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TC3/25

# **CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3  
RELATIONSHIP BETWEEN  
LEVELS OF GOVERNMENT**

**LOCAL GOVERNMENT  
WORKSHOP  
15 MAY 1995**

***DOCUMENTATION & QUESTIONS OF CLARITY***

*Embargoed until 09h00 29/5/95*

# TABLE OF CONTENTS

1	Notice of Meeting and Agenda	Page 1
2	Transcription of 'Questions of clarity' from the workshop on Local Government	Pages 2 - 34
3	Discussion document - The Constitutional Principles and Local Government	pages 35 - 44

**CONSTITUTIONAL ASSEMBLY**

**MEETING OF THE CORE GROUP  
THEME COMMITTEE 3**

**RELATIONSHIP BETWEEN  
LEVELS OF GOVERNMENT**

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

**Date** : **MONDAY 29 MAY 1995**  
**Time** : **09H00 - 12H00**  
**Venue** : **E249**

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**AGENDA**

1. Opening
2. Transcription of 'Questions of clarity' from the Workshop on Local Government presented by the Ad-Hoc Committee on Local Government (held on 15 May 1995)
3. Matters arising
4. General
5. Closure

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**HASSEN EBRAHIM  
EXECUTIVE DIRECTOR  
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**CONSTITUTIONAL ASSEMBLY  
MINUTES OF THE MEETING OF  
THEME COMMITTEE 3  
RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT  
MONDAY 15 MAY 1995 (AT 09H20)**

**PRESENT  
DC DU TOIT / P DE LILLE (CHAIRPERSONS)**

Andrew KM  
Blaas A  
Carrim YI  
Coetzee MP  
Cronje PC  
de Lille P (late)  
Du Toit DC  
King TJ

Koornhof GW  
Mahlalela AF  
Maine MS (Alt)  
Marais G (Alt)  
Maree JW  
Montsitsi SD  
Seperepere MS  
Verwoerd M

*(\* denotes alternate standing in for full member)*

**Apologies**

M Bhabha, CW Eglin and P Gordhan

**Absent**

BL Geldenhuys, PJ Groenewald, ON Khobe, ZA Kota, MS Manie, NN Mapisa-Nqakula, HJ Mashamba, LJ Modisenyane, R Rabinowitz, EEN Shandu and PF Smith and MI Vilakazi

**Technical Advisers**

None

**Ad-Hoc Committee on Local Government**

Mr A Boraine, Mr A Cornelissen and Mr B Mosley

**In Attendance**

S Haydon and M Mxenge

**1. OPENING**

- 1.1 Prof DC Du Toit opened the meeting.
- 1.2 The meeting agreed to proceed directly with the workshop on Local Government.

**WORKSHOP ON LOCAL GOVERNMENT - QUESTIONS OF CLARITY (TRANSCRIPT)**

Prof Du Toit welcomed the members of the Ad-Hoc Committee on Local Government and introduced Messrs A Boraine, A Cornelissen and B Mosley to the members of the Theme Committee.

Mr Boraine gave an introduction, apologising on behalf of the Ad-Hoc Committee, for the late circulation of the discussion Document - 'The Constitutional Principles and Local Government'. The members of the committee had been caught up in a lot of the day to day practicalities of the Local Government transition process and were not able to meet as a committee until 10 May 1995.

Let me just say one or two things about the process within organised local government that has been happening that would be relevant to your deliberations in the Constitutional Assembly. We did submit a list of the local government stakeholders to the Core Group. It is available there in terms of who's who in the local government world, in terms of any further consultations that may be necessary.

Within local government, on April 3 - 5, quite an important Constitutional Conference or workshop was held at which local government (these are the new transitional councillors from most parts of the country) attended. We will make reference to the Bloemfontein workshop because at this stage it is the only time that organised local government has come together to discuss constitutional issues amongst themselves. Some interesting points were made there.

There have been two workshops in the last month on Inter-Governmental Financial & Fiscal Relations which have been attended by all three tiers of government, including local government, and some useful points have come out of them on Inter-Government and Financial & Fiscal Relations and its application to local government and its effect on local government finance and financial autonomy. We would make reference to those two workshops.

Finally, last Thursday (May 11), there was a workshop held under the auspices of the Commission of Provincial Government, looking specifically at local government and the final Constitution. Again, some very useful and interesting points came out of that workshop which we could refer to.

In terms of submissions, we certainly haven't been given any submissions from your Secretariat, so we are not aware of any submissions on local government coming in from any parties or other stakeholders on local government. We would ask that you give us guidance about that at some stage during this workshop or perhaps later on today.

I think that it would be useful to know that from the local government side, there's probably been an understandable delay precisely because local government, and particularly organised local government, has been going through its own restructuring process. It is right in the middle of that restructuring process, and because it hasn't actually been completed, it's been hard for organised local government at a more representative and non-racial basis, to come together and discuss their own submissions, or potential submissions, to the CA, to your Theme Committee. This matter has been taken up nationally via the MIN/MEC meeting and deadlines have been set, for the restructuring and reorganisation of organised local government at a provincial level, by the end of June, and at a national level by the end of July.

So, depending on your own timeframes, and your time scales, for drawing up the Constitution and the involvement of local government in that, there will be bodies to consult with, relatively shortly, if that is what your intention is.

We would appreciate it, as Ad-Hoc Advisors on local government, if we could, perhaps towards the end of this workshop, or in the subsequent Core Group meeting, get some ideas of your own deadlines and your own processes and how you see our involvement. What you need from us. If you do need international references on local government and the Constitution, we can get them. When do you need them by? In other words, would you need something a lot simpler from us? That would help us in terms of our own work over the next two or three or four weeks.

Finally, ultimately the starting point for our discussion today, boils down to, do we all want relatively strong local government, and effective local government, or not? Because I think that is the fundamental, a priority starting point to the question to be answered, and ones answer to that then determines the various ways in which one approaches the issues of autonomy, questions of self-administration, inter-governmental relations.

Now, our paper, which my colleague Blake Mosley will take you through (which was circulated last Friday), does not cover all the areas that one could potentially cover in a constitution on local government. It really tries to bring out the five main themes that one would have to deal with in terms of the political and constitutional questions. There are certainly other areas, for example details on finance, details on the relationship between local

government, rural local government and traditional leaders, electoral systems, structures, categories and types which are not in the paper which we can certainly add in a discussion if that is your wish, if members would like more details on those sorts of areas and some international examples on that.

**MR BLAKE MOSLEY** (please refer to '*The Constitutional Principles and Local Government - A discussion document*' attached).

Prof Du Toit thanked Mr Mosley for the very lucid introduction on a very concise, clear document and invited other members of the panel to make an input.

Q

Prof Du Toit Perhaps just by way of introduction, they could also tell us about this word *autonomous* and look at it a bit because it does seem to be an unhappy word. Its Greek meaning originally is 'to make your own laws', that is to be a law unto yourself. I don't think that that is what is meant by autonomous in the sphere of local government. Perhaps the word 'self-administration' would be a better word to use.

(It was agreed that the panel would make additional input).

Mr Cornelissen Chairperson, just to add on to what Mr Mosley has said, when we talk about participatory local government (para 3.2.1) in the paper, then obviously we have got to take cognisance of CPXIV and how it applies to local government. There are two facets of participatory government - the one is the organs of civil society and the other one is make specific provision for .... (inaudible - 2 conversations on tape).... as provided for in CPXIV. Just that that is something that has got to be taken into account.

A

Mr Boraine I would like to amplify on the position of 'autonomy'. Because I think subsequent to writing this paper, (which as we note was done in a hurry), we have been able to do quite a lot of more research and work on it.

I think that one starting point we looked at is the European Charter of Local Self-Government, where they define it. They don't use the word 'autonomy', they use the concept 'the right to local self-government' and they do say that it's firstly within the limits of the law, mainly that it is subject to the law of a competent authority, be it provincial, national or a combination of both (and there is a reference there to CPXXIV), to regulate and manage a substantial share of public affairs under their own responsibility,

and in the interests of the local population.

I think that one issue that comes up here, is the question whether one goes for an ultravirus or the powers of general competence. There are numerous examples; for example the UK and Norway would go the ultravirus route, and the state of Bavaria, in Germany and most of the other European countries give local government the power of 'general competence' or 'inherent powers'. But prescribed by law. I think that we have looked a little bit more at how countries that use the term 'the right to self-administration', how it is interpreted, particularly in the German system, because I think that is where it is derived from internationally.

Certainly I think it's not necessarily a weaker term than 'autonomy'. It's a different way of defining it. It's not just talking about administration. It tends to be based on giving them general competency powers and saying that a local authority can do whatever its electorate wants it to do, unless another tier or sphere of government is doing that. I think that it is quite a strong concept in the German system. It also specifically says in a number of the Länder or provincial constitutions, for example in Bavaria, it says that the role of the province, in terms of supervising the local authority, is limited to judicial review only. It's not a licence to intervene politically. It is simply to say 'is the local authority doing what the law says it must do? What its bylaws say', and for example 'is it spending the money?' In other words does it have a proper internal auditing system to make sure the money is not going astray. Let me give you another example - in Brandenburg the Länder simply has the duty of legal supervision, and again it's quite similar there. The concept of the right of self-administration as we see it, is quite a powerful one and it does mean relative autonomy. Particularly if linked to the powers of general competence. But we do think that it is a potentially better formulation because the word autonomy, as you pointed out, can be misleading because it is not qualified in any way.

The other point that we would make though, and there is certainly a fear when we have talked to local government people about encroachment, I think that again there are historic examples not just in this country, of other levels of government encroaching.

Now there's two ways of dealing with that and it affects the autonomy issue or the right of self-determination, one can put in an anti-encroachment clause. Our current Interim-Constitution tends to do that. That's one way of dealing with it. Another way, which I think is much more positive, is to focus on the due



process. In other words the right of access of local government, and organised local government, to the inter-governmental institutions and mechanism and processes. In other words, protection doesn't come only through the Constitution, it also comes in terms of access to where decisions are being made. To where inter-governmental relations are being mediated. Hence, if you go that route, you say 'well is organised local government allowed to be represented on an inter-governmental forum'? For example at the moment it isn't represented there. Does it have representation on the FFC or on a commission of provincial government? So, let me just point to some anomalies that we have at the moment. The Commission on Provincial Government, in terms of the current Constitution, has as one of its tasks in fact, the determination of the powers and functions of local government for the final Constitution or to make a submission on that to your committee, I presume.

On that commission, there's not anyone who has any knowledge or background in local government. So if one looks at this notion of an inter-governmental relations accord, where the rights of access to the mechanisms and institutions that mediate inter-governmental relations, local government get access to that on an equal basis together with province and national government. That tends in practice to protect a particular sphere of government's powers and functions a lot better than anti-encroachment clause which simply has to rely on the Constitutional Court to give a ruling. So, those are just some of the additional comments that I would make on the concept of autonomy which are hopefully helpful to the members.

Prof Du Toit

Thank you very much Mr Boraine. The more I look at it, the more I see I don't want to comment from here before I give the chance for other questions. I think one should approach this whole thing about co-operative governments, not as a structural concept but as a functional concept, because then you can talk about spheres. But the moment we think about the levels of government as 'levels of government' then the hierarchy, as has been pointed out by Mr Boraine.

(.... Words lost at change over of tapes).

Q

Mr Andrew

Mr Boraine made reference to a European Union Charter on Local Government (or something to that effect), I don't know how voluminous that document is, but if it is a manageable size, would

it be possible for us to get copies of that in due course?

Prof Du Toit I think it's quite important.

Mr Boraine It's six pages.

Prof Du Toit Then definitely I think we need a thing like that. Also, the type of commentary that Mr Boraine has given to us just now on autonomy, we need that in writing, that argument.

Mr Andrew Are you taping the proceedings? Because if we could get a transcript of it that would save him the trouble.

Mr Cornelissen Just to add on to what Mr Boraine has said about autonomy and the inter-governmental relations as a different way, or an add-on, to really determine self-administration, I think that literature has also shown us from experience that if you do this inter-governmental relations in a format that is just an extension of your government departments, then we find that it does not work that well.

If you manage it in such a way that it is just an extension, say for instance your central government department, your form for inter-governmental relations, it becomes a method of implementing government policy instead of a real forum for where inter-governmental relations can be discussed. There are sufficient examples of that, and then I think it becomes less effective, and from my perspective I would like to add that on to what Mr Boraine has said. When we talk about inter-governmental relations as a way of self-administration.

Prof Du Toit In actual fact, as I understood you, it mustn't become line functions. That is the problem which we have generally with inter-governmental affairs as such. The concept, if it degenerates into that, then it is not inter-governmental affairs, just line functions consulting with each other.

(Prof Du Toit unwell, Ms de Lille took over the Chair)

Q

Mr Marais The speakers highlighted the problem of the National Fiscal Commission, they highlighted the problem of extending the functions of the Commission, of provincial government, they mentioned the Senate. I also have problems with the Financial and Fiscal Commission. I feel to some extent that the possibility is that if you can have inter-provincial administration, you are going to have a section of local government, if you could have an

advisory commission on functions assigned. Also, language, because I think that is going to be a serious problem, regarding the language to local government.

Then it was mentioned by the speakers from the Constitution - revenue sharing. Now in Brussels you have it direct to the local government from the central government. In Germany you have it via the Länders. Now if you are going to have it through the provinces you are definitely going to need also a commission that is going to allocate the funds from central government where you can have the representatives of the local governments involved. That's the one.

Second one, maybe it's not in the questions here, but I have a problem with specific functional agencies awardable, ESKOM, because in the old days it was that the local authorities put levies on the supply of electricity and now we are trying to cut it down. The balance between special functional agencies and general purpose governments. Then the powers of small local units who can't deliver services, can't you give them certain powers like veto, veto override? That they have the right to make accommodations; they have the right to advise to first our local small local units. Their authorities must first agree on the decisions taken by higher levels in departments that influence them. So you give the smaller unit certain powers and units that can't deliver services, or make policies, then .... it was mentioned here the question also of powers in the Constitution. It's basically general powers to the local authorities and it was mentioned that we must be careful not to be too specific. Now what about drawing a line between mandating powers and permissive powers? We don't see anything about it.

Then also if participating government (it was also mentioned), we must have a kind of philosophy. Must it be polycentric, must it be federal, must it be unitary or consolidative? At the moment I have feeling with our metropolitan and local units, they are very much federal in our parts (or co-operative we could give it another name). Another aspect that I would like to point out is, nowhere in our deliberations, discussions, do we bring in the role of the private sector in the delivery of services. Or put it another way, you have the relationship the provision, financial, the production of services, the delivery of services, the control of services. It's possible that in certain areas you can have the local authority finance. I have covered most of my points. Thank you.

A

Mr Cornelissen Madam Chair, just an opening remark. I listened to what was said

by the honourable speaker and certainly a lot of salient issues were raised, but I think the critical question is, what of these issues should be contained in the Constitution and which of them should be dealt with by subsidiary legislation? I think those are the critical issues. If you feel strongly about them I think the ultimate decision will be which should be concluded as a constitutional right for local government. I think that is the issue that has still got to be discussed.

Q

Mr Marais

You see, if you don't want to decide, or when you have to decide what are you going to put in a constitution, (you are not going to put all these details into a constitution quite right), but you must have certain philosophy, or policy, of thinking on many of these aspects, and then in your constitution you have the broader guidelines or principles under which these can be implemented. For example, the role of the provincial governments in relation to local government. If you don't have a clear concept of what you have in mind is it going to be possible later on to have a kind of advisory commission on the allocation of functions? At the end if you are going to give it to the FFC, because that is also the thinking in certain areas before us, the thinking that the FFC must assign some of these functions, so you must, if you are not clear that what you are going to assign to the provinces and to the local authorities, it may end up at other bodies.

For example, funds. At the moment we have a definition on tax revenue sharing. Now, are we going to (like the German one), going via the provinces, or are we going to do like the Brazil one that's going to the local government? It is an important difference because if you are going to put it through the provinces you must give them the structures to implement it.

A third aspect, a loan committee. At the moment we have recommendations that there must be one central loan commission. Now the question is, isn't it more important to have a loan commission in the provincial setup? Can you see why I bring up these points? Because it is going to affect the role of the FFC. It is going to affect the whole question of tax sharing, it's going to affect the whole question of loans. The whole fiscal, federalism type of concept is involved here.

Ms de Lille

Parties must also remember, that they are entitled to put all the detail that they would like to be seen listed into the Constitution, into their submissions, and then when we look at the submissions as the Theme Committee, we will have an opportunity again to discuss what we all agree, or more or less have consensus, on

what must go in the final Constitution.

Mr Cornelissen Just maybe a last observation, and that is exactly why, Mr Boraine in his introduction, we feel before we can really react to all these questions, there are certain critical guidelines that we have got to get from the CA, or the other way around. We will take our own position and then submit to them. That going with the understanding of our function here. That's why we asked the question, 'do we want strong local government or not?' Because it's only once you have determined whether you want strong local government, or stronger local government, that you can really apply your mind on how do you fit in these various authorities and functions of local government in the total structure. So that would be the basic question and once we've received some indication on that, certainly, we have made up our minds - we think we know what we would like, but we don't know whether that is our function to come and tell you whether that should be done in a different way.

Ms Coetzee I would like to pose a question to Mr Boraine about autonomies towards local government. As it is provided for in the Interim Constitution, to me it seems as if we should give autonomous powers to local government. We are going to have a problem in the future, because then the councillors can make bylaws, like they did even in the past. If we take in chapter 174.4 (chapter 10, para 174.4) also, where parliament, or even provincial government, shall not encroach on the powers, mistakes can be done especially where powers is lying and then the people abuse their powers. So when we look at this word 'autonomous' it is actually a danger if we should put it in our new Constitution, that local government should be an autonomous power to act, or do whatever, without parliament or provincial government to encroach upon.

Ms de Lille So you just express your view on the word autonomy?

Ms Coetzee Yes, autonomy and encroaching parliament or provincial government encroaching on local government.

A

Mr Andrew Yes, I presume we are not sort of having a debate because, I mean I understand the kind of concerns that of Mrs Coetzee, but I would doubt whether under the new Constitution with Bills of Rights and a whole variety of other things, that many of the abuses that one would be concerned about, would not be considered encroachment on local government. That would simply be enforcing the implementation of the Constitution which would not

be prevented, as I see it.

I just want to make the point because the point has been made by Mr Boraine and I think Mr Cornelissen, as far as I am aware, (and obviously the other parties have to speak for themselves), the structures and things and details have to be sorted out, but as far as I am aware, all the political parties are in favour of strong local government. Now, I am not talking about autonomous local government or any of those kind of words, and obviously everything is a matter of degree, but nevertheless, as far as I am aware, all the political parties, that there is agreement that one should have strong and viable local government structures. So, if that's something that is at present an obstacle in the evolution of their advice and thinking, I think we may well be able to remove that obstacle and, in other words I don't think there is anybody here who is either against having local government or is in favour of saying 'well, it should be just weak and sort of incidental'. I think we think it should be a proper level of government, and it should be strong in that sense, and then we would obviously probably differ on some of the details of exactly where the various things lie.

But to the extent that it helps the TA's on the subject, I think if parties could give them guidance, it may help sort of wasting time and they could develop their thinking further and help us with examples and so on. Thank you.

Q

Mr Carrim

I will say a similar thing to what Ken Andrew has just said. I think that all parties agree there should be strong local government. It's the degree of autonomy, so to speak, around which they differ. As they also differ around to what extent it should be set out in the Constitution. So even if one agrees that there should be strong local government, there are differences about how that must be represented in the Constitution. That even in the first place, to what degree it should be represented in the Constitution.

I just wanted to raise one or two more things. Firstly, at the beginning Andrew Boraine said that there was a workshop or conference on Inter-Governmental Financial Relations; now I don't know if our TC has got the minutes or the reports of that conference, but that would be quite useful. But also you referred to a meeting held last week, or a workshop, that a Commission on Provincial Government on local government, the final Constitution, again thereto if we could have a report, it would help us on our deliberations.

The think what I thought was really very interesting is your reference to developmental role, and your suggestion that it would be constitutionalised as it were. That the Constitution sort of makes out that the task of local government is to deliver services and you don't focus sufficiently on the developmental role. I think that is very useful. I agree with you personally, I don't know what my party thinks, but I agree we should give attention to that, that we should insert that in the Constitution. That the role of local government is actually quite essentially a developmental one.

I don't know whether one can give clarity on this, but what exactly is meant by 'equitable share'? There is constant reference to an 'equitable share' of the resources, an 'equitable share' of the funding and so on, what is meant by that? And I'm not altogether clear, on page 10, you say that Section 178(3) and 199(b) are not altogether consistent. Could you just expand on that?

I also found it interesting, your reference to local government as being answerable at one level possibly to provincial and central government, but at another level to the electorate. I think that is a very useful notion, that local government is answerable to the electorate. But it could also be abused you know. I mean, a right wing group in some part of the Free State or where-ever, in that enclave where they are largely people of one particular social and racial composition, they may well argue that look, their constituency wants a Volkstaat, or its independence and autonomy and so on, and they are answerable to the electorate. So while I recognise the value of what you are saying, it has to be tempered by the notion that there is also a broader electorate ultimately, the electorate of the people of this country as a whole, to which the electorate in some particular local municipality may have to subordinate its own interests and needs to .... although that doesn't have to be the case, but I am just saying that if ultimately if it clashed it will ultimately occur.

I am just also very interested about how local government can be represented in the Senate. How is it done? I believe in Germany it happens. How precisely does it happen, because presumably the Senate also has provincial interests in it? We as a party have proposed that that be considered, but we haven't fleshed out fully how that might be done. Thank you.

A  
Mr Boraine

Perhaps I could say just one or two more things on autonomy and I think it does (as Mr Carrim has said), we have tried to emphasise and draw a distinction around the notion of accountability, because that helps us to define what autonomy, or right to self-

administration is. In other words, if you have increased autonomy, or increased right to local self-government, or self-administration, or whatever one calls it, who is then one accountable to? I think that certainly the trend in Europe and in other parts of the world, is to try and increase the accountability of local government and all levels of government, to its immediate electorate, as apposed to another tier of government. So, the whole debate around participatory democracy and the rights of citizens to intervene in between elections in terms of their council or their legislature, comes to the fore here. In other words, one could spell out, and some constitutions do, others do it through legislation, the rights of local citizens, whether it's challenging local government, provincial government or central government, to, for example, recall representatives. That is one way of doing it.

Two, the question of defining criteria for referenda, that if a certain number of people sign or vote in a particular way, that council has to table certain legislation for discussion. I mean, there is a host of things, and perhaps we don't need to go into them now. The point is that that the Constitution is designed to try and make local government more accountable to its electorate and it doesn't rely on top-down supervision from another tier of government to do that. It relies more on the bottom-up participatory democracy. That is why we put some notion of civil society in there as well, and there is a debate around that.

A future Constitution could emphasise participatory democracy, and we found one reference interestingly enough in one of the provincial constitutions in Germany, where local governments are obliged to endeavour, in all their proceedings, towards participatory democracy. So it's not prescriptive in the sense of say 'you shall do A, B and C', it's enabling. It's an encouragement towards participatory democracy and presumably citizens could test their local authority against that clause in the Constitution. We can write out that reference for you.

Just to perhaps respond to the comment on what happens if local authorities make mistakes, and supervision of that. In a sense the right to self-administration or local self-government, is the right to make mistakes, and to mess it up. I mean, that's the right if one is relatively autonomous. The question is, what do you do if someone makes a mistake? Clearly, I don't think anyone would argue that local governments are outside the law, outside judicial process. They are subject to that, and another tier of government or the Constitutional Court or both, would have to supervise that, and regulate that and as soon as any local authority or council



moves outside either the law, whether it is a provincial law or a national law, or both, or outside of the terms of the Constitution, then someone has to act. It is not an absolute autonomy. It has to be within the national framework. Just as if a province acted outside the Constitution someone would take them to the Constitutional Court. It is the same limitations on one's absolute autonomy.

I think just a point, that local authorities don't usually pass their own legislation anyway. They don't have full legislative competency like other tiers of government. They would pass their own bylaws and those bylaws are subject to the legislation. It's within the limits of the law and therefore can be reviewed by another tier. So I think that even within the notion of the right to self-administration, or autonomy (whatever one calls it), it's definitely within a framework that has a number of checks and balances and it's not saying that a council can do what it likes. Certainly if it transgresses the law it is subject to some sort of prescription there.

Q

Mr Marais

In Natal, we have had the experience of towns going bankrupt because of putting up a power station, (I just want to give you practical examples), and other municipalities being unable to govern themselves because of the revolt against malpractice among councillors and officials. So what one needs, although you would like to have autonomy and maximum self-government powers devolved down to municipalities, could you be more precise and deal with the problems where within the law, within their competency, they have acted stupidly and made towns bankrupt and ungovernable, what bodies do you foresee to be able to take over in those exceptional circumstances which could be disastrous?

A

Mr Cornelissen

Chairperson, one way of, could one say, preventing that, is more or less to use the New Zealand scheme where local governments are obliged to every year publish their plan and discuss it with the inhabitants of their community. There are certain performance measurements against which, at the end of the year, their plan is tested, and again published by way of an annual report. So you can evaluate whether they have actually done what they have set out to do. Apart from that there is the auditing system, so there are various ways you could either try and prevent it before, or, you can make provision that in the case where a different tier of government, it comes to their notion that this is actually going on that you can then intervene and also almost appoint an administrator or commissioner to manage. But once again the

question arises, should that be covered in your Constitution or should that be done in subsidiary legislation? But there are ways and means of curtailing that.

Q

Mr Boraine

Chairperson, there has been quite a few questions on finance, and revenue sharing and equitable ....., and let me try and cover some of those points because our paper is not that detailed and one could in a sense, write a completely separate document just on inter-governmental financial relations.

I think the reference to the apparent contradiction in terms of the current Constitution between 178(3) and 199(b) and in fact CPXXVI, is as follows: 178(3) says that local authorities have a right of access to a portion of provincial revenues. In other words, it's very much within the framework of Schedule 6 'Competencies of Provinces'. However, 199(b) says what the current Fiscal and Finance Commission has to do and it's written very much in terms of the way in which CPXXVI is in fact phrased, which actually says that both provinces and local government have a right to an equitable share of revenue collected nationally, namely revenue collected by a national government, that is income tax, company tax and VAT being the three main ones.

This Constitutional Principle, and the way in which 199(b) is in fact written, tends to suggest the very new way, a more thorough way of financing local government than what is currently the situation and what 178(3) in fact says.

Our current situation is that local authorities are meant to raise most of their own finances from own sources, particularly property tax, the RSC levies and user charges and surpluses from the trading services. What happens at the moment is that any inter-governmental transfers that come are very much ad-hoc. They are not particularly transparent in terms of the way that their formula is worked out. They don't really allow for multi-year budgeting. There's no certainty.

What CPXXVI actually says in practice, as I understand it, is that it's introducing a notion of inter-governmental revenue sharing. So that monies that are allocated to local government from revenues collected nationally are actually solely for local government. No other tier of government will be able to use that, so it's not a question of giving those to the provinces to then perhaps give on to local government. It is guaranteed, it's certain and it's transparent. What that says is that that money is no longer national government or provincial government's money, it's local

government's money. In a sense, the transfers are regarded as a source of own income, not a hand out from another level of government their own income and local authorities can budget accordingly. But clearly within that you have to work out what the question of equity means. Firstly, what do you say about vertical equity. In other words, how much does national government get, how much do the provinces get and how much does local government get? Bearing in mind that they have also collected some of their own revenue and in a sense they are not as dependent on transfers as provinces would be at this current stage. Ironically provinces have a smaller tax base at the moment, own revenue, than local government.

So the first step would really be to look at vertical equity between the three levels of government within this revenue sharing formula. The second stage then would be to look at horizontal equity. How is money allocated to the local government, distributed between say urban and rural areas? Where are priorities for development, big cities and small towns? There one would have to probably look at national criteria which are actually applied though at provincial level rather than at national level. That is certainly my own opinion. It may be wrong, but one would have to look at distinguishing between where one sets standards or where one sets the criteria, and where one actually administers and regulates and supplies the funds and actually works it out. One would probably have to have a formula both nationally and provincially to do that.

The final point is, what criteria are used in this revenue sharing formula? That's precisely what the Fiscal and Finance Commission is currently working out. Here there's a whole range of criteria. Some countries, such as Canada, have a very complex formula with 36 different criteria. Other countries, like Nigeria which also has a quasi-federal system, have but four criteria. So one has a complete range of options there. The advice that we are getting is that, at this stage, keep your formula simple so that it can be understood and at the end of the day a more complex formula is not necessarily worth the effort. So one starts with perhaps numbers of people per province, per local authority, and looks then at additional weighting criteria, which can go on and on in terms of the number of people living under a certain income level, the backlogs, levels of unemployment etc. Those are the debates the FFC would have to go through in terms of recommending that to parliament.

So Chairperson, what I'm saying here is that what the

Constitutional Principle, I think XXVI, is pointing us towards, is a much more certain method of inter-governmental financing than we've ever had in this country. Certainty for provinces, it doesn't depend on bargaining once a year, and arm-twisting and fighting between levels. It actually anticipates a revenue sharing formula based on objective criteria which is a much more co-operative method of doing it. I think that saying CPXXVI brings local government into that process is not just between central and provincial, but it's between all three levels, and that's the important point of it.

A  
Mr Andrew

Again it's in a sense asking for information. It would be very useful for to us if Mr Borraine, or either of his colleagues, has factual information available, I mean not to present now but in terms of the amount of revenue collected at local government level around South Africa. Now, I'm not talking about the whole issue of non-payment, not that problem, just so that when we are looking at the Financial / Fiscal sections we have some idea how much is potentially collected, for example in property rates around the country compared with the amount we collect for VAT. So that kind of statistic if it could be provided to us. I mean, sooner or later it's essential, but if Mr Borraine or one of his colleagues has that easily available it would save us having to try and seek it elsewhere. So it is just a request for information on the current, and I say not addressing the issue of non-payment and all of that kind of problem, what kind of property tax bases, the totality the local authorities have around South Africa and what are their sources of income? What proportion of their incomes are coming in by way of electricity or water or property rates and so on?

Q  
Ms Seperepere

Thank you madam Chair. You said that we should refer to the points tabulated here. My point is not here but it does not mean it is not relevant. I think the panellists mentioned some few points that are not in the document but which can be discussed and of course to me it underlines my concerns that this issue is either never given serious thought or because we never like to address it, or we address it in passing.

It is the question of the rural-local government. The Government of National Unity has said that the coming elections will involve every South African, but to me it seems that we are not even trying to prepare the rural people given the fact that the majority of them are illiterate. We are saying that for the local authorities we are unable to deliver. The Regional Services Councils are there to assist, but to me, the Regional Services Councils have not even prepared our people to register. I don't think they were given

terms of reference. They just give the people the forms and it ends there. Those forms are not going to be recognised, if what I heard is true, that if an address does not appear on that form, that voter will be disqualified. But we know in the rural areas there are no streets and the houses are not numbered. In the squatter camps there are no streets. Those shacks are not numbered. How then do we expect those people to participate in the coming elections? How then do we expect the RSC really to help people to govern themselves if we can hardly prepare them for registration? Also that unless there has been restructuring of the RSC, these are apartheid structures which have done nothing for our people in the past. Thank you madam Chair.

Q  
Mr Cronje

Madam Chair, I am also going to talk in a general way but I would suggest that perhaps we afterwards go through consequentially, or you know, in sequence so that we can all talk about the same thing. It's jumping around a bit.

Now in the general sense when we are talking about strong autonomous, the relationship between the levels of government, then obviously one must understand that the South African condition changes terribly from place to place. Look for instance in Midlands. Richmond town consists of about 2000 ex-group areas people. Their TLC takes in Ndaleni which is 40,000 people, totally underdeveloped, semi-rural, no services whatsoever. Now to make that government viable is totally different to, for instance, Greytown, where in Greytown they have got 4000 ex-group area people, well developed, sweet little town and they are to be married with the local Hlalahle which is about 4000, in other words equal numbers, of black people in a very well developed little township. Now obviously, that municipality is up and running and viable and they can virtually look after themselves because they have been paying for services etc.

So there is a big, big, big difference between various localities as to what is going to make it viable. I mean Richmond simply cannot become autonomous to the same degree as the other because they won't have the capacity there. There is not the engineering capacity, nothing is actually going there that they have got a mental sense so that there, some other agencies will have to come in.

Pietermaritzburg has a bigger budget than the whole of Qwaqwa, or Johannesburg, bigger than the old Transvaal. So should they relate directly to national rather than go through the one tier where there is perhaps again Richmond and another smaller towns might

want some provincial connection first, because it's closer and there are agencies which can assist? Again, in terms of that relationship between different local governments, I think that always in the province if you have the metropolis overshadowing the needs of smaller municipalities, so it seems like somehow if you had a provincial control over small municipalities, but let the metropol link directly with the national government so they don't overshadow in that particular province for instance the needs of the smaller municipalities.

Q

Mr Marais

Chairperson, I am going to reformulate two of my questions. It fits in actually with what Mr Cronje was also mentioning now.

The one is the role of specific functional agencies in South Africa where the local authorities can't deliver the services. Because in some case you get a conflict situation even between a specific functional agency like Water-board, like Eskom and the local authority.

My second question is where local authorities transfer the delivery of the function to something else, an agency or a level higher up, the possibility to stall the participatory type approach we have still given some legal powers of possible veto overriding, to make recommendations, give advice. Things like that. Isn't for South Africa a solution to some extent what Mr Cronje also mentioned here? That means if you give the local unit that can't deliver, transfer the delivery of the service to some other level, you still give him some legal powers to veto or take part and then another lot of areas, not that I want it like America special school districts and things like that, when it comes to economies of services etc etc. But this is something we must also clear our mind, the role of the specific functional agencies.

A

Mr Cornelissen Chairperson, just to inform you on the rural-local government aspects and then maybe some observations on the election.

We are not directly involved with the elections and obviously not something that's relevant for the new Constitution, but I think I could mention to you that the latest estimate is that more than 60% of the total population will be registered, or rather that the possible voters will be registered for the coming elections. If you think from where we have started from, a zero base, and in the small ... (lost at time of changeover of tape) ... regulations in terms of the Transition Act to create more local government structures that will be able to look after local government service delivery in the rural areas.

Coupled to that, the whole problem of how to accommodate the traditional authorities or traditional leaders in your structures, turned out to be a very very difficult process in most of the provinces, or in some of them. We became aware of one big danger and that is that provinces could create structures that in the words of Deputy Minister Vali Moosa, only become paper-tigers in the sense that at the rural level you have political functionaries and you have staff but you have no discretionary budget money because all your available capacity is taken up by your political functionaries and by your staff structures. So we were briefed, together with the provincial governments, to try and devise a simpler and more effective system which we didn't want to do at a central level in the beginning, because that's not the idea of Section 10 in the Provincial Functions, and together with the provinces we have come up with the three possible models that will be discussed tomorrow and we hope a final decision will be taken by the end of that meeting tomorrow.

One very very simple model, (and this is only for information because the question was asked, and it hasn't got a lot of bearing on the new Constitution I think), but it would tide us over this next period of three to five years wherein we can then really develop in each province, structures that will accommodate that particular provincial government's problems. A very simple model is that you, in the non-metropolitan areas, (and I'm now talking non-metropolitan, I'm talking stand-alone towns and your real communities), that you create a two level structure consisting of your stand-alone towns, your primary local governments, and that for certain areas in your province, demarcated areas, you will have either a district or a regional or a services council, but that is at another level. Your stand-alone towns will then indirectly nominate people to that level but for all the areas outside your stand-alone towns, you divide them into wards and people directly elect representatives on that level.

That's got a lot of advantages. One, you don't create unfunctionary, or too many structures in the rural areas. You give them representation in the rural areas directly in the level where they have got money and capacity and they then can put their case there and the money can be spent and development take place in their areas. We feel that this is a much simpler and easier model (I'm glad to see there's affirmative nods somewhere along the line), but tomorrow the provincial governments will decide which of these three approaches they will use. I can just talk on behalf of I think, Andrew and myself who were involved in the developing of those systems, that that would be the easier one to

tide them over this next couple of years.

Q

Ms Seperepere Thank you madam Chair. There could be 60 or 70% registration but my concern is that according to my information registration forms without street numbers and numbers of houses, are not going to be recognised. That is my concern. Perhaps if you could deal with this matter.

A

Mr Cornelissen It's not within my responsibility and would suggest that you could contact the joint Chairpersons of the Election Task Group, Dr van Zyl Slabbert and Kehla Shubane, on this particular issue, but I think that I'm fairly right in saying that they have made a plan on that particular issue and it's not as critical as that. So, even if the address is not absolutely by street number or house or whatever, that there is a way that they are accommodating that.

A

Mr Boraine Chairperson, just specifically on that, I mean the regulations, the electoral regulations do say that it is the job of the municipality to ensure that people who register, or who apply for registration, have an address. So, if they don't have a street number or if the street doesn't have a name, then the municipality must fix it, not the person, and that would go for rural areas as well. There is nothing to stop a whole area being given one address which can cover 10,000 people. Nothing stopping you from all coming from the same address, namely that village which can be mapped in terms of aerial photography quite easily and located on a map. I think that those are some of the technical ways in which the people in rural areas are making sure that people have a fixed address. It's not up to them. In a sense the municipalities or the RSC's have to make sure. As long as they apply on a form, even if they have left their address blank, they should get help on that.

A

Mr Mosley

Thanks Mr Chairperson. Just to comment on the question actually asked. I think that given the reorganisation of local government, the process around the reorganisation of local government and the process of the establishment of transitional local councils and transitional metropolitan authorities; because the conditions in the country is vastly different, you would find the fiscal and institutional capacities differ from area to area. So I think that the level of self-government within a particular area would hinge quite critically on whether the necessary finances are actually there or whether the necessary administrative capacities are actually there. In the end, if it is that a particular service that has been given to local authorities to implement cannot be implemented; if it is that it is delegated on an agency basis to some other agency, I think that what would be critical to make sure that that agency is



actually accountable to that local authority vis a vis in terms of the standards of services that is actually to be delivered.

A  
Mr Boraine

Chairperson, if I may add a different slant on the question. It takes us back to the Constitution and in a sense, how much we put in and how much we leave out, the minimalist / maximalist areas, because I think it is precisely because there's so much variation at a local level, the capacity of a large metropolitan area and the capacity of a rural village, are just totally different. It has far more variation than you would have between provinces, that you need to build into your Constitution in my opinion, reflects the fact that there can be flexible approaches at different local levels to deal with different situations. For two reasons, one is that conditions change over time and you need to anticipate that. Some areas will grow and others won't. Platteland towns tend to shrink as people migrate into the cities. Cities will double in size in the next ten years. Our Constitution has to accommodate that in some way.

Secondly, you need to really make provision for different types and categories of local government. We already have 174(2) which makes provision for three types, and the suggestion is, certainly from the Free State Municipal Association, that you need to put in an enabling clause there that allows the competent authority, whether it is provincial or national, to implement a number of different types or categories of local government. How you start catering for weaker areas or poor areas and stronger areas and things like that, is that you allow for different structures within local government. A metro area is precisely to do that. There are always some weaker, what are called sub-structures or locals, but the metro is meant to bring them together and redistribute resources and finances.

Same in rural areas. You will always have some really small areas having to be linked to on economies of scale, to larger areas through your districts or your sub-regional councils or things like that. I think it is precisely your flexibility in your Constitution, it should have an enabling clause to allow for different types over time to be evolved. Within that different types of co-operation and delegation that provinces should be able to delegate downwards to some of the stronger municipalities, particularly metros in terms of primary health care, even looking at coming in on the education provision, buildings and things like that.

But in rural areas to be able to delegate upwards so that other tiers of government can take over responsibilities on a delegated basis

from areas that are too poor or too weak at this stage to actually have a fully fledged administration. They cannot afford it. There is a critical mass that one can show quite clearly where one can still retain political autonomy, or political responsibility at the local level while delegating certain administrative and financial functions to a more competent level whether it's the district council or the province. To be able to do that for five or ten years while we build up the local resources. I think that's where the notion of co-operation, say between different levels of government, between local authorities themselves, and between a local authority and a functional agency, or between local authority and the private sector, must be allowed for. That's the sort of flexibility that we would certainly be looking for in the Constitution.

Q

Ms Verwoerd

Chairperson, thank you. I want to just briefly return to the rural areas. I think we only had one model, but it doesn't matter because we are not going into a detailed discussion, I just want to know the provision that is currently there for 50/50 division for division of the wards, Mr Cornelissen, of the previously represented areas - just how do you provide for that in your model of the rural areas or are you of the opinion that it doesn't actually affect the rural areas because the Constitution doesn't specifically mention the rural areas? I hope my question is clear.

A

Mr Cornelissen

Chairperson, the way I understand it is that that particular section in 245 in its description does not include areas like that in the rural areas where you can actually determine that those kind of areas are in the rural areas, then obviously you have got to make provision for that. But, once again, it's not something for the new Constitution, but I can just tell you that what we are faced with at the moment is obviously there are two different kinds of difficulties that we encounter in the rural areas and that will also be discussed tomorrow. That is how you really accommodate at grass-roots the traditional leaders and then there are very strong representations from the commercial farming areas. In one way or another that will probably still come to parliament. Those problems need to be addressed.

Q

Ms Verwoerd

Can I just ask a follow-up? So are you suggesting then that the 50/50 does not affect rural areas?

A

Mr Cornelissen

Well, if I understand the description, you know the qualification. You see the question that you have got to ask is, the qualification is (Section 245 (3)(b)(1)(b) 'Provided that, notwithstanding anything to the contrary contained in this Constitution, where the area of jurisdiction of the local government includes - (i) the area

of jurisdiction of any institution or body as was referred to in section 84(1)(f) of the Provincial Government Act, 1961 (Act No.32 of 1961); and (ii) any other area not falling within the area of jurisdiction of the institution or body referred to in subparagraph (i), (ii) .... 'provided further that an area referred to in subparagraph (i) shall be deemed not to include any area for which a local government body referred to in paragraphs ....' and then it says '.... shall not have more than 50/50 ....' So I think the political question is, does it include any of those areas or not? It's nowhere that I can sit here and say it's not applicable are wrong. I think that's the critical question.

Q

Mr Montsitsi

Chairperson, I was actually looking at this problem of the delivery of services by some of the national service providers. One can take for instance Eskom. I would like this question to be answered in the context of the powers which the local authority might have. If, for instance, there is disparity regarding the provision of services from one local authority to another, what recourse does a local authority have in that instance? Thank you.

Q

Ms Coetzee

Madam Chair, I don't know really maybe this question was raised while I went out for a few minutes; my question actually, upon this document is, it's exactly the same as the Interim-Constitution, it doesn't provide for the rural-local government. So my question to all three gentlemen here, that I would like to address is, should rural-local government also be entrenched in the Constitution seeing as the Interim one does not provide for it? With also the functions, powers and fiscal, and all those things?

Q

Mr Carrim

It's relevant to page 3 of the document. You know this reference to the final phase, in terms of the LGTA where there are three phases, now let me be very clear personally I mean, when does the final phase really become operative? Because the Constitution gets sorted out the middle of next year, does it mean three years hence when we have the next local government elections we will have it in terms of the new Constitution or will we still operate by the Interim-Constitution?

The second issue also is presumably, this question of when we have the new phase is related to how decision making powers are allocated to the province or central state in deciding the shape of the local government terrain. You see, the national Constitution will deal with largely national issues, and it also will set out what powers the provinces have over local government. Now I know there is a push from provincial government that they would like to have great say of how local government is organised because they

argue that there's substantial differences between the different provinces. I know KwaZulu-Natal argues strongly that there are unique circumstances there and so on. The question is, to what extent will a national constitution dictate the final phase and to what extent provincial governments, either through provincial constitutions and/or through legislation, dictate when the final phase will come?

A  
Mr Mosley

Thanks Mr Chairperson. Just in response or to comment on the question which was being asked on the inequality in service delivery by local authorities, I think that in terms of the reorganisation of the local government process and the establishment of transitional councils, we would have cases where services are not of an equal standard which would need to be addressed, but I think that it would be important that minimum goals actually be set at a national level. That the service delivery agents that are providing those particular services actually have to conform to those minimum goals which are actually being set. If it is that service standards are to be equalised, I would be of the view that it has to be done over a period of time. That it would not be done on an overnight basis.

In terms of the differentiation of service standards, we would have nationally set what is a basic level of standard. What would be intermediate, what would be a full standard. I think that in terms of the setting of those standards that would need to be done. Also some process would need to be found for it to be done in consultation with local government.

A  
Mr Cornelissen

Madam Chair, can I go to maybe the rural structures? Could I say that I think what is important for us to understand is that there's a huge difference between category of local government and levels of government. The existing CPXVI refers to 'Government shall be structured at the national, provincial and local levels'. As it stands here, I interpret it as very hierarchical sort of structure whether we like it or not, but it is there as a Constitutional Principle. Then section 245 of the Constitution says that until elections take place reconstruction will only be done in terms of the Transition Act and after the elections in terms of chapter 10 and the Constitution as a whole.

Now, if we remember that there is a difference between a level and a category of local government, now if you refer Ms Coetzee to section 174(2), which is in chapter 10, there it specifically refers you to a law referred to in subsection (1) 'may make provision for categories of metropolitan, urban and rural local

governments ....' so in that way rural-local structures are entrenched in the Constitution. There is ample capacity I think to differentiate also between province and province on how you are going to deal with your rural-local government.

A  
Mr Boraine

When we get on to the document from the Free State, they do propose an amendment for example, to 174(1), where they actually say that there should be explicit provision for local government to cover the entire area of South Africa. The so-called wall to wall principle. That in a sense would have to cover rural-local government.

But the question of Mr Carrim about the final phase. Firstly, we were hoping you would be able to tell us when the final phase gets implemented. We've listened to Judge Olivier for example, who felt in his reading that nothing gets implemented before 1999 in terms of the final Constitution. We also spoke to other people who said no, only the provisions relating to power sharing and the executive remain in place until then for the full five years but that other provisions could be implemented as soon as they have been adopted. That presumably could impact on local government. Certainly I think that the perception amongst local government people is that the next local government elections would take place in terms of the final Constitution as apposed to the Interim one. We wouldn't have two sets of local government elections under the Interim-Constitution, only this one on November 1st.

You raise an interesting point about where local government is going to be defined. Is it the national Constitution or a provincial constitution? Or both? One could be more detailed than the other. I think I'll make two points there as part of the debate. In the final Constitution are provinces going to have their powers defined as they currently have it in terms of Schedule 6 and is local government going to be there, the same as housing or education or welfare? Or, in a sense, is local government going to be treated slightly differently because in a sense it is not a function like housing is or welfare is? Local government is a tier of government and if one does adopt a non-hierarchical approach, one could still have it as a provincial function or also as a national function. In other words as a specific concurrent function and that local government has access equally both to the province and to the national, because it is a level of government and that is your model of inter-governmental relations as apposed to being a function like housing or welfare or education. Now it depends on one's answers and positions to those questions. Before one can answer that whether it is exclusively in the provincial constitution

or whether it is defined primarily in the national Constitution and amplified perhaps in the provincial constitution.

Q

Mr Cronje

I think we would like to see more participation and you go through the arguments here as to whether it should be constitutionalised, whether it's an obligation rather than almost a convention. I'll leave this argument perhaps aside for the moment. To say that people have a way of voting out of office their local councillors, isn't the period of five years too long and let's say that things change quicker at the local level, that you should have either a shorter period for everybody, or like some councils had it in the old days, where for instance Pietermaritzburg a ward had three councillors and every three years one comes up for re-election. Wouldn't that assist also with a quicker check from the electorate on the councillors rather than describing how the civil society must take part?

A

Mr Boraine

Yes, I think that there are numerous possibilities in designing electoral systems and I think that that can certainly work. I would guess one wouldn't put that in the Constitution. One needs to work out what, in terms of the electoral system, what would be a minimum that you want to put in the Constitution. There is a debate that you just have the reference to proportional representation, because I think one of the Constitutional Principles, I cannot remember which one, in a sense emphasises PR and seems to make it mandatory to have some for PR. One comment we have had from local authorities is that if you retain a system of both proportional representation and wards it tends to make either the councils very big, and therefore expensive, or the wards are too big to be very localised. There is a problem with that and I think that some local government people would prefer to see just a ward system. But we may run into the problem of having to put in proportional representation combined. I think that one could perhaps put in a reference to having both PR and wards in the Constitution, and the system that flows from that gets designed through legislation. Perhaps one puts in who can vote, the basic requirements of citizenship rights to vote in a local government election, but the rest one would put in legislation. But certainly what you suggest in terms of continuity where one has an election every three, four or five years, that is currently the provision, one can have it between three and five years. It doesn't have to be every five years. That can certainly be in legislation and there's a 101 issues I think that would have to be debated there.

(Question inaudible - mike off)

A

Mr Boraine

Personally I think that the example we gave of the Bavarian Constitution, the obligation to strive towards participatory democracy is a very interesting one. I guess that one would still have to combine that with enabling legislation which shouldn't be, in my opinion, mandatory. It should suggest a whole lot of ways in which participation could take place. A local authority, whether it's a big one or a small one, could choose a number of different ways in which its citizens could participate. One could list a whole lot of examples there. It has to be flexible, because to prescribe how rural areas participate as apposed to large urban areas, would be wrong in my opinion.

Prof Du Toit

Just a short comment. Number 1 - it's true that when you constitutionalise consultation that you have delays in the process, but on the other hand if you don't have this participation, local government can sometimes become non-functional.

We have got a very interesting situation with participatory local government worldwide at the moment in the sense that in countries like Europe, the most radical positions on it are taken by left wing parties like the Greens which seems to be leading the reform of local government in Europe. In South Africa, the counter-part of that extreme local government approach is taken by rightwing parties like the Freedom Front, rather than leftwing parties. I do have some literature available on the policies of the Greens in Germany which I could make available and talk to the advisors at a later stage.

Q

Mr Marais

I would like to ask a question on the electoral system. There was an ordinance in Natal, a 1943 ordinance, in terms of which only ratepayers and citizens who paid a certain amount of rental were allowed to vote. The question now arises whether the panel knows of any country where people that are entitled to vote are other than the citizens of that area, or whether they are limited to ratepayers or contributors who pay for services and other benefits, or is generally the citizens only or are there combinations between the extreme that we had in Natal, and perhaps the general approach that everybody has the right to vote?

A

Mr Boraine

Maybe I could hazard a guess at that. We could certainly look at the specific requirements of other countries. Offhand it would be hard to say what the various examples are. My impression though is that because one's notion of local government is not linked just to the provision of services, but actually to the deepening of democracy, very few countries would have a qualified franchise.

In other words based just on whether one pays rates and taxes or is in other words a property resident of the area as apposed to a resident. The right of citizens to participate fully and directly in local government is part of the devolution of democratic system making in your system of government and it is not linked in any way to service delivery. Service delivery is almost an incidental side of what local authorities do. In fact you find that in many countries there is a shift in local government away from municipal service delivery. In fact in some countries that is privatised off and they become local institutions of self-government that deal with schools and health and education and the participation of citizens in the decision making around those. Therefore one couldn't restrict it to just people who paid rates and taxes. It would have to be open to all citizens if one went that route.

Q

Mr Cronje

The powers and functions thing. I think we've all more or less agreed that because of the tremendous variations in capacity and needs and so forth, that one needs to be flexible rather than rigid and listing exactly the powers and functions. In Natal we had an Extension of Powers ordinance by which, I think, it describes the conditions that will have to be satisfied before a town council could claim further powers. Would you suggest that would be the sort of thing to go for?

Q

Mr Marias

With your permission, may I just go back to page 9 and refer to the third diamond? What is meant by that? If that could be explained to me please.

A

Mr Mosley

What is meant by the third diamond is that if we are saying local government is actually developmental and we are embarking upon projects within a particular community, the point there is how long we are actually going to involve community participation. Is there capacity for community participation to be actually involved in that project? If not, what strategies would the local authorities actually put in place for community participation actually to be possible within that particular project development? That's basically the interpretation of developmental local government. The responsibilities towards enhancing the participation of local communities within the developments intended for them.

A

Mr Cornelissen

Chairperson, I would like to react on what Mr Cronje said. The history of our country in local government has followed the ultravirus route. There's a very specific indication of what they can do and what they cannot do. I'm not to sure in my own mind whether I'm in favour of that because it's a very restrictive type of approach. My own feeling with this would be that we use more



the approach of the inherent type of authority where you have got to legislate to say what they cannot do. Then, one way or another, describe who has got the authority to legislate what local government cannot do. Then if it's the restrictive approach and the ultravirus approach then you include it in the Constitution, it means that you have got to amend the Constitution every time that development in local government takes place. Quite frankly that is just my gut feeling at this moment. There are the two distinct approaches in the world and one probably has to discuss this a little bit more and read about it a little bit more. As I say from the historical perspective ours is the ultravirus approach which we have taken and formally the British system were your closest.

Q  
Mr Cronje

This fiscal and financial powers thing. Again, because of the uncertainties I think Mr Boraine at some point said that we must keep it simple. In other words you start with a per capita allocation almost, but because of again some of those examples that I raised, a per capita allocation would make Greytown richer and Richmond poorer. So, it would look to me like if the FFC would look at the developmental phase of a particular place and put there the infrastructure factors to determine what their allocation should be, that once that has been done on such a formula, the locality, or the provinces it's channelled through, should then follow that as a budget line allocation and not a global allocation. In other words, they cannot reallocate. What is your view of that?

A  
Mr Boraine

Firstly Chairperson, the complexities that are being spelt out in a discussion document by the FFC at the moment, which is due to be released in the next two weeks for comment, and that's the document that should come here and it should be discussed in the light of building these institutions up, because it does look at the pros and cons of different sorts of criteria. Certainly the simple sort of per capita allocations can't work. I mean, it would have to be qualified in many different ways in terms of existing levels of poverty or development, depending on the historical circumstances. It would have to take those into consideration to get a more equitable allocation between urban and rural within the urban areas, between poor and rich areas. So, there is a whole discussion on that and there are five or six different ways of measuring criteria. One could look at inputs. One could look at outputs. The number of hospitals, the number of beds, the pupil-teacher ratios. All sorts of ways in which one could design these criteria and I think there is a discussion document coming out on that quite soon. Hopefully by the end of this month.

Your second question. I think that you probably find it working slightly different between provinces, in the allocation to provinces, provinces will be 80% to 90% dependent on the transfers and clearly within that, they would have to, within that current section 155, says that transfers happen in two ways. One is a fixed percentage of the revenue collected nationally, and the other one are grants, and grants can be conditional and unconditional. In a sense the whole debate Chairperson, around autonomy and relative autonomy, whether it's at provincial level or local level also comes into this question that depends on the degree on which grants are conditional or the degree that they are unconditional, it can be treated as own income. One would have to have a balance there, a degree of having interrelation between those two ratios. I think because local government would be funded a lot less by inter-governmental transfers and derives far greater percentage of its own income from its own collection processes on the ground, it presumably wouldn't necessarily be tied to the different functions as it might be with the provinces, because local government has far fewer functions and it may be just that function of providing services in poor areas, its tied that, but how they budget that, and how they allocate it, may be flexible on the ground.

Q

Mr Marais

Madame Chair, if every municipality would have sufficient income sources that you know would not need any transfers, or money from the outside, could the panel please, in furnishing us with information, give us some idea of how other countries either finance from outside sources their municipalities, and to what extent they are self-efficient and what balance should be struck in that regard?

Chairperson

Let me just remind members also, we recently had a workshop in Pretoria, where papers were delivered from outside countries and maybe we should also ask members to have a look at those presentations. I think we were two or three of us who attended the workshop in Pretoria. Mr Cornelissen would like to respond.

A

Mr Cornelissen

Madame Chair, I'm not going to respond on the question on the papers and the documentation but just a general observation that, well certainly in this country we've got to take cognisance of the fact that we have huge underdeveloped areas, and in that in some way or another we've got to make provision for developing there or development. One of the golden rules of finance is that, and it has been formulated and I have quoted this often, it's the principle of fiscal equivalence as opposed to fiscal equality and it more or less runs like this, and that is that where decision is taken on the

type of service and the level of service and who should pay for it and how much they should pay for it, that decision should preferably all those areas, or all those areas should preferably be covered by the same group of people because otherwise you will find that if people are totally dependent for their expenditure, and there is also this whole debate on local government in any event being a non-investment part of the governmental sector, they are more concerned with social spending instead of social investment and it's becoming used as debate and you will find that if people must look at the local level dependent on provincial or central grants that they tend to draw up wishes when they go into development, instead of getting down to reality. So whilst I've prefaced my observation that certainly we've got to make provision for the transfer of money to get disparities right we've got to be very careful that local governments will in future just draw up wishes instead of really getting to grips with what they could afford.

Chairperson Can I take it that we are through with this document now? Then we've got ten minutes left now. I've asked the question whether this document is for our information, or whether the Advisors want to lead through this document, The Free State Municipal Association document? How do you want us to deal with that? Suggestion here, is that we keep it for our information. Is that fine with members?

A  
Mr Boraine Chairperson, I think that, The Free State Municipal Association, I assume, want to at some stage make a formal submission and this is marked "draft", because I know that at the workshop, called by The Commission on Provincial Government on Thursday, The Free State Municipal Association actually presented this and I think noted certain different options and possible changes that they would want to make in their final submission. But I think it would be useful for members to be able to read through this because it does give you a good idea of what local government, a portion of local government on the ground is thinking of and the advantage of it from page 12 onwards really, that's really from where you need to read because there they make specific recommendations to change the provisions of the Interim Constitution in chapter 10 and they have their own specific wording there, which is quite a useful way. You get away from all the guff and you come down specifically to what they want there, and I think from page 12 to, I think, page 16 would be useful for members to read through and see how the submissions are going there.

A  
Mr Cornelissen Madame Chair, just to add on to what Andrew has said, by giving

us the indication this morning that you are fundamentally in favour of strong local government, with of course all the reservations that we've got to take into consideration, we will now attempt tomorrow to get a decision, at MIN/MEC, so that this document is also workshopped in the other provinces so that local government in all of the nine provinces, in one way or another, will make a submission from their perspective on these issues. Thank you very much, I think you've greatly assisted us.

Chairperson Comrades, on behalf of the members of Theme Committee 3 may I thank the panel, Mr Boraine, Mr Mosley, Mr Cornelissen for their input and we will make a follow up about the requests that we've made to you for some more information. We thank you very much for coming.

## 2. CLOSURE

The meeting closed at 11h55.

# **CONSTITUTIONAL ASSEMBLY**

## **THE CONSTITUTIONAL PRINCIPLES AND LOCAL GOVERNMENT**

**A DISCUSSION DOCUMENT**

**Prepared by the Advisors to the  
Ad-Hoc Committee on Local Government**

**15 May 1995**

## **1. OBJECTIVES.**

- ◆ Familiarise ourselves with how the constitutional principles relate to local government.
- ◆ to highlight the issues which are presently being debated
- ◆ to identify issues for incorporation into the final constitution and those that can be contained in subsidiary legislation.

## **2. STRUCTURE OF PAPER**

Input deals with the following;

- ◆ Legislative framework for local government that is the Local Government Transition Act (LGTA), Ch.10 of Interim Constitution, section 245 of Interim Constitution and the Constitutional Principles (CP).
- ◆ Status & Purpose of local government
- ◆ Participatory local government
- ◆ Powers and functions of local government
- ◆ The developmental role of local government

### **3. LEGISLATIVE FRAMEWORK FOR LOCAL GOVERNMENT.**

#### **3.1 Local Government Transition Act, (LGTA) Ch.10 of Interim Constitution, Section 245 of Interim Constitution and the Constitutional Principles (CP)**

The LGTA serves as a regulatory framework to guide the local government transition process. Local government may not be restructured other than in terms of the act. Should legislation be passed by a competent authority after the elections, it should be done in accordance with the Interim Constitution and Ch. 10 thereof in particular.

The LGTA divides the transition process into three phases, that is:

- \* the pre - interim phase that corresponds with the appointed transitional councils
- \* the interim phase - this will commence with the local government elections due to be held on 1st November 1995
- \* the final phase - which commences when the final constitution becomes operative.

#### **3.2 Status, purpose and structure of Local Government.**

The following CP's are of relevance here.

**CP 4, which states the supreme nature of the constitution and it being binding on all levels of government.**

**CP 16 which states that there shall be three levels of government.**

**CP 17 which states that every level of government shall be democratic and**

**CP 24 which allows for a framework for the structures, powers and functions of local government to be set out in the Constitution.**

It is suggested that the autonomy of local government be explicitly stated in the future constitution and in this regard clause 174 (3) is endorsed.

Discussion on autonomy inevitably raises the character of inter governmental relations that prevail. Local government constitute a separate sphere of government which together with Provincial and National government constitute/make up the totality of S.A's governance system. This implies that it is not possible to talk of absolute autonomy for local government. Autonomy should be seen as relative to the other levels of government.

It should also be worthwhile to note that autonomy depends in part on the capacity of local authorities to deliver. It may be that for some areas and for some time to come local authorities will battle to fulfil their functions due to lack of capacity.

What is important however is to have an enabling framework that will ensure the autonomy of local government. In this respect it is of paramount interest that local government is given the necessary executive and legislative powers and financial resources that will ensure them executing their powers and functions successfully.

Past experience in S.A has often tended to view local government as subordinate to Provincial structures and the relationship to local government has often been associated with one of control. This hierarchical interpretation of inter - governmental relations does not allow for an interpretation which recognises that each sphere of government could have exclusive and concurrent functions depending on which sphere does what best.



This conceptualisation seeks to encourage the notion that all are levels of government and that there is a need to govern in partnership or in co - operation with one another. Inter - governmental relations is in this approach about partnerships or co - operative government although each sphere of course have widely differing powers and functions. Local government's main accountability is also to its electorate as much as it is accountable to provincial and national government.

### **3.2.1 Participatory Local Government.**

Historically there has been a strong tradition and demand for local government to be participatory by allowing for the participation of the communities that they govern.

There is the view which argues for the entrenchment of right to consultation of community based organisations within the constitution prior to the enactment of legislation.

According to this argument, the above will ensure consultation of community based organisations which otherwise, it is feared, will not happen.

Several arguments are listed against constitutionalisation:

- ◆ the prerogative to make decisions & govern continues to rest with the statutory body.
- ◆ should consultation be constitutionalised then it would be necessary to define what a CBO is and which are to be consulted and that they may end up as co - government partners
- ◆ there is the common argument that elaborate consultation processes are long winded, costly and remove the ability to take quick decisive action

- ◆ the alternative to the above is that the power base of community organisations and other organs of civil society are the people and constituencies that they are representing who have the opportunity to exercise that power through democratic voting. These organisations have the power if it is able to deliver votes in favour of the candidates it supports.

It is further argued that to successfully perform the role as watchdogs of the community, civil society should not be seen to be too closely associated with it in a formalised way.

#### **Comment:**

While recognising the fact that elected statutory bodies still have the prerogative to take decisions and should rightfully govern - the responsibility of government should not be that of communities. The way in which they govern is what matters. Hence it would be important for local government to create structures and institute processes which will allow and elicit community participation without it being necessarily a constitutional entitlement.

### **3.3 Powers and Functions of local government. (Minimalist vs Maximalist Debate).**

The following CP's are of relevance.

CP 20, guarantees appropriate and adequate legislative and executive powers and functions to function to effectively and deals with the criteria for the allocation of powers between different levels of government.

CP 24, provides for a framework for local government powers, functions and structures and a comprehensive list of these to be included in subsidiary legislation.

**CP 25, whilst national and provincial fiscal powers and functions are to be defined in the constitution, those for local government (with its different categories) shall be contained in the framework referred to CP, 24.**

**CP 26, ensures that local government will have an equitable share of the revenue collected nationally to enable it to provide the basic services and execute the functions allocated to them and**

**CP 27, is to recommend equitable fiscal and financial allocations to local government from the national revenue subject to certain criteria.**

Clause 16 (5) (a) of the LGTA together with clause no 176 & 177 of the Interim Constitution indeed raises the question if they cannot be contained in subsidiary legislation as they describe processes and details which need not necessarily be contained in the constitution. The minimalist would argue that the constitution should only contain broad principles while allowing legislation to work out the finer detail.

There is another view however, which has it that the functions of local government be detailed in the constitution so as to protect it from encroachment by any level of government. The latter position is what is called the Maximalist position whereas the former can be referred to as the Minimalist position.

In line with the above debate, maximalist would argue for producing a detailed list of what local government's finance and fiscal powers should be, which should be incorporated into the constitution.

#### **COMMENT**

Having mentioned that it makes sense to constitutionalise the status and fundamental purpose of local government what is left however is the balance that should be found between the amount

**of detail that one needs to go into or whether the enunciation of general principles with details contained in subsidiary legislation would suffice.**

The advantage of having a detailed constitution is that it is easier to interpret the allocation of powers and functions and it also allows for protecting the powers and functions from encroachment per se.

Nevertheless the above approach needs to be tempered with reality. Circumstances changes over time and there would be a constant need to adapt inter - governmental relations accordingly. If everything is entrenched in the Constitution it would mean that constitutional amendments would need to be made every time when additional power is allocated or removed from local government. Frequent changes to the constitution runs the risk of devaluing the importance of the constitution as the most supreme body of legislation within the country.

#### **Participation of local government in government.**

A recent conference on local government in Bloemfontein that had a wide representation from local government stakeholders, identified at least the following possible different mechanisms for protecting the powers and functions of local government:

- \* Establishment of a local government council, which should discuss local government legislation before it is tabled;
- \* Establishment of a Commission on Local Government ( or the transformation of the existing Commission on Provincial Government into the Commission on Provincial and Local Government;
- \* A strong formalised consultative process with organised local government prior to legislation being tabled in Parliament / Provincial Legislatures.

Aside from the appropriate mechanism, the point here is that the principle of local government participation and consultation prior to the enactment on any local government constitution should be provided for in the constitution.

### **3.3.1 Local Government to be Developmental.**

Historically in S.A., the role of local government has been narrowly viewed in terms of delivery of services. Local government is not seen as the central/key point around which local development revolves. At best the relationship of local government to development is viewed in a very fragmented way and at worst local government's role is viewed as a pure deliverer of basic services.

What is meant by developmental local government? The elements could be identified as follows:

- ◆ the conception that local government is integral to local development. It has the responsibility of stimulating and generating local economic growth in the area. In this respect local government has an intimate role to play in the emergence of local economic development in S.A.
- ◆ local government has to promote integrated and sustainable development. Integrated development means looking at the fiscal, institutional, socio-economic dimensions of a project from the conception to the implementation phase of a project.
- ◆ developmental local government would look at strategies of building the institutional capacity of communities to enhance their participation in the developments intended for them.

A reading of section 175 (2) of the Interim Constitution seems to view the role of local government simply as the provision of services to the communities they serve and it begs the question of a more broader development role for local government to be included in the formulation of that particular clause.

### **3.4. Local Government Fiscal and Financial Powers.**

The following provisions of the Interim Constitution and CP's are relevant.

Section 178 (3) which guarantees local government an equitable allocation by provincial government of funds with the FFC making recommendations regarding allocation of such funds. This has to be read in conjunction with CP 26, referred to earlier.

Section 199 (b) which deals with the FFC allows the latter to advise on the equitable financial and fiscal allocations to the national, provincial and local government from revenue collected nationally. It should be noted that section 178 (3) and 199 (b) does not necessarily correspond.

Section 178 (2) states the revenue sources of local government and it is suggested that these be retained in the future constitution.

#### **Allocation of additional/devolving of functions**

Should additional functions be allocated to local government or it be devolved by another level of government, such allocation must be accompanied with the principle that the necessary financial resources should follow to ensure that the functions are implemented successfully by local government.

Given that the FFC's mandate is to recommend formulae that would ensure equitable distribution of the national fiscus to all spheres of government clarity needs to be had about the role and composition of the FFC. Is it a bargaining forum consisting of representatives from the various provinces, or is it a body of technical experts with the goal of determining an equitable formula.

**ENDS**