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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

FINAL REPORT

**INTER-GOVERNMENTAL
RELATIONS**

**BY THE
TECHNICAL ADVISORS**

5 SEPTEMBER 1995

Embargoed until 18h00 Fri 1/9/95

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~~IFP~~ ↗

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

REPORT : PARTY SUBMISSIONS : ON INTERGOVERNMENTAL RELATIONS

This report is modelled on four issues that seem to be covered by all political parties who have made submissions on intergovernmental relationships. While it attempts to be brief, it also endeavours to capture some of the detail that accompanies some of the submissions. Some of the submissions deal with issues that are not directly, or even indirectly canvassed by the other political party submissions.

On such issues it is difficult to determine whether there is agreement or contention among the party submissions. An example is the submission of the African Christian Democratic Party which focuses on the size of the civil service. It advocates a smaller, skilled, motivated and efficient civil service and suggests that in this manner there will be a reduction of duplication and unwieldiness. What is not clear from the submission is whether a smaller civil service facilitates intergovernmental relations. On the other hand, the African National Congress sees the Senate as one of the intergovernmental mechanisms that should be constitutionalised while other submissions do not deal with this matter.

It appears from the submissions, in general, that all political parties appreciate the fact that in a multi-tiered government system the need exists for mechanisms which will ensure that there is consultation, co-operation, co-ordination and smooth interaction among the various levels and sections of the system. Agreement is missing regarding the question whether intergovernmental mechanisms should be constitutionalised. There does not appear to be consensus as to which mechanisms should be constitutionalised, which is not a major issue when one considers the fact that some party submissions propose that intergovernmental mechanisms should be allowed to evolve.

Note that the above does not apply to the Inkatha Freedom Party (IFP). The IFP ~~submitted~~ made submissions in early 1995 but was not present when this Report was approved by the theme committee. Nevertheless, the technical advisers made an effort to include (as far as it was possible) the IFP submissions in the "further clarity" column.

INTERGOVERNMENTAL RELATIONS : REPORT ON PARTY SUBMISSIONS

| Issues | Agreement | Contentious | Further clarity |
|--|--|-------------|--|
| <p>1. The importance of inter-governmental mechanisms in a three-tier system of government.</p> | <p>1. To an extent, parties accept the importance of intergovernmental relations. 2. ACDP - They are important for the sound communication channels between government sectors & levels & are vital to ensure a healthy functioning of government. 3. ANC - Emphasises the principle of co-operative governance. All state organs should co-operate to the benefit of the people & nation building. 3. DP - They are of critical importance & aim to promote co-ordination & consultation. 4. NP - Mechanisms, structures & procedures are imperative so that the different levels of government liaise on the basis of equality. 5. PAC - There is a need to create a framework on intergovernmental relations. 6. CPG - The need for inter-governmental relations is obvious, & some mechanisms should receive constitutional recognition.</p> | | <p>1. ACDP - Favours having objective-orientated specialist sections in a single sector of government, who can draw on particular expertise should this be required. 2. PAC - Although it accepts the three-tier system of government, it advocates a central government with a strong executive president. Provinces should be headed by administrators. The relationship between the central government & the provinces should be regulated by commissions such as the Commission on Provincial Government which should make recommendations on provincial problems, the Financial & Fiscal Commission & the Commission on Local Government. Not clear how important it sees the mechanisms under that kind of arrangement, considering that when government is centralised, the need for intergovernmental mechanisms is reduced. It sees some of the intergovernmental mechanisms as important.</p> |

intergovernmental relations are an essential feature of federalism with respect to relations between each province or provinces as a whole and national government, and between and among provinces themselves. However, the IFP2 (PTG) states that

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believes that intergovernmental relations shall not be institutionalised in any type of entity, forum, agency or commission provided for in the Constitution. In fact, if such entity exercises any type of executive or advisory power as provided for in the Constitution or in implementing laws, by definition that would encroach on the autonomy of provinces in the exercise of their powers concerned, and if such entity does not exercise executive or advisory powers, it is useless.

| Issues | Agreement | Contentious | Further clarity |
|--|--|-------------|---|
| <p>2. Principles and objectives of inter-governmental mechanisms.</p> | <p>1. ACDP - To ensure that government levels talk to one another & lessen conflict & waste.</p> <p>2. ANC - The promotion of cooperation between levels of government, including the local government level, & between the various provincial governments. Also the promotion of joint policy-making where it is necessary to prevent lack of co-ordination, the reduction (in) additional costs of government, the prevention of the adoption of mutually destructive policies, norms & legislation in the various provinces, addressing the regional distortions & disparities in resources.</p> <p>3. DP - The promotion of co-operation, consultation & co-ordination among the various levels of government.</p> <p>4. NP - The facilitation of inter-dependence, co-ordination & co-operation - but not to subjugate provinces.</p> | | <p>1. ACDP - It sees the emergence of the need for intergovernmental mechanisms as a sign that there is something wrong in government & as a sign that it must go back to the drawing board.</p> <p>2. PAC - Although it does not deal with the objectives of inter-governmental relations, this party's submission implies an acceptance of the objectives given in the second column.</p> <p>3. ANC - There should be a duty on different levels of government to co-operate. Intergovernmental relations are premised on the principles that the different levels of government * should support and assist one another, * share information and consult with one another, * cooperate in the development and execution of their policies, and * adhere to agreed procedures and maintain friendly relations.</p> |

| Issues | Agreement | Contentious | Further clarity |
|-----------------------|--|-------------|--|
| 2. <i>(continued)</i> | 5. CPG - The objective is to facilitate co-operative, consultation & co-ordination among various levels of government with the aim of serving the people of SA. | | 4. NP - adopts the principles as proposed by the Dept of Provincial Affairs & Constitutional Development. They are (a) that governments should conduct their affairs towards one another in the spirit of trust, good faith, friendship and mutual respect; (b) that governments should assist and support one another and consult and share information with one another; (c) that governments should comply with procedural requirements governing the way in which interaction among them should occur; (d) that governments should co-operate with one another and co-ordinate their activities in the realisation of their objectives in order to harmonise decision-making. |

~~5. The IFP does not address this issue directly.~~

| Issues | Agreement | Contentious | Further clarity |
|--|---|---|---|
| <p>3. Should inter-governmental mechanisms be constitutionalised?</p> | <p>1. ANC - Some mechanisms should be constitutionalised. However, elaborate details on inter-governmental relations should not be contained in the Constitution. It is necessary to constitutionalise some but not to spell out in detail all specific institutions of inter-governmental relations. Elaborate provisions on the detail of inter-governmental co-ordination & structures in regard to especially executive & administrative matters should not be contained in the Constitution.</p> <p>2. DP - Proposes that at few mechanisms should be constitutionalised but that others be left to evolve voluntarily.</p> <p>3. NP - The Constitution should only lay down the principle that intergovernmental relations must be provided for in parliamentary legislation and should not provide all detail. Some of those mechanisms which are already provided for in the 1993 Constitution should be constitutionalised but most should be left to evolve voluntarily.</p> | <p>1. Regarding details, the formulations in the Constitution proposed by the parties are so different that the issue is contentious.</p> <p>2. ANC - The ANC submission, however, does emphasise the primary importance of the Senate as the forum of legislative intergovernmental relations.</p> <p>3. NP - The Constitution should contain a commitment to inter-governmental mechanisms in the form of a principle & leave details to parliamentary legislation because inter-governmental relationships are a process which cannot be confined to mere structures. The other reason is that an extensive provision in the Constitution leads to inflexibility.</p> <p>4. CPG - It is necessary to constitutionalise some. CPXXVII requires, by implication, constitutionalisation of the Finance & Fiscal Commission.</p> | <p>1. CPG - The new Constitution should contain a general provision which requires that all levels of government shall strive towards co-operative government, consultation & co-ordination with the aim of serving the people of SA. Such provision should require that higher levels of government shall not dominate or encroach upon the geographical, functional or institutional integrity of any lower levels [CPXXII S174(4) & (5)].</p> <p>2. The IFP does not believes that intergovernmental relations shall not be constitutionalised (see above). The IFP believes that it is intergovernmental</p> |

relations should develop freely so as to accommodate the changing needs of society. Federal co-operativism operating in the USA is on a completely voluntary basis and has proven to be extremely effective in addressing any relevant need for coordination and integration when and as required.

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| Issues | Agreement | Contentious | Further clarity |
|-----------------------|--|-------------|-----------------|
| 3. <i>(continued)</i> | 4. PAC - There is need to create a framework on intergovernmental relations. | | |

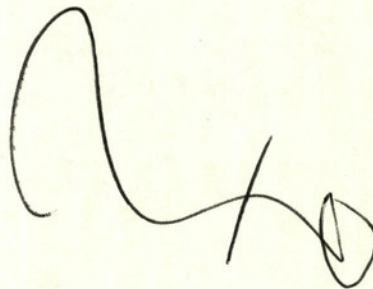
| Issues | Agreement | Contentious | Further clarity |
|--|-----------|--|---|
| <p>4. What intergovernmental mechanisms should be constitutionalised, if any?</p> | | <p>1. ANC - A Senate which is representative of the provinces & possibly of local government. For these purposes it becomes a Council of Provinces to provide a major say in the National Assembly Bills that deal with provincial affairs. Also a forum in which provinces can interact with each other.</p> <p>2. DP - The Premiers Forum or Council &, besides those mentioned below, all others should be left to evolve voluntarily. The Party mentions the Finance & Fiscal Commission [CPXXVII, S198], Commission on Provincial Government for 10 years [S163], Police Board of Commissioners [S220], Committee of the Minister & the MEC's & the Senate.</p> <p>3. NP - The Senate which should be representative of provinces, should be constitutionalised. Other mechanisms which should be constitutionalised are those</p> | <p>1. NP - The proposal provides that there should be provision for Senate representation on the Finance & Fiscal Commission & on the Commission on Provincial Government.</p> <p>2. The ACDP, the PAC & other parties do not address the Senate as one of the mechanisms.</p> <p>3. CPG - Also retain the Commission on Remuneration of Representatives whose job should be expanded to cover remuneration of traditional leaders. The IGF should be retained but restructured to reflect a greater equality among the participating governments. The Financial & Fiscal Commission [CPXXVII & S198 & S199 of the 1993 Constitution] should be provided for in the new Constitution. Establish a Council for Intergovernmental Executive Relations to monitor the operation of national-provincial-local relations, to propose options for solving conflicts between levels of government & to assist relations, to propose options with the establishment of intergovernmental</p> |

Issues

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| | | Contentious |
|----------------|--|---|
| 4. (continued) | | already provided for in the 1993 Constitution. 4. PAC - Maintain the Commission on Provincial Government, the Finance & Fiscal Commission on Local Government. 5. CPG - The Senate. It should be composed in such a way that it is truly representative of the provinces. |



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| Issues | Agreement | Contentious | Further clarity |
|--|---|---|---|
| <p data-bbox="98 236 416 379">5. What mechanisms should be specifically mentioned in the Constitution?</p> <p data-bbox="98 424 490 528"><i>(a) Among those already provided for in the Interim Constitution?</i></p> <p data-bbox="98 1058 470 1126"><i>(b) Among those which have evolved informally?</i></p> | <p data-bbox="533 424 1066 564">All parties agree that, in addition to the Senate, the Finance & Fiscal Commission should be mentioned in the new Constitution.</p> | <p data-bbox="1104 424 1505 564">1. ANC - The other mechanisms should not be mentioned in the new Constitution.</p> <p data-bbox="1104 571 1576 826">2. DP - In addition, retain the Commission on Provincial Government, the Commission of the Minister of Safety & Security & MEC's & the Police Board of Commissioners should be retained in the Constitution.</p> <p data-bbox="1104 833 1453 936">3. NP - Most should be retained in the new Constitution.</p> <p data-bbox="1104 943 1568 1046">4. CPG - In addition, retain the Commission on Remuneration of Representatives.</p> | <p data-bbox="1608 1058 2141 1198">DP - Proposes that the Premiers Forum should be constitutionalised. The submissions of other parties do not deal with this point.</p> |

| Issue | Agreement | Contentious | Further clarity |
|--|---|---|---|
| <p><i>5. (continued)</i></p> <p><i>(c) Among those that some parties propose should be created?</i></p> <p><i>(d) Among specialised or technical mechanisms</i></p> <p>(i) Financial & Fiscal Commission</p> | <p>All parties as well as the CPG agree that the FFC should be specifically provided for in the Constitution.</p> | <p>1. DP - The Intergovernmental Consultative Council for achieving the necessary co-operation & agreement between the provinces on matters of mutual interest.</p> <p>2. PAC - The Commission on Local Government.</p> <p>3. CPG - The IGF should be retained but restructured to reflect greater equality among participating governments.</p> | <p>1. NP - The Intergovernmental Forum, the Technical Committee to the Intergovernmental Forum, the Ministerial Forum, Technical Committees consisting of officials who assist the Ministerial Forums & the Senate Secretariat Committee which promotes co-operation between the Senate & Provinces.</p> |

| Issue | Agreement | Contentious | Further clarity |
|---|---|--|---|
| <p>6. The role of the Senate as a mechanism for intergovernmental relations.</p> | <p>1. ANC - The party sees the Senate as important in the articulation of the views of provinces. 2. DP - The Senate should be constitutionalised as one of the mechanisms for intergovernmental relations. 3. NP - However, it will also play an important role in inter-governmental relations when it shall act as representative of the provinces. 4. CPG - It will play an important role but it must be structured in such a way that it is truly representative of the provinces.</p> | <p>1. ANC - It would represent the interests of the provinces & become a Council of Provinces. 2. NP - The Senate is, in the first place, the second chamber of Parliament. This is its primary function.</p> | <p>1. DP - The precise role of the Senate is being considered by Theme Committee 2 - no further comment is made in this submission. 2. The IFP believes that the Senate should represent the provinces and its members should derive directly through indirect elections by the provincial legislatures in consultation with</p> |

the provincial cabinets. Each province shall be equally represented in the Senate and the Senate shall have the specific power to monitor executive functions such as defense and foreign affairs in which provinces have no competence. Furthermore, the Senate shall not have less legislative authority than that given to the National Assembly.

ADDENDUM
LIST OF POSSIBLE MECHANISMS TO BE TAKEN INTO ACCOUNT

| Issue | Agreement | Contentious | Further Clarity |
|--|-----------|---|--|
| <p>A. Political or legislative mechanism.</p> <p>1. The Senate.</p> | | <p>ANC - It is an important mechanism as it is representative of provinces and possibly also of local government, and articulates the views of and protects and promotes the interests of provinces.</p> <p>NP - While it agrees that the Senate plays an important role in inter-governmental relations, it argues that the primary role of the Senate is that of a second chamber of parliament and that inter-government relations should not be made to take precedence.</p> <p>CPG - Proposes the retention of the Senate and that it should be constituted in such a way that it represents provinces.</p> | <p>DP - Proposes that there should be provision for the Senate made in the Constitution.</p> <p><i>IFP - see their ^{its} submissions on the Senate discussed above.</i></p> |

| Issue | Agreement | Contentious | Further clarity |
|--|-----------|-------------|---|
| B. Executive mechanisms. 1. The informal Commission of the Minister and the MEC's. | | | Political party submissions do not deal with this mechanism. |
| 2. The proposed Inter-governmental Executive Relations Council. | | | CPG - proposes establishment and inclusion thereof in the new Constitution. |
| 3. The informal Premiers Forum. | | | DP - Proposes that this mechanism be provided for in the new Constitution. Submissions of other political parties do not deal with the mechanism. |
| 4. The informal Inter-governmental Forum | | | Political party submission do not deal with this mechanism. CPG - proposes that it should be included in the new Constitution and restructured to ensure equality among all participants. |
| 5. Commission of the Minister of Safety & Security & Commissioners [S 220(1)] | | | DP - This mechanism should be provided for in the new Constitution. Other political party submissions do not address this matter. |

| Issue | Agreement | Contentious | Further clarity |
|--|-----------|---|--|
| C. Administrative 1. Commission on Provincial Government [S163] | | DP - It should be retained for a period of ten years after the adoption of the new Constitution. CPG - It should be abolished one the new Constitution is adopted. | Further clarity is needed regarding the positions of other parties. Q. Should the CPG be transformed into the Commission for Local Government or the Commission for Provincial and Local Government? |
| 2. The Public Service Commission and the Provincial Service Commissions [S209 and S213]. | | | The views of political parties are not stated in the submissions to Theme Committee 3. |
| 3. The proposed Commission on Local Government. | | | PAC - proposes the establishment thereof. DP - proposes that the CPG becomes a Commission on provincial and local government. |
| 4. Police Board of Commissioners [S220(2)] | | | The views of political parties are not stated in the submissions. DP - should be provided for in the new Constitution. |
| 5. The Public Protector and Provincial Public Protectors [S110-114] | | | No party submission to TC3 deals with the aspect. |

| Issue | Agreement | Contentious | Further clarity |
|--|-----------|-------------|---|
| 6. Commission on the Remuneration of Representatives [S207(1)] | | | <p>CPG - It should be retained and its work expanded to include the remuneration of traditional leaders [see however S207(2)].</p> <p>Q. It is not clear what the position of political parties is.</p> |

NB The above mechanisms are dealt with either in our Theme Committee 3 report or in reports of other Theme Committees.

APPLICABLE CONSTITUTIONAL PRINCIPLES

The Constitutional Principles do not deal directly with intergovernmental relations as it does for example, with the question of allocation of legislative and executive powers to the national government and to provincial and local governments. As such it is, except in one instance, not easy to marry particular Constitutional Principles to particular issues, questions or submissions. Where this is possible it has been shown on the body of the report. All the Constitutional Principles that have intergovernmental implications are given below:

1. **CPXIII** - provides that the institution, status and role of traditional leadership shall be recognised and protected in the Constitution.
2. **CPXVI** - provides that government shall be structured at national, provincial and local levels. Intergovernmental relations are necessary to regulate how these levels of government relate to each other and how they relate among themselves.
3. **CPXVIII (4) and (5)** - deal with the allocation of powers, functions or institutions of provinces.
4. **CPXIX** - provides that powers given to the national and provincial levels shall include exclusive and concurrent powers and provides for delegation of powers and the exercise of powers of one level by another on an agency basis. This CP creates a relationship or relationships between the two levels of government which may need to be regulated through intergovernmental mechanisms.
5. **CPXXI** - lays down criteria for the allocation of powers between the national level and the provincial level.
6. **CPXXII** - this Principle is some for of regulation which provides that in its relationship with provinces, the national level should not encroach upon the geographical, functional or institutional integrity of the provinces.
7. **CPXXIV** - requires a framework for local government powers, functions and structures. It also gives jurisdiction to both Parliament and provincial legislatures to fill in the framework through legislation. According to **CPXXV** a similar procedure is laid down regarding fiscal powers of local government.
8. **CPXXVI** - provides that each level of government shall have an equitable share of revenue collected nationally. Intergovernmental mechanism are necessary to ensure that the objectives of the CP are achieved.
9. **CPXXVII** - requires that the Financial and Fiscal Commission be provided for in the new Constitution. All submissions of political parties, as well as the submission of the Commission on Provincial Government, propose that the FFC be provided for in the new Constitution.

We have gone through the submissions of political parties again. There does not appear to be any submission which is in conflict with the Constitutional Principles. Originally some political parties had not proposed that the Financial and Fiscal Commission be provided for in the new Constitution. However, as soon as their attention was drawn to **CPXXVII** they proposed that it be provided for in the new Constitution.