

7th April 1995

**Democratic Party Submission: Block 2 (Phase 1)
Theme Committee 3**

National and Provincial legislative and Executive Competences

1. Introduction

The system of representative parliamentary democracy only works effectively in circumstances where a political minority or minorities have the opportunity and the real prospect of becoming the political majority from time to time.

Parliamentary democracy will not work if because of linguistic, religious, cultural, ethnic or racial factors political minorities are relegated to a position of political impotence and have to endure the prospect of being permanent political minorities. In such circumstances the pressures within the society become unbearable.

It is imperative to look for alternatives that can mitigate the effects of single-party dominance. A major potential political danger to democracy in South Africa can be reduced to a single issue: the centralisation of power in a single site. The obvious remedy must be to increase the sites of power and maximise the points of influence. In short, the political system must be kept as pluralistic as possible. Devolution of power to provinces and vigorous local government are an important part of the answer.

The DP believes in the maximum devolution of power

The Democratic Party believes that the people must govern, and that there is no more effective way of giving this expression than for the constitution to provide for a variety of sites of power in which the people can participate in making decisions affecting them.

Distributing power

By providing a variety of different sites of power, devolution enables more people to take part in the process of government. It brings government closer to the people. This promotes accountability of political office-bearers to their constituents, and promotes the establishment of a democratic culture. It can also reduce the intensity of the struggle for power at the central government level as it ceases to be a 'winner takes all' contest.

Defence against tyranny

The Democratic Party believes that an over-concentration of power in central government leads to the retention of power for its own sake, and the use of power and patronage for the advantage of the party or group which is in power. South Africa's history is littered with examples of

the use of the monopoly of centralised political power to impose an oppressive philosophy on the entire country. Decentralising power makes this very much more difficult, and provides a variety of sites of power in which more people can exercise power, making the retention of central government power relatively less important.

Accommodating pluralism

The Democratic Party accepts the cultural, linguistic, geographic and political diversity of South Africa. This diversity is a national asset which needs to be developed in a spirit of mutual respect, tolerance and conciliation. Devolution of power helps to accommodate this diversity by multiplying the sites of power.

Subject only to considerations of the essential national interest, legislative and executive decisions should be taken at the level that is closest to the people who will be affected by such decisions.

It is essential that the rights, powers and responsibilities of the provincial political authorities are written into and entrenched in the constitution. It is a central tenet of DP policy that the national parliament will enjoy co-ordinate sovereignty with the provincial parliaments. It is also essential that the constitution guarantees equitable access by provincial political authorities to the resources of the nation as a whole: otherwise any rights, powers and responsibilities of such authorities will be meaningless.

2. Constitutional Principles

The Constitutional Principles contained in Schedule 4 of the Constitution stipulate requirements which have to be met in a new constitution.

Principles XVIII to XXVII are directly related to relationships between different levels of government. This submission is not required to comment on financial and fiscal relationships, so these matters are not addressed.

The elements of the principles which most directly prescribe requirements in respect of allocation of powers are:

- (a) XVIII 1. The powers and functions of the national and provincial governments shall be defined in the Constitution.
- (b) XVIII 2. The powers and functions of the provinces defined in the (new) Constitution, shall not be substantially less than or substantially inferior to those provided for in this (current) Constitution.
- (c) XIX The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers.

- (d) XX Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.
- (e) XXI This Principle sets out criteria to be applied in the allocation of powers.
- (f) XXII 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.

3. Allocation of Powers

- 3.1 Subject to the provisions of paragraph 3.4, Parliament shall have exclusive legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

Citizenship, immigration and passports
Customs and excise
Defence (See 3.12)
Foreign Affairs
Mineral and Energy Affairs
National Economic Policy
National Finance
National Intelligence and Security
National Public Enterprises
National Public Service
National Public Works
National Transport
Posts and Telecommunications
Registration of companies and financial institutions
Trade and industries
Water

- 3.2 Subject to the provisions of paragraphs 3.4 and 3.5, a provincial legislature shall have exclusive legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

Casinos, racing, gambling and wagering
Cemeteries and cremation
Clinics and hospitals, excluding teaching hospitals
Combating of public nuisances
Cultural Affairs
Delivery of water, electricity and other essential services
Education at all levels, excluding university and technikon education
Firefighting, ambulance services and other protection services

Housing
Indigenous and customary law
Land Affairs
Language policy and the regulation of the use of official languages
Legal Aid
Liquor licensing/controls
Local government
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Provincial public media
Provincial sport and recreation
Roads
Regional planning and development
Tourism
Town planning
Traditional Authorities
Provincial public service
Provincial public works
Public Holidays
Trading hours
Urban and rural development
Waste disposal

3.3 Subject to the provisions of paragraphs 3.4, 3.5 and 3.6, a provincial legislature shall have legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

Abattoirs
Agriculture
Airports
Animal control and disease
Archives and Museums
Consumer protection
Correctional Services
Environment
Forestry
Harbours
Health services
Justice (See 3.12)
Labour
Meteorological services
Police and Public Safety (See 3.12)
Pollution control
Population development

Provincial Public Enterprises
Public transport
Registration of deeds and surveys, excluding trigonometrical surveys
Registration of births, deaths, marriages and issuing of identity documents
Refugees and expellees
Road traffic regulation
Soil conservation
Trade and industrial promotion
University and technikon education
Veterinary services
Welfare services

3.4 Parliament and provincial legislatures shall not enact legislation that is in conflict with the Bill of Rights.

3.5 A law passed by a provincial legislature shall prevail over an Act of Parliament which deals with a matter referred to in paragraphs 3.2 and 3.3 except in so far as -

- (a) the Act of Parliament deals with a matter which is the subject of an international treaty or international law to which South Africa is bound; or
- (b) the provincial law or practice materially and unjustifiably prejudices the economic, health, environment or security interests of another province or the country as a whole; or
- (c) the provincial law or practice materially and unjustifiably obstructs the free movement of people, goods, money, information or assets between provinces.

3.6 A law passed by a provincial legislature shall prevail over an Act of Parliament which deals with a matter referred to in paragraph 3.3 except in so far as the Act of Parliament is in the form of framework legislation and is required because minimum standards or uniformity across the nation are necessary for a particular function to be performed effectively.

3.7 In the event of a dispute concerning which level or levels of government have legislative competence in respect of a particular activity or functional area which cannot be resolved by mediation or by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the provincial legislature or legislatures.

3.8 If parliament exercises its legislative competence in terms of paragraphs 3.5 or 3.6, the legislative competence of a provincial legislature shall be constrained only to the extent that the relevant parliamentary legislation deals with such matters, and expressly or by implication limits the legislative competence of the provincial legislature.

3.9 Executive power relating to all functional areas listed in paragraph 3.1 shall vest in the national government.

3.10 Executive power relating to all functional areas listed in paragraphs 3.2 and 3.3 shall vest in the provincial executive.

3.11 Powers and functions at national, provincial or local level shall include the power to perform functions for other levels of government on a mutually agreed agency or delegation basis.

3.12 The allocation of the powers of the national and provincial governments in respect of Police, Justice and Defence are set out in greater detail in separate Chapters of the Constitution as per DP submissions to Theme Committees 5 and 6.4.

4. Senate

The Senate will have special powers to protect the interests of provinces and to promote co-operation and co-ordination between the national government and the provinces, and between the provinces themselves. A DP submission has been made to Theme Committee 2 in this regard. Other bodies and mechanisms to facilitate co-operation and co-ordination are the subject of the next submissions to Theme Committee 3.

5. Local government

5.1 Local government is a fundamentally important tier of government at which people at grassroots level have their say in the laws, regulations and administration which impact most directly on their communities and daily lives.

5.2 In line with the approach of bringing government as close to the people as possible, substantial powers and functions should be allocated to local government. These allocations to local government should be dealt with primarily in provincial constitutions and legislation.

5.3 Wherever practical, an endeavour should be made to allocate to local governments the powers and functions allocated to provinces in these proposals.