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CONSTITUTIONAL ASSEMBLY

CONCURRENT POWERS IN A FEDERAL

OR

QUASI-FEDERAL SYSTEM

by

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We were given the brief to discuss **concurrent powers** and as these powers are usually found in a **federal or quasi-federal** type of constitutional system some discussion on **federalism** itself is clearly required.

By way of introduction, I would like to say a few words on the background against which **federal** systems or federal **ideas** (such as **concurrent powers**) should, in my view, be discussed. As far as this background discussion is concerned I am indebted to R L Watts who wrote a Chapter entitled "Contemporary views on Federalism" in the book "Evaluating Federal Systems" Juta 1994 (ed B de Villiers) and from which I have gleaned many of the ideas that I will discuss with you as well as quotes in the following discussion (please have a look at the said Chapter for the sake of completeness).

First, the work of the Constitutional Assembly in writing a final Constitution for South Africa must take place **within the strict confines prescribed by the Constitutional Principles.** This is the reality. Our next brief as so-called technical advisers is to discuss the Constitutional Principles and the way in which the Principles impact upon the subject matter of Theme Committee III, that is, the nature of provincial powers and the relationship between national and provincial powers (also coming later to local government powers). In essence, one would be discussing the well-known **continuum** of possible constitutional **options**, ranging from a **fully unitary** state, to a **federalist** state to a **confederal** option. I would not like to preempt this issue. Suffice to say that the Constitutional Principles appear to rule out either a fully unitary state or a real confederal option - in fact, the Constitutional Principles **appear to favour the introduction of a federal or quasi-federal option.**

Second, although it is often claimed that federal constitutional systems do provide a practical way of **combining** (through democratic representative structures) the **benefits** of **unity** as well as **diversity**, it is of the utmost importance **not** to view such systems as a **panacea** for all of society's political ills (see Watts **op cit**).

Third, the extent to which a federal type of system can accommodate political realities is likely to depend on whether the particular form or variant that is adopted gives adequate expression to the **demands and requirements of the particular society** in question. Ultimately, federalism or quasi-federalism is a **pragmatic, prudential technique** whose applicability may well depend upon the particular form which is adopted or even upon further innovations in its application. Ideally, federalism is a technique that permits the **closest political approximation to contemporary reality**.

Furthermore, although academics and so-called experts will seek analytical and theoretic clarity and therefore would try to define federalism and federal political systems (also by applying terms such as concurrent powers, exclusive powers, residuary powers, assymetry and subsidiarity), and such clarity may even be useful to avoid confusion or internal contradictions, the use of such terminology is not inevitably prescribed in the sense that it must of necessity be used whenever constitutional arrangements deal with the problem of allocating competences to the different levels of government. The prescribed use of these stereotyped terms may in certain circumstances even stifle proper constitutional debate should one try to fit all powers and systems into neatly pre-defined compartments.

Nation builders who are engaged in the decisive process of writing a Constitution, on the other hand, are less likely to be bound by considerations of theory, seeking political arrangements **that will work**, rather than theoretical niceties or purity. Approaching their problems **pragmatically**, they may on occasion be willing to consider hybrids (Watts **op cit**). The interim

Constitution is certainly an example of such pragmatic hybrid system which was agreed upon in the spirit of tolerance and compromise.

Although analytical work by scholars can be helpful to nation-builders in identifying **alternatives or possibilities**, the realm of practical politics is sure to be permeated by a preoccupation with pragmatic compromise which is likely to predominate. We should especially **not** view federalism or quasi-federalism as a type of **ideology**: Federalism in all its forms and variations is not an abstract ideological model to which political society is to be brought into conformity, but rather a **way or process** of bringing people together through **practical arrangements** intended to meet both the **common and the diverse** preferences of people. These practical arrangements primarily deal with questions how to **organise and allocate political powers** in a way that will enable the common needs of people to be achieved whilst accommodating diversity of their circumstances and preferences. Federalism, therefore, although it is often seen as inflexible and conservative, should rather be seen as **flexible and varied** in striving to provide a **common ground** for so-called **centralisers and provincialists** (Watts **op cit**). In fact, Constitutional Principle **XX** states unambiguously that "the **allocation of political powers** between different **levels of government** shall be made on the basis which is conducive to (inter alia) effective public administration which recognises the need for and promotes **national unity** and legitimate provincial **autonomy** and acknowledges cultural **diversity**" (my underlining).

Having stated a preference for the aforementioned pragmatic approach, I will nevertheless venture that one may recommend a very simple practical description or **definition** of federal-type systems:

the common denominator appears to be that it is that type of political organisation that seeks to achieve both or unity as well as diversity by combining **shared rule** on some matters and **self rule** on others (see Watts **op cit**). It is in this context that the term "**concurrent powers**" has developed, that is, two levels of government which exercise power with regard to the **same**

matters or **functional areas**.

Our brief to discuss the topic of "**concurrent powers**" was more specific, that is, as we understood it, the views of the writer Uwe **Leonardy** on concurrent powers must be discussed **critically and analytically**, especially in so far as he may hold different views on the subject of concurrent powers from those held by others. We were also referred to an article of Leonardy in this regard.

I do hope that I have identified the correct article: the one that I will be referring to is the article by Leonardy which is contained in the submissions to Theme Committee III by the Commission on Provincial Government, entitled: "Constitutional Provisions on Devolution and Federalism" (in the book "Birth of a Constitution"). Hopefully, therefore, you will have the said article in hand as I am taking you through it.

In essence, Leonardy states that **concurrent powers** presupposes the identification of the seat of **residual powers**, that is, the level which shall be entitled to legislate in so far as the Constitution does not specifically assign the legislative function to any other level. Leonardy criticizes Constitutional Principle **XXI(7)** which appears to view the allocation and the making use of concurrent powers as a matter of "mutual co-operation".

In **Leonardy's** view, concurrent powers is the application of a **strictly divisive** principle laying down the **conditions of claims to certain legislative powers** on the background of a clear realisation of the seat of the **residual power**. He sees this as **a circle which closes** and takes the view that the conditions or grounds of justification for laying claim to concurrent powers must be addressed at specifically and only the **non-possessor of the residual power**.

Accordingly, he criticizes the interim constitutional arrangements (section 126(3)) for going **the other way round**: it namely defines the **grounds** on which the national level of

government (which is according to him clearly the possessor of the residual powers although it is not provided for expressly) may make use of the concurrent powers which is basically **its own**. Instead (according to Leonardy), the interim Constitution should have defined the **circumstances** under which the **Provinces** may lay claim to the concurrent powers.

In my view this is a highly theoretical **criticism** resulting in affected or artificial reasoning which, in practice, does not lead to a solution of the problems which are identified by Leonardy but, in fact, leads to the **exactly** the same results. His criticism should therefore not be given too much weight. I say this especially because the same problems would result in terms of Leonardy's proposed model for the allocation of concurrent powers (combined with an override or prevalence) than he claims would result from the present arrangements pertaining to concurrent powers in the interim Constitution:

First, the problem which Leonardy identifies, namely that the Provinces would have to **predict** the extent to which they can (in reality) make use of the concurrent powers taking into account the grounds (the five conditions spelt out in section 126(3) of the interim Constitution) on which they may do so remains a problem in terms of Leonardy's model: The grounds of justification that he suggests are the following (clearly echoing section 126(3) of the interim Constitution), that is, that the provinces may exercise the **concurrent powers** to the extent that: (i) the matter, to be performed effectively, does not require to be regulated or co-ordinated by **uniform norms or standards** which apply generally throughout the Republic; (ii) it is not necessary to set **minimum standards** across the nation for the rendering of public services; (iii) it is not necessary for the determination of **national economic policies**, the maintenance of economic **unity**, the protection of the **environment**, 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; (iv) the provincial law does not materially prejudice the economic, health or security interests of **another province or of the country** as a whole; (or (v) the provincial law deals with a matter which can **effectively** be

dealt with by provincial legislation).

It is clear that in thus describing the said conditions in terms of which the Provinces may make use of the concurrent powers, the problem which Leonardy identifies with regard to section 126(3) is **not** resolved: the Provinces will nevertheless have to display almost **prophetical abilities** in order to determine the border-lines of their legitimate field of legislation or, put differently, the field in which their concurrent competences in the functional areas concerned may be exercised. Accordingly, the Provinces must **still predict** to what extent the Parliamentary Acts would prevail in that Parliament could in future cut down provincial laws which conflict with Parliamentary laws in this area.

Leonardy's ***second*** point of criticism, that is, that the Provinces would be politically bound to consider the concurrent powers as "competitive" powers in the sense that the sooner they make use of them, the more they would gain by them, is likewise also true in terms of the model that he propagates: the Provinces are namely called upon to make use of these powers and can do so without impunity **only until** Parliament exercises its **override** in the applicable circumstances.

It follows from this discussion that Leonardy's ***last*** point of criticism, that is, that the Provinces will act as if **they** were the seat of the residual powers makes no difference in practice: whether or not the Provinces act as if they were the seat of the residual power or not, it still remains an uncontrovertible fact that Provinces can only make laws in instances where the Parliamentary Acts do not **prevail**.

Another legitimate point of criticism against Leonardy's views is the fact that he makes no mention of **overriding or prevailing** powers even though it is clear that what we are dealing with is concurrent powers. Concurrent powers (in the strict sense of the word, that is, two levels of government exercising legislative competences with regard to the same functional

areas) inevitably require that there must be some mechanism of **override** or **prevalence** in cases of conflict in order to be (practically) in a position to give preference to one of the two conflicting laws of the two levels of government which are clearly **competing** for concurrent powers in the **same functional areas** of legislation.

To **summarise**:

As far as the practical realities of the allocation of **concurrent** powers are concerned, it is **not** inevitable that one must apply Leonardy's thesis of the **full circle**. In other words, it is **not** inevitable that one must start out by identifying the residual seat; then to identify concurrent areas of legislative powers (or functional areas) and then to address specifically and only the non-possessor of the residual power with regard to the conditions or justification for making use of the concurrent powers. One may also point out that the override is not always given to the level of the residual seat: In terms of the federal system which applies in, for instance, the United States of America it is clear that notwithstanding the fact that the **residual** powers resides with the component **states**, the **override** is given to the **other** level of government (that is, the **federal** government) which allows the federal government to override state interests (on the grounds of legislating on inter-provincial commerce) and thus increases federal powers.

The only inevitable reality (it would seem to me) is the fact that concurrent powers (which by definition belong to two **different levels** of government) will require that the **grounds of justification** to make use of these powers will have to be **spelt out clearly** and, furthermore, that a **mechanism** will have to be provided to act as arbitrator of disputes when there are conflicts which will inevitably result when two different levels of government legislate with regard to the very **same functional areas**.

As far as the use of such mechanism is concerned, one can only agree with Leonardy that **judicial control** (in the form of especially the Constitutional Court) is clearly the most obvious mechanism to arbitrate such disputes.

In this regard, Leonardy also mentions the possibility of **political control** which is absent in the interim Constitution. This is clearly an **alternative mechanism** which can be implemented **together with** judicial control in dealing with a dispute in the field of concurrent powers in a practical manner: for instance, the Senate as **federal institution within Parliament** can take upon itself the **political** protection of justified provincial claims in the process of political interaction between Parliament and the Provinces - also when concurrent powers come into play. In this regard the political process should create opportunity for political **compromise** as far as possible. Leonardy therefore (in my view correctly) recommends that the political process should include certain **time-limited steps of communication and negotiation** between the Senate and the National Assembly:
for instance, a provincial law on the terrain of concurrent powers must be submitted to Parliament before its promulgation. Such law cannot be promulgated if Parliament within a specific period of time (eg, nine weeks) states by Resolution that the provincial law does not meet the requirements (the grounds of justification which were spelt out earlier). In order to be passed, such Resolution requires the consent of the Senate. Furthermore, such Resolution must be conveyed to the Senate by the National Assembly within a specific period of time (eg, three weeks) and the Senate must then convey an intention to refuse its consent within a specific period of time (eg, a further three weeks) in order to provide opportunity for compromise. If Parliament nevertheless adopts such Resolution, the Province concerned may appeal to the Constitutional Court, that is, judicial control comes into play as was explained earlier.

I can only but agree with Leonardy's thesis that **both** mechanisms, that is, the judicial as well as the political mechanisms should apply when the constitutional issue of addressing the dispute over the concurrent competences of the different levels of government has to be dealt with. Combining judicial control with preceding political control will also have the benefit of preventing that all such disputes have to be dealt with by the Constitutional Court which may result in a flooding of this Court.

One may also point out that the role of the Senate as protector of provincial interests (as spelt out above) will only be possible if the Senate is, in effect, the representative of provincial interests. For example, in Canada where the Senate is a nominated body (senators are nominated by the political party in power) the Senate is, in effect, the representative of political party interests and is not an effective representative of provincial interests. In Australia, on the other hand, where the senators are elected by the voters in the provinces, the Senate is a body which represents provincial interests. The above-mentioned are not the only possibilities of mechanisms which deals with concurrent powers. One may also, for instance, introduce inter-governmental mechanisms which may preceed provincial legislation and whereby conflicting interests may be reconciled beforehand.

Although a discussion of the topic of **exclusive powers** falls outside the present brief, Leonardy does address this topic and one may perhaps conclude a discussion of his article by briefly referring to his views on exclusive provincial legislative competences.

Leonardy, once again, appears to take the untenable point of view that exclusive provincial powers are inevitable in the sense that any Constitution which allocates competences to the national and provincial level of government must, as of necessity, provide for exclusive provincial powers. He points out that (in terms of section 144(2) of the interim Constitution) a Province will only have executive authority once it has exercised its legislative competence on that terrain. Therefore Provinces will have no executive powers until they exercise their legislative competences or will have virtually no executive powers until matters are allocated to them in terms of the transitional provisions contained in section 235 of the interim Constitution or any law and matters delegated to them under any law. In his view, the granting of exclusive provincial powers will deal with this problem in that Provinces will automatically have executive competences on the terrain in which they have to exercise their exclusive legislative competences.

Although Leonardy may be correct in stating that Constitutional Principle **XIX** demands that the "powers and functions of the national and provincial levels of government shall include exclusive **and** concurrent powers" and that the (final) Constitution will have to comply with this demand (whilst the interim Constitution fails to do so because it contains no exclusive powers on the provincial level), he is, in my view, not correct when he appears to be saying that (in general) the inclusion of exclusive powers are always prescribed.

It is namely not so that provinces have executive powers only if they exercise legislative powers in the same functional area. In fact, for instance, the German constitutional dispensation makes it clear that the Provinces (Länder) are given executive competences in functional areas in which the federal government (Bund) exercises legislative competence. Although it may be true that Provinces usually exercise also executive competences in the areas where they are granted exclusive legislative competences, it is simply not correct to create the impression that Provinces must have exclusive legislative competences in an area before Provinces will be able to exercise executive competences in that area. Leonardy himself refers to Constitutional Principle **XIX** which demands that the "provincial levels of government shall perform functions for other levels of government on an agency or delegation basis". Leonardy then makes (in my view correctly) a distinction between administration by **delegation** (which leaves full responsibility for the delegated fields with the Provinces as matters of their own) and administration by **agency** (which keep full powers of supervision with the national level). He therefore also appears to realise that the Provinces may thus be granted executive responsibility in fields which are matters of national legislation. In other words, executive and legislative responsibility need not be assigned to the same level of government. Lastly note that executive powers need not only be delegated (either on an agency or delegation basis - **supra**) but can also be devolved upon the provinces and may lead to real power for the provinces on the lines of the Länder in Germany.