

2/3/1/24

**CONSTITUTIONAL
ASSEMBLY**

**MANAGEMENT
COMMITTEE**

**THURSDAY
23 FEBRUARY 1995
(08h00)
V16**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE MANAGEMENT COMMITTEE

Please note that a meeting of the above committee will be held as indicated below :

Date : Thursday 23 February 1995

Time : 08h00 - 10h00

Venue : V16

AGENDA

- 1. Opening**
 - 2. Minutes: Pages 2 - 6**
 - 3. Matters Arising: See Agenda Items Below**
 - 4. Directorate Report:**
 - 4.1 Chairpersons' Forum: Pages 7 - 8**
 - 4.2 Language Sub-Committee: Page 9**
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 - 4.4 Administrative Matters: Pages 9 - 10**
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 - 4.6 Work Schedule: Pages 16 - 17**
 - 5. Theme Committee 3 Report: Pages 18 - 70**
 - 6. Theme Committee 1 Matters: Pages 71 - 72**
 - 7. Constitutional Committee Agenda for 27 February 1995: Page 73**
 - 8. AOB**
 - 9. Closure**
-

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

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CONSTITUTIONAL ASSEMBLY

MINUTES OF MANAGEMENT COMMITTEE MEETING THURSDAY 16 FEBRUARY 1995 (AT 08H00)

PRESENT

Ramaphosa MC (CHAIRPERSON)

Chabane OC
Eglin CW
Mabandla BS
Meshoe KR
Meyer R

Moosa MV
Mulder C
Smith PF
Van Breda A
Wessels L (Deputy Chairperson)

Apologies: Viljoen C

In attendance:

Ebrahim H, Lilienfeld P, Zondo L, Sparg M, Grové G, and Keegan M.

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 08h06. The agenda was adopted with the following additions: 8.1 Technical Experts and 8.2 The Constitutional Principles.
- 1.2 The meeting noted that Dr. C. Mulder of the FF would stand in for Gen. C. Viljoen at this meeting of the Management Committee.

2. MINUTES

- 2.1 The Minutes of the 10 February 1995 meeting of the Management Committee were adopted with one amendment: it would be noted that Mr. C. Eglin, for the DP, raised the concerns expressed in paragraphs 5.3.1(i) and 5.3.1(ii).
- 2.2 Mr. Ramaphosa ruled that when members raised matters on behalf of their parties, it would be noted in the minutes.

3. MATTERS ARISING

Mr. Ebrahim reported that the Law Advisors' opinion on the relationship between the CA and the Commission on Provincial Government was nearing finalisation and that a joint meeting of the Chairpersons and the Commission on Provincial Government to discuss the document would be held before it was forwarded to the Management Committee. The meeting agreed to defer

the matter the next meeting of the Management Committee.

4. GUIDELINES FOR THEME COMMITTEE REPORTS

4.1 Mr. Ebrahim spoke to the document entitled, "*Guidelines: Theme Committee Reports*," tabled at the meeting.

4.2 The meeting adopted the guidelines with two amendments:

- i. The guidelines would apply to Theme Committees' final reports, not to their progress reports; and
- ii. Political party submissions on the block of work done would be attached to reports to provide reference on party positions.

5. LANGUAGE ISSUE

5.1 Mr. Ramaphosa stood down from the Chair and was replaced by Mr. Wessels.

5.2 Mr. Meyer spoke to the NP submission entitled, "*Language Matters - Submission*," tabled at the meeting. Mr. Meyer suggested that the Constitutional Assembly adopt a policy of using all 11 official languages. Mr. Ramaphosa responded that the submission, itself, implied that Afrikaans be added first, and the other languages only later, which he strongly rejected. Mr. Meyer denied the charge.

5.3 Mr. Wessels reported that the Chairpersons had repeatedly discussed the matter, amongst themselves and with the Administration, but had identified technical, administrative and financial problems with using all 11 languages. Mr. Ebrahim noted that the practicalities needing consideration were:

- i. Regarding minutes and documentation packs: translation would be costly and slow the process down;
- ii. Regarding CA discussions: only a few venues were available with facilities for simultaneous translation, although it is noted that should a speaker request to speak not in English but another language, translation would be made available if prior notification were given to the Administration.
- iii. Regarding CA advertisements and other publications, like leaflets and brochures, these were already done in all the official languages; and
- iv. Regarding the publication, "Constitutional Talk:" translation into all 11 languages would cost between R1 million and R2

million.

- 5.4 The meeting neared consensus on the question of communication within the Constitutional Assembly, including minutes, documentation packs, and discussions: these could continue to be done in English. The meeting noted, however, the offer of translation if adequate notification were given.
- 5.5 The meeting also agreed that certain issues of "Constitutional Talk" would use a mixture of languages for its articles, provided the Administration was not subscribed to using a particular language for a particular article.
- 5.6 The meeting agreed to create a committee to study the matter. Parties would forward names of its representatives on the committee to the Administration by no later than 12h00 on Monday, 20 February 1995.

6. THEME COMMITTEE 1 REPORT

- 6.1 The meeting noted the document entitled, "*Theme Committee 1 Report of Block 1,*" included in the documentation.
- 6.2 The meeting noted that the report of Theme Committee 3 would be forwarded to the Administration for tabling at the Constitutional Assembly on Monday, 20 February 1996.

7. REPORT ON THE CONSTITUTIONAL ASSEMBLY PROGRAMME FOR 20 FEBRUARY 1995

- 7.1 Mr. Ebrahim updated the document entitled, "*Constitutional Assembly Programme for 20/2/95,*" by proposing that the meeting begin with a brief report from the Administration to the CA, including an amendment to increase the number of Technical Committee members. Theme Committee reports would follow.
- 7.2 The meeting agreed to the proposed agenda.

8. ANY OTHER BUSINESS

8.1 TECHNICAL EXPERTS

- 8.1.1 The meeting noted the letter from Prof. A. Thomashausen, tabled at the meeting.
- 8.1.2 The meeting agreed that because Mr. Thomashausen was not a South African citizen, he was not eligible for appointment as a Technical Expert.

8.1.3 The meeting agreed, noting the objection by the IFP, to request that the Sub-Committee to Recommend Technical Experts reconvene to identify a replacement for Prof. Thomashausen.

8.2 CONSTITUTIONAL PRINCIPLES

8.2.1 Ms. Zondo introduced that the document entitled, "*Constitutional Principles*," tabled at the meeting. She reported that it had been produced by the CA-appointed advertising agency and was for noting.

8.2.2 The meeting noted that this kind of summarisation could be "dangerous" in that it lent itself to interpretation of the principles. It was agreed the Law Advisors would study the document and report back to a further meeting. Parties would also study the document. The meeting further agreed to ask the agency to consider ways of educating the public on the importance of the principles without necessarily publishing all of the principles.

8.3 IFP SUBMISSION ON THEME COMMITTEE REPORTS

It is noted that various IFP documents were tabled at the Constitutional Committee meeting of 13 February 1995, entitled as follows :

- * " Comments on the document entitled : Report of the Technical Committee to Theme Committee 1 " dated 9 February 1995;
- * " IFP proposal for the drafting of ... Draft Discussion document : first report of Theme Committee 4 on Block 1 of the Work Programme", undated;
- * "Submission to the Management Committee on the document titled " Proposal on the drafting of a new constitution", undated;
- * " The status of international mediation in terms of the agreement for peace and reconciliation", undated; and
- * " IFP proposed draft to the Theme Committee For : Report to the Constitutional Committee from Theme Committee NO 2 Structures of Government on Block 1 : Separation of Powers ", undated.

It was noted that one of these documents, the first listed above, was the document Mr Smith spoke to in the meeting of the Constitutional Committee of 13 February 1995.

8.4 POLITICAL PARTY SUBMISSIONS

Mr. Ebrahim requested that political parties forward their submissions to the Administration on disk, for ease of storage, etc. The Administration would reimburse them, if necessary.

9. CLOSURE

The meeting closed at 10h00.

**DIRECTORATE REPORT TO MANAGEMENT COMMITTEE
23 FEBRUARY 1995**

1. Introduction

This report serves to update members of the Management Committee on some of the more important developments since the last meeting of the Management Committee on 16 February 1995.

2. Chairpersons' Forum

Decision Required: None - for noting.

The Chairpersons' Forum met on 16 February 1995 and made the following recommendations:

- i. **Information Seminars** - Technical Experts could assist Theme Committees in convening seminars on aspects to be covered in a particular block to help familiarise Theme Committees with the issues and concepts.
- ii. **Public Submissions** - As per Management Committee, Technical Experts have a definite role to play in providing a summary overview of all public submissions and submitting a report to the relevant Theme Committee.
- iii. **Joint meetings of Theme Committees**

A recommendation was made to convene a meeting of all the relevant Theme Committees to discuss the issue of Traditional Authorities.

Action taken: A meeting has been arranged for Monday 6 March 09h00 - 10h00 in E249 to discuss the aspect of Traditional Authorities. All Theme Committee Chairpersons and Technical experts have been invited to attend. The draft Agenda is as follows:-

1. Traditional Authorities: Overlap between Theme Committees. Are they Structures of Government or Specialised Structures.
2. Distribution of work between respective Theme Committees.

3. The Ad-Hoc Technical Committee on Traditional Authorities - What is its role?
4. Time-frames
5. Any other business of relevance to the aspect of Traditional Authorities.

A further recommendation was made to hold joint Theme Committee meetings on a range of other issues - eg. Theme Committee Six raised the issue of Correctional Services as an area which perhaps would be better located within the ambit of the work of Theme Committee Five.

Action taken: A memorandum has been sent to all Theme Committee Chairpersons and Technical Experts requesting them to identify other constitutional issues requiring Joint Theme Committee meetings as well as possible dates. Feedback is expected by 28 February 1995 after which such Joint meetings would be convened.

- iv. **Technical Experts - Convenors for Technical Committees** - It was restated that it would facilitate communication if all Technical Committees were to appoint convenors.

Action taken: A memorandum has been sent to all Technical Committees requesting technical Experts to appoint convenors and to furnish names by 28 February 1995.

A recommendation was also made to convene a meeting of all Technical Experts to discuss issues of common concern such as conditions of Service.

A further recommendation was made that a uniform approach needs to be developed in relation to the role that technical Experts would play at public hearings.

- v. **Coherence of Theme Committee work programme** - It was recommended that ongoing meetings be held between Technical Experts to ensure a coherence running through the work of Theme Committees.
- vi. **Convenors of Technical Committees** - It was recommended that all Technical Committees should appoint a convenor from amongst its members.

Action taken: A memorandum containing this request was issued to all Theme and Technical Committees

3. Language Sub-committee.

- Decision Required:**
1. Should the deadline for submitting names be extended.
 2. When should the Language Sub-committee be convened.
-

Although some political parties have submitted the names of members who will sit on the Language Sub-committee, others have not. A decision must be made as to whether the deadline for submitting names should be extended and whether or not the Language Sub-committee should proceed.

4. Sub-Committee to Recommend Technical Experts.

Decision Required: None - for noting.

The Sub-Committee met on Monday 20 February 1995 to discuss nominations of Technical Experts for the Sub-committee on Local Government and for the Technical Committee on the Public Protector. The meeting will continue discussions on these matters at its next meeting, scheduled for Friday 24 February 1995, in addition to considering a replacement for Prof. Thomashausen for the Technical Committee for Theme Committee One.

5. Administrative Matters

Decision Required: None - for noting.

The appointment of Technical Committees has increased the load of work upon the Secretariat. Additional administrative staff have therefore been employed on a six-month contract. Six new members of staff have been added to the Secretariat to assist the Technical Committees attached to the various Theme Committees. In addition, the Secretariat had to replace the Minute Secretary for Theme Committee One, Khulile Radu, who has resigned to work for the Department of Sports and Recreation. The new staff members are:

1. Susan Rabinowitz: Minute Secretary (Theme Committee One)
2. Aziza Parker: Administrative Secretary (Theme Committee One)
3. Charmaine Fredericks: Administrative Secretary (Theme Committee Two)
4. Vanessa Calvert: Administrative Secretary (Theme Committee Three)
5. Pamela Crowley: Administrative Secretary (Theme Committee Four)
6. Beverline Thomas: Administrative Secretary (Theme Committee Five)
7. Agnes Mrubata: Administrative Secretary (Theme Committee Six)

6. Work Programme

Decision Required: None - for noting.

See Appendix One attached.

7. Work Schedule

Decision Required: None - for noting.

See Appendix Two attached.

Appendix 1:

SECOND REVISION OF RECOMMENDED WORK PROGRAMME AS PER THEME COMMITTEES' RECOMMENDATIONS

BLOCK NO	TC 1	TC 2	TC 3	TC 4	TC 5
1	1. Democracy and Character of State	1. Separation of powers	1. Nature and status of the provincial system and local government	1. Constitutional Principle II	1. Structure of the Court System 2. The relationship between the different levels of courts 3. The composition and appointment of judicial officers 4. Access to the courts, including lay participation
2	2. Equality 3. One, sovereign state	2. The structure and functioning of government: 2.1 At National Level (a) The Legislature (b) The Executive (c) Checks and Balances	2. National and provincial legislative and executive competences:	2. Nature of Bill of Rights and application 3. Equality 4. Human dignity 5. Right to life 6. Privacy	NB: Blocks 1 - 4 have been merged, and the above agenda items shall be dealt with simultaneously under Blocks 1 - 4.

3	4. Supremacy of the Constitution	2.2 At Provincial Level (a) The Legislature (b) The Executive (c) Checks and Balances NB: Blocks 2 & 3 have been merged, and the above agenda items shall be dealt with simultaneously under Blocks 2 & 3.	NB: Blocks 2 & 3 have been merged, and the above agenda item shall be dealt with simultaneously under Blocks 2 & 3.	7. Religion, belief and opinion 8. Freedom of expression 9. Freedom of association 10. Language and culture	
4	5. Accountable government	3. Traditional Authorities	3. LOCAL GOVERNMENT NB: Blocks 4, 5 & 6 have been merged, and the above agenda item shall be dealt with simultaneously under Blocks 4, 5 & 6.	11. Administrative justice 12. Access to information 13. Access to courts 14. Freedom and security of the person 15. Detained, arrested and accused persons	
5	6. The Economy	4. Volkstaat and community self-determination		16. Servitude and forced labour 17. Economic activity 18. Property 19. Labour relations 20. Environment	5. Traditional Authorities and customary law

6	7. Representative government 8. Citizenship 9. Suffrage	5. Electoral System (at national and provincial level)		21. Citizens' rights 22. Political rights 23. Freedom of movement 24. Freedom of residence 25. Freedom of demonstration and petition	6. Attorneys-General and other judicial appointments
7	10. Language	6. Constitutional amendments	4. Financial and Fiscal Relations	26. Children's rights 27. Education rights	7. General
8	11. Foreign relations and international law		5. Miscellaneous	28. Other rights and directive principles 29. Customary and indigenous law 30. Linqistic, religious and cultural minorities	8. Legal education and legal profession
9	12. Name, Symbols and National Territory 13. Seats of government			31. Limitation of rights 32. Effect of Bill of Rights on existing law 33. States of emergency and suspension of rights	9. Transitional arrangements

10	14. Preamble and Postamble			34. Interpretation of Bill of Rights 35. Horizontal application of Bill of Rights 36. Class actions	
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**THEME COMMITTEE 6
SPECIALISED STRUCTURES OF GOVERNMENT**

Workplan as at 9 February 1995

Block	Subtheme Committee 6.1	Subtheme Committee 6.2	Subtheme Committee 6.3	Subtheme Committee 6.4
1	Public Service	Auditor General; Reserve Bank; and Procurement.	Information seminars on all areas of work.	Accountability and control of the security forces.
2	Public Service	Auditor General; Reserve Bank; and Procurement.	Identification and isolation of issues arising out of the seminars and preparation of report.	Accountability and control of the security forces.
3	Public Service	Auditor General; Reserve Bank; and Procurement.	The Public Protector	
4	Public Service	Auditor General; Reserve Bank; and Procurement.	The Public Protector	
5	Public Service	Auditor General; Reserve Bank; and Procurement	The Human Rights Commission.	
6	Election Commission	Finance and Fiscal Commission; and Public Enterprises.	The Human rights Commission.	
7	Election Commission	Finance and Fiscal Commission; and Public Enterprises.	Commission on Gender Equality.	
8	Election Commission	Finance and Fiscal Commission; and Public Enterprises.	Commission on Gender Equality.	
9	Public Service	Finance and Fiscal Commission; and Public Enterprises.	Commission on restitution of land rights.	
10		Finance and Fiscal Commission; and Public Enterprises.	Commission on restitution of land rights.	

(Appendix 2)

CONSTITUTIONAL ASSEMBLY SCHEDULE

Monday 27 February - 05 March 1995

Date	Event	Time	Venue
Monday 27 February	Theme Committee 1	08h30 - 12h00	V227
	Theme Committee 2	08h30 - 12h00	M46
	Theme Committee 3	08h30 - 12h00	E249
	Constitutional Committee	14h00 - 17h00	
	Theme Committee 4	18h00 - 21h30	M46
	Theme Committee 5		Pretoria
	Theme Committee 6	18h00 - 21h30	E249
Thursday 2 March	Management Committee Party Caucuses	08h00 - 10h00 10h15 - 13h00	V16
Saturday 4 March	Public Participation Event		
Monday 6 March	Chairpersons' meeting on Traditional Authorities	09h00 - 10h00	E249
	Theme Committee 4	10h30 - 12h00	M46
	Theme Committee 5	10h30 - 12h00	V227
	Theme Committee 6	09h00 - 17h00	E249
	Theme Committee 6.1		
	Constitutional Assembly	14h00 - 17h00	
	Theme Committee 1	18h00 - 21h30	V227
Theme Committee 2	18h00 - 21h30	M46	
Theme Committee 3	18h00 - 21h30	E249	
Thursday 9 March	Management Committee Party Caucuses	08h00 - 10h00 10h15 - 13h00	V16
Friday 10 March	<i>Deadline for Submissions for Block Two</i>		
Saturday 11 March	Public Participation Event		
Monday 13 March	Theme Committee 1	08h30 - 12h00	V227
	Theme Committee 2	08h30 - 12h00	M46
	Theme Committee 3	08h30 - 12h00	E249
	Constitutional Committee	14h00 - 17h00	
	Theme Committee 4	18h00 - 21h30	M46
	Theme Committee 5	18h00 - 21h30	V227
	Theme Committee 6	18h00 - 21h30	E249
Tuesday 14 March	<i>Deadline for Submission of progress/Final report on Block 2 as well as any outstanding supplementary reports on Block 1 for Constitutional Committee.</i>		

Thursday 16 March	Management Committee Party Caucuses	08h00 - 10h00 10h15 - 13h00	V16
Saturday 18 March	Public Participation Event		

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

REPORT ON BLOCK 1

**THE NATURE AND STATUS OF THE
PROVINCIAL AND LOCAL SYSTEMS
OF GOVERNMENT**

As at the 16 February 1995

**THEME COMMITTEE 3
RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT**

REPORT BLOCK 1

**THE NATURE AND STATUS OF THE PROVINCIAL
AND LOCAL SYSTEMS OF GOVERNMENT**

February 16, 1995

PREAMBLE

Theme Committee 3 is pleased to report on its work commencing on 24 January 1995.

The Theme Committee has re-ordered its work programme in terms of the following headings: (1) the nature of the systems of provincial and local government; (2) national and provincial legislative and executive competencies; (3) local government; (4) fiscal and financial matters; and (5), a miscellaneous category to include, *inter alia*, overlapping matters such as the Senate.

[Other than heading #1, these headings do not correspond to the blocks in the schedule]. Submission dates for the next reports are still to be determined.

All parties bar the ACDP (which waived its right) made submissions on block 1. Arising from the nature of these submissions, and in anticipation of meeting future needs, it was decided that parties' submissions should preferably follow a predetermined framework in order to ensure both a cohesive approach to the work programme, and to simplify the drafting of reports. It is this approach which has been followed in the block 1 report below.

All parties were given the opportunity to talk to their submissions in order to facilitate a joint understanding of parties' positions. Two special Theme Committee meetings were convened for this purpose, the first dealing with the nature of the provincial system, and the second with the nature of the local government system.

On 8 February, a one-day "orientation workshop" was convened, facilitated by two discussants -Mr Richard Humphries and Professor Willie Breytenbach. Members benefited greatly from intensive deliberation on both basic constitutional models and key concepts germane to the Theme Committee's work programme.

The Theme Committee's first report is divided into two parts, the first dealing with the parties' submissions, the second with civil society submissions. The former is divided into two sections -covering the nature of the provincial and local government systems respectively. The latter will be submitted at the earliest opportunity.

The Theme Committee has not yet been able to give extensive consideration to its own public participation programme and will therefore report on this aspect at a later stage.

SECTION I PROVINCIAL GOVERNMENT SYSTEM

INTRODUCTION:

This Report is compiled on the basis of the parties' submissions. A further Report covering submissions from civil society will follow. The structure of this Report reflects a predetermined framework agreed upon by the parties, within which are subsumed issues and details thereof which are also identified as contentious or non-contentious. This Report refers to details found in parties' submissions which have been used to identify the nature of the issues at hand - the submissions however, comprise an integral part of this Report. As far as possible the report comprises verbatim extracts from the submissions. Since the formulation of general principles upon which consensus can be reached is severely limited, this Theme Committee sought to make progress in identifying more precisely the issues upon which there is contention and non-contention. Furthermore, the Theme Committee has found utility in identifying a third category of issues or positions on which there is not necessarily either consensus or contention.

A SOUTH AFRICA'S SPECIFIC CONDITIONS

To what extent does our history have a bearing on the constitution?
What historical considerations and factual elements should be taken into account?

Non-contentious

1. South Africa is a deeply divided society with huge social inequalities. The following factors need to be born in mind: the legacy of colonialism and apartheid, massive inequalities between regions and between urban and rural areas, between the racial groups and sexes.

These observations are made whilst acknowledging that South Africa has an advanced economy and that South Africa plays a leading role in the political, social, educational and economic development of our region. Every endeavour should be made to enhance our competitiveness in the international world.

2. The lessons emerging from the implementation of the interim constitution should be taken into account.

Contentious

1. The historical fact that autonomy and devolution existed with TVBC states and SGT's cannot be ignored in the drafting of the new constitution.
2. Different regions of South Africa have distinct identities. The people of KwaZulu-Natal in particular have a distinct political identity in wishing to preserve the

autonomy the Kingdom of KwaZulu-Natal. Oppressed, exploited and raped by the colonial and apartheid regimes, the people of this province who have always maintained their sovereignty and their unique position within the broader politick, have reclaimed their sovereignty, desirous that this be recognised within a federal South Africa.

3. The implementation of the Interim Constitution has exacerbated tensions between Central Government and the Provinces.
4. The diversity and deep division of our society must be catered for, *inter alia*, by devolving executive and legislative power whenever possible.
5. For a variety of reasons it could be expected that provinces will develop own and typical "characters". Such development should be encouraged, but then subject to loyalty to the single sovereign state, which loyalty shall be premised on the enhancement of national reconciliation. In that sense provincial loyalty should be encouraged as it could and should serve as a springboard for the enhancement of loyalty to the one, sovereign state.
6. Through redistribution, redirection, reprioritisation and reallocation of resources, the imbalances of the past have to be redressed. South Africa should be a non-racial, non-sexist democracy which systematically eradicates the devastation of apartheid and reduces the social inequalities that it bred.
7. There is a need to discourage political mobilization on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for purposes of ethnic or racial domination and intolerance.

B DEMOCRATIC PRINCIPLES

What are the fundamental principles of democracy which should shape the system of provincial government?

Non-contentious

1. The Constitution in its entirety shall be the supreme law of the land.
2. Democracy must ensure elected structures of government at all levels, regular elections on a common voters' roll based on universal suffrage (to read in conjunction with first contentious point below).
3. The democratic principles of representation, accountability, responsiveness and openness are best served by government being as close as possible to the people.
4. There should be a three-tiered system, such that government with its accountability

can be taken closest to the people, and where people with democratic responsibility can be closest to government.

5. The constitution should allow for freedom, that is, rule by the people, for the people, people being involved in the governing of themselves. Main activity of the people should not be reduced to occasional elections.
6. Accessibility, ensuring that people are directly involved in shaping their destinies at every level of government and that government is open and transparent and responsive to people.
7. Accountability, there must be accountability within government, between different levels of government, and of government to the public.
8. Functionality, requiring that the system is suited to SA's needs and reality.
9. Efficient and effective - a system that works well and is productive and delivers on people's needs.
10. Each Province must be equipped to provide for the special needs and capacities of its inhabitants.
11. Participatory organs - government should interact with and respond to the needs and views of civil society organs.
12. National unity must be sustained and enhanced, while, at the same time, providing for the division of power between the different levels of government catering for diversity and facilitating nation building.
13. There shall be separation of powers among levels of government in a balanced way to prevent concentration of power.

Contentious

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, such as traditional communities).
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.
3. Provision shall be made for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.
4. The exercise of state power shall be controllable within set limits.
5. Uniformity is a vital national objective to pursue in the context of massive disparities and inequalities that prevail in South Africa.

6. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
7. National reconstruction and development must be facilitated by the system of provincial government.
8. There shall be proportional representation in the legislature and the executive of all levels of government.

C PROVINCIAL GOVERNMENT PRINCIPLES

What are the principles which should shape the system of provincial government?

Non-contentious

1. There shall be democratic structures of government at national, provincial and local levels.
2. Government should interact, and respond to, the needs and views of civil society organs.

Contentious

1. Principle of subsidiarity and various formulations thereof (refer parties' submissions).
2. The vertical separation of power shall be founded on autonomous and original powers.
(This matter has to be referred to the Technical Experts for clarification. See CP XVIII[1]).
3. There shall be exclusive and concurrent powers as well as powers to perform functions for other levels of government.
(This matter has to be referred to the Technical Experts for clarification. See CP XIX)
4. Our past authoritarian, centralistic and oppressive legacy can only be overcome by recognising SA as a plural society in which, *inter alia*, the provinces are the "primary government" of the people and the role and scope of any government is limited.
5. Only the powers of the national government ought to be listed in the constitution, while all other powers should be left to the Provinces. Residual powers should be left with the provinces.
6. There should be the least possible interference from government at any level.

Individuals, families and communities should be left to do whatever they are capable of doing without interference. What they are unable to do should be the responsibility of local government, and functions which local government is unable to perform effectively should be handled by provincial government. Only those functions which cannot be carried out at the "lower" levels should be the responsibility of national government.

7. There shall be separation of powers between all levels of government and civil society. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.
8. The allocation of powers to provincial and local levels should be conducive to financial viability at each of those levels, effective public administration, national unity, legitimate provincial autonomy and should acknowledge cultural diversity.
9. Provinces shall have full judicial powers in all matters of their competence, in addition to fully autonomous legislative and administrative powers.
10. Democracy is synonymous with self-government which requires the provision of constitutionally designed autonomy at the provincial and local level.
11. The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.
12. National government shall have no overrides and, as a rule, Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers, regulated by checks and balances, intended as a predetermined set of mutual interferences among the powers of each level of government.
13. In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could be utilised.
14. The powers and functions of each of the levels of government must be defined in the constitution in a manner that will allow for cooperation, but not encroachment, between the respective levels. This requires that exclusive powers and independent sources of finance be provided for in the constitution.
15. In relation to their respective areas of constitutionally recognized autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively.
16. The Constitutional Court should judge any conflict between provinces and national

levels of government. In addition, provinces should have the opportunity of influencing by means of their own judicial system how the national constitutional court interprets the constitutional provisions which define their autonomy.

17. The national constitution shall provide for the maximum degree of provincial autonomy. Each Province shall be free to opt to exercise lesser powers than the full autonomy to which such Province is entitled, if such Province is not ready, willing or able to exercise any of the legislative or administrative powers concerned.
18. The issue of federalism cannot be settled by virtue of majoritarian rule, no matter how large the majority concerned is. Even if the rest of South Africa wishes to organize itself as a unitary state, regions such as KwaZulu-Natal which have expressed federal aspirations should be entitled to receive the autonomy they demand and to coexist with the rest of South Africa on the basis of a federal relation.

D ELEMENTS OF THE PROVINCIAL SYSTEM

What characteristics are to be taken into account in addressing the system of provincial government?

1. Boundaries of provinces
2. Number of provinces
3. Government structures.
4. Government powers and functions.
5. Inter-governmental coordination.
6. Affordability/cost.
7. Fiscal equalization.
8. Taxation powers of each level of government.
9. Residual powers.
10. Fiscal and financial powers.
11. Fiscal relationships.
12. Role of a Fiscal & Fiscal Commission.
13. Executive structures.

14. Legislative structures.
15. Judiciary.
16. Civil service.
17. Electoral system.

Contentious

1. These issues were not discussed in detail. Note, however the following contentious point: provincial constitutions shall determine any matter related to the organisation and operation of the legislative, executive, judicial; and administrative branches of the provincial governments.
2. The viability of corporate self-determination, as a method of furthering the rights of self-determination of linguistic, cultural and religious minorities, shall be explored.
3. The constitution shall recognize traditional leaders at provincial and local levels as representatives of the people from whom they have obtained a mandate.
4. Both provincial and local government must include community related structures that will address the needs for a pluralistic society. This must be done in order to accommodate cultural/ethnic realities in a way that peace shall prevail and national unity be enhanced.
5. Provincial constitutions.

E MISCELLANEOUS

The two issues below have not yet been discussed by the Theme Committee.

1. **Transitional measures:**
In this transition phase, it may be necessary to prescribe some structures and procedures in a new constitution which will fall away after a few years and be replaced at provincial and local government level by structures and procedures decided upon by democratically elected bodies at those levels.
2. **Senate:**
In a provincial system - as opposed to a federal system - the Senate becomes unnecessary. There is then no need for extra representation for provinces at the level of the central legislature.

The Senate shall represent the Provinces and its members shall be directly elected and empowered to act authoritatively on behalf of the Provinces, jointly and severally.

The role of the Senate as provided for in the interim constitution and its relationship with the provinces needs to be developed and refined.

The Senate should not have less legislative authority than that given to the National Assembly. The Senate should represent the Provinces and its members should derive directly from the provinces through indirect elections by the provincial legislatures in consultation with the provincial cabinets. Each province shall be equally represented in the Senate.

The Senate should have the specific power to monitor executive functions such as defense and foreign affairs in which Provinces have no competence.

SECTION II LOCAL GOVERNMENT SYSTEM

A SOUTH AFRICAN SPECIFIC CONDITIONS

Non-contentious

The section on "*South Africa's specific conditions*" in the Provincial Government section also applies here; and in addition it is noted that:

1. There is a universal demand for the transformation of local government in South Africa. South Africa's past experience of apartheid based local government entailed a massive differentiation between black and white local government in the areas of legitimacy, resources and service delivery capabilities.

Contentious

1. The viability of corporate self-determination, as a method for furthering the rights of self-determination of linguistic, cultural and religious minorities, shall be explored.
2. There is a demand for constitutional protection of local decision-making within the provinces as determined by the provinces, subject only to the Schedule 4 Constitutional Principles.
3. Through redistribution, redirection, reprioritisation and reallocation of resources, the imbalances of the past have to be redressed. South Africa should be a non-racial, non-sexist democracy which systematically eradicates the devastation of apartheid and reduces the social inequalities that it bred.
4. There is a need to discourage political mobilization on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for

purposes of ethnic or racial domination and intolerance.

5. South Africa should be society in which national unity, reconstruction and development prevails.

B DEMOCRATIC PRINCIPLES

See section on Provincial Government.

C PRINCIPLES OF LOCAL GOVERNMENT

Non-contentious

1. Local Government will be elected on the basis of universal suffrage.
2. The Constitution shall empower the active involvement of ordinary people.
3. There shall be transparency and accountability.
4. Delivery of services is the prime responsibility of local government.

Contentious

1. There shall be elected local government throughout the entire country including the rural areas.
2. Local Government must be entitled to regulate its own affairs within the context of national policy.
3. Local government shall not be autonomous, but must assist in the administration of national and provincial policy.
4. The CA does not have the discretion to provide provinces with less autonomy and fewer powers with respect to local government than that provided for in Chapter 10 of the interim constitution (Constitutional Principle XXIV read in conjunction with Constitutional Principle XVIII (2)).
5. The degree of financial and fiscal autonomy of Local Government
6. All people shall have access to basic services. These services will be based on affordability and there shall be a progressive tariff structure linked to peoples ability to pay.
7. Local Government is central to the implementation of the RDP.
8. Local government shall operate on the basis of "One city, one tax base".
9. Civil society has a central role to play in local government.

D ELEMENTS OF THE LOCAL GOVERNMENT SYSTEM

Non-contentious

1. Local Government should have guaranteed, transparent, predictable and equitable sources of revenue.
2. The Constitution shall provide a framework for local government powers, functions and structures. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or both (Constitutional Principle XXIV).

Contentious

1. In order to reflect local administrative needs and pluralism, the national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation.
2. Local Government by-laws should be consistent with an applicable Act of Parliament or Provincial Law and the Constitution.
3. Local government in both urban and rural areas shall promote the establishment of structures of civil society which would in turn actively participate in the affairs of local government.
4. In metropolitan areas, there shall be elected metropolitan governments. In non-metropolitan areas, local government shall be structured on a two-tier basis consisting of integrated and elected districts and local councils.
5. Local government shall play an active role in capacity-building and shall ensure education and dissemination of information on the RDP.

E MISCELLANEOUS

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OFFICE OF THE SECRETARY GENERAL

MR H. Ebrahim
The Executive Director
Constitutional Assembly
Cape Town

25.01.95

Dear Mr Ebrahim

ANC SUBMISSIONS TO THEME COMMITTEES

We forward herewith preliminary submissions of the ANC to the Theme Committees, in respect of Block One of the adopted CA work programme. We wish to advise that, as these are preliminary submissions, the ANC will be forwarding further submissions in due course.


We trust you find same in order.

Yours Sincerely

A handwritten signature in cursive script, appearing to read 'C. Carolus', is written over a horizontal line.

C. Carolus

DEPUTY SECRETARY GENERAL


The People Shall Govern!

THEME COMMITTEE 3

AFRICAN NATIONAL CONGRESS

PRELIMINARY SUBMISSION ON NATURE OF PROVINCIAL SYSTEM AND LOCAL GOVERNMENT

1 INTRODUCTION

This document presents a preliminary outline of the ANC's perspective on the nature of the provincial system and local government which the new constitution should embrace and reflect. It is our understanding that Block 1 of Theme Committee 3 requires that parties present their view and understanding of the nature of the provincial system and local government. This in turn entails an elaboration of general perspectives and principles which will serve as a foundation of the provincial and local government system.

South Africa's peculiar on historical context requires that we take into account a number of specific factors which impact and determine the nature of the provincial and local government system, and we identify central elements of that system which will be the subject of further submissions

We must assert at the outset that the ANC is unequivocally committed to the creation of a non-racial, non-sexist democracy which systematically eradicates the devastation of apartheid and reduces the social inequalities that it bred. We are committed to a society in which national unity, reconstruction and development prevails

2 GENERAL PERSPECTIVE

The ANC's conception of a provincial system for South Africa is based on the following criteria and principles

- a) DEMOCRACY which will ensure elected structures of government at all levels, regular elections at least every 5 years, in a common voters roll based on universal suffrage.
- b) ACCESSIBILITY ensuring that people are directly involved in shaping their destinies at every level of government and that government is open and transparent and responsive to people.
- c) ACCOUNTABILITY there must be accountability within government, between different levels of government, and of government to the public.
- d) FUNCTIONALITY requiring that the system is suited to South Africa's needs

and reality.

- e) **EFFECTIVE & EFFICIENT** a system that works well and is productive and delivers on people's needs.
- f) **PARTICIPATORY ORGANS** government should interact with and respond to the needs and views of civil society organs
- g) **NATIONAL UNITY** must be sustained and enhanced while, at the same time, providing for the division of power between the different levels of government and facilitate nation-building.
- h) **UNIFORMITY** is a vital national objective to pursue in the context of massive disparities and inequalities that prevail in South Africa.
- i) **NATIONAL RECONSTRUCTION & DEVELOPMENT** must be facilitated by the system of provincial government.

3 CONSTITUTIONAL PRINCIPLES: CONSTRAINTS & POSSIBILITIES

The constitutional principles in schedule 4 of the interim constitution are mandatory prescriptions on the constitution-making process. - in particular principles XVI to XXIII.

4 ADDITIONAL FACTORS IMPACTING ON PROVINCIAL SYSTEM

The way in which government is structured and the specific objectives it sets for itself inevitably depends on the history of the country and the specific context in which government finds itself.

In the case of South Africa a number of additional factors need to be borne in mind in considering the future shape of a provincial and local government system:

- i) the terrible legacy of apartheid: massive inequalities between communities and regions between urban and rural areas; between the racial groups and sexes.
- ii) the undeniable need for redistribution, redirection, reprioritization and reallocation of resources in the quest for equality among all
- iii) deracialisation of our country
- iv) the need to discourage political mobilisation on the basis of race, ethnicity or language and especially to prevent state power at any level from being used for purposes of ethnic domination and intolerance.

In addition the actual lessons, positive and negative, emerging from the implementation of the interim constitution should be taken into account in formulating the new constitution. The experience of establishing and operationalising the present system will be singularly instructive in this regard.

It could be submitted at this stage that our institutional arrangements should be as flexible as possible so as to enable them to grow and adapt themselves in the light of actual experience. The development of our systems should be need-driven rather than ideologically-driven.

5. ELEMENTS OF A PROVINCIAL SYSTEM

The following are some of the main elements which this Theme Committee must address in the course of its work:

- a) Boundaries and number of provinces
- b) Government structures
- c) Powers and functions of levels of government
- d) Inter-governmental co-ordination
- e) Affordability/cost of system
- f) Financial equalisation
- g) Taxation powers of each level
- g) Residual Powers

6 LOCAL GOVERNMENT

Our approach to local government must be understood in the context of the principles and values underlying provincial government.

Local government must be entitled to regulate its own affairs within the context of National Policy. It must have executive powers so as to allow it to function effectively. However, by-laws should be consistent with an applicable Act of Parliament or Provincial Law and the Constitution.

This is the level of government charged with the actual implementation of the RDP to ensure the transformation of society. Hence, the task of local government is to ensure that all residents have equal access, free of any form of discrimination to basic services. Local government shall contribute actively towards the redistribution of resources on the basis of race, class and gender.

Local Government shall be structured according to the democratic principles of accountability, inclusivity, non-racialism, non-sexism, maximum participation, and full representivity.

In order to achieve these goals and plan properly, local government should have guaranteed, transparent, and predictable and equitable sources of revenue.

The delegated functions and duties provided to any local authority should be developmental as

well as simply allowing for service provision.

There shall be regular local government elections in both rural and urban areas. The tenure of office of local government councillors shall not be less than 3 years and not more than 5 years.

Local government in both urban and rural areas shall promote the establishment of structures of civil society who would in turn actively participate in the affairs of local government.

In metropolitan areas, there shall be elected metropolitan governments. Local government structures shall be established wall to wall throughout the country. In non-metropolitan areas, local government shall be structured on a two-tier basis consisting of integrated and elected districts and local councils.

Local government shall play an active role in capacity building and shall ensure education and dissemination of information on the RDP.

7. CONCLUSION

This preliminary submission contains the general values and principles which underline the nature of the Provincial and Local Government system.

A more detailed spelling out of the elements of the system will be provided in the blocks of discussion that are to follow.



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CONSTITUTIONAL
ASSEMBLY

Demokratiese Party
Democratic Party

000729

01 FEB 1995

31 January 1995

**DEMOCRATIC PARTY: FURTHER SUBMISSION TO THEME COMMITTEE 3 ON
"THE NATURE AND STATUS OF THE PROVINCIAL SYSTEM AND LOCAL
GOVERNMENT"**

Set out in accordance with framework agreed by TC3 on 30 January 1995.

1. South Africa's Specific Conditions

South Africa has a diverse and deeply divided society. Any constitution which is going to work successfully must cater for this diversity by devolving executive and legislative power wherever possible. The key challenge is to recognise and cater for divisions which exist and will not disappear in the foreseeable future without exacerbating those divisions.

South Africa also has one of the most unequal societies in the world - in terms of individuals and provinces. Some of these inequalities arose in the normal course of events but many were the result of specific discriminatory policies applied for decades if not centuries. A new constitution must therefore facilitate the removal of these inequalities and neither individuals nor particular provinces should be condemned to live in poverty as a result of historical circumstances.

2. Democratic Principles

The democratic principles of representativity, accountability, responsiveness and openness are best served by government being as close to the people as possible.

3. Provincial/Local Government Principles and Points of Departure

The Democratic Party believes that constitutions and governments should empower individual citizens to take control of their own lives. Only then can an individual exercise the freedom, rights, opportunities and responsibilities of an open and democratic society.

People should be left to get on with their lives and make their own choices with the least possible interference from government at any level.

Individuals, families and communities should be left to do whatever they are capable of doing without any interference. What they are unable to do should be the responsibility of local government, and functions which local government is unable

to perform effectively should be handled by provincial government. Only those functions which cannot be carried out at "lower" levels should be the responsibility of national government.

For these reasons, the Democratic Party attaches great importance to both Provincial and Local Government. It is at these levels in a three-tiered structure of government that government with its accountability can be taken closest to the people, and where the people with the democratic responsibility can be taken closest to government.

Of critical importance to the DP is that the powers and functions of each of the levels of Government must be defined in the constitution in a manner that will allow for cooperation, but not encroachment, between the respective levels. This requires that exclusive powers and independent sources of finance be provided for in the constitution.

4. Elements of the Provincial System

The DP believes that the structures provided for in the 1993 Constitution are appropriate, although they need to be reduced in size and the electoral system changed to incorporate constituencies and proportional representation.

The role of the Senate and its relationship with the provinces needs to be developed and defined.

The fiscal relationship, as already mentioned, is critical. If provincial (and local) governments do not have guaranteed access to tax revenues, without interference from central government, their powers will be almost meaningless and their democratic accountability to their voters a charade.

5. Miscellaneous

Local government is the key to effective development and delivery of services. It has been rather neglected until recently but will hopefully receive the attention it deserves from now onwards.

In this transition phase, it may be necessary to prescribe some structures and procedures in a new constitution which will fall away after a few years and be replaced at provincial and local government level by structures and procedures decided upon by democratically elected bodies at those levels.

DEMOCRATIC PARTY

TC Series

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Ref No



18 JAN 1995

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
ROOM 104

18 January 1995

Dear Mr Ebrahim

Democratic Party: Initial Submission on the New Constitution - January 1995

1. In response to the Constitutional Assembly's invitation to the public to make initial submissions on the new Constitution, the Democratic Party has pleasure in submitting the following:-
2. The Democratic Party believes that a Constitution that is liberal, democratic and federal is best suited to meet the needs of our people and reflect the realities of our country.
3. Many of the features associated with this form of Constitution are itemised in the Constitution Principles which are binding on the Constitutional Assembly. Others, to a greater or lesser extent, are given effect to in the present interim Constitution.
4. The Democratic Party submits that
 - (i) the Constitution Principles and
 - (ii) the present interim Constitution, shorn of its transitional and interim features,
 provide a useful starting point for the Constitutional Assembly when it considers and drafts the new Constitutional Text.
5. Against this background the Democratic Party believes that the following priorities should be born in mind when drafting the new Constitutional Text.
 - 5.1 The new Constitution must bring government closer to the people - and the people closer to government. Wherever possible people must be empowered to make decisions on matters directly affecting their lives and their communities.

This can be done by strengthening the Provincial System - allocating more original powers to the Provincial Governments and ensuring their financial and fiscal viability. In addition there must be effective people-driven Local Governments in both the urban and rural areas through which communities can exercise a considerable degree of local autonomy.

- 5.2 The new Constitution must maximise openness and accountability at all levels of government.

This can be done by introducing strong checks on the executive government and on the decisions of bureaucrats, and by introducing direct constituency accountability for elected public representatives. The public must have the right of access to information relating to executive and administrative decisions.

- 5.3 The Bill of Rights in the new Constitution must guarantee to all the people of our country fundamental human rights, civil liberties and equality before the law.

The Bill of Rights must be written in a language that can be understood by and be meaningful to the individual citizens of our country.

- 5.4 If the new Constitution with its Bill of Rights is to provide the legal framework within which our society will function and governance can take place, it is essential that there should be a strong and independent judiciary.

The courts as well as the legal system should be readily accessible to the ordinary citizens of our country.

- 5.5 The new Constitution should reject totally all forms of racial discrimination. It must also provide for the cultural, religious and language diversity that is part of our country's rich heritage.

Each South African, whether acting as in an individual or acting together with others with whom he or she shares a common heritage, must feel comfortable and secure under the new Constitution.

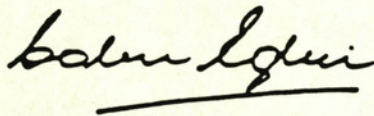
The new Constitution must encourage our people to say "In spite of our diversity, we are all South Africans. Because the Constitution respects our rights, we respect the Constitution."

- 5.6 Representativity and accountability makes it necessary for South Africa to have a range of legislative, executive and judicial structures. However, a developing country like ours must take the cost factor into account.

Accordingly, the government structures under the new Constitution should be as small and as cost effective as possible.

6. The Democratic Party will make further detailed submissions on specific aspects of the new Constitutional text as the work schedule for the various Theme Committee "Blocks" unfolds.

Yours sincerely

A handwritten signature in cursive script, which appears to read "Colin Eglin". The signature is written in dark ink and is underlined with a single horizontal line.

for Colin Eglin MP
Democratic Party



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PROPOSALS ON THE NATURE OF THE PROVINCIAL SYSTEM AND LOCAL GOVERNMENT

1. INTRODUCTION

Invariably we all tend to think today about democracy in terms of a hierarchy: The true democratical structures, it is assumed, lie with Parliament at the national level. Provincial parliaments and/or local government structures are seen to be derived from central government and often to be inferior to central government. Many books on Democracy explain the theory around democratic government and then proceed to the application of the theoretical framework on national level without even referring to the provincial or local levels.

We have clearly fallen into the trap of phenomenological analysis - we try to explain the systems of democracy as they exist in recent history and the world we know.

We furthermore tend to think about democracy in terms of power, which is not quite what the underlying classic notions about democracy indicate : serving the public in the pursuit of the common good.

Provincial government and local government even more so are relegated to inferior positions. Some authors openly talk about "subordinate" government when they refer to 2nd and 3rd tier government.

What we also have to say is that this approach has been prevailing in South Africa in the past and not without good reason : centralized authority can best be used to manipulate and control the entire country. It fitted the authoritarian character of the type of political philosophy and practice that was the underlying motive of the minority that attempted to rule for all.

-2-

One has to be very critical particularly about a system that pretend to be democratic. The line between democracy and bureaucracy is a thin one and in the age of ideological preoccupation and propaganda there is a real danger of creating a system in the clothes of democracy which is far removed from the essential concept of classic democracy, which allows for freedom, i.e. rule by the people, for the people. The bigger and more centralized a system of democratic rule becomes, the greater the danger becomes of government being removed so far from the governed that the real advantages of the democratic system get lost and in the process the true nature of the people being involved in the governing of themselves gets lost. The main activity of the people then is reduced to occasional elections.

If one looks at the origins of democracy in the city states of Greece and particularly in the model of Athens, which is often still regarded as representing the best form of popular democratic involvement, the practice was not only direct democracy where the community was directly involved in the act of governance in the city, but even more the local character of democracy was jealously guarded in that not even a comprehensive democratic large structure for Greece (consisting of the existing city states) was acceptable.

It was only when subsequently the great roman empire developed that the temptations of "bigger and better" control undermined the notion of keeping government small became too strong. Even in democracy then the growing elaborate system of representative democracy developed and provided for more extensive control of bigger and bigger entities. During the Renaissance in Italy though and even later when national states in Europe developed the system of representative democracy was adapted in an effort to utilize on a wider scale exactly those ancient principles of government by the people as directly as possible.

In order to preserve these basic notions of democracy however we need always to build into our larger systems specific features that will ensure that the nature of democratic rule not be violated. So we try to retain the fundamentals of democratic belief like:

1. Respect for the individual personality
2. Individual freedom
3. Equality
4. Justice and the rule of law
5. Constitutionalism
6. Systems for the control of state power, etc.

We cherish these things in an effort to retain within our "bigger and better" systems those notions of government that had origins in the democracy of the city states.

2. PROVINCIAL AND LOCAL GOVERNMENT

And that is why local and provincial government within democratic thinking become important : It is part of the spreading of power and the differentiation of functions (both original and concurrent) that helps us retain the true spirit and practice of democracy. It is a built in mechanism to control power. For the distance between the governing and the governed becomes smaller. Involvement of communities and the individual is enhanced. Governmental services become effectively related to the people. Accountability becomes a practical reality for those who govern to do it, so to say, under the eyes of the people.

The present transitional constitution allows for both provincial and local government but a lot remains to be done to put it in place as true modes of democratic government in its own right. Of course it needs not necessarily be (from the point of view of principle), both Provincial and Local government but the message is clear - getting structures, actions and control systems of government more transparent and directly related to people.

The point we arrive at is that here at the level of the province or the local community true selfgovernment can be realised and need some constitutionally designed autonomy that is to be respected if the democratic ideals is to be incorporated in the different tiers of government. This has very distinct consequences for the nature of government at these levels.

2.1 . We believe that at the level of local government the principle of affected interests should be adhered to in the establishment of structures and institutions.

In our situation we suggest a differentiation between rural and urban communities which should be a guiding principle of delimitation and representation. The pattern of local government will be determined by the overriding interests of the community and the underlying idea is maximum efficiency in attending to the needs of the communities.

2.2 We also believe that it is at this levels of democratic government where the tensions of a pluralistic society can best be absorbed in adapted democratic structures, which can serve the important purpose of strengthening the overarching central authority at national level.

It is the system of provincial autonomy that keeps a region like Quebec into the state of Canada, a fact of considerable significance if one thinks of the crucial role which that province plays in national household of Canada.

Switzerland, deeply divided on issues like language, culture and religion has found over centuries on the level of their cantons accommodation of their differences to become perhaps the richest and most peaceful country in the world. And everybody that studies the intensity of the conflicting diversity of that historic country, will agree that the ensuing sense of national unity that prevails today is a miracle.

For Africa these possibilities of accommodating divisions for the sake of national unity is of particular importance. The thrust for domination and commercial exploitation in the Colonial era had no regard for the existing internal realities of communities, cultures and languages. The states we inherited in this way comprise of very divergent structures of authority and cultural value systems. When the colonial powers left, we in Africa did not regroup in any way or reconsidered the boundaries of state that have been superimposed on us.

Now we have to accommodate diversity for the sake of peace, internal tolerance and progress within the existing state.

In South Africa we have through our traumatic history the legacy of a divided pluralist society. We in the Freedom Front have accepted the need to work towards national reconciliation and the strengthening of South Africa as a whole.

However we do not think that this process can be forced by the application of the foreign ideas of liberal democracy on our society. We need to look at a model of transition which will allow for the reality of the divided pluralist society that we live in. This perhaps is the foremost task we in the Freedom Front has taken upon us. We will come up with specific suggestions. But at this stage we want to point out that this crucial aspect of the process of constitutional transition can best be negotiated at the provincial and local levels. At this stage we want to indicate areas of direct relevance to this strategy of ensuring national unity:

- 2.2.1 The recognition of legitimate traditional leaders at provincial and local levels as representing the people from whom they have obtained a mandate.
- 2.2.2 The realization of acceptable forms of selfdetermination for those Afrikaners who have mandated us in the Freedom Front to achieve this ideal in accordance with the agreement between us and the ANC on the 23rd April 1994.
- 2.2.3 The Freedom Front accepts the establishment of democratic structures of government at National, Provincial and Local levels.

2.2.4 We submit that Local and Provincial governments are fully fledged manifestations of democracy and constitutional regulation should rule out undue interference by Central government. The autonomy of both should be guarded and balanced.

2.2.5 Both Provincial and Local government must include community related structures that will address the needs for a pluralistic society. This must be done in order to accommodate cultural/ethnic realities in a way that peace shall prevail and national Unity^b enhanced.

For what is at stake is the conscious and willing participation of all communities in the political system in such a way that they will experience the reality of democratic government : i.e. government by the people for the people. They must be respected for what they are and constitutionally coopted for the building of a strong united South Africa that transcends the divisions and the trauma of the past and move on to a common future.

"Democracy means freedom to choose"



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

31 January 1995

The Secretariat
Theme Committee 3
Constitutional Assembly

Dear Madam/Sir

REVISED SUBMISSION

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

Yours sincerely

Peter Smith



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

THEME COMMITTEE 3 RELATIONS BETWEEN LEVELS OF GOVERNMENT

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

29 January 1995

PROVINCIAL GOVERNMENT SYSTEM

A SOUTH AFRICA'S SPECIFIC CONDITIONS

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

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

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

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

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

B DEMOCRATIC PRINCIPLES

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

SUPREMACY OF THE CONSTITUTION:

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

SEPARATION OF POWERS (Form of State):

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

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

WHAT TYPE OF DEMOCRACY:

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

REPRESENTATIVE DEMOCRACY:

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

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

PARTICIPATORY DEMOCRACY:

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

TRANSPARENT AND ACCOUNTABLE DEMOCRACY

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

TYPE OF STATE

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

C PROVINCIAL PRINCIPLES

Type of powers to be allocated

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

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

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

Principle of subsidiarity

1. The Provinces shall be the primary governments of the people and shall be entitled to those powers and functions which can be properly and adequately exercised at provincial level³.
2. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level.

Allocation of powers

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

Relation between powers

1. There shall be separation of powers between national and provincial level of government⁴.
2. National government shall have no overrides.
3. Provinces shall have exclusive powers.
4. Both the national and the provincial levels of government shall enjoy exclusive powers.
5. The relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the powers of each level of government.

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

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

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

These interferences are based on the extension by relevancy or implication of the exclusive power of the national level of government into the areas of competence of the Provinces, as in theory is the case in the U.S. (i.e. interstate commerce).

6. In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used. Framework legislation shall not enable the national government to act in lieu of the provincial one, but should merely direct the action of the provincial government, leaving sufficient space for implementing action on the side of the provincial legislature.

Fiscal autonomy

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

Fiscal equalisation

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

Entrenchment of provincial autonomy

1. Provincial autonomy shall be indestructible, and no national legislative or executive action shall be valid if it encroaches on provincial autonomy.
2. The Constitutional Court should judge any conflict between provinces and national levels of government.
3. In addition, provinces should have the opportunity of influencing by means of their own judicial system how the national constitutional court interprets the constitutional provisions which define their autonomy.

Role of the Constitutional Court in protecting provincial autonomy

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

Asymmetry

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

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

Provincial autonomy and economic unity

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

Senate

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

D ELEMENTS OF THE PROVINCIAL SYSTEM

Provincial constitutions

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

E MISCELLANEOUS



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

THEME COMMITTEE 3 RELATIONS BETWEEN LEVELS OF GOVERNMENT

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

LOCAL GOVERNMENT SYSTEM

A SOUTH AFRICA'S SPECIFIC CONDITIONS

- 1 There is a universal demand for the transformation of local government in SA. SA's past experience of apartheid-based local government entailed a massive differentiation between black and white local government in the areas of legitimacy, resources and service delivery capability which must be addressed.
- 2 There is a demand that local government be properly empowered to fulfil its role as the third tier of government, not through the dictates of central government, but by way of constitutional protection of local decision-making within the provinces and as determined by them, subject only to the Schedule 4 constitutional principles.
- 3 The removal of apartheid barriers at local government level should be balanced by provision for maximum cultural pluralism.

B DEMOCRATIC PRINCIPLES

- 1 The democratic principles expressed in the national constitution shall be of guidance to the provincial legislature in legislating upon the structure and functions of local government.
- 2 The following IFP Theme Committee 1 submission is also pertinent:

REPRESENTATIVE DEMOCRACY:

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities).

2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.
3. The electoral system is a fundamental element characterizing the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task of implementing such principles, so as to leave sufficient flexibility for future developments. The provincial electoral systems should be within the exclusive competence of provincial constitutions.

C LOCAL GOVERNMENT PRINCIPLES

1 Constitutional Principle XXIV states:

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or both.

The requirement of this principle would be satisfied by a provision in the national Constitution prescribing the following framework:

The Provincial Constitution shall set out the general principles of the local government system, ensuring its coherence and consistence with the principles underlying the national constitution. The provisions of the constitution of each Province relating to local government shall be implemented by a law of the provincial legislature. Each provincial constitution shall be entitled to make specific provision to provide for each different category of local government as determined by such provincial constitution and provincial implementing legislation with appropriate autonomus fiscal powers and functions.

This approach is consistent with an accurate reading of Constitutional Principle XXIV which prescribes that the "framework" for powers, functions and structures of local government be provided for in the constitution and NOT local government's actual powers, functions and structures, including their "different categories", which is a function of the "structure" of local government.

- 2 Moreover the second sentence of Constitutional Principle XXV creates an exception to the broader and more general rules set out in the preceding Principle, requiring greater detail with respect to local government's fiscal autonomy, requiring that local government is to enjoy its "own fiscal powers". Clearly this reference must be intended as a more specific part of the same "framework" as indicated by the opening words of the second sentence Constitutional Principle XXV.

- 3 In interpreting the relevant Constitutional Principles, it must be noted that Constitutional Principle XVIII (2) states that the Constitutional Assembly does not have the discretion to provide Provinces with less autonomy and fewer powers with respect to local government than that given to Provinces in terms of Chapter 10 of the interim constitution. The "framework" can therefore not be more detailed and specific than the provisions set out in Chapter 10 of the interim Constitution.

D ELEMENTS OF THE SYSTEM OF LOCAL GOVERNMENT

Local government

1. The national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation. This is necessary to allow a system of local government which reflects local administrative needs as well as the plural nature of South African society.

In fact, the local government system will need to reflect a variety of realities ranging from traditional communities to metropolitan areas. This calls for fluidity and suggests the non-advisability of entrenching in the national constitution any given type of local government system.

E MISCELLANEOUS



25 JAN 1995

TC 3

510

**National Party
Nasionale Party**

**Federal Council
Federale Raad**

25 January 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposals regarding subject matters pertaining to Theme Committee 3, and included in the Work Schedule, Block 1.

Kind regards

Abrië Hanekom
Secretary



THEME COMMITTEE 3

NATIONAL PARTY PROPOSALS ON : THE NATURE OF THE PROVINCIAL SYSTEM
AND LOCAL GOVERNMENT

The following submissions should be seen as a broad framework, setting out principles and not detail.

1. The following points of departure apply:

In order to serve the citizens and in order to prevent a concentration of powers:

- (a) There shall be a vertical separation of powers in a balanced way, between national, provincial and local levels.
- (b) The exercise of state power shall be controllable and within set limits.
- (c) There shall be representative government at all levels viz. national, provincial and local. This principle

implies proportional representation in all legislative and executive structures at all such levels.

- (d) The vertical separation of power shall be founded on autonomous and original powers for each level of government, and each level's position vis-a-vis the other must be constitutionally balanced.
- (e) At the National level, the Senate shall represent the Provinces and its members shall be directly elected and empowered to act authoritatively on behalf of the Provinces, jointly and severally.
- (f) The nine existing provinces must be retained.
- (g) Each province must be constitutionally equipped to provide for the special needs and capacities of its inhabitants.
- (h) Levels of decision-making will be determined with regard to the quality and effectiveness of the rendering of services in accordance with the principle of subsidiarity.
- (i) The powers and functions of government at provincial level shall include exclusive and concurrent powers as well as the power to perform functions for other

levels of government on an agency or delegation basis.

(j) The allocation of powers to provincial and local level should be conducive to:

- financial viability at each of those levels
- effective public administration
- national unity

- legitimate provincial autonomy

and should acknowledge cultural diversity

(k) The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

(l) The fiscal powers and functions of the national and provincial governments shall be defined in the Constitution.

(m) A framework for local government powers, functions and structures shall be set out in the Constitution and shall furthermore make provision for appropriate fiscal powers and functions for different categories of local government.

- (n) Each level of government shall have a constitutional right to an equitable share of revenue collected nationally.
2. In addition to the above points of departure, the following three aspects also have relevance for the nature of the system:
- (a) An electoral system based on proportional representation, which may possibly include elements of geographical representation, shall apply.
 - (b) The viability of corporate self-determination, as a method for furthering the rights of self-determination of linguistic, cultural and religious minorities, shall be explored.
 - (c) A provincial legislature shall be entitled to pass a constitution for its province within the parameters set by the Constitutional Principles and the new Constitution.
3. For a variety of reasons it could be expected that provinces will develop own and typical "characters". Such development should be encouraged, but then subject to loyalty to the single sovereign state, which loyalty shall be premised on the enhancement of national reconciliation.

In that sense provincial loyalty should be encouraged as it could and should serve as a springboard for the enhancement of loyalty to the one, sovereign state.



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PAN AFRICANIST CONGRESS OF AZANIA

SUMMARY OF SUBMISSION TO CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

The PAC has always maintained that the interpretation and understanding of the Constitutional Principles must precede any debate on the final Constitution.

The ideal situation would be to return to the 1909, 1961 and 1983 Constitutions which all provided for a full unitary state now that we have democratically elected representatives.

The proponents of a federal state had in the past used the unitary state as a very powerful and undiluted tool to oppress the majority of our country. It is ironic now that the same parties want to take the power away from the people by diluting it into a federal system on the basis of divide and rule. These parties are fully aware of the advantages that a unitary system will have for empowering the majority of our people.

What South Africa (Azania) needs is a strong Central Government to provide the necessary programmes to correct the imbalances of the past and to fully empower the people both politically and economically.

When considering the various Constitutional Principles that will effect the Theme

Committee work the PAC has produced the following summarised proposals:

Constitutional Principle No 1

Refers to a Sovereign State. With such a State there can be devolution of power to the various levels of government. We can have Provincial and Local Government without having independent states. We can never balkanise our country again.

Constitutional Principle 4

States that Constitution is the Supreme law and will bind both National and Provincial Government.

Constitutional Principle 16

States that Government shall be structured at National, Provincial and Local levels. This principle rules out a pure federal state. It refers to Provincial and not federal.

Constitutional Principle 18

The powers and functions of National and Provincial Government shall be as defined in the Constitutional Principle 18 (2). The powers of the Provincial Legislature shall not be less than as stated in the Interim Constitution. Therefore, the existing concurrent powers cannot be removed but only more can be added. Currently the Interim Constitution gives no exclusive powers for Provinces and the PAC support this.

Constitutional Principle 19

The powers and functions of both National and Provincial Government shall include concurrent and exclusive powers. Constitutional Principle 19 should be read subject to Constitutional Principle 21. To maintain a strong central government, as little as possible exclusive powers must be granted to provinces.

Constitutional Principle 21

This principle can provide for either a unitary or a federal state and is halfway between the two (hybrid).

To achieve effectiveness Constitutional Principle 21(1) can be used in both instances for National and Provincial Government.

Constitutional Principle 21(2) Gives the National Government the power to intervene in protection of National interest regardless of exclusive powers that might be given to Provincial Government.

Although Constitutional Principle 19 gives concurrent and exclusive powers to National and Provincial Government, 21 (ii) states that national Government can overrule exclusive powers of provinces.

- 21 (iii) Foreign Affairs remains exclusively for National Government
- 21 (iv) As far as uniformity is required National Government power is exclusive
- 21(v) National Economic Policy.
- 21 (vi) Provincial Planning can be either exclusive or concurrent
- 21 (vii) Mutual cooperation must be concurrent only
- 21 (viii) Where there is disagreement on exclusive or concurrent, National Government will prevail.

22. National Government shall not encroach upon the geographical and functional integrity of Provinces. In practice it means nothing because it is the same as Constitutional Principle 16.

23. Refers to any disputes on concurrent powers between National and provincial Government and the national get preference.

These are some of the identified confines that we must consider in our debates. As the debate unfolds and we get into details we will make further submissions.

ELEMENTS OF PROVINCIAL SYSTEM

The Senate

If you have a provincial system as opposed to a federal system the senate become unnecessary. There is then no need for extra representation for provinces at the level of Central/National Level.

Executive Structures

The Executive Structure must be responsible to the Provincial legislature, in other words the Executive should be elected from amongst the members of the Provincial legislature to ensure a representative and democratic executive. The Executive should not be an enforced coalition between participating political parties but the majority party should exercise executive power.

Legislative Structure

The Legislative structures should be directly elected bodies according to a mix system of proportional and constituency representation.

Fiscal relationship

Our view is that fiscal and financial powers of provinces should be determined by Central Government according to the provinces respective fiscal and financial needs. Provinces must not be granted taxation rights.

Local Government

Local government should constitute grassroot democracy and should not be autonomous but answerable especially to Provincial and National Government. Local Government should not become enclaves but must assist in administration of National and Provincial Policy especially as far as the Reconstruction and Development is concerned.

P de Lille

MP

APPOINTMENT OF COMMISSIONS

1. At its meeting of the 2nd December 1994 the Constitutional Committee decided that the appointment of commissions should be considered in the further development of the work programme. Since that date Theme Committees have not made any specific proposals on the appointment of commissions and have dealt with matters of immediate concern. It would appear, though, that especially in relation to agenda items appearing in blocks lower down on the work programme a need for commissions may arise.
2. The rules of the Constitutional Assembly provide for the appointment of commissions "to investigate any matter on which the Constitutional Assembly or a committee ... requires information which cannot conveniently be obtained through the procedures of the Constitutional Assembly ...". For this purpose commissions have the powers of select committees. Thus commissions are competent to summon persons to appear before them, to require such persons to give evidence on oath or affirmation and produce documents and to conduct in depth investigations into matters for which they are appointed.
3. A number of agenda items within the mandate of Theme Committee 1 would appear to involve issues that could more conveniently be dealt with by commissions. These are

Block 7	:	Language
Block 9	:	Name and symbols; National territory; and Seats of government.

3.1 The language issue involves matters such as

- the question of official language(s) at national and provincial level;
- ways and means to protect and promote the diversity of language (see CP XI);
- use of language in official institutions including Parliament and provincial legislatures;
- the medium of communication with state institutions;
- the language(s) in which government publications should be published;

- language(s) in which statutes should be drafted;
 - the language question in courts and semi-judicial institutions;
 - protection and entrenchment of language rights (see CP 11).
- 3.2 The name of the country and its official symbols (national anthem, national flag, official coat of arms and official seal) are all matters that need to be properly investigated before a political decision can be taken.
- 3.3 The national territory is presently defined with reference to the territories of the provinces which in turn are defined according to magisterial districts, former homelands, farms and other statutory defined areas situated within the provinces. The definitions leave much to be desired technically as well as politically, whilst the constitutional position as to the territorial waters and islands such as the Prince Edward Islands is unclear.
- 3.4 The seat of the national legislature is presently the subject of enquiry by a Cabinet Committee. The places where the National Assembly, the Senate, the Appeal Court and the Constitutional Court sit are, however, presently regulated by the Interim Constitution. As such the matter of the seats of government is a constitutional issue that will eventually have to be decided by the Constitutional Assembly.
4. All these issues require, apart from political input, the perspectives of the broad public and guidance from suitably qualified technical experts in the various fields. In terms of the rules persons appointed as members of a commission may be or may include persons who are not members of Parliament, which makes it possible for suitably qualified experts to serve on such commissions.
5. Ideally commissions should conduct their investigations outside the political arena and then submit their reports to the Theme Committee where it will of course be dealt with politically.
6. The matter is placed before the Management Committee for discussion.

DRAFT

CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE

Please note that a meeting of the above committee will be held as indicated below :

Date : Monday 27 February 1995

Time : 14h00

Venue : M46

AGENDA

1. Opening
 2. Minutes
 3. Matters Arising: See Agenda Items Below
 4. Reports from Theme Committees 1, 3 and 4:
 5. Constitutional Assembly Report for 27 February 1995
 6. Theme Committee 1 Matters
 7. Traditional Leaders: Report
 8. Local Government Matters
 9. Correctional Services
 10. Work Programme
 11. Work Schedule
 12. AOB
 13. Closure
-

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries : Ms MM Sparg, Tel 245-031 ext. 212, Page 418-4616 code 6970

