

2/4/3/8/26

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

DRAFT REPORT 4

LOCAL GOVERNMENT

**BY THE
TECHNICAL ADVISORS**

17 AUGUST 1995

Embargoed until 10h00 Mon 21/8/95

THEME COMMITTEE 3
REPORT ON LOCAL GOVERNMENT TO THE CONSTITUTIONAL
COMMITTEE
Draft

1. Material processed

- In March 1995 Prof Dion Basson summarised submissions by civil society on matters concerning Theme Committee 3. 23 of those submissions dealt with both provincial and local government (reflected in section II of the summary) and 15 dealt with local government as such (section III of the summary).
- A *Framework on Local Government*, drafted by Prof BC Majola, was circulated on 3 April 1995.
- Proposals of the Free State Municipal Association entitled *Local Government beyond 2000*, dated 14 May 1995, was distributed.
- On 15 May 1995 the Theme Committee held a workshop on local government, which apparently centred around a discussion document prepared by the ad hoc committee on local government. The proceedings were transcribed and distributed on 29 May 1995.
- The Commission on Provincial Government submitted their *Preliminary Recommendations on Local Government - Document 9* on 25 May 1995
- A *Special Edition* of submissions on local government was circulated on 12 June 1995 and between 23 June 1995 and 17 July 1995 Submissions Volumes 19, 20, 21 and 23 were distributed.
- Political party submissions on local government were submitted by the ACDP, ANC, DP, FF, NP and PAC.

2. Overview of processed material

The main focus of the report is on the submissions received from political parties. From those submissions it is however clear that some of the non-political material had significantly influenced the views of some of the political parties. Additional matters that may require the consideration of the Constitutional Assembly emerging from submissions received from other sources than the political parties, are set out in paragraph 4 below.

3. Additional matters

From a survey of the general submissions, the following matters or issues present themselves as possibly also requiring the attention of the Constitutional Assembly:

- The extent of the responsibility of local governments regarding education, health, churches, water and forestry [Submissions referred to in the Basson summary par II A 3, 4 and 7; Submissions Volume 19 p 1945-1966].
- The nature and structures of rural and regional (local) government [Submissions referred to in the Basson summary par III A 1, 3, 5, 6, 7, 9].
- The nature and structure of metropolitan government [Submission referred to in the Basson summary par III A 11].

Embargoed until 10h00 Mon 21/8/95

- Delegated and agency functions of local government [Submission referred to in the Basson summary par III A 12].
- Separation of powers in local government [Submission referred to in the Basson summary par III A 12].
- The nature of "organised local government" [Submissions Volume 20 p2051-2060].

LOGGOVT5.DOC
17 AUGUST 1995

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>1. What, regarding local government, should be incorporated into the Constitution.</p>	<ul style="list-style-type: none"> • A framework for local government should be contained in a <i>chapter</i> of the Constitution [CPrinc.XXIV]. • The Constitution should protect the necessary and essential features of local government; <ul style="list-style-type: none"> • <i>The Constitution should contain a provision dealing with procurement administration [section 187];</i> • <i>The Constitution should entrust local government with functions and powers to enable it to promote the development of the communities that it governs.</i> 	<p>⇒The Afrikaner must be recognised and protected in the Constitution at local government level as a community sharing a common language and cultural heritage [FF].</p>	<ul style="list-style-type: none"> ◆ The basic functions of local government should be listed - not exhaustively / "a minimum list" - in the Constitution [ANC, DP, CPrinc.XXIV]. ◆ A code of conduct for members (and officials [NP]) of local government <i>should be provided for</i> [ANC, NP, DP, section 180]. ◆ <i>There should be a provision affording a local government the right of recourse to a judicial remedy to secure the free exercise of its powers and the principles relating to local government [NP].</i> ◆ The national legislation containing detail should reflect the opinions which would have been solicited from the various Commissions [PAC]. ◆ <i>There is a "need for the autonomy, powers and functions of local government to be adequately provided for in the Constitution" [DP].</i>

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>2. What the relative positions of the national and provincial governments regarding local government should be.</p>	<ul style="list-style-type: none"> • Local government is a matter of both national and provincial interest. • Proposed legislation concerning organised local government should not be introduced without local government having been consulted [Section 174(5)]. 	<p>⇒ There is need for control to be exercised over the provincial and local governments and other like institutions to ensure that the grand policy is being applied; there should be strong Central Government and the other two tiers of government should become mere administrative institutions [PAC].</p>	<ul style="list-style-type: none"> ♦ The respective powers of the national and provincial levels should be clearly defined (NP, CPG). ♦ Framework laws <i>should be</i> enacted at national level, <i>the provinces must be responsible for the implementation, supervision and management of</i> local government and the provinces will have concurrent power to legislate on local government [ANC]. ♦ <i>How (e.g. as a functional area, separate sphere of government, etc.) should the responsibilities of the provinces regarding local government be dealt with in the Constitution?</i>
<p>3. What the status of local government as such should be.</p>	<ul style="list-style-type: none"> • Local government <i>is not at the bottom of a hierarchy of levels of government; it is a specific level of government; and should be recognised constitutionally as a fully-fledged level of government. This means that</i> local government is to be recognised as a separate sphere (not a "tier") of government. 	<p>⇒ Our towns and cities do not merely consist of a number of individuals, but of clearly identifiable communities that share a common language and cultural heritage; each community is best able to deal with its own precious and sacred interests [FF].</p>	<ul style="list-style-type: none"> ♦ Section 174(4) should be retained in the Constitution [NP], in amended form [DP]. ♦ There should be strong and efficient local government, operating under effective conditions of intergovernmental relations based on the notion of co-operative governance [ANC].

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>3. What the status of local government as such should be.</p>			<ul style="list-style-type: none"> ◆ The term "self-administration" (rather than "autonomy") should be used [ANC]. ◆ Though local government must be subject to national and provincial legislation, it should not be completely subservient to them - there should be autonomy [NP]. ◆ Local government should have autonomy [DP] / must be autonomous [PAC]. ◆ Local government should be autonomous with each district having its own governmental structures [ACDP]. ◆ Democratic local government is part of the government of a state comprising of democratically elected representatives of the enfranchised residents of a defined geographical area within that state, who, as a legal entity separate of its individual members, is vested with prescribed governmental authority which it may exercise relatively independent from state control [PAC, taken from <i>Local Government Beyond 2000</i>].

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>4. Structures and administration</p>	<ul style="list-style-type: none"> • All areas within the territory of the Republic must be represented in local government structures. • Demarcation should be done on the principle of "one city/town, one tax basis". • The norms for demarcation should be based on technical and developmental considerations rather than political expediency. • The administration must be based on sound principles of public administration, good governance and public accountability [section 178(1)]. • Local government will <i>provide</i> effective and efficient local administration and government. 	<p>⇒A local government should have the discretion to establish sub-municipal entities [NP, Section 175(6)].</p> <p>⇒Provincial legislatures should make provision for categories of local governments with differentiated powers, functions and structures [DP].</p> <p>⇒An Afrikaner Council should be elected by all Afrikaners within each area of jurisdiction of a local authority where an Afrikaner community exists to accept responsibility for the exercise, protection and extension of Afrikaner interests [FF].</p> <p>⇒The present sections 176 (council resolutions) and 177 (executive committees) should be retained with some amendments and additions [NP].</p> <p>⇒The present sections 176 and 177 should be deleted from the Constitution [DP].</p> <p>⇒Local government should, <i>through organised local government</i>, be given representation in the Senate in the form of a delegation of senators [ANC].</p> <p>⇒Local governments should be</p>	<ul style="list-style-type: none"> ◆ Under which circumstances should parliamentary or provincial legislation regarding local government affairs prevail [NP, CPrinc XXIV)? ◆ There should be categories of metropolitan, urban, district and rural local governments [ANC, NP, DP, section 174(2)]. ◆ There should be Metropolitan Development Authority Committees that will have jurisdiction over all the major town councils, and a Rural Development Authority with jurisdiction over all areas outside municipal boundaries [ACDP]. ◆ Local government areas should be demarcated by the provincial legislatures [DP]. ◆ A Local Government Commission should be established to be the guardian of local government, advise Parliament and the national government and to initiate laws and policies and conduct research [NP]. ◆ The Commission on Provincial Government should be restructured as a Commission for Provincial and

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
4. Structures and administration		represented on the national body of representatives [ACDP].	<p>Local Government to mediate and adjudicate disputes between provincial and local governments [DP].</p> <ul style="list-style-type: none"> ◆ Local government will be represented in the proposed Local Government Commission that would deal with relations with other levels of government [PAC]. ◆ The relationship(s) between the three levels of government will be dealt with in the various Commissions, the Commission on Provincial Government, the Commission on Local Government and the F & F Commission respectively [PAC]. ◆ The establishment of national and provincial intergovernmental or co-operative councils for organised local government should be considered [ANC]. ◆ Provincial intergovernmental forums representative of the provincial government and organised local government should be provided for by provincial laws [NP]. ◆ Local governments should be entitled to co-operate and form joint

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>4. Structures and administration</p>			<p>bodies and associations (also internationally) [NP].</p> <ul style="list-style-type: none"> ◆ Provision should be made for administrative supervision of local governments according to procedures that will not allow for undue intervention [NP]. ◆ The principles pertaining to public administration should apply to local government, but local government should not be regarded as part of the Public Service [NP].
<p>5. The <i>fields</i> in which local governments should provide services.</p>	<ul style="list-style-type: none"> • Duties may be imposed on local government by national or provincial laws. • There should be no restriction on national or provincial government to delegate or devolve powers and functions (but finance should follow function). • Local government will provide affordable and sustainable service delivery with the utilisation of local expertise where possible. • The delivery of services to and facilitation of development of the communities <i>must be</i> the essence of 	<p>⇒ Provincial legislatures may alter the power and functions of a local authority only with its agreement [DP].</p> <p>⇒ A clear distinction should be drawn in each city or town between functions and powers that are linked to communities or persons and those functions and powers that are territorially linked, such as roads, sewerage, water, etc. [FF].</p> <p>All functions and powers that are identity forming elements to a community must be exercised by that community itself if it is preferred and</p>	<ul style="list-style-type: none"> ◆ (At least [NP, DP]) water, transport, electricity, primary health care, (pre-school [DP]) education, housing and security [ANC, NP and DP], provided that the functions can be performed in a sustainable and financially justifiable manner [NP]. ◆ Whether the Constitution should list the powers and functions of local government exhaustively or empower local governments in broad terms. ◆ At least sanitation [NP, DP], physical land-use planning, parks and gardens, stormwater drainage, licences and permits, local roads, libraries,

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>5. The areas in which local governments should provide services.</p>	<p>local government.</p>	<p>possible in practice, including all education, radio, television, printed media, fine arts, music, theatre, ballet, visual arts, sport, librarianship, museums, tourism, leisure, primary health clinics, old age homes and service centres [FF].</p>	<p>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, combating of nuisances, cemeteries and crematoria, municipal police, beaches and amusement facilities [DP].</p> <p>◆ Services should be provided by community-based organisations functioning on a non-profit basis, remunerated by the town councils [ACDP].</p> <p>◆ Local government should have <i>inherent powers</i>, meaning that they may perform any function not prohibited by law, besides those expressly entrusted to them [NP]. Choice of organisation and personnel, financial authority, planning powers, provision of facilities, "mandatory"</p>

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
			functions, by-laws and administrative decisions based on statute [ANC].
6. The nature of the governmental competence of local government to be set out in the Constitution.	<ul style="list-style-type: none"> • Local government should have adequate and appropriate legislative and executive powers to allow it to govern effectively with regard to its powers and functions. 		<ul style="list-style-type: none"> ◆ There should be a <i>right to local government</i>, being constitutionally authorised to regulate and manage a substantial share of public affairs [ANC]. ◆ Local government will redress imbalances of the past and improve conditions of the previously neglected communities with special attention to the rural communities [PAC].
7. The financial and fiscal arrangements regarding local government that should be made in the Constitution.	<ul style="list-style-type: none"> • A local government will be competent to raise levies, rates and fees, based on a uniform structure, as may be necessary to exercise its functions. • The financial resources should be commensurate with the responsibilities. • Financial viability should not mean self-sufficiency. • Intergovernmental transfers should be based on objective formulae. • Local government shall have a fair share of the national and provincial revenue. 	<ul style="list-style-type: none"> ⇒ A local government should be entitled to establish "progressive tariffs and rates" [ANC]. ⇒ The (fiscal) competency of a local government must be regulated by national legislation [ANC]. ⇒ Intergovernmental transfers should not give other spheres of government a right to dictate [DP]. 	<ul style="list-style-type: none"> ◆ Financial allocations to local government should be provided for as in the present section 158 and also be further regulated in the Constitution [NP, taken from CPG]. ◆ The uniformity of the taxing structures should be regulated as in the present section 178(2) [NP, taken from CPG]. ◆ The right to a share of revenue should be more tightly worded than in the present section 178(3) [NP, taken from CPG]. ◆ The present section 178(2) should be phrased more tightly by replacing

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>7. The financial and fiscal arrangements regarding local government that should be made in the Constitution.</p>	<ul style="list-style-type: none"> • The recommendatory/advisory role of the F&F Commission regarding intergovernmental transfers should be retained. 		<p>the reference to "a competent legislature" with a reference to the Constitution and the reference to the uniformity of the taxing structures should be retained [DP].</p> <ul style="list-style-type: none"> ◆ Local government should be "constituentially accountable to raise taxes" to be used for specific tasks in the community [ACDP]. ◆ Local government could be represented on the F&F Commission through a national co-ordinating structure [ANC]. ◆ Three members of the F&F Commission should be designated by organised local government, at least one of whom must have expertise in local government finance [NP]. ◆ There should be greater representation of local government on the F&F Commission [DP]. ◆ Provisions similar to the present sections 178(3) en 188 regarding borrowing powers for local governments should be included [NP, taken from CPG]. ◆ Provisions similar to the present

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
			<p>section 193(2) regarding the auditing the accounts and financial statements of local governments should be included [NP, taken from CPG].</p>
<p>8. How local governments should be elected.</p>	<ul style="list-style-type: none"> • Voters should be natural persons ordinarily resident in the area of jurisdiction. • A dual electoral system (partly proportional, partly wards) should apply. 		<ul style="list-style-type: none"> ◆ Members of provincial legislatures and employees of a local government (but not employees of the national or provincial governments [ANC, NP, s42(1)(e)] should (also) be disqualified from being elected [ANC, NP, DP]. ◆ Persons liable for the payment of property rates, rent, service charges or levies to a local government should also have the vote [NP, DP]. ◆ Elections should be held at least every five years [ANC, DP]. ◆ Elections should take place at intervals between 3 and 5 years [NP]. ◆ Elections should not take place in the same year that national elections occur [ANC]. ◆ 60% of the members should be elected by simple majority from wards and 40% proportionally [NP]. ◆ Elections should be regulated by national legislation and/or regulations [ANC].

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>9. Democratic principles</p>	<ul style="list-style-type: none"> • Local governments will first and foremost be accountable to the people it serves. • Local government will be accessible. 	<p>⇒ Local government is accountable to its electorate, not to provincial or national government [DP].</p> <p>⇒ The protection and extension of the interests and rights of our people outside the Volkstaat can best be served at local level, i.e. city council level [FF].</p>	<ul style="list-style-type: none"> ◆ Participatory democracy and mechanisms to give effect thereto are vital [ANC]. ◆ Civil society and its various organisations have a crucial role in democratising and transforming South Africa [ANC]. ◆ Local government should promote the establishment of forums and/or other mechanisms whereby community organisations can participate in local governance without compromising the powers and functions of elected local government [ANC]. ◆ There should be a decentralisation of government power and a devolution of powers with the balance of power residing in the local and regional tiers of civil governance [ACDP]. ◆ Local governments will promote a participative and inclusive approach in all decisions [PAC].

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
<p>10. What the role of traditional leaders should be in local government.</p>			<ul style="list-style-type: none"> ◆ Traditional leaders should participate in local government [ANC, ACDP]. ◆ Traditional leaders should serve in an <i>ex officio</i> advisory capacity, subject to the principle of democratic and accountable local government [ANC]. ◆ The provinces should determine the form of participation [ANC]. ◆ Traditional leaders should be remunerated (and thus be accountable to) their people [ACDP]. ◆ Traditional leaders should not have guaranteed <i>ex officio</i> membership of any elected government structure; should not receive official remuneration for occupying two different positions in government [DP]. ◆ Whether traditional leaders should be accommodated in the local government structure and what role they should play are issues to which consensus is needed [PAC]. ◆ The Indigenous Authorities are to be accommodated in the same way as the Rural Councils and should be called Rural Local Authorities [NP].

Embargoed until 10h00 Mon 21/8/95

Constitutional Issues	Areas of Agreement	Areas of Contention	Further Clarity Required
			<p>◆ The Indigenous Leaders residing in the area of the Rural Local Authority appoints half of the representatives in the Rural Local Authority; the other half of the representatives are to be democratically elected by the community [NP].</p> <p>◆ Consideration should be given to the creation of informal voluntary Settlement Advisory Forums within the area of jurisdiction of a Rural Local Authority; such Settlement Advisory Forums could advise both the Rural Local Authority and the Regional Services Council personnel on matters pertaining to the development and administration of the particular settlement [NP].</p>

Embargoed until 10h00 Mon 21/8/95