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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

REPORT ON BLOCK 1

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

As at the 16 February 1995

THEME COMMITTEE 3
RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

REPORT BLOCK 1

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

February 16, 1995

PREAMBLE

Theme Committee 3 is pleased to report on its work commencing on 24 January 1995.

The Theme Committee has re-ordered its work programme in terms of the following headings: (1) the nature of the systems of provincial and local government; (2) national and provincial legislative and executive competencies; (3) local government; (4) fiscal and financial matters; and (5), a miscellaneous category to include, *inter alia*, overlapping matters such as the Senate.

[Other than heading #1, these headings do not correspond to the blocks in the schedule].
Submission dates for the next reports are still to be determined.

All parties bar the ACDP (which waived its right) made submissions on block 1. Arising from the nature of these submissions, and in anticipation of meeting future needs, it was decided that parties' submissions should preferably follow a predetermined framework in order to ensure both a cohesive approach to the work programme, and to simplify the drafting of reports. It is this approach which has been followed in the block 1 report below.

All parties were given the opportunity to talk to their submissions in order to facilitate a joint understanding of parties' positions. Two special Theme Committee meetings were convened for this purpose, the first dealing with the nature of the provincial system, and the second with the nature of the local government system.

On 8 February, a one-day "orientation workshop" was convened, facilitated by two discussants -Mr Richard Humphries and Professor Willie Breytenbach. Members benefited greatly from intensive deliberation on both basic constitutional models and key concepts germane to the Theme Committee's work programme.

The Theme Committee's first report is divided into two parts, the first dealing with the parties' submissions, the second with civil society submissions. The former is divided into two sections -covering the nature of the provincial and local government systems respectively. The latter will be submitted at the earliest opportunity.

The Theme Committee has not yet been able to give extensive consideration to its own public participation programme and will therefore report on this aspect at a later stage.

SECTION I PROVINCIAL GOVERNMENT SYSTEM

INTRODUCTION:

This Report is compiled on the basis of the parties' submissions. A further Report covering submissions from civil society will follow. The structure of this Report reflects a predetermined framework agreed upon by the parties, within which are subsumed issues and details thereof which are also identified as contentious or non-contentious. This Report refers to details found in parties' submissions which have been used to identify the nature of the issues at hand - the submissions however, comprise an integral part of this Report. As far as possible the report comprises verbatim extracts from the submissions. Since the formulation of general principles upon which consensus can be reached is severely limited, this Theme Committee sought to make progress in identifying more precisely the issues upon which there is contention and non-contention. Furthermore, the Theme Committee has found utility in identifying a third category of issues or positions on which there is not necessarily either consensus or contention.

A SOUTH AFRICA'S SPECIFIC CONDITIONS

To what extent does our history have a bearing on the constitution?
What historical considerations and factual elements should be taken into account?

Non-contentious

1. South Africa is a deeply divided society with huge social inequalities. The following factors need to be born in mind: the legacy of colonialism and apartheid, massive inequalities between regions and between urban and rural areas, between the racial groups and sexes.

These observations are made whilst acknowledging that South Africa has an advanced economy and that South Africa plays a leading role in the political, social, educational and economic development of our region. Every endeavour should be made to enhance our competitiveness in the international world.

2. The lessons emerging from the implementation of the interim constitution should be taken into account.

Contentious

1. The historical fact that autonomy and devolution existed with TVBC states and SGT's cannot be ignored in the drafting of the new constitution.
2. Different regions of South Africa have distinct identities. The people of KwaZulu-Natal in particular have a distinct political identity in wishing to preserve the autonomy the Kingdom of KwaZulu-Natal. Oppressed, exploited and raped by the colonial and apartheid regimes, the people of this province who have always

maintained their sovereignty and their unique position within the broader politick, have reclaimed their sovereignty, desirous that this be recognised within a federal South Africa.

3. The implementation of the Interim Constitution has exacerbated tensions between Central Government and the Provinces.
4. The diversity and deep division of our society must be catered for, *inter alia*, by devolving executive and legislative power whenever possible.
5. For a variety of reasons it could be expected that provinces will develop own and typical "characters". Such development should be encouraged, but then subject to loyalty to the single sovereign state, which loyalty shall be premised on the enhancement of national reconciliation. In that sense provincial loyalty should be encouraged as it could and should serve as a springboard for the enhancement of loyalty to the one, sovereign state.
6. Through redistribution, redirection, reprioritisation and reallocation of resources, the imbalances of the past have to be redressed. South Africa should be a non-racial, non-sexist democracy which systematically eradicates the devastation of apartheid and reduces the social inequalities that it bred.
7. There is a need to discourage political mobilization on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for purposes of ethnic or racial domination and intolerance.

B DEMOCRATIC PRINCIPLES

What are the fundamental principles of democracy which should shape the system of provincial government?

Non-contentious

1. The Constitution in its entirety shall be the supreme law of the land.
2. Democracy must ensure elected structures of government at all levels, regular elections on a common voters' roll based on universal suffrage (to read in conjunction with first contentious point below).
3. The democratic principles of representation, accountability, responsiveness and openness are best served by government being as close as possible to the people.
4. There should be a three-tiered system, such that government with its accountability can be taken closest to the people, and where people with democratic responsibility can be closest to government.

5. The constitution should allow for freedom, that is, rule by the people, for the people, people being involved in the governing of themselves. Main activity of the people should not be reduced to occasional elections.
6. Accessibility, ensuring that people are directly involved in shaping their destinies at every level of government and that government is open and transparent and responsive to people.
7. Accountability, there must be accountability within government, between different levels of government, and of government to the public.
8. Functionality, requiring that the system is suited to SA's needs and reality.
9. Efficient and effective - a system that works well and is productive and delivers on people's needs.
10. Each Province must be equipped to provide for the special needs and capacities of its inhabitants.
11. Participatory organs - government should interact with and respond to the needs and views of civil society organs.
12. National unity must be sustained and enhanced, while, at the same time, providing for the division of power between the different levels of government catering for diversity and facilitating nation building.
13. There shall be separation of powers among levels of government in a balanced way to prevent concentration of power.

Contentious

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, such as traditional communities).
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.
3. Provision shall be made for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.
4. The exercise of state power shall be controllable within set limits.
5. Uniformity is a vital national objective to pursue in the context of massive disparities and inequalities that prevail in South Africa.

6. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
7. National reconstruction and development must be facilitated by the system of provincial government.
8. There shall be proportional representation in the legislature and the executive of all levels of government.

C PROVINCIAL GOVERNMENT PRINCIPLES

What are the principles which should shape the system of provincial government?

Non-contentious

1. There shall be democratic structures of government at national, provincial and local levels.
2. Government should interact, and respond to, the needs and views of civil society organs.

Contentious

1. Principle of subsidiarity and various formulations thereof (refer parties' submissions).
2. The vertical separation of power shall be founded on autonomous and original powers. (This matter has to be referred to the Technical Experts for clarification. See CP XVIII[1]).
3. There shall be exclusive and concurrent powers as well as powers to perform functions for other levels of government. (This matter has to be referred to the Technical Experts for clarification. See CP XIX)
4. Our past authoritarian, centralistic and oppressive legacy can only be overcome by recognising SA as a plural society in which, *inter alia*, the provinces are the "primary government" of the people and the role and scope of any government is limited.
5. Only the powers of the national government ought to be listed in the constitution, while all other powers should be left to the Provinces. Residual powers should be left with the provinces.
6. There should be the least possible interference from government at any level. Individuals, families and communities should be left to do whatever they are capable of doing without interference. What they are unable to do should be the responsibility of local government, and functions which local government is unable to perform

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

7. There shall be separation of powers between all levels of government and civil society. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.
8. The allocation of powers to provincial and local levels should be conducive to financial viability at each of those levels, effective public administration, national unity, legitimate provincial autonomy and should acknowledge cultural diversity.
9. Provinces shall have full judicial powers in all matters of their competence, in addition to fully autonomous legislative and administrative powers.
10. Democracy is synonymous with self-government which requires the provision of constitutionally designed autonomy at the provincial and local level.
11. The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.
12. National government shall have no overrides and, as a rule, Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers, regulated by checks and balances, intended as a predetermined set of mutual interferences among the powers of each level of government.
13. In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could be utilised.
14. The powers and functions of each of the levels of government must be defined in the constitution in a manner that will allow for cooperation, but not encroachment, between the respective levels. This requires that exclusive powers and independent sources of finance be provided for in the constitution.
15. In relation to their respective areas of constitutionally recognized autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively.
16. The Constitutional Court should judge any conflict between provinces and national levels of government. In addition, provinces should have the opportunity of influencing by means of their own judicial system how the national constitutional court interprets the constitutional provisions which define their autonomy.
17. The national constitution shall provide for the maximum degree of provincial autonomy. Each Province shall be free to opt to exercise lesser powers than the full autonomy to which such Province is entitled, if such Province is not ready, willing or

able to exercise any of the legislative or administrative powers concerned.

18. The issue of federalism cannot be settled by virtue of majoritarian rule, no matter how large the majority concerned is. Even if the rest of South Africa wishes to organize itself as a unitary state, regions such as KwaZulu-Natal which have expressed federal aspirations should be entitled to receive the autonomy they demand and to coexist with the rest of South Africa on the basis of a federal relation.

D ELEMENTS OF THE PROVINCIAL SYSTEM

What characteristics are to be taken into account in addressing the system of provincial government?

1. Boundaries of provinces
2. Number of provinces
3. Government structures.
4. Government powers and functions.
5. Inter-governmental coordination.
6. Affordability/cost.
7. Fiscal equalization.
8. Taxation powers of each level of government.
9. Residual powers.
10. Fiscal and financial powers.
11. Fiscal relationships.
12. Role of a Fiscal & Fiscal Commission.
13. Executive structures.
14. Legislative structures.
15. Judiciary.
16. Civil service.
17. Electoral system.

Contentious

1. These issues were not discussed in detail. Note, however the following contentious point: provincial constitutions shall determine any matter related to the organisation and operation of the legislative, executive, judicial; and administrative branches of the provincial governments.
2. The viability of corporate self-determination, as a method of furthering the rights of self-determination of linguistic, cultural and religious minorities, shall be explored.
3. The constitution shall recognize traditional leaders at provincial and local levels as representatives of the people from whom they have obtained a mandate.
4. Both provincial and local government must include community related structures that will address the needs for a pluralistic society. This must be done in order to accommodate cultural/ethnic realities in a way that peace shall prevail and national unity be enhanced.
5. Provincial constitutions.

E MISCELLANEOUS

The two issues below have not yet been discussed by the Theme Committee.

1. Transitional measures:
In this transition phase, it may be necessary to prescribe some structures and procedures in a new constitution which will fall away after a few years and be replaced at provincial and local government level by structures and procedures decided upon by democratically elected bodies at those levels.
2. Senate:
In a provincial system - as opposed to a federal system - the Senate becomes unnecessary. There is then no need for extra representation for provinces at the level of the central legislature.

The Senate shall represent the Provinces and its members shall be directly elected and empowered to act authoritatively on behalf of the Provinces, jointly and severally.

The role of the Senate as provided for in the interim constitution and its relationship with the provinces needs to be developed and refined.

The Senate should not have less legislative authority than that given to the National Assembly. The Senate should represent the Provinces and its members should derive directly from the provinces through indirect elections by the provincial legislatures in consultation with the provincial cabinets. Each province shall be equally represented in the Senate.

The Senate should have the specific power to monitor executive functions such as defense and foreign affairs in which Provinces have no competence.

SECTION II LOCAL GOVERNMENT SYSTEM

A SOUTH AFRICAN SPECIFIC CONDITIONS

Non-contentious

The section on "*South Africa's specific conditions*" in the Provincial Government section also applies here; and in addition it is noted that:

1. There is a universal demand for the transformation of local government in South Africa. South Africa's past experience of apartheid based local government entailed a massive differentiation between black and white local government in the areas of legitimacy, resources and service delivery capabilities.

Contentious

1. The viability of corporate self-determination, as a method for furthering the rights of self-determination of linguistic, cultural and religious minorities, shall be explored.
2. There is a demand for constitutional protection of local decision-making within the provinces as determined by the provinces, subject only to the Schedule 4 Constitutional Principles.
3. Through redistribution, redirection, reprioritisation and reallocation of resources, the imbalances of the past have to be redressed. South Africa should be a non-racial, non-sexist democracy which systematically eradicates the devastation of apartheid and reduces the social inequalities that it bred.
4. There is a need to discourage political mobilization on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for purposes of ethnic or racial domination and intolerance.
5. South Africa should be society in which national unity, reconstruction and development prevails.

B DEMOCRATIC PRINCIPLES

See section on Provincial Government.

C PRINCIPLES OF LOCAL GOVERNMENT

Non-contentious

1. Local Government will be elected on the basis of universal suffrage.
2. The Constitution shall empower the active involvement of ordinary people.
3. There shall be transparency and accountability.
4. Delivery of services is the prime responsibility of local government.

Contentious

1. There shall be elected local government throughout the entire country including the rural areas.
2. Local Government must be entitled to regulate its own affairs within the context of national policy.
3. Local government shall not be autonomous, but must assist in the administration of national and provincial policy.
4. The CA does not have the discretion to provide provinces with less autonomy and fewer powers with respect to local government than that provided for in Chapter 10 of the interim constitution (Constitutional Principle XXIV read in conjunction with Constitutional Principle XVIII (2)).
5. The degree of financial and fiscal autonomy of Local Government
6. All people shall have access to basic services. These services will be based on affordability and there shall be a progressive tariff structure linked to peoples ability to pay.
7. Local Government is central to the implementation of the RDP.
8. Local government shall operate on the basis of "One city, one tax base".
9. Civil society has a central role to play in local government.

D ELEMENTS OF THE LOCAL GOVERNMENT SYSTEM

Non-contentious

1. Local Government should have guaranteed, transparent, predictable and equitable sources of revenue.
2. The Constitution shall provide a framework for local government powers, functions and structures. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or both (Constitutional Principle XXIV).

Contentious

1. In order to reflect local administrative needs and pluralism, the national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation.
2. Local Government by-laws should be consistent with an applicable Act of Parliament or Provincial Law and the Constitution.
3. Local government in both urban and rural areas shall promote the establishment of structures of civil society which would in turn actively participate in the affairs of local government.
4. In metropolitan areas, there shall be elected metropolitan governments. In non-metropolitan areas, local government shall be structured on a two-tier basis consisting of integrated and elected districts and local councils.
5. Local government shall play an active role in capacity-building and shall ensure education and dissemination of information on the RDP.

E MISCELLANEOUS

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