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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE

TC3 TECHNICAL ADVISER'S OPINION.

MONDAY
21 AUGUST 1995
E249

ADOPTED BY SUB-COM AS A Guide for drafting.

Tech Adviser instructed to draft a formula complying in their opinion taking in all views & submissions to produce 1 draft midday by end of week

DOCUMENTATION

(Constitutional Committee Sub-Committee - 21 August 1995)

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(Constitutional Committee Sub-Committee - 21 August 1995)

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Monday, 21 August 1995

TIME: 14H00 - 18H00

VENUE: E249

DRAFT AGENDA

1. Opening
2. National and Provincial Legislative and Executive Competencies - *Discussion document* (14h00 - 16h00), pages 2 - 12
3. Presentation - Freedom of Expression: Conference of Editors and Black Editors' Forum (16h00 - 17h30)
4. Any other Business
5. Closure

N.B. * Please bring along the CC Sub-Committee document of 07 August on National and Provincial Legislative and Executive Comptencies.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

Enquiries: Ms MM Sparg, Tel 245031, page 4184616 Code 6970

C

See CP [26] compet
X 19) opinion

An opinion

FF = not bound by I/C but
by CPs.
= s 68 (1) Read the entire
Chapter.

Where is sovereignty allocated
E Prime | National Govt

German Constitution ie ss 1.2 the
Untable + residual powers

National & Provincial Competencies

CONSTITUTIONAL PRINCIPLES APPLICABLE TO THE ALLOCATION OF NATIONAL AND PROVINCIAL COMPETENCIES

by

THE TECHNICAL ADVISORS OF THEME COMMITTEE 3

1. INTRODUCTION

The Sub-Committee of the Constitutional Committee instructed us on 10 August 1995 to draft a report on the interpretation of the Constitutional Principles contained in Schedule 4 of the present Constitution regarding key issues concerning the allocation of legislative and executive competencies to the national and provincial governments respectively.

For the purposes of this report we have identified the following questions at this stage to be of fundamental importance:

- Should the Constitution contain one or two lists of functions or functional areas?
- How should the matter of "overrides" be determined?
- What guidance is to be found regarding "residual powers"?
- What does "framework legislation" entail?

How do we regard Schedule 4 as a legal entity?

In our discussion of the various Constitutional Principles, reference will be made to these problem areas.

The debate on national and provincial competencies should in our view take place against the background of the following considerations.

1.1 THE NATURE OF THE CONSTITUTIONAL PRINCIPLES

Section 71(1) of the Constitution provides, inter alia, that a new constitutional text shall comply with the Constitutional Principles contained in Schedule 4.

→ frame / guidelines.

Section 71(2) provides that the new constitutional text must be certified by the Constitutional Court as complying with the Constitutional Principles.

Whilst this report is not an attempt to "second guess" the Constitutional Court, it is important to understand the jurisprudential nature of the Constitutional Principles, i.e. the manner in which they are likely to be applied.

It is significant that the word "principles" is employed to describe the constitutional statements in Schedule 4. Principles have a particular meaning in the legal literature and this has been recognised by our courts. Principles differ from rules of law. They do not apply on an "all-or-nothing" basis like rules of law. They perform the role of a value framework pointing in a particular direction rather than prescribing one narrowly defined result.

Accordingly the Constitutional Principles in Schedule 4 should not be read in an inflexible, literal manner, but rather as creating a framework for the drafting of the Constitution, although some of the Constitutional Principles (e.g. IV, XXXII and XXXIII) are phrased in a more direct manner and in more concrete constitutional language.

It is submitted that a holistic approach should be followed. In short, the Constitutional Principles should be read together as the new constitutional text must conform to all the Constitutional Principles.

1.2 THE NOTION OF "RESIDUAL POWERS"

The expression "residual powers" finds its meaning in the notion that certain powers are allocated from a specific reservoir of powers, leaving a "residue" of unallocated powers in the reservoir, which then remains with the original bearer(s) of those powers. The typical application of the concept is where a federation is composed of a number of independent states, each with its own sovereign authority. The component states sacrifice their sovereignty and surrender some of their powers to the federation. Such a process of federation can entail that either the federal authorities are endowed with a specified list of powers, leaving the "residual powers" with the component states, or the powers of the component states may be listed, and whatever is not listed, is entrusted to the federation.

The Constitutional Principles do not deal with the matter of residual powers. This is explained by the fact that the South African constitutional process is not one comparable to a process of federation as described above. The Republic was endowed, prior to 27 April 1994, through the mechanism of parliamentary sovereignty, with the full reservoir of governmental authority, and from that date onwards continued to hold those powers, subject though to the Constitution (sections 37 and 75). The Constitution replaced parliamentary sovereignty with its own supremacy (section 4) and in section 124 established new entities known as provinces, which were endowed (sections 126 and 144) with competence in the field of a list of functional areas (Schedule 6), taken from, as it were, the reservoir of national competence.

From this it is clear that the provincial competencies are derived from the Constitution and therefore that a construction of residual power vesting in them is untenable.

1.3 THE NOTION OF "FRAMEWORK LEGISLATION"

In view of the fact that various parties have expressed the view that the new Constitution should employ the mechanism of "framework legislation", it may be useful also to consider its nature.

1.3.1 ORIGINS

The prime (and, as far as could be established, only specific) constitutional example of framework legislation is to be found in the *Grundgesetz* (*Basic Law*) of Germany.

Section 75 of the *Basic Law* empowers the federal parliament to make "framework regulations" (which is considered in German law to be synonymous to "framework legislation") with regard to a list of specified matters.[1] Framework legislation of the federal parliament is subject to the same limitations applicable to concurrent legislation (section 72 of the *Basic Law*). The limitations are comparable to those provided for in section 126(3) of our present Constitution.

Whether framework legislation should be considered to be a legislative category distinct from concurrent legislation, or if it must be understood to be a form of concurrent legislation, has not been settled in German legal theory. What is however generally accepted, within the context of the German Constitution is that the competency to adopt framework legislation is more limited than that regarding concurrent legislation. A federal framework law may not regulate the subject matter exhaustively. Framework laws are intended to provide guidelines within which the legislatures of each of the *Länder* will then make, according to the specific and often different requirements of each, detailed legislative provisions. The framework law is in all respects federal legislation, while the detailed provisions are laws of each *Land*. A law is only considered to conform to the description of a framework law if it *requires substantial* "filling in" and if it is indeed *capable* of being filled in by *Länder* legislation.

The purpose of a framework law is to define the boundaries within which the *Länder* are enabled to complete the legislative regulation of the matter. This however does not mean that the framework law must be limited merely to fundamental principles. Apart from prescribing guidelines to the *Länder* legislatures, framework laws sometimes contain substantive provisions directly applicable in all the *Länder*.

Framework legislation must be distinguished from *empowering* legislation in which an organ of the executive is empowered to make detailed provisions by means of subordinate regulations. Framework legislation does not merely empower the adoption of subordinate legislation, because the laws of the *Länder* made in pursuance of a federal framework law are original *Länder* laws applying independently from (though necessarily in conformity with) the framework law.

1.3.2 IMPLICATIONS FOR THE NEW CONSTITUTIONAL TEXT

If the concept of framework legislation is to be used in the new constitutional text, it is advisable to provide clearly what it means, because there is no indisputable universal meaning that can be attached to the concept, and even in Germany differences in expert opinion in regard thereto are prevalent.

Considerable care should therefore be taken before the concept of framework legislation is employed in the Constitution as a synonym for the terms "exclusive"

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[1]. The listed matters are the legal status of persons in the public service of the *Länder*, of local governments and of other public corporate bodies, general principles of the higher education system, the press and films, hunting, nature conservation and protection, land distribution, regional planning, water affairs, registration of inhabitants and personal documentation (identification and passports).

and/or "concurrent" powers as they appear in the Constitutional Principles.

The balance of this opinion deals with the various principles identified as relevant to the allocation and relationship between national and provincial competencies.

2. CONSTITUTIONAL PRINCIPLE XVI

"Government shall be structured at national, provincial and local levels".

Apart from requiring three levels of government, this CP does not take the debate as to residual powers, the listing of powers or the overrides any further.

3. CONSTITUTIONAL PRINCIPLE XVIII

"1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less or substantially inferior to those provided for in this Constitution.

3. ...."

CP XVIII para 1 : The operative words are "shall be **defined**". In our view, "**defined**" would cover the description of the seat of the residual power, that is, if the Constitution states, for instance, that Parliament shall have the competence or power to make laws for the country as a whole this "**defines**" the power of Parliament as national lawmaker. To list the powers for instance, of the national lawmaker would likewise "**define**" these powers. However, this does not mean that this CP requires a listing of powers and that other ways of "**defining**" are ruled out.

CP XVIII para 2 : The operative words are "not **substantially** less or **substantially** inferior to". In our view, the word "substantially" means that the powers and functions of the province **CAN** be less or inferior to those provided for in the 1993 Constitution but should not be substantially so. In other words, it is a question of degree : it is impossible to devise a definitive test which would authoritatively decide the question of when powers and functions are less or inferior but not substantially so.

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 in relation to the national government as they can be at present. 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. In short, the determination is one of weight of powers rather than the quantity thereof.

4. CONSTITUTIONAL PRINCIPLE XIX

"The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis".

The constitutional empowerment of one level of government (be it the executive or legislative arm of government) to perform functions for another level of government on an agency or delegation basis would be an example of "defining" the powers and functions of a level of government (see the discussion on "defining" above). The concept of framework legislation can also be applied when empowering one level of government on an agency or delegation basis to perform functions for another level of government. That is, the framework legislation empowers another level of government to do the filling in of the framework legislation on either an agency or delegation basis.

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.

It is clear that both the national and provincial levels of government must have exclusive as well as concurrent powers. A possible argument is that this CP does not require both legislative and executive powers to be exclusive and that, for instance, granting merely exclusive executive powers to provinces would satisfy the requirements of this CP. There is precedent for this approach in, for example, Germany.

Another argument that may pass the test of the requirements of this CP is that this CP does not require legislative exclusivity with regard to certain defined functional areas. In other words, if provincial legislatures may pass legislation in certain defined (listed) functional areas concurrently with the national Parliament the provincial legislatures do not have exclusive jurisdiction with regard to these functional areas but these provincial legislatures **DO** have exclusive legislative powers where, for example, the national overrides do not apply or even where

provincial overrides apply, as the case may be. The question arises as to whether provinces may be granted exclusive legislative powers by means of framework legislation, that is, whether provincial legislatures have exclusive legislative powers with regard to the filling in within the parameters described by the framework Act of the national Parliament when the framework Act requires that the provincial legislatures make laws with regard to the detail within the norms or principles set out in such Act. (See paragraphs 1.3.1 and 1.3.2 above).

5. CONSTITUTIONAL PRINCIPLE XX

"Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity".

In our opinion the parameters of "appropriate and adequate" powers that will enable government to function "effectively" are very wide and do not take the debate on exclusive or concurrent powers; on overrides; on the listing of powers and the seat of residual power any further. This submission is equally applicable to powers which must be conducive to "financial viability" and to "effective" public administration. The framework is wide : there must be provision for both "national unity" and "legitimate provincial autonomy" as well as "cultural diversity".

6. CONSTITUTIONAL PRINCIPLE XXI

"The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decision can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards for the rendering of services, the maintenance of economic unity, the maintenance of social 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, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia -

   (a) for the purposes of provincial planning and development and the rendering of services; and

   (b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments".

CP XXI is of crucial importance with regard to the criteria which apply in the allocation of powers to the national government and the provincial governments.

CP XXI para 1 enjoins the Constitution to empower the level of government at which decisions can be taken "most effectively" in respect of the "quality and rendering of services". There is no indication that the lowest level of government should always be the level so empowered. It may be that one may in suitable circumstances come to the conclusion that the lowest level of government (in these circumstances) may be the level at which decisions can be taken most effectively with regard to the quality and rendering of services. In our view, this is a general principle with regard to the allocation of powers which does not require a listing of all the functions (although it certainly does not rule out the listing of functional areas). This CP can play a role in deciding the overrides in that a certain level of government must be empowered because decisions can be taken most effectively in respect of the quality and rendering of services at such level.

CP XXI para 2 states that the Constitution shall empower the national government to intervene in certain circumstances : it is accordingly clear that this CP deals with the important questions of **overrides**. It is submitted that overrides would take place

primarily "through legislation" - the only other procedure for overriding would be through the executive arm of national government. Accordingly, this CP does not deal with the issue of the seat of the residual power or the listing of powers as such but it awards an override in certain prescribed **circumstances**. In our view, this CP requires that the Constitution must empower the national government to intervene in the prescribed circumstances; in other words, the Constitution must make provision for a national override in the following circumstances : when it is necessary for the maintenance of essential national standards; for the establishment of minimum 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. We submit that para 2 constitutes a formulation for an override not only in respect of concurrent but also of exclusive provincial powers. Unlike other paragraphs of CP XXI which specifically refer to exclusivity or concurrency (para 6), there is no qualification contained herein and furthermore the CP mandates national government intervention by employing the word **"shall"**. Similarly, this paragraph does not employ the word "allocation" which supports our submission that this subparagraph deals not with allocation of power directly but with the override.

Depending on the definition given to framework legislation, such overrides could also take the form of national framework legislation. For example, the national Parliament can be empowered to pass framework Acts which lay down essential national standards or required minimum standards for the rendering of services and the provincial legislatures then acquire the power to pass detail legislation to fill in such frameworks enacted by Parliament.

CP XXI para 3 in essence, requires, that foreign affairs should be allocated to the national level. This can, of course, be achieved in different ways :

- foreign affairs could be part of the "residual" powers of national government;
- foreign affairs can be listed as one of the functional areas of national government (on the assumption that these powers are specifically listed); or
- foreign affairs could be taken care of by means of an override on the legislative terrain.

This CP does not appear to favour any one of these alternatives over the other.

CP XXI para 4 In circumstances where uniformity across the nation is required for a particular function, the Constitution must allocate the relevant legislative competencies predominantly of wholly to the national legislature (Parliament). This could be done by way of :

- an outright override (where national legislation prevails wholly);
- by way of framework Acts of Parliament (where national legislation prevails predominantly by laying down the parameters of uniformity within which the provincial legislatures may pass detail (filling in) legislation); or
- a guideline for the defining of powers in a list (if such system is employed).

Whichever of these options are employed the Constitutional Assembly will have to apply its mind to the question of which functions will have to be exercised at the national level in order to attain uniformity across the nation.

CP XXI para 5 requires that the functional areas of national economic policies; the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour must be allocated to the national government. As is the case with foreign affairs (CP XXI para 3 discussed above) this can be achieved in different ways :

- these functional areas can be part of the "residual" power of national government;
- they can be listed as functional areas of national government; or
- they can be taken care of by means of an override on the legislative terrain.

This CP does not favour any one of these options. However, the term inter-provincial commerce has been widely used by the courts in the USA to strengthen the position of the national (federal) power over that of the composite states. It is submitted that this CP is couched in terms which are often employed for the purposes of an override.

CP XXI para 6 requires that the Constitution **"shall"** allocate to provincial governments inter alia the following powers either exclusively **or** concurrently with the national government : powers for the purposes of provincial planning and development and the rendering of services; and powers in respect of aspects of government dealing with specific socio-economic needs and the general well-being of the inhabitants of the province. If such powers are allocated **concurrently** this need not only be done by way of listing the functional areas (subject to national or provincial prevalence, as the case may be) but it is also clear that this CP allows for framework legislation in these concurrent areas of jurisdiction : for instance, the national Parliament can lay down parameters or standards or principles within which provincial planning and development as well as the rendering of services must take place. On the whole, it would appear as if this CP deals, in general, with matters which are province-specific, that is, that issues such as provincial planning or development, the rendering of (provincial) services; and the specific socio-economic or cultural needs and general well-being of provincial inhabitants "shall" be allocated either exclusively or concurrently to the provincial governments. This paragraph will also lend weight to the conclusion that where the matters specified therein are not specific to provinces, eg. socio-economic and cultural needs of national importance, these should be allocated to the national government (in terms of CP XXI para 2). In our view this CP merely states this as a general requirement and does not require that all matters which are either province-specific or, on the other hand, national-specific should be listed. This CP is also valuable in the override-debate. For example, the Constitution may state that provincial laws which deal specifically with the socio-economic or cultural needs of the provincial inhabitants, must prevail over an Act of Parliament in this area of legislation.

CP XXI para 7 contains a general principle which operates in allocating powers to the national and provincial governments. Where mutual co-operation is essential or

desirable or where it is required to guarantee equality of opportunity or access to a government service, the Constitution should allocate such powers **concurrently** to the national and provincial governments. Concurrent powers can be allocated either by way of listing of the functional areas concerned or by way of framework legislation in terms of which both the national and provincial governments exercise power but where the national government lays down the standards or principles and the provincial governments provide the filling in (detail) in those areas where, for instance, as a general rule mutual co-operation is essential or desirable.

CP XXI para 8 requires the Constitution to specify "how" powers which are not specifically allocated to the national government or to the provincial government "shall" be dealt with as **necessary ancillary powers** pertaining to the powers and functions allocated either to the national government or provincial governments. Section 126(2) of the 1993 Constitution provides an illustration of such a provision: "The legislative competence referred to in Subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence". It is submitted that this Principle does not deal with residual powers, but, as section 126(2) of the present Constitution, with powers *ancillary* to such powers as are specifically allocated. The Principle is not concerned with the mechanism of allocation, but seeks to ensure that the constitutional provisions dealing with the allocation of powers will also be understood to allocate the authority to do whatever is peripherally necessary to exercise those competencies effectively.

7. CONSTITUTIONAL PRINCIPLE XXII

"The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces".

In our view, this CP does not address the problem area of residual powers; the listing of powers; or overrides in a meaningful manner. This CP merely introduces a test to curb national powers in general : it shall not overstep the mark and encroach upon the geographical, functional or institutional integrity of the provinces. In our view this CP provides an objective test which could be introduced in the Constitution and thereby allow the courts to determine the limits of the national government power.

8. CONSTITUTIONAL PRINCIPLE XXIII

"In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the national government".

This could be an important principle because it creates a presumption in favour of national legislation whenever there is a dispute between the national government

and the provincial governments with regard to concurrent legislative powers and the court is unable to decide the matter on an interpretation of the Constitution. This CP would accordingly rule out a provision in the Constitution which purports to create a general presumption in favour of provincial legislation.

9. CONSTITUTIONAL PRINCIPLE XXIV

"A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both".

This CP does not have any direct implication for the debate on national and provincial competencies. It also adds nothing to the debate whether local government should be a function of the national or of provincial governments or of both.

10. CONSTITUTIONAL PRINCIPLE XXV

"The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution ...."

This CP deals with fiscal and financial issues and does not relate directly to the debate on national and provincial competencies.

2 C Eglin: Are there any residual/left over powers to be allocated to LGA in the Constitution

Answer: Nothing in CP 24 that LGA fits in one or two spheres. LGA can be dealt with by National/Provincial = parliamentary statute.