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COMMISSION ON PROVINCIAL GOVERNMENT

KEY CONSTITUTIONAL ISSUES

PROVINCIAL AND LOCAL GOVERNMENT

ISSUES AND QUESTIONS FOR DISCUSSION

These issues have been identified by the CPG in consultation with stakeholders in provincial and local government, and experts in various fields, and on the basis of invitations for submissions by interested parties and the people of South Africa.

INTRODUCTION

The Commission on Provincial Government is tasked by the interim Constitution inter alia with making recommendations to the Constitutional Assembly and providing it with constitutional text relating to provincial (including local) government systems.

In terms of section 161(1) of the Constitution, the development of a system of provincial government shall receive the priority attention of the Constitutional Assembly which, in this regard, shall take into consideration the recommendations of the Commission and the comments thereon by the respective provincial governments.

Although a new Constitution is being prepared, the provisions contained in such a Constitution must comply with the 34 Constitutional Principles.

This document deals with various subjects relating to provincial and local government which may have to be embodied in the new Constitution. On each issue there is an introductory statement referring to the relevant Constitutional Principles which apply to that particular subject, followed by a number of questions which could serve to highlight the issues involved. Views which could guide the Commission in framing its recommendations to the Constitutional Assembly are invited on this basis. The relevant provisions of the interim Constitution might serve as a general guide to amplify the issues.

A question which can be raised in respect of each of the subjects is in how much detail provincial and local government matters should be dealt with in the new Constitution.

The Commission welcomes the participation of all interested parties in their process. Copies of these guidelines for discussion and the Commission's work programme will be supplied on request.

Submissions or comments should be addressed to

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1. PROVINCIAL LEGISLATIVE COMPETENCE

INTRODUCTORY STATEMENT

The allocation of legislative powers and functions to provincial governments flows from Constitutional Principles XVIII to XXI. These Principles provide for the allocation of exclusive and concurrent legislative powers to provincial governments (CP XIX); the basis on which the powers are to be allocated (CP XX); the criteria to be applied (CP XXI); and override by national government legislation (CP XXI and XXIII). Current provincial legislative competencies are substantially entrenched in Constitutional Principle XVIII. Competencies could conceivably be greater under the new Constitution. In the light of the Constitutional Principles, what should be the appropriate legislative competencies of provinces?

Questions:

- (a) Provinces have a choice between having entrenched exclusive legislative powers, thus sacrificing a say in national legislative powers, or having a say in national powers with concurrency. Which is preferable?
- (b) What would be the appropriate legislative powers to allocate to provinces in the light of the preference expressed in (a)?
- (c) How are the powers and functions going to be established?
 - Should the allocation be on the basis of specific allocation to one level of government with residual powers to the other?
 - In the case of concurrent powers, should the Constitution spell out the detail of the powers allocated to each of the legislatures or are the provisions in section 126 in conjunction with Schedule 6 of the interim constitution adequate?
 - How should powers which are not specifically allocated in the new constitution be dealt with (CP XXI)?
 - Should all provinces exercise identical powers? Should provinces be able to decide which powers they wish to exercise?
 - How should future disputes about legislative powers be settled?
- (d) How explicitly should the Constitution address these issues?

2. PROVINCIAL CONSTITUTIONS

INTRODUCTORY STATEMENT

In terms of Constitutional Principle XVIII the new Constitution will have to provide for the adoption of provincial Constitutions by provincial legislatures on substantially the same basis as contained in section 160 of the interim Constitution.

To what extent should the national Constitution specify the form and content of provincial constitutions?

Questions:

- (a) Should the national Constitution make certain binding provisions in the case of provincial constitutions? If so, what should be specified?
- (b) Should provinces be entirely free to shape their own constitutions, provided only that they are not in conflict with the national Constitution?
- (c) Should the national Constitution contain guidelines for provincial constitutions? If so, what should these be?
- (d) Should the national Constitution provide a model provincial constitution, for any province which has not devised its own? If so, what should its features be?

3. PROVINCIAL LEGISLATURES

INTRODUCTORY STATEMENT

The independence of provincial legislatures (CP VI), their representative nature (CP VIII, XIV and XVII) and their procedures (CP X) are provided for in the Constitutional Principles. The question is what provisions in the national and provincial constitutions are needed for legislatures to function effectively.

Questions:

- (a) Do checks and balances between the provincial legislature and provincial executive need to be improved?
 - do you consider that one branch of government is dominant at present in your province?
 - should there be a greater role for the legislature in introducing legislation?

- should the legislature have greater leeway in turning down Bills emanating from the executive? (If so, this would probably indicate an independently elected executive).
- how can provincial legislatures be made more accessible to the public?
- should the legislature fulfil a greater watchdog role over the administrative departments at provincial level? What limits should there be on this role? What are the implications for the separation of powers?
- should the legislature have a guaranteed period of existence, or should the executive have the right to dissolve the legislature?
- should MECs be members of party caucuses?
- should the executive convene sittings of the legislature, or should it be decided by the constitution?

(b) At present, no member of a provincial legislature represents a geographic constituency, because of the form of PR being used. There are other options, such as:

- (i) A multimember constituency system, or
- (ii) Electing a proportion of the legislature on the basis of constituencies, while the rest are elected on party lists.

Should a constituency system be introduced alongside, or in conjunction with, the PR system?

(c) In terms of Section 133(1)(b) of the Interim Constitution, a member of a provincial legislature will vacate his/her seat if he/she ceases to be a member of the party which nominated him/her. Is this provision consistent with Principle VIII ('representative government' and 'multiparty democracy')?

(d) According to Principle VIII, 'regular elections' should be held.

If national and provincial elections were held at different times, could it strengthen the provinces' focus on provincial politics and issues?

Should provincial elections be held at the same time as national elections? Should simultaneous elections (a) be required, (b) be permitted, or (c) be prohibited?

- (e) In terms of Principle XX, 'Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively'. Do you believe that an extensive or vibrant committee system would contribute to the effectiveness of the legislative process?
- (f) Should provincial legislatures' staff fall under the Public Service Commission, the executive, or the legislature itself?

4. PROVINCIAL EXECUTIVES

INTRODUCTORY STATEMENT

The Constitutional Principles provide for the separation of powers between the legislature, executive and judiciary with appropriate checks and balances (VI); democratic representation at each level of government; the definition of provincial governments' powers and functions in the Constitution (XVIII); and stipulate that each level of government shall have appropriate and adequate executive powers and functions to function effectively (XX), including exclusive and concurrent powers as well as the powers to perform functions for other levels of government on an agency or delegated basis. CP XXII prohibits the national government from exercising its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces. What provisions should be made in the national Constitution for provincial executives in terms of these principles, or any other considerations?

Questions:

- (a) Should each province be allowed to decide the composition and powers of its executive? If so, are safeguards needed to prevent provinces from establishing undemocratic institutions?
- (b) Principle VI requires that legislatures and executives be separated. At present, the provincial executives are composed of 11 members of the provincial legislatures. Is this an adequate form of separation of powers?
- Executives may be established in various ways. For example, an executive may
 - be elected/designated/appointed indirectly by the legislature from its own members (as in the present system); or
 - be elected directly and separately by the electorate; or
 - be appointed by the chief executive (Premier) who is elected, directly or indirectly, either from among the members of the legislature or from outside.

- It is possible for an executive to be elected directly by the citizenry. Are you in favour of such a system?
- At present, the MECs may form a large proportion of the legislature. Is this satisfactory?
 - (i) Should MECs be members of the legislatures at all?
 - (ii) Should legislatures be enlarged?
 - (iii) Should the size of the executives be limited?
- At present, the constitution provides for the appointment of staff of the legislature by the executive of the province. Is this satisfactory? Should there be a separation between the public service employees and the staff of the legislature?
- Is the present relationship between the national Public Protector and the Provincial Public Protector satisfactory?
- (c) What should the position be when the connection of a Premier or MEC with the party list is severed?
- (d) Should there be constitutional provisions relating to governments of unity at the provincial level?
- (e) Should there be uniform provisions in the national Constitution for procedural matter relating to provincial executives, as contained in section 145 to 154 of the interim Constitution?

5. PROVINCIAL STAFF MATTERS

INTRODUCTORY STATEMENT

Constitutional Principle XXX provides inter alia that there shall be an efficient public service. Principle XXIX furthermore provides for the safeguarding of the independence and impartiality of a Public Service Commission only.

Question:

- (a) Should all provincial staff (other than a legislature's staff) be part of the Public Service? If so -
 - is there a need for a Provincial Service Commission for each province?
 - what should be the powers and functions of a Provincial Service Commission, vis a vis the Public Service Commission?

- in view of their limited powers and functions under the present Constitution, how many members should serve on such commissions and should they be full-time or part-time?
- should the new Constitution provide for Provincial Service Commissions?

(b) If the reply to (a) is no, what provision for provincial staff should be made in the Constitution and how will co-ordination be established between provincial and national staff matters and between provinces?

6. FINANCIAL AND FISCAL ISSUES

INTRODUCTORY STATEMENT

According to Constitutional Principle XXV both the national government and provincial governments shall have fiscal powers and functions, defined in the Constitution. Furthermore, principle XXVI provides for the constitutional right of each level of government to an equitable share of revenue collected nationally, to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

In accordance with principle XXVII, a Financial and Fiscal Commission, in which each province is represented, must recommend equitable fiscal and financial allocations to provincial and local governments from revenue collected nationally. This allocation must take into account the national interest, economic disparities between provinces, and the population and development needs, administrative responsibilities and other legitimate interests of each province.

Principle XXI (1 and 2) indicates that the level of government responsible and accountable for the quality and rendering of services must be that level at which such decisions can be taken most effectively; while the maintenance of minimum standards is the responsibility of national government. This implies that adequate levels of finance will be available at provincial level to discharge functions for which provinces are either constitutionally empowered or mandated by the national government.

How should fiscal and financial provisions be constitutionalised?

Questions:

(a) Which economic 'principles' or criteria should play a dominant role in determining the revenue powers assigned to provinces by the Constitution?

An optimal system of subnational government financing would:

- ensure a correspondence between subnational recurrent and capital expenditure responsibilities, and subnational revenue resources (taxes, non-tax revenue and borrowing);
- encourage the power and incentives to mobilise subnational revenues and fiscal responsibility;
- not compromise the macroeconomic management policies of the central government; the inter-jurisdictional mobility of factors of production such as capital and labour; nor introduce distortions in inter-jurisdictional economic decision-making (locational neutrality);
- be consistent with national redistribution goals;
- give appropriate expenditure discretion to subnational governments and improve their accountability; and
- be transparent, and based on objective, stable, non-negotiated criteria, as well as being administratively cost-effective and efficient.

Some of these principles or criteria might be in conflict and no one intergovernmental system will meet them all. Different countries and different levels of government attach different priorities to each of these criteria. In addition, priorities might change over time in response to the socio-dynamics in a country or province. There is no single 'correct' system of intergovernmental financing.

(b) What constitutional provision should be made for:

- exclusive revenue (tax and non-tax) powers to central and provincial levels (separation of revenue powers); and
- concurrent powers over revenue sources (sharing of revenue bases)?

Are the existing provisions adequate?

In this regard it should be noticed that the revenue powers of subnational governments could be limited by requirements of uniformity derived from provisions that no tax shall discriminate between provinces or give preference to one province over another; by provisions to encourage interprovincial commerce and the mobility of factors of production; and by provisions for safeguarding macroeconomic stabilisation and redistribution policies.

Taking into account these provisions, what level of fiscal independence should or could feasibly be accommodated in the constitution? (Fiscal independence refers to the ability of subnational governments to finance a large proportion of their expenditure needs through their revenue over which they have a high degree of discretion).

Where and at what levels of government should taxpayers be taxable?
Should the Constitution deal explicitly with this matter?

- (c) How explicit should be the assignment of revenue sources in the constitution?

To ensure correspondence between subnational expenditure responsibilities and subnational power over income sources and certainty regarding this income, an explicit assignment of revenue seems to be desirable. However, a developing economy such as South Africa's might experience major structural shifts in socio-economic conditions - per province and in the country as a whole. Therefore, to what extent should the need for flexibility be taken into account in the constitutionalisation of revenue powers?

Furthermore, the financial implications of expenditure/functional powers of the respective levels of government are not yet clear. How should this be taken into account in the constitutionalisation (explicit or otherwise) of revenue powers?

- (d) Should provinces have borrowing powers? For what purposes? Should these be constitutionalised? Is the existing constitutional provision adequate or should it be amended?

The national government will seek to exert control over the borrowing activities of subnational authorities in pursuit of macroeconomic policies, although borrowing for investment purposes is regarded as efficient and fair from an economic perspective. How should this issue be dealt with in the constitution if at all?

- (e) How could a rational, accountable and predictable structure of intergovernmental transfers be safeguarded?

Exclusive and concurrent powers to revenue sources mainly seek to address the issue of vertical fiscal balance, i.e. the matching of revenue and expenditure responsibilities. However, the assigned revenue powers of subnational governments might render revenue which is insufficient in relation to expenditure responsibilities, as well as for ensuring responsible decision-making on public expenditure. If a relatively centralised revenue structure is accompanied by a relatively decentralised expenditure structure, how should the intergovernmental transfer system be structured to address:

- vertical fiscal capacity equalisation? (e.g. revenue sharing for vertical fiscal capacity equalisation could be made through unconditional, lump sum transfers)

- interjurisdictional spillovers? (e.g. transfers to correct for interjurisdictional spillovers, mainly due to public infrastructure and human capital development, could take place through conditional matching grants)
- horizontal fiscal capacity equalisation? (e.g. transfers for fiscal capacity equalisation across subnational governments, could also take place through unconditional matching grants)
- provision of minimum standard basic services? (e.g. transfers for ensuring a minimum standard of basic services could be done through conditional lump-sum transfers)

Should the provision [Section 155 2(c)] be amended? e.g. to accommodate these different objectives of a transfer system, as well as to ensure that the system is rational, predictable and accountable. If so, how? Or should these issues be addressed statutorily?

To ensure a predictable flow of revenue to the provinces, should the basis be

- (i) prescribed in the Constitution; or
 - (ii) dealt with in separate legislation; or
 - (iii) left to the Fiscal and Financial Commission?
- (f) What financial arrangements, if any, should provinces be able to enter into with foreign parties? e.g. aid, trade agreements, etc.
- (g) How should fiscal disputes between provinces and the national government be settled?
- e.g. through the constitutional court; political decision making; or other institutional arrangements? Should the Constitution provide for such an event?
- (h) Should any other provision in the interim Constitution be modified? If so, which and why?

7. TRADITIONAL AUTHORITIES

INTRODUCTORY STATEMENT

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution (CP XIII). However, the role of traditional leaders in national, provincial and local government is not defined in the Constitutional Principles. In the interim Constitution, traditional authorities, indigenous law and customary law are entrenched provincial functional

areas (Schedule 6) subject to section 126 which provides for concurrent powers at national level. The stipulations in Constitutional Principle VIII concerning multi-party democracy, elections, universal adult suffrage, a common voters' roll and, in general, proportional representation, may lead to tensions in relation to traditional authorities.

Questions:

- (a) What should be the role of traditional authorities; how should this role be reconciled with other elements in the constitutional system; and how should the Constitution deal with these matters?
- (b) Should the Constitution provide a basis for determining who are to be recognised as traditional leaders?
- (c) What should be the powers and functions of traditional leaders at each level of government? Should this be provided for in the Constitution?
- (d) What should be the relationship between traditional authorities and elected structures at various levels?
- (e) Should provinces have exclusive powers with regard to traditional matters? If not, which matters should be subject to national regulation?
- (f) Should the Constitution provide a basis for determining the number and remuneration of traditional leaders, and the size of Houses of Traditional Leaders? What might that basis be?

8. SELF-DETERMINATION

INTRODUCTORY STATEMENT

The new Constitution of South Africa must provide for the establishment of one sovereign state, a common South African citizenship, and a democratic system of government committed to achieving equality (CP I). However, there must also be constitutional provision for collective rights of self-determination in civil society (including the formation of cultural, linguistic and religious associations) on the basis of non-discrimination and free association (CP XII); while Constitutional Principle XXXIV allows for the possibility of constitutional provision being made for the right to self-determination of any community sharing a common heritage of language and culture, whether in a territorial entity within the Republic or in any other recognised way, on the basis of substantial proven support within the community concerned. Should such a territorial entity be established under the interim Constitution, the new Constitution shall entrench that entity's continuation, including its structures, powers and functions.

In what ways might the right to self-determination be reconciled with the maintenance of one, sovereign, democratic state, and with its systems of provincial and local government?

Questions:

- (a) Self-determination by communities may take either (i) non-territorial or (ii) territorial forms. At the levels of both provincial and local government, how might such self determination be accommodated
- (i) non-territorially
- (ii) territorially?
- (b) Does the matter of self-determination have a bearing only on the Volkstaat issue, or are there other communities who might have a real interest in exercising such a right?
- (c) If a right to collective self-determination is claimed, what criteria and procedures should there be for deciding whether this is justified?
- (d) How should provisions concerning self-determination be constitutionalised?
- (e) If no territorial entity is established under the interim constitution (as provided for in Constitutional Principle XXIV) should this possibility continue to be accommodated in the new Constitution?

9. NUMBERS AND BOUNDARIES OF PROVINCES**INTRODUCTORY STATEMENT**

Constitutional Principle XVIII.3 provides that the boundaries of the provinces shall be the same as those established in the interim Constitution. The boundaries as they existed before the adoption of the new Constitution will therefore have to be reflected in that constitution. Constitutional Principle XVIII.4 provides further that amendments to the Constitution which alter the boundaries of provinces, shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces or, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives; while if the amendment concerns specific provinces only the approval of the legislatures of such provinces will be needed.

Questions:

- (a) Are the provisions in the Constitutional Principles sufficient to protect the integrity of provincial boundaries and to prevent frequent changing of boundaries? Or should it be made easier to amend provincial boundaries?
- (b) Should public participation by way of a referendum or otherwise be obtained before boundaries are amended?

- (c) What special majorities should be required in provincial legislatures for the approval of amendments to boundaries?
- (d) Would provincial legislatures be prepared to accept amendments of boundaries without their involvement (as is made possible in CP XVIII.4) if a chamber of Parliament is composed of provincial representatives?
- (e) How should deadlocks be resolved where legislatures of the provinces involved in a pending amendment of their boundaries cannot agree on such an amendment?

10. SUB-REGIONS (POWERS AND FUNCTIONS)

INTRODUCTORY STATEMENT

The Constitutional Principles do not provide for the establishment, powers or functions of formal sub-regions of provinces. Is there a need to provide for the establishment of sub-regions as a tier of government, or should sub-regions be dealt with administratively? Should the new Constitution provide for this, in the event of any province not adopting its own constitution?

Questions:

- (a) On what basis and subject to which criteria could formal sub-regions be established?
- (b) What should be the powers and functions of sub-regions? Should they be able to exercise subordinate legislative powers and, if so, what structures should be created for this purpose?
- (c) Could metropolitan areas be considered for sub-regional status with concomitant powers and functions?
- (d) Could a cultural entity be accommodated as a sub-region?

11. LOCAL GOVERNMENT

INTRODUCTORY STATEMENT

Local government has a constitutionally guaranteed right to existence (CP XVI). Constitutional Principle XXIV provides for the entrenchment of a framework for local government powers, functions and structures. These must be such that local government can function effectively (CP XX), and be financially viable (CP XX), with appropriate fiscal powers and functions (CP XXV) and a right to an equitable share of revenue collected nationally (CP XXVI, XXVII). Local government must function democratically (CP VIII, XIV, XVII).

Do Chapters 10 and 11 of the interim Constitution provide an adequate basis for local government systems, and for the framework which must be incorporated in the new Constitution?

Questions:

- (a) Should local government powers and functions be described more specifically in the Constitution?
- (b) What should be the relationship between national, provincial and local government? How could encroachment on local government powers by other levels of government be prevented?
- (c) Is the provision of section 158(b) of the interim Constitution in regard to revenue allocations to local governments adequate?
- (d) Should the Constitution specifically provide for local government representation on the Financial and Fiscal Commission?
- (e) Should metropolitan areas enjoy special constitutional recognition? If so, in what ways?
- (f) How should disputes between local governments, and provincial and national governments be resolved? What mechanisms or structures are needed?

12. INTERGOVERNMENTAL RELATIONS

INTRODUCTORY STATEMENT

Provinces and local government form an integral part of a sovereign South Africa. This means that governmentally there is an inter-relationship between the national, provincial and local tiers of government. The Constitutional Principles do not address the processes of intergovernmental relations directly. The system requires co-operation among the various levels, in the interest of effective government (CP XX). However, disagreements among levels of government could arise from matters such as the allocation of concurrent and exclusive powers (CP XXI), the power of override vested in the National Government (CP XXI), the prohibition of one level encroaching upon the functional competencies of another (CP XXII), and the allocation of revenue (CP XXVI). The question is how intergovernmental relations should be facilitated.

How should intergovernmental relations be facilitated?

Questions:

Should these relationships be -

- (a) institutionalised by means of institutions prescribed in the Constitution, and if so, for which relationships should the Constitution provide;
- (b) if institutionalised, should the intergovernmental bodies be composed of political representatives and/or officials and/or experts;
- (c) of a specialised nature, e.g. in the fields of finance, policy-making in various fields, and in matters concerning administration;
- (d) facilitated by an independent and impartial body, and if so, how should it be structured?

13. THE SENATE

INTRODUCTORY STATEMENT

The Senate's existence, composition and functions are not dealt with in the Constitutional Principles. The need for a second chamber, its objectives, functions and structure, are all open to question. If the object of the Senate is to provide for provincial participation in the national legislative process, how might that best be achieved?

Questions:

- (a) Is a Senate needed? If so, should its primary purpose be to represent provincial interests, or should it have a wider legislative function, or should it combine both functions?
- (b) In terms of its purpose as defined, what should its composition be? Should interests other than provinces be represented? If so, what interests?
- (c) Are there shortcomings in the present constitutional provisions relating to the Senate? If so, how should these be rectified?
- (d) What should be the size of the Senate, in view of its purpose, and vis a vis the National Assembly?
- (e) What should be the status of provincial representatives in the Senate vis a vis provincial governments and political parties? Issues might include the following:
 - (i) should Senators be additional to the provincial representatives in the National Assembly, or should the latter comprise the Senate?
 - (ii) what are the implications for provincial interests of representation from province to National Assembly on party lists?

- (iii) what are the implications for provincial interests of the prohibition on crossing the floor?
- (iv) should Senators be elected at large (on a third list)?
- (v) should a residential qualification apply?
- (vi) should representatives of provincial governments sit in the Senate?
- (f) What principle should determine the representation of provinces in the Senate: state equality, population or a formula balancing these? Is the existing formula just and fair?

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