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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

SUBMISSIONS

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COMMISSION ON PROVINCIAL GOVERNMENT

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COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON INTERGOVERNMENTAL ARRANGEMENTS (RECOMMENDATIONS DOCUMENT 10)

1. INTRODUCTION

- 1.1 See introductory notes under recommendations on provincial legislative competence (Recommendation 2).
- 1.2 The term "intergovernmental relations" can be interpreted to include every aspect of the official relationships among different levels of government and between governments on the same level. These constitute a very complex and pervasive set of relationships, encompassing anything from informal and unstructured communications among officials of national, provincial and local governments to highly structured meetings or conferences involving high-level political office-bearers. It would obviously be neither feasible nor appropriate to deal with the total spectrum of intergovernmental relations in this document, which is concerned with the elements of a system to be provided for in the new Constitution.
- 1.3 In considering ways in which the new Constitution might deal with intergovernmental relations, it is important to bear in mind the South African experience in this regard under the interim Constitution; and it could also be helpful to take note of the various ways in which such matters are handled in other countries whose practices might be instructive in this context.
- 1.4 The Commission funded a research project on intergovernmental relations in countries employing a variety of methods for dealing with such relations, namely Belgium, Canada, Germany, India, Nigeria and the United States of America. These countries have multi-level governments with varying degrees of decentralisation of powers to sub-national levels of government. The methods employed by them to facilitate effective intergovernmental relations vary from structures provided for in the national constitution to wholly non-statutory arrangements. The Commission is of the opinion that the study of intergovernmental relations in these countries provides a useful background for relevant decision-making in South Africa. The edited research report will be made available to the Constitutional Assembly.
- 1.5 A synopsis of current arrangements for intergovernmental relations in South Africa is appended (See Annexures A and B).

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 The following Constitutional Principles will influence the nature of intergovernmental relations under a new Constitution -

- CP I - provides for the establishment of one sovereign state
- CP III - provides for the promotion of national unity
- CP IV - prescribes separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- CP VII - empowers the judiciary to safeguard and enforce the Constitution.
- CP XVI - prescribes the structuring of government at national, provincial and local levels.
- CP XVIII - prescribes special procedures and majorities for amendments to the new Constitution which alter or concern the powers, boundaries, functions and institutions of provinces.
- CP XIX - XXI - prescribe the criteria and other considerations for the division of powers and functions between levels of government.
- CP XXII - prohibits encroachment by national government on the geographical, functional or institutional integrity of provinces.
- CP XXIII - gives precedence to national legislative powers in unresolved disputes concerning legislative powers.
- CP XXIV - provides for local government powers, functions and structures.
- CP XXV - provides for the allocation of fiscal powers and functions to all three levels of government.
- CP XXVI - confers upon all levels of government the right to an equitable share of revenue collected nationally.
- CP XXVI - prescribes the continued existence and functions of a Financial and Fiscal Commission and representation thereon of provinces.

CP XXIX - provides for the independence of a Public Service Commission and Auditor-General in the interests of the maintenance of effective public finance and administration.

2.2 In addition to the establishment of the three levels of government and provisions relating to their powers, functions and structures, the following institutions relevant to intergovernmental relations are established by the interim Constitution -

- (a) Senate (sections 48 - 54)
- (b) Courts of law, including the Constitutional Court (particularly sections 98, 101 and 103)
- (c) Commission on Provincial Government (sections 163 - 173)
- (d) Auditor-General (section 191 - 194)
- (e) Financial and Fiscal Commission (sections 198 - 206)
- (f) Commission on Remuneration of Representatives (sections 207 - 208)
- (g) Public Service Commission (sections 209 - 211)
- (h) Minister and National Commissioner of Police and other provisions (sections 214 - 223)

These institutions, and their roles in intergovernmental relations, are described briefly in Annexure A.

3. DISCUSSION

General

3.1 The nature of the powers and functions allocated to the various levels of government within a state (country) and the method of allocation have a significant influence on the nature of intergovernmental relations within that state, and on the institutions required to facilitate sound relations. In a state where there are no provinces or regions, for instance, relations would obviously be simpler, involving only the central and local levels. In a federal state, such as the United States of America, the relationships are more complex. In South Africa, relevant aspects for the future structuring of government are still to be determined by the Constitutional Assembly. However, the Constitutional Principles require that there be three levels of government (CP XXI) and that provinces must retain powers and functions which are not substantially less than or substantially inferior to the powers and functions assigned to them in the interim Constitution (CP XVIII.2); but the Constitutional Principles also require the national government

inter alia to maintain economic unity and national security, to prevent unreasonable actions by provinces prejudicial to the interests of others or the country as a whole and to promote interprovincial commerce (CP XXI). The Constitutional Principles furthermore provide for legitimate provincial autonomy and non-encroachment by the national government upon the geographical, functional or institutional integrity of a province (CP XX and XXII). Here intergovernmental relations become even more complex. This is compounded by the creation of a further set of relationships between national and local and provincial and local governments (CP XXIV). Interprovincial relations among provincial governments, and relations among local governments, further complicate the picture.

3.2 As noted in the introductory remarks above, not all of these relationships need be dealt with in the Constitution, nor is it possible to do so. It is apparent from the appendix that a number of formalised non-statutory structures have already been created to deal with certain aspects of the relationships between national and provincial governments and among provincial governments. (See Annexure B.) The Commission has already expressed its support for the further institutionalisation of such mechanisms in an emerging system of intergovernmental forums (par 1.10 of Document 2). However, the Commission also cautioned against the creation of any perceptions that the national government dominates proceedings pertaining to provincial government and administration. The creation of such perceptions should be avoided too in forums which include local government representatives. The Commission therefore suggested that intergovernmental forums be chaired in rotation by national and provincial representatives (and by extension local government representatives in the appropriate forums) to remedy such perceptions. In developing a system of co-operative governance, attention to such detail is perhaps as important as the larger structural and constitutional issues (par 1.11 of Document 2). The Commission has also recommended that there be consultation on appropriate matters with representative local government bodies in forums to be established in terms of national and provincial laws (par. 3.2.5 of Document 9).

3.3 "Framework legislation" is a concept which frequently crops up in current discussions about intergovernmental relations. The question has been raised whether provision should be made in the new Constitution for framework legislation which would then form part of the system of intergovernmental relations between national and provincial levels of government. In the Commission's view this is not the appropriate context for the discussion of framework legislation.

The concept of framework legislation is applied for example in Germany. There the Länder have exclusive legislative power only where and to the extent that they are explicitly empowered by federal law to pass such laws (article 71), while they have concurrent legislative powers as long as and to the extent that the Federation does not exercise its legislative powers

(article 72). The Länder therefore have limited exclusive or concurrent legislative competency. Article 75 of the German Basic Law provides for the enactment of framework legislation by the Federation, which allows Länder to enact more extensive provisions within that framework. Six areas for framework legislation are listed, namely -

- (i) the legal status of persons in the public service of the Länder, municipalities and other public corporations;
- (ii) general principles of higher education;
- (iii) general legal status of the press and the film industry;
- (iv) hunting, nature conservation and landscape management;
- (v) land distribution, regional planning and water management;
- (vi) registration of residence or domicile, as well as identity documents.

In South Africa's case, while the Interim Constitution empowers Parliament to pass laws in respect of all the Schedule 6 functions, provincial laws prevail unless the national legislation fulfils the conditions of section 126(3). The provisions in section 126(3) allow Parliament to enact "framework" legislation, e.g. providing for norms and standards for certain matters. However, framework legislation could deal also with matters other than those clearly involving intergovernmental relations. For instance, it could be provided for in order to allow for further functions to be assigned to provinces, e.g. in regard to water, forestry, minerals, etc. The Commission is therefore of the opinion that framework legislation could be dealt with more appropriately in conjunction with the legislative competence of provinces, rather than under the heading of intergovernmental relations.

3.4 In regard to matters relating to intergovernmental relations that could be provided for in the new Constitution, it may be noted that the more recent constitutional practice has a tendency to provide for some aspects of intergovernmental relations in the constitutions (Germany, India, Belgium and South Africa), while older constitutions of the eighteenth and nineteenth centuries tended to omit such provisions (USA and Canada). The change is undoubtedly due to the increasing scale and complexity of governmental operations, and the interdependency of services rendered by the various institutions of government, which require such co-operation; as well as to the growing need for closer cooperation between levels of government in the national interest in a changing world order.

3.5 A preliminary report on the research referred to in paragraph 1.3 contains the following statement:

"South African circumstances - as is the case internationally - require a high level of co-operative intergovernmental relations. This means in essence that there should be a range of networks between the provinces themselves and with the national

government. [Local governments should also be included in such networks.] It does not mean that there will be no competition between the various levels of government, but rather that where required partnerships will be established.

In organising intergovernmental relations a balance must be struck between a constitutional/statutory framework and the allowing of sufficient room for spontaneous and ad hoc developments. Intergovernmental relations cannot be confined to the narrow definitions of the constitution or other statutes; on the other hand, a young democracy such as South Africa cannot adopt a laissez faire approach to the relationship between levels of government.

It must be emphasized that no single institution, whether created by the constitution or in a spontaneous manner, should be seen as the sole facilitator in intergovernmental relations. The whole body politic - legislative, executive and judicial organs, civil servants, political parties, specialist agencies and pressure groups in civil society - should combine forces to provide a dynamic network to link the levels of government in as many ways as circumstances may require.

The new constitution should be a catalyst for an intergovernmental partnership by initiating and introducing a framework for intergovernmental relations, but without attempting to dominate all other initiatives.

It is recommended that:

- (i) the new constitution should contain an overall [statement of] objectives which requires that all levels of government shall strive towards co-operation, consultation and co-ordination in the exercise of their responsibilities with the aim of serving the people of South Africa in an optimal manner. Such a provision could be used as an introduction to the allocation of powers to national, provincial and local governments*
- (ii) the importance of sound intergovernmental relations and a partnership based on mutual respect and sharing should therefore receive constitutional recognition and be mandatory on all tiers of government. This will have a legal, political and moral impact on the whole governmental fabric. It will also ensure that the constitutional and legal basis of intergovernmental agreements is explicit, which in turn will allow the judiciary to develop a jurisprudence that could serve as a framework for intergovernmental relations;*

(iii) *the Constitutional Court should in its interpretation of the constitution and its efforts to balance national and provincial interests, use the objective referred to in (i) above to develop the contours within which all levels of government must exercise their powers and functions."*

- 3.6 In the light of these observations, and in order to establish a general principle of co-operative governance, the Commission recommends that a provision requiring co-operation, consultation and co-ordination between levels of government in all functional areas which do not fall within their exclusive power, be included in the new Constitution.

However, such a provision should also determine that any higher level of government shall not exercise its powers, whether exclusive or concurrent, so as to encroach upon the geographical, functional or institutional integrity of any lower level of government [CP XXII and section 174(4)].

3.7 A System of Intergovernmental Relations

The need to develop an effective system of intergovernmental relations for South Africa is obvious. Such relations can be broadly classified as addressing three categories of activity, namely

- Legislative activities
- Executive activities
- Administrative activities

There may be a considerable overlap between the categories. However, there could also be considerable differences in the nature of the institutions which may be provided to facilitate co-operation, co-ordination and consultation between governmental structures in each of the broad categories.

3.8 Relations in respect of legislative activities

3.8.1 The assignment of legislative powers and functions between levels of government is usually dealt with in the national constitution. It is therefore appropriate that a constitution should also provide for any institutions considered necessary to allow for regional participation in the national legislature and/or to deal with any conflict among legislatures which may arise out of a division of legislative powers. (In Germany for instance, the Bundesrat has been provided for in Article 50 of the Basic Law.)

3.8.2 The Senate

In South Africa, the interim Constitution provides for a Senate which could fulfil a role in intergovernmental relations in the legislative process. It appears, however, that up to now the Senate has not functioned

effectively in this regard. The Commission is of the opinion that a properly composed second chamber can play a significantly stronger role in facilitating intergovernmental co-operation particularly in respect of legislation affecting provinces and even local government. The Commission recommended in its document on a second chamber of Parliament (Document 4) that the Senate should be strengthened to this end, that it should be composed of representatives of the provincial legislatures and play a more significant role in regard to legislation affecting provinces, and that representatives should be required to report back to their respective legislatures. It was also recommended that the Senate be given an enhanced role in regard to legislation affecting the powers and functions of provinces. The Commission is furthermore aware of suggestions that the second chamber should have a permanent committee on intergovernmental relations. However, this is not a matter that needs to be addressed in the Constitution.

3.8.3 The Commission recommends that the Senate, constituted as recommended in Document 4 be retained and that it actively perform the envisaged role in intergovernmental relations.

3.8.4 Commission on Remuneration of Representatives

Although this Commission is not mandated to play a role in the legislative process, it is included in this category because of its co-ordinating function in regard to the remuneration of legislators of all levels of government. The CPG considers the retention of this Commission to be of great importance. Its role could be expanded to include the determination of the remuneration of traditional leaders as such, and the CPG recommends accordingly. The recommendations of the Commission on Remuneration of Representatives should furthermore be binding upon all levels of government, subject only to the availability of funds and the approval of the President.

3.8.5 Courts of law (including the Constitutional Court)

The courts are vital as final arbiters in disputes between levels of governments or governments on the same level, concerning the exercise of their legislative, executive and administrative powers and functions. However, the Commission is of the opinion that court actions should be invoked only as a last resort after all political and administrative processes to reach a solution to any problems have been exhausted. Courts tend to decide whether a party to a dispute has acted within the parameters prescribed by statute or common law rather than seeking a solution for the problems which led to the dispute. Other mechanisms are required to assist the disputing parties to work out mutually satisfactory solutions.

3.8.6 Local government

Section 174 of the interim Constitution provides for the autonomy, within limits, of local government, prohibits encroachment on its powers, functions and structures by Parliament or a provincial legislature and provides for publication of proposed legislation which materially affect its status, powers and functions or its jurisdictional boundaries, for comment and representations. The Commission has in general recommended the retention of similar provisions in the new Constitution (paragraph 3.2.4 of Document 9). In Document 9 it has also recommended the establishment of formal consultation processes between national and provincial governments and representative local government bodies in forums to be established in terms of national and provincial laws (paragraph 3.2.5).

- 3.8.7 The Commission is of the opinion that no further constitutional provisions are required for the resolution of possible conflict in regard to the legislative powers of the national and provincial levels of government. If such a conflict does arise, a mediation committee could be formed, consisting either of an equal number of members of each Chamber (with the Senate representing the provinces), or else of Parliament and the provincial legislature(s) involved. The object of these mediation committees would be to arrive at compromise proposals in order to resolve such conflicts. Only if such mediation proves unsuccessful would it become necessary, as a last resort, to refer a dispute to the Court.

3.9 Relations in respect of executive activities

- 3.9.1 Annexure B contains information in respect of a number of formal non-constitutional structures established since the commencement of the interim Constitution to facilitate intergovernmental executive relations.
- 3.9.2 The following institutions in this category are of particular importance -

The Intergovernmental Forum - The Forum is composed of four ministers and the nine provincial Premiers. The President and Executive Deputy Presidents attend meetings of the Forum twice a year. Meetings are chaired by the President or a Deputy President or in their absence by the Minister for Provincial Affairs and Constitutional Development. The Commission is of the opinion that the manner in which this forum is presently constituted and conducted could create the impression that it is an instrument of and dominated by the national government. Such an important institution concerned with intergovernmental relations should be restructured to reflect a greater equality among the participating governments. It should manifestly be seen to be a forum in which

national ministers and premiers have equal status. For this reason it should not be perceived to be functioning under a Cabinet minister of the national government. The meetings should be chaired on a rotational basis.

Such a forum should have plenary meetings in which reports are considered and adopted. Plenary meetings of the forum should be open to the public. The preparatory work should be done by committees for specific functional areas with the support of the forum's own professional and administrative staff. It could, but need not necessarily, incorporate some of the issues which are presently dealt with by the Inter-departmental Ministerial Forums (MINMEC). The forum could also have a special mediation committee to address conflicts in regard to the executive functions of the two levels of government.

The question whether the Constitution should establish such a body is dealt with in paragraph 4.4 below in the proposals in regard to new constitutional provisions.

The Premiers' Forum - This Forum has been established by the provincial governments to discuss matters of mutual interest and more specifically to prepare Premiers for meetings of the Intergovernmental Forum. The Forum's discussions could be broadened to include matters involving actual or potential conflict between provinces or between national government and provinces. As with the Intergovernmental Forum, the Premiers' Forum could play a very important role in intergovernmental relations.

MINMEC - These interdepartmental forums have been established between national line-function Ministers and Members of Executive Councils responsible for relevant functions. They meet on an *ad hoc* basis, *inter alia* to consider policy matters, co-ordinate legislation, plan joint programmes, exchange information, etc. Such forums could perhaps be incorporated into the Intergovernmental executive relations structure recommended below.

3.10 Relations in respect of administrative activities

3.10.1 The following institutions are provided for in the interim Constitution to deal with specific aspects of intergovernmental administrative relations -

3.10.2 Auditor-General - it is self-evident that the role of the Auditor-General is to ensure the regularity and efficiency of the collection and expenditure of revenues in a uniform manner at all levels of government. The retention of the Auditor-General's functions in the new Constitution is recommended.

3.10.3 Financial and Fiscal Commission - the Commission's recommendations in regard to the FFC are contained in its Document 7.

3.10.4 Public Service Commission - the Commission's recommendations in respect of staff matters are contained in Document 6. The Public Service Commission, under whatever name is to be decided upon, should also be instrumental in determining levels of remuneration and conditions of service for local government employees. It should also be consulted in regard to the remuneration and conditions of service of the staff of provincial legislatures (Recommendations Document 3).

3.10.5 The Commission on Provincial Government was created by the interim Constitution with the specific objective to facilitate the establishment of provincial government and with the competency -

- (a) to advise the Constitutional Assembly on the development of a constitutional dispensation with regard to provincial systems of government (including local government) ;
- (b) to advise the national government or a provincial government on the establishment and consolidation of administrative institutions and structures in a province or on any matter arising out of the application of section 124 of the interim Constitution, i.e. the establishment of provinces in terms of that Constitution; and
- (c) to make recommendations on the rationalisation of statutory enactments or public sector resources directed at the introduction and maintenance of an effective system of provincial government.

It was obviously intended that the Commission should exist only for the duration of the interim Constitution to facilitate the matters mentioned above. The Commission decided at its first meeting that it had a limited lifespan and would disband upon the adoption of a new Constitution. The Commission still holds that view and consequently recommends that the relevant provisions be omitted from the new Constitution.

3.10.6 The Commission did not investigate the position of the South African Police Service as such as this was not considered to fall within its mandate to facilitate the establishment of provincial government.

4. NEW CONSTITUTIONAL PROVISIONS

- 4.1 As in so many other matters, the institutionalisation of intergovernmental relations may be viewed from maximalist or minimalist positions. Should nothing be said in the Constitution, leaving all to the process of time? Or should provisions be laid down, either broadly or in close detail?
- 4.2 The constitutional provision for intergovernmental relations bears little relation to the "federal" debate as such. A classic federation, such as the USA, makes no constitutional provision in this regard. However, any modern state with multi-level government - irrespective of the distribution of powers among those governments - confronts the question whether inter-governmental relations should be constitutionalised and, if so, to what extent and by means of which institutions.
- 4.3 The countries studied in the research project commissioned by the CPG show a wide variety of practices.

The Nigerian constitution, for example, created a large number of institutions ranging from the Council of State to a Police Council to deal with inter-state matters. A National Council on Inter-governmental Relations was created by Decree in 1992 to -

- monitor the operations of the federal system and give continuing attention to intergovernmental relations in the Nigerian federal system;
- study, conduct research and maintain data on intergovernmental relations;
- recommend solutions to problems of intergovernmental relations and provide necessary forms of improvement;
- play mediatory roles towards resolving conflicts between the Federal, State and Local Governments; and
- establish contacts with other organisations with similar objectives.

The Indian constitution provides in more general terms for the establishment of an inter-state council to -

- inquire into and advise upon disputes between states;
- investigate and discuss subjects in which some or all of the states or the Union and one or more states have a common interest;
- make recommendations upon any such subject, particularly in regard to better co-ordination of policy and action with respect to that subject.

In the United States of America the Advisory Council on Intergovernmental Relations and 26 State Councils are non-statutory creations involved in resolving inter-state issues. In Canada, interactions are even more unstructured.

By contrast, in Germany the Bundesrat is provided for in the Basic Law.

The manner in which intergovernmental relations are provided for is obviously a product of each country's experience. These experiences do not provide models for South Africa to follow, but they may be instructive.

It is clear that in modern states with multi-level government, provision must be made for institutionalising intergovernmental relations, either in the Constitution or by other means. The case for constitutional provisions must be made on the basis of a country's experience in the desirability of establishing certain formal channels for articulating interests and entering into intergovernmental discussions, and for exercising checks; as well as for structures capable of playing an independent mediating role in intergovernmental relations.

4.4 Council for Intergovernmental Executive Relations

4.4.1 The Commission is of the opinion that intergovernmental executive relations are of such complexity and importance in South Africa that provision should be made in the new Constitution for an institution to co-ordinate and facilitate such relations. Provisions have indeed been made in the Interim Constitution for bodies to deal with Intergovernmental relations in the legislative category (e.g. the Senate) and the administrative category (e.g. the Public Service Commission). However, no provisions were made for the extremely important category of executive relations. This omission should be corrected in the new Constitution.

4.4.2 In the research report referred to in paragraph 1.3 above, it was proposed that a National Commission on Intergovernmental Relations should be provided for in the new Constitution. The functions of such a commission would be *inter alia* to monitor the operation of national-provincial-local relations, to undertake research relevant to the formulation of policy on intergovernmental relations, to collect relevant data, to propose options for solving conflict between levels of government and to assist with the establishment of intergovernmental partnerships within or between provinces. It was suggested that the composition of the commission should provide a scientific, expert and technical basis for its functioning and should enhance its acceptability and credibility at all levels of government.

- 4.4.3 The Commission considered this proposal and is of the opinion that it has merits. However, the Commission is not convinced of the need to create a new structure unconnected with government to deal with intergovernmental relations. Apart from problems which would undoubtedly arise in regard to its composition, the persons to serve on it, and its general acceptability and credibility, such a commission would tend to create a new bureaucracy whose functions would overlap with institutions already established to deal with intergovernmental relations and which will continue to exist in a new constitutional dispensation, e.g. the Intergovernmental Forum.
- 4.4.3 In paragraph 3.9.2 the Commission highlighted the importance of the Intergovernmental Forum as a facilitator of intergovernmental executive relations. The Commission is of the opinion that this Forum could be the basis for a body to be established by the Constitution to deal with intergovernmental executive relations. The Commission considers it necessary, however, that it should be restructured significantly in order to function effectively as the main co-ordinating and facilitating institution for such relations in South Africa. The framework for its composition and activities should be provided for in the new Constitution.
- 4.4.4 The Commission has prepared draft constitutional provisions for the establishment of a Council for Intergovernmental Executive Relations (see Annexure C) to replace the non-statutory Intergovernmental Forum. The proposed provisions are discussed in the following paragraphs.
- 4.4.5 Composition

It is proposed that the Council consist of the nine Premiers of the provinces and not more than nine Ministers appointed by the President. This should give the Council the necessary status as an institution for intergovernmental executive relations (a status almost approaching that of the Bundesrat in Germany). The composition will allow for a balancing of national and provincial interests, although it will be in the discretion of the President to nominate fewer than nine Ministers. One such minister should be the Minister responsible for local government matters. Decisions made by this body will carry considerable weight because of its composition, although some of its decisions may have to be ratified by Cabinet and provincial Executive Councils. Provision is made for representation of a Premier or Minister when unable to attend. Membership of the Council will be terminated if a member vacates office as Premier or Minister.

4.4.6 Chairpersons

The proposal is that the Council elect its own Chairperson and Deputy Chairperson for such period as determined by itself. This will allow for the rotation of the chair among all members and is a significant departure from the present practice in the Intergovernmental Forum. It would reflect the equality of members of the Council in matters pertaining to intergovernmental relations.

4.4.7 Objects and functions

The object of the Council will be to facilitate effective co-operation, co-ordination and consultation in executive matters among all levels of government and between governments on the same level. This should be seen as an activity distinct from the ordinary legislative processes. The Council will be competent -

- (a) to monitor the operation of intergovernmental executive relations among all levels of government and between governments at the same level;
- (b) to issue directives regarding the establishment, maintenance and improvement of a system of intergovernmental executive relations;
- (c) to facilitate the development and co-ordination of policy in matters of mutual interest;
- (d) to facilitate mediation in disputes between national and provincial and between provincial executive institutions in regard to their executive powers and functions;
- (e) to provide assistance in regard to any matter relating to intergovernmental relations between a provincial government and local governments or between local governments in a province at the request of any such government;
- (f) to monitor and facilitate the development of the capacity of the provinces' administrative structures to exercise their powers and perform their functions efficiently and effectively;
- (g) to perform any function which the Council considers to be relevant or ancillary to its functions; and
- (h) to publish reports from time to time on its activities and on matters which have engaged its attention and to table an Annual Report in Parliament and the provincial legislatures.

- 4.4.10 The draft provisions also deal with the remuneration of members of committees and persons co-opted by committees who are not employed by the state or a local government. No provision in this respect need be made for members of the Council as they will all be in the employ of the state.
- 4.4.11 It is particularly important that the Council should have the power to appoint staff and manage its affairs without having to rely completely on services rendered by a department of the national or provincial governments. This independence is provided for in the draft text. It will, however, not preclude the Council from utilising the services of an existing department on an agency basis if this proves to be more economical. Its line staff should be seen to be independent of any departmental structure. Staff from government departments, particularly those presently supporting the functioning of structures such as the Intergovernmental Forum, could be seconded or transferred to the administration of the Council.
- 4.4.12 Finally, the Council is empowered to make rules and determine procedures for the conduct of its own meetings and activities, including those of committees established by the Council.
- 4.5 The Commission is of the opinion that a Council established in the manner described above, would contribute immensely to the achievement of co-operative intergovernmental relations in South Africa. Through its committees and the activities of its staff, it would be able to identify at an early stage areas in regard to which intergovernmental conflict might arise, and to facilitate and support timely action to prevent such conflict from impacting negatively on government administration. It would strengthen the processes of joint policy-making and assist in improving intergovernmental relations at all levels. Particularly in relation to provincial and local levels of government, the Council could identify needs for the development of administrative capacity, and facilitate such development. In general, it would foster processes of co-ordination and consultation among governments and government structures, and play a key role in a system of co-operative governance.
- 4.6 The Commission has been careful not to propose powers and functions for the Council of such a kind as to create the impression that it could become a "Super Cabinet" which will consider all policy matters concerning more than one level of government. The Council should deal primarily with matters concerning relations among governments rather than with the contents of policies, so as not to cause undue delay in the development and implementation of policy.
- 4.7 The Commission recommends the establishment of a Council on Intergovernmental Executive Relations as described in the paragraphs above and the draft constitutional text in Annexure C.

PROVISIONS OF THE INTERIM CONSTITUTION RELATING TO INTERGOVERNMENTAL RELATIONS

(a) The Senate

Sections 48 - 54, 61

The Senate is composed of 10 senators for each province, nominated by the parties represented in a provincial legislature, on a proportional basis related to the number of seats held by a party in the provincial legislature.

The Senate's purpose is not defined explicitly, but clearly the intention was that, in general, it would afford its members the opportunity to represent provincial interests in the national legislature. It is common cause that the Senate has not functioned effectively in this regard. See *inter alia* the CPG's Preliminary Recommendations on a Second Chamber - Document 4.

The Senate's constitutional role as a guardian of provincial interests is seen specifically in sections 61 and 62.

In terms of section 61, Bills affecting the boundaries or the exercise or performance of the powers and functions of the provinces must be passed separately by both Houses; and a Bill (other than one amending the Constitution in terms of section 62) affecting such matters in the case of a particular province or provinces, requires the approval of a majority of senators from the province or provinces in question.

Constitutional amendments must ordinarily be adopted by a joint sitting of both Houses, and require a majority of at least two-thirds of their combined members. However, section 62 specifies *inter alia* that amendments concerning the legislative competence of provinces (section 126) or their executive authority (section 144) must be passed separately by both Houses, by majorities of at least two-thirds of the members of each House.

(b) Courts of Law

The Constitutional Court

Sections 96 - 100, 102

Consisting of a President and 10 other judges, the Constitutional Court has jurisdiction as the court of final instance over all matters relating to the interpretation, protection and enforcement of the Constitution's provisions, including any dispute of a constitutional nature between organs of state at any level of government [section 98(2)(e)].

The Supreme Court, and other Courts of Law

Sections 101, 103

Within its area of jurisdiction, a provincial or local division of the Supreme Court has the powers of the Constitutional Court (in terms of provisions in section 98) to exercise jurisdiction *inter alia* in respect of disputes over the constitutionality of any executive or administrative act or conduct of any organ of state, and any dispute of a constitutional nature between local governments or between a local and a provincial government.

Other courts of law may serve as a point of entry in intergovernmental disputes. In all other courts of law, if the validity of a law or provision is questioned on constitutional grounds, the presiding officer may postpone proceedings so that application may be made to a provincial or local division of the Supreme Court to deal with the issue or refer it to the Constitutional Court.

(c) The Commission on Provincial Government

Sections 163 - 173

The Commission on Provincial Government consists of a minimum of 10 and a maximum of 15 members, appointed by the President. At least one member must be appointed from each province with the concurrence of the province's Premier.

The object of the Commission is to facilitate the establishment of provincial government.

To that end, the CPG is competent to advise the Constitutional Assembly on the development of a constitutional dispensation with regard to provincial systems of government. Such advice shall *inter alia* include recommendations regarding the finalisation of the number and the boundaries of the provinces; the constitutional dispensation of such provinces; the final delimitation of powers and functions between national and provincial government; fiscal arrangements between national and provincial governments; and the powers and functions of local government.

The CPG is also competent to advise the national government and provincial governments on the establishment and consolidation of administrative institutions and structures in provinces, and on any matters arising out of section 124 concerning the establishment of provinces.

The CPG is furthermore competent to make recommendations to the national government or provincial governments on the rationalisation of statutory enactments or public resources directed at the introduction and maintenance of an effective system of provincial government.

(d) The Auditor-General**Sections 191 - 194**

The Auditor-General's appointment must be approved by a majority of at least two-thirds of the members of the National Assembly and the Senate present and voting at a joint meeting.

The Auditor-General shall *inter alia* audit and report on all the accounts and financial statements of all the accounting officers at national and provincial level of government. He shall also audit and report on all the accounts and financial statements of any local government whose accounts and financial statements are required in terms of a law to be so audited.

At the request of the President or Parliament, the Auditor-General shall also conduct performance audits.

(e) The Financial and Fiscal Commission**Sections 198 - 206**

The FFC must make recommendations to the relevant legislative authorities regarding the financial and fiscal requirements of the national, provincial and local governments. Matters within its purview include fiscal and financial policies; equitable allocations to national, provincial and local governments from revenue collected nationally; criteria for the allocation of financial and fiscal resources; taxes, levies, imposts or surcharges that a provincial government intends to levy; and the raising of loans by a provincial or local government, and the applicable financial norms.

The Commission's membership consists of a (full-time) chairperson and deputy chairperson, appointed by the President in consultation with the Cabinet; and 16 other (part-time) members: nine persons, each of whom is designated by a province's Executive Council, and appointed by the President, and seven other members appointed by the President on the advice of the Cabinet, at least one of whom must have expertise in local government finance.

(f) The Commission on Remuneration of Representatives**Sections 207 - 208**

The Commission, constitutionally required to be established by an Act of Parliament, shall make recommendations to Parliament, the provincial legislatures and local governments on matters concerning the remuneration and allowances of members of all elected legislative bodies of the national government, and of provincial and local governments, including members of the provincial Houses of Traditional Leaders and the Council of Traditional Leaders.

(g) **The Public Service Commission****Sections 209 - 211**

The Public Service Commission, with a minimum of three and a maximum of five members, is appointed by the President. It is competent *inter alia* to make recommendations, give directions, and conduct enquiries with regard to the organisation and administration of departments and the public service; conditions of service and personnel practices; and the promotion of efficiency and effectiveness in departments and the public service. When requested, the PSC is competent to advise the President, a Minister or a member of the Executive Council of a province in regard to any matter relating to the public service or the employment, remuneration or other conditions of service of functionaries employed by any institution or body receiving funds wholly or partly appropriated by Parliament or a provincial legislature. The PSC may also exercise other powers and functions entrusted to it by a law of a competent authority.

Provincial public service commissions may be provided for by provincial legislatures. A provincial public service commission functions in respect of public servants employed by the province, subject to norms and standards applying nationally. It may also exercise and perform other powers and functions of the Public Service Commission assigned to it by the President with the approval of the Premier of the province.

(h) **The Police Board of Commissioners, and the Committee of the Minister and MECs****Sections 214, 216 - 220**

Section 214 requires that an Act of Parliament establish and regulate a South African Police Service structured at both national and provincial levels, which shall function under the direction of both the national government and the various provincial governments.

- (i) Section 220(2) requires that this Act shall provide for the appointment of a Board of Commissioners, consisting of the National Commissioner and the Provincial Commissioners, to promote cooperation and coordination in the Service.

The President appoints the National Commissioner, who exercises executive command of the Service subject to the directions of the Minister. The National Commissioner is in turn responsible for the appointment of provincial commissioners subject to the approval or veto of the relevant Members of the Executive Councils. A Provincial Commissioner exercises responsibilities subject *inter alia* to the National Commissioner and the directions of the relevant MEC.

- (ii) **Section 220(1) specifies that a committee, consisting of the Minister and the respective Members of the provincial Executive Councils, shall be established to ensure the effective coordination of the Service and effective cooperation between the various Commissioners.**

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ANNEXURE B

FORMAL NON-CONSTITUTIONAL STRUCTURES ESTABLISHED TO FACILITATE INTERGOVERNMENTAL RELATIONS

The national government and the respective provincial governments agreed on 12 August 1994 to establish the following structures:

- (a) An Intergovernmental Forum;
- (b) A Technical Intergovernmental Committee;
- (c) Ministerial Forums (MINMEC); and
- (d) Interdepartmental Technical Committees.

In addition, the provinces have established a Premiers' Forum.

(a) Intergovernmental Forum

The Intergovernmental Forum is a structure for consultation and joint decision-making between ministers of the national government and the Premiers of the provinces on matters of mutual concern.

The Forum meets on a monthly basis. The President and Executive Deputy Presidents attend twice a year. Problems have been experienced because the agenda is over-crowded; but this may be a passing phase.

Decisions taken by the Intergovernmental Forum are binding on the national and provincial governments only after being ratified by the Cabinet and the respective Executive Councils.

The Forum's permanent members are the Minister for Provincial Affairs and Constitutional Development, the Minister of Finance, the Minister for the Public Service and Administration, the Minister without Portfolio, and the provincial Premiers. Their respective directors-general are also in attendance.

The Minister for Provincial Affairs and Constitutional Development chairs the meeting when the President or the Executive Deputy Presidents are not present.

(b) Technical Committee to the Intergovernmental Forum

This committee is a supporting mechanism, which undertakes the preparatory groundwork for the Forum.

(c) **Interdepartmental Ministerial Forums (MINMEC)**

These forums have been established between national line-function Ministers and the Members of Executive Councils responsible for the relevant functions. They meet on an *ad hoc* basis, *inter alia* to consider policy matters, coordinate legislation, plan joint programmes, exchange information, etc.

The national Minister chairs the forum.

(d) **Interdepartmental Technical Committees**

Committees consisting of senior officials provide the MINMEC forums with technical advice and support. These committees meet more regularly than the forums.

The director-general of the national line-function department concerned chairs the committee. The national department provides a secretariat for the Interdepartmental Technical Committee and also for the Ministerial Forum concerned.

(e) **The Premiers' Forum**

The Premiers' Forum, established by the provincial governments, meets monthly to discuss matters of mutual interest.

Potentially, this body could develop a specific focus which might place it in an adversarial relationship with the national government on occasion.

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DRAFT CONSTITUTIONAL TEXT ON INTERGOVERNMENTAL EXECUTIVE RELATIONS

Establishment of Council for Intergovernmental Executive Relations

1. (1) There shall be a Council for Intergovernmental Executive Relations consisting of
 - (a) the nine Premiers of the provinces and
 - (b) not more than nine Ministers appointed by the President.
- (2) Whenever it is not possible for a Premier or Minister appointed in terms of subsection (1)(b) to attend any meeting of the Council -
 - (a) the Premier may nominate a member of the Executive Council of the province;
 - (b) the President may nominate another Minister to represent him/her at such meeting.
- (3) The membership of a member of the Council shall terminate when he or she vacates the office which entitles him or her to such membership or in the case of a Minister, if the President revokes his or her nomination.
- (4) The Council shall appoint one of its members to be the Chairperson and one member to be the Deputy Chairperson for a period determined by the Council.
- (5) (a) If the Chairperson is absent or unable to perform his or her functions as Chairperson, the Deputy Chairperson shall act as Chairperson, and if both the Chairperson and the Deputy Chairperson are absent or unable to perform the functions of the Chairperson, the Council shall elect another member to act as Chairperson.
 - (b) While acting as Chairperson the Deputy Chairperson or such member may exercise the powers and shall perform the functions of the Chairperson.

Objects and functions of the Council

2. (1) The object of the Council is to facilitate effective co-operation, co-ordination and consultation in executive matters among all levels of government and between governments on the same level.

- (2) The Council shall be competent -
- (a) to monitor the operation of intergovernmental executive relations among all levels of government and between governments at the same level;
 - (b) to issue directives regarding the establishment, maintenance and improvement of a system of intergovernmental executive relations;
 - (c) to facilitate the development and co-ordination of policy in matters of mutual interest;
 - (d) to mediate or to facilitate mediation in disputes between national and provincial and between provincial executive institutions in regard to their executive powers and functions;
 - (e) to provide assistance in regard to any matter relating to intergovernmental relations between a provincial government and local governments or between local governments in a province at the request of any such government;
 - (f) to monitor and facilitate the development of the capacity of the provinces' administrative structures to exercise their powers and perform their functions efficiently and effectively;
 - (g) to perform any function which the Council considers to be relevant or ancillary to its functions; and
 - (h) to publish reports from time to time on its activities and matters which have engaged its attention and to table an Annual Report in Parliament and the provincial legislatures.

Meetings of Council

3. (1) The first meeting of the Council shall be held within 30 days of its establishment at a time and place to be determined by the President, and subsequent meetings shall be held at a time and place determined by the Council or, if authorised thereto by the Council, by the Chairperson.
- (2) A quorum for a meeting of the Council shall be not less than two-thirds of all its members.
- (3) A decision of a two-thirds majority of all the members of the Council shall constitute a decision of the Council.
- (4) All the decisions of the Council shall be recorded.

Committees

4. (1) The Council shall from among its members or from persons appointed in terms of section 4(2) establish a Committee to deal with local government relations and may establish such other committees as it may deem necessary for the execution of its functions.
- (2) The Council may appoint persons to serve as members of a committee established in terms of subsection (1) and such members shall be entitled to take part in the proceedings and to vote at any meeting of such committee, provided that on the invitation of the Council a representative local government institution for each province shall be entitled to nominate one person to serve as a member of a committee established to deal with local government matters.
- (3) The Council shall designate one of the members of a committee as chairperson thereof, and if any such chairperson is absent from a meeting of the committee the members present shall elect one from among their number to act as chairperson.
- (4) The Council may, subject to such directions as it may issue from time to time, delegate any power granted to it by or under section 2 to such a committee.
- (5) The Council shall not be divested of a power so delegated and the performance of a function so authorised, and may amend or rescind any decision of a committee.

Co-option of persons to committees

5. (1) A committee may co-opt any person to serve on it or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.
- (2) Such a person may take part in the proceedings of the committee in connection with such matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

Remuneration of members of Committees and other persons

6. Members of committees established in terms of section 4 and persons referred to in section 5 who are not in the employment of the state or a local government, shall be paid such remuneration and allowances as the Minister responsible for national financial affairs may determine.

Power to appoint staff and manage its affairs

7. (1) The Council may appoint such staff as it may deem necessary for the efficient performance of its functions and administration, and may, after consultation with the Public Service Commission, determine the remuneration and conditions of service of staff members who are not public servants seconded to the service of the Council.
- (2) The Council shall be entitled to incur expenditure during the exercise of its functions which shall be paid from money set aside by Parliament.

Rules and procedures

8. The Council may determine rules and procedures for the conduct of its meetings and activities and for the conduct of the meetings and activities of committees established in terms of section 4.

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