

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 3

BLOCK 2: NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCES

INTRODUCTION

Before proceeding to the questions put by the Technical Committee, we wish to emphasise that the matter of national and provincial legislative and executive competences entails some of the most crucial issues to be resolved in the constitutionmaking process. Not only the status, powers and functions of both the provinces and the national government are involved. the relationship between these levels of government and, eventually, the form of the future South African state itself, is at stake. For this reason, we wish to make a responsible, fair and constructive contribution to the deliberations on this aspect of the constitution in the best interests of the whole country and all its regions and people.

We believe that in drafting the constitution, the Constitutional Principles form the legal framework within which we are obliged to operate, and also our guiding light for the direction that we should take. The Constitutional Principles are not only a technical instrument. they breathe the democratic spirit that should guide and sustain us in our task. With regard to the provinces, the Constitutional Principles obviously call for extensive arrangements covering in detail all aspects of the relationship between the different levels of government, but they also call for a strong, viable and entrenched provincial system as an integral part of a stable and democratic dispensation. In our endeavours we should heed the technicalities as well as the underlying spirit of these Principles. Therefore, it is our view that within the framework of the Constitutional Principles, it is incumbent upon us to protect and strengthen the autonomy and position of the provinces.

We are further mindful of the fact that, due to the complex and dynamic nature of modern government and of the relationships between different levels of government, the formal distribution of powers often do not fully and accurately reflect the true relationship between those levels and that we should allow for continuous growth and development in this respect. For the same reason, we should not focus too narrowly on a particular theoretical model, but should work towards the development of a system unique to our own circumstances and needs.

Guided then by the Constitutional Principles pertaining to the provinces and also by those Principles providing for a democratic system based on freedom, equality, accountability, transparency and an entrenched, justiciable constitution, we approached the questions of the Technical Committee.

For the sake of convenience, a summary of the salient viewpoints and proposals emerging from this submission, is as follows:

- (a) We believe in strong and viable provincial government for South Africa and our proposals are directed at protecting and strengthening the position and autonomy of the provinces.
- (b) In South African circumstances, the powers of the provinces should be listed in a schedule to the constitution and residual powers should vest in the national government. In addition, the following should be provided for:
 - (i) In terms of the criteria for the allocation of functions to the provinces set out in Constitutional Principle XXI, we propose that Agency and Delegated Functions, Forestry, Land Affairs, Publication Control, Public Works and Water Affairs be added to the present list. However, we believe that a proper allocation can be accomplished only if all relevant information is available. We propose, therefore, that accurate information should be obtained from the state administration on the progress made with the implementation of the present list of provincial functions before a list of provincial functions is finalised.
 - (ii) Due to the complexities of modern government, a strict separation between the levels of government is impossible and undesirable. Therefore, we propose that Parliament should have concurrent powers with the provinces over its list of functions.
 - (iii) Provincial laws in respect of these matters should, however, prevail over national laws except insofar as national laws comply with certain prescribed criteria. These overrides should be restricted *inter alia* by narrower definition, the principle of subsidiarity and the Constitutional Principle that the national level may not encroach upon the geographical, functional and institutional integrity of the provinces.
- (c) The principle of subsidiarity in terms of which functions should be allocated to the lowest level of government where it can be exercised and performed effectively, should apply to the allocation of functions and the application of the overrides.
 - (d) A *second list of matters* should be identified over which Parliament may only adopt framework legislation, in order to allow the provinces to make detail legislation on those matters not subject to any other overriding powers of the national level, A further submission on matters to be included in such a list will be made at a later stage, but expert advice should be obtained on which matters qualify for such a list. In addition, the state administration should be approached for an input in this regard based on progress to date with the implementation of the present list of provincial functions.
- (e) Regional differences are part of the South African reality and the principle of asymmetry in terms of which differences may exist among the provinces in respect of their structures, powers and functions, should be allowed to develop. Asymmetry can be promoted as follows: (i) Provinces should be allowed to adopt their own constitutions. (ii) Provinces should be able to take up functions according to their different needs and capabilities. In this regard, the transfer of functions to the provinces should be the responsibility of an independent body and not the executive. (iii) Provision should be made for the performance of functions on an agency or delegated basis in order to allow provinces to request other governments to perform particular functions on their behalf (iv) Asymmetry will finally be furthered by the concept of framework legislation which will enable provinces to make detail legislation peculiar to their own circumstances and needs.
- (f) Mechanisms for the promotion and regulation of inter-governmental relations must be provided to enhance interaction and co-operation between the provincial and central levels of government. Detailed proposals in this respect will be made at a later stage.

- (g) Detailed submissions on local government as a provincial function, and the Senate as the body representing provincial interests in national decision-making, will also be made later.

2 THE QUESTIONS

A ALLOCATION OF POWERS

AI Should the Constitution list only the competences of the government at national level? If so, which?

In general, no. *Firstly*, we do not believe there is any compelling reason to deviate from the arrangement contained in the transitional constitution in terms of which only the powers and functions of the provinces are listed. As a matter of fact, if one adopts the principle that residual powers should be vested at the national level (see below), it would be rather illogical to list the competences of the national government and not those of the provincial level. Normally, in other systems, residual powers are vested at the level of which the powers are *not listed*. *Secondly*, Constitutional Principle XVIII(I) provides that both the powers and functions of the national government and the provinces shall be *defined* in the Constitution. Although this could be interpreted to mean that the powers and functions of both levels of government need not actually be *listed* in the Constitution, and that it is still possible under this Principle only to make the necessary arrangements to *determine* the powers and functions of each level of government, we feel that the Principle at least implies that listing national competences without sufficient reference to the provinces would be inconsistent with the Principle.

A2 Should the Constitution list only the competences of government at provincial level?

(a) In general, yes. The same reasons and arguments apply. We see no reason why the present approach in terms of which only provincial competences are listed in a schedule need to be amended.

(b) In our reasoning, in present South African circumstances the sensible corollary to this is that *residual* powers shall vest at the national level

(c) What needs to be done, however, is to look carefully into the present list of provincial functional areas in order to identify according to the criteria contained in Constitutional Principle XXI, (and bearing in mind the limitation imposed by Principle XVIII(2) which prescribes that provincial powers shall not be substantially less than those provided for in the transitional constitution), those matters that rightfully belong at provincial level. In particular, we believe that the principle of subsidiarity referred to in Principle XXI(I) should be applied consistently. In terms of this principle, functions must be allocated at the lowest level where it can be performed effectively.

In addition, the allocation of functions should be done *inter alia* with reference to the progress made to date with the implementation of the transitional constitution and the practical experience of the provinces in this regard since April 1994. We propose that the state administration, and possibly the Commission on Provincial Government, be requested to furnish this information in order for the Theme Committee to form a well-founded opinion on the ideal list of provincial functions.

Meanwhile, in terms of the criteria in Principle XXI, we recommend that the following matters be added to the present list of provincial functions: Agency and Delegated Functions, Forestry, Land Affairs, Publication Control, Public Works, and Water affairs.

(d) The provinces should not have *exclusive* jurisdiction over such a list of functions. As pointed out in the introduction, we believe that the complexities of modern government require a more flexible approach providing for concurrency and cooperation. We therefore see the list of provincial competences as a list of

matters over which there shall be concurrency with the national level. This implies an arrangement with regard to which legislation shall prevail, requiring in turn an exposition of the criteria in this regard - the so-called "overrides" (see below).

Although Constitutional Principle XIX provides for exclusive and concurrent powers for both the national and provincial levels of government, this does not necessarily mean the exclusive allocation of complete functional areas to the provinces. We believe that exclusive powers for the provinces should be arrived at firstly, through the prevalence of provincial laws if national legislation does not comply with the "overrides" and, *secondly*, by the concept of framework legislation which implies that the detail of those matters dealt with by national framework legislation, shall be the exclusive concern of the provinces. (These concepts are discussed in more detail below.)

(e) As at present, the provinces should be *able, firstly*, to make laws that are reasonably necessary for or incidental to the effective exercise of their powers and functions and, *secondly*, to recommend to Parliament the passing of laws on any matter not within their competency.

A3 Should the Constitution list both national and provincial competences?

In view of the comments above, not in principle. Of course, we envisage a list of provincial matters over which the two levels of government shall have concurrent powers, as well as a list of matters over which the national level shall only have the authority to adopt framework legislation. To this extent, the Constitution will contain a list of provincial as well as national competencies.

With regard to *framework legislation*, our proposal is that matters be identified which require only a framework of general principles and/or guidelines that apply throughout the Republic, whereas detail provisions can be left to the provinces to fill in. As a matter of fact, providing for the detail will be the exclusive concern of the provinces in the sense that the national government will only be able to promulgate framework legislation and not to prescribe detail on the grounds, for instance, of effectiveness, maintenance of economic unity, promotion of interprovincial commerce, etc. This will allow the provinces the opportunity to design detail peculiar to their different circumstances and needs, thus giving expression to provincial diversity, without sacrificing national control over norms, standards, etc. We believe there are a number of matters even now in the list of provincial functions, as well as other matters presently under exclusive national jurisdiction, which the national government need not deal with in detail. The matters we have in mind may, therefore, extend to both the residual and concurrent powers. Moreover, some matters in the existing list of provincial functions do not readily present themselves as matters over which national legislation will ever be required for the sake of, for example, the maintenance of economic unity, the protection of the common market, the security of the country, or the implementation of national economic policies. They may, however, require uniform norms and standards. Such matters should then rather form part of a separate list not subject to the whole range of "overrides". We further propose that in order not to impede the freedom of the provinces to act, or to prevent their action altogether, they should be able to proceed in respect of these matters in the absence of national framework legislation. Of course, as soon as such framework legislation is promulgated, their own arrangements must be amended accordingly.

The items to be included in a list of matters subject to national framework legislation need careful consideration and a further submission in this regard will be made at a later stage. However, we believe this to be a highly technical matter and we propose that expert advice be obtained as well on the functions that qualify for such a list. We further propose that the state administration should be approached for an input in this regard based on its experience to date with the implementation of the present list of provincial functions.

The following draft provision on framework legislation is submitted for consideration:

"(I) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule Y.

(2) The national parliament shall be competent to enact only framework legislation which sets out principles and/or guidelines, and which shall be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule Y."

B RELATIONSHIP BETWEEN NATIONAL AND PROVINCIAL GOVERNMENTS

BI Should exclusive and concurrent powers be listed expressly for each level of government?

In principle, no. However, as explained already, we foresee a list of concurrent matters as well as a list of matters subject to national framework legislation only. See below with regard to concurrency and national preemption.

B2 Should the Constitution expressly provide for overriding powers for the national level of government in certain prescribed instances?

Yes. We have already stated that a list of concurrent powers should be provided for. It stands to reason that when one adopts the notion of concurrency, an arrangement in this regard will be necessary. We therefore believe that the Constitution should expressly provide for overriding powers for the national level. However, the prescribed instances in which national legislation shall prevail or, put another way, the criteria with which national legislation has to comply in order to enjoy preference, have to be reconsidered. As they stand in the transitional constitution, we believe they are virtually limitless. The present section 126(3) enables the national level to undermine the integrity and autonomy of the provinces systematically and completely. For this reason, we propose that the overrides be redrafted more narrowly. In addition, balancing criteria such as the subsidiarity principle, which forces the national government to justify its interference in a provincial matter, and Constitutional Principle XXII which prohibits the national government to exercise its powers in a way that encroaches upon the geographical, functional and institutional integrity of the provinces, should be included. We therefore propose the following set of "overrides".

"(I) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter allocated to the provinces, except insofar as -

- (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards for the management or administration of that matter that apply generally throughout the Republic;
- (c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services.,
- (d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the Republic. (2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic. (3) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(4) An Act of Parliament shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.

(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment upon the geographical, functional or institutional integrity of any province.

(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively. "

B3 Should the competences of the provinces be fixed by the Constitution, or should the Constitution allow for an evolutionary process?

We do not believe that these alternatives are mutually exclusive. On the one hand, we need constitutional certainty as to the powers of each level of government. Therefore, the powers of the provinces should be spelled out and entrenched in the constitution. Simultaneously, enough flexibility should be provided to allow for future developments and for differences among the provinces. This creates the opportunity of encouraging *asymmetry* in our provincial system. We believe that regional and provincial differences are a part of the South African reality that should be accommodated in our system. The principle of asymmetry is a particularly suitable vehicle for this purpose.

Asymmetry can be encouraged in the following ways.

(a) The provinces should be allowed to adopt provincial constitutions that may differ from the provisions of the constitution regarding provincial legislative and executive structures and processes (see the present section 160).

(b) The list of provincial functions should, in principle, apply to all provinces, Albeit concurrent, it is a set of original functions entrenched in the constitution and determining the position and status of the provinces. However, the national level and the provinces should also have the power to perform functions for other levels of government or for other provinces on an agency or delegated basis. This would enable a province unable or unwilling to take care of a particular function, to request another province or the national level, to perform that function on its behalf The principle, however, is that it is a provincial function and that it is for a province to decide not to perform it by itself

(c) The provision dealing with the transfer of functions to the provinces in relation to current legislation is also of particular relevance (the present section 235(8)). This provision, *inter alia*, allows for the extension of the powers of a province as it becomes capable of exercising it, implying that at any given time, the powers of provinces may vary. However, the decision whether a province is indeed capable of exercising a particular function effectively should not be in the sole discretion of the national executive, but should be

arrived at independently. We therefore propose that this decision be entrusted to an independent tribunal or other forum. Details in this regard should be worked out.

(d) The concept of framework legislation, which allows provinces to adopt detail legislation peculiar to their own circumstances and needs, will also further the idea of asymmetry. This concept has been discussed above.

B4 Should the Constitution provide for additional inter-governmental mechanisms to enhance co-ordination and to prevent or mediate possible conflicts regarding the exercise of competences, ie what mechanisms should regulate this relationship?

Yes, additional inter-governmental mechanisms should be provided for. In modern states, levels of government cannot operate in separate compartments and extensive cooperation and interaction are imperative. This should be encouraged and promoted by means of formal and informal structures and processes. A further submission in this regard will be made at a later stage.

B4 Should the fields of potential activity of provincial authorities be amended?

We have already indicated that the present list of provincial functional areas should be extended - see above.

C LOCAL GOVERNMENT

CI How, in broad terms, should the Constitution deal with local government as a consideration in the distribution of competences between the national and provincial levels of government.

Local government is a fully-fledged level of government and should be entrenched as such. See in this regard Constitutional Principle XVI. In addition, the Principles prescribe a framework for the structures, powers and functions of local government to be provided for in the constitution (Principle XXIV). Local government should, nonetheless, still fall under the control of the other levels of government and should be one of the functional areas over which provinces have jurisdiction. This arrangement has two implications. *Firstly*, the national and provincial levels will be able to make laws affecting local government but, as presently provided, should not be allowed to compromise the fundamental status, purpose and character of local government (see section 174(4) of the transitional government). *Secondly*, as a functional area of the provinces, they will be able to regulate local government in full. However, the provisions on local government in the constitution will enjoy higher status than any provincial law and the latter must always be consistent with those provisions. Recognition of local government in the supreme constitution has thus changed the traditional discretionary authority of higher levels of government over local government. They are unable to regulate and affect local government at will. This position should be retained.

D MISCELLANEOUS

DI What should the nature and extent of the provinces' national involvement in matters concerning provincial government be? Should there be a second parliamentary chamber

representing the provinces, and if so, how should it be composed? What should the voting mechanisms be for deciding questions of this nature, both where a second parliamentary chamber is instituted and alternatively, in the event of a unicameral Parliament being established?

In principle, we are strongly in favour of a second parliamentary chamber to represent provincial interests in the national legislature. A further submission in this regard will be made at a later stage.