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**CONSTITUTIONAL
ASSEMBLY**

**THE SENATE
AND
NATIONAL & PROVINCIAL
LEGISLATIVE & EXECUTIVE
COMPETENCIES**

**POLITICAL PARTY
SUBMISSIONS
24 OCTOBER 1995**

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**CONSTITUTIONAL
ASSEMBLY**

**AFRICAN NATIONAL
CONGRESS**

**POLITICAL PARTY
SUBMISSION**

AFRICAN NATIONAL CONGRESS
THE COUNCIL OF PROVINCES
AND LEGISLATIVE COMPETENCIES

MAIN ELEMENTS FOR NEGOTIATIONS

Draft 3. 19 10 1995

The main elements on which agreement should be reached are the following:

- The **restructuring of the Senate**, directing it more effectively to the task of being the bearer of provincial interests and cooperative governance at national level.
- The **legislative authority** of the Republic and of the provinces under the perspective of the provincial system.
- The **function, composition, chairing, procedure and administration** of the Senate/Council of Provinces.
- The aspects of the **legislative process** of Parliament affected by the redirection of the Senate/Council of Provinces.
- The way in which **conflict of laws** of national and provincial level should be treated (because the Council of Provinces and the legislative process - see above - impact on this).

LEGISLATIVE AUTHORITY

- *In this respect the inclusion of the relevant paragraphs from Draft 3 of the Technical Experts are recommended. The inclusion of the concept of framework legislation is not proposed. It is covered sufficiently by Paragraph 10 below.*

Legislative authority of the Republic

1. The legislative authority of the Republic vests in Parliament [*consisting of the National Assembly: see paragraph 7 below*], which shall be competent to make laws in terms of this Constitution on any matter including matters falling within the functional areas specified in Schedule 1.¹

[x - y: Duration, elections, composition etc ...]

¹ That is the present Schedule 6 of the Interim Constitution, except for Police and local government which must receive special treatment.

Legislative authority of provinces

2. (1) The legislative authority of a province vests in its provincial legislature which shall be competent to make laws in and for its province in terms of this Constitution.
- (2) A provincial legislature shall have the competence to legislate on any matter which falls within a functional area specified in Schedule 1.

Necessary ancillary powers

3. The legislative competencies referred to in paragraphs 1 and 2 shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competencies.

COUNCIL OF PROVINCES

- *In general the intention is that the provinces and the local level of government of the Republic should be able to **participate and cooperate** in the*
 - (1) *legislative,*
 - (2) *budgetary and*
 - (3) *intergovernmental processes on national level (but not to interplay on the line functions of the Executive regarding intergovernmental relations)**of the Republic through the Council of Provinces.*
- *This could be effected by describing the functions of the Council of Provinces in a suitable way:*

Functions

4. (1) The basic purpose regarding the function of the Council of Provinces, is that the provinces and the local level of government of the Republic shall *participate* in the legislative process of the Republic through the Council of Provinces.
- (2) Because the Council of Provinces should function as an overseeing organ of intergovernmental relations, consideration should be given to empower it to formally ratify or approve the establishment of all intergovernmental institutions. This give a legal basis for such institutions while at the same time they can develop as need arises.

At the same time, to give effect to the idea of cooperative governance (of which the Council of Provinces is the foremost organ) provision should be made that the Council of Provinces can oversee and coordinate intergovernmental relations with the *aim* that the different levels of government in the Republic should cooperate mutually by-

- (a) assisting and supporting each other,
 - (b) sharing information and consulting with each other,
 - (c) having regard for the needs and interests of each other,
 - (d) cooperating in the development and execution of their policies, and
 - (e) adhering to agreed procedures and maintaining friendly relations.
- (3) The third main function of the Council of Provinces should derive from giving it participation in and the ability to influence financial and budgetary processes. It should be enabled to be informed and entitled to discuss and comment on-
- (a) the national budget process,
 - (b) the national departmental budget process, and
 - (c) negotiations on all allocations through the recommendations of the Financial and Fiscal Commission.

Composition

- *When the Senate/Council of Provinces is redirected to the definite purpose of looking after provincial interests as the top institution of intergovernmental relations, its composition should naturally reflect this purpose. This could be effected in the first instance by adapting the appointment system.*
5. (1) The Council of Provinces shall consist of *provincial and local government senators/delegates*.

The *provincial* delegates should be *appointed and recalled* on a party political proportional basis adapted suitably from the present provision in the Interim Constitution.² They should hold membership of the legislatures of the respective provinces.³

² Sect 48(2).

³ The opposite of the present sect 48(3).

There should be *seven* delegates representing the *local level* of government. Provision could be made that they represent different kinds of local government in a fair manner. The local government delegates should be *appointed and recalled* by a representative *national association* of local governments which the State President has recognised for this purpose.

- (2) A distinction should be made in each delegation between a component of *full-time* senators/delegates and a component of *floating positions* of senators/delegates. It is proposed that a small as possible but adequate number of full-time senators be provided for. Two full-time delegates per delegation seem to be sufficient [Total: 20].

Alternates may be appointed.

- (3) Every provinces should have at least four but not more than eight delegates and votes. Provinces with less than one million inhabitants shall have four,⁴ provinces with more than two million inhabitants shall have five⁵ provinces with more than three million inhabitants shall have six,⁶ provinces with more than five million inhabitants shall have seven⁷ and provinces with more than seven million inhabitants shall have eight delegates.⁸

Chairman, procedure and administration

6. (1) Because the legislative and other functions of the Council of Provinces stand under the *aegis* of intergovernmental relations, a normal parliamentary style of administration would not be able to carry out the functions expected from it. An efficient, effective and strong management model and style should be made possible.

This influences especially the question of the chairmanship and the Secretariat of the Council of Provinces. The options are either that the Council of Provinces shall elect from the full-time delegates of any province a chairman or president for a period of at least three years (the Council of Provinces is a permanent body), *or* the chair is elected for one year at a time, in rotation and starting from the province with the least up to the province with the most inhabitants, a chairman for one year at

⁴ Northern Cape: 0,742M.

⁵ Free State: 2.782M.

⁶ Mphumalanga: 3,007M, North-West: 3,351M, Western Cape: 3,721M.

⁷ Northern Province: 5,397M, Eastern Cape: 6,481M.

⁸ Gauteng: 7,048M, KwaZulu/Natal: 8,713M. Total: 57 provincial delegates + 7 local government delegates = 64.

a time. The second option will result in a weaker management role. The chairperson is of course subject to being recalled by his province.

The Chairperson of the Council of Provinces should be enabled to have adequate interaction with the national Executive and the National Assembly.

- (2) The chairman should convene the Council of Provinces. He should be obliged to do so when the delegates of at least two provinces so demand.
- (3) The Council of Provinces shall take its decisions with a majority of votes of delegates present and voting. (But see below under legislative process of Parliament.) It shall draw up rules of procedure and its sittings shall be public.
- (4) Other members or representatives of provinces and the association of local governments referred to in paragraph 5(1) must be able to serve on the committees of the Council of Provinces.
- (5) Every province should establish and regulate an office for the administration of its participation in the Council of Provinces.

LEGISLATIVE PROCESS OF PARLIAMENT

Bills

- *Because the heart of redirecting the Senate as a Council of Provinces is that it should be the overarching functionary or actor in intergovernmental affairs, both as regards national legislation and its other functions, it should not be conceived of as a part of Parliament. Otherwise it may tend to diminish its provincial perspective as happens in the present situation. The Council of Provinces should therefore play a substantial part in the national legislative process, but not be structurally part of the Parliament. This would lead to it becoming a mere upper house of review again. What the Council of Provinces should be able to do, is to initiate and present bills to Parliament, and be able to impact substantially on the legislative process.*
7. It is suggested accordingly that provision be made that Bills shall be presented in Parliament [*National Assembly*] by the national Executive, committees of Parliament or the Council of Provinces.
- Regarding the powers and functions of the Council of Provinces with respect to legislation, it is proposed that a distinction be made between the power of the Council of Provinces to
 - (1) **comment** on all types of bills, and

(2) (a) **object** or (b) **deny consent** to bills affecting provincial powers.

- In the first case (**comment**) the provinces as a group *or individually* gain a public national platform to influence the legislative process. The intention is that the National Assembly is publicly informed before the second reading of the Bill about the objections the provinces may have against the bill and be able to take corrective action.
- In the second case (**objects or does not consent**) a substantial impediment or obstruction power is created for the provinces on bills adopted by the National Assembly after the second reading where it affects Schedule 6 (Interim Constitution) powers.
- When the Council of Provinces **objects** to a bill affecting provincial matters, a **delay mechanism** will come into operation.
- When the Council of Provinces **denies consent** to a bill affecting provincial matters, either:
 - (1) a **mediation** process, or
 - (2) a **raised majority** in the National Assembly should be required.

Comment on bills

8. (1) Bills on any matter which **fall within** the functional areas specified in **Schedule 1** should be referred after it has been introduced in Parliament to the Council of Provinces for consideration and comment upon it within four weeks after referral. Delegates of a province or individual delegates may additionally comment on, motion amendments or indicate their opposition to such a bill.
- (2) Bills on any matter **other than** the functional areas specified in **Schedule 1** shall be submitted on introduction in Parliament to the Council of Provinces and may be considered and commented upon by the Council of Provinces before the second reading thereof in Parliament.

Adoption of bills

9. (1) Bills shall be adopted by Parliament [*National Assembly*].⁹
- (2) Bills on any matter which fall within the functional areas specified in Schedule 1 except money bills shall be either **objected** or **consented** to by the Council of Provinces within four weeks after adoption thereof by Parliament.

⁹ There will be no joint sittings of the National Assembly and Council of Provinces, as the Council of Provinces will not be an upper house.

- (3) If the Council of Provinces **objects** to a bill on any matter which fall within the functional areas specified in Schedule 1, the Council of Provinces must motion amendments on the bill and Parliament must reconsider the bill, and adopt or reject the amendments.
- (4) If the Council of Provinces **denies its consent** to a bill on any matter which fall within the functional areas specified in Schedule 1, the bill shall:
 - (a) be referred for adoption, amendment or rejection to a Mediation Committee consisting of equal members of Parliament and the Council of Provinces. If the committee adopts, amends or rejects the bill, it will be deemed to have been the decision of Parliament. The members of the Council of Provinces of this committee shall not be bound by instructions and voting shall take place in secret, or
 - (b) not become law unless Parliament adopts the bill with a majority of two-thirds of its members present and voting.

CONFLICT OF LAWS

10. In the event of an inconsistency between an Act of Parliament and a law of a provincial legislature with regard to any matter which fall within the functional areas specified in Schedule 1, the Act of Parliament shall prevail over the provincial law only to the extent of any inconsistency between them if-
 - (1) the national law deals with a function in respect of which uniformity across the nation is desirable,
 - (2) the national law deals with a matter in which it is necessary for South Africa to speak with one voice or to act as a single entity, in particular in relation to other states,
 - (3) the national legislation is necessary for the maintenance of essential national 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,
 - (4) the national legislation deals with national economic policies or the promotion of equal living conditions, the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour,

- (5) the national legislation provides for equality and opportunity or access to a government service, or
 - (6) the national law establishes a national framework for the provision of public services or the management of institutions relating thereto.
11. Where a provincial law deals specifically with matters other than those referred to in Paragraph 10(1) - (6) [*such as the socioeconomic and cultural needs of a particular province*], such matters shall prevail over national legislation. Provinces may adopt bills in regard to the matters referred to in Paragraph 10(1) - (6), provided such legislation is not inconsistent with a national law.
 12. In the event of a dispute concerning the legislative competencies on any matter which fall within the functional areas specified in Schedule 1-
 - (1) Such legislation shall be deemed to be necessary or desirable in terms of the requirements set out in Paragraph 10(1) - (6) if such legislation has been consented to by the Council of Provinces, or by mediation or in terms of Paragraph 9(4)(b);
 - (2) Save for (1), the Constitutional Court, or other courts where applicable, shall have jurisdiction on the constitutionality of legislation in such disputes to decide whether the Act of Parliament fit the categories set out in Paragraph 10(1) - (6).
 - (3) If such a dispute cannot be resolved by a court on a construction of the Constitution, precedence shall be given to national legislation.
 13. An Act of Parliament shall not empower an organ of state to encroach upon the geographical, functional or institutional integrity of a province.
 - [14. Residual powers shall be within the exclusive competence of the national Executive and Parliament in accordance with the Constitution.] [*Unnecessary in view of Par 1.*]
 - *Regarding executive authority of the Republic and provinces, the formulations of Draft 3 of the Technical experts are repeated here.*

EXECUTIVE AUTHORITY OF THE REPUBLIC

15. (1) The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament vests in the national government consisting of the President and other members of the Cabinet, which shall exercise and perform its powers and functions subject to and in accordance with this Constitution.

- (2) The national government may, with the concurrence of the provincial government or of a local government, appoint such provincial government or local government as its agent to perform a specified function within its competence in terms of subsection (1).
- (3) The national government may, with the concurrence of a provincial government or of a local government, delegate to such provincial government or local government the performance of a specified function within its competence in terms of subsection (1).

EXECUTIVE AUTHORITY OF PROVINCES

16. (1) A province shall have executive authority over-
 - (a) all matters in respect of which the provincial legislature has passed laws, and
 - (b) matters entrusted to the provincial government in accordance with this Constitution.
- (2) The executive authority of the province vests in the provincial government consisting of the Premier and the other members of the Executive Council.
- (3) The provincial government may, with the concurrence of the national government or of a local government within the province, appoint the national government or such local government as its agent to perform any specified function within its competence in terms of this paragraph.
- (4) The provincial government may, with the concurrence of the national government or of a local government within the province, delegate to the national government or to such local government the performance of a specified function within its competence in terms of this paragraph.

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**CONSTITUTIONAL
ASSEMBLY**

**DEMOCRATIC
PARTY**

**POLITICAL PARTY
SUBMISSION**

23 October 1995

**NATIONAL AND PROVINCIAL LEGISLATIVE
AND EXECUTIVE COMPETENCIES**

Note : This submission is drawn up in the context of the CA document, "Third Draft - 6 September 1995", and where necessary is amplified by earlier submissions made by the Democratic Party.

Legislative authority of the Republic

1. (1) The legislative authority of the Republic vests in Parliament, which shall be competent to make laws in terms of this Constitution.
- (2) Parliament will be competent to make laws on matters which fall within the functional area of Schedule 1 to the extent that such laws apply uniformly in all parts of the country, and are necessary for:
 - the establishment of essential national or minimum standards required for a service to be rendered; or
 - the prevention of unreasonable action taken by a province which is materially and unjustifiably prejudicial to economic unity, or the health, environmental or security interests of another province or the country as a whole.

Legislative authority of Provinces

2. (1) The legislative authority of a province vests in its provincial legislature which shall be competent to make laws in and for its province in terms of this Constitution.
- (2) A provincial legislature shall be competent to legislate on any matter which falls within a functional area specified in Schedule 1.

Framework legislation

Unnecessary in view of proposed construction of the Constitution.

Necessary ancillary powers

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

Conflict of laws

4. In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the Act of Parliament shall prevail over the provincial law only to the extent such Act was made in terms of section 1(2).

Legislative procedures

5. (1) A Bill designed to become an Act of Parliament intended in section 1(2) shall be introduced in the Senate and shall require the approval of both the Senate and the National Assembly.
(2) The Constitutional Court shall, upon application by at least one fifth of the members of the Senate, and prior to the promulgation of a Bill intended in section 1(2), expeditiously determine whether the Bill conforms with the requirements of section 1(2).

Integrity of provinces

6. (1) An Act of Parliament shall not empower an organ of state to encroach upon the geographical, functional or institutional integrity of a province.
(2) The National Government shall not exercise its powers so as to encroach on the geographical, functional or institutional integrity of a province.

Executive Authority of the Republic

7. The Executive Authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President and the Cabinet who shall perform his or her powers and functions subject to and in accordance with this Constitution.

Executive Authority of Provinces

8. (1) The Executive Authority of a Province shall vest in the Premier of the Province who shall execute and perform his or her powers and functions subject to and in accordance with this Constitution.
(2) A province shall have executive authority over all functional areas in respect of which it has legislative competence, matters assigned to it

under section (x) or any law, and matters delegated to it by or under any law.

Transitional period

9. (1) A provincial government may assume its executive and legislative powers in each of the functional areas assigned to it in Schedule 1 when it has the capacity to exercise the powers effectively.
- (2) In the event of the national government disputing the capacity of a province to exercise one or more powers effectively, the Commission on Provincial and Local Government will adjudicate on the dispute.
- (3) Ten years after the adoption of this Constitution, all the powers in the functional areas listed in Schedule 1 will automatically be assumed by all the provinces except in the case of a province which has made an alternative arrangement with the national government.

**CONSTITUTIONAL
ASSEMBLY**

**NATIONAL
PARTY**

**POLITICAL PARTY
SUBMISSION**

25/10/95

NATIONAL PARTY

**SUBMISSION ON THE SENATE
AND COMPETENCIES OF PROVINCES**

1. Purpose of Senate

It is the opinion of the National Party that the new constitutional text should provide for a **second chamber of Parliament**, called the Senate.

* **The main purpose of a second chamber is to represent particular interests in society not adequately represented in the popularly elected house.** A second chamber to represent the constitutionally entrenched, but still fledgling, South African provinces in decision-making at national level is strongly called for, both for symbolic reasons and for the real influence it can exercise in the governing process. This is particularly important in view of the powers of the national Parliament to legislate on matters affecting the provinces, for example in the case of provincial finances and in those cases where national legislation overrides provincial legislation.

* A second chamber can, by providing a **second opportunity to consider legislation**, enhance the quality of Parliamentary decision-making and serve as an effective control mechanism in a democratic society. In this regard, a second chamber is often referred to as a house of revision, that promotes thorough consideration of matters before Parliament, strengthens control over the executive and alleviates Parliament's workload in the process. A second chamber can serve a useful purpose in this regard in South Africa.

It should be considered to include in the constitution an **express reference** to the purpose for which a second chamber is established.

2. Composition

2.1 The Senate should be composed of an **equal number of members** for each province. By this arrangement, the equal status formally enjoyed by the provinces is recognized and the purpose of the Senate to represent the provinces at national level is confirmed. The present number of **ten Senators per province** should be retained. The size of the country and of the population warrant a second chamber of at least the present size. A reduction in the number of Senators would impede the ability of the Senate to function effectively and, in any case, make it even more difficult for smaller parties to obtain seats in the Senate.

2.2 If it is accepted that the main purpose of the Senate is to represent the provinces in national decision-making, Senators should be elected in a way that serves and promotes that purpose. In this regard, the present method of nomination by the political parties holding seats in the various provincial legislatures has been criticised for not providing enough linkage between a province and its Senators. Accordingly, it is proposed that Senators be elected **indirectly by the respective provincial legislatures on a proportional basis**. This will establish a formal constitutional link, largely absent at present, between Senators and their respective provinces. This also allows for a direct link between the provincial representatives and the province itself as well as the provincial legislature.

In addition, the present proportional formula according to which the parties nominate Senators should be reconsidered as it tends to favour the bigger to the disadvantage of the smaller parties. Normally, in

composing a Parliamentary committee, for example, the smaller parties are being favoured to some extent. The present formula should be adapted accordingly and applied in such a way that when the provincial legislatures elect their Senators, all but the very small parties represented in such a legislature will be able to nominate at least one Senator.

2.3 The **qualifications for Senators** should be the same as for members of the National Assembly, with the addition of the requirement that all Senators must be ordinarily resident in their respective provinces. This is a necessary concomitant to the main purpose of the Senate and the attempt to strengthen the ties between Senators and their provinces.

3. Powers

3.1 Powers should be assigned to the Senate in accordance with its purpose (i) to represent the provinces in national decision-making and (ii) to provide an opportunity for reconsideration during the legislative process in Parliament. On this basis, the following existing and additional powers should be assigned to the Senate:

- * As second chamber of the national Parliament, the Senate, like the National Assembly, shall **consider all bills** introduced in Parliament.
- * With regard to disagreements on **ordinary bills**, the present arrangement in terms of which a joint committee is established to submit proposals to a joint sitting where the bill must be adopted by a majority of all members of Parliament (section 59 of the transitional constitution), is unsatisfactory. The purpose of a joint committee always is to submit proposals that will be acceptable to both houses

sitting separately (*cf* the conference committees of the United States Congress and the Mediation Committee of the German Parliament). Our joint committee should fulfill the same function, namely to submit proposals to the Houses sitting *separately* and only if agreement is still not reached, should a joint sitting be held.

* Section 61 of the transitional constitution provides that bills affecting the **boundaries or powers and functions of the provinces**, must be adopted by both Houses sitting separately. Furthermore, such a bill, if it affects a particular province or provinces only, must also be approved by a majority of the Senators from that province or provinces. In the absence of agreement between the Houses, no law is made. For the effective representation of the provinces in matters affecting them, this arrangement should be retained.

* The present section 60 in terms of which the Senate can only delay and not veto **money bills**, emphasises the Senate's subordinate position with regard to this crucial category of bills. Actually, there is no convincing reason why the same arrangement as in the case of ordinary bills should not apply here. In other words, if the Senate and the National Assembly disagrees on a money bill, a joint committee (*e.g.* the joint standing finance committee) could be asked to submit proposals to the Houses sitting separately, and if agreement is still not reached, the bill is disposed of at a joint sitting. The NP proposes accordingly.

* **Other financial bills affecting the provinces** should be dealt with as provided in sections 155-157 of the transitional constitution. Such bills should be adopted by both Houses sitting separately and in the case of disagreement, the normal provisions for resolving disputes (section 59) shall not apply. This means that no law is made if the Houses cannot agree.

* The provision for **constitutional amendments** (section 62) should also be retained. In other words, amendments should be adopted by a two-thirds majority at a joint sitting, but (i) amendments affecting the legislative and executive powers of the provinces must be adopted by a two-thirds majority in both Houses sitting separately, and (ii) amendments affecting a particular province or provinces should only be adopted with the consent of the affected province or provinces.

* It could further emphasise the function of the Senate as the representative of the provinces, if it is required that **any bill directly affecting the provinces or a particular province shall be introduced in the Senate first**. For such bills, Senate committees could be required to hold public hearings where the provinces could state their views.

* The Senate's role as the legislative body that has the "advise and consent" function, *ie to assent to, or make recommendations for, certain top executive and judicial appointments, should be extended*. The Senate is already involved in nominations for justices, the Public Protector, and the Auditor-General .

and the establishment of a Pan South African Language Board. In addition, the Senate should also be involved in the appointment of constitutional bodies such as the *Human Rights Commission*, the *Commission on Gender Equality*, the *Commission on Provincial Government*, the *Financial and Fiscal Commission*, the *Public Service Commission* and the *Independent Electoral Commission*. The Senate should also have the function to assent to appointments to bodies such as the *Land Claims Court*.

* The Senate should be **represented in the Commission on Provincial Government and the Financial and Fiscal Commission.**

* The Senate's role as **watchdog** over the constitutionality of bills (section 98(9)) should be confirmed.

4. Competencies of provinces

The distribution of powers between levels of government entails some of the most crucial issues to be resolved in the constitution-making process. Not only the status, powers and functions of both the provinces and the national government are involved; the relationship between these levels of government and, eventually, the form of the future South African state itself, is at stake. For this reason, the National Party wishes to make a responsible, fair and constructive contribution to the deliberations on this aspect of the constitution in the best interests of the whole country and all its regions and people.

The Constitutional Principles call for extensive arrangements covering in detail all aspects of the relationship between the different levels of government, but they also presuppose a strong, viable and entrenched provincial system as an integral part of a stable and democratic dispensation. (*Constitutional Principles XVIII, XIX, XX, XXI, XXII and XXIII*). It is accordingly necessary to protect and strengthen the autonomy and position of the provinces. Due to the complex and dynamic nature of modern government and of the relationships between different levels of government, the formal distribution of powers often do not fully and accurately reflect the true relationship between those levels and that we should allow for continuous growth and development in this respect. For the same reason, we should not focus too narrowly on a particular theoretical model, but should work towards the development of a system unique to our own circumstances and needs.

The NP accordingly submits the following proposals:

- * We believe in strong and viable provincial government for South Africa based on federal principles and our proposals are directed at protecting and strengthening the position and autonomy of the provinces.

- * In South African circumstances, the powers of the provinces should be listed as at present in a Schedule to the constitution and residual powers should vest in the national government. In addition, the following should be provided for:
 - In terms of the criteria for the allocation of functions to the provinces set out in *Constitutional Principle XXI*, we propose that **Agency and Delegated Functions, Forestry, Land Affairs, Publication Control, Public Works and Water Affairs** be added to the present list. However, we believe that a proper allocation can be accomplished only if all relevant information is available. We propose, therefore, that accurate information should be obtained from the state administration on the progress made with the implementation of the present list of provincial functions before a list of provincial functions is finalised.

 - Due to the complexities of modern government, a strict separation between the levels of government is impossible and undesirable. Therefore, we propose that Parliament should have **concurrent powers** with the provinces over its list of functions.

 - Provincial laws in respect of these matters should, however, prevail over national laws except insofar as national laws comply with certain prescribed criteria. These **overrides** should be re-

stricted *inter alia* by narrower definition, the principle of subsidiarity and the Constitutional Principle that the national level may not encroach on the geographical, functional and institutional integrity of the provinces. A provision in this regard could read as follows:

"(1) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter allocated to the provinces, except insofar 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 for the management or administration of that matter that apply generally throughout the Republic;
- (c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services;
- (d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, 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
- (e) the provincial law materially prejudices the economic, health or security interests of another province or the Republic.

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic.

(3) 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.

(4) An Act of Parliament shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.

(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of any province.

(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively.*

* The principle of **subsidiarity** in terms of which functions should be allocated to the lowest level of government where it can be exercised and performed effectively, should apply to the allocation of functions and the application of the overrides - see subclause (6) of the above draft clause.

* A *second list of matters* should be identified over which Parliament may only adopt **framework legislation**, containing mere general principles and/or guidelines, norms and standards, in order to allow the provinces to make detail legislation on those matters not subject to any other overriding powers of the national level. The national government should not be able to prescribe detail on these matters on the grounds, for instance, of effectiveness, maintenance of economic unity, promotion of interprovincial commerce, etc. This will allow the provinces the opportunity to provide detail peculiar to their different circumstances and needs, thus giving expression to provincial diversity, without sacrificing national control over norms, standards, etc. We believe there are a number of matters even now in the list of provincial functions, as well as other matters presently under exclusive national jurisdiction, which the national government need not deal with in detail. Those matters may, therefore, extend to both the residual and concurrent powers. Moreover, some matters in the existing list of provincial functions do not readily present themselves as matters over which national legislation will ever be required for the sake of, for example, the maintenance of economic unity, the protection of the common market, the security of the country, or the implementation of national economic policies. They may, however, require uniform norms and standards. Such matters should then rather form part of a

separate list **not subject to the whole range of "overrides"**. We further propose that in order not to impede or even prevent the freedom of the provinces to act, they should be able to proceed in respect of these matters in the absence of national framework legislation. Of course, as soon as such framework legislation is promulgated, their own arrangements will be subject to the principles or guidelines enunciated in such framework legislation. A further submission on matters to be included in such a list again depends on expert advice, *inter alia* from the state administration, on which matters qualify for such a list. The following draft provision on framework legislation is submitted for consideration:

"(1) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule Y.

(2) The national Parliament shall be competent to enact only framework legislation which sets out principles and/or guidelines, and which shall be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule Y."

- * Regional differences are part of the South African reality and the principle of **asymmetry** in terms of which differences may exist among the provinces in respect of their structures, powers and functions, should be allowed to develop. Asymmetry can be promoted as follows:
- Provinces must be able to adopt their own constitutions.
 - Provinces must be able to take up functions according to their different needs and capabilities. In this regard, the transfer of functions to the provinces should be the responsibility of an independent body and not the executive.
 - Provision should be made for the performance of functions on an agency or delegated basis in order to allow provinces to request other governments to perform particular functions on their behalf.

- Asymmetry will finally be furthered by the concept of framework legislation which will enable provinces to make detailed legislation on those matters peculiar to their own circumstances and needs.

5. Intergovernmental Relations

In any modern state in which powers and functions are distributed constitutionally among different levels of government, formal and informal structures, mechanisms and procedures regarding intergovernmental relations are imperative. Various *Constitutional Principles* also envisage extensive provision in this regard. However, the objective of mechanisms for intergovernmental relations should never be to subject the provinces to national control, supervision or domination. Unless the different levels of government always liaise and co-operate on the basis of equality, and respect each other's constitutional status and domain, the *practice* of intergovernmental relations will be in conflict with the constitutional entrenchment of different levels of government and their status and powers, and the *idea* of constructive intergovernmental relations will be lost. This basic point of departure should be followed throughout.

The transitional constitution makes limited provision for intergovernmental relations. Various *informal* mechanisms for intergovernmental relations have nevertheless been established. Accordingly, it is proposed, *firstly*, that the necessity for structures, mechanisms and procedures for intergovernmental relations which, at the same time, respect the constitutional status and domain of each level of government, be **acknowledged in the constitution**. The constitution should only lay down the principle that intergovernmental relations must be provided for in parliamentary legislation and should not provide all detail itself.

Secondly, consideration should be given to the inclusion in such legislation of the structures and mechanisms such as those already established informally, such as

- * the **Intergovernmental Forum**, jointly chaired by the Ministers of Provincial Affairs and Constitutional Development and of Public Service and Administration, and attended by the Premiers of all nine provinces
- * the **Technical Committee to the Intergovernmental Forum**, which is responsible for its preparatory work
- * **Ministerial Forums** established *ad hoc* on a line-function basis between ministers at national level and members of provincial executive councils
- * **Technical Committees** consisting of officials which assist the Ministerial Forums
- * a **Senate Secretariat** which promotes communication between the Senate and the provinces.

The following additional mechanisms could be considered:

- * A single structure for the co-ordination of intergovernmental relations, called the **Advisory Committee on Intergovernmental Relations**, and consisting of representatives of the national government, the provinces and other bodies concerned, such as the Commission on Provincial Government, could be established.
- * Provision should be made for the representation of the **Senate** on certain bodies such as the Financial and Fiscal Commission and the Commission on Provincial Government.
- * Senate liaison with the provinces, *inter alia* through the **Senate Secretariat**, should be extended.

* Express scope for further formal and informal developments could be built into the legislation. The legislation should, in other words, provide for a compulsory minimum of mechanisms, with room for additional optional structures and procedures.

6. Finances

The National Party proposes that a **revenue-sharing model** be followed to empower provinces financially. The National Party accordingly proposes that direct personal and corporate taxes, VAT or other sales tax, fuel levies, customs and excise, estate duties should be collected **nationally** and deposited in the National Revenue Fund for revenue sharing purposes.

The servicing of national debt should have first claim on these incomes. The balance should then be shared between the national government and the provinces on the basis of formulae recommended by the Financial and Fiscal Commission (section 155(4)), but subject to the condition that the fiscal competencies of and taxes raised by the provinces, in view of the limited extent of the sources of revenue in this regard, shall not be taken into account to determine the share of each province. It should also not be possible for the national government to use these financial relations as a political weapon and to withhold a province's share for any other reason than financial maladministration. A provision to this effect should be included in the constitution.

Provinces (see *Constitutional Principle XXV*) should have **exclusive** competence over stamp duties, transfer duties, vehicle licences, toll taxes and taxes, levies and duties imposed on casino's, gambling, wagering, betting and lottery tickets. It should be possible to add to the list on the recommendation of the Financial and Fiscal Commission.

Provinces should also be able to impose user charges and should be competent to impose levies on taxes raised nationally (section 156(1)).

