

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 indiginous 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.
- 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.
- 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 socioeconomic 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:

- I . 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 goverwnent 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 gouvrenment, 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 *infral*].
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 limited'.
3. The constitution should contain all recognized socioeconomic 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.

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 power^{S2}, 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 level¹³.
 2. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level.

Allocation of powers

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

Relation between powers

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

Technically, residual powers are all those powers which are not listed in the provisions of a constitution which distribute powers between different levels 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.

' 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 exercising them, even if such allocation 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

'. 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 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.

- 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.

- The following IFP Theme Committee I 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 consistency 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 autonomous 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 nonadvisability of entrenching in the national constitution any given type of local government system.

E MISCELLANEOUS