

AFRICAN NATIONAL CONGRESS (ANC)

THE HOMOGENEITY CLAUSE AND PROVINCIAL CONSTITUTIONS

DRAFTING CONSIDERATIONS

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INTRODUCTION

In the meeting of the Constitutional Committee on 19 October 1995, the ANC motioned that clause 111 of the Refined Working Draft should be redrafted in the sense of a more fully realised homogeneity clause. (Section 160(3) of the interim Constitution is a homogeneity clause in principle.) This memorandum explains more detail regarding the proposal.

SECTION 160, INTERIM CONSTITUTION

Centrifugal and centripetal elements

1. Constitutional Principle XVIII (2) preserves, for purposes of the final Constitution, the competence of a provincial legislature to adopt a constitution for its province, in the sense that this competence shall not be substantially less than or substantially inferior to the provision in Section 160 of the interim Constitution.
2. Section 160(1) of the interim Constitution belongs to the core of the provincial system of South Africa as created in 1994. It entitles a province to pass a constitution for the province. At the same time this not inconsiderable power should be classified as belonging to the centrifugal side of the balance the Interim Constitution desires to strike between the centripetal and centrifugal elements of the provincial system.
3. Whilst the competence to adopt a provincial constitution (Section 160(1) belongs to the centrifugal side of the balance, the main part of Section 160(3) provides to a considerable extent the centripetal balance, although still incomplete. It is meant to make provision for the present interim phase of provincial constitutions under the interim Constitution, and thus refers to the Constitutional Principles which is to bind the interim provincial constitutions. In the final Constitution the Constitutional Principles for provincial constitutions must be reified. As it stands now, the provision is namely that a provincial constitution shall be consistent with:
 - 3.1 the interim Constitution, and
 - 3.2 the Constitutional Principles in Schedule 4.

4. The most important of the sections in the interim Constitution to which provincial constitutions are bound as a centripetal element, is Section 4, which describes the supremacy of the interim Constitution, adding that "any law or act inconsistent with [the interim Constitution] provisions] shall unless otherwise provided expressly or by necessary implication ... be of no force and effect to the extent of the inconsistency." The interim Constitution binds all legislative, executive and judicial organs of the state at all levels of government.
5. On the other hand, the proviso's in Section 160(3) now allow provinces in their provincial constitutions to deviate to a certain extent from the interim Constitution (and thus put another centrifugal element on the table.) Being exceptions to the general rule in Section 160(3) (provincial constitutions to be consistent with the interim Constitution and the Principles), the proviso's are *prima facie* presumed to be interpreted restrictively. Given the weight of the principle of the supremacy of the Constitution in South Africa, it is submitted that this would be the right approach to the interpretation of the proviso's. The question is whether provinces can deviate from the interim Constitution regarding their executive and legislative structures and procedures completely or up to what extent. This is relevant for the final Constitution, because the corresponding homogeneity clause of the final Constitution is to be drafted under the protection of Constitutional Principle XVIII(2).

THE NATURE OF HOMOGENEITY CLAUSES

Apart from the fact that the Republic of South Africa is -

- a. a *democratic state*, and
- b. a *constitutional state*,

it is also -

- c. a *provincial state*.

The intention in the final Constitution should be that the competences should be spread in such a fashion that the Republic has capacities to influence the provinces and the provincial governments have the capacity to influence the Republic, in the last mentioned case especially through the restructured Senate. It is in this context that a certain homogeneity between the Republic and the provinces be put into effect. (If the national state is a republican democracy, it would be unthinkable that a province could be an autocratic monarchy!)

The quality of South Africa as a provincial state developed *de constitutione* late. It is not a normative ("vorverfassungsmässigen") concept in itself. It is not for example a "federal principle" going behind and beyond the Constitution. That is the reason why, *de constitutione ferenda*, there is need to spell out the political unity of South Africa in a homogeneity clause, to give form to the

political unity of South Africa, without diminishing the provinces as entities. Its purpose is to bind the diversity of the provinces into a unity.

A definite measure of homogeneity is needed for the stability of the provincial system and to keep it together. It must balance the centrifugal elements inherent in a provincial system where the provinces can write their own constitutions. The intention is thus that in so far as there does not exist homogeneity, the provinces will have constitutional autonomy. Normally a homogeneity clause rests on basic principles, like republicanism, (social) democracy and constitutionalism.

These and other material principles of the South African state needs to be spelt out in some detail to regulate provincial constitutions. It is not enough to write organisational aspects of provinces in a chapter like the present contents of Chapter 8 of the Refined Working Draft and then add that provinces can make their own constitutions in which they can enact different legislative and executive structures and procedures. The objects of a homogeneity clause is not attained in that way. The chapter on provinces should open with the clauses on provincial constitutions and homogeneity, because that is the basis of the (cooperative) provincial system of South Africa.

The formulation of the competence to enact a provincial constitution should leave no doubt that the principle of the supremacy of the South African Constitution may not be undermined. A constitutional analysis should begin from answering the question what aspects of the national Constitution a province can depart from in their provincial constitution. One has to examine further what is so essential and fundamental for a democratic system guaranteeing human rights and the rule of law, that a deviation would not touch the whole character of the state.

It is clear that a minimum of homogeneity in structures, functions and procedures on all levels of government is needed to preserve the coherence of the state, to enable an effective and peaceful cooperation between the three levels and to strengthen the integration process and the national identity of the citizens. At least the legitimation standards must be unified, while bearing in mind, however, that homogeneity does not mean uniformity (BVerf GE 9, 279: "gewisse Homogenität", nicht Uniformität).

It is therefore universally the case that states which consists of more or less sovereign, autonomous or independent sub-entities (like provinces, states, Länder, republics etc) take care of structural, functional and procedural homogeneity in their constitutions.'

The homogeneity test of provincial constitutions which should be included in Chapter 8 must focus the principles of a democratic state from which no dispensation or deviation in provincial constitutions should be allowed. Some of these can be deducted from the Constitutional Principles of the interim Constitution, but it should at least contain the following:

- a. The need for two branches of provincial government.
- b. The division of powers /the independence of the two branches of provincial government.

- c. Periodical democratic elections of the legislative authority on the basis of a democratic voting system within a system of mainly proportional representation, although an Electoral Act should in the interests of uniformity be a national competence.
- d. The parliamentary responsibility and accountability of the executive council (including the premier).
- e. The acknowledgment of a legitimate opposition.

POSSIBLE FORMULATION OF A HOMOGENEITY CLAUSE

It is proposed provisionally that clause 111 in the Refined Working Draft be relocated to the beginning of Chapter 8, and be worded as follows:

Provincial Constitutions and homogeneity

Adoption and constitutionality

111. (1) A provincial legislature may adopt a constitution by resolution of at least two-thirds of its members.
- (2) A provincial constitution must be consistent with the Constitution and conform to the following principles within the meaning of this Constitution -
- (a) The Republic of South Africa is one sovereign state. Provincial constitutions must promote national unity, and racial and gender equality. Provinces are a level of government of, and are integral and inseparable provinces of the Republic of South Africa.
 - (b) There is a common South African citizenship and the people of a province belong to the South African nation.
 - (c) The Republic of South Africa, its provinces and local governments are founded on respect for human rights. Provincial constitutions must promote the achievement of equality between men and women and people of all races.
 - (d) The provincial and local levels of the Republic of South Africa must comply with the principles of constitutional democracy and the rule of law.
 - (e) In each of the provinces and in all the local government areas of South Africa the people must be represented by a body elected by general, free, equal and secret ballot, but the provisions in the Constitution of the Republic of South Africa with regard to elections, including multi-party democracy, regularity, universal adult suffrage, a common voters' roll and proportional or other representation, apply to all provinces equally and undiminished.

Provision must be made for participation of minority parties in the legislative process of provinces in a manner consistent with democracy.

- (f) Provincial constitutions must provide for the separation of powers between the legislature and the executive in the province, with appropriate checks and balances to ensure accountability, responsiveness and openness.
 - (g) Amendments to provincial constitutions must require special procedures involving special majorities.
 - (h) A province shall maintain relations of good neighbourliness to, and shall assist and support all levels of [the state of/the government of] the Republic of South Africa. It shall cooperate with the national, other provincial and the local levels of the state.
- (3) Save for (2), a provincial constitution may -
- (a) establish legislative and executive structures and internal procedures for the province different from those provided for in this Constitution, and
 - (b) may provide for the institution, role, authority and status of a traditional monarch according to indigenous law in the province.
- (4) A provincial constitution has no force or effect unless the Constitutional Court has certified that all its provisions are consistent with the Constitution.
- (5) A certification in terms of subsection (4) is final, and no court of law has jurisdiction to enquire into the validity of that constitution.
- (6) The Republic of South Africa shall ensure that the exercise of powers under a provincial constitution conforms to the Constitution in general, and the bill of human rights and (2) of this Section specifically.