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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

INTERNAL MEMORANDUM

TO : **THEME COMMITTEE MEMBERS**
FROM : **MBASA**
DATE : **14 FEBRUARY 1995**

Please find attached a draft report on Block 1, to be tabled before Theme Committee 3 for confirmation, on Wednesday 15 February 1995.

Enquiries: **Mbasa X259**

THEME COMMITTEE 3
RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

FIRST REPORT

This report is compiled out of the various submissions handed in by different political parties who are represented in the National Assembly. These submissions form a continuum which ranges from the strict unitary model, to a loose federation, to a confederation. Differences between some are clear while they are not clear between others because the submissions did not necessarily address the same issues and where similar issues were addressed, the emphasis varied. However, it is clear that all submissions demand a democratic form of government which facilitates the taking of decisions also at the local level. The report closes with a list of abstract questions emanating from the submissions considered, that will have to receive the attention of the Constitutional Committee in order to take the process further.

1. Background influence of history

The African National Congress (ANC) emphasises the need to take account of the legacy of apartheid. The party is of the view that the writing of the future Constitution must be guided by the fact that there exists, as a result of apartheid, massive inequalities between communities and regions, between urban and rural, between sexes and among the various racial groups. According to the ANC, the need for redistribution, redirection, etc. in the quest to achieve equality, and the need to prevent dangers inherent in political mobilisation on the basis of race, ethnicity and language should not be ignored. The ANC believes that the system of provincial government must be designed to promote the goals of national unity, uniformity and national reconstruction and development.

The Freedom Front (FF) emphasises South Africa's traumatic history of a divided pluralist society. The party therefore sees the need to work toward reconciliation and the strengthening of South Africa as a whole.

The Pan Africanist Congress of Azania (PAC) submits that before the present Constitution was adopted, a unitary state was used as a powerful and undiluted tool to oppress the majority of the people of this country. It finds it ironic that parties which now support federalism were completely happy with the unitary state in the past. The PAC suspects that the federal system is advocated on the basis of divide and rule and in order to thwart the advantages that a unitary system will have for empowering the disadvantaged majority. It advocates a strong central government to provide the necessary programs to correct the imbalances of the past and to fully empower the people both politically and economically. However, it would appear that the PAC accepts that the Constitutional Principles do not leave room for a fully unitary state which it supports.

2. Influence of democracy

All political parties support representative and participatory forms of government. Certain parties such as the Democratic Party (DP) and the Inkatha Freedom Party

(IFP) have emphasised the importance of democracy as their guideline. Thus the DP and the IFP emphasise the need to bring government closer to the people. In this regard, the IFP has the following submission on the principle of subsidiarity: "The Provinces shall be the primary governments of the people and shall be entitled to those powers and functions which can be properly and adequately exercised at provincial level. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level." Other political parties' submissions do not deal with the principle of subsidiarity and it is not implicit in their submissions that they support it in this form. The meaning of subsidiarity and the question whether it is a principle or a yardstick for the vertical distribution of powers, appears to be one of the contentious issues.

The DP submits that, "Wherever possible, people must be empowered to make decisions on matters directly affecting their lives and their communities." The DP advocates a strengthening of the provincial system, allocating more original powers to the provincial governments and ensuring their financial and fiscal viability. As far as local government is concerned, the DP advocates effective, "people-driven" local governments in both the urban and rural areas through which communities can exercise a considerable degree of local autonomy. In the same vein, the ANC supports the principle of accessibility and accountability, that is, ensuring that people are directly involved in shaping their destinies at every level of government and that government is open, transparent, responsive and accountable to the people. The party supports the principle of democracy which requires regular elections based on universal suffrage in a common voters' roll.

The National Party (NP) states that representative government implies proportional representation in all legislative and executive structures at all levels of government. It further appears to support the principle of corporate self-determination as a method for furthering the rights of self-determination of linguistic, cultural and religious minorities.

The FF believes in the accountability of government through decentralisation of power in order to control the use of power. It believes in self-government on the basis of constitutionally designed autonomy.

3. Provincial powers

The PAC rejects pure federalism for historical the reasons given above and wants no exclusive powers for the provinces.

The NP supports fully the idea of provincial government and the retention of the present nine provinces. It submits that provincial powers must be such that all provinces exercise autonomous and original powers and acknowledge cultural diversity. Such powers should include fiscal powers. The party accepts that there should be allocated both concurrent and exclusive powers to provinces. The allocation of provincial powers should be conducive to financial viability, effectiveness and national unity. Furthermore, a provincial legislature must be empowered to pass a provincial constitution within the parameters set by the Constitutional Principles.

The IFP submits that all government powers should primarily vest in the provinces except such powers as are specifically given to the central government by the Constitution. In this regard, the principle of subsidiarity must be applied fully, it is submitted. The IFP advocates exclusive powers for provinces and do not support the principle of override of provincial powers by the national government. In essence, the IFP believes in "indestructible" provincial autonomy which allows no encroachment by any national legislative or executive action. The IFP suggests that provinces must be empowered to adopt their own constitutions "in autonomy without the pre-emptive control of the national government, provided that such constitutions shall not exceed the area of autonomy recognised to the provinces and that such limitations be fully reviewable by the Constitutional Court." According to the IFP, the provinces should be so powerful as to enable each province to appoint, from its own provincial courts, judges of the Constitutional Court, whenever the Court adjudicates a conflict between the province and the national government. In addition, the IFP submits that the Constitutional Court must be bound by the interpretation of the provincial constitution adopted by the court of final instance in the provincial court system. Moreover, it contends, provinces must have the opportunity of influencing, by means of their own judicial system, how the national Constitutional Court interprets the constitutional provisions which define their autonomy. The party supports the principle of asymmetry: although the national Constitution must provide for the maximum degree of provincial autonomy, each province shall be free to exercise lesser powers if such province is not ready, willing or able to exercise any of the powers concerned. The IFP feels so strongly about federal government that it argues that, even if the rest of South Africa wishes to organise itself as a unitary state, regions such as KwaZulu/Natal should be entitled to receive autonomy on the basis of a federal relationship. No other party holds the views expressed in this paragraph regarding the role of the Constitutional Court and the powers of provinces, in general. This is yet another contentious issue. The relationship between the national and provincial levels of government must be "...regulated by checks and balances intended as a predetermined set of mutual interferences among the 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, as in theory is the case in the US (i.e. interstate commerce). In specific areas of provincial competence the techniques of national framework legislation regulating exclusive provincial powers could also be used. Framework legislation shall not enable the national government to act in lieu of the provincial one, but should merely direct the action of the provincial government, leaving sufficient space for implementing action on the side of the provincial legislature." The IFP believes in fiscal autonomy, that is, that the provinces shall have original and residual taxing and revenue-raising powers ... on the basis of a parallel system of taxation." Further to ensure fiscal equalisation, there must be constitutionally mandated equalisation, also provided for a predetermined share of revenue collected nationally to be transferred to the provinces. This last-mentioned function should be guided by an independent fiscal and financial commission." The IFP submits that local government should be entirely regulated by provincial constitutions and legislation and it believes that it is non-advisable to entrench any given type of local government in the national Constitution.

The FF is committed to autonomy for local and provincial governments in order to obtain "true self-government". It believes in the maximum decentralisation of powers on the basis that "the spreading of power" will control the use of power and cater for or address the needs of pluralism. It also believes that provincial and local government must include community-related structures to address the needs of a pluralistic society. In this regard the party also wants the recognition of traditional authorities and the realisation of acceptable forms of self-determination for those Afrikaners who have mandated the FF to achieve this ideal in accordance with an agreement reached between the FF and the ANC on 23 April 1994. The FF does not mention how the community-related structures will relate to the provincial and local governments.

The DP believes in the strengthening of the present provincial system, allocating more original powers to the provincial governments and ensuring their financial and fiscal viability. In addition, there must be effective people-driven local governments in both the urban and rural areas "through which communities can exercise a considerable degree of local autonomy." There must be representivity, accountability and openness at all levels of government with strong checks and balances.

The ANC is committed to the principles of democracy, accessibility, accountability, functionality, effectiveness, participation, national unity, uniformity and national reconstruction and development. It therefore accepts the limitations of the mandatory Constitutional Principles, in particular Principles XVI to XXII. The ANC submits that the determination of powers of each level of government must be dictated by need rather than ideology. Local government must be able to regulate its own affairs within the context of the National Policy. The party is committed to urban metropolitan councils. In non-metropolitan areas, "local government shall be structured on a two-tier basis consisting of integrated and elected district and local councils."

5. Miscellaneous

The IFP supports the idea of a national Senate with no less legislative authority than that given to the National Assembly. The Senate must represent the provinces and the senators must derive directly from the provinces through indirect elections by the provincial legislatures in consultation with the provincial cabinets. Each province must be equally represented and the Senate must have specific power to monitor national executive functions such as defence and foreign affairs.

The NP supports a Senate which must represent the provinces. It proposes that senators shall be directly elected, "and empowered to act authoritatively on behalf of the provinces, jointly and severally."

6. Evaluation

Where the balance between central power and provincial power should be struck, is the cause of dispute. In particular, the meaning of subsidiarity as a basic principle guiding the formulation of provincial powers, is particularly contentious, when the differences between party proposals are examined.

The proposals of the different political parties still need to be tested against the requirements of the Constitutional Principles. The Constitutional Principles appear to provide for neither a fully federal nor a fully unitary form of government.

The submissions of the different parties do not follow a set pattern and therefore many issues were raised by parties to which responses cannot be gleaned from other submissions. It may therefore be useful to develop a common framework for the drafting of future submissions in order to establish a cogent basis of comparison. Such framework is proposed in a separate document.

7. Some crisp questions

Theme Committee 3 has arranged its working programme into five sections, namely *the nature and status of provincial and local government, the competence of the national and provincial governments, local government, financial and fiscal arrangements and miscellaneous matters*. The submissions of political parties received to date cover elements of all of these themes. Based on these submissions only, already a number of crisp constitutional questions that will eventually have to be resolved, arise and it is considered useful to list them as follows:

3.1 *The nature and status of provincial and local government*

- Should the number and boundaries of the present nine provinces be retained or amended?

3.2 *National and provincial competence*

- Should the Constitution list only the competence of the national government or of the provincial government, the competence of both the national and provincial governments, the competence of the national, provincial and local governments or any other combination of those?
- Should it be possible for national institutions (judicial or legislative) to limit the constitution-making competence of provinces?
- Should the competence of the provincial governments be more or less than, or equal to those provided for in the present Constitution?
- Should the Constitution expressly make use of the terms "concurrent", "exclusive", "residual" and "overriding"?

3.3 *Local government*

- Should the legislative powers of local governments be limited to express empowerment in national and provincial laws, or should it extend beyond such empowerment?
- What should the terms of office of local government councillors (in terms of years) be?
- What should the relationship between civil society and local government be?
- Should local government be limited to urban areas, and if not, how should rural local government be structured?

- Should local government be established and regulated primarily by national or by provincial constitutions and legislation?

3.4 *Financial and fiscal arrangements*

- Should provincial governments have the authority to raise and collect province-specific taxes?

3.5 *Miscellaneous*

- Should the provinces have the competence to regulate judicial matters?
- Should there be a second parliamentary chamber, and if so, what should it be called?
- What should the extent of the legislative authority of the second chamber be?
- Should the second chamber represent the provinces, and if so, how should its members be elected, appointed or designated?
- Should the electoral system at respectively provincial and local government levels be merely proportional, or should elements of geographical representation also be introduced?

THEME COMMITTEE 3
FRAMEWORK FOR SECOND ROUND OF SUBMISSIONS

The purpose of this framework is to provide a cogent and comparable basis for the framing of submissions to the Theme Committee.

Parties and persons interested in making submissions are requested to address the themes set out below with reference to the relevant Constitutional Principles and, where applicable, to the provisions of the present Constitution. In the second column the most relevant Constitutional Principle(s) and provisions are set out, but it is not intended to provide an exhaustive list.

<i>THEMES</i>	<i>RELEVANT PRINCIPLE(S) AND PROVISIONS</i>
1. The number and boundaries of the provinces.	Principle XVIII 3 Section 124 and Schedule 1
2. The constitutional mechanisms (e.g. <i>exclusive, concurrent, overriding, residual, original, delegated, subordinate, functions, functional areas, asymmetry and subsidiarity</i>) for the allocation of the powers and functions between the national and provincial tiers of government.	Principles XIX and XXI Sections 37 and 126
3. The extent of the relative competence of the national and provincial authorities (excluding, for the time being, financial and fiscal matters).	Principles XXI to XXIII Sections 37 and 126 Schedule 6