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NATIONAL PARTY SUBMISSION
THEME COMMITTEE 3
LOCAL GOVERNMENT

A. INTRODUCTION

The National Party believes that sound local government is the cornerstone of a healthy and viable democratic system. Local government brings decision-making closer to the people and affords them better opportunities to become involved in government processes in respect of matters affecting their daily lives. In addition, strong local government that performs effectively and enjoys the support of the people can in many ways achieve more than other levels of government in the fight against crime, poverty and other social problems and in creating stable, peaceful and prosperous local communities. For these reasons we believe that local government deserves our closest attention in the constitution-making process.

B. POINTS OF DEPARTURE

1. Local government should be **recognised constitutionally as a fully-fledged level of government**. Not only will that give effect to Constitutional Principle XVI; it will lay the foundation for sound local government in South Africa.

2. In accordance with Constitutional Principle XXIV, a specific chapter of the constitution should provide for a **constitutional framework for local government**. On the question whether to adopt a maximalist or a minimalist approach in such a framework, it is suggested that a middle course be followed.

3. With regard to the **relationship between local government and other levels of government**, in particular the question whether a hierarchical approach should be followed or whether we should aim at creating different spheres of government, we believe that local government should be subject to national and provincial legislation, but that does not mean that local government should be completely subservient to any higher level. Any legislative or other action by higher levels with regard to local government must be in terms of and subject to the framework for local government entrenched in the constitution. This is how the constitutional recognition of local government will be given practical effect and meaning.

4. With regard to the **autonomy** of local government, we fully support the fundamental premises expressed in the European Charter of Local Self Government, especially article 4.2, which reads: "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority." This is the same approach that has been followed in section 174(3) of the transitional constitution.

5. With regard to the actual **powers and functions** of local government, the ultra vires approach was followed in the past, meaning that a fixed list of local government functions was determined outside the ambit of which local government could not go. On the other hand there is the "inherent powers" approach, which means that a local government can exercise all powers and perform all functions as its community agrees to and is willing to pay for, except if specifically prohibited by national or provincial legislation. We lean towards the latter approach, although we recommend (see paragraph 4.3) the inclusion in the constitution of a minimum list of matters to which local government must attend. The idea is to entrust a local government with the responsibility to provide access for its community to a minimum number of basic services, without denying them the opportunity to perform any other function not prohibited by law.

6. There should be no restriction on either national or provincial government to **delegate or devolve** powers and functions to local government. However, the principle that finance follows function should be a prerequisite in such cases.

C. SPECIFIC CONSTITUTIONAL PROVISIONS

For the sake of convenience, we refer to the various provisions of the transitional constitution which we consider to be relevant in this regard.

1. Definition

The term "**competent authority**" as used in chapter 10 of the transitional constitution and in these proposals should be defined for the purposes of the final constitution in order to differentiate between legislation of Parliament and the provincial legislatures in respect of local government matters. (As suggested by the Commission on Provincial Government (document 9 paragraph 3.15), this could probably be done with reference to their respective powers in terms of the constitution.)

2. Section 158: Financial allocations by the national government

This provision should be retained unamended, so that financial allocations **by** the national government -

- (a) to a provincial or local government, shall be made in terms of an appropriation act;
and
- (b) to a local government, shall ordinarily be made through the provincial government of the province in which the local government is situated.

3. Section 174: Establishment and status of local government

3.1 We propose the following provision. It corresponds with the proposals contained in the document Local Government beyond 2000, except for the underlined amendments:

"174. (1) Local government shall be established to cover the national territory of the Republic for residents of areas demarcated by law of the competent authority. The law of such a competent authority dealing with demarcation shall base its norms for demarcation on technical and developmental considerations rather than political expediency,

(2) A law referred to in subsection (1) may make provision for categories of local government with differentiated powers, functions and structures.

(3) A local government shall be autonomous and, within the limits prescribed by or under the law of a competent authority, shall have the right to exercise its powers to regulate its own affairs and shall have adequate and appropriate legislative, executive and financial powers to allow it to function effectively with regard to its entrusted powers and functions."

3.2 The present subsections 174(4) and (5) can be retained unamended:

"(4) Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.

(5) Proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been published for comments in the Gazette or the Provincial Gazette, as the case may be, and local governments and interested persons, including organised local government, have been given a reasonable opportunity to make written representations in regard thereto."

4. Section 175: Powers and functions of local government

4.1 The present section 175(1) can be retained:

"175. (1) The powers, functions and structures of local government shall be determined by law of a competent authority."

4.2 In pursuance of the suggestion in Local Government beyond 2000, p.11, the following subsection 175(2) is proposed:

"175. (2) A local government shall be assigned such legislative, executive and financial powers and functions as may be necessary to provide services for and to promote the development of the communities that it governs."

4.3 The present subsection 175(3) should be retained but amended as indicated:

"175. (3) A local government shall, to the extent determined-in any applicable law, make provision for access by ail persons residing within its area of jurisdiction to at least water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practical."

4.4 The present subsections 175(4) and (5) can be deleted if subsection (2) is amended as proposed.

4.5 The present subsection 175(6) should be retained as subsection 175(4):

"175. (4) A local government may, in its discretion, by means of a resolution of its council, provide for the assignment of specified functions to local bodies or sub-municipal entities within its area of jurisdiction as prescribed and regulated by or under law where, in the opinion of the council, such assignment of functions will facilitate or enhance the provision or administration of services, the adherence to municipal bye-laws or, more generally, good governance in the public interest: Provided that such assignment of functions -

- (a) shall not be inconsistent with an Act of Parliament or an applicable provincial law; and
- (b) shall not diminish the accountability of such local government."

5. Section 176: Council resolutions

The section should be retained as amended:

"176. Matters before the council of a local government pertaining to-

- (a) the budget of the local government, shall be decided by a resolution of the council adopted by a majority of at least two-thirds of all its members: and
- (b) land use planning, shall be decided by a resolution of the council adopted by at least a majority of all its members: Provided that a council may delegate the power to make decisions on matters pertaining to land use planning to the executive committee or to a committee or officials -designated for this purpose: Provided further that section 177 shall apply mutatis mutandis to the appointment and functioning of a committee appointed for this purpose."

6. Executive committee(s)

The present section 177 should be retained as amended:

"177. A council of a local government shall elect, according to a system of proportional representation as may be prescribed by law, from among its members, an executive committee or committees to exercise such powers and perform such functions as may be determined by such council: Provided that -

- (a) the council shall determine the number of members of and the quorum for the executive committee or committees;
- (b) all committees shall endeavour to exercise their powers and perform their functions on the basis of consensus among their members; and
- (c) if consensus on any matter cannot be achieved, such matter may be decided by a committee by resolution of a majority of at least two-thirds of all its members, or the committee may, if a majority of the committee so decides, submit a report and recommendation (if any) on the matter to the council for a decision."

7. Section 178: Administration and finance

Again we follow the suggestions made in Local Government beyond 2000, p 15.

7.1 Subsections 178(1) and (2) can be retained unamended:

"178. (1) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.

(2) A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction."

7.2 In pursuance of a suggestion by the Commission on Provincial Government (p.10 of document 9), the following subsections should be substituted for the present subsection 178(3):

"178. (3) Subject to subsection (4), a local government shall be entitled to an equitable share of revenue collected nationally so as to ensure that it is able to provide basic services and exercise the powers and perform the functions allocated to it.

(4) The Financial and Fiscal Commission shall make recommendations regarding -

- (a) the percentage of revenue collected nationally to be allocated to local government in each province; and
- (b) the criteria for the allocation of an equitable portion of the percentage allocated to a province in terms of paragraph (a) to local government within the province, taking into account the different categories of local governments provided for in a law of the competent authority."

8. Section 179: Elections

The following provision suggested in Local Government beyond 2000, as amended, is proposed:

"179. (1) A local government shall be elected democratically, and such election shall take place in terms of an applicable law and at intervals of not less than three and not more than five years.

(2) Sixty percent of the elected members of a local government shall be elected according to a simple majority system on the basis that each member shall represent a ward and forty percent of the elected members shall be elected according to the system of proportional representation applicable to an election for members of the National Assembly.

(3) Subject to section 6, every natural person shall be entitled to vote in an election of a local government if he or she -

(a) is ordinarily resident within the area of jurisdiction of that local government or is under the law liable for the payment of property rates, rent, service charges or levies to that local government; and

(b) is registered as a voter on the voters' roll of that local government.

(4) Subject to subsection (2), a voter shall not have more than one vote per local government.

(5) No person shall be qualified to become or remain a member of a local government if he or she -

(a) is not eligible to vote in terms of subsection (3),

(b) is a member of the National Assembly or the Senate or a provincial legislature;

(c) is not qualified to become a member of the National Assembly.'

(d) is an employee of a local government; or

(e) is disqualified in terms of any other law."

9. Section 180: Code of conduct

The provision prescribing the adoption of an enforceable code of conduct for members and officials of local government is commendable and should be retained.

10. Section 182: Indigenous leaders and local government

The participation of indigenous communities and leaders in local government has been dealt with in another submission.

11. Section 187: Procurement administration

We propose that this provision, which applies to all levels of government, be retained unamended.

12. Section 200: The Financial and Fiscal Commission

Although the Financial and Fiscal Commission is not in the first place a negotiating forum with regard to allocations to the various spheres of government, we believe that the representation of local government in the Commission should be strengthened. Accordingly, we propose the following provision dealing only with the composition of the Commission:

"200. (1) The Commission shall consist of -

(a) a chairperson and deputy chairperson, appointed by the President in consultation with the Cabinet;

(b) a person designated by each of the various Executive Councils of the provinces, who shall be appointed by the President;

(c) four members appointed by the President on the advice of the Cabinet; and

(d) three members designated by organised local government, at least one of whom shall have expertise in local government finance, who shall be appointed by the President."

13. Section 207: Commission on remuneration of representatives

This provision, which applies to all levels of government, is dealt with in another submission.

14. Section 212: Public administration

Although the principles pertaining to public administration should apply to local government, local government does not, in practice, fall under the provisions of the constitution with regard to the Public Service. It is suggested that local government should only be regarded as part of the Public Service as an institution to which the relevant principles apply, and not in terms of its structure and function.

15. Section 221: Local policing

The existing provision can be retained unamended as far as local government is concerned.

D. NEW PROVISIONS

1. A Local Government Commission

In pursuance of the suggestion in Local Government beyond 2000, p.29, we propose the establishment of a Local Government Commission as follows. (Our amendments to that suggestion are underlined.):

"(1) There is hereby established a Local Government Commission for the Republic which shall have the powers and functions entrusted to it by this Constitution or by law of Parliament.

(2) The Commission shall consist of a chairperson and the number of members determined and appointed by the President: Provided that at least sixty Percent of the members of the Commission shall be appointed from nominations made by organised local government in a manner which shall ensure equitable representation of local government in each province as well as minority groupings within local government.

(3) The object of the Commission shall be to be the guardian of local government and to facilitate the establishment, development, maintenance and recognition of local government, for the achievement of which the Commission shall be competent to -

- (a) advise Parliament with regard to all legislation affecting local government;
- (b) advise the national government with regard to policies regarding local government systems, processes, institutions, powers and functions;
- (c) initiate any law or policy referred to in paragraphs (a) or (b); and
- (d) initiate and conduct research with regard to any law or policy referred to in paragraphs (a), (b) or (c).

(4) No draft legislation affecting the status, powers or functions of local government shall be tabled in Parliament unless the Commission has had reasonable opportunity to consider such draft legislation and has made its report and findings thereafter available."

2. Provincial Intergovernmental Forums for Local Government

We propose that such forums be established as suggested in Local Government beyond 2000, p.30, in order to protect the autonomy of local government, and to ensure that adequate consultation between local and provincial legislatures and executives takes place before legislation and policies affecting local government are adopted:

"A provincial law shall provide for the establishment of a provincial intergovernmental forum for local government consisting of the member of the executive council responsible for local government in that province, not more than four members of the provincial legislature concerned elected by such legislature, and an equal number of members of local governments in the province nominated by organised local government in that province: Provided that the representatives of organised local government equitably reflect the various interest groups elected as councillors."

3. Borrowing powers

We support the observations made by the Commission on Provincial Government (paragraph 3.12 of document 9) in this regard. The borrowing powers of local governments are not dealt with explicitly in the transitional constitution. However, section 188 implicitly recognises such a competency, but prohibits the national government to guarantee a local government loan unless it complies with norms and conditions set out in a law of Parliament, and unless the Financial and Fiscal Commission has made a recommendation concerning compliance with such norms and

conditions. Section 175(3) also prohibits a provincial government to guarantee a local government loan unless the need for the guarantee has been verified and recommended by the Financial and Fiscal Commission. We recommend that similar express provisions be included in the constitution.

4. Auditing

Once again, the remarks by the Commission on Provincial Government (paragraph 3.14) pertains. Section 193(2) of the transitional constitution empowers the Auditor-General to audit and report on all the accounts and financial statements of any local government. It has been suggested that local governments should arrange for the auditing of their own accounts. However, we agree that an independent body is needed to protect the interests of the taxpayers at all levels of government. Furthermore, as local governments will receive a portion of revenue collected nationally and may also receive other grants or allocations from national or provincial government, it is advisable that the Auditor-General shall do the auditing at all levels of government. We recommend that the provisions of section 193(2) be incorporated in the constitution in respect of local government as well.

5. Local governance

We believe that, although local governments has the primary responsibility to ensure their sound administration (see section 178(1)), higher levels of government, which have a certain measure of legislative and executive authority over local government, share that responsibility. At the same time, however, administrative supervision by higher levels of government should not amount to control as practised in the past and should not encroach on the affairs of local governments. Accordingly, we recommend the inclusion of the following provision, which corresponds to article 8 of the European Charter of Local Self Government:

"(1) Any administrative supervision of local governments may be exercised only according to such procedures and in such cases as are provided for by the constitution or another law.

(2) Any administrative supervision of the activities of local governments shall normally be directed only at ensuring compliance with the law and with constitutional principles. Administrative supervision may, however, be exercised with regard to expediency in respect of tasks the execution of which has been delegated to local governments.

(3) Administrative supervision of local governments shall be exercised in such a way as to ensure that the intervention is kept in proportion to the importance of the interests which it is intended to protect."

6. Co-operation among local governments

Article 10 of the European Charter of Local Self Government contains a provision in this regard and we propose that a similar provision be included:

"(1) Local governments shall be entitled, in exercising their powers and functions, to co-operate and, within the framework of the law, to form joint bodies with other local governments in order to carry out tasks of mutual interest.

(2) Local governments' competence to form and belong to associations for the protection and promotion of their mutual interests and to belong to international associations of local governments shall be recognised.

(3) Local governments shall be entitled, under such conditions as may be provided for by law, to co-operate with local governments in other countries."

7. Legal protection of local self government

The following provision of the European Charter of Local Self Government (article 11) should also be included:

"Local governments shall have the right of recourse to a judicial remedy in order to secure the free exercise of their powers and respect for such principles of local self government as are enshrined in the constitution or any other law."

E. CONCLUSION

As explained, we believe that ensuring strong local government will be in the best interests of South Africa and all its people. We believe that a chapter of the constitution that contains provisions as proposed in this submission will give due recognition to the importance of local government in our constitutional system, and will facilitate the establishment and protect the existence of strong local government. We should do everything in our power to work together in its implementation.

NATIONAL PARTY (NP)