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REPUBLIC OF SOUTH AFRICA

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# CONSTITUTIONAL ASSEMBLY

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## Theme Committee 3

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### Work Plan

Theme Committee 3 has pleasure in recommending to the Constitutional Committee of the Constitutional Assembly the following work plan for its work in pursuance of the request by the Management Committee of 17 October 1994.

In general the National Party strongly submitted that the Interim Constitution, 1993, should form the basis to reach consensus on the new constitution. No other party mentioned this in their submissions, but the ANC has indicated that it does not share this opinion.

#### 1. Constitutional Issues

The political parties represented in your Committee<sup>1</sup> identified a wide range of constitutional issues which need to be attended to.

The identification of issues depends on the way the mandate of the Theme Committee is understood. This will be addressed again below. Suffice to say that a broad interpretation of the instructions of the Committee includes *functions* as well as *structures*,<sup>2</sup> while a strict interpretation of the instructions restrict itself to *functions only*.

If the *strict interpretation* is followed, only the following issues could be addressed by the Theme Committee:

- The nature of the relationship between different levels of government
  - General aspects
  - Legislative competencies
  - Allocation of legislative powers
  - Executive relations and functions
- Financial and fiscal relations
- Local government

If the *broad interpretation* is followed, more issues may be included. Parties identified issues in a rather extensive way. The following discussion of possible issues is based on the broad approach to put the matter

1 The ANC, DP, FF, NP, PAC.

2 Reasoning that "structure follows function", one "can not do the one without the other", and thus leading to much overlapping with e.g. Theme Committee 2.

in a comprehensive way before the Constitutional Committee. If the Constitutional Committee rules that a more narrow approach should be followed, the necessary corrections may be made easily.

It is recommended that the following issues are inclusive of the recommendations of the parties.<sup>3</sup>

### 1.1 The nature of the relationship between different levels of government

The basis of the relationship between different levels of government is governed in the main by the division of legislative and executive powers. Under this heading a format for the relationship must be developed.

#### 1.1.1 General aspects

The general aspects of the relationship between the different levels of government, national, provincial and local, should be addressed under this heading.<sup>4</sup> As regards local government only general principles for and the nature of the institution of local government should be addressed here.<sup>5</sup> The further detail of local government could be covered under 1.7 below. Aspects of the following Constitutional Principles<sup>6</sup> need to be attended to here:

- Principles 16, 17, 18

The issue on the agenda of the Theme Committee is to find an institutional concept where national unity would not be lost while division of powers between different levels of government are realised.

In so far as it has a bearing on the relationship between different levels of government, the question of *selfdetermination*<sup>7</sup> or *autonomy*<sup>8</sup> of provinces or other regionalised entities and local government may receive attention here:<sup>9</sup>

- Principles 11, 12, 13, 34, and sect 3 and 31

The National Party is of the opinion that the question of *corporate selfdetermination (federalism)*, should be reconsidered in the context of the *Volkstaat* issue.

The question of provincial constitutions can be addressed under this heading as well, in the light of possible decisions regarding the nature of the relationship between national and provincial levels of government.<sup>10</sup>

- 3 The IFP notes that these issues should comprise a preliminary determination of the issues, which should be reviewed and added to if required at a later stage.
- 4 The NP suggested that sect 126 of the Interim Constitution, 1993, may be a point of departure in this regard.
- 5 The Constitutional Principles lack extensive coverage of the principles of local government. Chapter 10 of the Interim Constitution, 1993, to a certain extent is in the nature of a framework for local government. The IFP asks the question whether this should be provided for in the constitution, and if so, how. It seems that the NP lays stress on the relationship between provincial government and local government, and raises the question whether local government powers and functions should be allocated to provincial and local government levels exclusively.
- 6 Interim Constitution, 1993, Schedule 4.
- 7 The term used by the FF.
- 8 This term seems to be preferred by the IFP: They use for example the phrase: "Entrenchment of provincial autonomy." The NP uses *autonomy* as well, especially in regard to local government.
- 9 Submission by the FF.
- 10 The IFP specifically asks whether this should be provided for in the constitution, and if so, how. The NP includes the matter of provincial constitutions as an issue on provincial level, as for example presently set out in Schedule 6 of the Interim Constitution, 1993.

### **1.1.2 The legislative competence of provinces and local government in relation to each other and Parliament**

It is clear that the policy on division of legislative and executive powers between the different levels which must be enacted in the new constitution is the main issue confronting the Theme Committee. The principles and legislative techniques regarding overriding and residual legislative powers, concurrent and exclusive powers, framework legislation and the regulation of conflict between laws emanating from different levels of government, are of prime importance for the Committee.<sup>11</sup> Further the following Constitutional Principles should be considered here:

- Principles 19, 20, 21 22, 23<sup>12</sup>

### **1.1.3 The allocation of legislative powers to national, provincial and local levels**

Under this heading the specific<sup>13</sup> exclusive and concurrent<sup>14</sup> legislative competencies of provinces should be dealt with.

The IFP submitted that the type of powers to be allocated should receive attention, i.e. what the powers and functions are from which to choose in determining the powers which should be allocated to the national or provincial levels of government. They raised the question whether the constitution should list the national powers, the provincial powers or both.

## **1.2 Provincial legislative authorities**

The parties questioned the inclusion of 1.2 and 1.3 as issues for Theme Committee 3.<sup>15</sup> *The matter is referred to the Constitutional Committee for a ruling.*

### **1.2.1 The structure and functioning of provincial legislative authorities**

The structure and functioning of provincial legislatures under the new constitution should be considered in the light of the decisions regarding the division of powers (the structures must *fit* the functions.) The functioning of provincial legislative authorities must take account of the requirements for formal legislative procedures<sup>16</sup>

### **1.2.2 Provincial electoral law**

Consideration should be given whether provincial electoral systems need the attention of this Committee, or whether electoral systems should be treated in an integral way elsewhere. See also under 1.7 *below*.

## **1.3 Provincial executive authorities**

### **1.3.1 Structure and functions**

The structure and functioning of provincial executive authorities should receive attention. The National Party specifically highlights the issues regarding representation of minority parties on

11 The IFP asked what institutional techniques of coordination should be employed to regulate the relation between national and provincial levels of government. This could also be considered under 1.3.2 *below*.

12 Precedence to national level in case of certain disputes.

13 What is intended under "specificity" of the division of powers, is what specific or definite powers are allocated to the provinces and what to the national level.

14 And *other* powers and functions: Freedom Front.

15 See also above.

16 The last sentence submitted by the FF, quoting Principle 10.

the Executive Councils, uniform standards in the appointment of staff and service conditions as matters which should be addressed.

### 1.3.2 Intergovernmental relations

The institutionalising of sound and effective intergovernmental relations between national and provincial levels seems to be advisable and necessary. The National Party reminds of the Commission on Provincial Government and its use in the regulation or assistance of intergovernmental relationships<sup>17</sup>

### 1.4 Financial and fiscal relations

The political structure and constitutionalism of provincial and local governmental finance must receive specialised attention in the work of Theme Committee 3. The fiscal powers and functions of national and provincial governments should be defined, and provision should be made for appropriate fiscal powers and functions of different categories of local government.<sup>18</sup> Fiscal equity should receive attention at all levels.<sup>19</sup> These could be done under the following headings:

1.4.1 Intergovernmental fiscal relations between national, provincial and local governments

1.4.2 Provincial financial and fiscal powers and functions

1.4.3 Local government financial and fiscal powers and functions

Questions regarding the constitutional regulation of local government financial resources and resources that may be shared between local government and other levels of government may receive attention here.<sup>20</sup>

### 1.5 A national second chamber

The parties registered a note of caution on the inclusion of this topic under the mandate of the Theme Committee. *A ruling of the Constitutional Committee is requested.*

It should be established with respect to the relationship between different levels of government whether there is a need for the institution of a national second chamber or senate.<sup>21</sup> If the answer is positive, recommendations are required on all aspects of the appointment of members, and the structure, powers and functions thereof.

### 1.6 Definitions of provinces

For this topic the parties registered a note of caution as well. *A ruling of the Constitutional Committee is requested.* The matter is particularly affected by the prescripts of Constitutional Principle XVIII(1) and (3)<sup>22</sup>

17 See sect 128, Interim Constitution, 1993.

18 Principle 25 read with Principle 24.

19 Principle 26.

20 The NP further refers to accountability and reporting practices in local government and the demarcation of functional boundaries for metropolitan and rural local government institutions.

21 The IFP asks what the role of the second house would be in national legislative and/or executive decision making.

22 It states that the boundaries of the provinces must be defined in the new constitution, but it shall be the same as established in terms of the Interim Constitution, 1993. The time for border changes has also run out.

If the Constitutional Committee rules that the subject should be addressed by this Committee, the demarcation of provincial areas<sup>23</sup> and the finalisation thereof could receive attention.

### 1.7 Metropolitan, urban and rural local government

Under this issue the framework for the establishment, powers and functions of local government may receive attention.<sup>24</sup> The National Party wishes to have the question of provincial jurisdiction over local government, the autonomy of local government and the possibility of exclusive powers to local government to be addressed. The Freedom Front requested that the system of elections on local government level be considered.

## 2. Priority issues

### 2.1 As regards content

Your Theme Committee is of the opinion that the different issues mentioned in 1 *above* should receive concurrent attention of the Committee, where necessary through the work of subcommittees and commissions.<sup>25</sup>

An important consideration for ascertaining priorities is whether an issue may be referred to the Constitutional Court at an early stage in terms of sect 71(4) of the Interim Constitution. There is a possibility that the general aspects of the division of legislative powers between national and provincial levels<sup>26</sup> may be so referred.

As regards contents the Committee accordingly recommends that the *general aspects of the division of legislative powers between national and provincial levels* is the first priority of the Committee.<sup>27</sup>

### 2.1 As regards process

As regards the process priorities for the Theme Committee, the Committee recommends that the priorities be formulated as follows:

- Setting up subcommittees and commissions where necessary
- Soliciting public comment: written as well as oral

The PAC opinioned that the consistent interpretation of the constitutional Principles are important. The PAC accordingly proposed that the first three meetings of the Theme Committee be devoted to this exercise and the priorities of the Principles will then follow as a matter of course.

## 3. Overlapping areas

The Democratic Party opinioned that Theme Committee 3 is to consider the powers, functions and relationships between different levels of government. Once this task is completed it is the responsibility of other

23 Presently Schedule 1 of the Interim Constitution, 1993.

24 See Principle 24.

25 The proposal by the IFP to organise the work in clusters, and finishing the work in stages or consecutively, was seriously considered by the Committee.

26 Presently regulated by sect 126 of the Interim Constitution.

27 See 1.1 and 1.1.1 *above*. The IFP opinioned that the injunction of sect 161(1) that "the development of a system of provincial government shall receive the priority attention of the Constitutional Assembly" entails the anteriority of a group of questions, all of which have a bearing on the general aspects of the division of legislative powers between national and provincial levels. The questions which the IFP raise are substantive issues like: Will the provinces have residual powers, how will residuality be treated, what about entrenched constitutional autonomy for the provinces? There will be ample opportunity to consider these and other questions in the work of the Committee.

Theme Committees, in its view, to consider the structures, institutions and mechanisms to give effect to the proposed powers, functions and relationships.

The Committee noted, however, that there may be uncertainty whether the terms of reference of this Committee includes Chapters 9 and 10 of the Interim Constitution, 1993, which *inter alia*, deals with "structures, institutions and mechanisms". It was also suggested that the Theme Committees should not have hard borders of reference terms. In this line of thought the opinion is that all the issues enumerated *above* in the broad interpretation of the instructions of the Committee, are interrelated. This view<sup>28</sup> submits that it is practical to entertain questions of structure in conjunction with functions.

However it may be, serious concern was expressed by parties, like especially the IFP, about the problems of overlapping issues between the Theme Committees. *The Constitutional Committee is requested to address the problem seriously in order to provide clarity.*

The following areas, if they are the co-responsibility of Theme Committee 3, may possibly overlap with other Theme Committees.

- 3.1 Bicameralism and the possible role of the second chamber/Senate (Theme Committee 2)
- 3.2 Principle I: Unity of state (Theme Committee 1)
- 3.3 The form of state (Theme Committee 1)
- 3.4 The separation of powers between provincial legislatures and executives (Theme Committee 2)
- 3.5 Provincial and local government financial and fiscal affairs (Theme Committee 6)
- 3.6 Powers of Constitutional Court with regard to jurisdictional disputes on legislative competency between national and provincial levels of government (Theme Committee 5)
- 3.7 Principles VI, X, XIII, XIV, XV, XVI and XVII (Theme Committee 2)
- 3.8 Separation of powers (Theme Committee 5)
- 3.9 Provincial constitutions (Theme Committees 4 and 5)
- 3.10 Some specialised agencies of state, e.g. the Commission on Provincial Government and the Financial and Fiscal Commission (Theme Committee 6)
- 3.11 Judicial functions (Theme Committee 5)

#### 4. Sub-Committees

The ANC recommended that the following issues may be dealt with in Sub-Committees of Theme Committee 3 where necessary and depending on the ruling of the Constitutional Committee about the range of issues which should be addressed by Theme Committee 5.

28 Which is seriously queried.

<i>Sub-committee</i>	<i>Name</i>	<i>Terms of Reference</i>	<i>number of Members</i>
1	General aspects of the relationship between different levels of government	To investigate and write an interim report on the general aspects of the relationship between different levels of government, national, provincial and local, as well as on the legislative competence of provinces relative to Parliament, which should be enacted in the new constitution, and for this purpose to analyse and process information and evidence.	7
2	Allocation of powers	To investigate and write an interim report on the specific exclusive and concurrent legislative and executive powers of provinces which should be enacted in the new constitution, and for this purpose to analyse and process information and evidence.	7
3	Provincial legislative and executive authorities	To investigate and write an interim report on the structure and functioning of provincial legislative and executive authorities, with attention to the institutionalising of intergovernmental relations between national and provincial levels, which should be enacted in the new constitution, and for this purpose to analyse and process information and evidence.	7
4	Local government	To investigate and write an interim report on a framework for local government which should be enacted in the new constitution, and for this purpose to analyse and process information and evidence.	7

## 5. Commissions

The ANC recommended that the following issues may be dealt with in Commissions of Theme Committee 3 where necessary and depending on the ruling of the Constitutional Committee about the range of issues which should be addressed by Theme Committee 5.

The Constitutional Committee is further requested to give a ruling on the composition of Commissions. Should they include members of the Theme Committee as well, or only outside experts?

<i>Commission No</i>	<i>Name</i>	<i>Terms of Reference</i>	<i>Number of Commissioners</i>	
			<i>Members</i>	<i>Experts</i>
1	Financial and fiscal relations	To investigate and write an interim report on intergovernmental fiscal relations between national, provincial and local levels which should be enacted in the new constitution, and for this purpose to analyse and process information and evidence.	5	3

2	Role of Second Chamber [subject to the ruling of the CC]	To investigate and write an interim report on the need for a national second chamber or Senate, and if there is a need for such an institution, to recommend on all aspects of the appointment of members and the structure, powers and functions thereof and for this purpose to analyse and process information and evidence.	5	3
3	Definitions of provinces [subject to the ruling of the CC]	To investigate and write an interim report on the demarcation of provinces, with special reference to disputed areas, and to recommend how the definition of provinces should be finalised in the new constitution, and for this purpose to analyse and process information and evidence.	5	3

The Democratic Party recommended that financial relationships should be investigated and reported on by experts based on submissions and international experience in order to present a range of alternatives. The IFP did not regard subcommittees and commissions necessary, but said that proper instructions are important if such subcommittees and commissions are set up. The FF suggested a commission on the electoral system of local government.

## 6. Separate Reports

Subject to the more precise ruling of the Constitutional committee on the scope of the terms of reference of this Theme Committee, it is recommended that the following separate reports be submitted by Theme Committee 3 with deadlines as indicated (see Gantt Chart attached):

<i>No of Report</i>	<i>Issues</i>	<i>Deadline</i>
<i>Interim 1</i>	The nature of the relationship between different levels of government and legislative competencies	30 04 1995
<i>Interim 2</i>	Provincial legislative structures and executive functions and structures	30 04 1995
<i>Interim 3</i>	Definitions of provinces	30 04 1995
<i>Interim 4</i>	Local government	30 04 1995
<i>Interim 5</i>	Financial and fiscal affairs of provinces and local government	30 04 1995
<i>Interim 6</i>	The role of the Senate	30 04 1995
<i>Final 7</i>	Final & Composite Report	30 06 1995

## 7. Structures and role players

Your Committee requests that the following structures and role players be consulted for the work of Theme Committee 3.



- 7.1 Premiers of provinces
- 7.2 Executive Councils of provinces
- 7.3 Provincial Legislatures

The Theme Committee noted the observations of the Democratic Party on the representation of provinces on the Theme Committee. It is interpreted in such a way that the inputs of the established nine provincial governments is of the utmost importance for the work of the Committee, and that close relationships with these governments should be established in the execution of the mandate of the Committee.

- 7.4 The Department of Constitutional Affairs, the Commission on Provincial Government, the Fiscal and Financial Commission, and the Department of Public Service and Administration
- 7.5 The panel of constitutional experts
- 7.6 Political parties
- 7.7 Organs of civil society

This is a quite overflowing concept, which would include organisations like labour (e.g. COSATU), churches, organs of civil society proper (like SANCO), the business sector etc. The Freedom Front mentioned the following especially: the Volkstaatraad, Transvaal Municipal Association, SABRA, Volkseenheidskomitee and AVSTIG. The IFP mentioned provincial Houses of Traditional Leaders, academic and other technical experts.

- 7.8 Local government level authorities
- 7.9 Individuals

## 8. Community and media

Your Theme Committee suggests the following ways of reaching the public for which community and media liaison assistance would be required to facilitate the Committee's work.

<i>No</i>	<i>Method</i>	<i>Purpose</i>
1	Public proceedings	Evidence
2	Hearings in each province	Evidence
3	Television	Hearings & public participation
4	Radio	Interviews/ Evidence
5	Press	Advertisement & publicity
6	People's forums	Dialogue, esp population difficult to reach
7	Interim reports	Publicised/ Distributed for comment
10	Parties outside Parliament	Inputs & dialogue
11	Conferences	In depth papers & discussions

## 9. Technical assistance

The National Party and the IFP requested extra time to submit more nominations for technical experts. They will be able to provide these in January 1995.

In the meantime the following nominations are submitted:

No	Nomination	Description
1 & 2	Basson D UP Corder H UCT Dlova V UTranskei Erasmus MG US Murray C UCT Raath AWG UOFS Shabala SR UNatal Steytler N UWC Thornhill C UP Van der Westhuizen J UP Welsh DJ UCT	Two constitutional lawyers or political scientists
3	Abedian I UCT Black PA UCT Donaldson AR Dept Finance Loots L UWC Van Ryneveld P UWC	An expert on public finance (could be part-time & share with TC6)
4	Bernstein Ann, Urban Foundation Boraine A Mdakane, Richard	An expert on local government
5	Prof Flip Smit UP	An expert on provincial demarcation

## 10. Operational schedule

Your Committee encloses a schedule for the suggested operational management of the work of the Committee.

The main features of the schedule are the following:

- 10.1 Public hearings and the acceptance of written submissions should take place during February and be closed on 28 February 1995.

*Your Committee especially and urgently requests the Constitutional Committee to inquire from the Commission on Provincial Government whether it a full and complete report in pursuance of their objects, functions and duties in terms of sect 164(1) and (2) of the Interim Constitution can be submitted on or before 28 February 1995 to Theme Committee 3 in order to be taken into account and to avoid duplication.*

- 10.2 The processing and analysis of information and evidence should take place in March and be concluded on 31 March 1995.

It was stressed by the Core Group of your Committee that the opportunity for oral representation should be reserved as far as possible for institutions or individuals which may find it difficult to make written submissions. Sophisticated and empowered organisations or individuals should provide written submissions.

- 10.3 Six Interim Reports should be completed on 30 April 1995. At this stage referral to the Constitutional Court may be possible.
- 10.4 A second round of public hearings and acceptance of written submissions should take place during May 1995 to receive reaction to the Interim Reports. This round of hearings and submissions should not be announced at this stage, and in any event not until 31 March 1995.
- 10.5 The final and composite Report of the Theme Committee must be remitted to the Constitutional Committee of the Constitutional Assembly on or before 30 June 1995.

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*Constitutional Assembly*  
*Theme Committee 3*  
**WORK PLAN: SCHEDULE OF REPORTS**

<i>Phases</i>	<i>Reports</i>	<i>Nov 1994</i>	<i>Dec 1994</i>	<i>Jan 1995</i>	<i>Feb 1995</i>	<i>Mar 1995</i>	<i>Apr 1995</i>	<i>May 1995</i>	<i>June 1995</i>
<i>Phase 1: Gathering information and hearing evidence</i>	Interim Report 1: Local government		Preparation		Submissions Hearings			Not announced	
	Interim Report 2: Division of powers								
	Interim Report 3: Definitions of provinces								
	Interim Report 4: Legislative and executive authorities								
	Interim Report 5: Financial and fiscal affairs								
	Interim Report 6: The Senate								
<i>Phase 2: Processing information and evidence</i>	Interim Report 1: Local government					Analysis			
	Interim Report 2: Division of powers								
	Interim Report 3: Definitions of provinces								
	Interim Report 4: Legislative and executive authorities								
	Interim Report 5: Financial and fiscal affairs								
	Interim Report 6: The Senate								

<i>Phase 3: Preparing reports</i>	<i>Reports</i>	<i>Nov 1994</i>	<i>Dec 1994</i>	<i>Jan 1995</i>	<i>Feb 1995</i>	<i>Mar 1995</i>	<i>Apr 1995</i>	<i>May 1995</i>	<i>June 1995</i>
	Interim Report 1: Local government						Interim	Review	
	Interim Report 2: Division of powers								
	Interim Report 3: Definitions of provinces								
	Interim Report 4: Legislative and executive authorities								
	Interim Report 5: Financial and fiscal affairs								
	Interim Report 6: The Senate								
	Report 7 Final and Composite							Start	Final

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