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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO : To all members of the Constitutional Assembly

FROM : Sandra Haydon
Theme Committee 3

DATE : 22 February 1995

SUBJECT : POLITICAL PARTY SUBMISSIONS - BLOCK 1

The following Political Party submissions should be appended to the Report on Block 1 which was circulated to members of the Constitutional Assembly on 20 February 1995.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

Enquiries: Mbasu Mxenge Room 9-09 Regis House (Tel 245 031 X 259) and
Sandra Haydon Room 9-08 Regis House (Tel 245 031 x 267)

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

REPORT ON BLOCK 1

**THE NATURE AND STATUS OF THE
PROVINCIAL AND LOCAL SYSTEMS
OF GOVERNMENT**

POLITICAL PARTY SUBMISSIONS

As at the 16 February 1995

CONSTITUTIONAL ASSEMBLY

AFRICAN NATIONAL CONGRESS

POLITICAL PARTY SUBMISSION

BLOCK 1

**NATURE AND STATUS OF THE PROVINCIAL
SYSTEM AND LOCAL GOVERNMENT**

FEB 1995

African National Congress

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OFFICE OF THE SECRETARY GENERAL

MR H. Ebrahim
The Executive Director
Constitutional Assembly
Cape Town

25.01.95

Dear Mr Ebrahim

ANC SUBMISSIONS TO THEME COMMITTEES

We forward herewith preliminary submissions of the ANC to the Theme Committees, in respect of Block One of the adopted CA work programme. We wish to advise that, as these are preliminary submissions, the ANC will be forwarding further submissions in due course.

We trust you find same in order.

Yours Sincerely

A handwritten signature in cursive script, appearing to read 'C. Carolus', is written over a horizontal line.

C. Carolus

DEPUTY SECRETARY GENERAL

THEME COMMITTEE 3

AFRICAN NATIONAL CONGRESS

PRELIMINARY SUBMISSION ON NATURE OF PROVINCIAL SYSTEM AND LOCAL GOVERNMENT

1 INTRODUCTION

This document presents a preliminary outline of the ANC's perspective on the nature of the provincial system and local government which the new constitution should embrace and reflect. It is our understanding that Block 1 of Theme Committee 3 requires that parties present their view and understanding of the nature of the provincial system and local government. This in turn entails an elaboration of general perspectives and principles which will serve as a foundation of the provincial and local government system.

South Africa's peculiar on historical context requires that we take into account a number of specific factors which impact and determine the nature of the provincial and local government system, and we identify central elements of that system which will be the subject of further submissions

We must assert at the outset that the ANC is unequivocally committed to the creation of a non-racial, non-sexist democracy which systematically eradicates the devastation of apartheid and reduces the social inequalities that it bred. We are committed to a society in which national unity, reconstruction and development prevails

2 GENERAL PERSPECTIVE

The ANC's conception of a provincial system for South Africa is based on the following criteria and principles

- | | | |
|----|-----------------------|--|
| a) | DEMOCRACY | which will ensure elected structures of government at all levels, regular elections at least every 5 years, in a common voters roll based on universal suffrage. |
| b) | ACCESSIBILITY | ensuring that people are directly involved in shaping their destinies at every level of government and that government is open and transparent and responsive to people. |
| c) | ACCOUNTABILITY | there must be accountability within government, between different levels of government, and of government to the public. |
| d) | FUNCTIONALITY | requiring that the system is suited to South Africa's needs |

and reality.

- e) **EFFECTIVE & EFFICIENT** a system that works well and is productive and delivers on people's needs.
- f) **PARTICIPATORY ORGANS** government should interact with and respond to the needs and views of civil society organs
- g) **NATIONAL UNITY** must be sustained and enhanced while, at the same time, providing for the division of power between the different levels of government and facilitate nation-building.
- h) **UNIFORMITY** is a vital national objective to pursue in the context of massive disparities and inequalities that prevail in South Africa.
- i) **NATIONAL RECONSTRUCTION & DEVELOPMENT** must be facilitated by the system of provincial government.

3 CONSTITUTIONAL PRINCIPLES: CONSTRAINTS & POSSIBILITIES

The constitutional principles in schedule 4 of the interim constitution are mandatory prescriptions on the constitution-making process - in particular principles XVI to XXIII.

4 ADDITIONAL FACTORS IMPACTING ON PROVINCIAL SYSTEM

The way in which government is structured and the specific objectives it sets for itself inevitably depends on the history of the country and the specific context in which government finds itself

In the case of South Africa a number of additional factors need to be borne in mind in considering the future shape of a provincial and local government system:

- i) the terrible legacy of apartheid: massive inequalities between communities and regions between urban and rural areas; between the racial groups and sexes.
- ii) the undeniable need for redistribution, redirection, reprioritization and reallocation of resources in the quest for equality among all
- iii) deracialisation of our country
- iv) the need to discourage political mobilisation on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for purposes of ethnic domination and intolerance.

In addition the actual lessons, positive and negative, emerging from the implementation of the interim constitution should be taken into account in formulating the new constitution. The experience of establishing and operationalising the present system will be singularly instructive in this regard.

It could be submitted at this stage that our institutional arrangements should be as flexible as possible so as to enable them to grow and adapt themselves in the light of actual experience. The development of our systems should be need-driven rather than ideologically-driven.

5. ELEMENTS OF A PROVINCIAL SYSTEM

The following are some of the main elements which this Theme Committee must address in the course of its work:

- a) Boundaries and number of provinces
- b) Government structures
- c) Powers and functions of levels of government
- d) Inter-governmental co-ordination
- e) Affordability/cost of system
- f) Financial equalisation
- g) Taxation powers of each level
- g) Residual Powers

6. LOCAL GOVERNMENT

Our approach to local government must be understood in the context of the principles and values underlying provincial government.

Local government must be entitled to regulate its own affairs within the context of National Policy. It must have executive powers so as to allow it to function effectively. However, by-laws should be consistent with an applicable Act of Parliament or Provincial Law and the Constitution.

This is the level of government charged with the actual implementation of the RDP to ensure the transformation of society. Hence, the task of local government is to ensure that all residents have equal access, free of any form of discrimination to basic services. Local government shall contribute actively towards the redistribution of resources on the basis of race, class and gender.

Local Government shall be structured according to the democratic principles of accountability, inclusivity, non-racialism, non-sexism, maximum participation, and full representivity.

In order to achieve these goals and plan properly, local government should have guaranteed, transparent, and predictable and equitable sources of revenue.

The delegated functions and duties provided to any local authority should be developmental as

well as simply allowing for service provision.

There shall be regular local government elections in both rural and urban areas. The tenure of office of local government councillors shall not be less than 3 years and not more than 5 years.

Local government in both urban and rural areas shall promote the establishment of structures of civil society who would in turn actively participate in the affairs of local government.

In metropolitan areas, there shall be elected metropolitan governments. Local government structures shall be established wall to wall throughout the country. In non-metropolitan areas, local government shall be structured on a two-tier basis consisting of integrated and elected districts and local councils.

Local government shall play an active role in capacity building and shall ensure education and dissemination of information on the RDP.

7. CONCLUSION

This preliminary submission contains the general values and principles which underline the nature of the Provincial and Local Government system.

A more detailed spelling out of the elements of the system will be provided in the blocks of discussion that are to follow.

CONSTITUTIONAL ASSEMBLY

DEMOCRATIC PARTY

POLITICAL PARTY SUBMISSION

BLOCK 1

**NATURE AND STATUS OF THE PROVINCIAL
SYSTEM AND LOCAL GOVERNMENT**

FEB 1995

Demokratiese Party, 5de Verdieping, Marks-gebou, Parlementstraat, Kaapstad 8001
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PARLEMENT
PARLIAMENT

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Demokratiese Party
Democratic Party

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31 January 1995

**DEMOCRATIC PARTY: FURTHER SUBMISSION TO THEME COMMITTEE 3 ON
"THE NATURE AND STATUS OF THE PROVINCIAL SYSTEM AND LOCAL
GOVERNMENT"**

Set out in accordance with framework agreed by TC3 on 30 January 1995.

1. South Africa's Specific Conditions

South Africa has a diverse and deeply divided society. Any constitution which is going to work successfully must cater for this diversity by devolving executive and legislative power wherever possible. The key challenge is to recognise and cater for divisions which exist and will not disappear in the foreseeable future without exacerbating those divisions.

South Africa also has one of the most unequal societies in the world - in terms of individuals and provinces. Some of these inequalities arose in the normal course of events but many were the result of specific discriminatory policies applied for decades if not centuries. A new constitution must therefore facilitate the removal of these inequalities and neither individuals nor particular provinces should be condemned to live in poverty as a result of historical circumstances.

2. Democratic Principles

The democratic principles of representativity, accountability, responsiveness and openness are best served by government being as close to the people as possible.

3. Provincial/Local Government Principles and Points of Departure

The Democratic Party believes that constitutions and governments should empower individual citizens to take control of their own lives. Only then can an individual exercise the freedom, rights, opportunities and responsibilities of an open and democratic society.

People should be left to get on with their lives and make their own choices with the least possible interference from government at any level.

Individuals, families and communities should be left to do whatever they are capable of doing without any interference. What they are unable to do should be the responsibility of local government, and functions which local government is unable

to perform effectively should be handled by provincial government. Only those functions which cannot be carried out at "lower" levels should be the responsibility of national government.

For these reasons, the Democratic Party attaches great importance to both Provincial and Local Government. It is at these levels in a three-tiered structure of government that government with its accountability can be taken closest to the people, and where the people with the democratic responsibility can be taken closest to government.

Of critical importance to the DP is that the powers and functions of each of the levels of Government must be defined in the constitution in a manner that will allow for cooperation, but not encroachment, between the respective levels. This requires that exclusive powers and independent sources of finance be provided for in the constitution.

4. Elements of the Provincial System

The DP believes that the structures provided for in the 1993 Constitution are appropriate, although they need to be reduced in size and the electoral system changed to incorporate constituencies and proportional representation.

The role of the Senate and its relationship with the provinces needs to be developed and defined.

The fiscal relationship, as already mentioned, is critical. If provincial (and local) governments do not have guaranteed access to tax revenues, without interference from central government, their powers will be almost meaningless and their democratic accountability to their voters a charade.

5. Miscellaneous

Local government is the key to effective development and delivery of services. It has been rather neglected until recently but will hopefully receive the attention it deserves from now onwards.

In this transition phase, it may be necessary to prescribe some structures and procedures in a new constitution which will fall away after a few years and be replaced at provincial and local government level by structures and procedures decided upon by democratically elected bodies at those levels.

DEMOCRATIC PARTY

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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NATIONAL ASSEMBLY
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Ref No

F. 2 JAN 1995

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
ROOM 104

18 January 1995

Dear Mr Ebrahim

Democratic Party: Initial Submission on the New Constitution - January 1995

1. In response to the Constitutional Assemblies' invitation to the public to make initial submissions on the new Constitution, the Democratic Party has pleasure in submitting the following:-
2. The Democratic Party believes that a Constitution that is liberal, democratic and federal is best suited to meet the needs of our people and reflect the realities of our country.
3. Many of the features associated with this form of Constitution are itemised in the Constitution Principles which are binding on the Constitutional Assembly. Others, to a greater or lesser extent, are given effect to in the present interim Constitution.
4. The Democratic Party submits that
 - (i) the Constitution Principles and
 - (ii) the present interim Constitution, shorn of its transitional and interim features,provide a useful starting point for the Constitutional Assembly when it considers and drafts the new Constitutional Text.
5. Against this background the Democratic Party believes that the following priorities should be born in mind when drafting the new Constitutional Text.
 - 5.1 The new Constitution must bring government closer to the people - and the people closer to government. Wherever possible people must be empowered to make decisions on matters directly affecting their lives and their communities.

This can be done by strengthening the Provincial System - allocating more original powers to the Provincial Governments and ensuring their financial and fiscal viability. In addition there must be effective people-driven Local Governments in both the urban and rural areas through which communities can exercise a considerable degree of local autonomy.

- 5.2 The new Constitution must maximise openness and accountability at all levels of government.

This can be done by introducing strong checks on the executive government and on the decisions of bureaucrats, and by introducing direct constituency accountability for elected public representatives. The public must have the right of access to information relating to executive and administrative decisions.

- 5.3 The Bill of Rights in the new Constitution must guarantee to all the people of our country fundamental human rights, civil liberties and equality before the law.

The Bill of Rights must be written in a language that can be understood by and be meaningful to the individual citizens of our country.

- 5.4 If the new Constitution with its Bill of Rights is to provide the legal framework within which our society will function and governance can take place, it is essential that there should be a strong and independent judiciary.

The courts as well as the legal system should be readily accessible to the ordinary citizens of our country.

- 5.5 The new Constitution should reject totally all forms of racial discrimination. It must also provide for the cultural, religious and language diversity that is part of our country's rich heritage.

Each South African, whether acting as in an individual or acting together with others with whom he or she shares a common heritage, must feel comfortable and secure under the new Constitution.

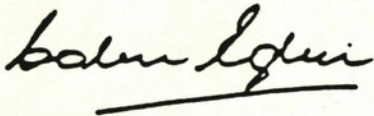
The new Constitution must encourage our people to say "In spite of our diversity, we are all South Africans. Because the Constitution respects our rights, we respect the Constitution."

- 5.6 Representativity and accountability makes it necessary for South Africa to have a range of legislative, executive and judicial structures. However, a developing country like ours must take the cost factor into account.

Accordingly, the government structures under the new Constitution should be as small and as cost effective as possible.

6. The Democratic Party will make further detailed submissions on specific aspects of the new Constitutional text as the work schedule for the various Theme Committee "Blocks" unfolds.

Yours sincerely

A handwritten signature in cursive script, which appears to read "Colin Eglin". The signature is written in dark ink and is underlined with a single horizontal line.

for Colin Eglin MP
Democratic Party

CONSTITUTIONAL ASSEMBLY

VRYHEIDSFRONT

POLITICAL PARTY SUBMISSION

BLOCK 1

**NATURE AND STATUS OF THE PROVINCIAL
SYSTEM AND LOCAL GOVERNMENT**

FEB 1995



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PROPOSALS ON THE NATURE OF THE PROVINCIAL SYSTEM AND LOCAL GOVERNMENT

1. INTRODUCTION

Invariably we all tend to think today about democracy in terms of a hierarchy: The true democratical structures, it is assumed, lie with Parliament at the national level. Provincial parliaments and/or local government structures are seen to be derived from central government and often to be inferior to central government. Many books on Democracy explain the theory around democratic government and then proceed to the application of the theoretical framework on national level without even referring to the provincial or local levels.

We have clearly fallen into the trap of phenomenological analysis - we try to explain the systems of democracy as they exist in recent history and the world we know.

We furthermore tend to think about democracy in terms of power, which is not quite what the underlying classic notions about democracy indicate : serving the public in the pursuit of the common good.

Provincial government and local government even more so are relegated to inferior positions. Some authors openly talk about "subordinate" government when they refer to 2nd and 3rd tier government.

What we also have to say is that this approach has been prevailing in South Africa in the past and not without good reason : centralized authority can best be used to manipulate and control the entire country. It fitted the authoritarian character of the type of political philosophy and practice that was the underlying motive of the minority that attempted to rule for all.

-2-

One has to be very critical particularly about a system that pretend to be democratic. The line between democracy and bureaucracy is a thin one and in the age of ideological preoccupation and propaganda there is a real danger of creating a system in the clothes of democracy which is far removed from the essential concept of classic democracy, which allows for freedom, i.e. rule by the people, for the people. The bigger and more centralized a system of democratic rule becomes, the greater the danger becomes of government being removed so far from the governed that the real advantages of the democratic system get lost and in the process the true nature of the people being involved in the governing of themselves gets lost. The main activity of the people then is reduced to occasional elections.

If one looks at the origins of democracy in the city states of Greece and particularly in the model of Athens, which is often still regarded as representing the best form of popular democratic involvement, the practice was not only direct democracy where the community was directly involved in the act of governance in the city, but even more the local character of democracy was jealously guarded in that not even a comprehensive democratic large structure for Greece (consisting of the existing city states) was acceptable.

It was only when subsequently the great roman empire developed that the temptations of "bigger and better" control undermined the notion of keeping government small became too strong. Even in democracy then the growing elaborate system of representative democracy developed and provided for more extensive control of bigger and bigger entities. During the Renaissance in Italy though and even later when national states in Europe developed the system of representative democracy was adapted in an effort to utilize on a wider scale exactly those ancient principles of government by the people as directly as possible.

In order to preserve these basic notions of democracy however we need always to build into our larger systems specific features that will ensure that the nature of democratic rule not be violated. So we try to retain the fundamentals of democratic belief like:

1. Respect for the individual personality
2. Individual freedom
3. Equality
4. Justice and the rule of law
5. Constitutionalism
6. Systems for the control of state power, etc.

We cherish these things in an effort to retain within our "bigger and better" systems those notions of government that had their origins in the democracy of the city states.

2. PROVINCIAL AND LOCAL GOVERNMENT

And that is why local and provincial government within democratic thinking become important : It is part of the spreading of power and the differentiation of functions (both original and concurrent) that helps us retain the true spirit and practice of democracy. It is a built in mechanism to control power. For the distance between the governing and the governed becomes smaller. Involvement of communities and the individual is enhanced. Governmental services become effectively related to the people. Accountability becomes a practical reality for those who govern to do it, so to say, under the eyes of the people.

The present transitional constitution allows for both provincial and local government but a lot remains to be done to put it in place as true modes of democratic government in its own right. Of course it needs not necessarily be (from the point of view of principle), both Provincial and Local government but the message is clear - getting structures, actions and control systems of government more transparent and directly related to people.

The point we arrive at is that here at the level of the province or the local community true selfgovernment can be realised and need some constitutionally designed autonomy that is to be respected if the democratic ideals is to be incorporated in the different tiers of government. This has very distinct consequences for the nature of government at these levels.

2.1 We believe that at the level of local government the principle of affected interests should be adhered to in the establishment of structures and institutions.

In our situation we suggest a differentiation between rural and urban communities which should be a guiding principle of delimitation and representation. The pattern of local government will be determined by the overriding interests of the community and the underlying idea is maximum efficiency in attending to the needs of the communities.

2.2 We also believe that it is at this levels of democratic government where the tensions of a pluralistic society can best be absorbed in adapted democratic structures, which can serve the important purpose of strengthening the overarching central authority at national level.

It is the system of provincial autonomy that keeps a region like Quebec into the state of Canada, a fact of considerable significance if one thinks of the crucial role which that province plays in national household of Canada.

Switzerland, deeply divided on issues like language, culture and religion has found over centuries on the level of their cantons accommodation of their differences to become perhaps the richest and most peaceful country in the world. And everybody that studies the intensity of the conflicting diversity of that historic country, will agree that the ensuing sense of national unity that prevails today is a miracle.

For Africa these possibilities of accommodating divisions for the sake of national unity is of particular importance. The thrust for domination and commercial exploitation in the Colonial era had no regard for the existing internal realities of communities, cultures and languages. The states we inherited in this way comprise of very divergent structures of authority and cultural value systems. When the colonial powers left, we in Africa did not regroup in any way or reconsidered the boundaries of state that have been superimposed on us.

Now we have to accommodate diversity for the sake of peace, internal tolerance and progress within the existing state.

In South Africa we have through our traumatic history the legacy of a divided pluralist society. We in the Freedom Front have accepted the need to work towards national reconciliation and the strengthening of South Africa as a whole.

However we do not think that this process can be forced by the application of the foreign ideas of liberal democracy on our society. We need to look at a model of transition which will allow for the reality of the divided pluralist society that we live in. This perhaps is the foremost task we in the Freedom Front has taken upon us. We will come up with specific suggestions. But at this stage we want to point out that this crucial aspect of the process of constitutional transition can best be negotiated at the provincial and local levels. At this stage we want to indicate areas of direct relevance to this strategy of ensuring national unity:

- 2.2.1 The recognition of legitimate traditional leaders at provincial and local levels as representing the people from whom they have obtained a mandate.
- 2.2.2 The realization of acceptable forms of selfdetermination for those Afrikaners who have mandated us in the Freedom Front to achieve this ideal in accordance with the agreement between us and the ANC on the 23rd April 1994.
- 2.2.3 The Freedom Front accepts the establishment of democratic structures of government at National, Provincial and Local levels.

2.2.4 We submit that Local and Provincial governments are fully fledged manifestations of democracy and constitutional regulation should rule out undue interference by Central government. The autonomy of both should be guarded and balanced.

2.2.5 Both Provincial and Local government must include community related structures that will address the needs for a pluralistic society. This must be done in order to accommodate cultural/ethnic realities in a way that peace shall prevail and national Unity^b enhanced.
^

For what is at stake is the conscious and willing participation of all communities in the political system in such a way that they will experience the reality of democratic government : i.e. government by the people for the people. They must be respected for what they are and constitutionally coopted for the building of a strong united South Africa that transcends the divisions and the trauma of the past and move on to a common future.

CONSTITUTIONAL ASSEMBLY

INKATHA FREEDOM PARTY

POLITICAL PARTY SUBMISSION

BLOCK 1

**NATURE AND STATUS OF THE PROVINCIAL
SYSTEM AND LOCAL GOVERNMENT**

FEB 1995

"Democracy means freedom to choose"



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

31 January-1995

The Secretariat
Theme Committee 3
Constitutional Assembly

Dear Madam/Sir

REVISED SUBMISSION

Enclosed, please find the IFP submission for the first block, revised in terms of the framework agreed to by the Theme Committee on 30 January.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Peter Smith', written over a horizontal line.

Peter Smith

"Democracy means freedom to choose"



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

THEME COMMITTEE 3 RELATIONS BETWEEN LEVELS OF GOVERNMENT

FIRST REPORT: THE NATURE OF THE PROVINCIAL AND LOCAL SYSTEMS OF GOVERNMENT

29 January 1995

PROVINCIAL GOVERNMENT SYSTEM

A SOUTH AFRICA'S SPECIFIC CONDITIONS

- 1 *SA is a plural society.* Notwithstanding colonial oppression of the indigenous peoples and the subsequent Act of Union in 1910, and notwithstanding the integrative effects of economic development and politics during much of the 20th century, SA is not a homogenous society. While commonality does exist as regards many issues, it is essential to recognise that the key to unity lies in the constitutional recognition of diversity, or pluralism.
- 2 *The people of KwaZulu-Natal in particular, have a distinct political identity in wishing to preserve the autonomy of the Kingdom of KwaZulu-Natal.* Oppressed, exploited and raped by the colonial and apartheid regimes, the people of this province who have always maintained their sovereignty and their unique position within the broader body politik, have reclaimed their sovereignty, desirous that this be recognised constitutionally within a federal SA.
- 3 The people of SA have different views on the future form of state, ranging from unitarianism, through provincialism, to federalism. *To the extent that such views are the dominant view within any particular province, it is vital that this be recognised constitutionally.* It would be in the best interests of the country to recognise the principle of asymmetry rather than to ignore provincial differences in setting out the relationship between first and second tiers of government.
- 4 Within the ambit of oppressor politics, SA has long experienced a tussle between centrist and federal forces. The 1910 Constitutional Convention, for instance, compromised upon a provincial rather than a federal system largely in order to preserve white domination. Whatever limited provincial "autonomy" did exist, was steadily eroded over the decades,

to be finally extinguished in the 1986 abolition of the provincial system. The "unitary/provincial/federal" debate has far outgrown its origins, and is today the key constitutional divide in the country. *With the demise of centrist white domination, federalism offers the best opportunity of securing freedom and democracy for all within a plural society.*

- 5 Simultaneously, the apartheid regime attempted to balkanise the country through "grand apartheid", resulting in two "national" categories (in addition to "white" SA) - the so-called Self Governing Territories and TBVC's, each of which enjoyed different yet substantial levels of autonomy until April 1994. *This historic autonomy, inadequately catered for in the interim constitution, is a central reality of the new SA, and cannot be ignored in the drafting of the new constitution.*
- 6 The vast majority of the people of SA have suffered centuries of colonial and racist oppression. But despite their very recent political liberation, they have inherited a tragic legacy of apartheid injustice which must be eradicated as timeously as possible. The constitution should make provision for this through various mechanisms, including, inter alia, the provision of first, second and third generation rights applied both vertically and horizontally, as well as *the empowerment of provinces, which, as the primary expression of government, will secure the socio-economic advancement of the people of SA and will ameliorate the legacy of the past.* It is totally unacceptable to significant regions of the country that the central government be the prime agency for the attainment of this goal.
- 7 *The implementation of the interim constitution has exacerbated provincial/central tensions.* Central government tardiness in complying fully with the constitution and attempting to nullify the limited provincial autonomy that does exist constitutionally, has resulted in widespread perceptions that the new constitution should more clearly delineate the competencies of the centre versus the provinces, and that it should moreover prevent needless central interference in what are properly considered provincial affairs. Within a system barely months old, provinces during 1994 were compelled to resist the "creeping centralism" of a central government unwilling to recognise the proper constitutional position of the provinces. Provinces recognise that this danger must be dealt with through constitutional means.
- 8 There are vast income and wealth per capita differences between the provinces and equally vast differences in the resources and economic capability of the provinces. If there is any commitment to ameliorating the legacy of the past, it cannot be countenanced that the disparity in relative wealth and income be perpetuated in a laissez faire fashion which will merely cement the economic hegemony and relative wealth of particular provinces. It is therefore essential that constitutional provision be made for *financial equalisation* through a system of federal transfers. But this does not entail the provinces necessarily being entirely dependant upon the central government fiscus for all their financial resources. *Constitutional provision must be made for independent provincial revenue-raising capabilities of the provinces in tandem with federal powers of revenue-raising and fiscal*

transfers so as to attain a balance between legitimate provincial and national needs.

- 9 Granting limited exclusive powers to the centre does not weaken the central government (cf USA, Germany). It frees central government to play a strong coordinating role. It also improves efficiency by clearly focussing accountability and responsibility for specific powers and functions within provinces and the centre respectively.
- 10 For a constitution to last, it must be acceptable to all the people, which can only be the case if provincial differences are recognised.

B DEMOCRATIC PRINCIPLES

- 1 The democratic principles of any given constitution emerge out of the actual provisions and system of checks and balances employed in such constitution.
2. The Constitutional Principles set out in Schedule 4 of the interim Constitution contain a set of broadly phrased constitutional ideas and directives. It would not foster debate or progress in the constitution making process to merely restate such principles.
3. Since it has been agreed that democratic principles are relevant to frame the work of the third Theme Commiree, the IFP first submission on the Character of the State is hereinafter reproduced.

SUPREMACY OF THE CONSTITUTION:

1. The Constitution in its entirety shall be the supreme law of the land. Therefore, the Constitution shall be fully and entirely justiciable by means of a Constitutional Court, and shall be the parameter for the validity and legality of the legislation of Parliament.
2. The constitution shall bind not only all organs of the Republic but shall also apply to all legal relations.
3. In relation to their respective areas of constitutionally recognized autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively. For instance, the constitutional right to health entrenched in the national constitution shall be implemented exclusively by the provincial legislation and administrative action.

SEPARATION OF POWERS (Form of State):

1. There shall separation of powers between national and provincial levels of government.
2. Provinces shall be the primary government of the people and shall be entitled to exercise any type of power and function which can adequately and properly be exercised at provincial level.
3. Only the powers of the national government ought to be listed in the constitution, while all other powers should be left to the Provinces.

4. Provinces shall have full judicial powers in all matters of their competence.
5. National government shall have no overrides and, as a rule, Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interferences among the powers of each level of government, also based on the extension by relevancy or implication of the exclusive powers of the national level of government into the areas of competence of the Provinces, as in theory is the case in the U.S. system (i.e.: interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used in matter which requires concurrence between the national and provincial levels of government, provided that national legislation shall not be so detailed as to actually regulate, or exercise the actual function in the matter concerned.
6. There shall be separation of powers between all levels of government and civil society.
7. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.

WHAT TYPE OF DEMOCRACY:

1. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy [see *infra*].
2. The principle of the autonomy of individuals as well as of economic, social, political and cultural formations should also be entrenched with respect to all activities for which any level of government does not have a compelling justification of public or national interest to regulate, control or directly exercise. *Inter alia*, the foregoing principle recognizes the autonomy of churches, political parties, professional associations, chambers of commerce, universities, arts and culture organization, family structures, traditional communities, economic enterprises, civics, private contractual autonomy in economic and personal matters, et cetera.
3. The principles of (a) transparency, (b) political accountability and (c) civil accountability of governmental structures shall be constitutionally entrenched.

REPRESENTATIVE DEMOCRACY:

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities).
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.
3. The electoral system is a fundamental element characterizing the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task

of implementing such principles, so as to leave sufficient flexibility for future developments. The provincial electoral systems should be within the exclusive competence of provincial constitutions.

PARTICIPATORY DEMOCRACY:

1. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation.
2. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
3. Provision shall be made for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.
4. Provision shall be made for the recognition of the right to petition any government structure.

TRANSPARENT AND ACCOUNTABLE DEMOCRACY

1. The right of access to all government information and private data banks information shall be recognized in the constitution, with customary qualifications and exclusions, subject to judicial review.
2. The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched.
3. Public officials shall be personally responsible for gross negligence and malice.
4. War shall be prohibited as a means to solve international controversies and shall only be allowed to defend the State's sovereignty over its territory.

TYPE OF STATE

1. South Africa should be a social but not a socialist state.
2. Private property and free-market enterprise shall be protected and the direct interference of government in economic matters shall be severely limited¹.
3. The constitution should contain all recognized socio-economic rights along with constitutional imperatives which mandate the legislature to operate to remove social injustice, and promote the social growth of all South Africans.

C PROVINCIAL PRINCIPLES

Type of powers to be allocated

1. All powers of a state are to be allocated between the national and the provincial level of government.

¹. The detailed aspects of this principles will be set out in the third Report to this Theme Committee relating to the Economic Constitution, as per approved work program.

2. The most important powers of the state, the so-called residual powers², often do not necessarily translate into governmental line functions or powers of government.
3. Residual powers should be left with the provinces.

Principle of subsidiarity

1. The Provinces shall be the primary governments of the people and shall be entitled to those powers and functions which can be properly and adequately exercised at provincial level³.
2. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level.

Allocation of powers

1. Only the powers of the central government shall be specifically listed in the constitution, and all the powers not allocated to the central government shall be powers of the Provinces
2. Provinces shall have full judicial powers in all matters of their competence, in addition to fully autonomous legislative and administrative powers.

Relation between powers

1. There shall be separation of powers between national and provincial level of government⁴.
2. National government shall have no overrides.
3. Provinces shall have exclusive powers.
4. Both the national and the provincial levels of government shall enjoy exclusive powers.
5. The relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the powers of each level of government.

². Technically, residual powers all those powers which are not listed in the provisions of a constitution which distribute powers between different level of government. A Parliament has power to enact legislation over more than 300 functional areas, which include matters such as corporate, family, criminal, inheritance, contract, and administrative law.

³. First Rule of Subsidiarity: *The higher level of government shall not do what the lower level government is capable of doing*: this principle requires that powers be allocated to the lowest level of government capable of exercise them, even if such allocation it is not the most efficient solution, as long as it is a "practical" one. Second Rule of Subsidiarity: *No government shall do what the family or civil society is capable of doing*

⁴. The following are generally recognized alternatives to structure the relation of powers: (a) mutually excluding national and provincial exclusive powers with an open set of national interferences on provincial powers; or (b) national framework legislation with either provincial (bi) concurrent powers or (bii) exclusive powers; or (c) national overrides with either provincial (ci) concurrent powers or (cii) exclusive powers, or (d) national general principles of legislation with either provincial (di) concurrent powers or (dii) exclusive powers.

These interferences are based on the extension by relevancy or implication of the exclusive power of the national level of government into the areas of competence of the Provinces, as in theory is the case in the U.S. (i.e. interstate commerce).

6. In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used. Framework legislation shall not enable the national government to act in lieu of the provincial one, but should merely direct the action of the provincial government, leaving sufficient space for implementing action on the side of the provincial legislature.

Fiscal autonomy

1. The IFP believes that provinces shall have original and residual taxing and revenue raising powers on the basis of a parallel system of taxation.

Fiscal equalisation

1. There shall be constitutionally mandated equalization.
2. The constitution may also provide for a predetermined share of nationally collected revenues to be transferred to provinces, for equalization purposes. This function should be guided by an independent Fiscal and Financial Commission.

Entrenchment of provincial autonomy

1. Provincial autonomy shall be indestructible, and no national legislative or executive action shall be valid if it encroaches on provincial autonomy.
2. The Constitutional Court should judge any conflict between provinces and national levels of government.
3. In addition, provinces should have the opportunity of influencing by means of their own judicial system how the national constitutional court interprets the constitutional provisions which define their autonomy.

Role of the Constitutional Court in protecting provincial autonomy

1. Each provincial legislature should elect judges from its own provincial court system to sit on the Constitutional Court as additional judges when the Constitutional Court adjudicates a conflict between the central government and that particular province.
2. When assessing the compatibility of national legislation with provincial constitutions, the Constitutional Court should be bound by the interpretation of the provincial constitution adopted by the court of final instance in the provincial court system.

Asymmetry

1. The national constitution shall provide for the maximum degree of provincial autonomy.
2. Each Province shall be free to opt to exercise lesser powers than the full autonomy to which such Province is entitled, if such Province is not ready, willing or able to exercise any of the legislative or administrative powers concerned.
3. The issue of federalism cannot be settled by virtue of majoritarian rule, no matter how large the majority concerned is. Even if the rest of South Africa wishes to organize itself

as a unitary state, regions such as KwaZulu-Natal which have expressed federal aspirations should be entitled to receive the autonomy they demand and to coexist with the rest of South Africa on the basis of a federal relation.

Provincial autonomy and economic unity

1. The segmentation of government along provincial divides does not imply nor require the segmentation of the economic continuum.
2. The establishment of a federal system modelled after the U.S.A. or Germany has no negative effect on the preservation of national economic unity.

Senate

1. The Senate should not have less legislative authority than that given to the National Assembly.
2. The Senate should represent the Provinces and its members should derive directly from the provinces through indirect elections by the provincial legislatures in consultation with the provincial cabinets.
3. Each province shall be equally represented in the Senate.
4. The Senate should have the specific power to monitor executive functions such as defense and foreign affairs in which Provinces have no competence.

D ELEMENTS OF THE PROVINCIAL SYSTEM

Provincial constitutions

1. Provinces shall be entitled to adopt their own constitutions autonomously (without the preemptive control of any organ of the national government), provided that such constitution shall not exceed the area of autonomy recognized to the provinces and that such limitation be fully reviewable by the constitutional court.
2. Provincial constitutions shall determine any matter related to the organization and operation of the legislative, executive, judicial and administrative branches of the provincial governments.

E MISCELLANEOUS

"Democracy means freedom to choose"



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

THEME COMMITTEE 3 RELATIONS BETWEEN LEVELS OF GOVERNMENT

FIRST REPORT: THE NATURE OF THE PROVINCIAL AND LOCAL SYSTEMS OF GOVERNMENT

LOCAL GOVERNMENT SYSTEM

A SOUTH AFRICA'S SPECIFIC CONDITIONS

- 1 There is a universal demand for the transformation of local government in SA. SA's past experience of apartheid-based local government entailed a massive differentiation between black and white local government in the areas of legitimacy, resources and service delivery capability which must be addressed.
- 2 There is a demand that local government be properly empowered to fulfil its role as the third tier of government, not through the dictates of central government, but by way of constitutional protection of local decision-making within the provinces and as determined by them, subject only to the Schedule 4 constitutional principles.
- 3 The removal of apartheid barriers at local government level should be balanced by provision for maximum cultural pluralism.

B DEMOCRATIC PRINCIPLES

- 1 The democratic principles expressed in the national constitution shall be of guidance to the provincial legislature in legislating upon the structure and functions of local government.
- 2 The following IFP Theme Committee 1 submission is also pertinent:

REPRESENTATIVE DEMOCRACY:

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities).

2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.
3. The electoral system is a fundamental element characterizing the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task of implementing such principles, so as to leave sufficient flexibility for future developments. The provincial electoral systems should be within the exclusive competence of provincial constitutions.

C LOCAL GOVERNMENT PRINCIPLES

1 Constitutional Principle XXIV states:

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or both.

The requirement of this principle would be satisfied by a provision in the national Constitution prescribing the following framework:

The Provincial Constitution shall set out the general principles of the local government system, ensuring its coherence and consistence with the principles underlying the national constitution. The provisions of the constitution of each Province relating to local government shall be implemented by a law of the provincial legislature. Each provincial constitution shall be entitled to make specific provision to provide for each different category of local government as determined by such provincial constitution and provincial implementing legislation with appropriate autonomous fiscal powers and functions.

This approach is consistent with an accurate reading of Constitutional Principle XXIV which prescribes that the "framework" for powers, functions and structures of local government be provided for in the constitution and NOT local government's actual powers, functions and structures, including their "different categories", which is a function of the "structure" of local government.

- 2 Moreover the second sentence of Constitutional Principle XXV creates an exception to the broader and more general rules set out in the preceding Principle, requiring greater detail with respect to local government's fiscal autonomy, requiring that local government is to enjoy its "own fiscal powers". Clearly this reference must be intended as a more specific part of the same "framework" as indicated by the opening words of the second sentence Constitutional Principle XXV.

- 3 In interpreting the relevant Constitutional Principles, it must be noted that Constitutional Principle XVIII (2) states that the Constitutional Assembly does not have the discretion to provide Provinces with less autonomy and fewer powers with respect to local government than that given to Provinces in terms of Chapter 10 of the interim constitution. The "framework" can therefore not be more detailed and specific than the provisions set out in Chapter 10 of the interim Constitution.

D ELEMENTS OF THE SYSTEM OF LOCAL GOVERNMENT

Local government

1. The national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation. This is necessary to allow a system of local government which reflects local administrative needs as well as the plural nature of South African society.

In fact, the local government system will need to reflect a variety of realities ranging from traditional communities to metropolitan areas. This calls for fluidity and suggests the non-advisability of entrenching in the national constitution any given type of local government system.

E MISCELLANEOUS

CONSTITUTIONAL ASSEMBLY

NATIONAL PARTY

POLITICAL PARTY SUBMISSION

BLOCK 1

**NATURE AND STATUS OF THE PROVINCIAL
SYSTEM AND LOCAL GOVERNMENT**

FEB 1995



National Party
Nasionale Party

Federal Council
Federale Raad

THEME COMMITTEE 3

NATIONAL PARTY PROPOSALS ON : THE NATURE OF THE PROVINCIAL SYSTEM
AND LOCAL GOVERNMENT

The following submissions should be seen as a broad framework, setting out principles and not detail.

1. The following points of departure apply:

In order to serve the citizens and in order to prevent a concentration of powers:

- (a) There shall be a vertical separation of powers in a balanced way, between national, provincial and local levels.
- (b) The exercise of state power shall be controllable and within set limits.
- (c) There shall be representative government at all levels viz. national, provincial and local. This principle



25 JAN 1995

TC 3

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National Party
Nasionale Party

Federal Council
Federale Raad

25 January 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposals regarding subject matters pertaining to Theme Committee 3, and included in the Work Schedule, Block 1.

Kind regards

Abrië Hanekom
Secretary

implies proportional representation in all legislative and executive structures at all such levels.

- (d) The vertical separation of power shall be founded on autonomous and original powers for each level of government, and each level's position vis-a-vis the other must be constitutionally balanced.
- (e) At the National level, the Senate shall represent the Provinces and its members shall be directly elected and empowered to act authoritatively on behalf of the Provinces, jointly and severally.
- (f) The nine existing provinces must be retained.
- (g) Each province must be constitutionally equipped to provide for the special needs and capacities of its inhabitants.
- (h) Levels of decision-making will be determined with regard to the quality and effectiveness of the rendering of services in accordance with the principle of subsidiarity.
- (i) The powers and functions of government at provincial level shall include exclusive and concurrent powers as well as the power to perform functions for other

levels of government on an agency or delegation basis.

(j) The allocation of powers to provincial and local level should be conducive to:

- financial viability at each of those levels
- effective public administration
- national unity

- legitimate provincial autonomy
and should acknowledge cultural diversity

(k) The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

(l) The fiscal powers and functions of the national and provincial governments shall be defined in the Constitution.

(m) A framework for local government powers, functions and structures shall be set out in the Constitution and shall furthermore make provision for appropriate fiscal powers and functions for different categories of local government.

- (n) Each level of government shall have a constitutional right to an equitable share of revenue collected nationally.
2. In addition to the above points of departure, the following three aspects also have relevance for the nature of the system:
- (a) An electoral system based on proportional representation, which may possibly include elements of geographical representation, shall apply.
- (b) The viability of corporate self-determination, as a method for furthering the rights of self-determination of linguistic, cultural and religious minorities, shall be explored.
- (c) A provincial legislature shall be entitled to pass a constitution for its province within the parameters set by the Constitutional Principles and the new Constitution.
3. For a variety of reasons it could be expected that provinces will develop own and typical "characters". Such development should be encouraged, but then subject to loyalty to the single sovereign state, which loyalty shall be premised on the enhancement of national reconciliation.

In that sense provincial loyalty should be encouraged as it could and should serve as a springboard for the enhancement of loyalty to the one, sovereign state.

CONSTITUTIONAL ASSEMBLY

PAN AFRICANIST CONGRESS

POLITICAL PARTY SUBMISSION

BLOCK 1

**NATURE AND STATUS OF THE PROVINCIAL
SYSTEM AND LOCAL GOVERNMENT**

FEB 1995



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SUMMARY OF SUBMISSION TO CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

The PAC has always maintained that the interpretation and understanding of the Constitutional Principles must precede any debate on the final Constitution.

The ideal situation would be to return to the 1909, 1961 and 1983 Constitutions which all provided for a full unitary state now that we have democratically elected representatives.

The proponents of a federal state had in the past used the unitary state as a very powerful and undiluted tool to oppress the majority of our country. It is ironic now that the same parties want to take the power away from the people by diluting it into a federal system on the basis of divide and rule. These parties are fully aware of the advantages that a unitary system will have for empowering the majority of our people.

What South Africa (Azania) needs is a strong Central Government to provide the necessary programmes to correct the imbalances of the past and to fully empower the people both politically and economically.

When considering the various Constitutional Principles that will effect the Theme

Committee work the PAC has produced the following summarised proposals:

Constitutional Principle No 1

Refers to a Sovereign State. With such a State there can be devolution of power to the various levels of government. We can have Provincial and Local Government without having independent states. We can never balkanise our country again.

Constitutional Principle 4

States that Constitution is the Supreme law and will bind both National and Provincial Government.

Constitutional Principle 16

States that Government shall be structured at National, Provincial and Local levels. This principle rules out a pure federal state. It refers to Provincial and not federal.

Constitutional Principle 18

The powers and functions of National and Provincial Government shall be as defined in the Constitutional Principle 18 (2). The powers of the Provincial Legislature shall not be less than as stated in the Interim Constitution. Therefore, the existing concurrent powers cannot be removed but only more can be added. Currently the Interim Constitution gives no exclusive powers for Provinces and the PAC support this.

Constitutional Principle 19

The powers and functions of both National and Provincial Government shall include concurrent and exclusive powers. Constitutional Principle 19 should be read subject to Constitutional Principle 21. To maintain a strong central government, as little as possible exclusive powers must be granted to provinces.

Constitutional Principle 21

This principle can provide for either a unitary or a federal state and is halfway between the two (hybrid).

To achieve effectiveness Constitutional Principle 21(1) can be used in both instances for National and Provincial Government.

Constitutional Principle 21(2) Gives the National Government the power to intervene in protection of National interest regardless of exclusive powers that might be given to Provincial Government.

Although Constitutional Principle 19 gives concurrent and exclusive powers to National and Provincial Government, 21 (ii) states that national Government can overrule exclusive powers of provinces.

- 21 (iii) Foreign Affairs remains exclusively for National Government
- 21 (iv) As far as uniformity is required National Government power is exclusive
- 21(v) National Economic Policy.
- 21 (vi) Provincial Planning can be either exclusive or concurrent
- 21 (vii) Mutual cooperation must be concurrent only
- 21 (viii) Where there is disagreement on exclusive or concurrent, National Government will prevail.

22. National Government shall not encroach upon the geographical and functional integrity of Provinces. In practice it means nothing because it is the same as Constitutional Principle 16.

23. Refers to any disputes on concurrent powers between National and provincial Government and the national get preference.

These are some of the identified confines that we must consider in our debates. As the debate unfolds and we get into details we will make further submissions.

ELEMENTS OF PROVINCIAL SYSTEM

The Senate

If you have a provincial system as opposed to a federal system the senate become unnecessary. There is then o need for extra representation for provinces at the level of Central/National Level.

Executive Structures

The Executive Structure must be responsible to the Provincial legislature, in other words the Executive should be elected from amongst the members of the Provincial legislature to ensure a representative and democratic executive. The Executive should not be an enforced coalition between participating political parties but the majority party should exercise executive power.

Legislative Structure

The Legislative structures should be directly elected bodies according to a mix system of proportional and constituency representation.

Fiscal relationship

Our view is that fiscal and financial powers of provinces should be determined by Central Government according to the provinces respective fiscal and financial needs. Provinces must not be granted taxation rights.

Local Government

Local government should constitute grassroot democracy and should not be autonomous but answerable especially to Provincial and National Government. Local Government should not become enclaves but must assist in administration of National and Provincial Policy especially as far as the Reconstruction and Development is concerned.

P de Lille

MP