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**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE**

**FRIDAY
15 SEPTEMBER 1995
09H30
OLD ASSEMBLY
CHAMBER**

**DOCUMENTATION
VOLUME 4B
FINANCIAL & FISCAL
RELATIONS**

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Note: The IFP's submissions are dated January 1995. The IFP was not present when this report was adopted by the Theme Committee. Accordingly, the IFP's submissions appear in the "further clarity" column. Furthermore, some of the issues are not directly addressed by the IFP submissions.

**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

**FINANCIAL & FISCAL
RELATIONS**

REPORT

5 SEPTEMBER 1995

THEME COMMITTEE 3

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

REPORT ON FINANCIAL AND FISCAL RELATIONS

1. Introduction

Theme Committee 3 hereby submits a report on Financial and Fiscal Relations which is Block 5 of the work programme. The Constitutional Principles which are relevant to the report are: XVII, XX, XXII, XXV, XXVI and XXVII.

2. Material processed

This report was compiled on the basis of submissions received from political parties (ACDP, ANC, DP, IFP, NP and PAC), organs of civil society, government departments and ministries and individuals.

Note: The IFP submissions are dated 31 January 1995. The IFP was not present when this report was adopted by the Theme Committee. Accordingly, the IFP's submissions appear in the "further clarity" column. Furthermore, some of the issues are not directly addressed by the IFP submissions.

Members of the Theme Committee also considered information gathered from the Public Participation Programme, Workshops, Seminars and Public Hearings.

3. Theme Committee Mandate

The mandate of the Theme Committee was to solicit information from the public, process the information and produce a report to be tabled at the Constitutional Committee.

In order to meet the principal objective the Technical Advisors were commissioned to produce a framework which was used by the political parties as a guideline for political party submissions which form part of the composite report.

3.1 Internal Workshop

An internal workshop was held on 5 June 1995, which was addressed by international experts from Germany, Canada and Nigeria and the Financial and Fiscal Commission were invited.

The following issues were dealt with at the workshop;

- i) National - Provincial Fiscal Arrangements in Canada and South Africa.
- ii) Constitutional public finance system in a federal country.
- iii) Revenue allocation in Nigeria, lessons for South Africa
- iv) Clauses in the interim Constitution in need for greater clarity or definition, clauses that may have negative consequences and composition and the function of the Financial and Fiscal Commission.

3.2 Workshop on Financial and Fiscal Matters

The three co-chairpersons of the Theme Committee and a Core Group member attended the workshop on Financial and Fiscal matters on 7 and 8 April 1995. The workshop was organised by the Commission on Provincial Government and held in Pretoria. A variety of stakeholders were participated in the workshop.

3.3 Public Submissions

From the 15 April 1995 the public was invited to make submissions on Financial and Fiscal Relations. The members of the Theme Committee requested clarity on the following issues;

- i) To ensure financial viability, what fiscal powers, provisions or arrangements should be included in the national constitution.
- ii) To what extent should the Constitution restrict the capacity of provinces to levy taxes.
- iii) What should be the borrowing powers of provincial and local authorities, should there be constitutional restrictions imposed on these powers.
- iv) Should there be a constitutionally imposed formula to ensure that each level of government enjoys an equitable share of revenue collected nationally.

It is evident from the list of submissions that the subject of Financial and Fiscal Relations is a technical field that engendered few but substantive submissions. The questions that the Theme Committee sought to be clarified were not adequately dealt with.

4. Draft formulations

This report does not include draft formulations. The Theme Committee resolved to allow the Constitutional Committee to prepare the draft formulations, this would facilitate speedy conclusion of the Theme Committee's work.

SCHEMATIC REPORT

**REPORT THEME COMMITTEE 3
REPORT: AREAS OF AGREEMENT & CONTENTION:
FINANCIAL & FISCAL RELATIONS¹**

Constitutional issues	Agreement	Contention	Further clarity
<p>1. Constitutional restrictions on capacity of provinces to levy taxes.</p>	<p>The provinces should have effective powers to levy taxes.</p>		<p>1. The ACDP submission is not totally clear ie whether they favour the so-called Canadian option ie. parallel tax power for provinces and central government. 2. The IFP believes that provinces shall have original and residual taxing and revenue raising powers on the basis of a parallel system of taxation to ensure fiscal autonomy.</p>

¹ Certain of the party submissions impact upon the workings of Theme Committee 6.2. Only those financial and fiscal issues which relate to provincial and national powers have been included in this report.

<p>2. Nature of restriction ie should there be changes to S156 of the Interim Constitution?</p>	<p>The provinces should be entitled to levy <u>non-national</u> taxes such as in respect of:</p> <ul style="list-style-type: none"> (a) casinos (b) gambling (c) vehicle levies 	<p>Whether provincial tax powers should be constitutionalised in express terms</p> <ol style="list-style-type: none"> 1. DP & NP say yes, ANC say no. 2. PAC says that the Constitution should only grant provinces administrative powers. 	<p>1.1 NP submits that Financial & Fiscal Commission should be able to recommend an extension of list of provincial taxes. With respect to stamp & transfer duty the NP suggest that the rate should be determined by National Government (in consultation with the provinces) which shall have right to abolish those duties upon recommendation of the FFC.</p>
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Constitutional issues	Agreement	Contention	Further clarity
<p>2. (continued)</p>			<p>1.2 The NP submits that the fiscal competencies of Provinces with respect to user charges [S156(3)] & levies on certain taxes [S156(1)] should not be diminished.</p> <p>2. The DP submits that provinces should be competent to levy taxes & levies other than income tax & VAT, as well as surcharges & retail sales tax after consultation with Minister of Finance & the FFC, provided that there is adherence to & compliance with principle of non-discrimination against non-residents of the province. A provincial legislature shall not be entitled to levy taxes, levies & duties which materially & unreasonably prejudice the national mobility of goods, services, capital & labour.</p> <p>3. The ANC suggests that where it is more efficient for provinces (or local government) to collect particular taxes, they should be allocated those powers as well as the power to use the revenue as collected.</p>

Constitutional issues	Agreement	Contention	Further clarity
2. (continued)			<p>4. The ACDP wants greater tax powers for the provinces.</p> <p>5. The IFP believes that provinces shall have original and residual taxing and revenue raising powers on the basis of a parallel system of taxation.</p>

Constitutional issues	Agreement	Contention	Further clarity
<p>3. Constitutional restrictions on loans raising by provinces.</p>	<p>1. S157 should be retained.</p>		<p>1.1 The NP suggests the establishment of Loans Authority to co-ordinate issue of loan stock. This Authority would also determine policy for management of the debt of the 3 levels of government. Detail to be contained in government legislation.</p> <p>1.2 NP proposes that the three tiers of government may not borrow to finance current expenditure.</p> <p>1.3 NP proposes a Committee under the chair of the Minister of Finance to co-ordinate the borrowing requirements of general government.</p> <p>1.4 NP submits that S157 be retained.</p> <p>2. ANC suggests an amendment to S157(2) - loans referred to in S157(1)(a) may be raised for bridging finance in the fiscal year subject to reasonable conditions as may be described by an Act of Parliament passed after recommendation by the FFC. [S157(1)(a) deals with current expenditure].</p>

Constitutional Issues	Agreement	Contention	Further clarity
<p>4. Should the Constitution have a specific formulation to ensure an equitable revenue share to provinces?</p>	<p>1. There is agreement that there should be an equitable share of revenue to provinces. The contention relates to the formulation & determination of the formula.</p>	<p>1. ANC & NP submit that formula should not be stipulated in the Constitution but be provided for in national enabling legislation. 2. The DP suggests an express provision in Constitution. 3. The ACDP & PAC are silent.</p>	<p>1.1 The ANC proposes that the Constitution should provide for the determination of the revenue formula through a specified process in which the FFC makes recommendations on the formula to parliament & provincial legislatures: recommendations subject to appropriate inter-governmental consultation & the final formula passed by national parliament. 1.2 The ANC proposes that the Constitution to provide for framework legislation empowering National Government to pass legislation facilitating intergovernmental co-operation on fiscal matters. 1.3 The ANC proposes that a Budgetary Co-operative Council could be established to give the provinces greater role in co-ordination of fiscal matters. Any such structure should operate under the auspices of the Council of Provinces (Senate). 2.1 The NP supports the revenue sharing model outlined in S155 read in conjunction with S199. 2.2 All taxes raised by means of a budget presented by the National Government to be</p>

Constitutional issues	Agreement	Contention	Further clarity
<p>4. <i>(continued)</i></p>			<p>deposited in National Revenue Fund for sharing with provinces.</p> <p>2.3 Servicing of national debt should have first claim on taxes collected nationally before the balance is shared in terms of the formula recommended by FFC. [See S155(4)].</p> <p>2.4 Servicing of provincial debt to have first claim on revenue accruing to provinces.</p> <p>2.5 The NP submits that the Constitution should prohibit withholding of province's share of revenue other than by resolution of Parliament following report by Auditor-General confirming gross mal-administration by a province.</p> <p>2.6 NP submits that the fiscal competencies & the taxes raised by the provinces shall not be taken into account to determine the share of revenue to be allocated to each province.</p> <p>3. The DP proposes definite formulae to determine equitable shares - each province shall obtain the following as an equitable share: 25% of income tax on individuals, VAT & fuel levy & 50% of other taxes raised by national government in</p>

Constitutional issues	Agreement	Contention	Further clarity
<p>4. (continued)</p>			<p>proportion to population size; 25% of individual income tax, VAT & fuel levy in proportion to amounts collected in provinces; 2% of all taxes raised by National Government to be distributed to local governments in proportion to their population sizes & conditional or unconditional grants as defined, with limitations on the extent to which grants can be made conditional. 4. The PAC submits that central government after consultation with FFC should allocate the budget. The IFP believes that there shall be constitutionally mandated equalisation. The Constitution may also provide for a predetermined share of nationally collected revenues to be transferred to provinces, for equalisation purposes. This function should be guided by an independent FFC.</p>

Constitutional issues	Agreement	Contention	Further clarity
<p>5. Expenditure by provinces: should the Constitution provide for regulation of provincial expenditure?</p>			<p>Various party proposals impact upon the expenditure process.</p> <p>1.1 NP submits that the servicing of provincial debt should have first claim on the revenue accruing to a province.</p> <p>1.2 NP proposes that National Government should have power to take over financial management of a province, after report from the Auditor General that the province is incompetent to perform this task.</p> <p>1.3 S126 to be amended so that provinces be granted greater autonomy to determine spending priorities in respect of their functions; National Government power to withhold tax revenue of province which doesn't maintain minimum services or standards to be scrapped [S126(3)(c)].</p> <p>2. ANC recommends framework legislation to provide for effective role of legislatures in budgetary process.</p> <p>3. PAC submit that budgetary allocation be administered by central government with consultation by FFC.</p>

**POLITICAL
PARTY
SUBMISSION**

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 3**

FINANCIAL AND FISCAL RELATIONS

The ACDP believe that effective government is determined by the extent decentration is realised, which in turn affects political accountability and measures a population's response or involvement to socio-economic demands.

The foundation for effective financial and fiscal discipline is proportional to the say people have in where and how their taxes are being utilised. It is reported that on average, the tax levels on gross personal income lingers around 30%, yet the people get very little value for their tax money. In fact, we have a situation where the so called wealth of the people is only apparent wealth. Simply stated our people are becoming poorer, while the state takes more and more.

If there is a large difference between taxes paid and services or benefits rendered, dissatisfaction creeps into the population, and in many instances efficacy decreases and country-hopping is being encouraged.

In so far as the disparities of the past have affected a large sector of our population; pressures on government spending and increased taxation to redress these imbalances are seen as ways to solve such problems. However, we ask for caution on such "drastic" methods, as our economy is still too weak to sustain major changes.

For example, the growth rate of South Africa is at present 3% and with regards to unemployment, the economy needs to expand at a rate of 5,5% per annum to absorb new entrants into the labour market.

Already we have an unemployment rate of 32,4% with the largest rate of unemployment in the Northern Transvaal at 47% followed by the Eastern Cape at 45,3%. Coupled with this is that 87% of the unemployed are unskilled.

The demands for wage increases and improved workers rights are important economic factors which need to be taken into consideration.

We are also seeing an increase in the crime rate, and this is already having a negative influence on investment opportunities.

What further distresses the economic climate is that we are a new democracy in the making, which still has to prove itself and which is strained by the above emerging factors characteristic of an open democratic society.

It is required of us to balance these diverse influences and demands, by ensuring a steady growth rate and friendly investment climate, as well as securing ready or disposable cash to the average person in the street.

In view of all these factors, the ACDP believe in the principle that smaller is better; the adage which states that the bigger you are the harder you fall is readily more true in the case of the latter than the former.

By allowing districts, regions or local communities to control their own finances, better controls can be exercised and larger returns can be expected.

Each community or region will commit itself to building up its infrastructure through a finance system supported by the community, and as a result services will trickle down quicker and be more cost effective.

A special tax system should be devised which is compatible to the status of a given region, and which corresponds co-efficiently to a tax structure on a national scale.

What is required is that finance and fiscal policy be based on simplicity, stability, equity and efficiency, through a process of community or regional consultation.

With regards to socio-economic upliftment and equity, a National "Watchdog" can be instituted to measure the regions economic growth patterns on one hand and how disparities of the past are being redressed, on the other.

People at local level need to experience economic growth in the shortest possible time, and this can be achieved through creative methods of enterprise and community contributions.

Masakhane is a good example in how finances are generated to pay for services rendered.

As the RDP is a process of delivery, decentration is a plan to fund these projects. For example a variety of tax incentives or subsidy schemes at local level are useful economic growth initiatives, where the biggest beneficiary will be the local regions, and for which the people will readily finance such projects.

11 July 1995
[FINFIS.WPS]

ANC



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FINANCIAL AND FISCAL RELATIONS

CONSTITUTIONAL ASSEMBLY
AMENDED SUBMISSION TO THEME COMMITTEE 3
PHASE 5

Draft 6

FINANCIAL AND FISCAL POWERS

Discussion

Constitutional Principle XXVI provides for the right of every level of government to an equitable share of revenue collected nationally to ensure that they (including local government) are able to provide basic services and execute the function allocated to them.

This Principle recognises that the major sources of revenue in the South African economy are collected nationally; in particular the major taxes, namely income tax (including company tax) and VAT.

The ANC does not favour the Canadian approach, which allows powers to levy any direct tax within the provinces in order to raise revenue for provincial purposes.¹ The German model represents a far more systematic approach to intergovernmental fiscal relations. In particular the German Basic Law gives the central state extensive legislative powers in the field of taxation, such that all major tax laws are central laws. This is considered to be in accordance with the wording and intention of Constitutional Principle XXVI.

Three inter-related questions are raised in this regard:

- The content of the formula for equitable shares (linked to the developmental objectives of the country),
- the manner in which the Financial and Fiscal Commission (FFC), responsible for making recommendations on the revenue sharing formula, should relate to the provincial and national legislatures, and

¹ Sect 92(2), Canadian Constitution.

- the role of provinces (in the context of cooperative governance) in making decisions about the recommendations of the FFC.

Determining the formula

The ANC proposes that the formula not be stipulated in the final constitution, but be provided for in national, enabling legislation. The constitution should provide that the determination of the formula should be consistent with the developmental objectives of the country and arrived at through the following process:

- The FFC submits its recommendations on the revenue sharing formula to the relevant standing committees of Parliament and the provincial legislatures for comment on the norms and parameters encapsulated in the formula,
- the FFC submits its revised recommendations, after feedback from Parliament and the legislatures, to an appropriate intergovernmental forum,² which should include appropriate local government representation, for amendment through joint consultation between the provinces and national government, and
- the revenue sharing formula, with the proposed amendments from the intergovernmental consultation, is submitted to national Parliament for final consideration and enactment.

The ANC's view is that South Africa should have a predominantly unified legislative and administrative fiscal and public financial system. It should be a *joint* fiscal system, under leadership of national government, and not a rigidly *divided* system between national and provincial levels of government. In this regard there should be a *co-operative* rather than a *competitive* relationship between national and provincial governments. This would amount to the provinces being involved in decision-making about fiscal matters through the involvement of both their legislatures and executives in considering FFC recommendations and approving, where appropriate, policy frameworks, revenue sharing formulae, and the norms and standards forming the basis for intergovernmental grants. This will ensure that all governments concerned will accept responsibility for acting within frameworks agreed through the process as proposed.

Proposals

Giving effect to the above new arrangements, would require the following:

1. The final constitution should provide that the new Council/House of Provinces (Senate) be given an appropriate role in the passage of money bills.
2. Any recommendations in this regard should fit in with proposals to broaden and strengthen the role of Parliament in the passage of money bills.
3. Legislatures' standing committees and departmental representatives of the provinces should be actively involved in the process of agreeing on the norms and standards upon which the revenue sharing and grants formulae will be based. They should also be suitably involved in the preparation of their budgets. This will be facilitated through a multi-year budgeting process broken down into clear steps at which the participation and agreement of the legislatures will be required. The constitution should require that there be framework legislation to provide for an effective role of the legislatures in the budgeting process.

2 See in general the ANC submission on Intergovernmental Relations, Theme Committee 3, Phase 3.

4. A national *Budget Cooperative Council*, operating under the auspices of the new Council/House of Provinces (Senate), could be established by national legislation to achieve greater coordination over fiscal matters. With representatives from the standing committees and finance executives of both national and provincial government, and possibly an appropriate forum of local government representation, such a BCC could give provinces a role in the determination of the macro-framework. This could provide a rational context within which provinces could draft their own budgets. This process would empower provincial legislatures, as well as the national Parliament, to play a more meaningful role in the determination of the allocation of public resources and the building of a broad understanding of what governments are trying to achieve. All provinces should have equal representation on such a BCC, which should be chaired by the national Minister of Finance.
- To this end it is proposed that the constitution shall in general terms empower national government to pass framework legislation to facilitate intergovernmental cooperation on fiscal matters.
5. Clauses similar to Sections 156(2), 157(1)(a), (b), (3) and 158(a) and (b) in the Interim Constitution should be carried over to the final constitution. These may have to be amended for greater clarity or consistency. For example, the formulation "surcharges on taxes" could be interpreted as allowing only a percentage to be added to the national tax rate (an undesirable mechanism), rather than a percentage to be imposed on the nationally determined base (e.g. personal income), which would avoid many of the negative features of the first interpretation. The ANC is of the view that these powers should be allocated and exercised in a manner consistent with the concept of cooperative governance.
6. Where it is more efficient to collect a tax locally, regionally or provincially, the appropriate level should be allocated this power and the right to use income thus collected.
7. The constitution should provide that the bulk of revenue should be apportioned at national level through a process like that proposed above, thus ensuring that provincial governments and legislatures, and, indeed, representative local government, participate³ in the formulation of the norms and standards upon which the FFC will have to make its recommendations.
8. A clause similar to Section 157(2) of the Interim Constitution should be included along the following lines:
- "Loans referred to in [157(1)(a)] may be raised for bridging finance in the fiscal year subject to reasonable conditions as may be prescribed by an Act of Parliament passed after recommendation by the Financial and Fiscal Commission."

3 Also by way of the new Council/House of Provinces (Senate).

FINANCIAL AND FISCAL COMMISSION

Discussion

Constitutional Principle XXVII specifies that the new constitution shall provide for a Financial and Fiscal Commission in which each province shall be represented to:

“recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.”

The ANC is of the view that many of the broad principles contained in Sections 198 to 206 of the Interim Constitution should be carried into the final constitution, but consider much of the detail included in these sections should be dealt with in national legislation rather than the constitution.

At present there is considerable lack of clarity in the wording of the applicable sections of the Interim Constitution. In particular:

- The reference to “equitable financial and fiscal allocations” leaves open to doubt whether the section refers exclusively to vertical equity⁴ or accommodates horizontal equity. It should refer to both.
- Section 199(1)(b), which refers to revenue collected at national level, could mean one of the following:
 - Revenue collected in the nation as a whole, i.e. by all levels of government, or revenues collected by the national government, whether for its own account or as an agent on behalf of the other levels of government, or
 - revenues collected at the national level, including the shares of the taxes specified in Section 155, but excluding revenues collected on an agency basis on behalf of other jurisdictions⁵, or
 - revenues collected at the national level, but excluding the specified shares of income tax, VAT and the fuel levy that has to go to the provinces, and excluding revenues collected on an agency basis on behalf of other jurisdictions.
The ANC submits that it should refer to the third definition.⁶
- It is uncertain as to what distinction should be drawn between taxes, levies, imports and surcharges in Section 199(1)(c).
The ANC submits that an alternative phrasing to the effect that “any form of tax regardless of the name given to it” is more precise.
- Section 199(1)(d) speaks of the “raising of loans”. The Financial and Fiscal Commission has submitted that this ought to cover any form of credit or advance to a provincial or local government or any agency owned or controlled by such a government. The ANC concurs in

4 Sect 199(1)(b).

5 E.g. transfer duties.

6 Concurring with the submission by the FFC of 5 June 1995.

7 *Ibid.*

- Section 178(2) states that local governments are “competent to levy and recover such property taxes, levies, fees, taxes and tariffs as may be necessary”. Once again it is not possible to draw a clear distinction between these terms, but the implication is that local governments are not subject to the same constitutional restraints as provinces. The clauses should be consolidated into one coherent and consistent section with a formulation similar to the above proposed new Section 199(1)(c). Local government powers of taxation and borrowing should be correspondent to those of provincial governments.

Proposals

9. The provisions relating to the establishment, objects and functions of the Financial and Fiscal Commission in Sections 198 to 199 of the Interim Constitution should be incorporated in the final constitution in abbreviated and revised⁸ form.
10. The constitution should provide that the Financial and Fiscal Commission shall be an independent statutory body, composed of persons with knowledge, experience and expertise in the fields as defined in Section 200(3)(b) of the Interim Constitution.
11. The constitution should provide that members of the Commission shall be appointed by the President in consultation with both the Cabinet and a cooperative council composed of representatives of the Executive Committees of the provinces, provided that if representatives of provinces in which the largest majority party is different from that in the National Assembly are dissatisfied with the composition of the Financial and Fiscal Commission as it emerges from this process, they may nominate persons of their own choice that meet the requirements in terms of expertise, in accordance with the number of seats in their provincial legislature as a proportion of the total number of seats in all provincial legislature.
12. While the constitution should specify the method of appointment (and possibly also the method of impeachment) of commissioners to ensure their independence, national legislation should specify the number of members of the FFC, their full-time or part-time status, and the manner of choosing a chair and deputy chair, to allow for flexibility in terms of numbers and extent of participation, and to take account of the experience of the present Financial and Fiscal Commission and international practice.⁹
13. The provisions for meetings, remuneration, co-optation and length of office that are covered by Sections 200 to 206 of the Interim Constitution shall be provided for in national legislation.
14. The constitution should state clearly that the Financial and Fiscal Commission has advisory and mediatory powers which must be reflected in the procedures for drafting budgets and fiscal legislation.
15. The constitution should provide that the Financial and Fiscal Commission present regular reports both to Parliament and to provincial legislatures in a manner to be determined by national legislation.

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⁸ See the above discussion.

⁹ It would also reinforce the position that the FFC is an independent, expert body, in which all the members have the same function and lines of accountability.

DP



Demokratiese Party
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PARLEMENT
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Democratic Party Submission
to Theme Committee 3

INTERGOVERNMENTAL FINANCIAL AND FISCAL RELATIONSHIPS

1. Fundamental Points of Departure

- 1.1 International experience shows that legislative powers without the necessary financial resources to implement programmes, leads to frustration and the erosion of the credibility of the provincial or local government.
- 1.2 The allocation of financial and fiscal powers, particularly in respect of tax distribution, should be laid down in the constitution clearly and in detail. It avoids annually recurring negotiations which make proper financial planning impossible. Furthermore, squabbling over the allocation of taxes can give rise to considerable tensions within a country and have a potentially destabilising effect. Using ad hoc arrangements to determine the allocation of revenue is also likely to lead to over-politicisation of the process.
- 1.3 The allocation of revenue should provide for as much predictability as is feasible, so that all levels of government will be able to formulate plans and budgets on a multi-year basis.
- 1.4 Each government should have an equitable share of revenue so as to ensure that it is able to provide basic services and execute the functions allocated to it.
- 1.5 Financing responsibility should follow executive responsibility. Whichever government is responsible for performing a duty should also bear the cost.
- 1.6 It is imperative to place an equal emphasis on revenue generation as on revenue allocation. It also cannot be the point of fiscal equity to burden thrifty states to the benefit of high-spending ones.
- 1.7 Provinces which generate most of the country's wealth should not be deprived of income needed to sustain and develop their economies, since to harm them could ultimately be to the detriment of all provinces.

2. Constitutional Principles

The Constitutional Principles which are relevant to this submission and their essential content are:

- XVII 2. Powers and functions of provinces not to be substantially less than in 1993 Constitution.
- XX Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. Allocation of powers to be conducive to financial viability.
- XXII National government shall not use its powers so as to encroach upon the integrity of the provinces.
- XXV The Constitution must describe national, provincial and local government fiscal powers and functions.
- XXVI Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.
- XXVII A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations from revenue collected nationally.

3. Shares of revenue collected nationally

- 3.1 Provincial and local governments shall be entitled to an equitable share of all taxes raised by the national government to enable them to provide services and to exercise and perform their powers and functions.
- 3.2 An equitable share of revenue referred to in paragraph 3.1 shall consist of:
 - (a) twenty-five per cent of income tax on individuals, value-added tax or other sales tax and any national levy on the sale of fuel, and fifty per cent of all other taxes raised by the national government, shall be distributed amongst the provinces in proportion to their population sizes;
 - (b) twenty-five per cent of income tax on individuals, value-added tax or other sales tax and any national levy on the sale of fuel, which are raised by the national government, shall be distributed amongst the provinces, in respect of each such tax or levy, in proportion to the amounts collected in each province;
 - (c) two per cent of all taxes raised by the national government shall be distributed amongst the local governments in proportion to their population sizes; and

- (d) any other conditional or unconditional allocations out of taxes raised by the national government, provided that not more than fifty per cent of such allocations may be conditional.
- 3.3 All transfers to provincial and local governments shall be effected expeditiously and without any deduction therefrom, with the national government acting simply as a collecting agency for the provincial and local governments in respect of the monies referred to in paragraphs 3.2 (a), (b) and (c).
- 3.4 The amounts and conditions referred to in paragraph 3.2(d) shall be fixed reasonably in respect of the different provinces and local authorities after taking into account the recommendations of the Financial and Fiscal Commission and the national interest.
- 3.5 Allocations referred to in paragraph 3.2(d) shall be determined in accordance with an Act of Parliament, with due regard to the national interest and after taking into account -
- (a) the recommendations of the Financial and Fiscal Commission, and
 - (b) the sufficiency of revenues of provincial and local governments to provide reasonably comparable levels of public services at reasonably comparable levels of taxation and efficiency of utilisation of revenue.
- 3.6 Notwithstanding anything to the contrary contained in paragraphs 3.2 (d), 3.4 and 3.5, for a period of ten years the national government may, after consultation with the Financial and Fiscal Commission, make special conditional grants to provincial and local governments for capital works to enable them to reduce or eliminate infrastructural backlogs.

4. Levyng of taxes by provinces

- 4.1 A provincial legislature shall be competent to raise taxes, levies and duties, other than income tax or value added tax, and to impose surcharges on the taxable income of individuals and companies, and to impose a sales tax, provided that -
- (a) it has consulted with the Minister responsible for national financial matters and the Financial and Fiscal Commission; and
 - (b) there is no discrimination against non-residents of that province who are South African citizens.
- 4.2 A provincial legislature shall have exclusive competence within its province to impose taxes, levies and duties (excluding income or value-added tax) on -
- (a) casinos;

- (b) gambling, wagering and lotteries;
- (c) betting; and
- (d) motor vehicles.

4.3 A provincial legislature shall not be entitled to levy taxes, levies and duties which materially and unreasonably prejudice the national mobility of goods, services, capital and labour.

4.4 A provincial legislature shall be competent to enact legislation authorising the imposition of user charges: Provided that -

- (a) such legislation may only be enacted after formal consultation with the Financial and Fiscal Commission; and
- (b) there is no unreasonable discrimination against non-residents of that province who are South African citizens.

5. Levying of taxes by local governments

The powers of taxation of local government are set out in Chapter 10. However, either in Chapter 10 or in this Chapter, it should be prescribed that a local government has the exclusive competence within its area of jurisdiction, to impose property rates, and duties on the transfer of property.

6. Raising of loans by provinces

Section 157 of the 1993 Constitution should be retained.

The Democratic Party has also made a submission to Theme Committee 6.2 in respect of Annual budgets which would impact on national and provincial governments.

7. Financial allocations by national government

Section 158 of the 1993 Constitution should be retained provided that it is made clear that the allocations refer to paragraphs 3.2(d) and 3.6 only.

8. Provincial Revenue Funds

Section 159 of the 1993 Constitution should be retained, provided it is clear that transfers received for local government from national government, do not have to go through an appropriation account as the provincial government would simply be acting as a conduit.

9. Local Government Revenue Funds

Provision needs to be made in the Constitution requiring local governments to establish revenue funds.

10. Conclusion

Many of the ideas and words in this document have been taken from submissions made to the Constitutional Assembly directly or at workshops etc. They have deliberately not been individually identified or acknowledged to encourage all proposals to be evaluated on their merits, irrespective of the source.

Legal and "quasi-legal" terminology is frequently used for the sake of brevity and in an attempt to be precise. It is not suggested that those words and phrases are all necessarily the most suitable ones for a constitution.



Ken Andrew MP
15 June 1995

IFP

1. SOUTH AFRICA'S SPECIFIC CONDITIONS
2. It is a general principle, notwithstanding national expression, that the independence of a people is not to be granted until they have demonstrated their ability to govern themselves as a free and responsible people. The key to any form of constitutional arrangement is the ability of the people to govern themselves.
3. The people of Swaziland in particular have a distinct political identity and possess the attributes of the Kingdom of Swaziland. They have been denied by the colonial and apartheid regimes the right to exercise their sovereignty and their unique position within the continent. They have rejected their apartheid status and demand that this be recognized constitutionally as a basis for a new state.
4. The people of Swaziland have different views on the future form of state, ranging from a unitary state to a federal state. It is clear that the people of Swaziland are not united in their views on the form of state. It is also clear that the people of Swaziland are not united in their views on the form of government. It is therefore necessary to provide for a form of government which is acceptable to all the people of Swaziland. The 1978 Constitutional Convention for Swaziland provided a basis for a form of government which is acceptable to all the people of Swaziland. However, the 1978 Constitutional Convention did not provide for a form of government which is acceptable to all the people of Swaziland.



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

C122

31 January 1995

CONSTITUTIONAL
ASSEMBLY

31 JAN 1995

The Secretariat
Theme Committee 3
Constitutional Assembly

Dear Madam Sir

REVISED SUBMISSION

Enclosed, please find the IFP submission for the first block, revised in terms of the framework agreed to by the Theme Committee on 30 January.

Yours sincerely

Peter Smith

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INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

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THEME COMMITTEE 3 RELATIONS BETWEEN LEVELS OF GOVERNMENT

FIRST REPORT: THE NATURE OF THE PROVINCIAL AND LOCAL SYSTEMS OF GOVERNMENT

29 January 1995

PROVINCIAL GOVERNMENT SYSTEM

A SOUTH AFRICA'S SPECIFIC CONDITIONS

- 1 *SA is a plural society. Notwithstanding colonial oppression of the indigenous peoples and the subsequent Act of Union in 1910, and notwithstanding the integrative effects of economic development and politics during much of the 20th century, SA is not a homogenous society. While commonality does exist as regards many issues, it is essential to recognise that the key to unity lies in the constitutional recognition of diversity, or pluralism.*
- 2 *The people of KwaZulu-Natal in particular, have a distinct political identity in wishing to preserve the autonomy of the Kingdom of KwaZulu-Natal. Oppressed, exploited and raped by the colonial and apartheid regimes, the people of this province who have always maintained their sovereignty and their unique position within the broader body politik, have reclaimed their sovereignty, desirous that this be recognised constitutionally within a federal SA.*
- 3 *The people of SA have different views on the future form of state, ranging from unitarianism, through provincialism, to federalism. To the extent that such views are the dominant view within any particular province, it is vital that this be recognised constitutionally. It would be in the best interests of the country to recognise the principle of asymmetry rather than to ignore provincial differences in setting out the relationship between first and second tiers of government.*
- 4 *Within the ambit of oppressor politics, SA has long experienced a tussle between centrist and federal forces. The 1910 Constitutional Convention, for instance, compromised upon a provincial rather than a federal system largely in order to preserve white domination. Whatever limited provincial "autonomy" did exist, was steadily eroded over the decades.*

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to be finally extinguished in the 1986 abolition of the provincial system. The "unitary/provincial/federal" debate has far outgrown its origins, and is today the key constitutional divide in the country. *With the demise of centrist white domination, federalism offers the best opportunity of securing freedom and democracy for all within a plural society.*

- 5 Simultaneously, the apartheid regime attempted to balkanise the country through "grand apartheid", resulting in two "national" categories (in addition to "white" SA) - the so-called Self Governing Territories and TBVC's, each of which enjoyed different yet substantial levels of autonomy until April 1994. *This historic autonomy, inadequately catered for in the interim constitution, is a central reality of the new SA, and cannot be ignored in the drafting of the new constitution.*
- 6 The vast majority of the people of SA have suffered centuries of colonial and racist oppression. But despite their very recent political liberation, they have inherited a tragic legacy of apartheid injustice which must be eradicated as timeously as possible. The constitution should make provision for this through various mechanisms, including, inter alia, the provision of first, second and third generation rights applied both vertically and horizontally, as well as *the empowerment of provinces, which, as the primary expression of government, will secure the socio-economic advancement of the people of SA and will ameliorate the legacy of the past.* It is totally unacceptable to significant regions of the country that the central government be the prime agency for the attainment of this goal.
- 7 *The implementation of the interim constitution has exacerbated provincial/central tensions.* Central government tardiness in complying fully with the constitution and attempting to nullify the limited provincial autonomy that does exist constitutionally, has resulted in widespread perceptions that the new constitution should more clearly delineate the competencies of the centre versus the provinces, and that it should moreover prevent needless central interference in what are properly considered provincial affairs. Within a system barely months old, provinces during 1994 were compelled to resist the "creeping centralism" of a central government unwilling to recognise the proper constitutional position of the provinces. Provinces recognise that this danger must be dealt with through constitutional means.
- 8 There are vast income and wealth per capita differences between the provinces and equally vast differences in the resources and economic capability of the provinces. If there is any commitment to ameliorating the legacy of the past, it cannot be countenanced that the disparity in relative wealth and income be perpetuated in a laissez faire fashion which will merely cement the economic hegemony and relative wealth of particular provinces. It is therefore essential that constitutional provision be made for *financial equalisation* through a system of federal transfers. But this does not entail the provinces necessarily being entirely dependant upon the central government fiscus for all their financial resources. *Constitutional provision must be made for independent provincial revenue-raising capabilities of the provinces in tandem with federal powers of revenue-raising and fiscal*

transfers so as to attain a balance between legitimate provincial and national needs.

- 9 Granting limited exclusive powers to the centre does not weaken the central government (cf USA, Germany). It frees central government to play a strong coordinating role. It also improves efficiency by clearly focussing accountability and responsibility for specific powers and functions within provinces and the centre respectively.
- 10 For a constitution to last, it must be acceptable to all the people, which can only be the case if provincial differences are recognised.

B DEMOCRATIC PRINCIPLES

- 1 The democratic principles of any given constitution emerge out of the actual provisions and system of checks and balances employed in such constitution.
2. The Constitutional Principles set out in Schedule 4 of the interim Constitution contain a set of broadly phrased constitutional ideas and directives. It would not foster debate or progress in the constitution making process to merely restate such principles.
3. Since it has been agreed that democratic principles are relevant to frame the work of the third Theme Commiree, the IFP first submission on the Character of the State is hereinafter reproduced.

SUPREMACY OF THE CONSTITUTION:

1. The Constitution in its entirety shall be the supreme law of the land. Therefore, the Constitution shall be fully and entirely justiciable by means of a Constitutional Court, and shall be the parameter for the validity and legality of the legislation of Parliament.
2. The constitution shall bind not only all organs of the Republic but shall also apply to all legal relations.
3. In relation to their respective areas of constitutionally recognized autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively. For instance, the constitutional right to health entrenched in the national constitution shall be implemented exclusively by the provincial legislation and administrative action.

SEPARATION OF POWERS (Form of State):

1. There shall separation of powers between national and provincial levels of government.
2. Provinces shall be the primary government of the people and shall be entitled to exercise any type of power and function which can adequately and properly be exercised at provincial level.
3. Only the powers of the national government ought to be listed in the constitution, while all other powers should be left to the Provinces.

4. Provinces shall have full judicial powers in all matters of their competence
5. National government shall have no overrides and, as a rule, Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interferences among the powers of each level of government, also based on the extension by relevancy or implication of the exclusive powers of the national level of government into the areas of competence of the Provinces, as in theory is the case in the U.S. system (i.e.: interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used in matter which requires concurrence between the national and provincial levels of government, provided that national legislation shall not be so detailed as to actually regulate, or exercise the actual function in the matter concerned.
6. There shall be separation of powers between all levels of government and civil society.
7. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.

WHAT TYPE OF DEMOCRACY:

1. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy [see *infra*]
2. The principle of the autonomy of individuals as well as of economic, social, political and cultural formations should also be entrenched with respect to all activities for which any level of government does not have a compelling justification of public or national interest to regulate, control or directly exercise. *Inter alia*, the foregoing principle recognizes the autonomy of churches, political parties, professional associations, chambers of commerce, universities, arts and culture organization, family structures, traditional communities, economic enterprises, civics, private contractual autonomy in economic and personal matters, et cetera.
3. The principles of (a) transparency, (b) political accountability and (c) civil accountability of governmental structures shall be constitutionally entrenched

REPRESENTATIVE DEMOCRACY:

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities)
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.
3. The electoral system is a fundamental element characterizing the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task

of implementing such principles, so as to leave sufficient flexibility for future developments. The provincial electoral systems should be within the exclusive competence of provincial constitutions.

PARTICIPATORY DEMOCRACY:

1. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation.
2. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
3. Provision shall be made for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.
4. Provision shall be made for the recognition of the right to petition any government structure.

TRANSPARENT AND ACCOUNTABLE DEMOCRACY

1. The right of access to all government information and private data banks information shall be recognized in the constitution, with customary qualifications and exclusions, subject to judicial review.
2. The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched.
3. Public officials shall be personally responsible for gross negligence and malice.
4. War shall be prohibited as a means to solve international controversies and shall only be allowed to defend the State's sovereignty over its territory.

TYPE OF STATE

1. South Africa should be a social but not a socialist state.
2. Private property and free-market enterprise shall be protected and the direct interference of government in economic matters shall be severely limited¹.
3. The constitution should contain all recognized socio-economic rights along with constitutional imperatives which mandate the legislature to operate to remove social injustice, and promote the social growth of all South Africans.

C PROVINCIAL PRINCIPLES

Type of powers to be allocated

1. All powers of a state are to be allocated between the national and the provincial level of government.

¹. The detailed aspects of this principles will be set out in the third Report to this Theme Committee relating to the Economic Constitution, as per approved work program.

2. The most important powers of the state, the so-called residual powers², often do not necessarily translate into governmental line functions or powers of government.
3. Residual powers should be left with the provinces.

Principle of subsidiarity

1. 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 level³.
2. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level.

Allocation of powers

1. Only the powers of the central government shall be specifically listed in the constitution, and all the powers not allocated to the central government shall be powers of the Provinces
2. Provinces shall have full judicial powers in all matters of their competence, in addition to fully autonomous legislative and administrative powers.

Relation between powers

1. There shall be separation of powers between national and provincial level of government
2. National government shall have no overrides.
3. Provinces shall have exclusive powers.
4. Both the national and the provincial levels of government shall enjoy exclusive powers.
5. 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 powers of each level of government.

². Technically, residual powers all those powers which are not listed in the provisions of a constitution which distribute powers between different level of government. A Parliament has power to enact legislation over more than 300 functional areas, which include matters such as corporate, family, criminal, inheritance, contract, and administrative law.

³. First Rule of Subsidiarity: *The higher level of government shall not do what the lower level government is capable of doing*: this principle requires that powers be allocated to the lowest level of government capable of exercise them, even if such allocation it is not the most efficient solution, as long as it is a "practical" one. Second Rule of Subsidiarity: *No government shall do what the family or civil society is capable of doing*

⁴. The following are generally recognized alternatives to structure the relation of powers (a) mutually excluding national and provincial exclusive powers with an open set of national interferences on provincial powers; or (b) national framework legislation with either provincial (bi) concurrent powers or (bii) exclusive powers; or (c) national overrides with either provincial (ci) concurrent powers or (cii) exclusive powers, or (d) national general principles of legislation with either provincial (di) concurrent powers or (dii) exclusive powers.

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 U.S. (i.e. interstate commerce).

6. 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.

Fiscal autonomy

1. The IFP believes that provinces shall have original and residual taxing and revenue raising powers on the basis of a parallel system of taxation.

Fiscal equalisation

1. There shall be constitutionally mandated equalization.
2. The constitution may also provide for a predetermined share of nationally collected revenues to be transferred to provinces, for equalization purposes. This function should be guided by an independent Fiscal and Financial Commission.

Entrenchment of provincial autonomy

1. Provincial autonomy shall be indestructible, and no national legislative or executive action shall be valid if it encroaches on provincial autonomy.
2. The Constitutional Court should judge any conflict between provinces and national levels of government.
3. In addition, provinces should 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.

Role of the Constitutional Court in protecting provincial autonomy

1. Each provincial legislature should elect judges from its own provincial court system to sit on the Constitutional Court as additional judges when the Constitutional Court adjudicates a conflict between the central government and that particular province.
2. When assessing the compatibility of national legislation with provincial constitutions, the Constitutional Court should be bound by the interpretation of the provincial constitution adopted by the court of final instance in the provincial court system.

Asymmetry

1. The national constitution shall provide for the maximum degree of provincial autonomy.
2. Each Province shall be free to opt to exercise lesser powers than the full autonomy to which such Province is entitled, if such Province is not ready, willing or able to exercise any of the legislative or administrative powers concerned.
3. The issue of federalism cannot be settled by virtue of majoritarian rule, no matter how large the majority concerned is. Even if the rest of South Africa wishes to organize itself

as a unitary state, regions such as KwaZulu-Natal which have expressed federal aspirations should be entitled to receive the autonomy they demand and to coexist with the rest of South Africa on the basis of a federal relation.

Provincial autonomy and economic unity

1. The segmentation of government along provincial divides does not imply nor require the segmentation of the economic continuum.
2. The establishment of a federal system modelled after the U.S.A. or Germany has no negative effect on the preservation of national economic unity.

Senate

1. The Senate should not have less legislative authority than that given to the National Assembly.
2. The Senate should represent the Provinces and its members should derive directly from the provinces through indirect elections by the provincial legislatures in consultation with the provincial cabinets.
3. Each province shall be equally represented in the Senate.
4. The Senate should have the specific power to monitor executive functions such as defense and foreign affairs in which Provinces have no competence.

D ELEMENTS OF THE PROVINCIAL SYSTEM

Provincial constitutions

1. Provinces shall be entitled to adopt their own constitutions autonomously (without the preemptive control of any organ of the national government), provided that such constitution shall not exceed the area of autonomy recognized to the provinces and that such limitation be fully reviewable by the constitutional court.
2. Provincial constitutions shall determine any matter related to the organization and operation of the legislative, executive, judicial and administrative branches of the provincial governments.

E MISCELLANEOUS

NATIONAL PARTY SUBMISSION

THESE COMMITTEES

NP

GOVERNMENT FINANCE AND INTERGOVERNMENTAL FISCAL RELATIONS

It is essential that the fiscal relations between the three tiers of Government...

The ideal would be, in particular, to grant greater local autonomy to the provinces...

agents having to perform certain functions on behalf of the National Government...

The following economic objectives need to be taken into account in the...

15 JUNE 1995

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 3

GOVERNMENT FINANCE AND INTERGOVERNMENTAL FISCAL RELATIONS

In this submission the above subjects are discussed with reference to the provisions contained in the Interim Constitution.

Introduction

It is essential that the fiscal relations between the three tiers of Government should reflect the spirit of the Constitution, take cognisance of competences and functions allocated to the various levels of Government by the Constitution and enable them, by granting them on an equitable basis access to the country's tax base and financial resources, to reasonably perform their respective functions.

The ideal would be, in particular, to grant greater fiscal autonomy to the provinces. However, various factors militate against the implementation of such a fiscal model and a more pragmatic approach, dictated by the realities of the South African situation, is therefore appropriate - namely a revenue sharing model, as outlined in the Interim Constitution. It should nonetheless not be viewed as confining the provinces to the role of agents having to perform certain functions on behalf of the National Government. The fact that a revenue sharing model is supported, does not impair the competence of the provinces to manage the expenditure sides of their budgets. Furthermore, several examples of revenue sharing models exist in other countries.

The following economic imperatives need to be taken into account in the shaping of fiscal relations between the various tiers of Government:

- The **skewed distribution of income and wealth, socio-economic backlogs, also in respect of infrastructural services in certain regions, and the uneven distribution of economic activities and of the total population.**
- **The tax base and its growth potential are extremely limited in certain regions and as a consequence these regions will be almost entirely dependent on transfer payments from a national source to maintain minimum standards** in respect of the functions assigned to them in terms of the Constitution. The alternative is a vast migration of people to the existing cities which will in any event increase the fiscal burden of these growth metropolises.
- **It is impractical for each province to have its own tax administration and to raise its own taxes.** Such a tax dispensation may also give rise to the problem which reared its head under the previous constitutional system where some TBVC-states not only used the tax system (lower taxes) to attract enterprises but also failed to collect taxes efficiently and then expected the central Government to compensate them, through transfer payments and Government guaranteed loans, for the resultant loss of revenue. Great difficulty is currently being experienced to upgrade the administration of Inland Revenue and it will be an impossible task to establish competent tax administrations in each province. It is also in the interest of the provinces that the efficiency of Inland Revenue be improved without delay.
- **Maintaining fiscal discipline and macro-economic stability is of paramount importance and remains to a large extent the responsibility of the National Government.** The Provinces will in the final analysis, however, be key players in maintaining fiscal discipline. South Africa's total tax burden, for a developing country, is already high and additional tax revenue should rather be generated by higher economic growth than an increase in the total tax burden. The deficit before

borrowing in the national budget is also too high and should be reduced. The assumption has always been that tax revenue from the National Government would be transferred to the provinces in respect of the functions for which they assume responsibility and that a higher tax burden should not result as a consequence - taking cognizance of the fact that loans are to some extent currently used to finance recurrent expenditure.

- **There is furthermore concern about the capability of some provinces to manage their financial affairs prudently and it is consequently essential that their powers to raise taxes and loans be subject to checks and balances.**
- **All taxes, in respect of which the revenues thus collected have to be deposited in the National Revenue Fund for sharing with the provinces, have to be raised via the budget presented by the National Government.**

The point that needs to be emphasised is that the principle of transfer payments is well established in South Africa and that the centralised system of tax collection (for revenue sharing purposes) is an unavoidable consequence of the structure of the economy. It should, however, not distract from the competences of the provinces to perform the tasks assigned to them by the Constitution - within the constraints of available resources.

In order to protect the integrity of the office of the Commissioner of Inland Revenue from political interference in its performance as tax collector, it is deemed desirable that the Commissioner should be granted independent status and that his office should fall under a supervisory body similar to the Audit Commission.

Prohibition on the withholding of a province's share of revenue

The fiscal relations between the National Government and the Provinces should furthermore be structured in such a manner that the National Government cannot abuse these financial relations to coerce provinces to implement policies dictated by it for reasons other than financial maladministration. It will create an untenable situation should the National Government attempt to use the centralised tax collection system, the product of practical considerations, to dictate policies to the provinces - which may in any event infringe their constitutional competences and impact adversely on the people of such provinces.

It is consequently proposed that the following provision be inserted after Section 155(3) of the Interim Constitution:

"The amounts referred to in subsection (1), without any deductions, shall be transferred to the Provinces and no share thereof shall be withheld other than on the basis of a resolution by Parliament following a report by the Auditor-General confirming gross maladministration by a Province."

The existing fiscal arrangements between the National Government and the Provinces as arranged in terms of the Interim Constitution

The Sixth Schedule to the Interim Constitution, read in conjunction with Section 126, details the functions which fall within the competences of the Provinces. This matter may still be open to negotiation.

It is vitally important that absolute clarity be obtained about the functional competences of the various tiers of Government as this aspect has serious implications for intergovernmental financial relations. However, we are more concerned here about the financial principles involved than the actual distribution of functions between the various tiers of government.

(a) **Revenue sharing between the National and Provincial Governments.**

The factors that impact on the fiscal relations between the National Government and Provinces, as alluded to above, had been taken into account in the drafting of the Interim Constitution. **The National Party is therefore broadly supportive of the tax revenue sharing model as outlined in Section 155 of the Interim Constitution - read in conjunction with Section 199.**

The National Party proposes that the following taxes and incomes should be collected nationally and be deposited in the National Revenue Fund for **revenue sharing purposes:**

- Direct taxes: personal and corporate plus mining taxation
- VAT or any other sales tax
- Fuel levies
- Customs and excise duties and any levies imposed thereon
- Estate duties

The servicing of national debt should have first claim on the taxes collected nationally and the balance should be shared between the National Government and the Provinces on the basis of formulae recommended by the Financial and Fiscal Commission - as outlined in Section 155 (4), but subject to the condition that the fiscal competences of and the taxes raised by the Provinces, in view of the limited extent of the sources of revenue available for this purpose, shall not be taken into account to determine the share of revenue to be allocated to each Province.

(b) **Levying of taxes by Provinces.**

The National Party proposes that the taxes listed hereunder should fall within the **exclusive** competences of the Provinces. There should be provision to add to this list on recommendations by the Financial and Fiscal Commission.

- Stamp duties
- Transfer duties
- Vehicle licences
- Toll taxes
- Taxes, levies and duties imposed on casinos, gambling, wagering, betting and lottery tickets.

The rate of stamp and transfer duties shall, however, be determined by the National Government in consultation with the Provinces and it shall also have the right to abolish these duties if so recommended by the Financial and Fiscal Commission.

The National Party also proposes that a provincial legislature should be competent to enact legislation authorising the imposition of user charges, as provided for in Section 156 (3) of the Interim Constitution.

The National Party is of the opinion that the Provinces should in principle have the competence to impose levies on taxes raised by the National Government, as provided for in Section 156(1) of the Interim Constitution.

All revenues accruing to a Province shall be paid into a Provincial Revenue Fund.

(c) Raising of loans and Government guarantees

The National Government currently uses loan funds to finance some consumption expenditure and it implies therefore, as long as this undesirable practice persists, that a portion of the loan funds raised by the National Government will have to be included as part of the transfer payments to the Provinces.

The National Party is of the opinion that the Constitution should provide for the establishment of a Loans Authority to co-ordinate the issue of loan stock and to determine policy for the management of the debt of the three tiers of government and guarantees provided by them. The details should be contained in an act of Parliament.

The National Party proposes that the three tiers of government may not borrow to finance current expenditure.

Borrowing by the Provinces (see also Section 199 (1)(d) of the Interim Constitution), which may be in lieu of loans raised by the National Government, imposes demands on the South African capital market and affects the general government's total budget deficit before borrowing. It is therefore essential that the borrowings by the general government institutions shall be properly co-ordinated. The NP proposes that a Committee under the chairmanship of the Minister of Finance be established to co-ordinate the borrowing requirements of the general government which should also take into account the ability of the public sector bodies to service such debt. General Government faces a possible debt trap and it is therefore essential that strict control should be exercised on its total loan requirements as well as the management of the debt of the three tiers of government.

As far as the competence of Provinces to raise loans is concerned, the National Party supports the principles as enunciated in Section 157 of the Interim Constitution.

(d) **Expenditure by Provinces**

As in the case of the National Government, the servicing of Provincial debt should have first claim on the revenues accruing to the Provinces.

Allocations to the Provinces to finance the provision of services have to be based on nationally determined minimum criteria - as laid down by Sections 126 and 199(e) of the Interim Constitution. The National Government can in terms of Section 126 of the Interim Constitution withhold the allocation of tax revenue to a Province which does not maintain minimum standards of services. The reason for this provision is obvious. The NP is, however, of the opinion that it should be scrapped and that the Provinces should enjoy greater autonomy to determine spending priorities in respect of the functions they have to perform and the standard of the services provided by them.

It is essential that the Provinces should maintain financial records in accordance with established accounting standards and introduce effective auditing procedures - to the satisfaction of the Auditor-General. The NP also proposes that the National Government should have the power to take over the financial management of a province, or certain elements thereof, should a Province, in the view of Parliament after a report to that effect from the Auditor-General, be regarded as incompetent to perform this task or certain elements thereof.

The fiscal competences of Local Authorities

The NP is in agreement with the powers and functions accorded to Local Authorities in terms of Section 175 of the Interim Constitution, the sources of taxation reserved for them in terms of Section 178 and the provision for transfer payments from the Provinces - in accordance with criteria recommended by the Financial and Fiscal Commission. The National Party is of the opinion that the revenue from property rates and land taxes should accrue to Local Authorities.

The borrowing activities of Local Authorities should also be subject to the surveillance and disciplines applicable to the Provinces. The Provinces shall be obliged to transmit to the Local Authorities all funds received from the National Government earmarked for Local Authorities.

The Financial and Fiscal Commission (FFC) (Sections 198 to 206)

The NP is of the opinion that the Constitution should provide for the FFC, in much the same way as outlined in the Interim Constitution. The NP furthermore proposes that experts on local authority finances should gain greater representation on the Commission.

Provincial FFC's

The NP proposes that the Constitution should provide for the establishment by Provincial Statute of a body similar to the FFC in each Province to deal with the financial and fiscal relations between the Province and Local Authorities in its area of jurisdiction. Each Province and the Local Authorities within its boundaries should have equal representation on the proposed Commission.

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PAC

1 June 1998

Attention: Director

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15 June 1995

Preliminary submissions

THEME COMMITTEE 3

The Financial and Fiscal Commission

Constitutional Principle XXV11 does accommodate the role of the Financial and Fiscal Commission in the Final Constitution that is currently being drafted by the Constituent Assembly. The PAC is not opposed to the above position in principle. Rather the PAC would go a step further and submit that the Financial and Fiscal Commission should be given a Constitutional recognition, but only when the relationship(s) between the three levels of government are clearly delineated and resolved. This does not mean that the Constitution should contain provisions setting out the functions of the different levels of government but only a framework of those functions.

This stems from the central belief in the PAC that the Provinces and Local government structures should only have administrative powers and nothing else.

If one were to look at the provisions of Constitutional Principle XXV11 the following emerge amongst others :

- (i) that they shall recommend equitable fiscal and financial allocations to the Provinces and Local governments from revenue collected nationally
- (ii) that they take into account the national interest
- (iii) that the economic disparities between the provinces

The PAC is of the view that the budget allocation must be administered by the Central Government wherein the Financial and Fiscal Commission will be fully consulted in order for the above objective to be fulfilled.

The PAC would submit that the composition of the Commission should draw representation from the Provinces, Local government structures and any other interested party.

Ms Patricia De Lille (MP)

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON PROVINCIAL
FINANCE AND FISCAL AFFAIRS
RECOMMENDATIONS - DOCUMENT 7

INTRODUCTION

CPG

- 1.1 See introductory recommendations on provincial legislative competence (Section 1).
- 1.2 Constitutional provisions relating to the financial and fiscal affairs of provincial and local governments are extremely important because they determine not only the measure of autonomy but also the effectiveness of those governments in exercising the powers and functions allocated to them. (See Constitutional Principles XX and XXI.)
- 1.3 Detailed provisions should not be dealt with in the Constitution, but rather in other national or provincial laws as required.
- 1.4 The new Constitution therefore need contain only general provisions which will determine how a provincial government may acquire the revenue (taxes, allocations, loans and other systems) required for its activities, the methods by which revenues may be appropriated to expenditure, and mechanisms to ensure the proper accounting for such collections and expenditure of revenues.
- 1.5 Provisions in regard to local government financing, especially where it involves allocations from national revenue, also need to be included in the new Constitution. However, this matter will be dealt with in a later document dealing with local government in general.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 The provisions of the new Constitution relating to the financial and fiscal affairs of provincial government shall, in terms of section 91 of the interim Constitution, comply with the applicable Constitutional Principles. The non-revenue principles are the following:

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to operate effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to the stability, viability of each level of government and to effective public administration, appropriate provincial autonomy and administrative decentralisation.

COMMISSION ON PROVINCIAL GOVERNMENT
PRELIMINARY RECOMMENDATIONS ON PROVINCIAL
FINANCE AND FISCAL AFFAIRS
RECOMMENDATIONS - DOCUMENT 7

1. INTRODUCTION

- 1.1 See introductory notes under recommendations on provincial legislative competence (Recommendation 2).
- 1.2 Constitutional provisions relating to the financial and fiscal affairs of provincial and local governments are extremely important because they determine not only the measure of autonomy but also the effectiveness of those governments in executing the powers and functions allocated to them. (See Constitutional Principles XX and XXI.)
- 1.3 Detailed provisions should not be dealt with in the Constitution, but rather in other national or provincial laws as required.
- 1.4 The new Constitution therefore need contain only general provisions which will determine how a provincial government may acquire the revenue (taxes, allocations, loans and other income) required for its activities; the methods by which revenues may be appropriated for expenditure; and mechanisms to ensure the proper accounting for such collection and expenditure of revenue.
- 1.5 Provisions in regard to local government financing (especially in so far as it involves allocations from national revenue), also need to be included in the new Constitution. However, this matter will be dealt with in a later document dealing with local government in general.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

- 2.1 The provisions of the new Constitution relating to the financial and fiscal affairs of provincial governments shall, in terms of section 91 of the interim Constitution, comply with the applicable Constitutional Principles. The main relevant Principles are the following:

XX

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

XXV

The national government and provincial government shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

2.2 The implications of Constitutional Principles XXVI and XXVII as crystallised in sections 155 and 156 of the interim Constitution are that each provincial government has a constitutional right to:

- (a) revenue which may be apportioned and spent at its discretion, derived from the following sources:
 - (i) an equitable share of revenues collected nationally, that will ensure its ability to provide the services and execute the functions allocated to it;
 - (ii) the transfer duties on property situated within the province;
 - (iii) taxes, levies, duties and surcharges on taxes as determined by section 156(1) of the interim Constitution;
 - (iv) taxes, levies, and duties on casinos, gambling, betting, etc, as determined in section 156 (1B); and
 - (v) other unconditional allocations out of national revenue; and
- (b) conditional allocations which, as the term implies, are subject to direction by the national government in regard to their spending.

In the Commission's view these provisions allow provincial governments a degree of autonomy, consonant with CP XX, especially in regard to expenditure of unconditional allocations set out in sub-paragraph (a) above.

The determination of allocations under both (a) and (b) above will have to be made in terms of the considerations set out in CP XXVII.

2.3 The general requirements relating to effectiveness, financial viability, accountability and responsibility contained in various other Principles also need to be provided for in the new constitutional provisions.

2.4 The Commission is required by section 164 (3) of the interim Constitution to take into consideration the provisions of the interim Constitution relating to financial and fiscal matters, which are contained mainly in sections 155 to 159, 187, 188, 193 and 198-200. The text of these sections is appended for easy reference.

3. DISCUSSION

3.1 In order to obtain information required to formulate its viewpoints and recommendations in regard to financial and fiscal matters relating to provincial systems of government, the Commission organised a special workshop in which the views of foreign and local experts and representatives from a large variety of institutions, including Parliament, the national government (state departments), provincial legislatures and executives, local governments and local government bodies, the Financial and Fiscal Commission and many others were solicited. Written submissions from a number of institutions were also obtained and considered and literature on the subject was studied. The Commission was assisted during its deliberations by a task group consisting of economists, lawyers and other persons with knowledge of and experience in dealing with financial matters.

3.2 From the discussions, submissions and literature studies, there appears to be a general consensus that -

- (i) only limited taxing powers could be assigned to provincial governments, and that these will not render sufficient revenue to finance the expenditure which the governments will have to incur in order to carry out their powers and functions effectively;
- (ii) because most major taxes would be imposed by the national government and revenues collected nationally, each province is entitled to a fair share of the revenues so collected to fund its legitimate expenditure;

- (iii) there is a national responsibility to distribute a portion of nationally collected revenues to the provinces in an equitable manner that will put each province in a position to provide the public goods and services for which the provincial level of government is responsible, subject to certain conditions such as the effective and efficient exploitation of the provinces' own tax bases and the effective, efficient and accountable expenditure of provincial revenues;
- (iv) a portion of the total allocations to provincial governments could be in the form of conditional allocations to finance activities which are deemed to be in the national interest. (Such allocations may also be differentiated according to the ability of provinces to contribute towards such activities from their own resources.);
- (v) while a portion of the allocations referred to in (iii) and (iv) above should be aimed at addressing disparities among provinces (i.e. for the broad purposes of "equalisation"), there is no perfect or uncontested method for determining such allocations. There must, however, be a manifest concern to ensure fairness. At the same time, wealthier provinces which generate most of the country's wealth should not be deprived of income needed to sustain and develop their economies, since to harm that could ultimately be detrimental to all;
- (vi) there are circumstances in which all levels of government should be allowed to borrow, namely for capital expenditure (which will also benefit future taxpayers, who should consequently pay their fair share of the capital costs), or to afford temporary relief if the revenue of a government drops to an extent which jeopardises the continuation of essential normal services. It is acceptable that the national government should regulate borrowing on the part of sub-national levels of government both in the interest of the national economy, and to dispel any misplaced expectations that (even in the absence of specific guarantees of loans) the national government will bail out sub-national levels of governments unable to meet their debt commitments. In order to enhance fiscal and financial discipline in regard to borrowing, access to financial markets by sub-national governments should not be distorted by instruments (e.g. subsidies) or mechanisms (e.g. special financial institutions) which could be detrimental to such discipline;
- (vii) the Constitution should contain only the framework for financial and fiscal relations between the levels of government. The detail should be dealt with in other laws. However, such laws should provide for as much predictability as is feasible concerning the amount of allocations to other levels of government, so that the recipient governments will be able to formulate plans and budgets on a multi-year basis;

- (viii) central government's allocations to local authorities should in general be channelled through provincial governments, but there might be circumstances in which the implementation of central government programmes may justify direct specific allocations to local governments; and
- (ix) there is a need for an impartial institution like the Financial and Fiscal Commission, independent of the executive branch of government, with expertise to advise on the equitable allocation, among all tiers of government, of revenues collected nationally.

3.3 The Commission assessed the appropriateness of the interim constitutional provisions in the light of the abovementioned considerations, *inter alia*, and the Constitutional Principles in order to formulate its recommendations enumerated below.

3.4 Provinces' share of revenue collected nationally

3.4.1 Section 155 of the interim Constitution provides that a province shall be entitled to an equitable share of revenue collected nationally to enable it to exercise and perform its powers and functions. Section 155 then goes on to specify how such a share should be constituted, namely -

- (a) a percentage, fixed by an Act of Parliament, of income tax on individuals, Value-added tax or other sales tax, and any national levy on the sale of fuel;
- (b) transfer duty on the acquisition, sale or transfer of any property (presumable fixed property) situated within the province concerned; and
- (c) conditional or unconditional allocations out of national revenue to a province.

An Act to provide for the abovementioned percentages shall be passed by the National Assembly and the Senate sitting separately. Reasonableness is required in fixing the percentages and conditions for allocations in respect of the different provinces after taking into account the national interest and the recommendations of the Financial and Fiscal Commission (FFC). The determination of both conditional and unconditional allocations is subject to considerations relating to interest and other payments in respect of the national debt, the fiscal capacities and performance, efficiency of utilisation of revenue, needs and economic disparities within and between provinces, development needs, administrative responsibilities and other legitimate interests as well as other objective criteria identified by the FFC, the legitimate needs and interests of the national government and the recommendations of the FFC.

3.4.2 As far as the revenue sharing provisions (Section 155(2) (a) to (c)) and the entitlement to transfer duty are concerned, the Commission is of the opinion that the provisions of the interim Constitution should be retained. It would be unwise to fix percentages in the Constitution because many circumstances could arise requiring the percentages to be changed from time to time and this might then necessitate continual amendments of the Constitution. Such matters should be dealt with in ordinary laws, subject to the principle of reasonableness and on the advice of an independent institution such as the FFC. The determination of such percentages by Acts of Parliament should be after consultation with the provinces and organised local government, and should generally be determined on a continuous (overlapping) multi-year basis in order to provide provinces with a significant measure of predictability with regard to revenues. On the other hand, on the grounds of reasonableness and legitimate provincial autonomy (CP XX), the Commission is of the opinion that the right of the provinces to receive either percentages or all of the respective taxes enumerated in the section, should not be diminished in the new Constitution. It could also be argued that the omission of such entitlements from the new Constitution would negatively affect the powers and functions of the provinces and therefore conflict with CP XVIII:2

The Commission therefore recommends that the provisions of section 155 (1) to 155 (3) or similar provisions should be incorporated into the new Constitution, with the addition that provision should be made for consultation with the provinces and organised local government as suggested above; and that the fixing of percentages should as far as possible be on a multi-year basis.

3.4.3 In regard to other conditional or unconditional allocations, section 155 (4) of the interim Constitution requires Parliament to take into account a considerable number of matters, some of which are not easily quantifiable and are difficult to assess reliably as between provinces, such as fiscal performance, efficiency in the utilisation of revenues, developmental needs, etc. This places an onus on Parliament to specifically consider each of the elements mentioned in the subsection, and subjects the resulting discussions and Acts to possible review by the Constitutional Court if all are not manifestly addressed before the law is passed. In some countries, such as the United States of America, the constitution is silent on such matters. In others, like Canada, the commitment in the constitution to make grants is purposely vague. The Canadian constitution merely states that "Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation".

The Commission is of the opinion that section 155 (4) should be replaced by a new subsection which in essence contains a similar general commitment towards the principle of equalisation. Provincial interests could be expressed most appropriately through the provinces' representatives in the second chamber (see CPG document 4) in the legislative process, and through the FFC in the administrative process. The Commission recommends that the new equivalent of section 155 (4) should read as follows -

- "(4) Allocations referred to in subsection 2 (e) shall be determined in accordance with an Act of Parliament, with due regard to the national interest and after taking into account -
- (a) the recommendations of the Financial and Fiscal Commission, and
 - (b) the sufficiency of revenues of provincial governments to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

3.5 Levying of taxes by provinces

3.5.1 Section 156 of the interim Constitution empowers provincial legislatures to raise taxes, levies and duties, other than income tax or value-added or other sales tax, subject to authorisation in an Act of Parliament. Such taxes should not detrimentally affect national economic policies, inter-provincial commerce or the national mobility of goods, services, capital or labour. In terms of CP XVIII.2 this power may not be substantially less or inferior in the new Constitution. Provincial legislatures must therefore be empowered in the new Constitution to impose any tax other than income, value-added or other sales tax within their areas of jurisdiction subject to the above-mentioned limitation. Provinces may also impose surcharges on taxes (presumably both national and local), provided they are authorised to do so by an Act of Parliament and that there is no discrimination against non-resident South African citizens. There are sound economic reasons why Parliament should specifically have to authorise the imposition of surcharges on taxes which fall within its exclusive powers, such as income tax and value added tax, e.g. in order to limit the possible negative effects of high provincial surcharges on the national economy. This power of provincial legislatures will have to be retained in view of CP XVIII.2. However, the Commission is of the opinion that the levying of a surcharge on local government taxes could not have been intended in section 156 (1) and that greater clarity in this regard should be provided in the new Constitutional text.

- 3.5.2 Section 156 (1B) vests provincial legislatures with the exclusive competence to impose taxes, levies and duties, (excluding income tax, value-added or other sales tax) on casinos, gambling, wagering, lotteries and betting. This competence should be included in the new Constitution in view of CP XVIII.2.
- 3.5.3 Section 156 (2) provides that provincial legislatures shall not be entitled to levy taxes detrimentally affecting national economic policies, inter-provincial commerce or the national mobility of goods, services, capital and labour. The Commission considers it necessary that this limitation should continue to be applicable in the new Constitution in the national interest. However, other levies and duties imposed by provincial legislatures could also have such detrimental effect and should be included in the relevant limiting provisions of the new Constitution.
- 3.5.4 Section 156 (3) empowers provincial legislatures to enact legislation authorising the imposition of user charges, subject to consideration of recommendations by the FFC concerning the criteria according to which such charges should be determined and further subject to there being no discrimination against non-resident South African citizens. In the Commission's view it would be sensible to continue to apply objective criteria for the imposition of user charges and to forbid discrimination against South Africans not resident in the particular province. However, the provision in section 156(3)(a) requiring a recommendation by the FFC for every enactment which imposes a user charge may prove to be too cumbersome. A provision requiring the FFC to recommend general guidelines which will be applicable to all such enactments would be more appropriate and practical. Because user charges should be a legitimate source of revenue for provinces, similar provisions should be incorporated into the new Constitution in view of CP XVIII.2, subject to the abovementioned amendment relating to the role of the FFC.

3.6 Raising of loans by provinces

The empowerment of provinces to raise loans was addressed in paragraph 3.2 (vi) above. Section 157 (1) appears to address both the needs and the concerns in regard to borrowing powers for provinces.

Section 157(3) provides that a province may not guarantee a loan unless the FFC has verified the need for a guarantee and recommended that it be given.

The Commission is of the opinion that the restraints on the borrowing power of provinces are necessary and adequately dealt with in the present section and recommends that similar provisions be incorporated into the new Constitution. It could prove to be too

cumbersome for the FFC to verify the need for a guarantee in each individual case. The Commission recommends that the FFC be required to provide only general guidelines for the guaranteeing of loans by provinces.

3.7 Provincial Revenue Funds

Section 159 provides for the establishment of a Provincial Revenue Fund in each province, the payment of all provincial revenues and allocations into such Fund and the withdrawal of money from the Fund only by virtue of an appropriation made in accordance with a law of the provincial legislature concerned. The Commission recommends that similar provisions be incorporated into the new Constitution.

3.8 Procurement administration

The proper management of the procurement of goods and services for any level of government is extremely important in order to guard against corruption, inefficiency and wastefulness. The Commission is of the opinion, therefore, that the new Constitution needs to contain provisions providing for orderly procurement management for goods and services at all levels of government. Section 187 of the interim Constitution stipulates that such procurement shall be regulated by an Act of Parliament and provincial laws, provides for independent and impartial tender boards and for a fair, public and competitive tendering system. The provisions appear to regulate state procurement of goods and services adequately and the Commission recommends that similar provisions should be included in the new Constitution.

3.9 Guarantees by national government section 188 of the interim Constitution prohibits the guarantee of provincial and local government loans by the national government unless the guarantee complies with norms and conditions set out in an Act of Parliament and the FFC has made a recommendation to that effect. The Commission recommends that similar provisions be incorporated into the new Constitution.

3.10 Powers and functions of the Auditor-General

3.10.1 Section 193 of the interim Constitution requires the Auditor-General to audit and report on all the accounts and financial statements of accounting officers at national and provincial levels of government and of all other persons in the national and provincial public services entrusted with public assets, trust property and other assets. Similar provisions apply in respect of local governments, boards, parastatals, etc. The Auditor-General may also conduct performance audits at the

request of the President. Other provisions relate to process, including his reporting to Parliament on the accounts examined by him and the duty to make such reports public after the expiry of 14 days from the date of their submission.

3.10.2 The power of the Auditor-General appointed by Parliament to audit accounts at all three levels of government is considered to be of the utmost importance to assure accountability for the collection and expenditure of government revenues. His authorisation to conduct performance audits at the request of the State President is equally important to ensure the effective and efficient spending of revenues. The Commission recommends that similar provisions be incorporated into the new Constitution.

3.11 Financial and Fiscal Commission

3.11.1 Section 198 of interim Constitution establishes the present Financial and Fiscal Commission. Section 199 stipulates that its objects and functions shall be-

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

including-

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

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

- 3.11.2 From what has been noted in paragraph 3.2 and succeeding paragraphs, it is clear that the financial and fiscal relations between levels of government in any state are complex.

Two sharply contrasting views may be taken of the appropriate role and function of a body such as the FFC. On the one hand, it may be seen as a negotiating forum; on the other, as an independent and impartial body.

In the opinion of the CPG, a body with responsibilities such as those of the FFC, as envisaged in the interim Constitution, should be impartial and independent of the executive and administrative structures of government. It should command the expertise necessary to fulfil its functions judiciously and to secure credibility and respect for its recommendations, particularly at the second and third levels of government. It should be able to take the long view in the national interest. There should be provision for a reasonable degree of continuity in its membership. Its size and modus operandi should be conducive to efficiency and coherence. At the same time, however, the requirements of transparency in its operations and representivity in its composition must be taken into account.

- 3.11.3 Constitutional Principle XXVII compels the Constitutional Assembly to include provisions relating to a Financial and Fiscal Commission in the new Constitution. The Commission is of the opinion that even if the provisions of this Principle were not so compelling, it would have been in the national interest to protect the institution and role of the FFC in the new Constitution. It therefore recommends that provisions similar to those contained in sections 198 and 199 be incorporated into the new Constitution.

- 3.11.4 Some doubt has been expressed whether the composition of the FFC should be prescribed in the Constitution itself or in a separate Act of Parliament. The Commission is of the opinion that the FFC's role in intergovernmental relations is so important that some matters besides those contained in sections 198 and 199 should be incorporated into the new Constitution. Furthermore CP XXVII requires that the representation of each province in the FFC should be addressed in the new Constitution.

- 3.11.5** The method for the appointment of members should be provided for in the Constitution in order to guarantee the continued independence, impartiality and acceptability of a body that has such an important (and probably unpopular) role to play in an area of intergovernmental relations which is fraught with contention. In terms of section 199 the FFC must advise and make recommendations to the relevant legislative authorities. In order that its advice and recommendations may enjoy their respect, at least, if not their unqualified support in all cases, the FFC needs to be acceptable to all levels of government. The Commission is of the opinion, therefore, that the members of the FFC should be appointed by the President from nominations by national and provincial governments and a representative local government forum.
- 3.11.6** At present the FFC consists of a chairperson and deputy chairperson and another seven members (at least one of whom shall have expertise in local government finance), all appointed by the President either in consultation with or on the advice of the Cabinet; and nine other members, with each of the provinces' Executive Councils designating one of these, who are then appointed by the President (section 200 (1)). Only the chairperson and deputy chairperson are full-time members. They are appointed for a period of five years. Other members of the FFC are appointed for a period of only two years, but are eligible for reappointment. The large number of members makes the FFC cumbersome. This could also hamper its effectiveness in the long run, because of the large proportion of part-time members appointed for short terms, and possibly representing divergent interests. Its present composition could obviously make it difficult for the FFC to reach consensus or even to obtain the two-thirds majority required for decisions (section 201 (3)), should each provincial representative seek to obtain the most favourable treatment for his or her province -or else risk incurring the province's displeasure. Provincial representatives would appear to be in an invidious position: since section 201 (7) requires members of the FFC to act impartially and independently. It can be foreseen that the FFC members might find themselves engaged in interprovincial negotiations on allocations, which could be dealt with more effectively, and more properly, in a different forum.
- 3.11.7** CP XXVII stipulates that each province shall be represented in the FFC, but does not specify that each should have a separate representative. In the Commission's view, the FFC could function more effectively if it were to be comprised of

a smaller number of members though still commanding sufficient expertise to deal with its complex tasks.

There is, however, some uncertainty about the interpretation of CP XXVII. Furthermore, the CPG is aware that both the provinces and local government have a clear interest in their having direct access to the FFC, in the determination of percentages of revenue sharing. Strong arguments have also been advanced (in workshops organised by the CPG, and elsewhere) that the representation of local government on the FFC should be expanded significantly, relative to that of the provinces. These considerations must be set against the case for reducing the FFC's membership in the interests of efficiency and effectiveness.

To address these different sets of concerns, the CPG consequently recommends that the FFC structure should consist of two chambers:

- (a) the "core" FFC, and
- (b) a plenary chamber.

3.11.8 The "core" FFC. In accordance with the considerations set out at 3.11.2 above, the Commission would recommend that the FFC consist of seven members altogether. A chairperson should be appointed by the President. The six other members should be appointed as follows: 2 nominated by the national government, 2 by the provinces jointly, and 2 by a constituent body from local government. The nominations could be made from panels of suitably qualified and experienced persons for each of the three tiers of government. The persons so appointed to the FFC would be expected to act fairly and impartially and should not be regarded as representatives of particular interests.

To enhance the perception of the FFC as an independent and impartial body, and strengthen its ability to act in an equitable manner, its chairperson should manifestly possess qualities consonant with these requirements. Consideration should be given to appointing as its chairperson an eminent individual with a judicial background (such as a judge, or a retired judge).

The FFC should be provided with staff commanding the requisite experience and ability to undertake preparatory work for the Commission. If this is done, it might not be necessary to have any full-time members on the Commission. However, the CPG is of the opinion that this

is not a matter for the Constitution but rather for an Act of Parliament, and even this should not be too prescriptive since the long-term needs of the FFC can only be established in the light of experience.

3.11.9 The plenary chamber of the FFC. Such a chamber could comprise the following elements:

- (a) a representative of each province,
- (b) a representative of local government in each province,
- (c) representatives of the national government, up to a maximum of nine, and
- (d) members of the "core" FFC.

This chamber would be a forum in which revenue allocations could be negotiated, in an attempt to reach consensus on the percentages to be allocated to provinces and local government, and on how these should be distributed among the provinces. If consensus cannot be reached, the "core" FFC will then have to formulate recommendations to the national government, which in turn will have to consult provincial governments (in terms of the recommendation at 3.4.2 above) before embodying these in an Act of Parliament.

3.11.10 As far as the further distribution of revenue to local governments is concerned, the CPG recommends that provinces should institute provincial negotiating forums, comprising representatives of the province and its local governments, to make recommendations on the allocations to each local government. It would be virtually impossible for one central body such as the FFC to deal with the detail of distribution among local authorities.

3.11.11 The "core" FFC should deal with all other matters assigned to the FFC by the Constitution or by Acts of Parliament. Interested parties should be able to make submissions on such matters to the FFC, and to present their views to it in an open forum.

3.11.12 It would be desirable to establish broad principles for the operation of the FFC, *inter alia* to foster transparency, to provide for interaction with interested parties in making their views known to it, and to ensure that reporting is done fairly, clearly, and comprehensively.

3.11.13 The Commission is of the opinion that the new Constitution need contain provisions regarding only the general composition of the FFC. Details on the method of selection of members and other procedural matters could perhaps be dealt with more appropriately in an Act of Parliament. It is to be expected that the provisions in any such Act would be formulated after consultation with provincial governments and organised local government.

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PUBLIC SUBMISSIONS

PUBLIC SUBMISSIONS

ON FINANCIAL AND FISCAL RELATIONS

NUMBER	ORGANISATION	SUBMISSION
1.	Afrikaans Handel Instituut	Reporting by Public Entities Act should be applied to more entities including all forms of Local and Provincial governments and public funded entities in accordance with principles of transparency and accountability.
2.	Financial and Fiscal Commission	This submission deals with the following issues; provincial share of revenue collected nationally,levying of taxes by provinces, raising of loans by provinces, uniform provincial accounting practices, local government taxes/loans/accounting practices, guarantees by national government and Financial and fiscal commission.
3.	Development Bank of South Africa	The Constitution should not with certainty and precision control every detail of the future, fiscal relations should to a limited extent be constitutionalised.
4.	Free Market Foundation of South Africa	Enabling laws must be put in place so that Local governments can raise its own funds and receive intergovernmental grants.
5.	Institute of Municipal Treasurers and Accountants	<p>This submission makes proposals with regard to amalgamation and rationalisation of administrative functions, maintenance of assets and housing.</p> <p>The second part looks at what should be the own sources of revenue for local government structures, and regulating revenue sharing and inter-governmental transfers.</p>
6.	Rentmeesterbeleggings	Government enterprises must be privatised to promote free enterprise.
7.	SACOB	Legislation relating to trading hours, informal training etc should be devolved to the provincial and local levels of government.
8.	Standard Bank	Consumer protection legislation should be uniform throughout the country. There needs to be certainty with regards to repayment of loans from the private sector, can the central government guarantee repayment of loans made by other tiers of government.
9.	Volkstaatraad	Local government structures should be autonomous and therefore there should be no interference from central level w.r.t revenue collection.
NUMBER	INDIVIDUALS	SUBMISSION
10.	Anonymous	Rates on property and taxes should be minimised.
11.	du Pisanie	Framework for fiscal financial relations among the National and Subnational governments.
12.	Fein B	Provincial governments should be empowered to have more autonomy over areas of government such as the levy of taxes and economic regulation.
13.	Friedman W and S	Changes to tax rates should require a special majority of 80%

NUMBER	INDIVIDUALS	SUBMISSION
14.	Galpin S	Ministries should publish a formal financial statement on a monthly basis to facilitate transparency and accountability.
15.	Glennie J	Provincial government should attend to all tax matters.
16.	Gorringe HP	Taxation should take the form of money or time, where a maximum rate is set.
17.	Kotze JJ	There should be transparency in rates revenue expenditure.
18.	McGregor, Rayne, Shone and Williams	Taxation should be divided into a provincial and national tax.
19.	Penner G Rudolph	Intergovernmental grants and borrowing power.
20.	Prud'homme R	Assignment of expenditure and of taxes between levels of government for the Republic of South Africa.
21.	van den Heever	This submission deals with access to financial and fiscal affairs and the limitation on the borrowing power of provincial and local authorities.
22.	Swart JS	Free market economy must be entrenched.

Year	Month	Day	Event
1900	Jan	1	...
1900	Jan	2	...
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1900	Jan	30	...
1900	Jan	31	...