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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**TUESDAY
27 FEBRUARY 1996
E249
(10h00)**

DOCUMENTATION

*Entire Document Embargoed Until
10h00 27 February 1996*

CONTENTS

1.	Notice	Page 1
2.	Volkstaat Discussion Document dated 27 February 1996 on Self-determination and the Working Draft of the New Constitution	Pages 2 - 10
3.	Major Urban Areas Association Interim Executive Inputs on Local Government dated 28 September 1995	Pages 11 - 28

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Tuesday, 27 February 1996

TIME: 10h00 - 18h00

VENUE: E249

DRAFT AGENDA

1. Opening
2. Local Government
3. Self-determination
4. Traditional Authorities
4. AOB
5. Closure

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

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VOLKSTAAT COUNCIL



DISCUSSION DOCUMENT ON

**SELF-DETERMINATION AND THE
WORKING DRAFT OF THE
NEW CONSTITUTION,
22 NOVEMBER 1995**

WITH THE

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

27TH FEBRUARY, 1996

1. THE VOLKSTAAT COUNCIL'S MANDATE

- 1.1 In terms of the Accord on Afrikaner Self-determination that was entered into between the Freedom Front, the African National Congress and the South African Government/National Party on 940423, the task of the Volkstaat Council is to investigate and report to the Constitutional Assembly and the Commission on Provincial Government on measures which can give effect to the idea of self-determination, including the concept of a Volkstaat. (Par. 5 of the Accord)
- 1.2 The Parties also agreed that support for the idea of a Volkstaat would be indicated by the electoral support which parties with a specific mandate to pursue the realisation of a Volkstaat, gained in the election of April 27, 1994. (Par. 4 of the Accord)
- 1.3 The Volkstaat Council was established in accordance with Chapter 11A of the Interim Constitution (Act 200 of 1993). Section 184B defines the nature of the Council as follows:

"The Council shall serve as a constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat."

- 1.4 Section 184B (1)(c) gives effect to paragraph 5 of the Accord by setting out the Council's mandate as follows:

"to submit representations and recommendations to the Constitutional Assembly and the Commission on Provincial Government with regard to the possible establishment of a volkstaat and any matter in connection therewith."

- 1.5 The Council's view has been that, in carrying out its mandate, cognisance be taken of the provisions of Constitutional Principle XXXIV and of the Accord.

- 1.6 In the execution of its mandate, the Council has

- * heard evidence from supporters and non-supporters of the idea of a Volkstaat, from experts on self-determination and other rights' issues, and from a number of non-governmental organisations;
- * conducted its own investigations, and
- * commissioned research on a number of issues by professional and academic institutions and researchers.

- 1.7 The purpose of this submission is to make recommendations that will facilitate practical expression of the Accord and Constitutional Principle XXXIV in the new constitution.

2. PERTINENT FINDINGS

- 2.1 Self-determination is recognised as a norm of international law; the UN regards it as a prerequisite for human rights, as a foundation for peace, development and co-operation among states, as the basis on which new states are formed and on which the international community of states functions.

- 2.2 Many writers and other authorities regard self-determination not merely as a norm of international law, but as "jus cogens" (a peremptory norm of general international law): withholding self-determination is forbidden, in the same way that genocide and piracy are forbidden.

- 2.3 Furthermore, self-determination is accepted by the international community as a collective right to which communities, minorities and indigenous and other peoples conforming to certain criteria, are

entitled. It enables them to choose their political destiny, as well as the government under which they wish to live:

- * Salient criteria are those of identity, self-awareness and an historical will and ability to survive as a distinct community.
 - * Forms of self-determination are identified as: (a) voluntary assimilation with the surrounding society; (b) incorporation for purposes of cultural, linguistic, educational or religious expression; (c) regional autonomy; (d) self-government; (e) independent statehood; (f) affiliation or unity with other state states.
- 2.4 State practice, UN agencies and conventions, European, African and other charters and conventions and institutions dealing with human rights and minority protection, accept the fact that rights violations are matters of legitimate international concern and are not the exclusive internal affairs of the respective states. They may be investigated and addressed despite the principle of state sovereignty.
- 2.5 Communities conforming to the criteria referred to in paragraph 2.3 above are entitled to self-determination; policies of assimilation and nation-building are making way for explicit recognition; and constitutional provision by governments for the protection of identity and continued existence, even in respect of communities who live dispersed and intertwined with members of other communities.
- 2.6 However, it is internationally accepted that rights of self-determination and their application cannot be absolute:
- * the rights and interests of other affected parties have to be accommodated;
 - * principles of equality and integrity of existing states and of communities must be adhered to;
 - * accords and other binding agreements must be honoured.

In each case the circumstances have to be investigated, and a suitable form of self-determination and procedures and instruments for its implementation, have to be devised.

- 2.7 Those who oppose the idea of self-determination in a Volkstaat or other territorial form, argue as follows:
- (a) The idea has to be reconciled with a democratic South Africa: one country, one citizenship, one sovereignty, based on principles of equality and non-discrimination.
 - (b) Human rights imply certain collective responses, sufficient to ensure that the identity and continued existence of communities are protected.

- (c) Territorial self-determination will lead to demands for external self-determination and secession. Such demands will undermine state- and nation-building, stimulate other similar demands and jeopardise the viability of the existing state.
- (d) South Africans are so free and equal that communities do not need additional protection over and above those contained in the Interim Constitution and in the Working Draft.
- (e) Separate or additional protection for communities may lead to a revival of unacceptable policies and practices such as apartheid.

2.8 Afrikaners constitute a community entitled to self-determination in terms of the Accord referred to in paragraph 1.1 above and of Constitutional Principle XXXIV and international covenants, UN resolutions and state practice relating to individual and collective rights.

2.9 The points raised in paragraph 2.7 (a) and (e) above, and conditions imposed by the Interim Constitution, for example "proven support", have been addressed in the Accord. Paragraph 3 of the Accord includes *inter alia* the following:

"They (the parties to the Accord) agree that their negotiations shall be guided by the need to be consistent with, and shall be governed by, the requirement to give due consideration to Constitutional Principle XXXIV, and other provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 as amended ..."

Such considerations shall therefore include matters such as:

"3.1.2 the principle of democracy, non-racialism and fundamental rights;

3.1.3 the promotion of peace and national reconciliation."

2.10 As is the case in subordinate communities in other parts of the world, Afrikaners are not of one mind about the form self-determination should take or the government under which they wish to live:

- (a) some are satisfied with human rights and require no further protection;
- (b) some regard "cultural rights" or corporate forms of self-determination as adequate;

- (c) others regard territorial forms of self-determination as essential.
 - (d) Supporters of territorial forms of self-determination fall into two categories:
 - (aa) those who seek empowerment in a province or independent territory in the short term;
 - (bb) those who view self-determination as a process, starting with corporate or other internal autonomy in designated areas that may develop into a province or a state in the long term.
- 2.11 Proponents of a Volkstaat do not consider human rights as sufficient to ensure their continued existence as a people. In common with communities, minorities, or indigenous and other peoples elsewhere, they need special rights and measures to ensure that fundamental rights apply equally to them, that they are not outvoted by majority decisions and that their condition of forming neither a majority, nor a substantial proportion of the population in their area be remedied.
- 2.12 Language, education, land matters, affirmative action and feelings of estrangement are major issues of concern among Afrikaners in all the categories listed above (Par. 2.10). They expect that present conditions will increase in severity and complexity in the future. The solutions that they pursue are not identical. In this respect they react similarly to subordinate communities elsewhere in the world.
- 2.13 Whilst Afrikaners in general subscribe to concepts of patriotism and co-operation, they differ in their evaluation of the feasibility and value of nation-building. They also differ in their assessment of the prospects for stability and sustained development under the present policies of nation-building (forced assimilation) and do not foresee that negotiations will come to mutually acceptable solutions.
- 2.14 The Council has researched almost the entire land area of South Africa in order to identify areas where different forms of territorial self-determination could be achieved. The areas are listed in the Council's First Interim Report. Their main features are as follows:
- (a) Some of them, those in metropolitan areas, have a majority of Afrikaners, whereas those in sparsely populated rural areas have a minority of Afrikaners.
 - (b) It may be possible to increase the Afrikaner component by means of border adjustments, but it does not seem that any significant deviations from the proposals contained in the report will be achieved. There are no new areas recommended for consideration.

- (c) Considerable numbers of non-Afrikaners live in all the areas.
- (d) Research on the history of the areas concerned is in progress.
- (e) Research to establish support for Volkstaat or other territorial solutions is also under way.

3. CONCLUSIONS

3.1 It would seem that:

- (a) Afrikaners of different persuasions want self-determination in one form or another;
- (b) a meaningful proportion support territorial forms;
- (c) striving towards a Volkstaat is likely to continue in the future;
- (d) even if present generations should accept something less, experience world-wide has taught that resumption of the struggle by future generations is to be expected.

3.2 From an Afrikaner perspective there exists a sense of expectation that general provision for self-determination will be made in the new constitution.

3.3 Provision for territorial forms of self-determination for Afrikaners is the subject of bilateral negotiations, the outcome of which is awaited.

3.4 Thus far only Afrikaners have advanced claims for external self-determination. Therefore, prospects that the integrity and viability of the existing South African state will be threatened by an abundance of such claims, seem unlikely.

3.5 Bearing in mind the growing international concern for the rights of national or ethnic, religious or linguistic minorities and indigenous peoples or communities, it would seem that such rights are becoming increasingly internationalised and are being considered for protection under international law. Governments can no longer deny or circumvent claims in this regard.

3.6 Members of communities or minorities or indigenous and other peoples have the right to exercise their human rights and fundamental

¹ Principle VIII of the Helsinki Accord, 1975 and reaffirmed by the Paris Conference, 1990; Par. 19-20 of the African Charter on Human and Peoples' Rights, 1991; Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, UNGA Resolution 47/134, 1992; Par. I: 19-20 and II: 25-32 of the Vienna Declaration, 1993, and others.

freedoms effectively without any discrimination and in full equality before the law. However, beyond the formal equality of treatment, they would need the following kinds of protection:

- (a) material equality in terms of equal opportunities (small minorities in particular are going to need measures of affirmative action);
- (b) equal opportunities should be guaranteed through special measures that conform to the principles of equality and non-discrimination with respect to other citizens, and shall not be considered as acts of discrimination (UN Declaration on the Rights of Persons Belonging to National Minorities, 1992);
- (c) such special protective measures should be provided with respect to language, education, associations and organisations, admission to the public service, political representation, appropriate forms of autonomy;
- (d) arrangements with neighbouring states to ensure that assistance, especially in the cultural sphere, to members of a community settled in those states, shall not be considered interference in the internal affairs of those states.

3.7 Peaceful constitutional efforts to realise Afrikaner self-determination could be facilitated by the parties agreeing that the objective is legitimate and mutually advantageous, and by commitment to settle all issues through negotiation.

4. RECOMMENDATIONS

- 4.1 Reference to self-determination as racism or apartheid cause concern and frustration among many leading Afrikaners. Instead, it should be recognised as a legitimate aim, an historical and world-wide phenomenon, a major international issue of the nineties and the century to come. State machinery should be set up to deal with existing and future issues of self-determination.
- 4.2 As immediate empowerment of any community in its own territory, for instance before the promulgation of a new constitution in May, 1996 seems impractical, it is recommended that constitutional provision be made for communities who qualify and ask for it, to exercise their right of self-determination within the provisions of the Constitution.
- 4.3 In the light of the findings in section 2, particularly paragraph 2.1 above, self-determination should be recognised in the new constitution as a right to which communities, minorities and peoples conforming to certain characteristics, are entitled.

4.4 In general communities should be given recognition as collectivities entitled to protective measures or to some or other form of self-determination.²

4.5 Recognition should be given to the interrelatedness of democracy, self-determination and human rights.

4.6 At present language and education, in particular mother tongue and religious instruction, seem to bind the different categories of Afrikaners together. The vast majority appear to be dissatisfied with the way the government, the SABC and the business sector are handling these matters. According to the Working Draft the provisions in this regard still need to be negotiated.

4.6.1 In view of the above, the Council wishes to emphasise that

- (a) linguistic communities the world over are extremely sensitive about the treatment and status accorded to their languages by their governments;
- (b) communities demanding collective rights want control of their education;
- (c) evidence before the Council has shown that the situation is not different in South Africa;
- (d) perceived language and educational discrimination is an important binding factor among Afrikaners of all persuasions.

4.6.2. The Council recommends that in addition to proposed forms of territorial self-determination, the following issues be agreed to:

- (a) that care should be taken to ensure equal treatment of the different national languages;
- (b) that the provision for private education proposed in the Working Draft should include subsidisation;
- (c) that parents should have the right to ensure the religious and moral education of their children in conformity with their own convictions;
- (d) that a person may not have his rights restricted in any way, or be granted any privileges, on the basis of sex, race, nationality,

²

A community is composed of citizens, fewer in number than the rest of the population, settled compactly or dispersedly, sharing ethnic, linguistic or cultural features different from the rest of the population, and guided by the will to safeguard these features.

language, origin, social status, religion, convictions, or opinions;

- (e) that members of communities should have the right to foster their language, culture and customs collectively;
- (f) that provision be made for communities to administer the affairs of their culture, education, organisations, charities and mutual assistance independently, and that the state should support communities. The Council's recommendations on Cultural Community Councils refer.

5. CONSTITUTIONAL PROPOSALS

Constitutional phrasing of the above recommendations is contained in a submission to the Constitutional Assembly. It can be made available for this discussion.

MAJOR URBAN AREAS ASSOCIATION

INTERIM EXECUTIVE

INPUTS ON LOCAL GOVERNMENT

TO

THE CONSTITUTIONAL ASSEMBLY

1995-09-28

I N D E X

PART A (Introduction)

	PAGE
1. Establishment and status of Local Government	1-3
2. Powers and functions of Local Government	3
3. Legislative powers of Local Government	4
4. Administration & Finance	4-5
5. Elections	5-6
6. Code of Conduct	6-7

PART B (Proposed Text for inclusion in the Final Constitution)

Chapter 10 (Local Government)

Section 1 Establishment and status of Local Government	1-2
Section 2 Powers and functions of Local Government	2-3
Section 3 Other legislative powers of Local Government	3-4
Section 4 Administration and Finance	4-5
Section 5 Elections	5-6
Section 6 Code of Conduct	7-8

Chapter 11 (Traditional Authorities)

Section 1 Recognition of Traditional Authorities and Indigenous Law	7
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Chapter 12 (Financial and Fiscal Commission)

Section 1 Objects and Functions	8-9
Section 2 Constitution of the Financial and Fiscal Commission	9

PART A

INTRODUCTION

NOTE: [Main paragraph numbers correspond with the numbers of the proposed section]

The proposals submitted herewith seek to address and establish the following principles basic to Government generally and to Local Government specifically, namely:-

1. ESTABLISHMENT AND STATUS OF LOCAL GOVERNMENT

1.1 Spheres of Government and Functional Autonomy

Whilst absolute autonomy (sovereignty) is neither possible, appropriate nor desirable for any form of Government since all spheres of Government are subject to the Constitution and the Bill of Rights, each sphere of Government should have meaningful autonomy vis-a-vis the other spheres of Government if it is to be enabled to function effectively and efficiently. In the case of Local Government, this is particularly so in respect of those of its functions which it can perform utilizing only its own resources. Accordingly, the concept of "spheres" of Government is in contrast to the hierachical arrangement implied in the terms "tiers" and "levels" and expresses the notion that the Local Government sphere is the most appropriate vehicle to exercise any function and make any decision regarding the services which can most effectively and efficiently be rendered locally (Constitutional Principle XX1-CPXX1). The concept of functionality is used to limit the autonomy of the Local Government sphere by reference to those conferred functions which can be carried out by Local Government utilizing only its own resources. On this basis Local Government will be dealing with those functions which are closest to the people, and their representatives in the Local Government sphere are the ones most closely attuned to their wishes and to the general political dynamics surrounding these matters at local level. For the sake of democracy, undue interferences by other spheres of Government must be avoided.

1.2 "Wall-to-wall" Local Government

Since Local Government is an obvious vehicle for the delivery of what are known as the basic municipal services such as electricity, water, sewerage, sanitation

1995-09-28

and internal roads - and to the extent that no part of the country should be deprived of the potential of enjoying these basic services, it is clearly necessary that there should be Local Government in respect of the whole of the country (the so called "wall-to-wall" Local Government)..

The implication following from "wall-to-wall" Local Government that every part of the country is entitled to have access to the basic services rendered to it, has to be qualified for entirely practical reasons of sustainability, practicality and economic viability, and such qualification is accordingly built into the proposal.

1.3 Categories of Local Government

The text deal with the principle of the division of Local Government into categories, and in this regard it was proposed that in place of the current 3-way division into Metropolitan, Urban and Rural Local Government there should be such categories of local government as are determined by a law of a component legislator. The categorisation of local government shall be made upon differentiated powers, functions and structures of the categories of local government according to considerations such as democracy, economy, physical and environmental conditions and other factors which justify or necessitate such differentiation.

There will always be a large divergence amongst Local Authorities in terms of the availability of resources - whether financial, manpower, experience or otherwise - and it is accordingly self-evident that there should be different categories of Local Government, depending on the nature of functions they perform and the resources at their disposal. Details of categorization need to be dealt with in subsidiary legislation.

1.4 Inter-Sphere Relations

Having accepted the above, it is necessary to regulate the relationship between the three spheres of Government, the more so in view of the obvious and necessarily superior legislative power of National and Provincial spheres of Government. The proposals accordingly contain a safeguard for the rights of Local Government by proposing

a Senate in which the three spheres of Government will be equally represented. One of the functions of such a reconstituted Senate would be to consider proposed legislation relating to Local Government, and a distinction is then drawn between, on the one hand, legislation which would materially affect Local Government in respect of its autonomy, and on the other hand, legislation relating to matters in which a Local Government does not have functional autonomy or where there is concurrence between it and another sphere of Government. In the former case it is proposed that such legislation should require the concurrence of the Senate by at least a two-thirds majority, whilst in the latter case the Senate must simply be given an opportunity to make an input thereon.

1.5 Savings Clause

The provision of sub-section 2 is intended to ensure continuity of Local Government.

2. POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

2(1)(a) Original versus Entrusted Powers

To create Local Government as a separate sphere of Government without affording it some original powers and functions is a misnomer. The powers and functions of Local Government should originate from two sources, namely:

- (i) those contemplated by the provisions of the Constitution (original powers) dealing with the role of Local Government vis-a-vis the roles of the other spheres of Government, namely to provide municipal services and local developmental services, and
- (ii) certain other powers and functions to be entrusted by a competent authority with a view to bringing government closer to the people. This entrustment must be made according to objectively determinable criteria, which could be enforced in a court of law.

2(1)(b) Sustainability and Practicability

The mechanisms used in the current Constitution to qualify any "right of access" to basic municipal services in terms of both practicability and sustainability are incorporated in these proposals.

3. LEGISLATIVE POWERS OF LOCAL GOVERNMENT

3.1 Original Legislative Power

Local Government, being a sphere of government with its own powers and functions, has an implicit need for real legislative powers (without compromising National policies and objectives) in certain limited circumstances, i.e.

3.1.1 where a function can be performed by an autonomous local authority utilising its own resources, and

3.1.2 where the exclusions currently applicable to provincial legislation are extended in an adapted form to an autonomous local authority, so that no significant impact upon the legislative competency of the other spheres can be expected to arise.

3.2 Concurrent Legislative Powers

If concurrent legislative powers with National Government would not be politically acceptable then Local Government should at least have some concurrent legislative powers with their provincial governments.

4. ADMINISTRATION & FINANCE

CP XX requires that the allocation of powers between the spheres of government shall be made on a basis which is conducive to "effective public administration", and it follows accordingly that each local authority must ensure that its administration conforms to this requirement.

The concept of autonomy for each sphere of government (as enunciated in the motivation for section 1 above) must be linked to the notion that the different spheres of government should have exclusive competency in respect of the imposition and recovery of their respective forms of taxation. This notion accords with CPXXV which requires that the new Constitution must make provision for "appropriate fiscal powers" for local government.

Furthermore, CPXXVI envisages that local government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that it is able to provide basic services and to execute the functions allocated to it.

CPXXVII envisages that objective criteria be developed regarding the distribution of such revenue, and that the body entrusted with such development should be representative of the affected spheres of government.

5. ELECTIONS

5.1 Holding of Elections

It is proposed that the Constitution should specify the outer parameters regarding the frequency with which general elections must be held and it is further proposed that such general elections should take place on the same day nationally. The former aspect is precisely what gives efficacy to a basic premise of democracy (the opportunity for the electorate to make regular changes of their representatives), whilst the latter proposal arises from the inadequacy of localised campaign infrastructures within many political groupings, necessitating a "one-off" campaign right across the entire spectrum of Local Government.

5.2 Electoral System

CPVIII and XIV envisage a system of proportional representation to be the general norm for representation in government. However, ward representation (especially in local government) promotes direct accountability to the electorate, and it should accordingly be provided for, so as to give full effect to CPXVII which envisages that within each sphere of government there must be proper democratic representation.

5.3 Qualification/Disqualification

The qualifications of voters and the disqualifications for persons to serve as members of a local authority are retained from the existing provisions, provided that simultaneous employment with and membership of the same council should not be permitted in view of the potential conflict of interest between employer and employee.

Other legislation should deal comprehensively with the aspect of "ordinary residence" as a qualification for voters.

Artificial interpretations of the current text of the Constitution have become necessary in order to allow both proportional and ward representation to be reconciled

with the requirement that no voter shall have more than one vote per local authority, and it is accordingly proposed that each voter may only be enrolled once per local authority.

5.4 Recall of Councillors

It is proposed that a procedure of recall of members of Local Government be introduced in the South African law.

6. CODE OF CONDUCT

An enforceable code of conduct for members and officials of local governments shall be provided for by law.

SECTIONS 176 & 177 (CURRENT CONSTITUTION) COUNCIL RESOLUTIONS AND EXECUTIVE COMMITTEES

It is not appropriate to deal with these matters in a Constitution.

There are no Constitutional principles supporting these provisions. This is illustrated by the amendment to 176(b) of the Constitution which section is now effectively nullified by the Constitutional amendment.

SECTION 181 (CURRENT CONSTITUTION) RECOGNITION OF TRADITIONAL AUTHORITIES AND INDIGENOUS LAW

The new subsection simply gives effect to CPXVII read with CPXIII, which seeks to reconcile the preservation of a role for traditional leaders with the requirement that there must be democratic representation in local government.

SECTION 199 (CURRENT CONSTITUTION) FINANCIAL AND FISCAL COMMISSION

It is recommended that the role of the Financial and Fiscal Commission be extended to take over from Provincial Governments the function of reviewing the imposition of Local Government taxes and charges. This is necessary in order for Local Government to become more autonomous on the one hand but on the other hand also to have a measure of uniformity with regard to the criteria for the imposition of Local Government taxes and charges. It is noted that in terms of the current Constitution, the Financial and Fiscal Commission has a similar role with regard to the imposition of Provincial taxes and charges and therefore little adjustment is required to extend and develop this role with regard to Local Government.

SECTION 200 (CURRENT CONSTITUTION)
CONSTITUTION OF THE FINANCIAL AND FISCAL COMMISSION

It is recommended that Local Government receive an adequate and direct representation in the Financial and Fiscal Commission in such way as to allow Local Government to make their own nominations. It is considered to be sufficient for the Constitution to afford Local Government this right of representation without defining this concept in any detail. This aspect could be left to subordinate legislation catering for specific needs. It would be a matter for interpretation whether a nomination for representation on this Commission is in fact from Local Government.

Adequate representation for Local Government was considered an appropriate concept as it is unlikely that Local government will receive equal representation.

It is noted that, whilst Constitutional Principle XXVII does not allow Provincial Government a right of representation on the Financial and Fiscal Commission, it allows this right to Provinces which may include Local Governments in their respective provinces.

PART B

LOCAL GOVERNMENT

Section 1 : ESTABLISHMENT AND STATUS OF LOCAL GOVERNMENT.

1(a) Local Government is a functionally autonomous sphere of government throughout the Republic instituted as individual local authorities on the basis of geographic jurisdictional areas as demarcated by a competent authority.

References: C.P.XVI, XXI(1); Interim Constitution (I.C.) section 174(1).

1(b) Local Government shall comprise categories of local Government with differentiated powers, functions and structures according to consideration of democracy, economy, physical and environmental conditions and other factors which justify or necessitate such differentiation.

References: C.P. XXIV; XXV; I.C. Section 174(2)

1(c) A Local Authority shall be autonomous in respect of those of its functions which it can perform utilising only those financial resources referred to in section four.

References: C.P. XX; I.C. Section 173(3)

1(d) Proposed legislation which:

(i) affects Local Government's competence to levy, recover or utilise any of its rates, taxes or levies shall not be introduced in a competent legislature without the concurrence of the Senate.

(ii) disestablishes or substantially changes any local authority with autonomous powers and functions or which affects such Local Authority in such autonomous powers and functions shall not be introduced in a competent legislature without the concurrence of the Senate.

(iii) affects Local Government otherwise than in respect of the matters referred to in Sub-paragraphs (i) and (ii) above shall not be introduced into a competent legislature unless the Senate has been given an opportunity to consider the proposed legislation and to make recommendations with regard thereto.

References: XXVII, XXII; C.I. Section 33(5) (b) and Section 174(4) & (5)

1995-09-28

- 1(e) The three spheres of government shall have equal representation in the Senate.

Note: The question whether Local Government should have concurrent competence with other tiers of government is to be dealt with under the heading "Powers and Functions of Local Government".

References: CPVI and CPXVIII

- 1(2) Local Authorities shall be established in accordance with the provisions of this Act by a law of a competent authority, provided that every Local Authority established in terms of section 8 of the Local Government Transition (Act no 209 of 1993) in existence at the date of coming into operation of this Act shall be deemed to have been duly established.

References: CPXXIV, Section 174(4)

Section 2 : POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

- 1(a) Local Government shall have the powers and functions necessary to render:

- (i) Municipal Services
- (ii) Local Developmental Services

Provided that the said powers and functions shall not be substantially less than or substantially inferior to those applicable in respect of Local Government immediately prior to commencement of the interim phase as defined in section 1(1) of the Local Government Transition Act, 1993.

- 2(b) Local Government shall ensure access by all persons to basic municipal services, provided that such services can be rendered in a sustainable manner and are financially and physically practicable.
- 2(2) Local Government shall be entrusted with such other powers and functions as may be most appropriately performed locally, and such entrustment shall be made on a basis which is conducive to the financial viability of the execution of such powers and functions and the effective public administration thereof.

References: CPXVIII(2) C.I. Section 175(1), (2)

and (3)

- 2(3) Any entrusted of any other powers or functions in terms of section 2(2) shall be accompanied by an allocation of sufficient financial resources to perform such powers or functions.
- 2(4) Every Local Authority shall be audited annually in terms of an applicable law.

Section 3 : OTHER LEGISLATIVE POWERS OF LOCAL GOVERNMENT

- 3(1) A Local Authority shall have the power to make laws not inconsistent with this constitution in order to perform the functions for which it is autonomous.
- 3(2) A Local Authority shall have the power to make regulations not inconsistent with this Constitution, an Act of Parliament or a Provincial Law in order to regulate its affairs and to perform the functions for which it is not autonomous.
- 3(3) A Local Authority shall adhere to any formal legislative procedures prescribed by the respective Provincial Governments, provided that no such procedure may infringe upon the autonomy of any Local Authority.
- 3(4) A law passed by a Local Authority in terms of this Constitution regulating a matter in respect of which such Local Authority is autonomous, shall prevail over an Act of Parliament or a law passed by a Provincial Legislature, except in so far as:
- (a) the Act of Parliament or the Law of the Provincial Legislature deals with a matter that cannot be regulated effectively by a Local Government Law,
 - (b) the Act of Parliament or the Law of the Provincial Legislature deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic or throughout such Province,
 - (c) the Act of Parliament or the Law of the Provincial Legislature is necessary to set minimum standards across the nation or the province for the rendering of public services,
 - (d) the Act of Parliament or the Law of the Provincial

Legislature is necessary for the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial and inter-local governmental commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security, or

- (e) the Local Authority Law materially prejudices the economic, health or security interests of another Local Authority, the province or the country as whole, or impedes the implementation of national economic policies.

References: CPX, CPXIX, CPXX, CPXXI, CPXXII, CPXXIV
Section 175(4)

Section 4 : **ADMINISTRATION AND FINANCE**

- 4(1) A Local Authority shall ensure that the administration of its affairs is effective and is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction.
- 4(2) Local Government shall have its own tax base. The tax base allocated to Local Government shall be such as to ensure that Local Government is able to provide basic municipal services. Local government shall be competent to levy and recover such rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions, provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction.
- 4(3) A Local Authority shall be entitled to levy tariffs and charges in respect of services rendered by it.
- 4(4) Local Government shall have exclusive competency in respect of the imposition and recovery of rates, taxes and levies.
- 4(5) Local Government shall be entitled to an equitable share of revenue collected nationally so as to enable Local Government to provide municipal services and to perform those other functions entrusted to Local Government.

References: C.P. XXVI, XXVII, C.I. 178(3)

References: CPXX Section 178

Section 5 : ELECTIONS

- 5(1) Local Government shall, subject to the provisions of Section 5(5), be elected democratically, and elections shall take place on the same day nationally at intervals of not less than 3 and not more than 5 years in terms of an applicable law which shall make provision for By-Elections.
- 5(2) The electoral system for Local Government shall, subject to the provisions of Section 5(5), in general consist of proportional representation ensuring multi-party democracy, and in addition to such proportional representation, shall also include direct representation, and shall be regulated by a law of a competent legislature.
- 5(3) Subject to Section 6 [of the Interim Constitution], every natural person shall be entitled to vote in an election of a Local Authority if he or she -
- (a) qualifies in terms of legislation of a competent authority with regard to ordinary residence within the area of jurisdiction of that Local Authority or is liable in law for the payment of rates, rent, service charges or levies to that Local Authority; and
 - (b) is registered as a voter on the voters' roll of that Local Authority; provided that a voter may only be enrolled once in respect of any Local Authority; provided further that every voter in a Local Authority have the same number of votes in respect of that Local Authority.
- 5(4) No person shall be qualified to become or remain a member of a Local Authority if he or she -
- (a) is not eligible to vote in terms of subsection (3);
 - (b) is a member of the National Assembly or the Senate or Provincial Government;

(c) is disqualified from becoming a member of the National Assembly in terms of Section 42(1)(a), (b), (c) or (d) [Reference is to the current Constitution] is not qualified to become a member of the National Assembly.

(d) is an employee of that Local Authority, or

(e) is disqualified in terms of any other law.

5(5) The provisions of this section shall not derogate from the status or role of Traditional Leadership according to Indigenous Law.

5(6) National legislation shall provide for the right of recall of a member of a local authority by his/her constituents in appropriate circumstances.

References: C.P. VIII, XIII, XIV, XVII

Section 6 : CODE OF CONDUCT

An enforceable code of conduct for members and officials of local governments shall be provided for by a law of a competent authority which law shall not derogate from the criminal law.

References: I.C. 180

Section 176 and 177

COUNCIL RESOLUTIONS AND EXECUTIVE COMMITTEES

References : IC, 176, 177

It is not appropriate to deal with these matters in a Constitution.

There are no Constitutional principles supporting these provisions and the above proposition is illustrated by the proposed amendment to 176(b) of the Constitution. This amendment has the effect of nullifying the constitutional enactment dealing with town planning, as matters pertaining to town planning are now on par with the rest of a council's powers.

TRADITIONAL AUTHORITIES (CHAPTER 11)

Section 1: RECOGNITION OF TRADITIONAL AUTHORITIES AND INDIGENOUS LAW

1(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.

1(2) Indigenous law shall be subject to regulation by law.

References : CP XIII

Section 182 of the current Constitution makes provision in respect of "Traditional authorities and local government", as follows:

1(3) "The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in

Chapter 10 shall *ex officio* be entitled to be a member of that Local Government, provided that he or she has been identified in a manner and according to guidelines prescribed by the President by proclamation in the Gazette after consultation with the Council of Traditional Leaders, if then in existence, or otherwise, with the Houses of Traditional Leaders which have then been established, and shall be eligible to be elected to any office of such local government".

FINANCIAL AND FISCAL COMMISSION : CHAPTER 12

Section 1 : OBJECTS AND FUNCTIONS

1(1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to National, Provincial and Local Government and Administration and Development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the National, Provincial and Local Governments, including -

- (a) financial and fiscal policies;
- (b) equitable financial and fiscal allocations to the National, Provincial and Local Governments from revenue collected at national level;
- (c) taxes, levies, imposts and surcharges that a provincial government or local government intends to levy;
- (d) the raising of loans by a provincial or local government and the financial norms applicable thereto;
- (e) criteria for the allocation of financial and fiscal resources; and
- (f) any other matter assigned to the Commission by this Constitution or any other law.

1(2) In performing its functions the Commission shall take into consideration, inter alia, the provisions of section 155(4)(b) [Reference is to the Interim Constitution] and any other provision of this Constitution.

Reference: C.P. XXVII and XXVI and I.C. II8 and 119

Section 2 : CONSTITUTION OF THE FINANCIAL AND FISCAL COMMISSION

(1) The Commission shall be adequately representative of each sphere of Government and shall be appointed by the President as follows:

- (a) a Chairperson and Deputy Chairperson, appointed by the President in consultation with the Cabinet;
- (b) a person designated by each of the various Executive Councils of the provinces, who shall be appointed by the President;
- (c) seven members appointed by the President on the advice of the Cabinet; and
- (d) such number of members appointed by the President, acting on the advice of Local Government, as he may determine.

Reference: C.P. XXVII and XXVI and I.C. II8 and 119

A:\MAJOR

