

2/4/3/8/22

**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

DRAFT REPORT I

LOCAL GOVERNMENT

**BY
AD HOC COMMITTEE
ON
LOCAL GOVERNMENT**

31 JULY 1995

Embargoed until 14h00 Tues 1/8/95

**SUMMARY REPORT ON LOCAL GOVERNMENT
SUBMISSIONS BY VARIOUS STAKEHOLDERS TO
CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 3.**

**REPORT COMPILED BY AD HOC TECHNICAL COMMITTEE
ON LOCAL GOVERNMENT**

FOR DISCUSSION BY THEME COMMITTEE THREE ON 1 AUG.1995

1. Introduction.

This report is a summary of local government submissions by various stakeholders. Submissions were made by political parties, organised local government and government/statutory institutions.

This report seeks to identify common positions between the various stakeholders, areas of difference and thereby hopes to facilitate discussion within Theme Committee 3 to compile a report on local government to the Constitutional Committee.

2. Materials Processed.

These include the following:

- ♦ Political party submissions on local government were made by the ANC, ACDP, DP, NP & PAC
- ♦ Submissions on local government received from the Commission on Provincial Government (CPG) in a document titled "Preliminary Recommendations on Local Government - Document 9 dated 25 May 1995.
- ♦ Submission from the Free State Municipal Association (FSMA) entitled "Local Government beyond 2000"

Both these documents (the latter two) have had a major influence in at least two of the party submissions.

In summarizing the various submissions made, specific emphasis will be placed on those of the political parties even though reference would be made to the CPG & FSMA submissions where appropriate.

Even though not all the party submissions followed the same sequence as in the Interim Constitution, for the sake of easy reference, the summary of submissions will attempt to follow the same sequence as in Chapter 10 on Local Government in the Interim Constitution.

Constitutional Issues	Common Positions	Divergent Positions
<p>1 Local Government and the Constitution</p>	<p>Local government should be in the Constitution and is a separate level of government. ANC 'specific level of government and not merely a provincial function',</p> <p>DP local government to be understood as 'a "sphere" rather than "tier" of government.... no predetermined hierarchy'.</p> <p>NP 'local government ..fully fledged level of government.</p> <p>ANC, DP & NP agree on either a framework or chapter on local government in Constitution.</p> <p>ANC, ACDP & NP specifically favours strong local government</p>	

Constitutional Issues	Common Positions	Divergent Positions
<p>2 The relationship between local government and other levels of government</p>	<p>ANC ...''local government is not a provincial function .. is a level of government.....Prov incial government ...to institute, supervise, & manage local government in their provinces. Also have concurrent powers to legislate on local government''</p> <p>NP 'local government should be subject to national and provincial legislation, but that does not mean that local government should be completely subservient to any other higher level''. Legislation around local government has to be in terms of the Constitution.</p> <p>For the DP ''local government as level closest to people does not mean that it is subordinate or merely adjunct to some other level.</p>	<p>There are still some differences though. For the ANC 'a strong hierarchical status concept of local government - concepts of levels ranging from higher to lower should not be applied in SA.'' The NP, however still seems to operate within a hierarchical conception of intergovernmental relations. This is evident in their language use '...any action by higher levels of government with regard to local government'</p> <p>For the DP local government accountability is to its electorate - not to provincial or national government''</p>

Constitutional Issues	Common Positions	Divergent Positions
3 Establishment and Status of local government	<p>The ANC, NP, DP & PAC are all in favour of "autonomous" local government with the ANC, NP & DP in particular favouring strong local government.</p> <p>The ANC, NP favour replacing the word "autonomy" with the definition derived from the "European Charter of Local Self Government" . The ANC "favours a right to local government, in the sense of being constitutionally authorised to regulate and manage affairs ...under own responsibility within a framework of an appropriate intergovernmental relations.</p> <p>The NP states "local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any authority" Both the DP, NP & CPG are in agreement of only providing for different categories of local government and not spelling it out</p>	<p>The PAC argues for a strong central government and that local government, together with provincial government becoming the administrative institutions of central government.</p> <p>The NP argues that criteria for demarcation of geographical boundaries be contained in the constitution.</p> <p>The ANC argues that "the final constitution, supplemented where necessary by national legislation, should provide for principles and appropriate mechanisms of participatory democracy as well as for organs of civil society" This principle is also supported by the PAC submission.</p>

Constitutional Issues	Common Positions	Divergent Positions
<p>3 Establishment and Status of local government</p>	<p>The ANC, NP, DP & PAC are all in favour of "autonomous" local government with the ANC, NP & DP in particular favouring strong local government.</p> <p>The ANC, NP favour replacing the word "autonomy" with the definition derived from the "European Charter of Local Self Government" . The ANC "favours a right to local government, in the sense of being constitutionally authorised to regulate and manage affairs ...under own responsibility within a framework of an appropriate intergovernmental relations.</p> <p>The NP states "local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any authority" Both the DP, NP & CPG are in agreement of only providing for different categories of local government and not spelling it out</p>	<p>The PAC argues for a strong central government and that local government, together with provincial government becoming the administrative institutions of central government.</p> <p>The NP argues that criteria for demarcation of geographical boundaries be contained in the constitution.</p> <p>The ANC argues that "the final constitution, supplemented where necessary by national legislation, should provide for principles and appropriate mechanisms of participatory democracy as well as for organs of civil society" This principle is also supported by the PAC submission.</p>

Constitutional Issues	Common Positions	Divergent Positions
<p>4 Powers and Functions of local government.</p>	<p>The ANC, DP, NP& PAC all agree that provision should be made for local government's powers and functions to be protected within the constitution. However, they differ as to how this is to be achieved.</p> <p>The NP explicitly states its discomfort with the ultra vires principle that has governed local government thus far and declares itself in favour of the inherent approach. A close reading of the ANC submission also lends itself in favour of the inherent approach. This can be explained by the words "whether and how local authorities can decide on its duties and those where the local authority can only decide how to carry out the duty"</p> <p>There is also broad agreement by the ANC, DP, NP & PAC that local government's role should not be restricted to a mere service delivery function, but that it has a broader developmental role to play</p>	<p>The ANC " mentions that there is no need to have an exhaustive list of powers and functions to be listed in the constitution. Only the most basic functions of local government should be mentioned. These has been identified as follows: choice of organisation & personnel, finances, planning functions, provision of facilities, admin management and passing of bye laws"</p> <p>The CPG & DP are of the opinion that clause 176 & 177 be deleted from the constitution, whilst the NP wants it retained as amended.</p> <p>The NP is content with clause 175 (1) whilst the DP wants to have a list of minimum functions to be spelt out in the constitution. See appendix 1</p>

Constitutional Issues	Common Positions	Divergent Positions
<p>5 Administration and Finances</p>	<p>All three parties, i.e ANC, DP & NP agrees that local government administration be soundly administered, hence clause 178 (1) is endorsed in one form or the other.</p> <p>All three again are in agreement that the financial powers of local government be listed in the constitution. There are slight variations though.</p> <p>The DP seeks to introduce the principle of user charges, the ANC the principle of progressive tariffs and rateswhich is to be regulated by national legislation whilst the NP endorses clause 178 (1) without any amendment.</p> <p>There is agreement amongst all three that the principle of finance to follow function be constitutionalised in the event of delegation of functions by any level of government to local government. Both the NP & DP argues for local government representation on the FFC</p>	<p>The CPG & NP suggest that clause 178 (3) be amended to read as follows "the FFC is to make recommendations regarding</p> <p>* the % allocation of revenue collected nationally to local governments in each province and</p> <p>* the criteria for the allocation of an equitable portion of the % allocated to a province in terms of the above to local governments in the provinces taking into account the different categories of local government provided in a law of competent authority.</p> <p>For the DP "intergovernmental grants should be regarded as an own source of revenue for local government and should not be dependent on annual lobbying and pleadingshould be guaranteed"</p>

Constitutional Issues.	Common Positions	Divergent Positions
6 Elections.	<p>All parties i.e ANC, DP, NP & PAC agree that elections are to be held for local government. The ANC "states every five years, DP " intervals of not more than five years.</p> <p>Both DP & ANC agree that elections may be held in both ward and proportional terms.</p> <p>Both the DP & ANC suggests that if one is member of the provincial legislature one cannot simultaneously be member of local government and that this be included in the disqualification criteria list.</p>	<p>The NP retains the present position that elections be held less than three and not more than five years" For the ANC local and national elections are not to take place in the same year.</p> <p>The NP agrees with ward and proportional representation but goes a step further by defining the percentage representation of ward i.e. 60% and proportional i.e. 40%.</p>
7 Code of conduct		<p>For the ANC "local government representatives are to be subject to an enforceable code of conduct which shall be detailed in an Act of Parliament". DP "an enforceable & justiciable code ...provided by provincial law" NP retains present provision in Interim Constitution which states that it is the responsibility of the law.</p>

Constitutional Issues	Common Positions	Divergent Positions
8. Traditional Authorities.	Both ANC & ACDP agrees that traditional authorities should be involved in local government.	<p>For the ANC their involvement should be on an ex officio basis.</p> <p>The DP suggest that traditional leaders " should not have guaranteed ex officio membership of any elected government position.</p>
9. Local Government Commission.	Both the NP & DP are in favour of some form of local government commission.	<p>The DP suggests that the Commission for Provincial Government be restructured and become the Commission on Provincial and Local Government (See Appendix 2 for its functions).</p> <p>The NP suggests the establishment of a Local Government Commission either by the Constitution or by law of Parliament. (See Appendix 3 for its functions). They also further suggest the establishment of Intergovernmental Forums for Local Government in order to protect the autonomy of local government, and to ensure adequate consultation between local and provinces prior to enactment of legislation.</p>

Constitutional Issues	Common Position	Divergent Positions
10 Borrowing Powers		<p>The NP suggests retaining clauses 188 and 175 (3) which respectively prohibits national or provincial government acting as guarantor for local government on the capital market, unless</p> <p>♦ it complies with norms and conditions set out in Parliament and unless the FFC has made a recommendation concerning compliance with such norms and conditions</p> <p>♦ and unless the need for the guarantee has been verified by the FFC.</p>
11 Auditing	<p>Both the NP & CPG agree on the desirability on independent auditing of local government finances as this should also be the case at all levels of government.</p>	
12 Co-operation among local governments		<p>The NP suggests that local government should have the right to associate, within the framework of the law, to carry out tasks of mutual interests.</p>

Constitutional Issues	Common Positions	Divergent Positions
13. Legal protection of local self government		The NP suggests that " local government shall have the right of recourse to a judicial remedy in order to secure the free exercise of their powers and respect for such principles of local self government as are enshrined in the constitution or any other law"

Schedule X, referred to by the DP, includes:

Physical and land-use planning, parks and gardens, stormwater drainage, water and electricity supply, sanitation, licences and permits, local roads, local public transport, primary health care services, pre-school education, housing, libraries, traffic control, fire brigade services, shopping hours, ambulance services, sport and recreation facilities, public halls, markets and pounds, street cleaning, refuse disposal, local economic growth, promotion of integrated and sustainable development, animal and vermin control, public health, air and noise pollution, liquor licensing, civil protection, combatting of nuisances, cemeteries and crematoria, municipal police, beaches and amusement facilities.

Appendix 2

The Commission on Provincial Government should be restructured and become a Commission for Provincial and Local Government. Such a Commission could mediate and, where necessary, adjudicate disputes between a provincial legislature and a local government as to whether a particular local government has the capacity to assume or retain specific powers and functions.

Appendix 3

(3) The object of the Commission shall be to be the guardian of local government and to facilitate the establishment, development, maintenance and recognition of local government, for the achievement of which the Commission shall be competent to : *(emphasis as per original document)*

(a) advise Parliament with regard to all legislation affecting local government;

(b) advise the national government with regard to policies regarding ;local government systems, processes, institutions, powers and functions;

(c) initiate any law or policy referred to in paragraphs (a) or (b); and

(d) initiate and conduct research with regard to any law or policy referred to in paragraphs (a), (b) or (c).

(4) No draft legislation affecting the status, powers or functions of local government shall be tabled in Parliament unless the Commission has had reasonable opportunity to consider such draft legislation and has made its report and findings thereanent available.