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CONSTITUTIONAL ASSEMBLY

DRAFT FORMULATIONS: LEGISLATIVE COMPETENCIES

MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

FROM: EXECUTIVE DIRECTOR

DATE: 12 MARCH 1996

RE: DRAFT FORMULATIONS ON LEGISLATIVE COMPETENCIES

We enclose for your consideration draft formulations entitled "*National and Provincial Legislative Authority*," produced by the Technical Advisors to the 6 March 1996 meeting of the Constitutional Committee Sub-committee and the 11 March 1996 bilateral between the ANC and NP.

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DRAFT - 12 MARCH 1996

Status: Draft discussed at CC subcommittee meeting of 5/3/96 as adjusted after bilateral between ANC and NP on 11 March 1996.

NATIONAL AND PROVINCIAL LEGISLATIVE AUTHORITY

Legislative authority of Republic

- 1.¹ (1) The legislative authority of the Republic is vested in [Parliament]² and confers on [Parliament] the power-
- (a) to amend the Constitution; or
 - (b) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 5³ but excluding any exclusive provincial matter.⁴
- (2) When exercising its legislative authority Parliament is bound only by the Constitution, and must act in accordance with and within the limits of the Constitution.

¹ This section as drafted is broadly supported by the parties, except the DP which reserved its position.

² No decision as yet whether the National Chamber of Provinces should be part of Parliament.

³ As the words "any matter" may be misinterpreted to relate only to matters within the exclusive competence of Parliament plus those within the parliamentary overrides in clause 3 of this draft, it is necessary to state categorically that Parliament is competent to legislate fully on the matters within the functional areas in Schedule 5 (and not only the parliamentary override part of those functional areas).

⁴ See clause 2(3) and foot note 10 below.

Legislative authority of provinces

- 2.⁵ (1) The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power -
- (a) to pass a constitution for its province or to amend any constitution passed by it;⁶ or
 - (b) to pass legislation in and for its province with regard to -
 - (i) any matter within the functional areas listed in Schedule 5;⁷ or
 - (ii) any matter outside these functional areas explicitly delegated to it by national legislation.⁸

⁵ Clause as drafted broadly supported by the parties, except the DP which reserved its position.

⁶ The above section must be read with section 154 of the Working Draft which prescribes the procedure for the adoption of a provincial constitution and the conditions to which a provincial constitution must conform.

⁷ NP and DP want concept of framework legislation to be introduced in this section. No agreement on framework legislation.

⁸ Matters of state at the different levels are so interrelated that it may be useful to allow Parliament to delegate further legislative powers to the provinces, for instance where there is a need for provincial legislation to complement specific national legislation in the provinces. This is in line with article 71 of the German Basic Law. It must be pointed out that this kind of provincial legislation will be mere subordinate legislation and completely dependent for its validity on the enabling national legislation. Parliamentary overrides do not come into play here as provincial legislation inconsistent with the enabling national legislation will obviously be *ultra vires*.

This provision may also be a useful instrument to give certain provinces more legislative powers than others (asymmetry). See also foot note 26.

- (2) When exercising its legislative authority a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with and within the limits of the Constitution and that provincial constitution.⁹
- (3) The passing of a provincial constitution and of any amendments to it is an exclusive provincial [matter].¹⁰
- (4) Legislation passed by a provincial legislature which is reasonably necessary for or incidental to the effective exercise of its power to legislate with regard to a matter within the functional areas listed in Schedule 5, is deemed to fall within those functional areas.¹¹

⁹ Section 156 of the Working Draft is incomplete in that it does not deal with the passing of laws by a provincial legislature under the regime of a provincial constitution. It is suggested that both the Constitution and the provincial constitution should bind the provincial legislature and that this principle should be stated in the Constitution.

The section also makes it clear that a provincial legislature, when exercising its legislative competence which includes the adoption of a constitution, must act in accordance with and subject to the limits of the Constitution (as prescribed elsewhere, e.g. sec. 154).

¹⁰ This clause contemplates vesting the power to pass and amend provincial constitutions exclusively in the provinces. It is suggested that this would satisfy CPXIX which requires both concurrent and exclusive powers for the provinces. This clause must be read with section 154 of the Working Draft which lays down the parameters for provincial constitutions, and also with clause 4 below which regulates the overrides where a provincial constitution and national legislation is in conflict with each other. Such conflicts may arise where a province includes in its constitution provisions dealing with matters that fall inside the concurrent area (Schedule 5 matters).

ANC considering whether "matter" used here and in other relevant sections should not be replaced by "legislative competence".

¹¹ A concern was raised that this provision should also specifically empower Parliament to legislate on "incidental matters". This has been considered but in context of the other provisions, especially clause 1(1)(b), there would appear to be no need for this.

Conflicts between national and provincial legislation¹²

3. (1) In the event of a conflict between national legislation and provincial legislation which falls within the functional areas listed in Schedule 5 -
- (a) the national legislation prevails over the provincial legislation if the national legislation -
 - (i) is aimed at achieving an [essential] national objective;
 - (ii) is necessary for the achievement of that objective; and
 - (iii) applies uniformly in or with regard to the country as a whole;¹³
 - (b) the provincial legislation prevails over the national legislation where paragraph (a) does not apply.
- (2) National legislation must be regarded as necessary for the achievement of an [essential] national objective if it -
- (a) deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;¹⁴
 - (b) establishes -
 - (i) norms and standards;¹⁵
 - (ii) structural, regulatory or other frameworks; or
 - (iii) a national policy,

¹² This clause is based on the different models in section 159 of the Working Draft. Subclause (1) attempts to lay down the general principle that national legislation which is necessary for the achievement of an essential national objective and applies uniformly with regard to the country as a whole, overrides provincial legislation and that, where this does not apply, provincial legislation overrides national legislation. Subclauses (2) and (3) sets out the specifics of the application of the general principle.

The DP does not support the concept of conflict resolution in this clause and proposes a formulation similar to section 72 of the German Basic Law which would limit Parliament to legislate on Schedule 5 matters to the extent of the Parliamentary overrides.

¹³ The word "essential" is in contention. Paragraph (a) redrafted as per agreement between ANC and NP.

¹⁴ Paragraph (a) adjusted on the insistence of the NP to bring it into line with section 126(3) of the Interim Constitution.

¹⁵ The previous reference to "minimum norms and standards" has been deleted as per agreement between ANC and NP.

aimed at achieving uniformity across the nation with regard to a matter which in the interest of the country as a whole requires uniformity;

(c) provides for -¹⁶

- (i) the maintenance of national security;
- (ii) the maintenance of economic unity;
- (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;¹⁷

- (v) the promotion of equality or equal opportunities; or
- (vi) the protection of the environment; or

(d) is aimed at preventing unreasonable action by a province which is prejudicial to another province or the country as a whole.¹⁸

(3) Unless the contrary is proved, national legislation aimed at achieving an [essential] national objective other than those listed in subsection (2), must be regarded as necessary for the achievement of that objective if it has been supported by the National Council of Provinces

¹⁶ The ANC and NP agreed that the words "the implementation of a national policy which is in the interest of the country as a whole, which includes", be deleted.

¹⁷ The term "interprovincial commerce" has been replaced with the agreement of the parties by "economic activities across provincial boundaries" which is more descriptive.

¹⁸ There is uncertainty whether this paragraph should not be dealt with separately in order to comply with certain interpretations of CP21.2. As presently positioned the parliamentary override will only set in if the relevant national legislation applies uniformly in the country as a whole. (See section 126(5) of the Interim Constitution).

[or agreed to in the Mediation Committee] with six provinces having voted in favour of the legislation.¹⁹

Conflicts between national legislation and provincial constitutions²⁰

4. In the event of a conflict between national legislation and a provision of a provincial constitution with regard to -

- (a) a matter where this Constitution specifically requires or contemplates the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; or²¹
- (b) a matter within the functional areas listed in Schedule 5, section 3²² applies as if the affected provision of the provincial constitution were provincial legislation contemplated in that section.²³

Conflicts that cannot be resolved

5. If a dispute concerning a conflict between national legislation and provincial

¹⁹ This subclause replaces the previous subsection (2)(e) and the previous options for subsection (3) and provides for a rebuttable presumption in favour of a parliamentary override where the relevant national legislation has been approved by the National Council of Provinces or agreed to in the Mediation Committee. However, its ambit has been narrowed down to national legislation

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

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

The NP suggests the deletion of the words in brackets. ANC will consider this. NP also favours the inclusion of the underlined words. ANC prefers an ordinary majority of the provinces.

²⁰ Conflicts between provincial constitutions and national legislation is a different matter that cannot be resolved by the same rules as applicable to conflicts between national and provincial legislation. It is consequently dealt with separately.

²¹ This paragraph only applies to national legislation specifically required by the Constitution, for instance in sections 172, 180 (1) and 187 of the Working Draft.

²² Of this Draft.

²³ This provision is necessary to prevent provinces from attempting to use their constitutions as a means to circumvent parliamentary overrides where these overrides would normally apply.

Further discussions at Bilaterals

legislation falling within Schedule 5 or between national legislation and a provincial constitution cannot be resolved by the Constitutional Court in terms of sections 3 and 4, respectively, the national legislation prevails over the provincial legislation or constitution.²⁴

6. **Subsidiarity**²⁵
7. **Asymmetry**²⁶
8. **Justiciability**²⁷

²⁴ See CP 23. Consideration was also given to CP 22 insofar as that Principle stipulates that the national government may not exercise its powers in such a way so as to encroach on the geographical, functional or institutional integrity of the provinces. It would appear that this Principle does not require the inclusion in the Constitution of a provision following its exact wording, and that the Principle would be complied with if the Constitution, read as a whole, disallows such encroachment.

²⁵ The view is that CP 21.1 is a matter which concerns the allocation of functional areas, e.g. Schedule 5, especially when it comes to the allocation of **executive** competences. It cannot be understood to intend excluding Parliament from legislating in those areas.

Matter of subsidiarity still unresolved.

²⁶ The current framework as envisaged for the new Constitution provides for asymmetry in the following respects:

- (a) Section 154 provides for institutional and procedural asymmetry in the sense that the provinces can establish and develop their own executive and legislative structures and procedures.
- (b) The draft on the transitional provisions (section 12) allows for an asymmetrical assignment of statutory powers and functions to the provinces in accordance with their administrative capacities. This principle is also contained in section 235 of the Interim Constitution.
- (c) Clause 2(1)(b)(ii) of this Draft provides for the delegation of additional legislative powers to the provinces, which does not exclude the allocation of more powers to some of the provinces.

²⁷ NP wants a provision stating clearly that disputes concerning overrides will be determined by the courts.

SCHEDULE 5

CONCURRENT FUNCTIONAL AREAS

PART A²⁸

Agriculture
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pool
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 official languages within a province subject to section 6
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism

²⁸ No real consideration has been given to this list up to this stage. Police has been removed as it appears to be dealt with explicitly outside this framework in Chapter 13 of the Working draft. NP wants to add

Forestry
Land affairs
Public works
Water affairs
Publication control.

ANC wants local government to be removed.

Words underlined added. NP will consider.

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Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services

PART B

Any matter where a provision of the Constitution specifically requires the enactment of provincial legislation.

