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CONSTITUTIONAL ASSEMBLY

16 February 1996

To: Constitutional Committee Sub-Committee Members
From: Hassen Ebrahim
Re: Draft on National and Provincial Legislative Competencies

Please find attached a draft on *National and Provincial legislative Competencies* prepared by the Technical Advisors in the delegation to Germany for consideration at the 19 February 1996 Constitutional Committee Sub-Committee

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THE NEW CONSTITUTION

**DRAFT ON NATIONAL AND PROVINCIAL LEGISLATIVE
COMPETENCIES**

INTRODUCTORY NOTE

This proposal on National and Provincial legislative competencies does not deal with the question of executive competencies as has been suggested elsewhere. The provinces will have exclusive executive competency over the administration of legislation and provincial legislation. They will also have executive competency in respect of matters which, although dealt with in national legislation by way of frameworks introducing uniform standards etc. directed at the provincial administration of Schedule 5 national areas and they will have competency in respect of those duties and functions delegated to them by national legislation.

The proposals contained herein should be read together with the proposal entitled Intergovernmental Co-operation and which specifies the powers of the provinces in regard to national legislation, which powers should be seen as complementing their competencies in regard to provincial legislation.

The different models in Chapter 9 of the Working Draft are all based on an assumption that Schedule 5 will contain an exhaustive list of all the matters in respect of which provinces may make laws, which is unlikely to be the case. In fact, as matters presently stand the Working Draft already provides for three different categories of provincial legislative areas, viz

- (a) Schedule 5 functional areas
- (b) Provincial constitutions and matters that may be included in provincial constitutions.
- (c) Other matters allocated to provinces in specific provisions of the Constitution, for instance in section 129(3), 150(1), 164(1), 169(2), 170, etc..

By addressing only category (a) the Working Draft models fail to resolve crucial questions such as

- the status of categories (b) and (c) legislations, i.e. whether they are areas of exclusive or concurrent provincial competence;
- the application of parliamentary overrides with reference to these categories; and
- the circumvention of parliamentary overrides by including Schedule 5 matters in provincial constitutions.

The attached draft attempts to present a more comprehensive view of the complexities involved. The approach was to add category (c) to the list of provincial functional areas in Schedule 5 but to keep category (b) separate as a possible area of exclusive provincial competence (together with the exclusive competence to execute provincial legislation) in order to comply with CPXIX.

For the rest the bases for the pre-eminence of national legislation is largely taken from the Constitutional Principles save for 3(2)(e). This addition, in line with the discussion on co-operative governance, gives added incentive to government to secure the approval of the National Council of Provinces for national legislation and emphasises the role of the Provinces, by means of the National Council, in resolving the essentially political, not legal, question of the pre-eminence of any national legislative intervention.

It is self evident from the nature of many of the conditions for legislative pre-eminence, that much of this legislation will be in the form of framework legislation to be executed by the provinces. It is accordingly necessary to make provision for executive intervention, with the National Council of Provinces' approval, where a province fails to or refuses to undertake its obligations.

STATUS SUGGESTION FROM THE TECHNICAL ADVISERS TO
THE CONSTITUTIONAL ASSEMBLY DELEGATION TO GERMANY

CHAPTER

NATIONAL AND PROVINCIAL LEGISLATIVE AUTHORITY**Legislative authority of Republic**

1. (1) The legislative authority of the Republic is vested in Parliament and confers on Parliament the power-
 - (a) to amend the Constitution;¹ or
 - (b) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 5² but excluding any exclusive provincial matter.³
- (2) When exercising its legislative authority Parliament is bound only by the Constitution.⁴

¹ Section 155 of the Working Draft gives the impression that the legislative authority conferred on Parliament by this section authorises the passing of ordinary legislation only. This is incorrect as Parliament also derives its power to amend the Constitution from the "legislative authority of the Republic" which this section vests in it. Section 54 of the Working Draft is not the source of Parliament's power to amend the Constitution, but merely prescribes the manner and conditions of its exercise. It is suggested that the wording of the clause be tidied up as proposed above.

² As the words "any matter" may be misinterpreted to relate only to matters within the exclusive competence of Parliament plus those within the parliamentary overrides in clause 3 of this draft, it is necessary to state categorically that Parliament is competent to legislate fully on the matters within the functional areas in Schedule 5 (and not only the parliamentary override part of those functional areas).

³ See clause 2(3) and footnote 9 below.

⁴ Section 155 of the Working Draft conferring on Parliament the power to make laws "in terms of the Constitution" may be understood to mean that Parliament may only do what the Constitution enables it to do, which is not the case. The Constitution is not really an enabling law but an instrument circumscribing the limits of parliamentary power. Within these limits Parliament remains sovereign to legislate as it wishes. It is suggested that the wording proposed above describes Parliament's constitutional position more accurately.

Legislative authority of provinces

2. (1) The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power-
 - (a) to pass a constitution for its province or to amend any constitution passed by it;⁵ or
 - (b) to pass legislation in and for its province with regard to -
 - (i) any matter within the functional areas listed in Schedule 5;⁶ or
 - (ii) any matter outside these functional areas explicitly delegated to it by national legislation.⁷
- (2) When exercising its legislative authority a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution.⁸
- (3) The passing of a provincial constitution and of any amendments thereto is an exclusive provincial matter.⁹
- (4) Legislation passed by a provincial legislature which is reasonably necessary for or incidental to the effective exercise of its power to legislate with regard to matters

⁵ Section 156 of the Working Draft is drafted as if the legislative competences of the provinces are confined to Schedule 5, which, as explained in the Introductory Note, is in fact not the case.

⁶ For purposes of this Draft, category (c) legislation has been added to the Schedule 5 list. (See Introductory Notes and proposed amendment to Schedule 5).

⁷ Matters of state at the different levels are so interrelated that it may be useful to allow Parliament to delegate further legislative powers to the provinces, for instance where there is a need for provincial legislation to complement specific national legislation in the provinces. This is in line with article 71 of the German Basic Law. It must be pointed out that this kind of provincial legislation will be mere subordinate legislation and completely dependent for its validity on the enabling national legislation. Parliament overrides do not come into play here as provincial legislation inconsistent with the enabling national legislation will obviously be *ultra vires*.

⁸ Section 156 of the Working Draft is incomplete in that it does not deal with the passing of laws by a provincial legislature under the regime of a provincial constitution. It is suggested that both the Constitution and the provincial constitution should bind the provincial legislature and that this principle should be stated in the Constitution.

⁹ This clause contemplates vesting the power to pass and amend provincial constitutions exclusively in the provinces. It is suggested that this would satisfy CPXIX which requires both concurrent and exclusive powers for the provinces. This clause must be read with section 154 of the Working Draft which lays down the parameters for provincial constitutions, and also with clause 4 below which regulates the overrides where a provincial constitution and national legislation is in conflict with each other.

within the functional areas listed in Schedule 5, is deemed to fall within those functional areas.¹⁰

Conflicts between national and provincial legislation¹¹

3. (1) In the event of a conflict between national legislation and provincial legislation with regard to a matter within the functional areas listed in Schedule 5 -
- (a) the national legislation prevails over the provincial legislation if the national legislation is necessary for the achievement of an essential national objective and applies uniformly with regard to the country as a whole; and
 - (b) the provincial legislation prevails over the national legislation where paragraph (a) does not apply.
- (2) National legislation must be regarded as necessary for the achievement of an essential national objective if -
- (a) it establishes norms and standards, structural, regulatory or other frameworks or policy directives aimed at achieving uniformity across the nation with regard to a matter which in the interest of the country as a whole requires uniformity; or
 - (b) it provides for the implementation of a national policy regarding -
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of interprovincial commerce, and;
 - (v) the promotion of equality and equal opportunities; or
 - (c) it is aimed at preventing unreasonable action by a province which is prejudicial to another province or the country as a whole; or
 - (d) it co-ordinates a matter that cannot be co-ordinated effectively by legislation enacted by the respective provinces individually and

¹⁰ Reformulation of an agreed position. See section 158 of the Working Draft.
¹¹ This clause is based on the different models in section 159 of the Working Draft. Subclause (1) attempts to lay down the general principle that national legislation which is necessary for the achievement of an essential national objective and applies uniformly with regard to the country as a whole, overrides provincial legislation and that, where this does not apply, provincial legislation overrides national legislation. Subclause (2) sets out the specifics of the application of the general principle.

- (e) in respect of national legislation enacted after the establishment of the National Council of Provinces has been supported by the National Council of Provinces or agreed to in the Mediation Committee¹²

Conflicts between national legislation and provincial constitutions¹³

4. In the event of a conflict between national legislation and a provision of a provincial constitution with regard to -
- (a) a matter where this Constitution specifically requires or contemplates the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;¹⁴
 - (b) a matter within the functional areas listed in Schedule 5, section 3¹⁵ applies as if the affected provision of the provincial constitution were provincial legislation contemplated in that section;¹⁶
 - (c) any other matter, the affected provision of the provincial constitution prevails over the national legislation.¹⁷

¹² See draft on Intergovernmental Co-operation. In practice this will mean that if at least five provinces supported the legislation in the National Chamber or agreed to it in the Mediation Committee, that legislation will always prevail over conflicting provincial legislation provided it is legislation of the kind contemplated in sub-paragraphs a-d. Under the schema the presumption that legislation is necessary for the achievement of an essential national objective provides greater certainty and allows the provinces to determine the 'necessity' for national legislation rather than a process by which the courts determine this political question. The courts will, however, retain the power to determine whether legislation which seeks to rely on this presumption is of the kind contemplated in paragraphs a-d.

At this stage it must be pointed out that a provision like the one suggested in paragraph (e) will only apply to new legislation and will not effect the vast body of existing statutory law.

- ¹³ Conflicts between provincial constitutions and national legislation is a different matter that cannot be resolved by the same rules as applicable to conflicts between national and provincial legislation. It is consequently dealt with separately.
- ¹⁴ This paragraph only applies to national legislation specifically contemplated in the Constitution, for instance in sections 172, 180(1) and 187 of the Working Draft.
- ¹⁵ Of this Draft.
- ¹⁶ This provision is necessary to prevent provinces from using their constitutions as a means to circumvent parliamentary overrides where they would normally apply.
- ¹⁷ This provision must be read against the background that provincial constitutions may not be inconsistent with the Constitution or wander beyond the permissible constitutional limits. If they do the Constitutional Court will not certify them.

SCHEDULE 5

PROVINCIAL FUNCTIONAL AREAS

PART A

Agriculture ¹⁸
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casino, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health Services
Housing
Indigenous Law and customary law
Language policy and the regulation of official languages within a province subject to section 6
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services

PART B

Any matter where a provision of the constitution specifically requires or contemplates the enactment of provincial legislation.¹⁹

¹⁸ No real consideration has been given to this list or whether it should be argued or whether areas are covered elsewhere. However the functional area of Policing has been removed as it appears to be dealt with explicitly outside this framework in Chapter 13 of the Working Draft.

¹⁹ Proposed amendment to add category (c) legislation (see Introductory Note).

