

AFRICAN NATIONAL CONGRESS

National and Provincial
Legislative and Executive Competences
Submission to Theme Committee 3
Block 2
6 April 1995

General principles

1. The following ideals, which are relevant to the inner consistency of the whole of the final constitution, should be achieved in relation to the provincial system:
 - 1.1 National unity, reconciliation and nation building;
 - 1.2 cost efficient and effective government, capable of redressing the iniquities of the past and the disparities of the present;
 - 1.3 the promotion of maximum participation in democratic and accountable governance at all levels;
 - 1.4 the promotion of governance close to the people and which is responsive to their needs.

Cooperative governance

The final constitution should establish a cooperative system of governance with the following guidelines:

- 2.1 Cooperative and coordinated national and provincial governance should be promoted, while strengthening the role of provinces in national policy and law making.
- 2.2 National and provincial governments should have regard for one another's legitimate interests in the exercise of their powers and functions.
- 2.3 Recognition should be given to legitimate regional aspirations and needs within a context of overall national imperatives.

General matters

3. The constitution should provide for a national and uniform framework for provincial constitutions, which could, however, allow for provincial variations in defined aspects.'
4. There should be democratically elected provincial legislatures, which should have the executive and legislative powers as set out below. From each of these legislatures a provincial executive should be formed. A provincial executive must be accountable to its provincial legislature.
5. The allocation of powers and intergovernmental relations should be based on the principle of coordinated and cooperative governance.
6. The final constitution should make a distinction between the following two aspects of the division of powers:
 - 6.1 The division of legislative powers between national and provincial levels, and
 - 6.2 the division of executive administrative powers between national and provincial levels.

Elements of the provincial system

7. The provincial system should have the following elements:
 - 7.1 A Senate, representative of provinces, which effectively reflects provincial needs and interests at national level, while providing an appropriate forum for intergovernmental coordination."
 - 7.2 Concurrent legislative competences for national Parliament and provincial legislatures.
 - 7.3 Executive and administrative competences at national and provincial levels.
 - 7.4 A Clear framework for determining uncertainties between national and provincial competences.
 - 7.5 The location of residual competences at national level.

National and provincial legislative competences

8. The final constitution should enact concurrent legislative powers for national and provincial government broadly in accordance with the currently existing competences and in compliance with Constitutional Principle XVIII(2) of the Interim Constitution, 1993. The inherent elasticity of concurrent legislative competences should be reflected in the constitution.
9. An Act passed by Parliament shall prevail over a law passed by a Provincial Legislature to the extent of any inconsistency between them, provided that the Senate has consented to such legislation 3 and further provided that:

- 9.1 the law sets minimum or uniform norms or standards across South Africa or provides for equal opportunity or access to government services, or
 - 9.2 the law deals with a matter that affects more than one province or enables the country to act as a single entity or with one voice, or
 - 9.3 the law establishes a national framework for the delivery of services or the management of institutions, or providing a public service or
 - 9.4 the law deals with the protection of the environment, the economic union or the capital/labour market of South Africa, the implementation of national economic policies, or the maintenance of national security, or
 - 9.5 the provincial law prejudices the economy, health, safety of the public or security interests of another province or the country as a whole. 4
10. In respect of any law referred to under §9.1 - 9.3 above, the provinces may pass legislation not inconsistent therewith. 5
 11. Where a provincial law deals with a matter which is specific to the socioeconomic and cultural needs of the inhabitants of that province, it shall prevail over national legislation other than that intended in §9 above. 6
 12. Provinces' legislative activity should also (in addition to its powers to legislate in its concurrent areas of legislative competence) be responsible for working out the detail of the "framework" or the "enabling" legislation of the national government, specifically relating to implementation, and ensuring that regional and sub-regional variations are taken into account. This "framework legislation" should form a separate category of concurrent legislative powers.
 13. The vertical division of competences should not be rigid and divisive. The system must evolve and should have elastic characteristics. Provincial legislation will give way to national legislation, and then only to the extent of any specific inconsistency in the circumstances set out in §9 above. Where those circumstances do not apply, the national legislation should not override provincial legislation. Especially through the category of "framework concurrent legislation" the intention in the final constitution should be to provide elasticity for legislative activity by the provinces without going the cumbersome way of constitutional amendment each time that there is need to enlarge provincial legislative powers.
 14. All residual (unallocated) powers shall be within the exclusive competence of National Government.

Aspects of competence affected by the character of the Senate

15. The final constitution should provide for a Senate, comprised of representatives of the provinces (and possibly representatives of local government level),⁸ which should allow for effective influence and participation of the provinces in national law-making at national level, and which should function as the suitable forum for intergovernmental coordination.
16. Members of the Senate should be appointed and recalled by provincial legislatures and/or provincial executives.
17. The consent of the Senate shall be required for all laws dealing with provincial matters, it may initiate laws regarding provincial matters and it shall have the right to review other legislation.
18. The provinces shall be entitled, primarily through the Senate and its structures or committees, to participate in financial and fiscal matters affecting the provinces, especially in the drafting of the national budget.
19. The intention in the final constitution should be to introduce a framework whereby the judicial determination of the pre-eminence of national legislation is replaced by the requirement that the provinces themselves through the Senate conclusively establish the desirability of the relevant national legislation. ⁹ The courts will still have a role to determine whether the overriding legislation fits the categories set out.

National and provincial executive competences

20. Also in respect of executive or administrative competences the constitution should give expression to the following two guiding principles:
 - 20.1 Bringing government closer to the people, allowing for governance to fit the specific conditions and variations in each province, region or sub-region,
and
 - 20.2 at the same time building and maintaining a single harmonious and prosperous nation and maintaining effective and cost-efficient government.
21. National and provincial government shall both have executive powers in regard to their concurrent competences. Ordinarily such powers should, with the consent of the Senate, be allocated to provincial government and, where appropriate, to local government, even if the relevant legislation was passed at national level.
22. The final constitution should have the basic feature that practical executive functions and administration may increasingly be assigned to elected and accountable provincial

governments as administrative capacity grows, while the weight of legislative activity at the national level of government should be especially concerned with the setting of norms, standards and frameworks.

23. Provincial governments should be the primary agent of administrative/ executive activity regarding matters of provincial interest and purport.
24. Exclusivity of executive functions for provinces should primarily exist in the context of executive implementation under enabling or framework legislation, as approved by the provinces in the Senate, and the implementation of provinces' own legislation.

Executive Authority

25. Provinces shall be allocated the resources and powers to implement or administer its legislation and such national legislation as is delegated or assigned to it. In general, provinces shall be responsible for executing the national legislation set out in §9 above. In this regard:
 - 25.1 Executive powers shall be allocated to the level at which it can be exercised most effectively and efficiently.
 - 25.2 In the event of a province failing or refusing to implement national legislation, the national government may itself implement the legislation or intervene.

Outstanding issues

26. The ANC will make further and more detailed submissions on outstanding issues, amongst which are the following:
 - 26.1 The size of provincial legislatures when weighed against cost and the principle of inclusivity and representativity.
 - 26.2 The manner in which provinces are to be represented in the Senate, and the size of the Senate.
 - 26.3 The administration and functioning of the Senate and its relation with the National Assembly.
 - 26.4 Questions of intergovernmental coordination in regard to executive and administrative matters.

F