture from their side.

Regarding Section 4

2.32 It was noted that this was a new matter that was being introduced; that is the whole area where national legislation is drafted and it is in conflict with the provincial constitution. It was noted that there was no provision for that in the Interim Constitution, but that both parties had agreed to it.

Regarding Subsection 4(c)

2.33 It was noted, However, that it had been agreed that (c) would be removed, because they were unable to find any other matter that fell outside of (a) and (b), and that they felt it would be too burdensome on the provinces and no one would really know what it would mean if they said "any other matter" as in (c). It was noted that in contrast, (a) and (b) were quite clear.

Regarding framework legislation

2.34 It was noted that the NP had indicated that they were still looking at this issue. It was noted that they wanted it included as part of the proposal. It was noted that they would in particular which to have a schedule regarding this and take the relevant issues out of schedule 5 and out of national competencies, and so would create a third area of legislative authority.

2.35 The ANC pointed out that they had agreed to this, but were opposed to framework legislation.. It was noted that both parties had agreed that whether it was in or out does not affect this particular structure, however, and that a decision on this could be taken at a later stage if a proposal came forward, and one could look at the merits of such a proposal.

Regarding Constitutional Principles

2.36 It was noted that there were two constitutional principles which deal with the fact that national government should not do anything which should encroach on the physical integrity of the provinces.etc. It was noted that in this regard there were two interpretations. First, that it is national government on the executive level, not the legislator. Second, that the whole scheme that one creates should not create an encroachment.

2.36 The NP stated that they had certain views that the national government was actually meant in the broader sense of the word which includes the legislator, and therefore that particular provision should be made for it here.

2.38 It was noted that there had been agreement that this was a very technical

issue that required an opinion being done or that was being done, so obviously the technical advisors would be able to look at that opinion.

Regarding subsidiarity and asymmetry

2.39 It was noted that the NP had raised these issues and that they felt it should also fall under the legislative competencies

2.40 It was noted that the ANC view had been that it falls under the executive competencies, and that the DP's point in this regard would be looked at , but that the issue have still to be finalised where this falls.

Schedule 5

2.41 It was noted that the word "provincial functional areas"may not be correct, because it was concurrent powers and not provincial executive areas, which would be a different issue.

2.42 Second, it was noted that policing had been left out here. It was noted that both parties had agreed that only when the chapter on policing had been finalised would they be able to see whether they should remove it or not, because only then would they know how parties had agreed to deal with it. So it was noted that it had to be born in mind that that was the reason it had been left out.

2.43 It was noted that a similar argument applied regarding local government, that local government should also not be included there., but that that was also not finalised

2.44 It was noted that the NP wanted certain matters added to the list and that they were "forestry", "land affairs", publication control", "public works" and "water affairs."

2.45 The ANC stated that this last mentioned matter was not agreed yet and had to be discussed further.

2.46 The PAC stated that they would oppose the addition of any further matters to the schedule.

4. CLOSURE

4.1 In closure it was agreed that this be referred to the Panel and technical advisers, in consultation with the law advisers, for further consideration taking into account of what was said in the meeting, and in order for bi-laterals to proceed to some point of finality. It was noted that in drafting sight not be lost of the Constitutional principles.