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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL PRINCIPLES RELEVANT TO THE RELATIONSHIP BETWEEN THE NATIONAL, PROVINCIAL AND LOCAL LEVELS OF GOVERNMENT

BY

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Introduction

Due to the binding nature of the Constitutional Principles contained in Schedule 4 of the Constitution, it is essential that the Constitutional Assembly will interpret the Principles relevant to a specific constitutional matter before any decision is reached regarding such matter. In its interpretation, the Constitutional Assembly will have to ascertain whether any particular matter is covered by the Principles or whether the Principles allow for the breaking of new ground.

Where a Theme Committee considers submissions, either from a political or a public source, it should be particularly useful if the Theme Committee were to express an opinion on the consistency with the Constitutional Principles, or otherwise, of the proposals contained in such submissions.

Which of the Constitutional Principles are relevant?

It is submitted that one should assume that any of the 34 Principles may prove to be relevant to the formulation of any specific part of the new constitutional text. The reason for this is to be found in the fact that it would not be possible for the Constitutional Court to certify a new text if any component of such text does not fully comply with all of the Principles. Consequently the Principles must be read as a whole: the implications contained in one of the Principles may influence the interpretation of another Principle.

This may be demonstrated by highlighting some general guidelines for constitution-writing contained in the Principles that should impact on practically all elements of the new constitutional text. Various Constitutional Principles, while dealing with specific matters, require by strong implication that the Constitution must in general ensure that government (at all levels) will be *effective*, *financially viable*, *accountable*, *responsive* and *open*.

- Principle VI prescribes the separation of powers "to ensure **accountability, responsiveness and openness**".

- Freedom of information is required by Principle IX "so that there can be **open** and **accountable** administration at all levels of government".

- Appropriate and adequate powers and functions must in terms of Principle XX be given to the various levels of government in order to "enable each level to function **effectively**." This is further strengthened by the injunction of Principle XXVI that "an equitable share of revenue" is due to all governments "so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them."

- Similarly Principle XX requires the allocation of powers and functions to be made "on a basis which is conducive to **financial viability** and **effective public administration.**"

- Among the criteria for the allocation of competencies, Principle XXI 1 determines that the level of government "at which decisions can be taken **most effectively** in respect of the quality and rendering of services" must be the "**responsible** and **accountable**" repository of the relevant powers.

- Principle XXIX ensures the independence and impartiality of certain institutions "in the interests of the maintenance of **effective public finance and administration**" and Principle XXX requires the public service, inter alia, to be **efficient**.

Although these principles each deal with different constitutional elements, it is submitted that a constitutional provision that purports to establish structures or institute procedures which are not conducive to the effectiveness, financial viability, accountability, responsiveness or openness of those structures or procedures, should not survive the scrutiny of the Constitutional Court, except perhaps if another Principle expressly requires a less effective, financially non-optimal or not fully accountable, responsive or open structure or procedure to be provided for.

The inter-relatedness of the Principles, combined with the lack of clear distinction between the working areas of some of the Theme Committees, renders it impossible to provide a list of Principles falling within the exclusive domain of a particular Theme Committee's work. Thus, where Theme Committee 2 would presumably be strongly engaged in the realisation of Principle VI (on the separation of powers), Theme Committee 3 should, as has been pointed out above, at least consider the possible effects of the Principle on the accountability, responsiveness and openness of the various levels of government. By the same token, every other Theme Committee will need to keep the effects of Principle VI in mind.

Nevertheless, this memorandum deals primarily with those Principles containing express provisions regarding the allocation of competencies to the three levels of government insofar as such allocation concerns the relationships between governments at the various levels. Some remarks are however also made regarding certain Principles relating to structures, because structure and function cannot be separated completely.

Principle I - "one sovereign state"

The country is in terms of this Principle to remain a single state. This means firstly that no part of the Republic, be it a volkstaat, a province or any part of a province, may in terms of the new Constitution be allowed to secede and to form a separate state.

Secondly South Africa must remain sovereign, meaning on the one hand that the Constitution may not allow the absorption of the Republic into a supra-national structure causing the diminution of its sovereignty, nor may its sovereignty be fragmented, for example by transforming the Republic into a confederation of states.

"Sovereignty" in the context of Principle I does however not invoke the Westminster doctrine of the sovereignty or supremacy of Parliament, nor does it express the need for the express internal allocation of the seat of sovereignty, for example in the nation, the President or the provinces. It is submitted that it would in any event not serve a purpose if the new Constitution would designate *the* seat of sovereignty - the battle for sovereignty in English constitutional law between Parliament and the Crown is long past and wholly irrelevant in the modern constitutional state where the Constitution is the supreme law of the land.

Principle IV - "binding on all organs of state at all levels of government"
The supremacy of the Constitution permeates not only all aspects of the law, but also determines the lawfulness (constitutionality) of the actions of every individual or structure exercising governmental authority. Thus the competencies, legislative, executive or administrative of local and provincial governments and of the national government, and of all the courts of law, will have to be exercised within the four corners of the new Constitution. This however does not mean that the Constitution may not itself empower especially the legislative organs at any level to deal with matters not regulated by the Constitution itself.

Principle VI - "separation of powers" (read with XX and XXIV)
In addition to what has already been said above regarding this Principle, one may consider whether the separation of powers is also prescribed for provincial and local government. Some may argue that the doctrine should not apply to the provincial or local levels because only legislative and executive competencies, and no judicial functions, are to be allocated to those levels. Such argument is however not persuasive, because the merits of the doctrine, such as the expressly mentioned "appropriate checks and balances", the separation of personnel and the allocation of legislative and executive functions to different organs, are not diminished at all by the fact that provincial and local governments do not have responsibilities regarding the judiciary. The judiciary, however nationally administered, would still serve as an effective check on the legislatures, executives and administrations at the provincial and local levels.

The prescription of Principle XX that "each level of government shall have appropriate and adequate *legislative and executive powers and functions*" puts it beyond doubt that the legislative and executive powers of provincial and local governments should be distinguished. Add to this the general requirement of accountability, and then no reasonable argument against the application of the doctrine at provincial and local level can be offered.

Regarding provincial government, it is submitted that consideration should be given to the question whether the provisions of the present Constitution (as the only available concrete point of reference) satisfy the requirements of Principle VI. Is there sufficient separation of personnel or separated allocation of functions where 11 of the 30 members of a provincial legislature are invested with the provincial executive power? Does it amount to an effective check on the provincial executive if the legislature is empowered to pass a vote of no confidence where the adoption of such vote is made highly unlikely by the fact that the Executive Council is composed of the political leadership in the legislature?

Due to the state of flux of the local government system (the present stage of development is labelled "pre-interim", which is to be followed by an "interim" phase after the elections on 1 November, eventually leading to a final dispensation at some future time) a satisfactory point of reference is difficult to identify. However, since local government has now under the present Constitution been acknowledged as being a level of *government* as opposed to local *authority*, *management*, or *administration*, some fresh ground will probably have to be broken regarding the clear separation of and balance between the legislative, executive and administrative functions of local governments. This, it is submitted, is a significant factor to be taken into account by the Constitutional Assembly in view of the first sentence of Principle XXIV: "A framework for local government powers, functions and structures shall be set out in the Constitution."

Originality of competencies (Principles XVIII 1 and XXIV read with IV and XV)
The full significance of Principles XVIII 1 and XXIV regarding the requirement that the powers and functions of all three levels of government must be provided for in the Constitution, only becomes apparent if read with Principle IV concerning the supremacy of the Constitution.

A constitution can hardly be a constitution if it does not deal with the structures and competencies of the national government, but it is conceivable that a constitution leaves the regulation of provincial and local government to ordinary laws of Parliament. Provision for those matters by ordinary law would have rendered provincial and local government subject to variations in parliamentary sentiments regarding the importance and autonomy of those levels. Such is not to be the case in South Africa.

The *definition* in terms of Principle XVIII 1 of the powers and functions of provincial governments in the supreme Constitution will secure their entrenchment, and therefore also such measure of autonomy from or subordination to the national government as may be provided for in the Constitution. The entrenchment is due to Principle XV, which requires "special procedures requiring special majorities" for the amendment of any of the provisions of the Constitution.

The setting out of a *framework* for local government powers, functions and structures in terms of Principle XXIV is slightly weaker than the "definition" required for the provinces. Nevertheless, it is submitted that the requirement of a constitutional framework cannot be understood to amount to an open-ended constitutional empowerment of Parliament or the provincial legislatures to regulate local government freely. The "framework" is contrasted in the Principle with the setting out in other laws of the *comprehensive* powers, functions and structures. This seems to mean that the Constitution itself should empower local governments in principle to exercise original powers by providing for the nature and general scope of local government competence, leaving it to Parliament and the provincial legislatures to provide for specific local competencies *on the basis of the Constitutional provisions.* This will require careful consideration by the Constitutional Assembly of the general classes of competencies and the extent of the competence needed by local government in general, and in particular by the different categories of local government (see also Principle XXV).

Having powers allocated *originally* to the provincial government by the Constitution has, in South African law, special significance. This came about through the interpretation by the courts of section 85 of the *South Africa Act* 1909 in terms of which Provincial Councils were empowered to make laws on a listed number of subjects. Thus, in the case of *Bloemfontein Municipality v Bosrand Quarries* 1930 AD 370 at 378 De Villiers CJ said:

> While the Provincial Council, as a legislature, is subordinate to Parliament, it exercises its legislative functions not as an agent or delegate of Parliament, but exercises original jurisdiction deriving its authority as it does from the South Africa Act which has conferred plenary powers of legislation upon it on the subjects mentioned in sec. 85.

Power entrusted originally in a constitution stand in contrast to *delegated* powers. (This distinction was derived from a decision of the Privy Council on a matter originating in Canadian constitutional law - see e.g. *Middelburg Municipality v Gertzen* 1914 AD 544 at 550).

It is suggested that where a Constitution of supreme stature entrusts a specific original competence to a provincial or local government, such originality would, in South African law, have to be recognised as being comprehensive and as unassailable as the Constitution itself. This is reinforced by the supremacy of the Constitution, in contrast to the supremacy of Parliament as was provided for by the *South Africa Act*.

Principles XVIII 2 - "not substantially less than or substantially inferior to"
In order to satisfy Principle XVIII 2, the new Constitution will have to allocate competencies to the provinces which are *substantially* neither quantitatively less nor qualitatively inferior "to those provided for" in the present Constitution.

The point of departure is therefore *all* provisions of the Constitution that "provide for" provincial competencies. Most of those are to be gleaned from sections 125-162 and Schedule 6, but other provisions such as sections 61, 62, 105, 114, 200, 213 and 219 will certainly also have to be taken into account.

What would amount to a *substantial* reduction of the quantity or quality of those competencies, can hardly be determined in the abstract. It is submitted that, in the context, the word "substantial" means that the provincial competencies of the new Constitution need not be exactly the same as those of the present Constitution, but that the provinces should be left in at least the same position of relative competence regarding the national government as they can be now. Thus a provision requiring provincial laws to be submitted for approval to the President (instead of the Premier), would, it is suggested, amount to a substantial qualitative reduction, whereas dealing with "animal control and diseases" as a component of the functional area of "agriculture" would hardly qualify as a reduction of the quantity of provincial competencies.

It should be noted that the provincial powers and functions concerned are not only those that will have been taken up and are actually exercised by the provinces at the time of the replacement of the present Constitution, but all those presently "provided

for", i.e. also those that may potentially accrue to a province through the adoption of laws falling within the ambit of a functional area mentioned in Schedule 6.

Principle XIX - "exclusive and concurrent powers", agency and delegation

Principle XIX states that national and provincial governments have to be endowed with both exclusive and concurrent powers (compare also Principles XXI 6 and 7, XXII and XXIII). Whether section 126 of the present Constitution (in which the terms "exclusive" and "concurrent" are not employed and from which the expression "concurrent" was removed by amendment) would, if retained in the new constitutional text, satisfy the relevant Principles, is worth while to consider.

A proper interpretation of section 126 and the contemplation of the meaning of the words "concurrent" and "exclusive" shows that subsections (1) and (2) clearly provide for concurrency, that subsection (3) allocates exclusive competence to the provinces regarding the functional areas listed in Schedule 6 and subsections (3) and (4) allocate exclusive competence to Parliament insofar as it passes laws within the prescribed limitations, and Parliament also has exclusive competence regarding all other matters in terms of section 37. It is therefore submitted that the wording of section 126 is an example of a formulation that could satisfy the requirements of the Principles.

As a matter of constitution-writing policy, it is suggested that it would be wise to avoid the grave risks of confusing the issue by employing "exclusive" and "concurrent" as terminological labels, the definition of which may perpetually be the subject of controversy.

The "power to perform functions for other levels of government on an *agency* basis" involves the appointment of one government as the agent (representative) of the other to perform a function of the latter in terms of a mutual agreement. In principle a government of any level can be empowered to appoint a government of any other level as its agent, but mutual agreement to such appointment is required. Agency is usually dealt with as a contractual matter. There is however no reason why inter-governmental agency cannot be regulated constitutionally. It is indeed submitted that Principle XIX should encourage the framing of clear guidelines in the Constitution for the implementation of inter-governmental agency.

Delegation of functions is normally conceived of as "downward" empowerment. Although Principle XIX seems to be cast in broad enough language to allow for the delegation of functions by a provincial government to the national government, perhaps regarding a matter in the exclusive domain of the province, it is submitted that such "upward" delegation would be a novel form of delegation. Delegation should preferably also be the subject of clear constitutional regulation, since the Principle would appear to go beyond the scope of the usual forms of administrative delegation.

Principles XX and XXI - Criteria for the allocation of powers

In addition to the requirements of financial viability and effectiveness already mentioned, Principle XX requires the allocation of powers to be made on a basis "which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity." This conglomeration of criteria, it is submitted, does not provide positive indicators for the formulation of the relevant

constitutional provisions. They will however have to be satisfied negatively, in that the text that emerges, must not have the effect of undermining national unity, detract from the autonomy of the provinces or disregard cultural diversity. "Provincial autonomy" is qualified by the word "legitimate" which is in itself an imprecise concept, but seems to prevent in this instance the viability of an argument in favour of extending provincial autonomy beyond a level of generally acceptable, rational justification.

Principle XXI is the equivalent of the provisions contained in subsections (2), (3) and (4) of section 126 of the present Constitution. Its wording however provides some significant scope for the improvement of section 126. The most compact format in which the application of the prescribed criteria can be demonstrated in conjunction with some other relevant Principles, is a draft text.

What follows is offered merely as a demonstration, developed for the purposes of discussing the application of Principle XXI and some of the related Principles. It shows some possible approaches to the regulation of matters currently dealt with in sections 125 and 126 in accordance with the Constitutional Principles. The relevant Principles are indicated in brackets.

Legislative authority of provinces

125. (1) There shall be a legislature in each province. **(XX)**

(2) The legislative power of a province vests, subject to this Constitution, in the provincial legislature, which is competent to make laws for the province in accordance with this Constitution. **(XX, IV)**

(3) Laws made by a provincial legislature shall apply only within the territory of the province. **(XXI 2 "action taken by one province which is prejudicial to the interests of another province or the country as a whole"**

(4) For the purposes of mutual co-operation **(XXI 7, X "national unity")** or to guarantee equality of opportunity or access to a government service both Parliament and a provincial legislature is competent, subject to section 126, to make laws for the province with regard to all matters falling within the functional areas specified in Schedule Z. **(XIX - concurrency)**

(5) The legislative competence of a province includes the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence. **(XXI 8)**

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which a provincial law does not prevail over an Act of Parliament in terms of subsection (1) of section 126.

(7) A provincial legislature may, within the framework of an Act of Parliament, make laws concerning the performance of functions of the national government which have been delegated to the provincial government or for which the provincial government may act as an agent for the national government in terms of an Act of Parliament. **(XIX "agency of delegation")**

Prevalence of provincial laws

126. (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 referred to in subsections (4) and (5) of section 125, **(XIX exclusiveness)** except insofar as —

(a) it is essential that the Republic should attain specific national goals in its international relations regarding such matter and the Act of Parliament provides therefor; **(XXI 3)**

(b) the matter is regulated effectively by the Act of Parliament regarding the quality and rendering of services and cannot be regulated effectively by provincial legislation; **(XXI 1)**

(c) essential uniform, generally applicable norms or standards for the whole of the Republic concerning the management or administration of the matter or of a related function are necessary, are not provided for by the provincial law and are provided for by the Act of Parliament; **(XXI 4)**

(d) minimum standards for the rendering of public services are necessary regarding the matter, they are not provided for by the provincial law and are provided for by the Act of Parliament; **(XXI 2)**

(e) the Act of Parliament —

(i) provides effectively for the maintenance of the unity of the national economy; **(XXI 2)**

(ii) is necessary to protect the environment across provincial boundaries; **(XXI 2)**

(iii) promotes interprovincial commerce; **(XXI 5)**

(iv) ensures the mobility of goods, services, capital and labour across provincial boundaries, **(XXI 5)** or

(v) is essential to protect the national security, **(XXI 2)**

and provincial legislation does not do so; or

(f) the provincial law unreasonably prejudices the national economy, the health of the community or the security of the Republic. **(XXI 2)**

(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. **(XIII 2, XXI 4)**

(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. **(XX - "promotes national unity and legitimate provincial autonomy")**

(4) An Act of Parliament shall prevail over a provincial law only if it is not possible for the Constitutional Court to resolve a dispute in this regard by means of a reasonable interpretation of subsection (4) of section 125. **(XXIII)**

(5) An Act of Parliament is invalid insofar as it purports to cause or empower an encroachment upon the geographical, functional or institutional integrity of a province. **(XXII)**

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