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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

**POLITICAL PARTY
SUBMISSIONS
BLOCK 2 PHASE 1**

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VOLUME 7

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**CONSTITUTIONAL
ASSEMBLY**

**AFRICAN CHRISTIAN
DEMOCRATIC PARTY**

**POLITICAL PARTY
SUBMISSION**

**BLOCK 2 PHASE 1
10 APRIL 1995**

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE THREE

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

Biblical Foundations of Government

In accordance with the Biblical principles on which the party is based, the ACDP states that government is an institution of the triune God, Creator of all and the mandate God had given to His institution is related in **Romans 13:4**:

Government is to be the servant of God for the good of all citizens.

From this aspect, it follows that government exists for two very basic purposes: Firstly to regulate society as a ruler of men in the attitude of a servant to God, and secondly, to do this to the benefit of all who submit under it's authority.

Decentralisation of Government

Since power residing in the people is a basic premise of democratic government, the government should be kept as close the people as possible. This can be accomplished by establishing a small national government and strong local and regional governments.

History has shown that centralisation of governmental power destroys the liberty and the rights of man. The way to have good and safe government is to divide the power among the people and the localities, instead of entrusting it to one body.

Delimitation of Powers and Capacities

Civil government in a country should be subdivided into many levels (local, regional, national.) The power of **each** level should be clearly defined and sovereign in those defined areas. **No** level of government should be able to usurp the jurisdiction of another. A great majority of the power should rest on the local level.

The limited powers of the national government should be clearly defined in a constitution and involve those things which affect the country as a whole, such as defence, foreign policy, regulation of interregional and foreign commerce, citizenship laws, coining money, and copyrights. All other powers should remain with the people, or with the local and regional governments. The powers of local and regional government can be written in a regional constitution and include such things as traffic regulations, business regulations, public works, voting procedures, and law and order.

The test should be whether these aspects of civil government can most effectively and efficiently be handled by an encompassing authority that has restricted resources with which to work - whether they be natural or otherwise.

Powers and competencies of the regions should not be a 'numerus clausus' or contained in the Constitution: this document, by nature should be tampered with as little as possible and it would be an extremely undesirable situation to have to amend this instrument every time a particular provincial government identifies a required competency in order to function smoothly.

In keeping with the inclusionary nature of the democratic process, currently underway in this country, a bottom to top approach is proposed for governmental relationships. This would mean that the citizens be given the first opportunity to make their needs and requirements known on a regional geographic basis.

It has already become undeniably apparent that no two provinces have the same strong or weak points, needs or requirements. The only effective way to ensure that these be addressed in a satisfactory manner, with the most efficient and effective application of limited natural and human resources would be to leave the allocation of resources to the national government. It is further submitted that assisting services be provided by the national government in the forms of research to find: eg. viable alternatives in an area where natural fuels are becoming scarce, or where the skills of the provinces are not sufficient, or the manpower not available to undertake a province-wide polio vaccination, or the supply of sufficient water, etc.

Overriding Powers and Competencies

Referring to the Biblical mandate for civil government, the following aspect becomes relevant:

No government, at whichever level, should enact any law or have any competencies that transgress the law of God or the morality thereof. Should a province rule that only the religion of secular humanism be allowed in secondary and tertiary institutions, thereby discriminating against other religions, national government should eg. have competence to override this legislation. The same power should, however, exist for the provincial governments to override national decisions that are not in line with the scriptural principles referred to.

It is submitted that this would provide a system of checks and balances that have a fixed and defined content, no matter what the context and, as such, a definitive standard against which uses of competencies and powers shall be tested.

Current thinking, following legally positivist tendencies, hold that societal changing needs will be the yardstick to measure when use becomes abuse and when corruption surfaces. A very real problem is that no absolutes; no standards are set, that will not be capable of being overruled by anyone with hidden agendae.

Coupled herewith, comes the corollary that government must benefit the citizens thereof. Government has authority which it received from God, as shown above. The word authority, stems from the Hebrew word meaning "increase". The test for government should always be - are the citizens better off than before? This is always subject to the morality of God's law. Homosexuals and lesbians will not eg. be able to claim political rights as members of their particular sexual orientation because this would be directly opposed to God's Word.

Biblical Principles include the right to self-defence and mobilisation against attack - even on national level.

Keeping in mind that a powerful elite group can easily turn into an even more powerful totalitarian elite, the powers of the respective governments in terms of war and imminent attack from outside the borders, should preferably not allow any group to consolidate themselves into a mini-dictatorship and checks and balances must always be found. Again, having Godly men and women in Government, who are there because of a calling on their lives by the Most High God and, as such, not drawn to the power attendant to leadership, but rather to the opportunity to be leaders from a position of servanthood, is proposed by the ACDP, to be the most vital requirement for anyone wanting to enter for public office or to accept the mandate of the Creator of heaven and earth.

7th April 1995

[LEVELS.WPS]

**CONSTITUTIONAL
ASSEMBLY**

**AFRICAN NATIONAL
CONGRESS**

**POLITICAL PARTY
SUBMISSION**

**BLOCK 2 PHASE 1
10 APRIL 1995**



National and Provincial Legislative and Executive Competences

Constitutional Assembly
Submission to Theme Committee 3
Block 2

Draft 3. 6 April 1995.

General principles

1. The following ideals, which are relevant to the inner consistency of the whole of the final constitution, should be achieved in relation to the provincial system:
 - 1.1 National unity, reconciliation and nation building;
 - 1.2 cost efficient and effective government, capable of redressing the iniquities of the past and the disparities of the present;
 - 1.3 the promotion of maximum participation in democratic and accountable governance at all levels;
 - 1.4 the promotion of governance close to the people and which is responsive to their needs.

Cooperative governance

2. The final constitution should establish a cooperative system of governance with the following guidelines:
 - 2.1 Cooperative and coordinated national and provincial governance should be promoted, while strengthening the role of provinces in national policy and law making.

- 2.2 National and provincial governments should have regard for one another's legitimate interests in the exercise of their powers and functions.
- 2.3 Recognition should be given to legitimate regional aspirations and needs within a context of overall national imperatives.

General matters

3. The constitution should provide for a national and uniform framework for provincial constitutions, which could, however, allow for provincial variations in defined aspects.¹
4. There should be democratically elected provincial legislatures, which should have the executive and legislative powers as set out below. From each of these legislatures a provincial executive should be formed. A provincial executive must be accountable to its provincial legislature.
5. The allocation of powers and intergovernmental relations should be based on the principle of coordinated and cooperative governance.
6. The final constitution should make a distinction between the following two aspects of the division of powers:
 - 6.1 The division of *legislative powers* between national and provincial levels, and
 - 6.2 the division of *executive/ administrative powers* between national and provincial levels.

Elements of the provincial system

7. The provincial system should have the following elements:
 - 7.1 A Senate, representative of provinces, which effectively reflects provincial needs and interests at national level,² while providing an appropriate forum for intergovernmental coordination.
 - 7.2 Concurrent legislative competences for national Parliament and provincial legislatures.
 - 7.3 Executive and administrative competences at national and provincial levels.
 - 7.4 A clear framework for determining uncertainties between national and provin-

1 The ANC reserves the right to make further submissions with regard to the principles applicable to provincial constitutions at a later stage.

2 Noted here for the sake of completeness; submission in this regard is the responsibility of Theme Committee 2. See also below.

cial competences.

7.5 The location of residual competences at national level.

National and provincial legislative competences

8. The final constitution should enact concurrent legislative powers for national and provincial government broadly in accordance with the currently existing competences and in compliance with Constitutional Principle XVIII(2) of the Interim Constitution, 1993. The inherent elasticity of concurrent legislative competences should be reflected in the constitution.
9. An Act passed by Parliament shall prevail over a law passed by a Provincial Legislature to the extent of any inconsistency between them, provided that the Senate has consented to such legislation³ and further provided that:
 - 9.1 the law sets minimum or uniform norms or standards across South Africa or provides for equal opportunity or access to government services, or
 - 9.2 the law deals with a matter that affects more than one province or enables the country to act as a single entity or with one voice, or
 - 9.3 the law establishes a national framework for the delivery of services or the management of institutions, or providing a public service or
 - 9.4 the law deals with the protection of the environment, the economic union or the capital/labour market of South Africa, the implementation of national economic policies, or the maintenance of national security, or
 - 9.5 the provincial law prejudices the economy, health, safety of the public or security interests of another province or the country as a whole.⁴
10. In respect of any law referred to under §9.1 - 9.3 above, the provinces may pass legislation not inconsistent therewith.⁵
11. Where a provincial law deals with a matter which is specific to the socio-economic and cultural needs of the inhabitants of that province, it shall prevail over national legislation other than that intended in §9 above.⁶
12. Provinces' legislative activity should also (in addition to its powers to legislate in its

3 Or mediated upon in case of conflict between National Assembly and Senate.

4 The overriding legality, desirability or necessity of such legislation is and should be finally resolved when the Senate approves the act; it should not be left to the courts to decide. Compare Constitutional Principle XXIII.

5 Where national government has the power to issue subordinate legislation dealing with national legislation administered by the provinces, the Senate could be required to approve thereto.

6 §11 entails a formulation of exclusivity of provincial exclusive legislative competence to comply with the requirements in this respect of Constitutional Principle XIX.

concurrent areas of legislative competence) be responsible for working out the detail of the "framework" or the "enabling" legislation of the national government, specifically relating to implementation, and ensuring that regional and sub-regional variations are taken into account. This "framework legislation" should form a separate category of concurrent legislative powers.

13. The vertical division of competences should not be rigid and divisive. The system must evolve and should have elastic characteristics. Provincial legislation will give way to national legislation, and then only to the extent of any specific inconsistency in the circumstances set out in §9 above. Where those circumstances do not apply, the national legislation should not override provincial legislation. Especially through the category of "framework concurrent legislation" the intention in the final constitution should be to provide elasticity for legislative activity by the provinces without going the cumbersome way of constitutional amendment each time that there is need to enlarge provincial legislative powers.
14. All residual (unallocated) powers⁷ shall be within the exclusive competence of National Government.

Aspects of competence affected by the character of the Senate

15. The final constitution should provide for a Senate, comprised of representatives of the provinces (and possibly representatives of local government level),⁸ which should allow for effective influence and participation of the provinces in national law-making at national level, and which should function as the suitable forum for intergovernmental coordination.
16. Members of the Senate should be appointed and recalled by provincial legislatures and/or provincial executives.
17. The consent of the Senate shall be required for all laws dealing with provincial matters, it may initiate laws regarding provincial matters and it shall have the right to review other legislation.
18. The provinces shall be entitled, primarily through the Senate and its structures or committees, to participate in financial and fiscal matters affecting the provinces, especially in the drafting of the national budget.
19. The intention in the final constitution should be to introduce a framework whereby the judicial determination of the pre-eminence of national legislation is replaced by the requirement that the provinces themselves through the Senate conclusively establish the desirability of the relevant national legislation.⁹ The courts will still have a role to determine whether the overriding legislation fits the categories set out.

7 As in the present Constitution

8 Full submission to be effected under Theme Committee 2. Regarding the question of representation of local government by Senators, the ANC reserves the right to make another submission at a later stage.

9 See also footnote 5 above.

National and provincial executive competences

20. Also in respect of executive or administrative competences the constitution should give expression to the following two guiding principles:
 - 20.1 Bringing government closer to the people, allowing for governance to fit the specific conditions and variations in each province, region or sub-region, and
 - 20.2 at the same time building and maintaining a single harmonious and prosperous nation and maintaining effective and cost-efficient government.
21. National and provincial government shall both have executive powers in regard to their concurrent competences. Ordinarily such powers should, with the consent of the Senate, be allocated to provincial government and, where appropriate, to local government, even if the relevant legislation was passed at national level.
22. The final constitution should have the basic feature that practical executive functions and administration may increasingly be assigned to elected and accountable provincial governments as administrative capacity grows, while the weight of legislative activity at the national level of government should be especially concerned with the setting of norms, standards and frameworks.
23. Provincial governments should be the primary agent of administrative/ executive activity regarding matters of provincial interest and purport.
24. *Exclusivity* of executive functions for provinces should primarily exist in the context of executive implementation under enabling or framework legislation, as approved by the provinces in the Senate, and the implementation of provinces' own legislation.

Executive Authority

25. Provinces shall be allocated the resources and powers to implement or administer its legislation and such national legislation as is delegated or assigned to it. In general, provinces shall be responsible for executing the national legislation set out in §9 above. In this regard:
 - 25.1 Executive powers shall be allocated to the level at which it can be exercised most effectively and efficiently.
 - 25.2 In the event of a province failing or refusing to implement national legislation, the national government may itself implement the legislation or intervene.

Outstanding issues

26. The ANC will make further and more detailed submissions on outstanding issues, amongst which are the following:¹⁰

- 26.1 The size of provincial legislatures when weighed against cost and the principle of inclusivity and representativity.
- 26.2 The manner in which provinces are to be represented in the Senate, and the size of the Senate.
- 26.3 The administration and functioning of the Senate and its relation with the National Assembly.
- 26.4 Questions of intergovernmental coordination in regard to executive and administrative matters.

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**CONSTITUTIONAL
ASSEMBLY**

DEMOCRATIC PARTY

**POLITICAL PARTY
SUBMISSION**

**BLOCK 2 PHASE 1
10 APRIL 1995**

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**Demokratiese Party
Democratic Party**

7th April 1995

**Democratic Party Submission: Block 2 (Phase 1)
Theme Committee 3**

National and Provincial Legislative and Executive Competences

1. Introduction

The system of representative parliamentary democracy only works effectively in circumstances where a political minority or minorities have the opportunity and the real prospect of becoming the political majority from time to time.

Parliamentary democracy will not work if because of linguistic, religious, cultural, ethnic or racial factors political minorities are relegated to a position of political impotence and have to endure the prospect of being permanent political minorities. In such circumstances the pressures within the society become unbearable.

It is imperative to look for alternatives that can mitigate the effects of single-party dominance. A major potential political danger to democracy in South Africa can be reduced to a single issue: the centralisation of power in a single site. The obvious remedy must be to increase the sites of power and maximise the points of influence. In short, the political system must be kept as pluralistic as possible. Devolution of power to provinces and vigorous local government are an important part of the answer.

The DP believes in the maximum devolution of power

The Democratic Party believes that the people must govern, and that there is no more effective way of giving this expression than for the constitution to provide for a variety of sites of power in which the people can participate in making decisions affecting them.

Distributing power

By providing a variety of different sites of power, devolution enables more people to take part in the process of government. It brings government closer to the people. This promotes accountability of political office-bearers to their constituents, and promotes the establishment of a democratic culture. It can also reduce the intensity of the struggle for power at the central government level as it ceases to be a "winner takes all" contest.

Defence against tyranny

The Democratic Party believes that an over-concentration of power in central government

leads to the retention of power for its own sake, and the use of power and patronage for the advantage of the party or group which is in power. South Africa's history is littered with examples of the use of the monopoly of centralized political power to impose an oppressive philosophy on the entire country. Decentralising power makes this very much more difficult, and provides a variety of sites of power in which more people can exercise power, making the retention of central government power relatively less important.

Accommodating pluralism

The Democratic Party accepts the cultural, linguistic, geographic and political diversity of South Africa. This diversity is a national asset which needs to be developed in a spirit of mutual respect, tolerance and conciliation. Devolution of power helps to accommodate this diversity by multiplying the sites of power.

Subject only to considerations of the essential national interest, legislative and executive decisions should be taken at the level that is closest to the people who will be affected by such decisions.

It is essential that the rights, powers and responsibilities of the provincial political authorities are written into and entrenched in the constitution. It is a central tenet of DP policy that the national parliament will enjoy co-ordinate sovereignty with the provincial parliaments. It is also essential that the constitution guarantees equitable access by provincial political authorities to the resources of the nation as a whole: otherwise any rights, powers and responsibilities of such authorities will be meaningless.

2. Constitutional Principles

The Constitutional Principles contained in Schedule 4 of the Constitution stipulate requirements which have to be met in a new constitution.

Principles XVIII to XXVII are directly related to relationships between different levels of government. This submission is not required to comment on financial and fiscal relationships, so these matters are not addressed.

The elements of the principles which most directly prescribe requirements in respect of allocation of powers are:

- (a) XVIII 1. The powers and functions of the national and provincial governments shall be defined in the Constitution.
- (b) XVIII 2. The powers and functions of the provinces defined in the (new) Constitution, shall not be substantially less than or substantially inferior to those provided for in this (current) Constitution.
- (c) XIX The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers.

- (d) XX Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.
- (e) XXI This Principle sets out criteria to be applied in the allocation of powers.
- (f) 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.

3. Allocation of Powers

- 3.1 Subject to the provisions of paragraph 3.4, Parliament shall have exclusive legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

Citizenship, immigration and passports
 Customs and excise
 Defence (See 3.12)
 Foreign Affairs
 Mineral and Energy Affairs
 National Economic Policy
 National Finance
 National Intelligence and Security
 National Public Enterprises
 National Public Service
 National Public Works
 National Transport
 Posts and Telecommunications
 Registration of companies and financial institutions
 Trade and industries
 Water

- 3.2 Subject to the provisions of paragraphs 3.4 and 3.5, a provincial legislature shall have exclusive legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

Casinos, racing, gambling and wagering
 Cemeteries and cremation
 Clinics and hospitals, excluding teaching hospitals
 Combating of public nuisances
 Cultural Affairs
 Delivery of water, electricity and other essential services
 Education at all levels, excluding university and technikon education
 Firefighting, ambulance services and other protection services
 Housing
 Indigenous and customary law

Land Affairs
Language policy and the regulation of the use of official languages
Legal Aid
Liquor licensing/controls
Local government
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Provincial public media
Provincial sport and recreation
Roads
Regional planning and development
Tourism
Town planning
Traditional Authorities
Provincial public service
Provincial public works
Public Holidays
Trading hours
Urban and rural development
Waste disposal

- 3.3 Subject to the provisions of paragraphs 3.4, 3.5 and 3.6, a provincial legislature shall have legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

Abattoirs
Agriculture
Airports
Animal control and disease
Archives and Museums
Consumer protection
Correctional Services
Environment
Forestry
Harbours
Health services
Justice (See 3.12)
Labour
Meteorological services
Police and Public Safety (See 3.12)
Pollution control
Population development
Provincial Public Enterprises
Public transport
Registration of deeds and surveys, excluding trigonometrical surveys
Registration of births, deaths, marriages and issuing of identity documents
Refugees and expellees

Road traffic regulation
Soil conservation
Trade and industrial promotion
University and technikon education
Veterinary services
Welfare services

- 3.4 Parliament and provincial legislatures shall not enact legislation that is in conflict with the Bill of Rights.
- 3.5 A law passed by a provincial legislature shall prevail over an Act of Parliament which deals with a matter referred to in paragraphs 3.2 and 3.3 except in so far as -
- (a) the Act of Parliament deals with a matter which is the subject of an international treaty or international law to which South Africa is bound; or
 - (b) the provincial law or practice materially and unjustifiably prejudices the economic, health, environment or security interests of another province or the country as a whole; or
 - (c) the provincial law or practice materially and unjustifiably obstructs the free movement of people, goods, money, information or assets between provinces.
- 3.6 A law passed by a provincial legislature shall prevail over an Act of Parliament which deals with a matter referred to in paragraph 3.3 except in so far as the Act of Parliament is in the form of framework legislation and is required because minimum standards or uniformity across the nation are necessary for a particular function to be performed effectively.
- 3.7 In the event of a dispute concerning which level or levels of government have legislative competence in respect of a particular activity or functional area which cannot be resolved by mediation or by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the provincial legislature or legislatures.
- 3.8 If parliament exercises its legislative competence in terms of paragraphs 3.5 or 3.6, the legislative competence of a provincial legislature shall be constrained only to the extent that the relevant parliamentary legislation deals with such matters, and expressly or by implication limits the legislative competence of the provincial legislature.
- 3.9 Executive power relating to all functional areas listed in paragraph 3.1 shall vest in the national government.
- 3.10 Executive power relating to all functional areas listed in paragraphs 3.2 and 3.3 shall vest in the provincial executive.
- 3.11 Powers and functions at national, provincial or local level shall include the power to perform functions for other levels of government on a mutually agreed agency or delegation basis.

- 3.12 The allocation of the powers of the national and provincial governments in respect of Police, Justice and Defence are set out in greater detail in separate Chapters of the Constitution as per DP submissions to Theme Committees 5 and 6.4.

4. Senate

The Senate will have special powers to protect the interests of provinces and to promote co-operation and co-ordination between the national government and the provinces, and between the provinces themselves. A DP submission has been made to Theme Committee 2 in this regard.

Other bodies and mechanisms to facilitate co-operation and co-ordination are the subject of the next submissions to Theme Committee 3.

5. Local Government

- 5.1 Local government is a fundamentally important tier of government at which people at grassroots level have their say in the laws, regulations and administration which impact most directly on their communities and daily lives.
- 5.2 In line with the approach of bringing government as close to the people as possible, substantial powers and functions should be allocated to local government. These allocations to local government should be dealt with primarily in provincial constitutions and legislation.
- 5.3 Wherever practical, an endeavour should be made to allocate to local governments the powers and functions allocated to provinces in these proposals.

**CONSTITUTIONAL
ASSEMBLY**

**INKATHA FREEDOM
PARTY**

**POLITICAL PARTY
SUBMISSION**

**BLOCK 2 PHASE 1
10 APRIL 1995**



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

THEME COMMITTEE 3 RELATIONS BETWEEN LEVELS OF GOVERNMENT

SUBMISSION FOR BLOCK No. 2

PART I NATIONAL AND PROVINCIAL LEGISLATIVE, EXECUTIVE AND JUDICIAL COMPETENCIES

1 ALLOCATION OF LEGISLATIVE COMPETENCIES

- 1.1 The constitution shall only list the legislative competencies of the national government.
- 1.2 Residual legislative powers shall be located with the Provinces.
- 1.3 National provincial levels of government shall have exclusive administrative and judicial powers in all subject matters in which they have legislative competence and in so far as they have such competence.
- 1.4 **Exclusive competencies of the National Government**
The national government shall have exclusive legislative competence on the following subject matters:
 - Foreign affairs
 - Defense against foreign threats
 - National citizenship
 - Immigration, emigration, extradition and asylum
 - Currency, money and coinage, weights and measures
 - Customs, excise, tariffs and foreign trade
 - Admiralty and maritime law and regulations
 - Railways across provincial borders
 - National public service and other national public servants
 - Industrial and intellectual property rights
 - Monetary policy
 - National public finance, including central government's taxation
 - Banking, credit, insurance and financial services across provincial boundaries
 - National statistical services
 - Civil aviation

Policing with respect to offenses determined by national legislation within the ambit of national legislative competence; international police liaison; criminal date, records and statistics; special task force for high-risk security operations in support of Provincial police services; national protection services; technical support services and logistical technology in support of Provincial police services;
Technical regulation of equipment of telecommunication and broadcasting
Post and interprovincial telecommunications

1.5 Concurrent competencies

1.5.1 Framework legislation With respect to the following subject matters Provinces shall exercise their legislative competence within the parameters of national framework legislation:

toxic waste disposal and migrant pollution
Interstate commerce
Road traffic regulation
Animal diseases and control
Communicable disease control constituting an interprovincial danger to public health; admission standards for the medical or ancillary professions; as well as registration of and trade in drugs, medicines, narcotics and poisons.

1.5.2 General principles of legislation With respect to the following subject matters Provinces shall exercise their legislative competence in harmony with general principle of legislation set out in national legislative directives:

Nature and soil conservation
National roads
Energy
Tertiary education
Local government
Welfare services

2 RELATIONSHIP BETWEEN POWERS

2.1 Both provinces and the National Government shall have exclusive powers.

2.1.1 The relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the exclusive powers of each level of government. These interferences are based on the extension by relevancy or implication of the exclusive power of the national level of government into the areas of competence of the Provinces.

2.2 National government shall have no overrides.

2.3 The Constitution shall list concurrent powers of the National and Provincial Governments.

2.3.1 Concurrent powers shall be characterized as either:

- a framework legislation, obliging Provinces to legislate against standards established nationally as defined under 1.5.1.
- b general principles of legislation, obliging Provinces to legislate norms and standards in harmony with these principles as defined under 1.5.2.

2.4 Should any Province fail to deliver essential services so as to jeopardizes the health, safety and welfare of citizens in the Province, the National Government may adopt the required legislative or administrative actions, provided that such actions are consistent with similar actions adopted in other Provinces and that such actions shall be valid and effective only for as long as and in so far as the Province concerned has not adopted its own adequate legislative or administrative measures.

2.5 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.

3. ALLOCATION OF EXCLUSIVE ADMINISTRATIVE COMPETENCE

3.1 The National Government shall have administrative competence in all areas of legislative competence, save where indicated otherwise.

3.2 The following areas of exclusive national legislative competence shall be administered either wholly or in part by the Provinces:

- Customs, excise and tariffs
- Federal taxation
- National statistical services
- Post and telecommunications

4 ALLOCATION OF JUDICIAL FUNCTIONS

4.1 National provincial levels of government shall have exclusive administrative and judicial powers in all subject matters in which they have legislative competence and in so far as they have such competence.

PART II LOCAL GOVERNMENT

1 The national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation. This is necessary to allow a system of local government which reflects local administrative needs as well as

the plural nature of South African society. The local government system will need to reflect a variety of realities ranging from traditional communities to metropolitan areas. This calls for fluidity and suggests the non-advisability of entrenching in the national constitution any given type of local government system.

2 Constitutional Principle XXIV states:

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 both.

The requirement of this principle would be satisfied by a provision in the national Constitution prescribing the following framework:

The Provincial Constitution shall set out the general principles of the local government system, ensuring its coherence and consistence with the principles underlying the national constitution. The provisions of the Constitution of each Province relating to local government shall be implemented by a law of the provincial legislature. Each provincial constitution shall be entitled to make specific provision to provide for each different category of local government as determined by such provincial constitution and provincial implementing legislation with appropriate autonomous fiscal powers and functions.

This approach is consistent with an accurate reading of Constitutional Principle XXIV which that the "framework" for powers, functions and structures of local government be provided for in the constitution and not local government's actual powers, functions and structures, including their "different categories", which is a function of the "structure" of local government.

3 Moreover the second sentence of Constitutional Principle XXV creates an exception to the broader and more general rules set out in the preceding Principle, requiring greater detail with respect to local government's fiscal autonomy, requiring that local government is to enjoy its "own fiscal powers". Clearly this reference must be intended as a more specific part of the same "framework" as indicated by the opening words of the second sentence of Constitutional Principle XXV.

4 In interpreting the relevant Constitutional Principles, it must be noted that Constitutional Principle XVIII (2) states that the Constitutional Assembly does not have the discretion to provide Provinces with less autonomy and fewer powers with respect to local government than that given to Provinces in terms of Chapter 10 of the interim constitution. The "framework" can therefore not be more detailed and specific than the provisions set out in Chapter 10 of the interim constitution.

PART III
INTERGOVERNMENTAL RELATIONS

- 1 Intergovernmental relations are an essential feature of federalism with respect to relations between each Province or Provinces as whole and national government, and between and among Provinces themselves.
- 2 Intergovernmental relations shall not be institutionalized in any type entity, forum, agency or commission provided for in the Constitution. In fact, if such entity exercises any type of executive or advisory power as provided for in the Constitution or in implementing laws, by definition that would encroach on the autonomy of Provinces in their exercise their powers concerned, and if such entity does not exercise executive or advisory powers it is useless.
3. Relation between levels of government shall not be institutionalized and shall develop freely so as to accommodate the changing needs of society. Federal cooperativism operating in the United States is a completely voluntary basis and has proven to be extremely effective in addressing any relevant need for coordination and integration when and as required.

**CONSTITUTIONAL
ASSEMBLY**

**PAN AFRICANIST
CONGRESS**

**POLITICAL PARTY
SUBMISSION**

**BLOCK 2 PHASE 1
10 APRIL 1995**



7 April 1995

PAN AFRICANIST CONGRESS
INTERIM SUBMISSION BLOCK 2
THEME COMMITTEE 3

Question 1

No

Question 2

- a. Yes, as listed in Schedule 6 so as to comply with Constitutional Principle 18 (2).
These should be viewed as concurrent powers only.
- b. With reference to Constitutional Principle 19 in so far as it refers to exclusive powers this should be construed to mean exclusive administrative powers only.

Question 3

No

Relationship between national and Provincial Governments in relation to their powers.

Question 4

1. Only Powers of Provinces (which are concurrent with National) should be listed and no exclusive powers to be listed. Residual powers will reside with National Government.
2. Yes national overrides all provincial legislation in accordance with Constitutional principle 21.
3. The Commission on Provincial government must be maintained to make recommendations on provincial government problems.
The financial and fiscal Commission must be maintained.
The Constitutional Court shall be the final arbiter.
4. The basis for allowing only concurrent and exclusive administrative powers

is to allow for an evolving process.

5. Some of the fields of activity like abbatoirs etc. are really Local Government functions and can be delegated to Local Government.

Local Government should be as independant as possible from the Provincial Government. Since it is listed in Schedule 6 as a provincial government power, and may be important in the light of Principle 18 (2), however, a Provincial Government must be given merely superiority and co-ordinated powers. The Constitution must gaurantee a local government share when the revenue is being allocated.

Mrs P de Lille

MP

**CONSTITUTIONAL
ASSEMBLY**

**NATIONAL
PARTY**

**POLITICAL PARTY
SUBMISSION**

**BLOCK 2 PHASE 1
10 APRIL 1995**

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 3

BLOCK 2: NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCES

1 INTRODUCTION

Before proceeding to the questions put by the Technical Committee, we wish to emphasise that the matter of national and provincial legislative and executive competences entails some of the most crucial issues to be resolved in the constitution-making process. Not only the status, powers and functions of both the provinces and the national government are involved; the relationship between these levels of government and, eventually, the form of the future South African state itself, is at stake. For this reason, we wish to make a responsible, fair and constructive contribution to the deliberations on this aspect of the constitution in the best interests of the whole country and all its regions and people.

We believe that in drafting the constitution, the Constitutional Principles form the legal framework within which we are obliged to operate, and also our guiding light for the direction that we should take. The Constitutional Principles are not only a technical instrument; they breathe the democratic spirit that should guide and sustain us in our task. With regard to the provinces, the Constitutional Principles obviously call for extensive arrangements covering in detail all aspects of the relationship between the different levels of government, but they also call for a strong, viable and entrenched

provincial system as an integral part of a stable and democratic dispensation. In our endeavours we should heed the technicalities as well as the underlying spirit of these Principles. Therefore, it is our view that within the framework of the Constitutional Principles, it is incumbent upon us to protect and strengthen the autonomy and position of the provinces.

We are further mindful of the fact that, due to the complex and dynamic nature of modern government and of the relationships between different levels of government, the formal distribution of powers often do not fully and accurately reflect the true relationship between those levels and that we should allow for continuous growth and development in this respect. For the same reason, we should not focus too narrowly on a particular theoretical model, but should work towards the development of a system unique to our own circumstances and needs.

Guided then by the Constitutional Principles pertaining to the provinces and also by those Principles providing for a democratic system based on freedom, equality, accountability, transparency and an entrenched, justiciable constitution, we approached the questions of the Technical Committee.

For the sake of convenience, a summary of the salient viewpoints and proposals emerging from this submission, is as follows:

- (a) We believe in strong and viable provincial government for South Africa and our proposals are directed at protecting and strengthening the position and autonomy of the provinces.
- (b) In South African circumstances, the powers of the provinces should be listed in a schedule to the constitution and residual powers should vest in the national government. In addition, the following should be provided for:
 - (i) In terms of the criteria for the allocation of functions to the provinces set out in Constitutional Principle XXI, we propose that Agency and Delegated Functions, Forestry, Land Affairs, Publication Control, Public Works and

Water Affairs be added to the present list. However, we believe that a proper allocation can be accomplished only if all relevant information is available. We propose, therefore, that accurate information should be obtained from the state administration on the progress made with the implementation of the present list of provincial functions before a list of provincial functions is finalised.

- (ii) Due to the complexities of modern government, a strict separation between the levels of government is impossible and undesirable. Therefore, we propose that Parliament should have concurrent powers with the provinces over its list of functions.
- (iii) Provincial laws in respect of these matters should, however, prevail over national laws except insofar as national laws comply with certain prescribed criteria. These overrides should be restricted *inter alia* by narrower definition, the principle of subsidiarity and the Constitutional Principle that the national level may not encroach upon the geographical, functional and institutional integrity of the provinces.
- (c) The principle of subsidiarity in terms of which functions should be allocated to the lowest level of government where it can be exercised and performed effectively, should apply to the allocation of functions and the application of the overrides.
- (d) A *second list of matters* should be identified over which Parliament may only adopt framework legislation, in order to allow the provinces to make detail legislation on those matters not subject to any other overriding powers of the national level. A further submission on matters to be included in such a list will be made at a later stage, but expert advice should be obtained on which matters

qualify for such a list. In addition, the state administration should be approached for an input in this regard based on progress to date with the implementation of the present list of provincial functions.

- (e) Regional differences are part of the South African reality and the principle of asymmetry in terms of which differences may exist among the provinces in respect of their structures, powers and functions, should be allowed to develop. Asymmetry can be promoted as follows: (i) Provinces should be allowed to adopt their own constitutions. (ii) Provinces should be able to take up functions according to their different needs and capabilities. In this regard, the transfer of functions to the provinces should be the responsibility of an independent body and not the executive. (iii) Provision should be made for the performance of functions on an agency or delegated basis in order to allow provinces to request other governments to perform particular functions on their behalf. (iv) Asymmetry will finally be furthered by the concept of framework legislation which will enable provinces to make detail legislation peculiar to their own circumstances and needs.
- (f) Mechanisms for the promotion and regulation of inter-governmental relations must be provided to enhance interaction and co-operation between the provincial and central levels of government. Detailed proposals in this respect will be made at a later stage.
- (g) Detailed submissions on local government as a provincial function, and the Senate as the body representing provincial interests in national decision-making, will also be made later.

2 THE QUESTIONS

A ALLOCATION OF POWERS

A1 Should the Constitution list only the competences of the government at national level? If so, which?

In general, no. *Firstly*, we do not believe there is any compelling reason to deviate from the arrangement contained in the transitional constitution in terms of which only the powers and functions of the provinces are listed. As a matter of fact, if one adopts the principle that residual powers should be vested at the national level (see below), it would be rather illogical to list the competences of the national government and not those of the provincial level. Normally, in other systems, residual powers are vested at the level of which the powers are *not* listed. *Secondly*, Constitutional Principle XVIII(1) provides that both the powers and functions of the national government and the provinces shall be *defined* in the Constitution. Although this could be interpreted to mean that the powers and functions of both levels of government need not actually be *listed* in the Constitution, and that it is still possible under this Principle only to make the necessary arrangements to *determine* the powers and functions of each level of government, we feel that the Principle at least implies that listing national competences without sufficient reference to the provinces would be inconsistent with the Principle.

A2 Should the Constitution list only the competences of government at provincial level?

(a) In general, yes. The same reasons and arguments apply. We see no reason why the present approach in terms of which only provincial competences are listed in a schedule need to be amended.

(b) In our reasoning, in present South African circumstances the sensible corollary to this is that *residual* powers shall vest at the national level.

(c) What needs to be done, however, is to look carefully into the present list of provincial functional areas in order to identify according to the criteria contained in Constitutional Principle XXI, (and bearing in mind the limitation imposed by Principle XVIII(2) which prescribes that provincial powers shall not be substantially less than those provided for in the transitional constitution), those matters that rightfully belong at provincial level. In particular, we believe that the principle of subsidiarity referred to in Principle XXI(1) should be applied consistently. In terms of this principle, functions must be allocated at the lowest level where it can be performed effectively.

In addition, the allocation of functions should be done *inter alia* with reference to the progress made to date with the implementation of the transitional constitution and the practical experience of the provinces in this regard since April 1994. We propose that the state administration, and possibly the Commission on Provincial Government, be requested to furnish this information in order for the Theme Committee to form a well-founded opinion on the ideal list of provincial functions.

Meanwhile, in terms of the criteria in Principle XXI, we recommend that the following matters be added to the present list of provincial functions: Agency and Delegated Functions, Forestry, Land Affairs, Publication Control, Public Works, and Water Affairs.

(d) The provinces should not have *exclusive* jurisdiction over such a list of functions. As pointed out in the introduction, we believe that the complexities of modern government require a more flexible approach providing for concurrency and co-operation. We therefore see the list of provincial competences as a list of matters over which there shall be concurrency with the national level. This implies an arrangement with regard to which legislation shall prevail, requiring in turn an exposition of the criteria in this regard - the so-called "overrides" (see below).

Although Constitutional Principle XIX provides for exclusive and concurrent powers for both the national and provincial levels of government, this does not necessarily mean the exclusive allocation of complete functional areas to the provinces. We believe that exclusive powers for the provinces should be arrived at *firstly*, through the prevalence of provincial laws if national legislation does not comply with the "overrides" and, *secondly*, by the concept of framework legislation which implies that the detail of those matters dealt with by national framework legislation, shall be the exclusive concern of the provinces. (These concepts are discussed in more detail below.)

(e) As at present, the provinces should be able, *firstly*, to make laws that are reasonably necessary for or incidental to the effective exercise of their powers and functions and, *secondly*, to recommend to Parliament the passing of laws on any matter not within their competency.

A3 Should the Constitution list both national and provincial competences?

In view of the comments above, not in principle. Of course, we envisage a list of provincial matters over which the two levels of government shall have concurrent powers, as well as a list of matters over which the national level shall only have the authority to adopt framework legislation. To this extent, the Constitution will contain a list of provincial as well as national competencies.

With regard to *framework legislation*, our proposal is that matters be identified which require only a framework of general principles and/or guidelines that apply throughout the Republic, whereas detail provisions can be left to the provinces to fill in. As a matter of fact, providing for the detail will be the exclusive concern of the provinces in the sense that the national government will only be able to promulgate framework legislation and not to prescribe detail on the grounds, for instance, of effectiveness, maintenance of economic unity, promotion of interprovincial commerce, etc. This will allow the provinces the opportunity to design detail peculiar to their

different circumstances and needs, thus giving expression to provincial diversity, without sacrificing national control over norms, standards, etc. We believe there are a number of matters even now in the list of provincial functions, as well as other matters presently under exclusive national jurisdiction, which the national government need not deal with in detail. The matters we have in mind may, therefore, extend to both the residual and concurrent powers. Moreover, some matters in the existing list of provincial functions do not readily present themselves as matters over which national legislation will ever be required for the sake of, for example, the maintenance of economic unity, the protection of the common market, the security of the country, or the implementation of national economic policies. They may, however, require uniform norms and standards. Such matters should then rather form part of a separate list not subject to the whole range of "overrides". We further propose that in order not to impede the freedom of the provinces to act, or to prevent their action altogether, they should be able to proceed in respect of these matters in the absence of national framework legislation. Of course, as soon as such framework legislation is promulgated, their own arrangements must be amended accordingly.

The items to be included in a list of matters subject to national framework legislation need careful consideration and a further submission in this regard will be made at a later stage. However, we believe this to be a highly technical matter and we propose that expert advice be obtained as well on the functions that qualify for such a list. We further propose that the state administration should be approached for an input in this regard based on its experience to date with the implementation of the present list of provincial functions.

The following draft provision on framework legislation is submitted for consideration:

"(1) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule Y.

(2) The national parliament shall be competent to enact only framework legislation which sets out principles and/or guidelines, and which shall be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule Y."

B RELATIONSHIP BETWEEN NATIONAL AND PROVINCIAL GOVERNMENTS

B1 Should exclusive and concurrent powers be listed expressly for each level of government?

In principle, no. However, as explained already, we foresee a list of concurrent matters as well as a list of matters subject to national framework legislation only. See below with regard to concurrency and national preemption.

B2 Should the Constitution expressly provide for overriding powers for the national level of government in certain prescribed instances?

Yes. We have already stated that a list of concurrent powers should be provided for. It stands to reason that when one adopts the notion of concurrency, an arrangement in this regard will be necessary. We therefore believe that the Constitution should expressly provide for overriding powers for the national level. However, the prescribed instances in which national legislation shall prevail or, put another way, the criteria with which national legislation has to comply in order to enjoy preference, have to be reconsidered. As they stand in the transitional constitution, we believe they are virtually limitless. The present section 126(3) enables the national level to undermine the integrity and autonomy of the provinces systematically and completely. For this reason, we propose that the overrides be redrafted more narrowly. In addition, balancing

criteria such as the subsidiarity principle, which forces the national government to justify its interference in a provincial matter, and Constitutional Principle XXII which prohibits the national government to exercise its powers in a way that encroaches upon the geographical, functional and institutional integrity of the provinces, should be included. We therefore propose the following set of "overrides":

"(1) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter allocated to the provinces, except insofar 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 for the management or administration of that matter that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial 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 Republic.

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic.

(3) 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.

(4) An Act of Parliament shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.

(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment upon the geographical, functional or institutional integrity of any province.

(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively.”

B3 Should the competences of the provinces be fixed by the Constitution, or should the Constitution allow for an evolutionary process?

We do not believe that these alternatives are mutually exclusive. On the one hand, we need constitutional certainty as to the powers of each level of government. Therefore, the powers of the provinces should be spelled out and entrenched in the constitution. Simultaneously, enough flexibility should be provided to allow for future developments and for differences among the provinces. This creates the opportunity of encouraging *asymmetry* in our provincial system. We believe that regional and provincial differences are a part of the South African reality that should be accommodated in our system. The principle of asymmetry is a particularly suitable vehicle for this purpose.

Asymmetry can be encouraged in the following ways.

(a) The provinces should be allowed to adopt provincial constitutions that may differ from the provisions of the constitution regarding provincial legislative and executive structures and processes (see the present section 160).

(b) The list of provincial functions should, in principle, apply to all provinces. Albeit concurrent, it is a set of original functions entrenched in the constitution and determining the position and status of the provinces. However, the national level and the provinces should also have the power to perform functions for other levels of government or for other provinces on an agency or delegated basis. This would enable a province unable or unwilling to take care of a particular function, to request another province or the national level, to perform that function on its behalf. The principle, however, is that it is a provincial function and that it is for a province to decide not to perform it by itself.

(c) The provision dealing with the transfer of functions to the provinces in relation to current legislation is also of particular relevance (the present section 235(8)). This provision, *inter alia*, allows for the extension of the powers of a province as it becomes capable of exercising it, implying that at any given time, the powers of provinces may vary. However, the decision whether a province is indeed capable of exercising a particular function effectively should not be in the sole discretion of the national executive, but should be arrived at independently. We therefore propose that this decision be entrusted to an independent tribunal or other forum. Details in this regard should be worked out.

(d) The concept of framework legislation, which allows provinces to adopt detail legislation peculiar to their own circumstances and needs, will also further the idea of asymmetry. This concept has been discussed above.

B4 Should the Constitution provide for additional inter-governmental mechanisms to enhance co-ordination and to prevent or mediate possible conflicts regarding the exercise of competences, ie what mechanisms should regulate this relationship?

Yes, additional inter-governmental mechanisms should be provided for. In modern states, levels of government cannot operate in separate compartments and extensive co-operation and interaction are imperative. This should be encouraged and promoted by means of formal and informal structures and processes. A further submission in this regard will be made at a later stage.

B4 Should the fields of potential activity of provincial authorities be amended?

We have already indicated that the present list of provincial functional areas should be extended - see above.

C LOCAL GOVERNMENT

C1 How, in broad terms, should the Constitution deal with local government as a consideration in the distribution of competences between the national and provincial levels of government.

Local government is a fully-fledged level of government and should be entrenched as such. See in this regard Constitutional Principle XVI. In addition, the Principles prescribe a framework for the structures, powers and functions of local government to be provided for in the constitution (Principle XXIV). Local government should, nonetheless, still fall under the control of the other levels of government and should be one of the functional areas over which provinces have jurisdiction. This arrangement has two implications. *Firstly*, the national and provincial levels will be able to make laws affecting local government but, as presently, provided, should not be allowed to compromise the fundamental status, purpose and character of local government (see section 174(4) of the transitional government). *Secondly*, as a functional area of the

provinces, they will be able to regulate local government in full. However, the provisions on local government in the constitution will enjoy higher status than any provincial law and the latter must always be consistent with those provisions. Recognition of local government in the supreme constitution has thus changed the traditional discretionary authority of higher levels of government over local government. They are unable to regulate and affect local government at will. This position should be retained.

D MISCELLANEOUS

D1 What should the nature and extent of the provinces' national involvement in matters concerning provincial government be? Should there be a second parliamentary chamber representing the provinces, and if so, how should it be composed? What should the voting mechanisms be for deciding questions of this nature, both where a second parliamentary chamber is instituted and alternatively, in the event of a unicameral Parliament being established?

In principle, we are strongly in favour of a second parliamentary chamber to represent provincial interests in the national legislature. A further submission in this regard will be made at a later stage.