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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

SECOND DRAFT REPORT ON

HEADING 2 PHASE 1

**NATIONAL AND PROVINCIAL
LEGISLATIVE & EXECUTIVE COMPETENCIES**

Thursday 20 April 1995

Room E249

(14H00)

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3 RELATIONSHIP BETWEEN LEVELS OF GOVERNMENTS

SECOND REPORT TO THE CONSTITUTIONAL COMMITTEE ON HEADING 2 PHASE 1: NATIONAL AND PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES

DISCUSSION ON AREAS OF AGREEMENT AND DISAGREEMENT

A. INTRODUCTION

In dealing with the question of National and Provincial Legislative and Executive Competencies, recourse must be had to the key Constitutional Principles in terms of schedule 4 which govern this area of the Constitution. In particular reference is made to

Principle XVIII (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 than or substantially inferior to those provided for in this Constitution.

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.

Principle XXI(2)

Where 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, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

Principle XXI(5)

The determination of national economic policies, and the power to promote interprovincial 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.

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 legislative powers of the national government.

In short each of the party proposals needs to be evaluated in terms of the applicable Constitutional Principles.

B THE EXISTENCE OF EXCLUSIVE AND CONCURRENT POWERS.

There is agreement amongst all parties that there should be powers allocated to both national and provincial governments.

The PAC and NP suggest that only the powers of the provinces should be listed. Here the PAC takes the view that the powers as listed in schedule 6 should continue. The NP has added certain powers to those of the provinces including agency and delegated functions, forestry, land affairs, publication control, public works and water affairs. In its submissions the ANC has not yet proposed a particular list of powers to be set out for either the national Parliament or the provinces (but appears to endorse the provincial competencies as set out in the present Constitution).

The IFP lists exclusive competency of the national government but also lists areas for framework legislation and general principles of legislation set out in national directives. The DP sets out lists for both parliamentary and provincial legislatures. In short the DP provides a list of exclusive legislative competence for Parliament and for the provincial legislatures. ACDP lists national competencies.

Conclusion

There is agreement about a range of powers which are contained in both the IFP and DP formulations which would by virtue of the logic of the other more extended formulations given by the other parties be common cause insofar as national competence is concerned. The contentious issue relates to:

- a) The extent of the powers given to the provinces per list
- b) Where the residue of power is situated. For the ANC, NP and PAC residual power lies with the national entity. For the IFP and the DP (and the ACDP ?) residual power lies with the provinces.

C FRAMEWORK LEGISLATION

There is agreement amongst the ANC, NP, IFP and DP (the other two parties do not seem to have canvassed this issue) that apart from exclusive and

concurrent competencies there should be framework legislation at national level within which the provinces are entitled to implement the detail within the framework provided by provided by the national legislature. The ANC and DP have left open what matters should be dealt with by framework legislation. The IFP has specified certain issues in para 1.5 points 1 & 2 of their submission. The DP has appeared to have left open the details of legislation.

Conclusion.

There is agreement that framework legislation for provincial powers would be entrusted to national Parliament. The only contentious issue are the subject matter which should be dealt with by framework legislation.

D EXECUTIVE COMPETENCE

Both the ANC and the IFP have recommended that there should be executive (administrative) competence granted to provinces insofar as executed national legislation is concerned. (See para 3.2 of the IFP recommendations and para 25 of the ANC). As the IFP and the NP recommended framework legislation, it appears implicit within their recommendations that certain measures of executive competence along the lines of the IFP and ANC recommendations are supported. The PAC and the ACDP appear to be silent insofar as these issues are concerned.

Conclusion

It would not appear to be a contentious issue that certain executive competencies be given to provinces in circumstances where they might not have legislative competence. The details however of where such competencies should be focused is not clear.

E NATIONAL OVERRIDE

It would appear that each party foresees the possibility of a national override. The ACDP suggests that there is an override of legislation (national and provincial) where a law does not comply with biblical principle. The IFP suggests there is an override in the event that a province fails to deliver essential services so as to jeopardise the health, safety and welfare of citizens in the province. In such circumstances the national government may adopt the required legislative and administrative actions, provided that such actions are consistent with similar actions adopted in other provinces and that shall actions shall be valid and effective only for as long as and insofar as the province concerned has not adopted its own adequate legislative or administrative measures. The IFP is silent as to whether the Bill of Rights overrides legislation in conflict therewith. As the Constitutional Principles are clear about the supremacy of the Constitution (CP II, III & IV) and given that there is injunction that the Constitution shall promote gender and racial equality (see CPIII), it would appear that such an override has been omitted

because it is not contested. The PAC recommends that the override of national legislation takes place in accordance with CPXXI (significant parts of which have been set out above). The NP and the DP have proposed overrides which constitute variations of section 126(3) of the present Constitution. The NP is closer to section 126(3) than is the DP although it purports to narrow the scope of the override by the insertion of three additional sub-clauses set out on page 11 of the party's submission. The DP's draft is narrower than the present section 126(3) in that a number of grounds for the override which presently exist have been deleted. In both cases the presumption is that the provincial legislation trumps an Act of the national Parliament save in certain circumstances. This is also reflected in 126. By contrast, the ANC also proposes an override on grounds which are also not particularly dissimilar from section 126 save that the presumption is that an Act of Parliament shall prevail over law passed by provincial legislature unless certain grounds are met and further that the Senate has consented to such legislation. (See para 9 of the ANC's submission).

Conclusion

There is agreement on the need for an override. In all cases legislation which is incongruent with the Bill of Rights can be rendered unconstitutional and hence has the effect of an override. There is also agreement amongst all the parties save for the ACDP that national legislation can override provincial legislation in certain circumstances. The narrowest ground is set out by the IFP while the major point of contention amongst the DP, PAC, NP and ANC turns on the nature of the presumption upon which grounds a provincial legislature can be overridden. This is a dispute which can perhaps can be resolved by testing the respective formulations against the grounds of the override as set out in CPXXI which after all must constitute a basic yardstick.

F THE SENATE

There is agreement amongst the ANC, NP and DP that the Senate constitutes a body capable of representing provincial interests in national lawmaking. The ANC has submitted that consent of the Senate shall be required for all laws dealing with provincial matters and that the Senate should function as a form of intergovernmental coordination. The DP suggests the Senate should have special powers to protect the interests of provinces and promote cooperation and coordination between national government and the provinces and the provinces themselves. The NP suggests that it is strongly in favour of a second parliamentary chamber to represent provincial interests in the national legislature. The other three parties namely the PAC, IFP and ACDP are silent in this regard.

Conclusion

It would appear that it is not a contentious issue.