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**CONSTITUTIONAL  
ASSEMBLY**

**THEME COMMITTEE 3**

**RELATIONSHIP BETWEEN  
LEVELS OF GOVERNMENT**

**SUBMISSIONS**

**RECEIVED AS AT 29 JUNE 1995**

**COMMISSION ON PROVINCIAL GOVERNMENT**

**VOLUME 22**

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# COMMISSION ON PROVINCIAL GOVERNMENT

*Established in terms of section 163 of Act 200, 1993*

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Ref 6/1/1

1995-06-29

The Executive Director  
Constitutional Assembly  
P O Box 15  
CAPE TOWN  
8000

Dear Mr Ebrahim

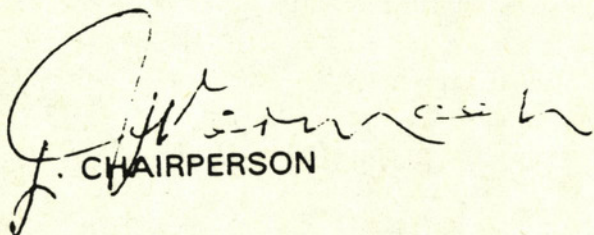
## PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

Preliminary recommendations on the number and boundaries of provinces  
(Document 11)

Recommendations in regard to self-determination will be submitted to you as soon as the final report of the Volkstaat Council has been received.

Yours faithfully

  
CHAIRPERSON

**COMMISSION ON PROVINCIAL GOVERNMENT**  
**PRELIMINARY RECOMMENDATIONS ON THE NUMBER AND**  
**BOUNDARIES OF PROVINCES**  
**RECOMMENDATIONS - DOCUMENT 11**

1. INTRODUCTION

- 1.1 Section 164(2) of the interim Constitution provides that the Commission on Provincial Government's advice to the Constitutional Assembly shall include recommendations in the form of draft constitutional provisions regarding, *inter alia*, the finalisation of the number and boundaries of the provinces of the Republic. Section 164(3) prescribes certain criteria which the Commission shall take into consideration in preparing such recommendations. The list of matters so to be considered by the Commission includes historical boundaries, including those set out in Part 1 of Schedule 1 of the interim Constitution (i.e. the present provincial boundaries), former provincial boundaries, magisterial district boundaries and infrastructures.
- 1.2 Section 124 of the interim Constitution establishes the nine provinces and provides for the alteration of the name of a province in accordance with the request of a provincial legislature. The area of each province is defined in Part 1 of Schedule 1 of the Constitution. Provision is also made for procedures to be followed to effect alterations to the boundaries of any province. All these methods for altering boundaries have now lapsed and boundaries may presently be altered only by way of an amendment of the interim Constitution through the special parliamentary processes prescribed for relevant amendments to the Constitution. Section 62(1) requires a two-thirds majority of the total number of members of both Houses of Parliament at a joint sitting for amendments of most sections of the Constitution, but Section 62(2) further provides that *inter alia* the boundaries of a province shall not be amended without the consent of the relevant provincial legislature.
- 1.3 Constitutional Principle (CP) XVIII.1 provides *inter alia* that the boundaries of a province shall be defined in the Constitution. Paragraph 3 of CP XVIII further prescribes that the boundaries of the provinces shall be the same as those established in terms of the (interim) Constitution. Paragraph 4 deals with future amendments of the new Constitution which alter *inter alia* the boundaries of provinces. It requires in addition to any other procedures for constitutional amendments, the approval of a special majority of the legislatures of the provinces or a two-thirds majority of a chamber of Parliament composed of provincial representatives, if there is such a chamber. If the amendment concerns specific provinces only, the approval

of the legislatures of such provinces will also be needed. Paragraph 5 requires that provision be made in the new Constitution for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

## 2. DISCUSSION

- 2.1 Because of the peremptory nature of CP XVIII.3, the Commission was uncertain whether it should specifically investigate matters relating to the boundaries of provinces in order to formulate relevant recommendations for consideration by the Constitutional Assembly. It consequently called for an opinion by the State Law Advisor to clarify its position regarding provincial boundaries. The relevant part of the opinion reads as follows:-

*"Our opinion is expressly requested as to the question whether paragraph 3 of Constitutional Principle XVIII in effect means that the Constitutional Assembly, when defining the boundaries of the provinces, "may only redefine the present boundaries as far as they are still unresolved, i.e. in respect of the affected areas listed in Part 2 of Schedule 1". The said paragraph 3 provides as follows:*

*"The boundaries of the provinces shall be same as those established in terms of this Constitution."*

*In our view this means that the new Constitution must provide that the boundaries of the provinces shall be the same as they existed immediately before the commencement of the new Constitution. The provincial boundaries as "established in terms of the Constitution" can only be its descriptions in the present Constitution as amended by -*

- (a) any Act of Parliament passed in accordance with section 62;
- (b) any proclamation made in terms of section 124(14); or
- (c) any Act of Parliament made under section 124(15) (if any).

*Thus, the Constitutional Assembly does not even have the power to redefine the boundaries of affected areas in the new constitutional text. Moreover, since section 74 expressly prohibits the repeal or amendment of the Constitutional Principles, the possibility of amending paragraph 3 of Principle XVIII, which prevents the Constitutional Assembly from redefining any provincial boundaries in the new constitutional text, does not exist. Therefore, any recommendations of the Commission on Provincial Government given to the Constitutional Assembly in terms of section 164(2)(a) regarding the finalisation of the number and the boundaries of the provinces will be futile since it would be outweighed by the mandatory Constitutional Principles." (Our underlining.)*

- 2.2 In view of this opinion that any recommendations of the Commission given in terms of section 164(2)(a) would be futile because of the effect of CP XVIII.3, the Commission did not embark on an investigation of the number and boundaries of provinces. The Commission consequently makes no recommendations in this regard.
- 2.3 The Commission is nevertheless of the opinion that the new Constitution should prescribe procedures for future amendments of the number and boundaries of provinces. This is, in fact, obligatory in terms of CP XVIII.4. Boundaries should not be altered continually and the procedures prescribed should therefore discourage frivolous attempts to amend the Constitution for this purpose. For the alteration of boundaries the Constitutional Principles require that the normal procedures for constitutional amendments be applied, with the further requirement of approval by a special majority of the legislatures of the provinces or a two-thirds majority in a chamber of Parliament composed of provincial representatives. However, if the amendment concerns specific provinces only, the approval of such provinces is also needed. The incorporation of these Principles into the new Constitution will serve to restrict the frivolous alteration of boundaries. The Commission is of the opinion that there should be an additional requirement that a referendum be held to determine the wishes of voters in any area liable to be incorporated into another province. It would be in accordance with democratic principles to consult persons whose interests are affected most directly by such an alteration of boundaries. However, such a referendum should be held only after the relevant provincial governments have provisionally agreed to make such an alteration, but before the constitutional amendment is debated in Parliament. No referendum should take place before provincial governments have indicated a serious intention to alter their boundaries as it could otherwise lead to frivolous calls for referendums and the abuse of the system. Furthermore, the outcome of a referendum should not be binding upon Parliament because there may be other important national interests which should take precedence. This observation does not detract from the principle that persons whose interests are at stake should be consulted before such important decisions are taken. The extent to which an alteration to the boundary is supported or rejected by the affected voters in such an area should weigh heavily among the various considerations to be taken into account by Parliament and the relevant provincial governments. The Commission recommends that the new Constitution provide for referendums as described above before amendments to the Constitution altering boundaries of provinces are adopted on the basis set out in the Constitutional Principles.



PROVINCIAL LEGISLATURE: NORTHERN CAPE

COMMITTEE SECTION

FACSIMILE

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DATE: 28 June 1995  
NO. OF PAGES INCLUDING COVER SHEET: 8

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MESSAGE

Please find attached Question 13 of the Green Book and Document 7, 8 and 9 of the preliminary recommendations.

Thanking you in advance



**PROVINCIAL  
LEGISLATURE OF THE  
NORTHERN CAPE  
KEY CONSTITUTIONAL ISSUES  
PROVINCIAL AND LOCAL  
GOVERNMENT**

**SUBMISSION BY THE CONSTITUTIONAL  
COMMITTEE**

**13. THE SENATE**

13.a Is a Senate needed? If so, should its primary purposes be to represent provincial interests, or should it have a wider legislative function, or should it combine both functions?

We do need a senate, but this should include both functions. Its primary function should be to represent provincial interests. It must have its own separate function and should not be a duplication.

b. In terms of its purpose as defined, what should its composition be? Should interests other than provinces be represented? If so, what interests?

The Senate should be made up of an equal representation for each province regardless of the population of provinces. It is further recommended that consideration be given to the ten senator positions matching the portfolios of the specific provinces and maintaining direct and regular contact with the MEC and the chairpersons of the relevant portfolio committees. It must be stressed that such liason should be at both the legislative and the executive level. Consideration could also be given to a further ten senators being appointed by the President based on their expertise.

- 204 25 195 12-100
- c. Are there shortcomings in the present constitutional provisions relating to the Senate? If so, how should these be rectified?

Answers to the previous questions in this section address the issue.

- d. What should be the size of the Senate, in view of its purpose and vis a vis the National Assembly?

The size is already addressed in b). Neither the size nor its composition should be related to the size of the National Assembly. It is recommended that the Senate should not be any smaller than already recommended in order to carry out its function efficiently.

- e. What should be the status of provincial representatives in the Senate vis a vis provincial governments and political parties? Issues might include the following:

- (i) should Senators be additional to the provincial representatives in the National Assembly, or should the latter comprise the Senate?

The question of the senate is aside from that of the National Assembly. The latter should be addressed separately.

- (ii) what are the implications for provincial interests of representation from province to National Assembly on party lists?

This question has no direct relevance to the Senate. However, the present system does not give any specific distinction between the 200 elected on the Provincial list and the 200 elected on the National list. Consideration should be given to the Provincial list being based on equal representation for the provinces.

- (iii) what are the implications for provincial interests of the prohibition on crossing the floor:

This is not specifically a provincial concern; this problem certainly affects all levels of government.

(iv) should senators be elected at large (on a third list)?

The appointment of senators should be based on a system which ensures that the best people i.e with the greatest expertise be appointed to the posts.

(v) should a residential qualification apply?

A Senator must be resident in the province which he/she represents. If a senator moves he/she should lose his/her seat in the senate.

(vi) Should representatives of provincial governments sit in the Senate?

If the proposals given above were not accepted then the representatives of provincial governments should sit in the Senate.

f. What principle should determine the representation of provinces in the Senate: state equality, population or a formula balancing these? Is the existing formula just and fair?

The existing formula is just and fair. The recommendation of presidential appointees should be taken into account.

MR AKHARWARAY (ANC).....  
CHAIRPERSON

COMMITTEE MEMBERS:

MRS PAPENFUS (DP).....

MR MOKGORO (ANC).....

DR LIEBENBERG (NP).....  
P.P.

# COMMISSION ON PROVINCIAL GOVERNMENT

## PRELIMINARY RECOMMENDATIONS ON PROVINCIAL EXECUTIVE AUTHORITIES:

### DOCUMENT 7 - PROVINCIAL FINANCE AND FISCAL AFFAIRS

21 June 1995

Comment by the Provincial Constitutional Committee, Northern Cape Legislature.

#### DOCUMENT 7

#### COMMENTS:

The Provincial Constitutional Committee is pleased to note that the proposals which have been submitted are being taken into account.

3.2.v (pg 4) : This is in conflict with the basic principle of taxation, where the taxes obtained from the wealthy are used to the advantage of all.

The phrase "..... wealthier provinces ..... generate most of the country's wealth ....." is misleading. The origins of the wealth of those provinces is not always within the provinces themselves. There is the appearance of the wealth being generated there, but the sources are not infrequently based elsewhere, for example, there are agribusiness and mining head offices in Gauteng, yet there is very little agriculture, and only one type of mining (to any significant extent) found in that province. The provinces from which the resources have come have a fair claim to that wealth.

3.vi (pg 4) : Agree fully with this.

3.4. (pg 5 & 6) : Please see this as a general comment on 3.4 with the proposal relevant throughout the document:

The issue of value added tax, and both the collection and the allocation of the revenue therefrom has not been addressed adequately and must be taken into consideration. Also, when considering provincial taxation, there should be controls which ensure that no citizen is overburdened because of where he/she lives. A tariff must be levied on raw materials/primary products which are derived from the province itself e.g iron ore is mined in the Northern Cape, but no tariff is paid to other provinces when "importing" this material. The province mining the product is therefore disadvantaged, because the province which transforms the raw material into a final product benefits from VAT.

There should also be levies on road usage e.g the province should have a financial advantage based on the extent to which their provincial borders are being used.

3.4.3 (pg 6) : It is recommended that legislation should not be left to the National level alone, but should be done in consultation with the provinces and the process should not merely be an advisory one, but should have specific powers.

3.10 (pg 9) : The position, powers and functions of the Provincial Auditors - General need to be specified.

3.11 (pg 10) : We agree with the composition of the Financial and Fiscal Commission.

In closing, it must be stated that we feel the relationship between national, provincial and local government should be in terms of spheres of government rather than tiers of government.

This can be explained by the fact that all inter-governmental levels should be linked, there should not be definite hierarchical levels.

## DOCUMENT 8 - TRADITIONAL AUTHORITIES

### COMMENTS:

1.6 (pg 2) Basic human rights must always take precedence.

We fully agree with this

1.7 (pg 2) Agree with this

2.3 (pg 3) This is contradictory as it has been recently decided that traditional leaders would be remunerated at National Level.

3.3.1 (pg 4) We agree that this is an urgent issue which must receive the necessary consideration.

3.3.4 (pg 5) Agree fully

3.5.1 (pg 5) The constitution should provide only the basic principles; more specific provision could be made in the separate provincial constitutions, thereby recognizing the extent to which this will differ from province to province.

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DOCUMENT 9 - LOCAL GOVERNMENT

COMMENTS:

2.5 (pg 2) This is already happening.

2.6 (pg 3) Agree. We are pleased to note that this proposal has been taken into account.

3.2.2 (pg4) Regional structures should be dealt with by those provinces drafting their own constitution.

MR AKHARWARAY (ANC) .....  
CHAIRPERSON

MRS PAPENFUS (DP) .....

MR MOKGORO(ANC) .....

DR LIEBERNBERG (NP).....