

DRAFT REPORT OF SUB-COMMITTEE 2

MULTI-LATERAL DISCUSSIONS

WAENHUISKRANS, 1-3 APRIL 1996

1. NATIONAL AND PROVINCIAL LEGISLATIVE AUTHORITY

Discussion was based on the document *National and provincial legislative authority*, dated 18 March, and contained in vol 1 of the multi-lateral documentation pack.

It was agreed that the footnotes would in general fall away as this was an old draft.

Section 1: Legislative authority of Republic

The meeting generally agreed to this section. It was generally agreed that where there was reference to "matter" in Sections 1 and 2, it should read "legislative power." It was also agreed that "or" between (a) and (b) in Sections 1 and 2 should read "and".

It was noted, however, that it still had to be decided whether one had to refer to Parliament at all or whether to legislation passed in terms of this Constitution. It was noted that there was no decision as yet whether the National Chamber of Provinces (NCP) should be part of Parliament.

The DP indicated that they may forego their position in footnote 1 depending on whether a solution could be found on other matters, notably the deadlock-breaking mechanism.

Section 2: Legislative authority of the provinces

The meeting agreed to this Section. It was agreed that the meeting would have to consider the provisions of Section 154.

The NP indicated that whatever was decided on framework legislation would affect the schedules, and also Subsection 2(1)(b)(i).

Section 3: Conflict between national and provincial legislation

Clause 3(1)

The meeting agreed to redraft Clauses 3(1)(a)(i) and (ii) by combining them and taking into account the DP's objection to having both "aimed at" and "necessary" in this juxtaposition.

It was agreed that "uniformly in or with regard to" may be tautologous and that "in or" would be deleted.

It was agreed that in redrafting this clause it be taken into account that the question of "essential" had not been resolved.

Clause 3(2)

It was agreed that for the purposes of working towards consensus it would be considered whether in redrafting this could be turned into a rebuttal clause as well.

Clause 3(2)(b)

It was agreed that the three tests in 3(2)(b) remain. However, it was agreed that "structural, regulatory or other frameworks" be replaced with "frameworks," meaning not any framework, but the framework "limiting."

It was agreed not to add "necessary for achieving" here because there was agreement that the courts would not have to look at this clause. It was agreed, however, to replace for this reason "aimed at achieving uniformity..." with "which provide for uniformity..."

Clause 3(c)(v)

It was agreed that to add "necessary " here would cause difficulties. It was agreed to reformulated 3(c)(v) more in line with cp XXI.7.

Clause 3(c)(vi)

It was agreed that the NP would take back to their principles their objection to this clause.

It was agreed that Professors Du Toit and Haysom would have further discussions regarding how to incorporate an NP proposal related to this clause.

Clause 3(3)

It was agreed that this clause related to the "aimed at" part rather than the necessity test and contained a rebuttable presumption that had to be retained, but that this clause could be drafted in a less confusing way, taking into account the DP and NP concerns that it should be consistent with clauses 3(1) and 3(2).

It was agreed that the words in brackets would be deleted and that regarding the underlined part it would be redrafted to stated "at least 5."

Regarding Section 4

This was agreed to

Schedule 5

It was agreed that the list of functional areas would be discussed further amongst the parties. It was agreed that the DP and NP would indicated in writing which are new areas they wish to add to this list. It was agreed that parties would also look other submissions in this regard, particularly that by the Minister of Transport, and that it was not possible nor realistic to have every department comment on this matter.

2. PROVINCIAL CONSTITUTIONS: SECTION 154 OF THE WORKING DRAFT

The meeting considered the formulations contained in the document *Provincial Constitutions* on page 154 of Volume I of the multi-lateral documentation pack.

The meeting generally agreed with the formulations on passing, certification, signing, promulgation and safekeeping of provincial constitutions.

Section 154C: Contents of provincial constitutions

The meeting agreed to this section, and to add "where applicable" to 2(b)

It was also agreed that there would be reference to co-operative governance here.

There was general agreement on the content of these clauses, but it was noted:

The NP proposed the wording "may not be inconsistent with the Constitution" and then the addition of the words "cannot deviate."

The DP had no problem with the fact that a provincial constitution had to be "consistent" with this Constitution, but requested that a different way be found to approach this from a textual point of view.

A question was raised as to whether reference to the Zulu monarch should be included in (3)(a).

3. NATIONAL AND PROVINCIAL EXECUTIVE AUTHORITY

The meeting considered the document entitled *National and provincial executive authority* contained on pp 142-144 in volume I of the multi-lateral documentation pack.

Regarding Section 1

The meeting agreed to suspend this clause as there was general agreement that this clause would be located in the appropriate area of the Working Draft dealing with the National Executive.

However, it was agreed that something was required on what were the limits of national executive authority.

Regarding Section 2

Clause 2(1)(a)

It was agreed that the executive authority of a province vested in the Premier, and it was noted that this had been requested at the meeting with Premiers. It was agreed that the relevant phrase in Section 2(1) should therefore read "of the Premier and the other members of the provincial cabinet."

It was agreed that the question of a mechanism to determine capacity of the provinces on which there was general agreement would be further discussed in a subgroup of committee 2 for finalisation by the drafters, and it was noted in this regard that:

The draft on transitional arrangements already provided for provinces to administer "in its capacity".

The NP had earlier tabled a proposal on this matter.

Clause 2(1)(b)

The meeting agreed to this.

Clause 2(1)(c)

It was agreed to this except for possible technical clarity. It was agreed that the subgroup would also look at this matters to finalisation.

There was a difference amongst advisers whether was clear, in particular whether "assigned" could be replaced with "delegate."

Clause 2(1)(d)

It was agreed that drafters consider replacing the phrase "an Act of Parliament" in both (c) and (d) with "national legislation supported by the National Council of Provinces."

Clause 2(2)

The meeting agreed to this and that it was necessary to include this in the draft.

Clause 2(3)

The meeting agreed to this and it was also agreed that consistency would be ensured with 2(1).

Regarding Section 3

The meeting agreed to this.

Regarding Section 4

This was generally agreed to, but the meeting agreed that the subgroup would look at a DP proposal that there be provision for how intervention by the national would take place such that would allow the administration to continue but would mean it had to comply with directives from national, as well as a proposal by the NP regarding the inclusion of the word "essential". It was agreed that there appeared to be two forms of intervention, first if it was not serious there could be intervention by directives, second, if it was serious there was a need to intervene immediately. It was also agreed that the subgroup would look at whether the draft fully covered the situation where a province fails to or refuses to perform.

4. PRINCIPLES OF CO-OPERATIVE GOVERNMENT

The meeting considered the draft formulations entitled *Principles of co-operative government* on p 2, of the additional documentation *Draft formulations on co-operative government and re-arrangement of national legislature*.

Regarding Section 39A

It was agreed that parties still needed to decide whether "levels" or "spheres" was the appropriate term.

It was also agreed that there would still have to decide whether the term "inseparable" was the appropriate one.

An adviser argued that "inseparable" was a strong and possibly undesirable word.

A member of the Panel of Experts argued that "interdependent" was more appropriate.

The ANC felt that "interdependent" did not convey the right meaning, and stated that what was required was something that provided coherence, and implies mutual support and working together rather than necessarily a "sticking together."

It was agreed that the ideas expressed in constitutional principle XXII should be incorporated here although there was some uncertainty expressed over the meaning of "institutional integrity".

Regarding Section 39B

The meeting agreed generally to this.

It was further agreed that this would give substance to the interpretation of the Constitution as a whole and would have a binding spirit.

It was agreed that a Submission by Mr Meyer be considered further by parties in this regard

General

It was noted that a general question arose whether these principles would make these matters too litigious.

5. NATIONAL COUNCIL OF PROVINCES

The meeting considered the draft formulations entitled *National Council of Provinces* contained on pp 8-12 of the additional documentation pack *Draft formulations on co-operative government and re-arrangement of national legislature*.

It was noted that this draft was based on the detailed agreements that had been agreed to at the CC Sub-committee.

Regarding Section 57: Establishment and composition of National Council

Regarding Section 57(3), it was agreed to "six permanent delegates" and "four special delegates."

It was agreed to note the question of proportionality and that this had bearing on (3).

Regarding Section 58: Permanent delegates

Regarding Section 58(1), the meeting agreed to this.

Regarding Section 58(2), it was agreed that the drafters incorporate the agreement that they need not necessarily be members of the provincial legislature. It was agreed to delete "must be members of the provincial legislature", and "permanent delegates component of the." It was also agreed to include a threshold.

Regarding Section 58(3), it was agreed to delete "full-time."

Regarding Section 58(4), the meeting agreed to this principle, and if there was no "first sitting" of the NCP, the existing will continue to sit.

Regarding Section 58(5), this was agreed to in principle, and that the requirements were the same as for the provincial legislature, except regarding the requirement of residence. It was also agreed that it would have to be looked at more clearly how the provincial constitutions making different structures may impact on this matters.

It was agreed that 5(a) may have to be moved to Section 57 as a qualification.

Regarding 5(b), it was agreed that this be further discussed by parties, and that they would consider reformulation of "has lost the confidence of the provincial legislature and is recalled by the party which nominated that person..."

The meeting agreed to 5(c).

Regarding Section 58(6), the meeting agreed to this.

Regarding Section 58(7), the meeting agreed to this.

Regarding Section 59: Special delegates

It was agreed that parties would look at this Section again. It was agreed to bear in mind the suggestion that reference to Premiers here would give the body the required status. It was agreed that the word "delegates" and a more flexible system avoided the difficulties that parties had with the term "mandate" before. It was agreed to bear in mind Section 60 when discussing further Section 59.

Regarding Section 60: Heads of delegations

This was agreed to.

Regarding Section 61: Sittings of the National Council

The meeting agreed that this would stand over, because if there was agreement that the NCP was part of Parliament, this Section would not be needed.

Regarding Section 62: Chairperson

The meeting agreed to two Deputy Chairpersons, one being permanent and the other being rotating.

It was noted that the DP stated that the person who was rotating was not occupying a permanent position and should not lead to an increase in salary.

It was agreed that this section would further reflect details that had been agreed to amongst parties.

Regarding Section 63: Decisions

Regarding (1)(a), the meeting agreed to the end (a) after the words "head of the delegation."

Regarding (1)(b), the meeting agreed that this would reflect the quorum, and that it should read "provinces" not provincial delegations.

Regarding (1)(c), the meeting agreed to include for the DP this qualification for now, even though in the context of the Constitution this would fall away in refinement later. It was agreed it should read "provinces" and not votes cast."

Regarding Section 64: Cabinet members' participation in National Council

The meeting agreed to this.

Regarding Section 65: Internal autonomy

Regarding Section 65(2), it was agreed that "minority parties" be replaced with "all the provinces."

Regarding Section 66: Privilege

The meeting agreed to this.

Regarding Section 67: Participation by local government

The meeting agreed to this. It was noted that the DP suggested representatives from local government be permanent members. The NP suggested that traditional leaders also be accommodated here, but that they would be willing to wave this should the meeting be prepared to agree that the NCP was part of Parliament.

Regarding Section 67A

It was agreed that "and its committees" be added after "may speak in their provincial legislature."

6. NATIONAL LEGISLATIVE PROCESS

The meeting considered the document on the *National legislative process* on pp 13-18 of the additional document entitled *Co-operative government and rearrangement of national legislature*.

Sub committee 2 met with the sub committee on financial matters over matters of overlapping interest.

Regarding Section 68: All Bills

The meeting agreed that provision be made for the NCP to initiate and introduce a Bill regarding any matter within the functional areas in Schedule 5.

Regarding Section 69: Bills amending the Constitution

The meeting agreed that this reflected the agreements.

In addition it was agreed that constitutional principle XVIII.5 required that provision be made for obtaining the views of all the provinces was required in respect of certain matters and that this should be catered for, although it was noted that Sections 66 and 69 complied generally with constitutional principle XVIII.

It was also agreed that "provincial delegations" be rephrased to read "provinces."

Section 70: Bills within the national government's exclusive legislative power

Regarding the question when a bill falls within the national government's exclusive power, it was generally agreed that a clear differentiation should be made.

Regarding Section 70 and 71, it was agreed that it seemed easier to use schedule 5 areas pertaining to both Section. It was agreed that the drafters should find a way to accommodate this. The meeting agreed to the suggestion by the drafters that Section 70 could be drafted to incorporate the phrase "a Bill falling outside the functional areas listed in Schedule 5..."

Regarding (1)(b), the meeting agreed to this, except that it was agreed to adjust the draft by replacing "reject the Bill" with "decide not to proceed with the Bill," to cater for where the NA rejects the Bill completely.

Regarding (1)(c), the meeting agreed that there appeared to have been a misunderstanding in drafting this subclause. It was agreed that the 30 days period had been included.

Regarding (1)(d), the meeting agreed to this.

Regarding Section 70(2)(a), the meeting agreed to this.

Regarding Section 70(2)(b), it was agreed that it would be wrong to give a double vote to the presiding officer, and that this aspect would have to be deleted.

Regarding Section 70(2)(c), it was agreed that a quorum was required and that this was correctly reflected, although at a later stage it may be decided to move it elsewhere.

Regarding Section 70(2)(d), it was agreed that a majority of the votes cast was required.

Regarding Section 70(3), it was agreed that this was a drafting question whether this subsection was necessary.

Section 71: Bills within the national government's concurrent legislative power

Regarding (d), it was agreed to remove the brackets, and that the 30 day cool-off period applied there.

Regarding (e), it was agreed that there was a contradiction between (e) and (f). It was agreed that the mediation committee should only be used in the event of a dispute. It was agreed that this would also cover the situation where there was an emergency to get a Bill passed.

Regarding (h), it was agreed that the word "present", had not been agreed to and should be deleted.

Section 72: Money Bills

Discussion took place with the sub-committee on finance and it was agreed that the sub-committee on finance would finalise the matters raised at the joint meeting. It was also agreed that the sub committee on finance discuss related matters with the persons involved in the NCP.

Section 73: Mediation Committee

The meeting agreed to this, except that the majority in 73(2) should be the "majority of the provinces".

It was agreed that the word "mediation" was indeed appropriate in this regard.

It was agreed that further discussions would take place regarding the NCP's role in appointments

7. LOCAL GOVERNMENT

The meeting considered the document entitled *Local government* and dated 1 April, which was tabled for multi-party discussion.

Regarding Section 163: General objectives

The meeting agreed on this section.

It was agreed that it had still to be decided whether the appropriate terminology was "level" or "sphere."

It was noted that the DP supported the term "sphere."

It was agreed that it had earlier been agreed to add "openness and accountability" and that this had to be inserted in this draft.

Regarding Section 164: Establishment of local government structures

The meeting agreed to this section.

It was noted that it was initially contemplated to include "provincial legislation" in (2), but there was consensus to exclude it, as it could lead to 9 different systems arising for local government.

Regarding Section 165: General duties of municipalities

The meeting agreed to this section, and it was agreed that the drafters would find a way to incorporate the PAC's technical concern that the term "orientate its administration" in (a) may be too vague, and the technical concern regarding the way that the term "mechanisms" in (d) may be interpreted.

Regarding (d), it was agreed that the broad consensus in relevant strategic documents including departmental white papers was to emphasise that community participation was important to develop our democracy.

It was noted that the NP stated a concern that NGO's and community structures may undermine the democratically elected councillors.

Regarding Section 166: Municipal legislative and executive authority;

Regarding Section 167: Conflicts between municipal and other legislation

The meeting agreed that these two sections would be discussed together.

It was agreed that underlying this was the notion that local government was a separate sphere and not merely an administrative arm. It was agreed that this meant it should be given some discretion to develop, but within the parameters of national legislation; one

had to create a balance between national policy and the discretion of local government.

It was also agreed that it was important to avoid a mass of litigation such as that arising in the Western Cape and which now required financial assistance for legal fees. In this regard, it was agreed to explore and find a solution taking into account the possibilities mentioned, including:

The DP's suggestion that more flexibility regarding intrusion be introduced, rather than merely formal intrusion; that there was a need to prove it was necessary, but not in a legalistic way.

The difficulty that the schedule would operate to make almost everything litigious, therefore the suggestion that one should try to think beyond the scope of the schedule.

The drafters' suggestion that it was essentially a choice between "delegated powers" or "original powers."

The German provision quoted: "...

It was agreed that parties would consider the provisions regarding local government finance emanating from the finance sub-committee. It was also noted that a mechanistic approach that with every function money followed could create difficulties.

Section 168: Composition of municipal councils

The meeting agreed that for now the words "municipality/municipal council" would be used to refer to the body until a decision could be made on a more appropriate term, whereas there was agreement on the term "local government" as related to the "sphere."

It was agreed to flag the question whether or how traditional leaders impact on this matter.

Section 168A: Membership

The meeting agreed to this.

Section 168B: Elections

The meeting agreed that the question whether these electoral provisions should at all be included in view of other provisions in the Constitution was a technical matter to be resolved in refinement.

Section 168C: Internal autonomy

The meeting agreed that this matter be brought in line with the national and provincial provisions.

A concern was noted that one should not have 3000 different systems evolving in this regard.

Section 168D: Privilege

The meeting agreed to this in principle.

Section 168E: Promulgation of municipal legislation

The meeting agreed to this in principle.

It was noted that this matter was presently not contained in the relevant schedule.

Section 168F: Organised local government

The meeting agreed to this.

Section 168G: Consultation with local government

The meeting agreed to this.

Section 168H: Other matters

The meeting agreed to this.

Regarding local government financial matters

Sub-committee 2 met with the sub-committee on financial matters.

It was noted that the Constitution would deal with vertical equity but would not provide for the regulation of horizontal equity which would be provided for in legislation. It was noted that local government should be reasonably self-sufficient, except for developmental needs and the needs of poor communities. It was also noted that if the portion of revenue collected by local government were significant, this would be taken into account in the determination of the local government taxes.