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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

SUMMARY

AREAS OF AGREEMENT & CONTENTION:

NATIONAL & PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES

17 May 1995

Embargoed until 18h30 17/5/95

REPORT THEME COMMITTEE 3
SUMMARY: AREAS OF AGREEMENT & CONTENTION:
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PART I : GENERAL PRINCIPLES

1. This section deals only with the approach of the various parties to the applicable Constitutional Principles. The details of the analysis of party proposals are attached in Part II.

Constitutional issues	Agreement	Contention	Further clarity
<p>1. The existence of exclusive & concurrent powers</p>	<p>There is agreement amongst all parties that there should be powers allocated to both national & provincial governments.</p>	<p>1. Where the residual powers of government lie. In other words for the ANC, NP & PAC residual power lies with the national entity, for the IFP, DP, (ACDP?) residual power lies with the provinces.</p>	<p>1. Not all parties have expressed a view as to whether specific powers of provinces & of national government shall be listed expressly in the Constitution.</p>
<p>2. Role of framework legislation to be passed by central government</p>	<p>There is agreement that national government should be empowered to pass framework legislation within which the provinces are then entitled to implement detail within the context of the framework provided by the said legislation.</p>		<p>1. Not all parties have expressed a view about framework legislation & functions. 2. The exact role to be fulfilled by framework legislation. <i>9 UNDER WHAT CIRCUMSTANCES?</i></p>



<p>3. The prevalence of powers of central government.</p>	<p>1. The principle of an override power to be exercised by the national parliament is accepted.</p>	<p>1. There is dispute as to the extent & ambit of the override. 2. There is a dispute as to the presumption that the legislature of central government prevails over that of provincial government if the requirements of the override have been met (or vice versa).</p>	<p>1. Certain parties have not made clear as to whether the Bill of Rights overrides legislation which is in conflict therewith. 2. What is still in dispute is the extent an override power is to be exercised.</p>
<p>4. Should the competencies of the provinces be fixed by the Constitution or should the Constitution allow for an <u>evolutionary</u> process? <i>(greater clarity)</i></p>	<p>Where parties have addressed the question directly, there is agreement that the power should be evolutionary.</p>		<p>1. Certain parties have not addressed this question at all. 2. Certain parties (IFP & PAC) need to address the matter expressly.</p>
<p>5. Executive competence of the provinces.</p>	<p>Provinces should be granted executive competency.</p>	<p><i>Some</i></p>	<p>The detail of how & where such competence should be specified remain to be canvassed. Should there be extensive executive competence without legislative competence?</p>

* PAC
WANTS THEM
FIXED :

* (circled)

SOME OF THE PARTIES...
(REPHRASE)
GIVEN THAT SOME PARTIES...

<p>6. Alternative mechanisms for safeguarding interests of provinces.</p>	<p>There is agreement between the ANC, NP & DP that the Senate constitutes a body capable of representing provincial interests in national lawmaking.</p>		<ol style="list-style-type: none"> 1. Liaison with TC2 which is also studying the Senate should be instituted as a matter of urgency to bring clarity to the role & composition of the Senate. 2. More detail is required on the role of other inter-governmental institutions which might be utilised in reconciling the powers of the provinces with the national government. 3. Certain parties to express their views more clearly (IFP & PAC).
<p>7. The manner in which the Constitution would deal with local government. In particular the question arises as to the distribution of competencies between national & provincial levels of government as far as local government is concerned.</p>	<p>The promotion of maximum participation in democratic & accountable government at local level should be encouraged.</p>		<ol style="list-style-type: none"> 1. Although there is a difference in certain of the proposals which dealt with local government specifically, namely as to whether local government should be entirely regulated by means of provincial constitutions & legislation, the matter was not canvassed by all the parties. 2. Should central or provincial government have a supervisory role over local government?

8. Asymmetry as a Constitutional Principle governing the allocation of power.

1. There is a need for all parties to define exactly what they mean when they apply this term.
2. Certain parties have not dealt with the matter expressly (ANC & PAC).

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PART II : DETAILED ANALYSIS OF PARTY PROPOSALS

Constitutional issues	DEGREE OF ^{CHANGE HEADINGS} Agreement	[?] Contention	Further clarity
<p>1. The existence of exclusive & concurrent powers: Residual Power & the Listing of Powers.</p> <p><i>BREAK UP</i></p>		<p>1. The ANC, NP & PAC believe that the national competency should be unallocated (residual). The IFP (on the other hand) believes that the provincial powers should be unallocated (residual) power. It would appear as if the DP does not indicate the seat of the unallocated (residual) power.</p> <p>2. The ANC believes that concurrent provincial competencies should be listed in the manner provided for by the present Schedule 6. Framework legislation forms a separate category of concurrent legislative competencies (see below). Furthermore, the provinces have exclusive legislative competencies when they legislate on matters specific to the socio-economic & cultural needs of provincial inhabitants, subject, however, to the overrides (see below).</p>	

SOME

DP/IFP POSITIONS

*BUT LIST ISSUES
WHERE*

*THIS COLUMN TO REMAIN
DETAILED*

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		<p>3. The NP believes that the concurrent legislative competencies must be listed - adding agency & delegated functions, water affairs, forestry, public works, land affairs & publication control to the present Schedule 6. The NP suggests that more information is to be obtained before such list is finalised. The NP further believes that exclusive provincial competencies is catered for when the provincial laws prevail (see overrides below); when the provinces pass detail legislation in terms of framework legislation of the national government (see below); & when provinces make laws that are reasonably necessary for or incidental to the effective exercise of their functions. The NP also proposes a second list containing the functional areas for framework legislation (see below).</p> <p>4. The IFP believes that the residual legislative competencies of provincial legislatures (see above) provide provinces with exclusive legislative power.</p>	
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		<p>Furthermore, the IFP believes that only the exclusive national legislative competencies must be listed as follows: foreign affairs, defence, citizenship, immigration, emigration, extradition & asylum, currency, money & coinage, weights & measures, customs, excise, tariffs, foreign trade, admiralty, maritime law, railways, national public service, industrial & intellectual property rights, monetary policy, national public finance, banking, credit, national statistical services, civil aviation, policing, telecommunication & broadcasting, postal communication. Concurrent provincial legislation only exists in the case of framework legislation (see below).</p> <p>5. The DP believes that exclusive national legislative competencies must be listed as follows: citizenship, immigration & passports, customs & excise, defence, foreign affairs, mineral & energy affairs, national economic policy, national finance, national intelligence & security, national public service, national public works,</p>	
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		<p>transport, posts & telecommunication, registration of companies, trade & industries, water. Furthermore, exclusive provincial legislative competencies must also be listed: casinos, racing, gambling, cemeteries & cremation, clinics & hospitals (excluding teaching hospitals), cultural affairs, delivery of water, electricity & other essential services, education at all levels (excluding university & technicon education), firefighting, ambulance, housing, indigenous & customary law, land affairs, language policy, legal aid, liquor controls, local government, markets & pounds, nature conservation, provincial public media, provincial sport & recreation, roads, regional planning, traditional authorities, provincial public service, provincial public works, public holidays, trading hours, urban & rural development, waste disposal. The DP also lists functional areas of provincial legislative competency where it is possible for the national government to pass framework legislation (see below).</p> <p>6. The PAC believes that only concurrent provincial legislative competencies must be listed (in keeping with the present Schedule 6).</p>	
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2. Role of framework legislation to be passed by central (national) government.

1. The ANC views framework legislation as a separate category of concurrent legislative powers (see above) in order to give elasticity to concurrent powers (where provinces have exclusive power to legislate on the detail). The ANC does not list these functional areas - apparently it is part of the residual legislative competencies of the national government.
2. The NP argues for a Schedule containing a second list of the functional areas for framework legislation (see above). It views these powers as a further category of concurrent legislative competencies. Again, the NP suggests that more information is to be obtained before such list is finalised.
3. The IFP proposes framework legislation for its limited provision of national concurrent legislative competencies. It is the (exclusive) prerogative of provinces to provide the detail of such legislation. In this regard the IFP distinguishes between framework legislation (obliging provinces to legislate against standards established nationally) & general principles of legislation (obliging provinces to legislate

~~Some~~ Somewhere we will have to include something on F/WK LEGISLATION.

FURTHER CLARIFY on WHAT PARTIES MEAN BY THIS TERM *

		<p>norms & standards in harmony with national principles).</p> <p>4. The DP (as one of the areas where provincial legislation does not prevail - see above) lists the functional areas where the national government is empowered to pass framework legislation for setting minimum standards or uniformity across the nation which are necessary for a particular function to be performed effectively: abattoirs, agriculture, airports, animal control & disease, archives & museums, consumer protection, correctional services, justice, labour, police & public safety, pollution control, population development, provincial public enterprises, public transport, registrations, refugees, road traffic, soil conservation, trade & industrial promotion, university & technicon education, veterinary services, welfare services.</p> <p>5. The PAC & ACDP do not address the issue of framework legislation.</p>	
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3. The prevalence of the powers of central government (overrides)

1. The ANC proposes that national overrides may take place upon the following grounds:

(a) provided that the Senate has consented; and

(b) provided that the law sets minimum or uniform norms or standards across the country, or provides for equal opportunity or access to government services; or

(c) provided that the law deals with a matter that affects more than one province or enables the country to act as a single entity or with one voice; or

(d) provided that the law establishes a national framework for delivery of services or the management of institutions or providing a public service; or

(e) provided that the law deals with the protection of the environment, the economic union or the capital/labour market of the country, the implementation of national economic policies, or the maintenance of security; or

(f) provided that the provincial law prejudices the economy, health, safety of the public, or security interests of another province or the country as a whole. The idea is that the Act of Parliament shall prevail over a law passed by the provincial

		<p>legislature if the said grounds are met.</p> <p>2. The NP proposes that there shall be prevalence of provincial laws over Acts of Parliament, except insofar as:</p> <ul style="list-style-type: none">(a) matters cannot be regulated provincially; or(b) matters require to be regulated or co-ordinated by uniform standards for the management or administration of that matter that apply generally throughout the country; or(c) the Act of Parliament is necessary to set minimum standards not provided for by provincial legislation for the rendering of services; or(d) the Act of Parliament is necessary for the maintenance of national economic 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 & labour, or the maintenance of national security; or(e) the provincial law materially prejudices the economic, health,	
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		<p>or security interests of another province or the country. The idea is that a law passed by a provincial government shall prevail over an Act of Parliament unless certain grounds are met. Accordingly, the NP believes that the present section 126 should be retained but on narrower grounds. Furthermore, these overrides should be restricted by the principle of subsidiarity (see below) as well as by Constitutional Principle XXII (the national level may not encroach upon the geographical, functional & institutional integrity of the provinces).</p> <p>3. The IFP rejects the idea of national prevalence or overrides. The IFP merely allows for prevalence of the national government on very narrow grounds: when a province fails to deliver essential services so as to jeopardise the health, safety & welfare of the citizens of the province. However, national overrides are valid & effective only for so long as or insofar as the province concerned has not adopted its own adequate legislative measures.</p> <p>4. The DP allows for overrides in terms of the Bill of Rights; & states</p>	
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		<p>that a provincial law (in the case of exclusive or framework provincial powers - see above) shall prevail over an Act of Parliament unless:</p> <ul style="list-style-type: none">(a) the Act deals with a matter which is subject of an international treaty or international law to which SA is bound; or(b) the provincial law or practice materially & unjustifiably prejudices the economic, health, environment or security interests of another province or of the country as a whole; or(c) the provincial law or practice materially & unjustifiably obstructs the free movement of people, goods, money, information or assets between provinces. Furthermore, a provincial law prevails unless Parliament passes framework legislation in the designated functional areas (see above). In the event of a dispute concerning which level of government should have legislative competence in respect of a particular activity or functional area which cannot be resolved by mediation or by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the provincial legislatures.	
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		<p>5. The PAC proposes national overrides according to CP XXI.</p> <p>6. The ACDP suggests that there us an override of legislation (whether of national or provincial nature) where a law does not comply with biblical principles.</p>	
<p>4. Should the competencies of the provinces be fixed by the Constitution or should the Constitution allow for an evolutionary process?</p>		<p>1. The ANC sees framework legislation as providing for the provincial legislative competencies to have some elasticity.</p> <p>2. The NP submits that constitutional certainty as to the powers at each level of government is needed. Powers are to be set out in the Constitution with, however, enough flexibility to allow for future development & for differences amongst the provinces. This will create the opportunity for asymmetry (see below).</p> <p>3. The IFP proposes a Constitution where powers are defined definitively.</p> <p>4. The DP, PAC or ACDP do not address this issue directly.</p>	

5. Executive competence of provinces.

1. The ANC distinguishes between legislative & executive functions on all the levels of government: practical executive functions in the administration must be assigned increasingly to elected & accountable provincial governments as administrative capacity grows while the weight of legislative activity at the national level of government is to be concerned especially with the setting of norms, standards & framework.

2. The NP proposes both legislative & executive competencies for provinces in the areas indicated above. That is, the NP believes that the provinces must have executive competence where they have legislative competence.

3. The IFP proposes the strengthening of provincial administrative executive powers through the provision of the following national matters to be administered by the provinces: customs, excise & tariffs, federal taxation, national statistical services, post & telecommunications.

4. The DP believes that the national & provincial government should have executive competence where

		<p>they have legislative competence (see above). Powers & functions at national & provincial (and local) level shall include the power to perform functions for the other levels of government on an agency or delegation basis.</p> <p>5. The PAC believes that the granting of exclusive executive powers to the provinces will satisfy the requirements of CP XIX.</p>	
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6. Alternative mechanisms for safeguarding the provinces.

1. The ANC believes in co-operative governance & sees the Senate as a body representing provincial interests in national lawmaking - the preferred method whilst the courts will still determine the overrides (see above).
2. The NP strongly favours the introduction of the Senate as a body representing provincial interests.
3. The IFP submissions to TC2 show that it is in favour of a strong Senate to protect provincial interests, however, the IFP also states that relations between levels of government should not be institutionalised.
4. The DP states that the Senate shall have special powers to protect the interests of provinces & to promote co-operation & co-ordination between the national government & the provinces & between provinces themselves. Other possible mechanisms are mooted.
5. The PAC & ACDP do not address this issue. The PAC alludes to mechanisms such as the Financial & Fiscal Commission and the Commission on Provincial Government.

<p>7. Local Government</p>		<ol style="list-style-type: none">1. The ANC does not address this issue.2. The NP states that the national & provincial levels must be able to make laws on local government. However, this should not endanger the fundamental status, character or purpose of local government. Recognition by the supreme Constitution means that local government cannot be regulated by the other levels at will.3. The IFP states that local government should be entirely regulated by provincial constitutions & legislation. Each provincial constitutional shall be entitled to make provision for different categories of local government. Local government cannot be dealt with more specifically than in Chapter 10 of the present Constitution.4. The DP believes in the maximum devolution of power - substantial powers & functions should be allocated to local government & should be dealt with primarily in provincial constitutions & legislation.5. The PAC states that local government shall be as independent as possible & that provincial powers should merely be supervisory & co-ordinating powers.	
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		6. The ACDP believes that the great majority of power should reside at the local level.	
8. Asymmetry		<p>1. The ANC does not address this issue directly.</p> <p>2. The NP proposes that asymmetry be promoted as follows:</p> <ul style="list-style-type: none"> (a) provinces should be allowed to adopt their own constitutions (see below); (b) provinces should be able to take up functions according to their different needs & capabilities; (c) powers should be granted to the provinces not by the executive but by an independent body; (d) agency & delegation should be provided for as well; and (e) framework legislation will aid provincial asymmetry (see above). <p>3. The IFP does not address this issue directly.</p> <p>4. The DP, PAC & ACDP do not address this issue.</p>	
9. Provincial constitutions		<p>1. The ANC, NP, IFP & DP propose provincial constitutions. The ANC believes that the (national) Constitution must provide for a framework for provincial constitutions which could allow for variations in defined aspects.</p> <p>2. The PAC & ACDP do not address this issue.</p>	

10. Subsidiarity principle		The NP, IFP & DP should explain this principle more clearly, that is, which are the functions which can be exercised best at the lowest levels of government?	
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