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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
28 AUGUST 1995**

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DRAFT REPORT OF THE CONSTITUTIONAL COMMITTEE SUBCOMMITTEE

28 AUGUST 1995

PART I

INDEPENDENT INSTITUTIONS

1 Auditor General

1.1 Correspondence with the Auditor General

It was noted that a letter, contained in the documentation for the meeting, had been received from the Auditor General responding to the draft text.

It was agreed that a meeting would be convened with the Auditor General, the Law Advisers and one or two members of the Panel of Experts, to discuss the Auditor General's views as set out in this letter.

It was agreed that this did not imply that a precedent had been set for consulting with incumbent office bearers.

1.2 Term of office of the Auditor General

It was agreed that the Law Advisers would draft an amendment for the consideration of the Committee, making provision for a single non-renewable term of office for the Auditor General of not less than five years and of not more than 10 years.

2 Appointment, qualifications, tenure and dismissal

2.1 It was noted that there was no consensus on the best appointment mechanism.

It was agreed that the Law Advisers should draft various options for further debate as follows:

- i) The person shall be nominated by a committee broadly representative of the parties in Parliament.

- ii) The person shall be nominated by a committee composed of one representative per party in Parliament.
- iii) The person shall be nominated by a committee composed of at least one representative per party in Parliament.
- iv) The person shall be nominated by an *ad hoc* or portfolio committee of Parliament.

It was noted that there was no consensus on the majority required to approve this appointment in Parliament.

- 2.2 It was noted that procedures for dismissal should conform with appointment procedures.

3 Chapter on independent institutions

It was agreed that this chapter should be redrafted distinguishing between institutions.

It was agreed that the Auditor General, Public Protector, Human Rights Commission and Electoral Commission could be retained in the chapter on independent institutions. The Reserve Bank, Financial and Fiscal Commission and Public Administration Commission would be considered separately.

PART II

NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCIES

1 Professors Basson, Davis, Majola and Venter spoke to the document entitled, ***"First draft text on National and Provincial Legislative and Executive Competencies"***.

1.1 The following typographical errors were noted:

1.1.1 In section 3(1) the words "An Act of" should be deleted.

1.1.2 In section 4(2)(ii) the words "social security" should be replaced with "national security".

1.2 All parties agreed that the draft provided a good starting point from which to work. It was agreed that a second draft would be tabled before the Committee taking the Committee's comments into account.

2 Issues outstanding from the first draft

2.1 It was noted that the second draft should incorporate more of the party submissions and work of the Theme Committee.

2.2 The NP stated that the next draft should incorporate subsidiarity as set out in Constitutional Principle XXI (1) and noted that asymmetry is not dealt with.

2.3 The NP stated that their proposal regarding a structure, other than the Executive, which would transfer competencies to provinces when provinces were in a position to execute them, should be incorporated into the draft.

2.4 It was noted that the competencies of executive authorities need to be included in the draft.

2.5 The ANC stated that it supported the possible insertion of some general principles before section 1. These could include the principle that legislative and executive powers and functions in the Republic shall be exercised by national, provincial and local governments and that the responsibility and accountability for the rendering of services may be delegated to provincial or local governments.

3 Legislative authority of the Republic (section 1)

It was agreed that the words "on any matter" should be placed in brackets for further debate.

4 Legislative authority of provinces (section 2)

4.1 The DP stated that sections 2(2) and 4(5) when read together would impact on residual powers and as they believed that residual powers belonged to the provinces, they would have reservations in this regard.

4.2 The ANC suggested that the Technical Advisers find an alternative to the phrase "functional area" contained in section 2(2).

5 Framework legislation (section 3)

5.1 The DP stated that if framework legislation is in respect of powers that are national powers, there is no need to define framework legislation if there are provisions that powers and functions at national, provincial and local level could include the power to perform functions for other levels of government on a mutually agreed agency or delegation basis. In addition a national law can authorise provincial legislatures to make legislation within conditions set out in law.

5.2 The ANC stated that it was in favour of retaining section 3 as is, as it ensured the orderly development of provincial government by allowing for principles and standards to be laid down in framework legislation.

5.3 The NP stated that the tabling of proposed Schedules would aid progress.

5.4 The Technical Advisers stated that it was necessary to define framework legislation further.

5.5 The NP requested a definition of framework legislation. It was noted that the Theme Committee had dealt with this and definitions were available.

6 Conflict of laws (section 4)

6.1 The ANC suggested that there was a need to distinguish between competencies and conflict of laws.

- 6.2 The ANC raised problems with section 4(4), stating that national Parliament could legislate on those matters contained in Schedule 1, provided the Senate has participated in the enactment.

The field of exclusivity for the provincial legislature would then lie in the areas where national interests are not present, that is any matter where the capital or labour market is not influenced. If it is not one of these national interests the province has exclusive power.

- 6.3 The PAC queried the necessity of retaining Schedule 2.
- 6.4 The DP stated that if framework legislation is linked to the powers of delegation or agency functions, a Schedule is unnecessary as these are powers of the national government.
- 6.5 The DP noted that section 4(2) has reversed the current interim Constitution position. The DP stated that it should be up to the national government to show that it has the right to intervene in a Schedule 1 matter, and not the other way around.
- 6.6 The ANC stated that it supported residuality lying with the national tier of government.
- 6.7 The DP proposed that section 4(2) be amended to read:

In the event of a conflict between an Act of Parliament and 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 and only to the extent that where:

- 6.8 The DP stated that section 4(2)(ii) misinterprets the Constitutional Principles, in that it is necessary for the rendering of services that there is a minimum standard, not that it is necessary for the establishment of minimum standards that services be rendered.
- 6.9 The DP requested a written exposition on the promotion of inter-provincial commerce. It was noted that the Technical Advisers had tabled a document in the Theme Committee which dealt with this in some detail.
- 6.10 The ACDP queried whether the present legislative competencies of the provinces would be undermined by altering what is in the present Schedule 6.

