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TC3

**CONSTITUTIONAL  
ASSEMBLY**

**THEME COMMITTEE 3**

**RELATIONSHIP BETWEEN  
LEVELS OF GOVERNMENT**

**COMMISSION ON  
PROVINCIAL GOVERNMENT**

**COMMENTARY ON  
INTERIM RECOMMENDATIONS  
BY  
PREMIER - WESTERN CAPE**

**RECEIVED AS AT 28 JUNE 1995**

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# COMMISSION ON PROVINCIAL GOVERNMENT

*Established in terms of section 163 of Act 200, 1993*

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Reference: 6/1/4

1995-06-28

The Executive Director  
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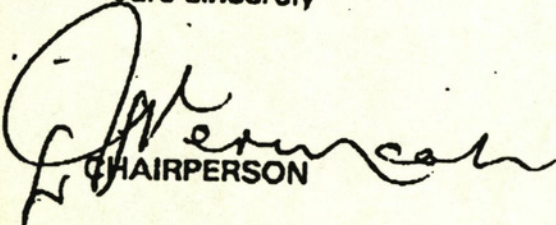
Dear Mr Ebrahim

## COMMENTS OF THE WESTERN CAPE PROVINCE

I enclose the comments of the Western Cape Province on the interim recommendations of the Commission in respect of the documents mentioned hereunder, for consideration by the Constitutional Assembly in terms of section 161 of the interim Constitution.

- Document 1 - Provincial constitutions
- Document 2 - Provincial legislative competence
- Document 3 - Provincial legislatures
- Document 4 - Second Chamber
- Document 5 - Provincial executive authorities
- Document 6 - Provincial staff matters
- Document 7 - Provincial finance and fiscal affairs
- Document 8 - Traditional authorities
- Document 9 - Local government

Yours sincerely

  
CHAIRPERSON

md657

Kantoor van die Premier Wes-Kaap  
Office of the Premier Western Cape  
I-ofisi veNkulumbuso Ntshona Koloni

REFERENCE  
VERWYSING  
ISINOQONISEKO

PM 4/1/5/1

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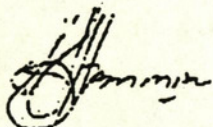
- 9 JUN 1995

The Secretary  
Commission on Provincial Government  
Private Bag X887  
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0001

COMMENTARY ON PRELIMINARY RECOMMENDATIONS OF THE COMMISSION ON  
PROVINCIAL GOVERNMENT TO THE CONSTITUTIONAL ASSEMBLY

By direction of Mr H J Kriel, Premier of the Province of the Western Cape, please find  
attached comments in the above regard.

Yours faithfully



K H HAMMAN  
ADMINISTRATIVE SECRETARY

kh/hrh

PROVINCE OF THE WESTERN CAPE  
COMMENTARY ON PRELIMINARY RECOMMENDATIONS OF  
THE COMMISSION ON PROVINCIAL GOVERNMENT TO THE  
CONSTITUTIONAL ASSEMBLY

## INTRODUCTION.

This document is structured on a similar style than the document of the Commission on Provincial Government titled "*Resource Document Constitutional Recommendations*" and the commentary will thus be directed at the relevant documents relating to specific constitutional issues.

A general comment in respect of the Constitutional Principles needs to be made at the outset since it is relevant to the debate on the new constitution. Reference is made throughout the Commission's Resource Document to different applicable Constitutional Principles since both the new national constitution as well as provincial constitutions must comply to the Constitutional Principles. The question that needs to be addressed is:

- (a) whether constitutional principles should be contained in the new constitution, and if so,
- (b) what principles should be included; and
- (c) whether they should be included as a list of principles as is currently the case, or whether they should be included as part of the body of the constitution, or a combination of the two methods.

It is quite clear from the wording of sec. 74 of the Constitution that the Constitutional Principles cannot be amended or repealed. The Constitutional Principles appear to be cast in stone and will therefore be included in the new Constitution. It form the constitutional guidelines according to which the Constitutional Court will have to interpret the old and the new Constitution.

The current way in which the Constitutional Principles are listed in a schedule to the Constitution will most probably be repeated in the new Constitution since it provides an easy reference and there is no compelling reason to change the format. It is however quite possible that particular principles or parts of it can be included in relevant sections in the Constitution itself as has already happened with parts of Constitutional Principle XXI which are included in sec. 126.

## I COMMENTARY RE DOCUMENT 1 - PROVINCIAL CONSTITUTIONS.

1. The conclusion on p 9 is in general endorsed, but a few submissions as stated below is added thereto.

2. It is submitted that the view expressed in 3.3 that the right of the provincial legislatures to adopt their own constitutions is guaranteed in the Constitutional Principles, subject to certification by the Constitutional Court, is indeed the correct view. Constitutional Principle (CP) XVIII is of specific importance in this regard. Provisions, similar to those contained in CP XVIII.2, should be included in the new Constitution in order to prohibit the national government to reduce the powers and functions of provinces in future.

3. The judiciary is extensively dealt with in Chapter 7 of the current Constitution, where *inter alia* provision is made for provincial and local divisions of the Supreme Court and the procedure for the appointment, removal from office and remuneration of judges of the Supreme Court. The *de facto* situation is that these courts, and the lower courts, relate to provinces, especially due to their geographical jurisdiction, although they form part of a national judicial system. They clearly form the third pillar of the *trias politica* which is provided for in CP VI.

Since the principle of separation of powers between the legislature, executive and judiciary is adhered to on the national level, there seems to be no reason why this should not be followed on the provincial level of government. Sec 160 allows sufficient autonomy for provinces to adopt their own constitutions. Although there is reference to legislative and executive structures and procedures in sec 160 (3), nothing is contained in sec 160 which prohibits a province to deal with the judiciary as a separate leg of provincial power. It is stated in sec 96 (1) that "the judicial authority of the Republic shall vest in the courts established by this Constitution and any other law". "Any other law", it is submitted, could imply a provincial constitution.

4. It is submitted that the chapter relating to the judiciary in the new Constitution is drafted in such a way that provision is made for greater provincial involvement in the appointment and removal from office of judges in a provincial or local division. It should in fact be a matter dealt with on a provincial basis. The possibility of having a judicial service commission for each province should be investigated.

## II COMMENTARY RE DOCUMENT 2 - PROVINCIAL LEGISLATIVE POWERS.

1. The approach in addressing the question of the appropriate legislative competence of provinces is indeed one based on legal

provisions as well as on practical experience as is stated in 1.5. It is however suggested that knowledge should also be gained from the experience of other countries which bear similarities to our own situation. In view of the fact that the new constitutional dispensation is merely one year old, too much reliance should not be placed on the current factual situation in the provinces.

2. The Constitutional Principles form the legal framework for the drafting of the new constitution and as such require extensive arrangements dealing with the relationship between the different levels of government. The issue of provincial legislative powers forms an integral part of this relationship. It is furthermore important that a strong, viable and entrenched system of provincial government as part of the new constitutional order shall, in accordance with the Constitutional Principles, be developed.

3. I agree with the view that in the new Constitution amendments to Schedule 6 will be necessary in the interests of good governance. The list of functional areas in Schedule 6 must be expanded to include:

- Agency and Delegated Functions;
- Finance;
- Forestry;
- Land Affairs;
- Justice;
- Prisons;
- Publication Control;
- Public Works;
- Tertiary Education and
- Water Affairs.

The principle of subsidiarity, in accordance with CP XXI.1, in terms of which functions should be allocated to the lowest level of government where it can be exercised effectively, is of relevance here and should also be contained in the new Constitution.

4. The criticism against the provisions of sec 126 and the responses of the Commission on Provincial Government (CPG) are dealt with below in the same order as it is given in 4.6 of the Resource Document.

(i) It is agreed that exclusive powers have on the face of it not been granted to provinces and in this regard it could indeed be argued that the present legislative powers of provinces are less than those which they are entitled to have in terms of CP XIX. The current Constitution only provide for concurrent powers with a preference for provincial laws in respect of the Schedule 6 functional areas.

The argument that provinces indeed have qualified exclusive competence to legislate on Schedule 6 functional areas is untenable and cannot be

supported. The national Parliament indeed has extensive overriding powers in terms of sec 126 (3) over concurrent matters and it can thus not be argued that a qualified exclusive competence is created for provinces. It is suggested that in the interest of strong and viable provincial government the overrides in sec 126 (3) should be restricted *inter alia* by a narrower definition and by inclusion of CP XXII as a limitation to the overrides.

(ii) The view that the residual powers rest with the national Parliament in terms of sec 37 is endorsed.

(iii) It is indeed true that Schedule 6 does not give a clear demarcation of the legitimate field of legislative powers of provinces, mainly due to the fact that it is a list of concurrent powers. Although cooperation and negotiation could resolve a number of issues of conflict between the different levels of government, it is submitted that it is in the interest of provinces that sec 126 should be redrafted in a more clear and distinct way. The allocation of powers in sec 126 is not the only way to adhere to CP XIX. Other possible ways of allocation of powers, which should include exclusive and concurrent powers to national and provincial levels of government as stated in CP XIX, should be investigated. It is submitted that other ways of demarcation of powers could include the following:

- \* dissecting specific functional areas in a practical way and giving exclusive jurisdiction to the provinces on identified parts of a particular functional area and exclusive jurisdiction to the national level over the balance of that functional area; or

- \* creating a list of functional areas on which the national government shall only be allowed to lay down principles and guidelines in framework legislation and on which the provinces would then enjoy exclusive jurisdiction to enact detail legislation.

There would always be areas of concurrency for which clear provision should be made in accordance with CP XIX.

5. I agree with the view of the CPG that sec 126 (5) and (6) need not be changed in the new Constitution.

6. As stated in 3. above agency and delegation competence should be included in the list of concurrent functional areas in order to empower national and provincial governments to perform functions for other levels of government on an agency or delegation basis. It is important that evolutionary development of provinces should be allowed. Any province should thus have the right to decide whether it can take care of a particular function or whether it would rather request another government to perform that function on an agency or delegation basis.



7. Although it is not referred to by name in the Constitution, sec 235 (8) and CP XIX relate to asymmetrical regionalism. In terms of sec 235 (8) (a) a province can request that powers and functions in relation to current legislation within the ambit of sec 126 be assigned to it. It implies that at any given time the extent to which provinces exercise the powers and functions referred to in Schedule 6 in relation to current legislation could vary from province to province. If one looks at the realities of South Africa, this situation seems to be in accordance with the differences in, amongst other things, the administrative capacity and needs of the 9 provinces.

Currently the decision as to whether a province has got the administrative capacity to perform the functions it has requested, lies with the President in terms of sec 235 (8). It is submitted that provision should be made for a mechanism to allow for a decision on an objective basis whether a province has indeed got the administrative capacity to perform the functions and powers as requested.

### III COMMENTARY RE DOCUMENT 3 - STRUCTURES AND PROCEDURES RELATING TO PROVINCIAL LEGISLATURES.

1. I am in agreement with the view expressed in 3.5.3 and 3.11.3 that the Constitution should allow for an electoral system of proportional representation on a constituency basis. The determination of the exact number of seats need not be covered in the national Constitution, but could be dealt with in a separate act of Parliament and/or in provincial constitutions.
2. It is in the interest of all provinces that the members of provincial legislatures are resident in the province for which they are elected. I thus support the view of the Commission expressed in 3.10.4.
3. As indicated in III.1 above provision should be made for a combined electoral system, containing both proportional representation and constituencies. If such a system would be included in the Constitution, it would impact, amongst other things, on the provisions in respect of vacation of seats. It follows that in such an instance sec 43 (b) should be deleted and sec 44 (1) and (2) be changed accordingly to provide that members representing constituencies should not vacate their seats when they change their party membership.
4. In view of the fact that provision is made in sec. 213 of the Constitution for the establishment of a provincial service commission for a province, it is submitted that the recommendation in 3.15.3 should in fact be changed to provide for consultation with a Provincial Service Commission and not with the Public Service Commission.

The question about differences in standards between provinces when the Public Service Commission is substituted by a Provincial Service Commission in the consultation process is relevant here. It is however submitted that the provision in sec. 213 (1), viz. "subject to norms and standards applying nationally", covers the concern raised by the Commission in 3.15.3. Any Provincial Service Commission must still adhere to national norms and standards in performing its functions in terms of sec. 213.

5. I am in agreement with the rest of the recommendations of the Commission.

#### IV COMMENTARY RE DOCUMENT 4 - A SECOND CHAMBER.

1. The arguments motivating the existence and purpose of a second chamber in 3.1.2 are supported. It must however be stressed that none of the two purposes of a second chamber, viz. (i) an internal control instrument and (ii) to broaden the system of representation, is currently achieved by the senate. It is thus of the utmost importance that a clear indication of the purpose of a second chamber be agreed upon by all the relevant parties before the composition of such a chamber can be finalised.

2. It is submitted that a second chamber should consist of either provincial representatives, elected on another basis as is currently done, or representatives of minorities, be it cultural or linguistic minorities. If the second chamber is composed of provincial representatives the recommendation in 3.2.4 is supported.

Provision should be made in the Constitution for mechanisms to ensure accountability of members of the second chamber to their respective provinces as well as for the recall of members who do not perform satisfactorily.

If the second chamber consist of provincial representatives, a residential requirement as suggested in 3.4 is essential and must be included in the Constitution.

3. The question about vacation of seats and the filling of vacancies in the second chamber can only properly be addressed once agreement has been reached on the composition of such chamber. In general we agree with the recommendations in 3.5 in this regard, if the second chamber is composed the way it is suggested there.

4. One of the functions of a second chamber should be to provide a form of control over government action, especially in the legislative process. In doing just that it is conceivable that a deadlock can arise

between the two houses of parliament. It is thus important to include in the Constitution effective deadlock breaking mechanisms, such as a cooling of period. The alarm bell procedure of Belgium is a useful example which should be taken into consideration.

5. It is agreed that disputes on money matters should preferably be dealt with in the administrative process preceding the legislative process. However, if disputes should arise during the course of the legislative process, effective mechanisms should be in place to resolve such disputes in the shortest possible time so that effective governance is not hampered by unnecessary delays in accepting money bills. The Financial and Fiscal Commission could play a facilitating role to resolve disputes.

6. The recommendations stipulated in 4.4 and 4.5 are supported. CP XVIII.4 and sec 61 and 62 of the Constitution relate to the constitutional position of provinces and should be retained in the new Constitution.

#### V COMMENTARY RE DOCUMENT 5 - PROVINCIAL EXECUTIVE AUTHORITIES.

1. The recommendations in 3.4.4 and 3.4.5 are supported.

The principle of accountability is an important cornerstone of our constitutional system. Relating to the functioning of the provincial executive and legislature, accountability could be enhanced by the effective use of parliamentary committees. Provisions relating to the operation of parliamentary committees need not necessarily be accommodated in full in the national Constitution, but should to some extent be included in provincial constitutions.

2. It is submitted that the provisions of sec 147 of the Constitution should be included in the new Constitution with the addition of the following function to the list of powers and functions of Premiers, viz. the power to award provincial decorations.

3. The number of members of the executive council of a province should not be fixed in the new Constitution, although the current figure of 10 could be used as a guideline. The power should lie with a province to decide on the number of members in its executive council. Provision should also be made in the Constitution for a province to decide on the appointment of deputy-ministers. Guidelines in this regard can be laid down in the Constitution.

Although provincial executive councils should not merely increase in size just for the sake of a larger executive, it is submitted that the current limit of 10 members does not take into account the asymmetry of

provinces. It should be possible for the provinces who take care of more functions to appoint more members in their executive.

It is suggested that the terms "executive council" and "member of the executive council" should be replaced by "provincial cabinet" and "minister".

4. The opinion expressed in 3.7.2, with which I disagree, is not in line with the reasoning in that paragraph. I submit that provision should be made in the Constitution for proportional allocation of membership of provincial cabinets. This is in agreement with the spirit of the current Constitution where national unity, or in the case of provinces, provincial unity is essential. I agree that the provisions of CP XXXII should be extended to provincial executives as recommended.

Provision should be made for the appointment of persons with the required expertise, who are not members of the provincial parliament, as provincial ministers. Such persons shall have seats in such parliament, but no voting rights.

## **VI COMMENTARY RE DOCUMENT 6 - PROVINCIAL STAFF MATTERS.**

### **1. One public service**

I am in agreement with the recommendations in 2.1, 2.2 and 2.3 and submits that provincial staff forms part of the public service in South Africa. The situation can be compared with a large corporation in the private sector who consists of various divisions. Although the staff are employed in a division, e.g. marketing division, they all form part of the staff of the corporation.

### **2. Public Service Commission**

The independence of the Public Service Commission and the Provincial Service Commissions is important and must be ensured in accordance with CP XXIX. The independence of the public service itself is also provided for in CP XXX and the new constitution must reflect this. This is essence relate to the institutions that serve taxpayers and which are funded by taxpayers' money. It is thus imperative that independence is ensured and a high ethical standard is maintained.

The recommendation in 2.7 relating to the role that provinces should play in the determination of norms and standards is supported and it is submitted that a proper structure of consultation between the Public Service Commission and the provinces are set up for the determination and continuous evaluation of the agreed norms and standards.

### 3. Provincial Service Commission.

A provincial staff commission is in principle just as relevant for provincial staff as the national public service commission is for "national" civil servants.

Inherent in our constitutional dispensation is the authority of provinces to legislate on and administer certain functional areas. This necessarily imply that decentralisation of functions in the public sector will take place. This in turn requires an independent provincial service commission that can perform the functions laid down in sec. 213 of the Constitution. The suggestion that the functions can be performed by the Premier's office is not supported. The functions stipulated in 2.11 is a fraction of the total functions of the public service commission as laid down in sec. 3 of the Public Service Act. As functions are devolved to provincial governments, the need for delivering services relating to that functions on national level deminish in favour of the need to deliver that services on a provincial level. The need for a provincial staff commission thus increases.

One very important policy issue, viz. that of affirmative action, is implemented by the provincial service commissions on instruction of the Public Service Commission and it is submitted that this is the most effective way of dealing with it. A provincial service commission, being closer to the people it serve, can more effectively attend to issues like training and empowerment of people.

Management and efficient control over staff matters can be done more effectively in a decentralised manner. A better and more cost-effective service can in this way be delivered to the public, who are the clients and the financiers of the public service.

Provision should be made, as is currently the case in sec. 213 (1) of the Constitution, that a provincial legislature may provide by law for the creation of a provincial service commission. This also entails the power to decide on the composition of such commission and whether it should be a permanent or part-time body.

## VII COMMENTARY RE DOCUMENT 7 - PROVINCIAL FINANCE AND FISCAL AFFAIRS.

1. The recommendation in 3.4.2 is supported on condition that the future constitutional provision explicitly includes:
  - (i) the "national interest" in the percentage scheme; and

(ii) a mechanism to prevent a president from applying the provision in question in forcing provinces to perform in a desired manner.

2. The recommendations contained in 3.5, 3.6 and 3.7 are supported.

3. Sec 187 (1) of the Constitution refers to "any level of government with reference to the appointment of tender boards. It is submitted that the participation of local governments in the impartial provincial tender boards could not have been intended here. The position is however not quite clear and greater clarity should be provided in the new Constitution.

4. The recommendation in 3.9 is supported.

5. With respect to the Auditor-General it is submitted that provision should be made for reporting, not only to Parliament, but also to a provincial parliament. If a report by the Auditor-General deals with a specific province, it is necessary that that report is labelled and discussed in that provincial parliament.

6. The recommendations in 3.11 are supported.

7. The method of selection of members of the FFC and other procedural matters relating to the FFC should be dealt with in an Act of Parliament. Reasonable representation by provinces in the selection process and on the actual Financial and Fiscal Committee should be provided for in such an act.

Kantoor van die Premier Wes-Kaap  
Office of the Premier Western Cape  
I-ofisi yeNkulumbuso Ntshona Koloni

REFERENCE  
VERWYSING  
ISINQOQWISISO PM 4/1/5/1

DATE  
DATUM  
UMHLA 14 June 1995

MR B LATEGAN  
COMMISSION ON PROVINCIAL GOVERNMENT  
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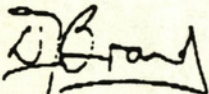
Dear Sir

COMMENTARY ON PRELIMINARY RECOMMENDATIONS OF THE CPG

Your letter 6/1/4 dated 29 May 1995 refers.

Attached hereto please find the commentary of the Premier, mr H J Kriel, on the preliminary recommendations of the Commission on Provincial Government in respect of Traditional Authorities and Local Government.

Yours faithfully



ADVO J BRAND  
CONSTITUTIONAL ADVISER

→ Mr Kriel  
K 2/16

**PROVINCE OF THE WESTERN CAPE**  
**COMMENTARY ON PRELIMINARY RECOMMENDATIONS OF**  
**THE COMMISSION ON PROVINCIAL GOVERNMENT TO THE**  
**CONSTITUTIONAL ASSEMBLY**

**I COMMENTARY RE DOCUMENT 8 - TRADITIONAL AUTHORITIES.**

I don't have any submissions in respect of traditional authorities.

**II COMMENTARY RE DOCUMENT 9 - LOCAL GOVERNMENT**

1. I agree in general with the recommendations of the commission, but would like to add a few comments.
2. The view expressed in 2.8 of your recommendations that "it is appropriate that provincial governments should be the main instrument for ordering and reviewing local government activities within their respective provinces..... and that the power to legislate and execute such laws in respect of local government matters should be allocated to provincial governments" is supported. It is submitted that provision should be made in the Constitution, preferably in the chapter dealing with local government, that provincial legislatures should be the "competent authority" to legislate on local government matters. The national Parliament should only have the power to legislate on local government matters in providing framework legislation as stipulated in Constitutional Principle(CP) XXIV, e.g. the current provisions of Chapter 10 of the Constitution, and to lay down minimum standards of rendering public services.
3. Section 174(3), (4) and (5) reflect on the status and sphere of local government. It is submitted that local government is a separate sphere of government responsible to exercise its powers and regulate its affairs relating to that



sphere of government. In that sense it is autonomous within the limits laid down by law. It is therefore suggested that the wording of sec. 174(3) be retained.

In view of the submissions in 2. above, it is suggested that your recommended sec. 174(4) be altered to read:

*"Parliament or a provincial legislature shall not encroach on the powers, functions and structures of local government except in matters and to the extent provided for by law of a competent authority in terms of subsection (1), and subjected to the provisions of subsection (5)."*

I agree with the recommendations in respect of sec. 174(5).

4. I don't have any further submissions in respect of local government.