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**CONSTITUTIONAL
ASSEMBLY**

**LOCAL GOVERNMENT
BEYOND 2000**

CONFERENCE & WORKSHOP

**HELD IN BLOEMFONTEIN BY THE
FREE STATE MUNICIPAL
ASSOCIATION**

ON 3, 4 & 5 APRIL 1995

Local Government Beyond 2000

Conference and Workshop

held in Bloemfontein by the

Free State Municipal Association (FMA)

on 3, 4 and 5 April 1995

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Contents

	Page
1. Opening Session	1
2. Welcome and Introduction	1
3. Opening Address: Ms Ouma Motsumi	3
4. Key-note Address: The Honourable Mr Justice Pierre Olivier	5
5. Orientation	13
6. Day 1: Workshop Session 1	15
6.1 Creating a vision for local government	15
6.2 Identifying key issues in local government	15
6.3 Plenary session: report-back	15
7. Day 2: Plenary Session	16
7.1 The vision, mission, and values of local government	16
8. Day 1: Key Issues	18
8.1 Group 1 (Theme 2: Establishment and Status of Local Government)	18
8.2 Group 2 (Theme 2: Establishment and Status of Local Government)	20
8.3 Group 3 (Theme 3: Administration and Resources)	21
8.4 Group 4 (Theme 5: Electoral System and Traditional Leadership)	22
8.5 Group 5 (Theme 1: Intergovernmental Relations)	23
8.6 Group 6 (Theme 4: Powers, Functions and Structure of Local Government)	24
8.7 Group 7 (Theme 3: Administration and Resources)	25
8.8 Group 8 (Theme 4: Powers, Functions and Structure of Local Government)	26
8.9 Group 9 (Theme 5: Electoral System and Traditional Leadership)	28
8.10 Group 10 (Theme 1: Intergovernmental Relations)	31
9. Days 2 and 3: Key Issues	33
9.1 Groups 1 and 2 (Theme 2)	33
9.2 Groups 3 and 7 (Theme 3)	37
9.3 Groups 6 and 8 (Theme 4)	40
9.4 Groups 4 and 9 (Theme 5)	44
9.5 Groups 10 and 5 (Theme 1)	48

DAY 1

1. Opening Session

The opening session was chaired by Councillor Gorden Taka, President of the Free State Municipal Association (FMA), who asked the Reverend Dalgleish to open the meeting with a scripture reading and prayer.

2. Welcome and Introduction

Clr Taka proceeded to welcome, on behalf of the Executive Committee of the Free State Municipal Association, the guests and delegates to the *Conference and Workshop on Local Government Beyond the Year 2000*. In particular, he welcomed:

- The MEC for Local Government in the Free State, Ms Ouma Motsumi (who delivered the opening address)
- The Honourable Mr Justice Pierre Olivier, judge of the Appellate Division of the Supreme Court of South Africa (the key-note speaker)
- Representatives of the Commonwealth and Sweden, visiting South Africa at the invitation of INLOGOV (Institute of Local Governance and Development) (see Appendix 2 for list of names). This delegation was accompanied by Mr Andrew Boraine, Executive Director of INLOGOV.
- Representatives of the British Development Division of South Africa (ODA), representing the Government of the United Kingdom. Clr Taka mentioned that the ODA was a major sponsor of the conference, and that their financial support had made possible the hosting of the workshop. He expressed the hope that the results of the workshop would meet the expectations of the British government.
- Representatives of Ernest and Young, Nashua, and Price Forbes Insurance Brokers, who co-sponsored the venture.

Clr Taka described the aims of the workshop as follows:

- To give major stakeholders in local government in South Africa the opportunity to consider and decide on the most suitable constitutional dispensation for local government;
- To establish a vision of what local government should be and how that vision could be included in the next constitution of South Africa.

In order to achieve these aims, the following objectives had been set by the workshop planning committee:

- To ensure an inclusive process by inviting major stakeholders in local government to attend the conference and workshop;
- To obtain interactive participation by all stakeholders during consideration, discussion and decision-making regarding constitutional issues in respect of local government;
- To reach agreement on specific principles and define elements of such principles in respect of local government in the next constitutional text;
- To facilitate the constitution-making process in respect of local government;
- To commence with processes of developing constitutional provisions regarding local government;
- To finalise a comprehensive report of the proceedings when delegates depart, and
- To submit conference and workshop papers to relevant theme committees of the Constitutional Assembly.

Clr Taka said that the Free State Municipal Association was privileged to have been requested to host the workshop for local government in South Africa. Although it was a newly established association, which held its inaugural congress as recently as the first week of December 1994, FMA was representative of all local governments and local government structures in the Free State and was playing a prominent role in the transformation of local government in the Free State and South Africa as a whole. He regarded the workshop as the starting point of a process that would ultimately ensure full local government involvement and participation in the drafting of the final constitution.

In his capacity as President of FMA, Clr Taka felt obliged to comment on the fact that there were fewer delegates than had been anticipated. He pointed out that the time constraints placed by the Constitutional Assembly on finalising the draft Constitution meant that local government had to submit proposals in this regard to the Constitutional Assembly by no later than the end of April/middle of May 1995. For this reason, the FMA Executive Committee felt compelled to proceed with the workshop, and he was confident that it would make a worthwhile contribution to the debate concerning the role of local government in the Constitution.

Clr Taka then called on Ms Ouma Motsumi, MEC for Local Government in the Free State, to open the conference and workshop officially.

3. Opening Address: Ms Ouma Motsumi

Ms Motsumi joined Clr Taka in welcoming the delegates and guests to what she said she believed to be a very important event in the history of local government in South Africa.

She said that it was often remarked that the current Constitution contained much more constructive provisions in respect of local government than most other constitutions. Chapter 10 of the Constitution contained provisions which were fundamental to local government, because they ensured interaction between local government and other levels of government. What Chapter 10 did not do, according to her, was to state clearly what local government was, or what it should be. On the other hand, she pointed out, the current Constitution was, by agreement, a temporary one, with an agreed life-span of five years from 27 April 1994. In order to ensure the acceptability to, and ownership of, the Constitution by the citizens of South Africa, it had to be effectively written by the people and their elected representatives. The Constitution should, therefore, be much more than a document which prescribed and regulated the systems and processes of government: it could be "the source of a common nationhood, a national symbol like an anthem and a national flag", which should "inspire citizens' loyalty to their country and maintain their belief in the systems and processes of government".

Ms Motsumi urged delegates to bear in mind that the institutions and processes of local government were not really negotiated at Kempton Park. Instead, Chapter 10 of the current Constitution was more or less the result of the negotiations in the Local Government Negotiating Forum. The present conference and workshop afforded local government the opportunity to consider local government, she said, and expressed her conviction that local government could achieve the status, powers and functions it needed. Local government was acknowledged to be an integral part of the government of South Africa, she said, and suggested that the conference consider whether the provisions relating to local government in the Constitution expressed that acknowledgement. "If local government is the level of government closest to the people, should not the interactions between local government and the people they govern be part of the Constitution?" she asked.

Ms Motsumi reminded all those present that the new Constitution had to be adopted on or before the middle of May 1996. This meant that not much time remained to make inputs.

"Never before in the history of local government in South Africa has local government enjoyed the constitutional recognition and safeguards it does have in terms of the current Constitution. But then also, never in the history of local government has so much been expected of local government," Ms Motsumi stated. For local government to be able to provide local government, to deliver services, and to implement sustainable development policies and -people driven development programmes suitable for the needs and aspirations of particular communities, the Constitution had to provide a suitable local government dispensation, she added.

She urged participants not to allow current perceptions to dictate their perspectives of what the future should be. It was easy to conduct the Constitutional debate at a level where participants were merely trying to redraft existing provisions. The current constitutional debates were difficult, she said, precisely because a fundamentally new — albeit temporary — constitution was being created. She challenged the conference to think creatively and innovatively and to view current Constitutional provisions as starting points for discussion.

Ms Motsumi quoted the saying that "local government is the third level of government, but the first level of democracy". In her view, the fundamental question that needed to be answered during the workshop was: "What should local government look like, and what should it be able to do to meet the core values of democracy, some of which are stated in the Constitutional Principles?" The participants were faced with the task of giving meaning to those Principles by formulating specific provisions, or at least ideas, for use by those who would later draft specific Constitutional provisions.

Ms Motsumi described the conference and workshop as providing local government and other stakeholders in local government with the opportunity to discuss and debate the constitutional position of local government in South Africa, and to decide on its future role in an atmosphere of constructive debate and free opinion forming.

Ms Motsumi concluded her address by congratulating the Free State Municipal Association on its initiative to host the conference and workshop, and declared it officially open.

4. Key-note Address: The Honourable Mr Justice Pierre Olivier

Judge Pierre Olivier commenced his address by referring to his brief, which he said was to assist the delegates in formulating proposals to the relevant theme committees of the Constitutional Assembly tasked with drafting provisions relating to third-tier government

One first had to consider the history of local government in South Africa, though, he said. Since 1948, separate racially based local authorities had been created for each of the four so-called "racial groups" in the country. The white local system was vastly favoured in terms of resources, facilities, services, and business and industrial areas. The other three groups were neglected, and consequently the supply of municipal services in non-white areas often broke down completely. In general, they had been nothing more than "dormitory suburbs" of the traditional white towns from which they were artificially separated. They had also been cut off from the life blood of municipal government,

namely a guaranteed regular income that would have enabled them to render essential services.

Referring to local councils, which were elected in separate racial elections in most non-white communities, Judge Olivier said that the so-called elected "local administrations" had not enjoyed the support of the majority of residents in their areas. Elections were boycotted, and voter turn-out was mostly dismal. The white system *de facto* controlled local government without effective participation by the other groups.

This situation, which had also reflected the position at national level, became increasingly unacceptable to black communities and to many whites. The inevitable breakdown of local government in black communities as a result of the rent and service charges boycotts, and the resignation of the remaining local councillors, had increased the pressure on the national government to find a solution to the local government crises. By early 1993, the South African National Civic Organisation (SANCO) had persuaded the Minister of Local Government to establish a formal national local government negotiating forum. This body served as the main forum for local government, and its recommendations were later substantially ratified by the multi-party negotiating forum at Kempton Park and subsequently incorporated into the Interim Constitution.

Judge Olivier said that the Interim Constitution was sometimes called "a bridge between the past and the future", since it bridged the chasm between the apartheid past of racial segregation, where the principle of equal justice for all had not been recognised, and the future of a non-racial, non-sexist, unified and democratic South Africa.

As far as local government was concerned, this bridging process was envisaged as taking place in three phases, he said:

■ **Phase one (pre-interim phase):**

From the adoption of the Local Government Transition Act to the first elections for local governments in the Interim Constitution. This phase was regulated by the provisions of the Transition Act, but the contents of the political agreements are also applicable.

■ **Phase two (interim-phase):**

Would start with the first elections of local governments under the Constitution, and end with the implementation of the final model for local government. This phase was governed by the provisions of the Interim Constitution, certain provisions of the Transition Act, and certain provisions of the political agreement.

■ **Phase three (final phase):**

Would be governed by the provisions of the final Constitution.

We were approaching the end of the first phase, Judge Olivier pointed out, and were preparing for the commencement of the second phase, i.e. the first election of local governments. This phase would, however, be very short-lived, since, in terms of the present Interim Constitution, the new Constitution had to be adopted by at least the middle of 1996, replacing the Interim Constitution with immediate effect. Because of the short-lived nature of the second phase, he wanted to focus on the preparation for the third phase, *viz* the drafting of the new Constitution, Judge Olivier said. This matter was extremely urgent, he added: all proposals for the chapter dealing with local government had to be finalised by June or July 1995, since the relevant chapter had to be drafted at the latest by July for consideration by the Constitutional Assembly.

The first questions to ask were: "Where does one start writing a Constitutional chapter dealing with local government, and are there any coding principles?" In his view, there were two sets of principles which could be used as points of departure:

- The 34 Constitutional Principles; and
- The provisions dealing with local government in the Interim Constitution.

The 34 Constitutional Principles were relevant and important, because the Interim Constitution required the new 1996 Constitution to comply with them. The Constitutional Court had the power to strike down the entire Constitution, or parts of it, if it violated any of the Principles. The provisions of the Interim Constitution were also important, since they had been formulated in accordance with the agreement reached at the multi-party negotiations at Kempton Park: on balance, one could expect the parties to adhere more or less to these provisions.

Constitutional Principles

In Judge Olivier's opinion, Principle 24 was the most important Principle. This Principle read as follows:

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

In his view, the message was clear: the Constitution should contain only the bare framework of local government powers, functions, and structures, with the detail being dealt with by means of national or provincial legislation. That this was, indeed, the philosophy of Principle 24 was also reflected in the provisions dealing with local government in the present interim Constitution, *viz* sections 174 to 182.

Judge Olivier pointed out that the philosophy of all South Africa's Constitutions since 1910, and also that of the Interim Constitution and of the Constitutional Principles, had been that control over local government should be a function and power of the relevant provincial governments.

That principle was enshrined in Schedule 6 to the Interim Constitution, which set out the powers of provincial legislation and provincial governments, including local government. The inter-relationship between the powers of a provincial government and those of the central Parliament were fully dealt with in the Interim Constitution, particularly in section 126

126. Legislative competence of provinces

- (1) A provincial legislature shall, subject to subsections (3) and (4), have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.
(Sub-s. (1) substituted by s. 2 (a) of Act No. 2 of 1994)
- (2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.
 - (a) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).
(Sub-s. (2A) inserted by s. 2(b) of Act No. 2 of 1994)
- (3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-

- (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
 - (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
 - (c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
 - (d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
 - (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.
- (Sub-s. (3) substituted by s. 2 (c) of Act No. 2 of 1994)
- (4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.
 - (5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are expressly or by necessary implication, inconsistent with each other.
 - (6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

Judge Olivier considered subsection (3) to be the most important, since it contained the principle that a law passed by a provincial legislature in terms of the Constitution shall prevail over a parliamentary statute, subject to certain well-defined exceptions. He added that the principle that provincial legislation should prevail over central legislation was being widely discussed and debated. In his view, the Interim Constitution dealt adequately with the relationship between central and provincial legislation, and he anticipated that South Africa would not be confronted later with legislation such as in Canada to distinguish between the powers of the two systems.

An important question to be asked in drafting a new Constitution dealing with local government was: "What are we going to provide in the Interim Constitution as regards the powers of local government in relation to the powers of the province and the central government?" Since sections 174 to 182 of the Interim Constitution dealt with local government, the further question arose: "Why not simply adopt these principles in the new Constitution?"

In answer, Judge Olivier proposed that it was definitely possible to improve on the Interim Constitution. The main problem presented by the Constitutional Principles, even read in conjunction with the Interim Constitution, was that they were extremely vague and contained ambiguous provisions such as those of sections 174 to 182.

At this stage, one could revisit the question: "How does one draft a Constitution dealing with, *inter alia*, local government?" This question could be approached in two ways, he said, *viz*:

- The so-called minimalist approach; or
- The so-called maximalist approach.

The minimalist approach held that the Constitution should contain broad principles only, leaving it to legislation to work out the finer detail. The maximalist approach required detailed, complete provisions. The problems created by the minimalist approach were manifold, e.g.:

- It allowed too wide a scope for central and provincial legislation, thus creating numerous potential clashes and constitutional litigation;
- It created uncertainty and confusion.
- It tended to be rhetorical, and it failed to lead to meaningful legislation.

At the same time, Judge Olivier said, he did not favour an unqualified maximalist approach. Too many details would cause as many problems as too few. Instead, he favoured a balanced, workmanlike approach. The Constitution should spell out the principles on which the country is to be governed in clear, precise terms: it should formulate the powers, functions and structures of each organ of government in such a way that the man in the street, as well as the courts, could understand the Constitution and give a meaningful interpretation to it. This required that we should avoid loose, "soft", meaningless terms, because they would lead to litigation. The task before the conference was, therefore, to take the relevant Constitutional Principles applicable to local government and to construct Constitutional clauses dealing with the framework of local government powers, functions and structures.

Judge Olivier stressed that the conference proposals would be useful only if they were in the form of well-formulated draft clauses, suitable for submission to the relevant Theme Committees of the Constitutional Assembly.

To illustrate his own approach in the time at his disposal, Judge Olivier used one of the five conference themes, *viz* Theme 1, inter-governmental relations, where the challenge lay in demarcating the competencies of the three tiers of government so as to avoid conflict.

As far as the relationship between central and provincial government was concerned, section 126(3) of the Interim Constitution dealt quite adequately with this issue, he said. This principle very clearly stated that provincial legislation would prevail over parliamentary legislation, except in a number of well-defined exceptions. The question was: "Do we not need a similar demarcation between the powers of local government and that of central and provincial government? And, if we accept that we do, how are we to formulate the respective competencies of the three institutions?"

Sections 174 (3), (4) and (5) of the Interim Constitution endeavoured to set out the definition of those various powers, he said.

174. **Establishment and status of local government**
- (3) A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.
 - (4) Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.
 - (5) Proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been published for comment in the *Gazette* or the *Provincial Gazette*, as the case may be, and local governments and interested persons, including organised local government, have been given a reasonable opportunity to make written representations in regard thereto.

Judge Olivier proceeded to point out certain ambiguities and problems in each of the above subsections. These problems could be summarised as follows:

- Subsection (3) stated that local government shall be autonomous, but within limits prescribed by law. This reflected the basic problem in the Interim Constitution: in the negotiating process at Kempton Park the parties could not find a solution to the problem of whether, as far as local government was concerned, there should be a devolution or deconcentration of power. A devolution of power, leading to substantial autonomy and discretionary decision-making power being given to the local level, was opposed to a mere deconcentration of powers, which implied limited delegated authority for the agent whose fundamental responsibility was merely to execute the will of the superior lawgiver. At Kempton Park in 1993 the participating parties expressed both ideas in subsection (3), since autonomy was a characteristic of devolution, whereas the requirement "within limits prescribed by or under law" constituted the definition of deconcentration. Judge Olivier suggested that South Africa had to choose between devolution and deconcentration, since the uncertainty in the current subsection (3) would inevitably lead to constitutional litigation.

- Subsection (4) stated that Parliament or a provincial legislature shall not encroach on the powers functions and structure of a local government to such an extent as to compromise the fundamental status purpose and character of local government. In his view, this subsection was extremely muddled. For example, did subsection (4) mean that, if a local government exempted certain institutions or churches from local taxes, and Parliament countered this by enforcing equality of rates and taxes, Parliament could be challenged in the Constitutional Court? And would this not, in fact, make local government the sovereign power? Judge Olivier suggested that subsection (4) was the kind of provision which "should be avoided at all costs", and it could be avoided only through clarity of thought. The delegates had to decide: "What exactly do we want? Where do we stand in respect of local government? What is the degree of sovereignty that local government should have, and what should be its relationship to the provincial legislature and the central legislature?"

- Subsection (5) dealt with the privilege and opportunity to make representations. This subsection stated that local government shall have an opportunity to make representations before legislation is passed. Why, Judge Olivier asked, was it

necessary for the legislature to state the obvious, namely the right to make representations, if it was not intended that that should be the operative clause, and that autonomy and the right not to be encroached upon actually only meant the right to make representations? This possible interpretation represented the kind of confusion which should be avoided.

Judge Olivier pointed out that it was the task of the delegates to the conference to spell out such problems to the Constitutional Assembly and to formulate better clauses. It was also important to keep in mind the main ideas of Chapter 3, the Bill of Rights, namely the Principle of Equality, and to avoid phrasing clauses that would violate this Principle.

In section 174(2), the Constitution made provision for three categories of local government, namely Metropolitan, Urban and Rural, with differentiated powers. A place had to be found for traditional authorities and rural government structures in the chapter on local government. Traditional authorities operating in non-urban areas would have to form part of the rural local government structure. Different possibilities existed in this regard. For example, in some rural areas only traditional authorities might exist; in other areas a traditional authority might have jurisdiction over only a part of a non-urban or rural area; and in yet other areas, such as the Western Province, no traditional authorities might exist in large areas. Judge Olivier therefore urged the delegates, in drafting proposals on local government for the new Constitution, not to forget Section 174(2) and to include proposals for traditional authorities and rural government.

In conclusion, Judge Olivier expressed the hope that the proposals to be put before the Constitutional Assembly would lead to a better and clearer final Constitution.

5. Orientation

Johnson Harvey International (JHI), a consultancy group, was approached to facilitate the workshop (see Appendix 2 for the list of facilitators). Dr Fritz Hölscher of JHI explained the rationale behind the programme and the working groups. In the workshops, which would alternate with a number of plenary sessions, five themes would be

addressed. Two groups would each consider one theme as a priority theme, but each group would also orientate itself in respect of the other themes. The five themes were (see Appendix 3 for a more detailed description of the themes):

1. **Intergovernmental relations**
2. **Establishment and status of local government**
3. **Administration and resources**
4. **Power, functions, and structure of local government**
5. **Electoral system and traditional leadership.**

After the plenary session on day one of the conference, delegates would gather in groups. Each group would be led by a facilitator in a break-away session, and the group discussions would be recorded by a secretary. A rapporteur, selected by the group from its own ranks, would present the group's findings during the plenary session.

Day one would be devoted mainly to determining a vision for local government in South Africa, and to brainstorming the key aspects of local government.

On day two, delegates would debate these key aspects in depth during theme workshops and also seek to determine to what extent they complied with the Constitutional Principles (see Appendix 4).

Day three would be devoted to report-back sessions on the theme workshops and to discussions of workshop reports. The focus of the discussions would be the drawing up of proposals regarding Constitutional provisions, and clarification of concepts. Issues which were deemed important but not appropriate for inclusion in the Constitution would be covered under the heading "subsidiary legislation". Attention would also be given to "the way forward".

The proceedings of the workshop should be presented to the Constitutional Assembly after formulation by constitutional experts, but it was suggested that the proceedings should also be communicated to other stakeholders not represented at the workshop.

It was suggested that this conference should be regarded as the first step to stimulate participation in the development of the Constitution regarding local government on a national basis.

Dr Höscher concluded the opening ceremonies and expressed the wish that all participants would enjoy a stimulating and productive conference. The delegates then proceeded to the first workshop session of the day.

6. Day 1: Workshop Session 1

6.1 Creating a vision for local government

The first workshop session was a brainstorming session, during which delegates focused on creating a vision, mission, and values for local government.

6.2 Identifying key issues in local government

During the second workshop session, the groups started to identify key issues in local government, which would form the basis of the next day's discussions.

6.3 Plenary session: report-back

The delegates convened for a presentation by each group's rapporteur of the day's group sessions. The key issues which were reported on during this session were meant to form the basis of day two's discussions, and they are therefore not listed here. The vision, mission, and values, as decided upon by each group, were consolidated by the theme group facilitators after the day's proceedings, for discussion the next day.

DAY 2

7. Day 2: Plenary Session

Councillor Taka opened the session.

7.1 The vision, mission, and values of local government

The vision, mission, and values of local government, as determined by the various theme groups, were discussed. In the course of a lively discussion, the consolidated vision and mission statements and the values of local government were amended, as follows:

Vision Statement

We want local government to be dynamic, autonomous and democratically elected in order to facilitate development and deliver effective and efficient services which will ensure and uplift the quality of life and the standard of living of the people it serves.

Points for further consideration:

- 1 The ideal of unified and/or integrated towns or cities which were separated in the past
- 2 The vision must take into account national and provincial policy and guidelines
- 3 Economic viability, e.g. among other, the "user-charge" principle.

Mission Statement

We deliver services to, and facilitate development of, the communities we serve.

Values

We are committed to:

1. Transparent and ethical behaviour
2. A participative and inclusive approach, in terms of which all role-players accept reciprocal responsibilities
3. Accountability to the people we serve, as well as to other stakeholders
4. Promoting accessibility
5. Redressing imbalances of the past and ameliorating the conditions of the disadvantaged
6. The empowerment of our employees and the community
7. Being environmentally sensitive
8. Being creative and pro-active in the fulfilment of our mission
9. Free and open relationships with other governments — locally, provincially, nationally, and internationally
10. A peaceful and secure environment
11. Effective and efficient administration
12. Affordable and sustainable service delivery

It was decided that further issues for discussion in respect of the vision, mission, and values, as identified during this plenary session, would be recorded in the conference proceedings

Dr Doreen Atkinson, an independent consultant, proceeded to present a brief summary of the key-note address by Judge Olivier, in order to focus the minds of the delegates on the need to test the key aspects which would form the basis of the day's discussions against the Constitutional Principles of the Interim Constitution.

The summary contained the following main points:

- ☑ Indicates points that were covered in the group sessions.
- (C) Indicates points which were considered appropriate for inclusion in the Constitution.
- (SL) Indicates points which were considered appropriate for inclusion in the subsidiary legislation.

8.1 Group 1 (Theme 2: Establishment and Status of Local Government)

Categories of local government

1. Metropolitan/urban/rural ☑ (section (5) = C) and (SL)
2. Traditional leaders/traditional council? ☑ (section (5) and (10) = C) and (SL)
3. Scale and diversity of population — geographic size ☑ (SL)
4. Revenue-generating capabilities, especially rural ☑ (SL) and (C)
5. Economic viability ☑ (SL)
6. Socio-demographic patterns ☑ (SL)
7. Infrastructure availability ☑ (SL)
8. Alternative sources of revenue ☑ (SL) and (mentioned C)
9. Equal status, based on proportionality ☑ (SL) and (C)
10. Will it be based on proportionality or economic viability? ☑ (SL)
11. Categorise, so as to have a consistent basis for funding ☑ (C) and (SL)
12. Level of autonomy ☑ (C)
13. Status of local government ☑ (C)
14. What is common for all of the different categories? ☑ (SL)
15. Cultural property of communities ☑ (C) and (SL)

Autonomy of local government

1. Legal autonomy (change to statutory autonomy) ☑ (C)
2. Financial autonomy ☑ (C) and (SL)
3. Various degrees of autonomy for various categories of local authority?
4. Compulsory versus voluntary tasks (minimum and open-ended) ☑ (C) and (SL)

5. Exclusive competency of local government
 - concurrency
 - residualisation
6. Qualify for autonomy
7. Autonomy overrides (C) and (SL)
8. What will be in:
 - national Constitution
 - provincial Constitution
 - national legislation
 - provincial legislation
9. What is viable in terms of autonomy?
10. Should we distinguish between components of competency? (C) and (SL)
 - powers
 - functions
11. Core responsibilities and functions
12. "Add-on" responsibilities and functions (C) and (SL)
13. Sources of revenue — directly allocated on regional basis (C) and (SL)
14. Exclusive areas of revenue (indirect C) and (SL)
15. Autonomy versus self-administration (C) and (SL)

8.2 Group 2 (Theme 2: Establishment and Status of Local Government)

1. Definition of category (C) and (SL)
 - recognition need for categories in local government
 - metropolitan
 - stand-alone towns (urban)
 - rural
 - traditional (disposed of)
2. Traditional form of local governments (C) and (SL)
3. Link between traditional leaders and services (C) and (SL)
4. Issue about form of political representation
5. Collective representation

6. Possibility of additional council (C) and (SL)
7. Role of traditional leaders as service providers (C) and (SL)
8. Recognise traditional leaders (C) and (SL)
 - Vote of equal value
 - Law of the land determines what may be done
 - Solution perhaps only through political negotiations
 - Traditional not exhausted
 - Wall-to-wall local government elections
 - Cannot guarantee role of traditional leader
 - Not one model for country, but flexible to cater for different needs

8.3 Group 3 (Theme 3: Administration and Resources)

1. How can we ensure viable local government? (C)
2. Public protector versus municipal ombudsman (C)
3. What should the role of the public protector be? (C)
4. Code of conduct: addresses councillors (not officials) (C)
5. Consider code of conduct for councillors and officials (C)
6. What human resource mechanisms need to be built into the Constitution? (C)
7. What appeal mechanisms need to be built into the Constitution? (C)
8. Should local government be constitutionalised as part of the public service?/What is the role of the Public Service Commission in local government? (SL)
9. Can an ethos or culture be constitutionalised, e.g. in relation to the payment of services?
10. Should local government be represented on the FFC? (C)
11. What should the relationship between local government, the Reserve Bank and the Auditor-General be? (C)
12. How should affirmative action be managed? (SL)
13. What representation should local government have on Nedlac? (SL)
14. Consideration of section 178 (C)
15. Tension between metropolitan government and national and local governments

General contextualising discussion

1. What does equitable mean?
2. Legislative versus administrative responsibilities
3. The basis for determining financial assistance
4. Constitutional Principle 25 — place of local government?
5. How do we put an input into the Constitution?

8.4 Group 4 (Theme 5: Electoral System and Traditional Leadership)

1. Should traditional leaders have a role in the provision of services? (SL)
2. Should traditional leaders be accountable? If so, how? To the community/province
 (SL)
3. Who should pay traditional leaders? (C)
4. What further functions should traditional leaders perform? (SL)
5. How does one determine authentic traditional leaders? (C)
6. What should happen to traditional leaders appointed by the previous government?
 (SL)
7. Should assets of tribes be utilised for the benefit of the whole of the tribe? (SL)
8. What should be the relationship between chiefs and elected structures? (C)
9. Should traditional leaders perform political or non-political functions or roles?
 (C)
10. How should the power of traditional leaders be determined and regulated? (C)
11. Who should determine and regulate the powers and functions of traditional leaders?
 (C)
12. Under what condition would a traditional leader be dismissed from his office?
13. Should the traditional leadership be retained? (C)
14. Is the authority of traditional leaders confined to specific geographical areas only?
 (SL)

8.5 Group 5 (Theme 1: Intergovernmental Relations)

1. Define degree of autonomy
 - provincial
 - national
 - local government (minimalist/maximalist)
 - exclusive
 - concurrent
 - residual and overriding powers (C)
2. Legislative, executive, and administrative divisions (C)
3. Adequate powers to be effective (C)
4. Devolution and deconcentration (C)
5. Spheres of government, not tiers (Indirectly covered) (C)
6. Which sphere does what best? (Indirectly covered) (C)
7. Get away from prescriptive administration to participatory (SL)
8. Institution which co-ordinates/resolves disputes and checks (C)
9. Local government must form part of the decision-making body — to allocate funds (C)
10. Clarify future role of (old) RSCs: funding — boundaries — spending in different areas from where funds raised (horizontal equity/vertical) (SL)
11. Accountability to the people (electorate and among government), no matter where we stand in inter-governmental relationship (C)
12. Degree/extent of financial autonomy and opportunities (Not fully covered) (C)
13. Regular, effective liaison (C)
14. Access to highest authority (C)
15. Service provision/delivery. National or local level? (SL)
16. Control over local matters (land issues). At what level? Are there national minimum standards? (SL)
17. Certainty in obtaining finance — formalise, so local government knows where it stands — local government to give input in allocation of funds, not just financial/fiscal commission (C)

18. Constitutional Principle 26: devise formula for an equitable share of revenue collected nationally — objective criteria, as opposed to "input" which may be ignored. Who decides once criteria are in place? (Partly covered) (C)
19. Define linkages between spheres (C)
20. Role of the Auditor-General/public protector (nature and audit machinery) (C)
21. Between elections — accountability through community consultancy/referenda? (C)
22. Equity of treatment between spheres, as regards "control" of other mechanisms of accountability (C)

8.6 Group 6 (Theme 4: Powers, Functions and Structure of Local Government)

1. Definition of power

Power allows you to do something. The following legislation is relevant:

- the Constitution of South Africa, Act 200 of 1993
- relevant legislation, e.g. the Local Government Transition Act (Act 209 of 1993)
- political agreements and by-laws

Finance is also a power

✓ (Covered under CPs 6, 8, 10, 14, 15, 20, 26. Chapter 10: 174, 175)

2. Definition of functions

Local authorities should render the following services, as it is their function:

- primary health care
- infrastructure (housing, sanitation, water, roads, electricity)
- protection services (traffic, fire-fighting, ambulance)
- safety and security (police)
- transportation facilities
- land-use facilities
- finance/budget
- environment
- sport and recreation

(Covered under Act 209 of 1993)

3. Definition of structure

Three local structures exist:

- rural local government
- urban local government
- metropolitan local government

☑ (Covered under Chapter 10: 174(1-5), 175(1-6), 177, 126(1 and 2).)

Questions

- Act 209 of 1993 does not address rural local government and needs to be commented on
- Clarity should be obtained on which structures should receive what powers.
- Identification of overlapping functions needs to be addressed according to areas and their particular circumstances, to be able to identify power sharing. The words "competent authority" in Chapter 10, section 174(1) have to be defined and clarified.
- Identification of various committees and systems

☑ (Covered under CPs 20, 24, 25, and Chapter 10: 174, 175, 176, 177)

8.7 Group 7 (Theme 3: Administration and Resources)

1. Autonomy/control ☑ (C)

- What do we mean?
- What is the relationship between local and provincial government, and what are the boundaries?

2. Financial assistance ☑ (C)

- Will the local government have representation on the FFC? ☑ (C)
- How will the funds be sourced?
- From where will the funds be allocated?

3. Accountability ☑

- To whom is local government accountable?
- How will the structures be formulated? ☑ (C)
- Who will be responsible for the delivery of services?

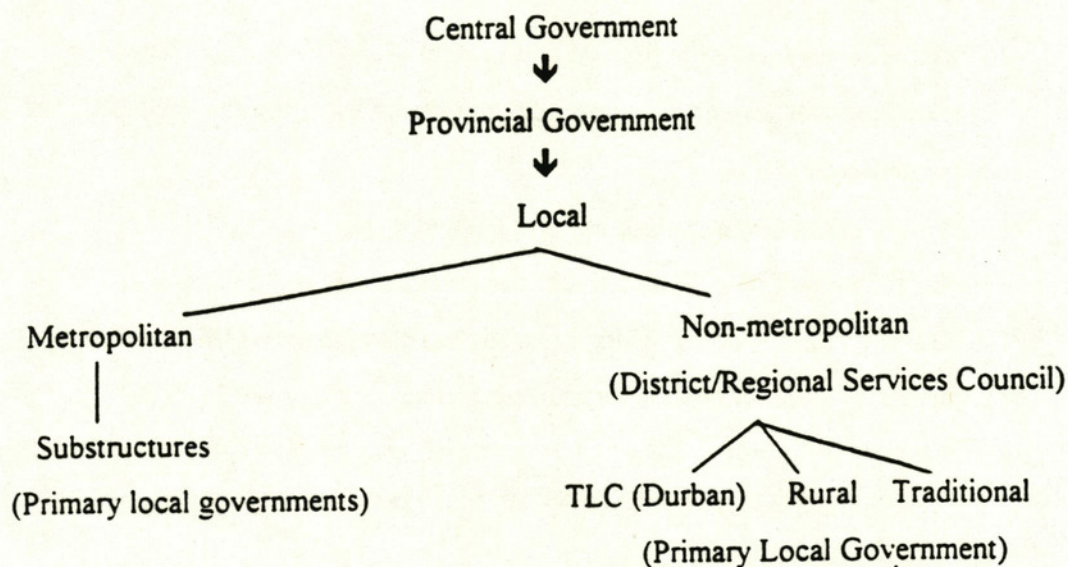
4. Transparency (C)
 - What does this mean?
 - How transparent will the budgeting be?
5. Training (SL)
 - Who will be responsible?
 - How will it be funded?
 - What are the skill requirements?
6. Affirmative action (C and SL)
7. How will the powers be separated between the administrators and the decision-makers?
8. Code of conduct (C)
 - Is this for councillors only? What about officials?
 - Who will police the code of conduct?
9. Books of account (not covered)
10. Levies
11. Remuneration (SL)
12. Human resource systems (SL)
 - Performance management
 - Labour relations
 - Manpower levels
 - In relation to the national policies framework
 - Provisional in the values statement

8.8 Group 8 (Theme 4: Powers, Functions and Structure of Local Government)

1. Local governments have powers to govern (C)
2. Trias politica (C)
3. Effective framework of powers (C)
4. Separation of powers between levels of government (functional activities)
5. Distinction between different categories of government (C)
6. Autonomy to be enshrined in constitution (C)
7. Autonomy intrinsically coupled to its powers/functions (C)

8. Differentiating voting rights (Theme 5)
9. Protection of financial resources from exploiting by other levels of government
 (C)
10. Share in revenue to be defined and protected (C)
11. Definition of functions to provide services to promote the well-being of all inhabitants (C)
12. Direct and indirect representation (Theme 5)
13. Establishment of local authorities for areas demarcated by law (C)
14. Define different policy-making structures (committees). Office bearers (SL)
15. Exercise all functions that are not performed by other levels (C)
16. Clarify terminology, e.g. local government, metropolitan government (C)
17. Accessibility (C)
18. Developmental approach (C)
19. Services delivery on agency basis (SL)
20. Prevalence of regulation over Act of Parliament or regional government (C)
21. Role of town clerk and officials (accounting officer) (SL)
22. Protection of officials (SL)
23. Code of conduct (SL)
24. Generic functions of councillors as governors (SL)
25. Powers and functions of executive (SL)

8.9 Group 9 (Theme 5: Electoral System and Traditional Leadership)



Electoral System

1. Common voters' role ✓ (C)
2. Proportional representation ✓ (C)
 - voting for parties
3. Ward system ✓ (C)
4. Participatory (minority parties) democracy ✓ (C)
5. Combination of 2 & 3 ✓ (C)
6. Both direct and indirect representation ✓ (C)

Traditional leadership

1. What is a traditional leader? ✓ (C)
2. What is a traditional authority? ✓ (C)
3. Powers/duties/functions of 1&2 ✓ (C)
4. What is indigenous law (customary law)? ✓ (C)
5. Question of land (what is the status of tribal land?)
6. Administrative capacity ✓ (SL)
7. Financial capacity ✓ (SL)

8. What does *ex officio* status entail? (C)
 - with voting powers?
 - without voting powers?
9. Is *ex officio* status also applicable at district/regional services council level? (SL)
10. Both direct and indirect representation (C)
11. Houses and council of traditional leaders (C) and (SL)

Answers

1. Hereditary position determined by birth confined to the head of a tribe
2. Traditional leader in 1 above with his council consists of:
 - nominated by customary law
 - legislation differs from province to province

Must make constitutional provision for liaising with organs of civil society. If not, it should be left to the day-to-day management of local government.

CONCEPTS

Autonomous

- 1 Self-administrative
- 2 Must be capable to perform functions
 - self-administrative
 - rendering services
- 3 Autonomous on three dimensions (all decision-making powers)
 - legislative
 - executive
 - judicial
 - There must be a municipal court
 - Powers of jurisdiction must be enhanced
 - Need to resolve the primary, non-metropolitan structure in terms of:
 - rural versus traditional authority
 - need clarity (definition)/criteria of rural area, proclaimed tribal areas, commercial farming, outside location
 - Tribal — demarcated, prescribed, and proclaimed

Electoral system

1. Common voters' role for each local government area
2. Proportional representation, as in paragraph XIV, p. 4
3. Need for combination of ward and proportional representation WHY? Ensure participatory democracy
4. Define "ward"
 - 60% ward basis
 - 40% PR
 - *Ex officio* (traditional leader, as per definition) need to take regional differences into consideration; e.g. North-West.
5. Direct and indirect representation
 - Direct representation (current — as October 1995)
 - 60% ward basis in substructure
 - 40% proportional in substructure
 - 40% directly elected of TMC-elected PR bases
 - 60% indirectly elected — nominated by substructure

Propose: (New Constitution)

1. Metropolitan Council should be constituted by 50% directly elected on PR basis, and 50% nominated by substructures (indirectly) to balance an elected member (increase)

Non-metropolitan

1. Current TLC — 60% elected ward basis and 40% elected on PR basis
2. Rural council/district council/transitional council
 - need for uniformity in terms of definitions
 - need for uniformity in terms of Constitution
3. Purpose: take principle of 60/40 and apply in rural as in TLC
 - 60% on ward basis
 - 40% on PR basis

Scrap section 245 of Transitional Council

1. Current: district/services/regional council — no legislation (own province provides in own)
2. Purpose
 - indirect representation — each constitutional local government representation based on population
 - in practice, it takes a long time to implement establishment of district councils

8.10 Group 10 (Theme 1: Intergovernmental Relations)

A. *Relevant issues*

1. Relationship between three tiers of government
2. Local government functions:
 - the definition
 - the question of agency
 - to which tiers of government are they responsible?
3. Nature of the delivery of services and the production of the deliverables (are they necessarily linked?)
4. How does the financial base of local government influence the notion of the relationship between the three tiers of government?
 - Should funds be allocated, and should local government be responsible for allocating funds to the various tiers of government?
 - Should local government be allowed to determine/broaden their gathering of funds from the community?
5. What is local government?
 - Revision via the inclusion of grassroots inputs and requirements
6. The issue of concurrent responsibility should be resolved (i.e. between tiers of government)
7. Once power has been delegated to local government, its exercise should not be constrained by bureaucratisation at the second and first tiers of government — i.e. a question as to the notion of relative autonomy *vis-à-vis* delegated functions to local government bodies
8. To whom is local government accountable?

9. Subsidisation via a sliding scale for historically disadvantaged areas/communities (that is, above and beyond central government funding for general service delivery and council allocation to such areas)
10. The RDP and local government
11. Self-reliance for local governments
12. Autonomy

B. An attempt at setting guidelines for:

- constitutionalisation
- secondary or other

Constitutionalisation

1. There shall be local government Z (C)
2. What should the relationships between each of the three levels of government be? (Extensively discussed) Z (C)
3. Ensuring that the relationships between the three tiers are not conflictual Z (C)
4. Local government should perform the tasks required/demanded by the community (facilitate ongoing change in implementation — practice and laws) (C)
5. The FFC and the finances of local government Z (C)
6. The self-reliance Z (C)
 - autonomy of local government
7. Definition of functions of local government Z (C)

Secondary or other

1. Definition of financial resource base of local government (SL)
2. The production and/or delivery of deliverables or services (SL)
3. An extra subsidisation, on a sliding scale, for local government (SL)
4. The needs of the community (SL)

9. Days 2 and 3: Key Issues

9.1 Groups 1 and 2 [Theme 2]

9.1.1 Brief of groups 1 and 2

Introductory statement

The Constitutional Principles state that there shall be local government and that the Constitution shall provide for a framework of local government powers, functions and structures.

Should the Constitution provide for different categories of local government and/or contain the determinants/criteria of categorisation of local governments?

Should local government be autonomous and how is such autonomy to be constitutionalised?

Refer also to Constitutional Principles 16 and 24

CP 25 was also considered in the discussion

Topics

- Types/Categories of Local Government
- Autonomy of Local Government

9.1.2 Criteria for selection of constitutional aspects

1. No vagueness.
2. Conflict issues should clearly be dealt with.
3. Entrenchment of local government as a form of government.
4. No point in the Constitution should contradict democracy.
5. Aspects essential to determine the nature and status of local government.
6. Principal aspects rather than detail aspects.
7. Should be national common denominator for all local governments.
8. Address issues that are so basic as to warrant special Constitutional protection.

9.1.3 Aspects considered for constitutionalisation

From the list of issues identified on day 1, the following issues were selected for discussion and possible inclusion in the Constitution:

Issues relating to categorisation

1. Categories — metropolitan/urban/rural.
2. Traditional leaders — advisory, non-voting consulted.
3. Revenue generating capabilities — direct seat on financial and fiscal commission.
4. Equitable access to funding.
5. Level of autonomy.
6. Status of local government.

Issues relating to autonomy

1. Autonomy.
2. Financial autonomy.
3. Exclusive competency of local authority.
4. Core responsibilities.

9.1.4 Suggested amendments to Interim Constitution

174. Establishment and Status of Local Government

- (1) Local government shall be established to cover the entire area of South Africa.
- (2) Local government shall be established for all the residents of areas demarcated by law of provincial legislature.
- (3) A law referred to in subsection (2) may make provision for categories of metropolitan, urban, district and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.

(4) Local government shall have exclusive authority over those functions and powers assigned to it by the provincial legislator, in consultation with local government, and no Parliament or provincial legislature shall encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government, except in matters pertaining to:

(1) raising of loans by a local government and the financial norms applicable thereto

(2) grading and categorising of local government

(3) matters that require to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the province or Republic

(4) where the setting of minimum standards across the nation or province is required for the rendering of public services

(5) matters that cannot be regulated effectively at local government level

(6) matters which materially prejudice the economic, health, environment, or security interests of another local authority, province, or the country as a whole, or impede the implementation of national economic policies.

Note: Consensus could not be reached on the inclusion or not of the word "autonomy" in this section, and this is the group's best attempt at reaching consensus

(5) Proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been published for comment in the *Gazette* or the *Provincial Gazette*, as the case may be, and local governments and interested persons, including organised local government, have been given a reasonable opportunity to make written representations in regard thereto.

175. Powers and Functions of Local Government

(1) The powers, functions and structures of local government shall be determined by law of a provincial legislature, and functions must be allocated according to

the principle that functions must be located at the most appropriate level of government, as close as possible to the electorate, considering the capacity to perform exists, provided that these powers should not be substantially less than, or inferior to, current powers of local government.

- (2) A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.
- (3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to, or at least include, town/rural planning, water, sanitation, electricity, primary health care, public protection services, refuse and waste removal, recreation amenities, and cemeteries within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.

9.1.5 Other aspects to be included

- 1 Local government should have equal representation to provincial and central representation on the financial and fiscal commission at national level
- 2 Local government should have adequate representation in the Senate
- 3 Concurrent powers in terms of education, housing, and transportation should be considered for inclusion in either the Constitution or national and provincial legislation.
- 4 Traditional leaders should be accommodated on local government councils, where applicable, in a non-voting and consultative capacity.

9.2 Groups 3 and 7 (Theme 3)

- A variable schedule (dependent on the form of local government) compiled in concurrence with organised local government should be promulgated, detailing the functions of local government. This schedule should be constitutionalised, and if this is not possible, should be included in subsidiary legislation. — (174(3) and 174(4) will therefore be qualified). Amendments which have the concurrence of organised local government can nevertheless be tested in the Constitutional Court.

- In relation to 174(4), we propose the following wording:
Parliament or a provincial legislature shall not encroach on or interfere with the powers, functions and structure of local government (delete the rest of 174(4)).

- In relation to 174(5), we propose that the subsection stands as is, but that the reference to status, powers and functions be deleted (boundaries only).

- We propose an additional subsection 174(6), which will read:
Proposed legislation which materially affects the status, powers and functions of local governments shall not be introduced in Parliament or a provincial legislature unless it has the approval of organised local government at either provincial or national level.

- In relation to 178(3) (it affects all clauses dealing with the concept "equitable") The term "equitable" needs to be measurable in terms of parameters/indicators/guidelines, and when it is being determined, this must be done in consultation with organised local government. "Equitable" should thereafter be used in a consistent fashion.

- Constitutional Principle 20 was fully endorsed.

- The Public Service Commission has no basis for operating in local government, since local government has adequate human resource systems, including dispute resolution mechanisms between between employers and employees.

- There shall be access by communities to a municipal ombudsperson. The responsibility for the provision of such ombudsperson rests with local authorities singly or collectively.
- The terms of reference for the municipal ombudsperson shall be consistent with those defined in relation to the public protector (in terms of section 112 of the Constitution)
- Section 180 (Code of Conduct). Endorsed principle. — Act accounts for councillors only, whereas Constitution calls for code of conduct for both councillors and officials. At all stages there must be effective policing and sanctions.
- We take note of agreements in terms of affirmative action reached at the national labour relations forum between employer and employee, and of the view that the agreements should be given force of law through the legislative process.
- Organised local government should have representation on Nedlac through nominees from organised local government.
- We fully endorse section 178 with the caveats made previously
- We take note of Constitutional Principle 25, which we suggest should be worded as follows
The national government, provincial governments, and local governments shall have fiscal powers and functions which shall be defined in the Constitution. The rest of the wording should be scrapped.
 In the event that this cannot be achieved, adequate qualification should be made in Chapter 10.
- In relation to 175(1), we propose the following addition to the wording, to read:
The powers, structures and functions of local government shall be determined by law of a competent authority, providing that no local government shall be charged with any duty or functions additional to those referred to in the variable schedule

(mentioned previously), unless sufficient financial resources to effectively carry out or meet such duty or function has been allocated to local government.

- In relation to Constitutional Principle 26, we note the need for qualifications to be made in Chapter 10, such that the principle of organised local government being represented by at least two persons nominated by organised local government on the fiscal and financial commission becomes constitutionalised.

We note, too, in relation to this Constitutional Principle, the need for an amendment/qualification in relation to the inclusion of the word "distribution". (*.... from the revenue collected [and distributed] nationally, after taking into account ...*).

Additional points for consideration

- Where labour from disadvantaged or underdeveloped areas is used in commercial and industrial areas, the local authority (in the latter case) should make a contribution to these areas.
- For the sake of transparency, the way in which a budget is prepared must be prescribed (in simple terms) so that people on the ground can make sense of it.
- Elected local government representatives must be accountable to their electorate only.

Concerns to be noted

- In relation to the recommendation on affirmative action, we note that the legislature might not give force to our recommendations and that an alternative might need to be considered.
- In relation to the additional points of consideration:
 - it was pointed out that consideration 1 would prove to be unmanageable. The "soundness" of this principle was very strongly questioned.
 - in relation to consideration 2, it was pointed out that there are international precedents for the production of "simplified" budgets.
 - in relation to consideration 3, it was pointed out that there is a debate on exclusive

and concurrent functions and that this consideration needs to be considered and thoroughly thrashed out within the context of the debate. As it stands, it makes little contribution.

9.3 Groups 6 and 8 (Theme 4)

CP6

It is merely viewed as a value-related statement.

CP8 — Is acceptable as a principle

But as SL: Acceptable representative government therefore does not only have to consist of directly elected proportional representation. Indirect representation in appropriate institutions of local government is therefore not excluded in terms of this principle, e.g: Metropolitan Council, non-Metropolitan Council, rural council, with regard to representation of traditional leaders.

CP14 — Is acceptable as a principle

But, as SL: For the purposes of local government, it does not only include political parties, but also non-political parties participating in the legislative process. SL should allow for participation by local committees and communities associated in local legislative processes.

CP20 — Is acceptable as a principle

- Clarification.

The specific reference of applying this principle to "each level of government" accentuates the application of this Principle to local government as well.

- Clarification:

It requires the Constitution to protect these powers and functions of each level of government *vis-à-vis* any other level of government.

■ **Clarification:**

The Constitution is required to provide a basic mechanism in terms of which powers can be allocated between different levels of government, including local government.

- **But as SL:** This mechanism is based on a test regarding the fundamental viability (operating from a sound financial base) at each level of government regarding the performance of the function and the effective public administration of such function. The test must be entrenched in the Constitution, to which all levels of government are subject, when powers are allocated.

CP24 — Is acceptable as a principle

- **But as SL:** The powers and functions of local government and fiscal base, as referred to in CP25 must be entrenched in the Constitution, not only in an Act [209 of 1993].

CP26 — Is acceptable as a principle

Recommendation:

- The allocation of an equitable share of revenue from central government needs to be done in accordance with a scientifically determined set of criteria (formula) determined by the financial and fiscal commission.
- This principle entrenches local government's right to provide basic services, even where such local government is financially not able to perform these basic services
- This principle obliges the fiscus to assist local government financially in its provision of basic services
- This principle does not allow any other level of government to share in revenue collected at local government level.

Chapter 10

174. Establishment and status of local government

1. Substitute subsection (1) and (2) for the following:

174(1) *Local government shall be the third tier⁽¹⁾ of government, consisting of metropolitan and non-metropolitan government established for those areas demarcated by law of a provincial authority comprising urban and rural local governments⁽²⁾ with differentiated powers, functions and structures according to consideration of demography, economy, physical and environmental conditions, and other factors which justify or necessitate such categories.*

⁽¹⁾ It is suggested that "sphere" is more empowering than "third-tier level". The completing and overlapping nature of local government functions may be reflected by using "sphere".

⁽²⁾ It is suggested that provision should also be made for tribal local authorities.

Clarification of key concepts:

Metropolitan government is that category of government which operates in areas as defined as such in relevant legislation.

Non-metropolitan government is that category that is outside the area of jurisdiction of metropolitan areas and consists of primary and regional government structures

2. Substitute subsection (3) for the following:

(2) *Local government shall have such legislative and executive powers to allow it to function effectively with regard to those entrusted powers and functions it can perform utilising its own resources and it shall be entitled to regulate its affairs.*

3. Move subsection (4) to 175(4).

4. Substitute subsection (5) for the following:

(3) *Proposed legislation which materially affects local governments in any manner*

whatsoever, or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been negotiated and agreed³¹ with organised local government before it is published for comments in the Gazette or the Provincial Gazette, as the case may be, and local governments and interested persons, including organised local government, have been given the opportunity of not less than 30 days to make written representation in regard thereto.

⁽³¹⁾ The possibility of the establishment of a dispute resolution commission should be considered to settle disputes between local spheres of government.

Note: It was mentioned that section 174 was also dealt with by other groups and that overlapping may occur. Notice must be taken of different queries of groups.

175. Powers and functions of local government

1. Subsection (1) should be amended to read as follows:

(1) The powers, functions and structures of local government shall be determined in accordance with the provisions of this Constitution.

2. Subsection (2) should be amended to read as follows:

(2) A local government shall be entrusted with such powers and functions as may be necessary to provide municipal services and to perform the developmental functions for the maintenance and the promotion of the well-being of all persons within its area of jurisdiction: Provided that such service can be rendered and functions exercised in a sustainable manner and are financially viable and physically practicable.

3. Subsection (3) should be amended to read as follows:

(3) One local government, or another on its behalf, shall make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education housing and security within a safe and healthy environment, which shall not be less than those listed in Act 209 of 1993 or other relevant legislation and all other functions

that are not performed by central and provincial government.

4. Subsection (4) should be amended to read as follows:
(4) Parliament or a provincial legislature shall not encroach on the powers, functions, and structure of a local government entrusted to it. A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.
5. Subsection (5) remains unchanged.
6. Subsection (6) remains unchanged.

Sections 176 and 177 should be contained in provincial legislation.

126. Legislative competence of provinces

We must ascertain whether the exclusions in subsections (3)(a) to (e) and (4) are ample enough to protect local government against provincial legislation.

Note: It is a power of a local authority to pass by-laws that are not in conflict with the Constitution

9.4 Groups 4 and 9 (Theme 5)

9.4.1 Electoral system

1. Common voters' role for each local government area
2. Proportional representation.
3. Need for combination of ward and proportional representation. **WHY?** Ensure participatory democracy

4. Define "ward"
 - 60% ward basis
 - 40% PR
 - *Ex officio* (traditional leader, as per definition in 2.2. below) need to take regional differences into consideration, e.g. North-West.

5. Direct and indirect representation
 - Direct representation (current — as October 1995)
 - 60% ward basis in substructure
 - 40% proportional in substructure
 - 40% directly elected of TMC-elected PR bases
 - 60% indirectly elected — nominated by substructure

Propose: (New Constitution)

1. Metropolitan Council should be constituted by 50% directly elected on PR basis, and 50% nominated by substructures (indirectly) to balance an elected member (increase)

Non-metropolitan

1. Current TLC — 60% elected ward basis and 40% elected on PR basis

2. Rural council/district council/transitional council
 - need for uniformity in terms of definitions
 - need for uniformity in terms of Constitution

3. Purpose: take principle of 60/40 and apply in rural as in TLC
 - 60% on ward basis
 - 40% on PR basis

Scrap section 245 of Transitional Constitution

1. Current: district/services/regional council — no legislation (own province provides in own) — too many different names
2. Prepose
 - indirect representation — each constitutional local government representation based on population
 - in practice, it takes a long time to implement establishment of district councils

9.4.2 Traditional leadership

1. Preamble:

We recognise that the system of traditional leaders is undergoing a process of dynamic changes and will in time come to embrace the principles of democratic representation.
2. Traditional leader:

Definition: Traditional leader shall be a person who is eligible to become a king, a chief, or a regent of such king or chief in terms of the indigenous law recognised and practised by a particular tribe or ethnic group.
3. Traditional authority

Traditional leader in 2 above, with his council constituted in terms of indigenous law

NB Differences by provinces
4. a) Powers, functions/duties of traditional authority
 - These are confusing in terms of Constitution.
 - Suggest Constitution only safeguard position of traditional leader (need clear definition of powers, duties in terms of functional indigenous law)

b) Suggested amendment

 - Section 181(1) should be revised as follows:

A traditional authority which observes a system of indigenous law shall exercise and perform the powers and functions vested in it in accordance with the

applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.

c) All powers, functions and duties outside the definition of indigenous law to be the responsibility of the rural local council.

d) We subscribe to the establishment of a national house of traditional leaders.

e) We subscribe to the establishment of a provincial house of traditional leaders.

5. Traditional local authorities to consist of:

- Traditional leader as the head:

- 50% of the traditional authority to be representatives nominated by the chiefs.

- 50% to be representatives elected by the people.

- Traditional authority = 50% nominated + 50% elected

6. a) *Ex-officio* status

With full membership and voting rights.

b) that *Ex-officio* status applies only at primary local government level

7. a) Points to be addressed.

- Conflict resolution should be role of national, provincial, and local governments in the event of conflict between traditional leaders and elected structures

b) Civil organisations to be recognised, but such recognition need not be enshrined in the Constitution

c) Remuneration of public representatives to be determined by the commission Envisaged in section 207 of the Interim Constitution.

d) Section 182: The wording needs to be phrased more clearly.

8. Other definitions

- Autonomy:

Has the necessary resources, power, and authority to discharge its functions within its sphere of competence.

- Sustainability:

Has clearly identifiable, guaranteed, and ongoing sources of revenue.

9.5 Groups 5 and 10 (Theme 1)

174. Establishment and Status of Local Government

- (1) *Adequately resourced local government shall be established for the delivery of services to, and facilitate the development of, the residents of areas demarcated by law of a competent authority:*
- (2) A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.
- (3) Local government shall, within the limits prescribed by or under law, have the right to exercise its powers and regulate its affairs.
- (4) Powers given by the Constitution to local government shall normally be full and exclusive. They may not be undermined or limited by central or provincial authority, except as provided for by law.
- (5) Proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been approved by the local government commission and has been published for comment in the *Gazette* or the *Provincial Gazette*, as the case may be.
- (6) Local government shall have the right to associate and enter into agreements.

Local Government Commission

(No) Establishment

There is hereby established a local government commission to be chaired by an independent person consensually acceptable to the parties and composed to include at least 60 per cent of the representatives elected by and from the ranks of organised local government.

(No) Objectives and functions

The objectives and functions of the commission shall be to consider proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas.

Concern noted: Provision should be made so that matters relating to a particular province and local government within that province can be dealt with.

175. Powers and Functions of Local Government

(1) Subject to the provisions of section 174(5) the powers, functions and structures of local government shall be determined by law of a competent authority

(2) A local government shall have such powers and functions as may be necessary to provide service for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.

(3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.

(4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.

(5) A local government shall have such executive powers as to allow it to function effectively.

(6) A local government may, in its discretion, by means of a resolution of its council provide for the assignment of specified functions to local bodies or submunicipal entities within its area of jurisdiction as prescribed and regulated by or under law where, in the opinion of the council, such assignment of functions will facilitate or enhance the provision or administration of services, the adherence to municipal bylaws or, more generally, good governance in the public interest:

Provided that such assignment of functions-

(a) shall not be inconsistent with an Act of Parliament or an applicable provincial law; and

(b) shall not diminish the accountability of such local government

176. **Council Resolutions**

Matters before the council of a local government pertaining to-

(a) the budget of the local government, shall be decided by a resolution of the council adopted by a majority of at least two-thirds of all its members

(b) land-use planning shall be decided by a resolution of the council adopted by at least a majority of all its members: Provided that a council may delegate the power to make decisions on matters pertaining to land-use planning to the executive committee or to a committee appointed for this purpose: Provided further that section 177 shall apply *mutatis mutandis* to the appointment and functioning of a committee appointed for this purpose.

177. **Executive Committees**

A council of a local government may elect, according to a system of proportional representation as may be prescribed by a law, from among its members, an executive committee to exercise such powers and perform such functions as may be determined by such council: Provided that —

- (a) the council shall determine the number of members of and the quorum for the executive committee, provided that the number shall not exceed 25 per cent of its total members.

178. **Administration and Finance**

(1) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.

(2) A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions. Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on an uniform structure for its area of jurisdiction.

(3) A local government shall be entitled to an equitably and specifically allocated portion of national and provincial revenue, and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations, taking into account the different categories of local government referred to in section 174(2).

179. **Elections**

(1) A local government shall be elected democratically, and such election shall take place in terms of an applicable law and at intervals of not less than three and not more than five years.

(2) The electoral system for a local government shall include both proportional and ward representation and shall be regulated by a law referred to in subsection (1).

(3) Subject to section 6, every natural person shall be entitled to vote in an election of a local government if he or she —

(a) is ordinarily resident/domiciled within the area of jurisdiction of that local government or is under law liable for the payment of property rates, rent, service charges or levies to that local government; and

(b) is registered as a voter on the voters' role of that local government.

(4) A voter shall not have more than one vote per local government.

(5) No person shall be qualified to become or remain a member of a local government if he or she —

(a) is not eligible to vote in terms of subsection (3).

(b) is a member of the National Assembly, Senate or provincial legislature;

(c) is not qualified to become a member of the National Assembly;

(d) is an employee of a local government (unless, with due regard to the public interest, exemption of this disqualification is given by the Executive Council of the province in which the local government is situated and proof of such exemption accompanies the nomination of such person); or

(e) is disqualified in terms of any other law.

180. **Code of Conduct**

An enforceable code of conduct and recall mechanism for members and officials of all levels of government shall be provided for by law.

Financial and Fiscal Commission

198. **Establishment**

There is hereby established a Financial and Fiscal Commission.

199. **Objectives and Functions**

(1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the national, provincial and local governments, including —

- (a) financial and fiscal policies;
- (b) equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level;
- (c) taxes, levies, imposts and surcharges that a provincial government intends to levy;
- (d) the raising of loans by a provincial or local government and the financial norms applicable thereto;
- (e) criteria for the allocation of financial and fiscal resources; and
- (f) any other matter assigned to the Commission by this Constitution or any other law.

(2) In performing its functions the Commission shall take into consideration, *inter alia*, the provisions of section 155(4)(b) and any other provision of this Constitution.

200. Constitution, expertise and impartiality. (1) The Commission shall consist of:

- (a) A chairperson and deputy chairperson, appointed by the President in consultation with the Cabinet;
- (b) A person designated by each of the various Executive Councils of the provinces, who shall be appointed by the President; and
- (c) A person designated by each of the various Provincial Local Government Associations.

Local Government Beyond 2000

Conference and Workshop

held in Bloemfontein by the

Free State Municipal Association (FMA)

on 3, 4 and 5 April 1995

Appendices

1. Programme
2. List of Participants
3. Themes of the Conference
4. Constitutional Principles
5. Extracts from the Constitution

1. Programme

DAY 1

Monday, 3 April 1995

Plenary Session

08:00 — 09:00	Registration and Tea
09:00 — 09:10	Welcome: Clr G Taka (President, FMA)
09:10 — 09:30	Opening: Ms MA Motsumi (MEC for Local Government, Free State)
09:30 — 10:15	Keynote address The Honourable Mr Justice PJJ Olivier
10:15 — 10:30	Orientation: Exposition of rationale behind programme and establishing working groups
10:30 — 11:00	TEA

Workshop Session

11:00 — 13:00	Workshops: Setting the Agenda
13:00 — 14:00	LUNCH
14:00 — 15:30	Workshops: Setting the Agenda
15:30 — 15:45	TEA
15:45 — 17:00	Report back and activating
19:00	DINNER

DAY 2

Tuesday, 4 April 1995

08:30 — 10:15	Theme Workshops
10:15 — 10:45	TEA
10:45 — 13:00	Theme Workshops continue
13:00 — 14:00	LUNCH
14:00 — 15:15	Theme Workshops continue
15:15 — 15:45	TEA
15:45 — 17:15	Theme Workshops: Summary and conclusion

DAY 3

Wednesday, 5 April 1995

Plenary Session

08:30 — 10:15	Theme Workshops: Report back
10:15 — 10:45	TEA
10:45 — 12:00	Discussion of workshop reports and decision-making
12:00 — 12:20	Summary : Mr Andrew Borraine
12:20 — 12:35	Decision-making: The way forward
12:35 — 14:00	LUNCH and DEPARTURE

2. List of participants

2.1 Guest Speakers

The Honourable Mr Justice Pierre Olivier
Ms Ouma Motsumi (MEC for Local Government: Free State)
Clr Gorden Taka (President: FMA)

2.2 Delegates

- * *Members of Statutory Organisations*
- *Members of Non-statutory Organisations*

Z Moeketsi (Mayor: Warmbaths) ■
H Tyemela (Exco member, Northern MSS) ■
W N Madonsela (Advisor: Ministry of Land, Housing & Loc. Gov.)
G Mandelstam (Mayor: Parys TLC) *
K W Lintluibeng (Barolong Tribal Authority, ThabaNchu)
S Nel (Council member, Bellville TLC) ■
S M Moroka (Traditional Leader, Barolong Tribal Authority)
P Waugh (Director: Bophuthatswana Mun. Ass.)
Salie Manie (Member of Parliament)
Sipho E Gabela (Council member, Pietermaritzburg TLC) ■
B Kompheia (Mayor: Kroonstad TLC) ■
S P Swanepoel (CEO, Goldfield RSC)
Sydney Choma (Council Member, Middelburg TLC)
M H Wessels (Free State Prov. Administration)
Barnie Botha (Senior Deputy City Administrator, CT Council)
T J Crouse (Gen. Secretary: Jhb Mun. Employers' Ass.)
K Padayachy (Councillor, Port Elizabeth TLC) *
V Piliso (King William's Town TLC) ■
Collen Harris (Durban City Council)
Carl Fischer (Director: Admin., Port Elizabeth TLC)
Best Mnyamane (Sanco, N-OFS)
A Smith (Bloemfontein TLC) ■
Hennie van Stryp (Chairman: Exco, Sasolburg TLC)
Cor Uys (Greater Pretoria Metrop. Council) *
Bernard van der Walt (Councillor: Potgietersrus TLC) *
Dorothy Campher (Cape Town Substructure, Exco Member) ■
Ben Smit (Town Clerk, Phuthaditjhaba Town Council)
R Z Mogletsi (Warmbaths TLC)
M W Gaba (Exco member, Cape Metrop. Council) ■
Johannes Melane (Sanco Prov. Committee, OFS)
S Siboto (FMA)
M S J Ledwaba (Chairman of Executive, Potgietersrus) ■
Sakkie Lombard (Director: Gauteng Prov. Admin)

J Douw (Exco member, North-West Mun. Ass.)
 D J Muller (Nelspruit Local Gov.)
 M L Kunene (Mayor: Phuthaditjhaba)
 Sello Dithebe (Member of O'Ru Transitional Council) ■
 Riaan Erasmus (King William's Town TLC) *
 Thys du Preez (Director: Ernst & Young Man. Serv.)
 Christo Geyer (Member: Institute of Town Clerks of SA)
 Jan Muller (North-West Mun. Ass.)
 Karel Liebenberg (Greater Potgietersrus TLC)
 John Fourie (Town Clerk, Warmbaths TLC)
 Neil Ross (Cape Metropolitan Council)
 Daniel B Moopela (Koffiefontein TLC)
 James Sadie (Director: UME of SA) ■
 Louis Brummer (Director: N-Tvl Prov.)
 Tertius Theron (CEO)
 G Shenker (City Administrator, Pietermaritzburg-Msunduzi TLC)
 Kobus van Zyl (Director: Loc. Gov Admin, North-West Prov. Admin.)
 Danie van Tonder (Chairman: Bloemfontein Area RSC)
 Fanie Jacobs (Mayor, Kroonstad) *
 D J Rossouw (Chief Director, Loc. Gov: Free State Prov. Admin.)
 Carel Cronjé (Member, Bellville TLC) *
 Gerhard Smith (Highveld RSC, Middelburg)
 Louis de Clercq (Vice-President: UME)
 B J Mthembu (Deputy Chair, Exco: Reitz-Petsana TLC) ■
 J S L Skosana (Deputy Mayor, Parys) ■
 J B Tolo (Highveld RSC, E-Tvl)
 Cor van Rooyen
 Makhabane Mopeli (Member of Phuthaditjhaba TLC) *
 Sedick Soeker (Exco Member, Cape Town City Council) ■
 Paul Broodryk (RSC Highveld; Regional Loc. Gov. Ass.)
 Ms Zoli Kambi (Development Bank of SA)
 Thomas Southon (TLC member, Pietersburg) ■
 Frans Phokojoe (Mayor, Sasolburg TLC) ■
 Sonja Botes (Greater Johannesburg TMC)
 Angus Knott-Craig (Chairman, Kamdeboo RSC, Eastern Cape)
 Joop Ferreira (Town Clerk, Parys)
 Jeff Cox (Union Executive (JMEA) (Non-statutory) ■
 Ms M Tsoametsi (Chairperson: Bloemfontein EC; Councillor: Non-statutory)
 Edwin Morgan (Ministry of Local Government, E-Tvl Prov.)
 Gert Gouws (Co-chair, Eastvaal RSC, Member: Commission for Provincial
 Government)
 M J Inno (Councillor: non-statutory, Mmabatho TLC) ■
 Kobus Coetsee (Town Clerk, Bellville TLC)
 Adriaan Blaas (Member of Parliament, National Assembly TC3)
 L D W Erasmus (Ass. Town Clerk, Koffiefontein TLC)
 P Flusk (Greater Johannesburg Metrop. Council) ■
 J van Zyl (Director: Tvl Local Gov. Ass.)
 Adv. A Swart (Secretary, Cape Local Authorities Employers' Ass.)
 D C Modungwa (Mayor, Mmabatho TLC)*

H Haasbroek (Ernst Young, Johannesburg)
Ian Davidson (Johannesburg TMC) *
Sarel van Tonder (Chief of Admin, Cape Metropolitan Council)
Neels Zaayman (Director: E-Tvl Loc. Gov.)
Karel Pretorius (Vice-Chair: Koffiefontein TLC) *
Leslie Klaas (Rustenburg TLC)
Frans Ralikontsane (Harrismith TLC, and FMA) ■
George Bengel (Management of Bakenpark, Bethlehem)
I Lenong (Sanco, Bethlehem)

2.3 Institute of Local Governance (INLOGOV) Delegation

Andrew Boraine (Executive Director: INLOGOV)
Thami Ngwevela (Co-ordinator: Local Government Policy Project,
INLOGOV)
Denmark Tungwana (Project Officer: Local Government Policy Project,
INLOGOV))
Peter Woods (Australian Local Government Association)
Jacques Jobin (Federation of Canadian Municipalities)
Carl Wright (Director: Commonwealth Local Government Forum)
Prov Keshac C Sharma (Dept of Political and Administrative Studies:
University of Botswana)
Morris Mhangami (Town Clerk: Municipality of Masvingo, Zimbabwe)
I May-Parker (Director: Institute of Public Administration and Manage-
ment, University of Sierra Leone)
James Kayila (Principal: Government Training Institute, Kenya)
Bruno Steiner (Association of Dutch Municipalities)
Torgny Ljungkvist (Swedish Association of Local Authorities)

2.4 Specialists

Dr Koos Smith (Consultant: FMA)
Dr Doreen Atkinson (Private Consultant: Commission for Provincial
Government:)
André Cornelissen (Department of Constitutional Development)
(Andrew Boraine [Executive Director: INLOGOV])

2.5 Facilitators: Johnson Harvey International (JHI)

Prof Alwyn Louw
Nic Loubser
Dr Fritz Hölscher
Victor Mayekiso
Jennifer Mackenzie

Joe Malapela
Prof Janis Grobbelaar
Karen Appelbaum
Keith Griffiths
Cliff Matthews
Tommy Liebenberg
Dorothy Matsepe
Prof Koos Bekker
Johan & Magda van Eeden (Document Co-ordinators)

2.6 Institutions/Stakeholders Invited

National level

Constitutional Assembly
Substructure of Local Governance and Development (INLOGOV)
South African National Civic Organisation (SANCO)
United Municipal Executive of South Africa (UME)
National Land Committee (NLC)
Department of Constitutional Development
Development Bank of South Africa (DBSA)
Institute of Town Clerks (ITC)
Regional Services Council (RSC) Association of South Africa
Institute of Municipal Treasurers and Accountants (IMTA)

Provinces

Members of Executive Councils for Local Government
Members of Provincial Legislatures
Local Government/Municipal Associations
Houses of Traditional Leaders
Local Governments, Regional Services Councils, Transitional Metropolitan
Councils and Substructures
Provincial Departments of Local Governments

3. Themes of the Conference

3.1 Theme 1: Intergovernmental Relations

3.1.1 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 constructed.

Refer also to Constitutional Principles 16, 18, 20, 24, 25, 26, and 27.

Topics

- Authority over Local Government
- Intergovernmental Financial Relations
- Control of Local Government

3.2 Theme 2: Establishment and Status of Local Government

3.2.1 Introductory Statement

The Constitutional Principles state that there shall be local government and that the Constitution shall provide for a framework of local government powers, functions and structures.

Should the Constitution provide for different categories of local government and/or contain the determinants/criteria of categorisation of local governments?

Should local government be autonomous and how is such autonomy to be constitutionalised?

Refer also to Constitutional Principles 16 and 24.

Topics

- Types/Categories of Local Government
- Autonomy of Local Government

3.3 Theme 3: Administration and Resources

3.3.1 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?

Refer also to Constitutional Principles 9, 20, 25, 26, 27, and 29.

Topics

- Viability
- Ethics in Local Government
- Human Resource Management
- Financial Administration and Management

3.4 Theme 4: Powers, Functions and Structure of Local Government

3.4.1 Introductory Statement

The Constitutional Principles call for a separation of powers and for a framework of local government structures to be contained in the Constitution. Each level of government is to be assigned appropriate and adequate legislative and executive powers and functions. The Constitution must provide for a framework of local government powers and functions.

How could separation of powers be obtained locally?

What powers and functions of local government need to be constitutionalized and how?

Refer also to Constitutional Principles 6, 14, 20, and 24.

Topics

- Structure of Local Government: Separation of Powers
- Powers and Functions

3.5 Theme 5: Electoral System and Traditional Leadership

3.5.1 Introductory Statement

Electoral System

Government shall be representative embracing, *inter alia* a common voters' roll and, in general, proportional representation. Minority political parties shall have the opportunity to participate in legislative processes in a manner consistent with democracy. Without derogating from the constitutional recognition and protection of the institution, status and role of traditional leadership, there shall be democratic representation at each level of government.

Traditional Leadership

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 VII 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.

Refer also to Constitutional Principles 8, 14, and 17.

Topics

- Electoral System
- Traditional Leaders
- Representation of Local Governments/Local Communities in Metropolitan/District/Regional Local Authority-type Institutions

4. Constitutional Principles

The Constitutional Principles listed below provided the framework for the discussion of the themes of the conference and workshop.

- I The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.
- II Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.
- III The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.
- IV The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.
- V The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
- VI There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

- VII The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.
- VIII There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and in general, proportional representation.
- IX Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.
- X Formal legislative procedures shall be adhered to by legislative organs at all levels of government.
- XI The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.
- XII Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations shall, on the basis of non-discrimination and free association, be recognised and protected
- XIII (1) The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.
- (2) Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

- XIV Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.
- XV Amendments to the Constitution shall require special procedures involving special majorities.
- XVI Government shall be structured at national, provincial and local levels.
- XVII At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.
- XVIII
- (1) The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.
 - (2) The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution of its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.
 - (3) The boundaries of the provinces shall be the same as those established in terms of this Constitution.
 - (4) Amendments to the Constitution which alter the powers, boundaries, functions or institutions 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, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

- (5) Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

- (1) The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.
- (2) Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the

- national government to intervene through legislation or such other steps as may be defined in the Constitution.
- (3) Where there is necessity for South Africa to speak with one voice, or to act as a single entity — in particular in relation to other states — powers should be allocated to the national government.
 - (4) Where uniformity across the nation is required for a particular function, the legislative powers over that function should be allocated predominantly, if not wholly, to the national government.
 - (5) The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
 - (6) Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* —
 - (a) for the purposes of provincial planning and development and the rendering of services; and
 - (b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.
 - (7) Where mutual co-operation is essential or desirable or where it is required to guarantee equality or opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.
 - (8) The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and

functions allocated either to the national government or provincial governments.

- XXII The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.
- XXIII In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.
- XXIV A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.
- XXV The national government and provincial governments shall have fiscal powers and functions which shall be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.
- XXVI Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.
- XXVII A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected

nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX (1) There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

(2) Every member of the public service shall be entitled to a fair pension.

XXXI Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their

functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

- XXXIV (1) This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.
- (2) The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.
- (3) If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

5. Extracts from the Constitution (Act 200 of 1993)

5.1 Chapter 10

5.1.1 Local Government

174. Establishment and Status of Local Government

- (1) Local government shall be established for the residents of areas demarcated by law of a competent authority.
- (2) A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.
- (3) A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.
- (4) Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.
- (5) Proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been published for comment in the *Gazette* or the *Provincial Gazette*, as the case may be, and local governments and interested persons, including organised local government, have been given a reasonable opportunity to make written representations in regard thereto.

175. Powers and Functions of Local Government

- (1) The powers, functions and structures of local government shall be determined by law of a competent authority.

- (2) A local government shall be assigned such powers and functions as may be necessary to provide service for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.
- (3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.
- (4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.
- (5) A local government shall have such executive powers as to allow it to function effectively.
- (6) A local government may, in its discretion, by means of a resolution of its council provide for the assignment of specified functions to local bodies or submunicipal entities within its area of jurisdiction as prescribed and regulated by or under law where, in the opinion of the council, such assignment of functions will facilitate or enhance the provision or administration of services, the adherence to municipal bylaws or, more generally, good governance in the public interest:
Provided that such assignment of functions-
 - (a) shall not be inconsistent with an Act of Parliament or an applicable provincial law; and
 - (b) shall not diminish the accountability of such local government.

176. Council Resolutions

Matters before the council of a local government pertaining to-

- (a) the budget of the local government, shall be decided by a resolution of the council adopted by a majority of a least two-thirds of all its members; and

- (b) town planning, shall be decided by a resolution of the council adopted by at least a majority of all its members: Provided that a council may delegate the power to make decisions on matters pertaining to town planning to the executive committee or to a committee appointed for this purpose: Provided further that section 177 shall apply *mutatis mutandis* to the appointment and functioning of a committee appointed for this purpose.

177. Executive Committees

A council of a local government shall elect, according to a system of proportional representation as may be prescribed by a law, from among its members, an executive committee to exercise such powers and perform such functions as may be determined by such council: Provided that —

- (a) the council shall determine the number of members of and the quorum for the executive committee;
- (b) the executive committee shall endeavour to exercise its powers and perform its functions on the basis of consensus among its members; and
- (c) if consensus on any matter cannot be achieved, such matter may be decided by the committee by resolution of a majority of at least two-thirds of all its members, or the committee may, if a majority of the committee so decides, submit a report and recommendation (if any) on the matter to the council for a decision.

178. Administration and Finance

- (1) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.
- (2) A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and

tariffs as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on an uniform structure for its area of jurisdiction.

- (3) A local government shall be entitled to an equitable allocation by the provincial government of funds, and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations, taking into account the different categories of local government referred to in section 174(2).

179. Elections

- (1) A local government shall be elected democratically, and such election shall take place in terms of an applicable law and at intervals of not less than three and not more than five years: Provided that the first local government elections after the commencement of this Constitution shall take place on the same day.
- (2) The electoral system for a local government shall include both proportional and ward representation and shall be regulated by a law referred to in subsection (1).
- (3) Subject to section 6, every natural person shall be entitled to vote in an election of a local government if he or she —
 - (a) is ordinarily resident within the area of jurisdiction of that local government or is under law liable for the payment of property rates, rent, service charges or levies to that local government; and
 - (b) is registered as a voter on the voters' role of that local government.
- (4) A voter shall not have more than one vote per local government.
- (5) No person shall be qualified to become or remain a member of a local government if he or she —
 - (a) is not eligible to vote in terms of subsection (3);
 - (b) is a member of the National Assembly or the Senate;
 - (c) is not qualified to become a member of the National Assembly;

- (d) is an employee of a local government (unless, with due regard to the public interest, exemption of this disqualification is given by the Executive Council of the province in which the local government is situated and proof of such exemption accompanies the nomination of such person); or
- (e) is disqualified in terms of any other law.

180. Code of Conduct

An enforceable code of conduct for members and officials of local governments shall be provided for by law.

5.1.2 Provincial Legislative Authority

126. Legislative Competence of Provinces

- (1) A provincial legislature shall, subject to subsections (3) and (4), have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

(Sub-s. (1) substituted by s. 2 (a) of Act No. 2 of 1994.)

- (2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

- (a) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

(Sub-s. (2A) inserted by s. 2(b) of Act No. 2 of 1994)

- (3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as —

- (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

- (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
- (c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
- (d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
- (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(Sub-s. (3) substituted by s. 2 (c) of Act No. 2 of 1994)

- (4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.
- (5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.
- (6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

5.1.3 Fundamental Rights

7. Application

- (1) This Chapter shall bind all legislative and executive organs of state at all levels of government.
- (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

- (3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.
- (4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) The relief referred to in paragraph (a) may be sought by —
 - (i) a person acting in his or her own interest;
 - (ii) an association acting in the interest of its members;
 - (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
 - (iv) a person acting as a member of or in the interest of a group or class of persons; or
 - (v) a person acting in the public interest.

5.1.4 Human Rights Commission

116. Powers and Functions

- (1) The Commission shall, in addition to any powers and functions assigned to it by law, be competent and be obliged to —
 - (a) promote the observance of, respect for and the protection of fundamental rights;
 - (b) develop an awareness of fundamental rights among all people of the Republic;
 - (c) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the further observance of such rights;
 - (d) undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions; and

- (e) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights.
- (2) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.
- (3) The Commission shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it shall, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for the purpose to do so, it may arrange for or provide financial necessary relief or may direct a complainant to an appropriate forum.

5.1.5 Revenue Allocations by National Government

158. Financial allocations by the national government —

- (a) to a provincial or local government, shall be made in terms of an appropriation Act, and
- (b) to a local government, shall ordinarily be made through the provincial government of the province in which the local government is situated.

5.1.6 Financial and Fiscal Commission

198. Establishment

There is hereby established a Financial and Fiscal Commission.

199. Objectives and Functions

- (1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to national, provincial and

local government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the national, provincial and local governments, including —

- (a) financial and fiscal policies;
 - (b) equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level;
 - (c) taxes, levies, imposts and surcharges that a provincial government intends to levy;
 - (d) the raising of loans by a provincial or local government and the financial norms applicable thereto;
 - (e) criteria for the allocation of financial and fiscal resources; and
 - (f) any other matter assigned to the Commission by this Constitution or any other law.
- (2) In performing its functions the Commission shall take into consideration, *inter alia*, the provisions of section 155(4)(b) and any other provision of this Constitution.

5.1.7 Public Protector

112. Powers and Functions

- (1) The Public Protector shall, in addition to any powers and functions assigned to him or her by any law, be competent —
- (a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged —
 - (i) maladministration in connection with the affairs of government at any level;
 - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
 - (iii) improper or dishonest act, or omission or corruption, with respect to public money;

- (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
 - (v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by —
- (i) mediation, conciliation or negotiation;
 - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
 - (iii) any other means that may be expedient in the circumstances; or
- (c) at any time prior to, during or after an investigation —
- (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
 - (ii) if he or she deems it advisable, to refer any matter which has an authority affected by it or to make an appropriate public body or regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- (2) Nothing in subsection (1) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law.

- (3) The Public Protector shall conduct an investigation under subsection (1) with due regard to the circumstances of each case, and shall for the purposes of such investigation, in addition to such powers as may be prescribed by law, but subject to the provisions of this Constitution and the law of privilege, be competent to —
 - (a) direct any person to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which, in the opinion of the Public Protector, has a bearing on the matter being inquired into, and may examine such person for that purpose; and
 - (b) enter, or authorise another person to enter, any building or premises and there to make such investigation or inquiry as he or she may deem necessary, and seize anything on those premises which in his or her opinion has a bearing on the purpose of the investigation.
- (4) The Public Protector or any member of his or her staff shall be competent, but not compellable, to answer questions in any proceedings in or before a court of law or any body or institution established by or under any law, in connection with any information which in the course of his or her investigation has come to his or her knowledge.
- (5) Recourse to, or the exercise and performance of any powers and functions of the Public Protector shall not oust the jurisdiction of a court of law to hear any matter or cause whatsoever.
- (6) The Public Protector shall report in writing on his or her activities to Parliament at least once every year.

5.1.8 The Public Service

Section 212

- (1) There shall be a public service for the Republic, structured in terms of a law to provide effective public administration.
- (2) Such public service shall —

- (a) be non-partisan, career-orientated and function according to fair and equitable principles;
 - (b) promote an efficient public administration broadly representative of the South African community;
 - (c) serve all members of the public in an unbiased and impartial manner;
 - (d) be regulated by laws dealing specifically with such service, and in particular with its structure, functioning and terms and conditions of service;
 - (e) loyally execute the policies of the government of the day in the performance of its administrative functions; and
 - (f) be organised in departments and other organisational components, and the head of such department or organisational component shall be responsible for the efficient management and administration of his or her department or organisational component.
- (3) Employment in the public service shall be accessible to all South African citizens who comply with the requirements determined or prescribed by or under any law for employment in such service.
- (4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account.
- (5) Subsection (4) shall not preclude measures to promote the objectives set out in subsection (2).
- (6) Provision shall be made by law for a pension for a member of the public service by means of a pension fund or funds established by law, and members of the public service who are required by law to be members of a pension fund shall be entitled to fair representation on the body which manages the applicable fund.
- (7) (a) In the event of changes to the law governing pension funds which prejudice a member of a fund, the real value of the accrued

benefits of such actuarial liability towards the member or his or her beneficiary, shall be maintained.

- (b) The retirement age applicable to a public servant by law as at 1 October 1993, shall not be changed without his or her consent.
- (8) For the purposes of this section the public service shall include the permanent force of the National Defence Force referred to in section 226(1).

5.1.9 Local Policing

Section 221

- (1) The Act referred to in section 214(1) shall provide for the establishment of community-police forums in respect of police stations.
- (2) The functions of community-police forums referred to in subsection (1) may include —
 - (a) the promotion of accountability of the Service to local communities and co-operation of communities with the Service;
 - (b) the monitoring of the effectiveness and efficiency of the Service;
 - (c) advising the Service regarding local policing priorities;
 - (d) the evaluation of the provision of visible police services, including —
 - (i) the provision, siting and staffing of police stations;
 - (ii) the reception and processing of complaints and charges;
 - (iii) the provision of protective services at gatherings;
 - (iv) the patrolling of residential and business areas; and
 - (v) the prosecution of offenders; and
 - (e) requesting enquiries into policing matters in the locality concerned.
- (3) The Act referred to in section 214(1) shall make provision for the establishment by any local government of a municipal or metropolitan police service: Provided that —

- (a) such a police service may only be established with the consent of the relevant member of the Executive Council of the province referred to in section 217(1);
- (b) the powers of such a police service shall be limited to crime prevention and the enforcement of municipal and metropolitan by-laws;
- (c) the said member of the Executive Council of the province shall, subject to paragraph (b) and the provisions of the said Act, determine the powers and functions of such a police service; and
- (d) the said Act shall provide that its provisions shall, as far as practicable, apply *mutatis mutandis* to any such police service.

5.1.10 Procurement Administration

Section 187

- (1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
- (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
- (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
- (4) All decisions of any tender board shall be recorded.

5.1.11 Commission on Remuneration of Representatives

207. Establishment

- (1) There shall be established by an Act of Parliament a Commission on Remuneration of Representatives.

- (2) The Commission shall make recommendations to Parliament, the provincial legislatures and local governments regarding the nature, extent and conditions of the remuneration and allowances of the members of all elected legislative bodies of the national government and of provincial and local governments, including members of the Provincial Houses of Traditional Leaders and the Council of Traditional Leaders.

208. Composition and Functioning

- (1) The composition, structure, powers, functions and procedures of the Commission and related matters shall be provided for in the Act referred to in section 207.
- (2) Reports by the Commission shall be tabled in Parliament: Provided that the Commission shall report to Parliament on its activities at least once every year.

5.1.12 Transitional Arrangements: Local Government

Section 245

- (1) Until elections have been held in terms of the Local Government Transition Act, 1993, local government shall not be restructured otherwise than in accordance with the Act.
- (2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after the elections referred to in subsection (1) have been held, shall be effected in accordance with the principles embodied in Chapter 10 and the Constitution as a whole.
- (3)
 - (a) For the purposes of the first election of members of a local government after the commencement of this Constitution, the area of jurisdiction of such local government shall be divided into wards in accordance with the Act referred to in subsection (1).
 - (b) Forty per cent of the members of the local government shall be elected according to the system of proportional representation applicable to an election of the National Assembly and regulated specifically or under the Act referred to in subsection (1), and

sixty per cent of the members shall be elected on the basis that each such member shall represent a ward as contemplated in paragraph (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), no area referred to in subparagraph (i) or (ii) shall be allocated less than half of the total number of wards of the local government concerned: 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 (a), (b) and (c) of the definition of "local government body" in section 1(1) of the Act referred to in subsection (1) of this section (as that Act exists at the commencement of this Constitution), has been established.

5.2 Chapter 11

5.2.1 Traditional Authorities

181. Recognition of Traditional Authorities and Indigenous Law

- (1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
- (2) Indigenous law shall be subject to regulation by law.

182. Traditional Authorities and Local Government

The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in Chapter 10, shall *ex officio* be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government.

LOCAL GOVERNMENT BEYOND 2000: REPORT OF PROCEEDINGS

CONFERENCE SUMMARY: ANDREW BORAINÉ, INSTITUTE FOR LOCAL GOVERNANCE AND DEVELOPMENT (INLOGOV)

The conference which is now drawing to a close forms part of a highly participatory process in drawing up a new Constitution. For the first time ever, members of non-racial transitional councils are taking part in this process.

Some delegates expressed concern that we did not come up with a final consensus document at this conference. Firstly, it is good that different positions have emerged - this encourages debate. Moreover, it is important to note that this conference was not a decision-making process. Firstly, delegates had no formal mandates from their councils and organisations. Secondly, the conference itself was not fully representative of all local government interest groups.

The conference should be seen as a tremendous start to the process of local government's involvement in the drafting of the new Constitution. There is much more work to be done, and there will be many more opportunities for debate.

Noting both the convergence and divergence of views of the delegates, we now need to ask the question: "How do we take the process forward?". I want to emphasise that this is not a summary of all the recommendations of the conference commissions, but rather a list of key issues that need further debate and clarity.

ISSUES FOR FURTHER DEBATE: PROBLEM AREAS AND GAPS

1. CONSTITUTIONAL ASSEMBLY PROCESS

I wish to clarify the constitution-making process. The new Constitution must be finalised by mid-1996. It will only be implemented in 1999. With regards to the process, I predict that local government will be lobbying the Constitutional Assembly until the very day the Constitution is adopted. Ongoing negotiations will need to take place once formal submissions have been made by local government.

Our conference spent some time focusing on the Constitutional Principles listed in Schedule 4 of the Constitution. These Constitutional Principles as they are written cannot be changed. Our task as local government therefore is to clarify their content, and ensure that the interests of local government are inserted in the new Constitution in accordance with the Constitutional Principles. The Constitutional court will then check to ensure that the new Constitution is consistent with the Principles.

2. WRITING THE NEW CONSTITUTION

An issue that local government needs to consider is whether we adopt a maximalist or minimalist approach to writing the Constitution.

I sense from local government that there is a need for detailed protection clauses to be inserted in the Constitution. In a more detailed Constitution, it is easier to interpret the allocation of powers and functions. It is also easier for political parties to entrench political deals, as in the interim Constitution. For these sorts of reasons, a maximalist approach would be used.

However, we need to approach this cautiously. As we know, circumstances change over time, and there is a constant need to adapt inter-governmental relations accordingly. If everything is entrenched in the Constitution, it becomes very difficult to make changes. For example, if in future local government wanted the power to perform an additional function, it would mean a constitutional change, which is, rightly so, a difficult process.

Moreover, a maximalist approach can become increasingly undemocratic, in that it undermines the electoral process of giving fresh mandates to a new government to make changes to legislation. This can reduce the status of the Constitution in the long run.

It will be necessary therefore for local government to make a clearer distinction between core issues that need to be constitutionalised (eg. the status and fundamental purpose of local government), and details that should be contained in subsidiary legislation.

Constitutional Principle 24 provides the starting point for an approach in this regard in that it distinguishes between a framework for local government and detailed legislation.

3. AUTONOMY

There was consensus at this conference about the need to entrench the right to local self-government. In this regard, our starting points are Constitutional Principles 20, 24 and 25.

I would however like to issue a word of caution. Absolute autonomy is not possible for local government, or any other level of government. Autonomy is always relative to other levels of government.

There is also a need for realism. Autonomy depends, in part, on the capacity of local authorities to deliver. In many areas, for some time to come, local authorities will battle to fulfil their functions, and will need support. I would also suggest that local government avoids accepting residual functions as this could put local government in a position of having a large range of responsibilities that other levels of government

do not want, without the necessary powers and financial resources.

How then can we define 'autonomy?' I note that there are at least five different recommendations from commissions at this conference on how to tackle this subject. One commission has suggested that the term itself is not particularly useful, and that it be dropped in favour of the right to local self-government.

In broad terms, autonomy means knowing who you are, and what you want to do. A right to (relative) autonomy derives from the notion of legitimacy, which in turn derives from the electorate of a level of government. Local government therefore needs to ensure that the electoral process is as successful as possible.

I would like to draw your attention to the notion of changing tiers of government into spheres of government, ie. a non-hierarchical approach to inter-governmental relations, where each sphere of government has both exclusive and overlapping (concurrent) functions, depending on which sphere does what best.

In this concept, no sphere is 'superior' or 'inferior' to another, and that there is equal status between spheres (although they of course have widely differing powers and functions). Inter-governmental relations is in this approach about partnerships between spheres of government, rather than control and authority.

In the past, I believe that too much attention was devoted to local government's accountability to 'higher' tiers of government. Local government's main accountability (as with all spheres of government) is to its electorate. Having said this, however, local government must also be accountable to other spheres of government, just as they need to be accountable to local government in terms of the notion of partnership.

4. PROTECTION OF LOCAL GOVERNMENT POWERS AND FUNCTIONS

There was strong consensus at the conference that the status and fundamental purpose of local government must be constitutionalised. To do this, we need to find a balance between a minimalist and maximalist approach.

One debate that needs further attention is which sphere of government constitutes the 'competent authority' for local government (see section 174 of interim constitution). Local government needs to put forward a view as to whether the provinces, or national government, or a combination of both (concurrent), should have competency regarding local government.

This conference has suggested at least four different possible mechanisms for protecting the powers and functions of local government:

- * Representation of local government in other spheres of government, ie. senate;
- * 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 in to 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.

5. ELECTORAL SYSTEMS

It is clear that we need clarity on the terminology that we are using, ie: metropolitan, urban and rural; metropolitan and non-metropolitan; rural and traditional, etc.

It is my impression that we did not have sufficient time to discuss the complexities of the existing local government electoral system. I am also surprised that no commission debated section 179(3)(b) of the interim Constitution, which provides for persons voting in local authorities different from where they are ordinarily resident on the basis of being liable for rates or service charges.

Commissions also did not pick up on sections 176 and 177 of the interim Constitution. These were interim measures inserted in the Constitution during the Multiparty negotiation process at the World Trade Centre, and in my mind should be addressed in subsidiary legislation rather than in the constitution.

There was very little discussion about participatory democracy and the role of civil society. While recognising the fundamental sovereignty of elected bodies, it is important to create structures to allow for the participation of civil society.

6. TRADITIONAL AUTHORITIES

Firstly, we need to note that there were very few delegates from rural areas and traditional authorities at this conference. It is essential that they are present in future debates.

I do not think that our discussions adequately distinguished between the role of traditional bodies and elected councils, and more work needs to be done in this regard. Overall, despite many initial misgivings, I sensed that many conference delegates recognise that we need to have a mature and strategic approach, and accommodate traditional leaders at a local level in one form or another.

The question still remains: 'How is this done?'. I note that at a recent ANC Constitutional conference, no less than five possible scenarios were put forward. This indicates the degree of complexity on these issues! Local government needs much more information on the issue of traditional leaders, and further discussion with this sector.

7. FINANCE

There is still quite a bit of confusion surrounding the concept of financial viability. I do not believe it can ever mean self-sufficiency. Viability (and sustainability) is achieved when a local authority has sufficient revenues from own sources and intergovernmental transfers and grants to carry out its functions. Having said this, intergovernmental transfers do not give other spheres of government the right to dictate to local government.

More work needs to be done by local government to protect its own sources of revenue. Constitutional Principle 25 is the appropriate starting point in this regard.

It is worth emphasising a strong point that was made at this conference, namely, that when functions are delegated by other spheres of government to local government, they should be accompanied by sufficient sources of revenue.

In terms of intergovernmental financial relations, it is important for local government to promote the principle of certainty, in order to move away from the current system of ad-hoc intergovernmental grants. Local government needs to be able to regard transfers as an own source of revenue, and not be dependent on annual lobbying and pleading, or on money going to the area of greatest crisis. This will allow long-term planning to take place (something that local government does not do too successfully at the moment) and will bolster confidence.

Our starting point in this regard is Constitutional Principle 26, which provides for local government to have a constitutional right to an equitable share of revenue collected nationally (note the seeming discrepancy with section 178(3) of the interim Constitution).

The main issue is to ensure that an objective formula, based on transparent criteria, becomes the basis for future distribution of revenues on the basis of vertical and horizontal fiscal equalisation. This can only be done once we have decided on national minimum standards.

Before discussing amendments to the composition of the Finance and Fiscal Commission (FFC), local government needs to be clear on its role.

Currently, the FFC's role is not to make allocations per se, but to determine a possible national formula for revenue sharing. FFC members, although nominated by various constituencies, currently do not formally represent them.

A strong argument can be made for more people with local government finance knowledge and experience to be nominated onto the FFC. However, if they are there to formally represent local government, this would alter the status of the FFC into a bargaining/ negotiating forum, which is not necessarily in the best interests of local government.

7. ENVIRONMENTAL SUSTAINABILITY

This issue was not covered at all by the conference. The World Commission on Environment and Development defines sustainability in terms of "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". It is important for local government to incorporate this into our way of thinking, and to take note of the suggestions on the role of local government contained in Agenda 21 that was drawn up at the "Earth Summit" in Rio de Janeiro in 1992:

"Local authorities construct, operate and maintain economic, social and environmental infrastructure... establish local environmental policies and regulations, and assist in implementing... national environmental policies. As a level of governance closest to the people, they play a vital role in educating, mobilising and responding to the public to promote sustainable development."

8. THE WAY FORWARD

It is important for local government to urgently reach consensus on a formal submission to the Constitutional Assembly. At the same time, it is equally important for organised local government to restructure itself on a more representative, non-racial and legitimate basis, both in terms of provincial municipal associations and a national association representing all local government interests.

If local government wants its points to be incorporated into the final Constitution, it must be able to back up its submission with a credible and well coordinated lobby. This does not exist at the moment. If organised local government is not restructured by the deadline of June 1995, I fear that local government will come off second best in the final Constitution.

THE WAY FORWARD

1. The Conference expresses an urgent need for legitimate co-ordinating local government structures at national and provincial levels.
2. The proceedings of the Conference need to be made accessible to other role-players for further discussion and debate. This document should be regarded as an initiative to further discussion and refined with reference to this issue of local government constitutionalisation.
3. The FMA was requested to co-ordinate the process, by way of:
 - 3.1 Finalising the document on conference
 - 3.2 Making it accessible to interested parties
 - 3.3 Identifying and negotiating with key towns/cities in other provinces to instate and facilitate the constitutional debate on local government in the province concerned.
4. Interested towns/parties are requested to consider including their provincial government in this regard.
5. It is expected that the FMA will receive feedback from interested towns and cities in terms of actions planned. This information should be consolidated and redistributed to the interested parties in order that planning of further initiatives can be done.

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