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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

DRAFT REPORT 2

LOCAL GOVERNMENT

**BY THE
TECHNICAL
ADVISORS**

7 AUGUST 1995

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**DISCUSSION PAPER FOR THE DEVELOPMENT BY THEME
COMMITTEE 3 OF A REPORT ON LOCAL GOVERNMENT TO THE
CONSTITUTIONAL COMMITTEE**

1. Material processed

- In March 1995 Prof Dion Basson summarised submissions by civil society on matters concerning Theme Committee 3. 23 of those submissions dealt with both provincial and local government (reflected in section II of the summary) and 15 dealt with local government as such (section III of the summary).
- A *Framework on Local Government*, drafted by Prof BC Majola, was circulated on 3 April 1995.
- Proposals of the Free State Municipal Association entitled *Local Government beyond 2000*, dated 14 May 1995, was distributed.
- On 15 May 1995 the Theme Committee held a workshop on local government, which apparently centred around a discussion document prepared by the ad hoc committee on local government. The proceedings were transcribed and distributed on 29 May 1995.
- The Commission on Provincial Government submitted their *Preliminary Recommendations on Local Government - Document 9* on 25 May 1995
- A *Special Edition* of submissions on local government was circulated on 12 June 1995 and between 23 June 1995 and 17 July 1995 Submissions Volumes 19, 20, 21 and 23 were distributed.
- Political party submissions on local government were submitted by the ACDP, ANC, DP, FF, NP and PAC.

2. Overview of processed material

The main focus of the report is on the submissions received from political parties. From those submissions it is however clear that some of the non-political material had significantly influenced the views of some of the political parties. Additional matters that may require the consideration of the Constitutional Assembly emerging from submissions received from other sources than the political parties, are set out in paragraph 4 below.

3. Positions of the political parties

In order to present the party positions in a concise format, the relevant constitutional issues have been extracted and listed under 10 headings (the first column of the table).

For the purposes of the development of a report to the Constitutional Committee, the positions taken by the political parties will be classified as being "contentious" or "non-contentious" after they have been discussed in the Theme Committee. For the purposes of such discussion similar positions taken by parties and positions taken uniquely by a single party have been reflected in the second column of the table below and propositions made by parties which deviate from the positions of one or more of the other parties have been placed in the third column.

The party or parties from whose submissions a specific proposition has been taken are identified in square brackets in the second and third columns. In some instances the relevant Constitutional Principle, the equivalent provision of the present Constitution, or another source, is also indicated.

4. Additional matters

From a survey of the general submissions, the following matters or issues present themselves as possibly also requiring the attention of the Constitutional Assembly:

- The extent of the responsibility of local governments regarding education, health, churches, water and forestry [Submissions referred to in the Basson summary par II A 3, 4 and 7; Submissions Volume 19 p 1945-1966].
- The nature and structures of rural and regional (local) government [Submissions referred to in the Basson summary par III A 1, 3, 5, 6, 7, 9].
- The nature and structure of metropolitan government [Submission referred to in the Basson summary par III A 11].
- Delegated and agency functions of local government [Submission referred to in the Basson summary par III A 12].
- Separation of powers in local government [Submission referred to in the Basson summary par III A 12].
- The nature of "organised local government" [Submissions Volume 20 p2051-2060].

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THEME COMMITTEE 3

*Exposition of the positions of Political Parties on Local Government
for purposes of discussion.*

Constitutional Issues	Similar or unique propositions	Divergent propositions
<p>1. What, regarding local government, should be incorporated into the Constitution.</p>	<ul style="list-style-type: none"> • A framework - a chapter -for local government should be contained in the Constitution [ANC, NP, DP, PAC, CPrinc.XXIV]; • The Constitution should protect the necessary and essential features of local government [ANC]; • The basic functions of local government should be listed - not exhaustively - ("a minimum list") in the Constitution [ANC, DP, CPrinc.XXIV]; • A provision prescribing a code of conduct for members (and officials [NP]) of local government [ANC, NP, DP, section 180]; • A provision dealing with procurement administration [NP, section 187]; • A provision affording a local government the right of recourse to a judicial remedy to secure the free exercise of its powers and the principles relating to local government [NP]. 	<p>The national legislation containing detail should reflect the opinions which would have been solicited from the various Commissions [PAC].</p> <p>A "need for the autonomy, powers and functions of local government to be adequately provided for in the Constitution" [DP].</p>

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Constitutional Issues	Similar or unique propositions	Divergent propositions
		The Afrikaner must be recognised and protected in the Constitution at local government level as a community sharing a common language and cultural heritage [FF].
2. What the relative positions of the national and provincial governments regarding local government should be.	<ul style="list-style-type: none"> • Local government is a matter of both national and provincial interest [ANC]. The respective powers of the national and provincial levels should be clearly defined. (NP, CPG); • Proposed legislation concerning local government should not be introduced without local government having been consulted [NP, DP, section 174(5)]. 	<p>Framework laws enacted at national level, provinces responsible to implement, supervise and manage local government and provinces will have concurrent power to legislate on local government [ANC].</p> <p>There is need for control to be exercised over the provincial and local governments and other like institutions to ensure that the grand policy is being applied; there should be strong Central Government and the other two tiers of government should become mere administrative institutions [PAC].</p>
3. What the status of local government as such should be.	<ul style="list-style-type: none"> • Local government not at bottom of hierarchy of levels / is a specific level of government [ANC]; should be recognised constitutionally as a fully-fledged level of government [NP]; local government is to be recognised as a separate sphere (not a "tier") of government [DP]; 	There should be strong and efficient local government, operating under effective conditions of intergovernmental relations based on the notion of co-operative governance; the term "self-administration" (rather than "autonomy") should be used [ANC]; though local government must be subject to national

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<ul style="list-style-type: none"> • Section 174(4) should be retained in the Constitution [NP], in amended form [DP]. 	<p>and provincial legislation, it should not be completely subservient to them - there should be autonomy [NP]; local government should have autonomy [DP]; local government should be autonomous with each district having its own governmental structures [ACDP]; democratic local government is part of the government of a state comprising of democratically elected representatives of the enfranchised residents of a defined geographical area within that state, who, as a legal entity separate of its individual members, is vested with prescribed governmental authority which it may exercise relatively independent from state control [PAC, taken from <i>Local Government Beyond 2000</i>]; local government must be autonomous [PAC]; our towns and cities do not merely consist of a number of individuals, but of clearly identifiable communities that share a common language and cultural heritage; each community is best able to deal with its own precious and sacred interests [FF].</p>
4. Structures and administration	<ul style="list-style-type: none"> • There should be categories of metropolitan, urban and rural local governments [ANC, NP, DP, section 174(2)]; there should be Metropolitan Development Authority 	<p>Categories of structures should be metro, district, rural and urban [ANC]; (unspecified) categories of local government with differentiated powers, functions and structures;</p>

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<p>Committees that will have jurisdiction over all the major town councils, and a Rural Development Authority with jurisdiction over all areas outside municipal boundaries [ACDP];</p> <ul style="list-style-type: none"> • All areas within the territory of the Republic must be represented in local government structures [ANC, NP, DP]; <ul style="list-style-type: none"> • Local government should be given representation in the Senate in the form of a delegation of senators [ANC]; local governments should be represented on the 	<p>a local government should have the discretion to establish sub-municipal entities [NP, section 175(6)]; Provincial legislatures should make provision for categories of local governments with differentiated powers, functions and structures [DP]; An Afrikaner Council should be elected by all Afrikaners within each area of jurisdiction of a local authority where an Afrikaner community exists to accept responsibility for the exercise, protection and extension of Afrikaner interests [FF]. Demarcation should be done on the principle of "one city/town, one tax basis" [ANC]; The norms for demarcation should be based on technical and developmental considerations rather than political expediency [NP]; Local government areas should be demarcated by the provincial legislatures [DP].</p> <p>The present sections 176 (council resolutions) and 177 (executive committees) should be retained with some amendments and additions [NP]; the present sections 176 and 177 should be deleted from the Constitution [DP].</p>

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Constitutional Issues	Similar or unique propositions	Divergent propositions
	<p>national body of representatives [ACDP];</p> <ul style="list-style-type: none">• A Local Government Commission should be established to be the guardian of local government, advise Parliament and the national government and to initiate laws and policies and conduct research [NP]; the Commission on Provincial Government should be restructured as a Commission for Provincial and Local Government to mediate and adjudicate disputes between provincial and local governments [DP]; local government will be represented in the proposed Local Government Commission that would deal with relations with other levels of government; the relationship(s) between the three levels of government will be dealt with in the various Commissions, the Commission on Provincial Government, the Commission on Local Government and the F & F Commission respectively [PAC];• The establishment of national and provincial intergovernmental or co-operative councils for organised local government should be considered [ANC]; provincial intergovernmental forums representative of the provincial government and organised local government should be provided for by provincial laws [NP];	

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<ul style="list-style-type: none"> • Local governments should be entitled to co-operate and form joint bodies and associations (also internationally) [NP]. • The administration must be based on sound principles of public administration, good governance and public accountability [ANC, NP, DP, section 178(1)]; • The present section 178(1) (sound principles of public administration) should be retained [NP, DP]; • Provision should be made for administrative supervision of local governments according to procedures that will not allow for undue intervention [NP]; • Local government will be effective and efficient local administration and government [PAC]. 	<p>The principles pertaining to public administration should apply to local government, but local government should not be regarded as part of the Public Service [NP].</p>
<p>5. The areas in which local governments should provide services.</p>	<ul style="list-style-type: none"> • (At least [NP, DP]) water, transport, electricity, primary health care, (pre-school [DP]) education, housing and security [ANC, NP and DP]. 	<p>At least sanitation [NP, DP], physical land-use planning, parks and gardens, stormwater drainage, licences and permits, local roads, libraries, traffic control, fire brigade services, shopping hours, ambulance services, sport and recreation facilities, public halls, markets and pounds, street cleaning, refuse disposal, local economic growth, promotion of integrated and sustainable development, animal and vermin control, public health, air and noise pollution,</p>

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<ul style="list-style-type: none"> • The present section 221 regarding local policing should be retained [NP]; • Duties may be imposed on local government by national or provincial laws [ANC]; there should be no restriction on national or provincial government to delegate or devolve powers and functions (but finance should follow function) [NP]; • Services should be provided by community-based organisations functioning on a non-profit basis, remunerated by the town councils [ACDP]; • Local government will provide affordable and sustainable service delivery with the utilisation of local expertise where possible; the delivery of services to and facilitation of development of the communities becomes the essence of local government [PAC]. 	<p>liquor licensing, civil protection, combating of nuisances, cemeteries and crematoria, municipal police, beaches and amusement facilities [DP].</p> <p>Provincial legislatures may alter the power and functions of a local authority only with its agreement [DP].</p> <p>A clear distinction should be drawn in each city or town between functions and powers that are linked to communities or persons and those functions and powers that are territorially linked, such as roads, sewerage, water, etc.;</p>

Constitutional Issues	Similar or unique propositions	Divergent propositions
		<p>all functions and powers that are identity forming elements to a community must be exercised by that community itself if it is preferred and possible in practice, including all education, radio, television, printed media, fine arts, music, theatre, ballet, visual arts, sport, librarianship, museums, tourism, leisure, primary health clinics, old age homes and service centres [FF].</p>
<p>6. The nature of the governmental competence of local government to be set out in the Constitution.</p>	<ul style="list-style-type: none"> • There should be a <i>right to local government</i>, being constitutionally authorised to regulate and manage a substantial share of public affairs [ANC]; • Local government should have <i>inherent powers</i>, meaning that they may perform any function not prohibited by law, besides those expressly entrusted to them [NP]; • Local government should have adequate and appropriate legislative and executive powers to allow it to govern effectively with regard to its powers and functions [NP, DP]; • Choice of organisation and personnel, financial authority, planning powers, provision of facilities, "mandatory" functions, by-laws and administrative decisions based on statute [ANC]; • Services should be rendered in a 	

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<p>developmental and environmentally friendly manner [ANC]; local government should have such legislative, executive and financial powers and functions enabling it to provide services for and to promote the development of the communities it governs; the services should be provided within a safe and healthy environment [NP, section 175(3)];</p> <ul style="list-style-type: none"> • Local government will redress imbalances of the past and improve conditions of the previously neglected communities with special attention to the rural communities [PAC]. 	
<p>7. The financial and fiscal arrangements regarding local government that should be made in the Constitution.</p>	<ul style="list-style-type: none"> • A local government will be competent to raise levies, rates and fees, based on a uniform structure, as may be necessary to exercise its functions [ANC, NP, DP]. 	<p>A local government should be entitled to establish "progressive tariffs and rates"; the (fiscal) competency of a local government must be regulated by national legislation [ANC];</p> <p>Financial allocations to local government should be provided for as in the present section 158 and also be further regulated in the Constitution; the uniformity of the taxing structures should be regulated as in the present section 178(2); the right to a share of revenue should be more tightly worded than in the present section 178(3) [NP, taken from CPG];</p>

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<ul style="list-style-type: none"> • The recommendatory/advisory role of the F&F Commission regarding intergovernmental transfers should be retained [ANC, NP and DP]. 	<p>The present section 178(2) should be phrased more tightly by replacing the reference to "a competent legislature" with a reference to the Constitution and the reference to the uniformity of the taxing structures should be retained; the financial resources should be commensurate with the responsibilities; financial viability should not mean self-sufficiency; intergovernmental transfers should not give other spheres of government a right to dictate; intergovernmental transfers should be based on objective formulae [DP];</p> <p>Local government should be "constituentially accountable to raise taxes" to be used for specific tasks in the community [ACDP].</p> <p>Local government could be represented on the F&F Commission through a national co-ordinating structure [ANC]; Three members of the F&F Commission should be designated by organised local government, at least one of whom must have expertise in local government finance [NP]; There should be greater representation of local government on the F&F Commission [DP].</p>

Constitutional Issues	Similar or unique propositions	Divergent propositions
	<ul style="list-style-type: none"> • Provisions similar to the present sections 175(3) en 188 regarding borrowing powers for local governments should be included [NP, taken from CPG]; Provisions similar to the present section 193(2) regarding the auditing the accounts and financial statements of local governments should be included [NP, taken from CPG]. 	
8. How local governments should be elected.	<ul style="list-style-type: none"> • Voters should be natural persons ordinarily resident in the area of jurisdiction [ANC, NP and DP]; • Members of provincial legislatures and employees of a local government should (also) be disqualified from being elected [ANC, NP, DP]; • Elections should be held every five years [ANC, DP]; • A dual electoral system (partly proportional, partly wards) should apply [ANC, NP and DP]. 	<p>Persons liable for the payment of property rates, rent, service charges or levies to a local government should also have the vote [NP, DP].</p> <p>Elections should take place at intervals between 3 and 5 years [NP]; Elections should not take place in the same year that national elections occur [ANC].</p> <p>60% of the members should be elected by simple majority from wards and 40% proportionally [NP]; Elections should be regulated by national legislation and/or regulations [ANC].</p>

Constitutional Issues	Similar or unique propositions	Divergent propositions
9. Democratic principles	<ul style="list-style-type: none"> • Participatory democracy and mechanisms to give effect thereto are vital; civil society and its various organisations have a crucial role in democratising and transforming South Africa; local government should promote the establishment of forums whereby community organisations can participate in local governance without compromising the powers and functions of elected local government [ANC]; • local government is accountable to its electorate, not to provincial or national government [DP]; • there should be a decentralisation of government power and a devolution of powers with the balance of power residing in the local and regional tiers of civil governance [ACDP]; • local governments will first and foremost be accountable to the people it serves; will be accessible; will promote a participative and inclusive approach in all decisions [PAC]; • the protection and extension of the interests and rights of our people outside the Volkstaat can best be served at local level, i.e. city council level [FF]. • • 	

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10. What the role of traditional leaders should be in local government.	<ul style="list-style-type: none"> • Traditional leaders should participate in local government [ANC, ACDP] 	<p>Traditional leaders should serve in and ex officio advisory capacity, subject to the principle of democratic and accountable local government; the provinces should determine the form of participation; [ANC];</p> <p>Traditional leaders should be remunerated (and thus be accountable to) their people [ACDP]; Traditional leaders should not have guaranteed ex officio membership of any elected government structure; should not receive official remuneration for occupying two different positions in government [DP]; Whether traditional leaders should be accommodated in the local government structure and what role they should play are issues to which consensus is needed [PAC].</p>