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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN LEVELS
OF GOVERNMENT**

CPG

**SUMMARY OF PROVINCIAL AND
NATIONAL GOVERNMENT**

**SUBMISSIONS IN REGARD TO
PROVINCIAL COMPETENCIES**

AS AT 10 AUGUST 1995

COMMISSION ON PROVINCIAL GOVERNMENT

SUMMARY OF PROVINCIAL AND NATIONAL GOVERNMENT SUBMISSIONS IN REGARD TO PROVINCIAL COMPETENCIES AS AT 10 AUGUST 1995

A ALLOCATION OF LEGISLATIVE COMPETENCE TO NATIONAL AND PROVINCIAL LEGISLATURES (PRESENT SECTION 126)

1. Western Cape Province

- 1.1 Because the interim Constitution is only one year old, too much reliance should not be placed on the current factual situation in the province. Further information on the issue should be obtained based on the experience of other countries in similar situations.
- 1.2 The Constitutional Principles must form the framework for the drafting of the new constitution in regard to provincial legislative powers.
- 1.3 In the interim Constitution exclusive powers have not been granted to provinces as required by CP XIX. This must be rectified in the new constitution.
- 1.4 In the interest of strong and viable provincial government, the provision of national legislative overrides should be restricted, inter alia by a narrower definition of such overrides and by the inclusion of CP XXII as a limitation to the overrides.
- 1.5 The view that residual powers rest with the national parliament is endorsed.
- 1.6 Alternative methods for the allocation of legislative powers should be explored, e.g. -
 - Dissecting specific functional areas in a practical way and giving exclusive jurisdiction to the provinces on identified aspects of a particular functional area and exclusive jurisdiction to the national level over the balance of that functional area.
 - Creating a list of functional areas regarding which the national government should only be allowed to lay down principles and guidelines in framework legislation and over which the provinces would then enjoy exclusive jurisdiction to enact detail legislation.

1.7 There will always be areas of concurrency for which clear provision should be made in accordance with CP XIX.

1.8 Asymmetry could be provided for by allowing individual provinces to make requests for the assignment of powers and functions. Provision should be made for an objective basis for determining whether a province has the administrative capacity to perform the powers and functions so requested.

2. North West Province

The present provisions of section 126 are adequate but further enquiry is necessary in order to determine whether these will be sufficient for the new Constitution.

3. Northern Cape

3.1 Agrees with the conclusion of the Commission on Provincial Government that in general the allocation of powers and functions contained in section 126 of the interim Constitution are at this stage appropriate to serve the interests of good government in South Africa.

3.2 Certain powers need to be allocated exclusively to the national level and others exclusively to provincial level.

3.3 All powers not explicitly listed must be regarded as potential exclusive provincial legislative powers or possible concurrent powers depending on negotiation between provincial and national authorities.

3.4 The Constitution should be so formulated as to prevent section 126 from being used to minimise provincial powers and functions.

3.5 Provinces must be able to decide which of the powers allowed to them in the Constitution they wish to exercise.

3.6 The Constitution should address only broad principles in line with the Constitutional Principles.

B SCHEDULE 6: FUNCTIONAL AREAS

1. Western Cape Province

The following further functional areas should be included in Schedule 6:

Agency and Delegated Functions

Finance

Forestry

Land Affairs

Justice

Prisons

Publications Control

Public Works

Tertiary Education

Water Affairs

(No reasons were furnished for the inclusion of the additional functional areas despite a request by the Commission on Provincial Government that such reasons be furnished by 30 June 1995).

2. North West Province

The present functional areas listed in Schedule 6 are satisfactory, but further comments may be furnished by the Provincial Executive Committee. Clarity is required in respect of police powers, technikons and trade and industrial promotion.

3. Northern Cape Province

3.1 The following further functional areas should be included in Schedule 6:

Finance

Mineral Rights

Water

Economic Affairs

Conservation

Provincial, Fiscal and Financial Control

Provincial Public Works

Reconstruction and Development Programme at Provincial Level

(No reasons were furnished for the inclusion of the additional functional areas despite a request by the Commission on Provincial Government that such reasons be furnished by 30 June 1995).

4. Comments on Functional Areas by the responsible Departments of the National Government

4.1 *Agriculture*

4.2 *Abattoirs*

4.3 *Animal Control and Diseases*

4.4 *Soil Conservation*

- The absolute necessity for uniform policies throughout the country on the above functional areas, is made problematic by Schedule 6.
- It is improbable that provinces would be able to enact adequate laws to replace the relevant portions of those laws which are intended to be assigned to them. This problem should be addressed in the new Constitution.
- There is also a need to ensure uniform application of these laws throughout the Republic.
- The important function of statutory control of diseases, which cross provincial and even national boundaries, was apparently not seriously considered in the formulation of the interim Constitution, to the detriment of the control of some of the most highly infectious or erosive diseases known, which could cripple the economies of the entire continent.
- Soil conservation is another example of a very important function which has national implications that are often more important than the consequences for any one province in isolation.
- The functional areas of "animal control and diseases", "abattoirs" and "soil conservation" therefore should not have been allocated to provincial governments and should have been retained as an exclusive national function.

4.5 *Correctional Services*

- The distribution of infrastructure, staff, training facilities and specialised care services is of such a nature that to duplicate these according to provincial boundaries would not be a cost effective exercise.

4.6 *Education*

- The Department of Education has not yet turned its attention to how the new Constitution should provide either directly or indirectly for education.

4.7 *Environment*

4.8 *Nature Conservation*

- Neither nature conservation nor "environment" are one dimensional functions, e.g. they include elements such as spatial planning, maintenance of biodiversity, pollution control, rural and urban development, etc.
- Any particular environmental matter cannot (and must not) be dealt with at only one level of government. The geographic sphere of impact of specific environmental matters must be taken into consideration.
- The functional areas include matters with global impact (e.g. depletion of the ozone layer), continental importance (e.g. conservation of endangered species), national importance (e.g. air and water pollution), regional importance (e.g. coastal management) and local importance (e.g. waste management).
- It is therefore inappropriate to allocate exclusive legislative competence regarding a specific matter to any single level of government.
- Central government must be responsible for:
 - developing general and specific national environmental policy and strategy
 - all international matters, including the implementation of international treaties
 - establishing co-operation and co-ordination between central and provincial government departments
 - developing national standards and norms
 - promulgation of framework legislation to achieve the above
 - managing marine resources, national parks, designated sites of international importance and national herbaria and botanical gardens

- Any absolute demarcation of functions is impossible and the appropriation of legislative powers must be established by negotiations. The current version of section 126 of the interim Constitution should remain unaltered.

4.9 *Health*

- The provincial power to legislate in respect of health services, should not include the regulation and registration of health professionals nor the regulation and control of matters concerned with public health. Provincial powers should be restricted to the provision of health services in the narrow sense of providing services and facilities such as hospitals, clinics, laboratories, family planning, ambulances and the like.

4.10 *Housing*

- Housing is a matter of national interest. The national government must therefore play a leading role with regard to housing through the determination of national housing policies and strategies for implementation on a uniform basis at second and third tiers of government.

4.11 *Justice*

- Justice should be retained as a national government function. No reasons were given in support of this assertion.

4.12 *Land Affairs*

- A national uniform land registration system is of the utmost importance

The following functional areas could be allocated to provinces and local governments for the exercise of exclusive legislative powers:

- at provincial level, the preparation of proclamations of towns and their extensions and the re-allotment and issuing of deeds of grant.
- at local government level, the administration of consolidations and subdivisions of town properties.

- The Department of Land Affairs sees no areas where there could be concurrent powers at national, provincial and local government levels, and proposes the following allocation of functions:

Functional areas that could be allocated to provinces for the exercise of exclusive legislative powers:

- (i) Surveys for agricultural purposes like irrigation and forum planning
- (ii) Special purpose mapping of specific areas for regional planning
- (iii) Surveys for the construction of roads, bridges and dams; for the registration of property and other real rights as required by the provincial government
- (iv) Implementation of land information systems on provincial level

Functional areas that could be allocated to local government:

- (i) Surveys for the relocation or pointing out of property beacons for housing, the registration of property and other real rights as required by the local authority for mass housing
- (ii) Special purpose mapping of specific areas for urban planning
- (iii) Implementation of land information systems on local authority level

Functional areas that should be allocated to the National Government for the exercise of exclusive legislative powers:

- (i) Establishment and maintenance of the national control survey network
- (ii) Maintenance of the maps of the national series
- (iii) Co-ordination of land information services
- (iv) Exercising control over all surveys done in terms of the land Survey Act No 9 of 1927 and the Sectional Titles Act No 95 of 1986 (Surveyors General)

National functions that could be delegated to provincial and local governments for execution on behalf of the national Department:

- (i) The erection, survey and maintenance of town survey marks as part of the national control survey network to local governments with the national department co-ordinating and controlling the function to ensure uniformity.
- (ii) All other survey functions that have already been delegated, with the national government only controlling and co-ordinating.

- (iii) In respect of urban land: With the exception of the power to draft national legislation and to formulate national policy and guidelines, the delegation of all other powers and functions to the provincial authorities, as well as the power to issue subordinate legislation (subject to the obligation to delegate further such powers and functions to the new local authorities - depending in both instances on the availability of sufficient capacity).
- (iv) In respect of non-urban (rural) land: With the exception of the power to draft national legislation, national policy and the disposal functions, the delegation of all powers and function (as well as the power to issue subordinate legislation) to the provincial authorities (subject to the obligation to delegate further such powers and functions to the new rural local authorities - depending in both instances on the availability of sufficient capacity).

Provision of mechanisms for obtaining provincial and local government inputs in the formulation of national norms and standards:

Representation by provincial and local governments on

- (i) The Co-ordinating Committee for the development of the National Land information System
- (ii) The Survey Regulations Board
- (iii) The Sectional Titles Regulations Board

Physical Planning

The DLA proposes that regional planning and development should fall within the legislative competencies of the provinces

Disposal of State owned land

The DLA proposes that land which is applied or intended to be applied for or in connection with a matter which is not a national matter and which falls within the functional areas specified in Schedule 6 should vest in the Provincial Government.

Settlement Support

Settlement support could be classified as an area where there could be concurrent powers at national and provincial level.

4.13 *Minerals and Energy*

- Legislation administered by the Department of Mineral and Energy Affairs is essentially of a national nature and does not really concern or regulate matters of a provincial or local nature.
- The allocation of concurrent legislative powers to provinces could lead to unnecessary duplication.
- Delegation of some functions to provinces or local governments could be considered, such as the siting of service stations.

4.14 *Sport and Recreation*

- The following functions in regard to sport and recreation should be carried out at provincial and local levels of government:
 - (a) provincial level
 - rationalisation of sport structures within the province
 - provision of funds for the promotion of sport and recreation
 - organising projects such as regional games
 - upgrading basic sports facilities
 - the implementation of fitness programmes
 - legislation pertaining to sport and recreation if necessary
 - (b) local level
 - provision and maintenance of basic sports facilities
 - provision of incentive measures and assistance in regard to sport and sport management

(Note - the above appear to be predominantly administrative and not legislative functions)

4.15 Finance

- Consideration needs to be given to the degree of detail to be incorporated in the new Constitution, or otherwise provided for by way of separate legislative provisions relating to Exchequer administration (catered for in the Exchequer Act) and to provisioning (reflected in a Tender Board Act).

(Provincial legislative powers in regard to financial matters were not dealt with specifically).

4.16 Trade and Industry

- Executive authority in respect of the following matters could be delegated to the provinces (no comment was offered regarding the possible allocation of exclusive or concurrent legislative powers in respect of the functional areas):
 - Regional promotion and marketing activities in respect of export trade promotion, foreign trade relations and financial assistance schemes
 - Licensing of businesses through the establishment of licensing authorities
 - Inspection services and certain aspects of administration of the Usury Act, credit control and trade inspections
 - Consumer protection inspection services and consumer education
 - Consideration of liquor licence applications
 - Execution of activities in respect of small and medium business development
 - Promotion, marketing, research and development in respect of industry and industrial technology
 - Investment advice, promotion and marketing
 - Execution of regional industrial development programmes

4.17 Tourism

- Each province should be responsible for its own domestic tourism programme. However, it is vital that there should not be a fragmentation of legislative and executive powers which could result in the projection of a fragmented and/or limited product to international tourism markets and lead to inter-provincial competition in regard to this aspect of the industry.

4.18 *Water Affairs*

- The functional field of water resource conservation, utilisation, management and development is indivisible and no aspect of this functional field should be allocated to the exclusive legislative or executive jurisdiction of either the provincial or the local levels of government.
- A number of functional areas listed in Schedule 6 have the potential to impact on the availability or the quality of water resources and consequently the national government must retain concurrent legislative powers in respect of such functional areas.
- Various powers, duties and functions in regard to water may be delegated to provincial governments in terms of national legislation.

4.19 *Forestry*

- National forestry policy, co-ordinating both the supply of and demand for forest products in the market, is essential for economic stability of this sector, also because of the impact of forestry on water resources. Legislative power in respect of the forestry function should therefore vest exclusively in the national government.
- The major part of the execution of national legislation and policy in respect of forestry could be delegated to provincial or local government and even to the private sector.

4.20 *Welfare and Population Development*

- The functional area of population development should be regulated and co-ordinated by uniform norms and standards that apply generally throughout the Republic. Provincial governments should therefore have to plan population development functions and activities within the parameters of national policy and strategy.
- The responsibility for development of national norms and standards, monitoring criteria for funding and national legislation in respect of welfare services needs to remain the responsibility of the national government, to be developed in full consultation with the provinces. It is essential to establish and maintain a national welfare system within which provincial and local governments can exercise their powers and functions in respect of this functional area.

5. Commission on Provincial Government: Recommendations

5.1 Allocation of legislative competence

No further information has come to the Commission's attention to affect the view expressed, in paragraph 5 of its Preliminary Recommendation dated 23 March 1995 (Document 2) which reads as follows:-

"The provisional conclusion of the Commission is that in general the allocation of powers and functions contained in section 126 of the interim Constitution are at this stage appropriate to serve the interests of good government in South Africa".

The Commission is of the opinion that the national interest will for the foreseeable future require that limited concurrent legislative power in respect of the functional areas listed in Schedule 6 (as provided for in section 126) be retained by Parliament to ensure that national objectives can be achieved and that uniform broad policies, norms and standards can be established to guide provincial governments in the development of their own policies and programmes, without encroaching upon their areas of competence.

5.2 At this stage in the development of the new provincial system of government, the Commission could not support the expansion of exclusive powers for the provinces. In view of the fact that the ability of most provinces to exercise their present powers adequately has not yet been tested in practice, the Commission considers that it would be ill-advised to enhance those powers at this stage. On the other hand, it is of the opinion that CP XVIII would not support any significant reduction of the provinces' legislative powers and functions. In the main, the status quo should therefore be maintained. Constitutional changes to enhance or diminish their legislative powers at any stage in the future should rather be dealt with by means of constitutional amendments.

5.3 *Functional areas - Schedule 6*

5.3.1 Provincial governments have thus far failed to advance any reasons for the inclusion of further functional areas in Schedule 6. Some of the areas requested are indeed provided for in the present section 126(2) dealing with laws which are necessary or incidental to the effective exercise of legislative competences, and which therefore could be interpreted to include such functional areas as provincial financial matters and public works. Provisions in other parts of the interim Constitution confer powers upon provincial legislatures to pass laws in respect of matters such as provincial finance and fiscal affairs (sections 155-159), provincial public protectors (section 114), agency and delegated functions (section 144(2)), etc.

5.3.2 In the light of the views expressed by national departments responsible for the following functional areas requested by some provincial governments, the Commission would comment as follows:-

Forestry - The Department's views as to why forestry should remain an exclusive national function are not convincing. While it is accepted that long term planning for the industry and its effect upon water resources might require national policy and norms and standards, the Commission can find no reason in the argument why provinces should not be responsible for the management of their own forests and the regulation of commercial forestry in the province in general. The Commission recommends that the inclusion of forestry in Schedule 6 be considered.

Land Affairs - Given the sensitivities relating to land matters, it would perhaps be unwise to consider such matters for inclusion in Schedule 6. However, it appears that provinces need at least delegated powers in respect of certain competencies which are presently not within their powers in order to deal with matters which are included in Schedule 6, such as urban and rural development, housing, and others. As suggested by the national department, this could be dealt with by means of delegation to provinces.

Justice - The Commission is of the opinion that it would not be in the national interest to confer powers in regard to judicial functions upon the provinces at this stage. No reasons have been advanced why provinces would consider it appropriate to acquire legislative powers in respect of this function and the Commission consequently cannot support the request.

Prisons (Correctional Services) - Because the prisons function is so closely related to the judicial function, the Commission is of the opinion that this should continue to be an exclusive national functional area.

Publications control - The Commission is of the opinion that it would be inappropriate to empower provinces to legislate in regard to the control of publications. Because publications are constantly transported across provincial boundaries, it would be almost impossible to enforce different publication control measures. Publications control may furthermore infringe upon the constitutional right of freedom of speech and therefore needs to be dealt with in a uniform manner at national government level. The Commission does not support the inclusion of publications control in Schedule 6.

Tertiary education - In the absence of cogent reasons being advanced in support of this being a provincial competence, the Commission is of the opinion that tertiary education should continue to be a national functional area because of the need for national human resource development, the maintenance of norms and standards, the rationalisation of scarce resources and the better maintenance of academic freedom in relation to a single level of government. Tertiary institutions generally draw their clients from areas wider than the provinces in which they are located and therefore cannot be regarded as exclusively provincial institutions. The Commission recommends that tertiary education remain an exclusive national functional area.

Water Affairs - While provincial governments need to exercise certain competencies in regard to the provision of water to communities and industries within their provinces, the Commission agrees with the view of the Department of Water Affairs that the conservation of water resources and the management and utilisation of this scarce resource needs to be regulated at national government level in the national interest. The solution would be for national legislation on water affairs to delegate certain functions to the provincial governments to enable them to carry out their responsibilities effectively, or else to provide for limited provincial legislative powers in national framework legislation.

Mineral Rights - The reasons advanced by the Department of Mineral and Energy Affairs why mineral rights should remain a national functional area are unconvincing, being based on the establishment of national norms and standards (which would in any case remain a national function in terms of section 126(3)), and the utilisation of scarce and specialised manpower (which applies equally to many other functional areas). It could, nevertheless, be argued that minerals are important national assets which need to be regulated nationally in order to benefit the Republic as a whole. The exploitation and development of such rights inevitably benefits the province whose territory the minerals are located by way of the resulting economic development. However, the income generated directly by the rights should benefit the country as a whole. The Commission therefore recommends that the regulation of mineral rights remain an exclusive national competence.

Economic Affairs - It is not clear what the term "economic affairs" is intended to cover. Schedule 6 already contains a number of functions with economic dimensions such as airports, casinos, consumer protection, markets and pounds, tourism, trade and industrial promotion, etc. In the absence of clarity as to which further economic functions are desired by the particular province which requested "economic affairs" as a functional area, the Commission cannot support the inclusion of such an imprecise area in Schedule 6.

Conservation - The request for this to be included in Schedule 6, does not indicate what the object of such conservation should be. Nature conservation and cultural affairs (conservation of cultural products) are already included in Schedule 6. The Commission consequently cannot recommend the inclusion of this term in Schedule 6.

Abattoirs

Animal control and diseases

The Department of Agriculture has advanced compelling reasons why these two functional areas should not be included in Schedule 6. The Commission consequently recommends that consideration be given to the exclusion of the two functional areas from the equivalent of Schedule 6 in the new Constitution. Provinces would still be empowered to deal with agriculture in general as a provincial function, but excluding these specific areas.

Soil conservation - The Department of Agriculture also requested the classification of soil conservation as an exclusive national function, but without furnishing proper reasons why this should be the case. There appears to be no reason why the Department could not deal adequately with aspects of soil conservation which require national regulation in terms of concurrent powers provided for in section 126(3). The Commission consequently cannot support this request at this stage.

6. **Conclusion**

This report by the Commission was prepared at short notice to assist the Constitutional Committee in its deliberations on provincial competencies. There was insufficient time to obtain further comments from the relevant departments or the provincial governments. These recommendations should therefore be regarded as provisional in nature.

Cape Town
10 August 1995