

WORKING DRAFT - 19 SEPTEMBER 1995

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CHAPTER 1

FORMAL PROVISIONS

Republic of South Africa

1. (1) The Republic of South Africa shall be one, sovereign state.
- (2) The national territory of the Republic comprises the areas of the provinces of -

(a) ...¹

- (3) The areas and boundaries of the provinces shall be as defined in the Constitution of the Republic of South Africa Act, 1993.²

Provinces

2. (1) The following provinces shall, for the purposes of the Constitution, be recognised as the provinces of the Republic:

¹ The names of the provinces to be inserted when that issue has been finalised.

² In terms of Constitution Principle XVIII(1) the boundaries of the provinces must be defined in the Constitution. Furthermore, the boundaries must be the same as those established in terms of the Interim Constitution (CP XVIII(3)).

Special provision will have to be made in the section dealing with amendment of the Constitution with regard to the alteration of provincial boundaries - see CP XVIII(4) and (5).

(a) ...

(b) ...

(2) Parliament shall at the request of a provincial legislature alter the name of a province in accordance with the request of such legislature.

(3) The areas and boundaries of the respective provinces shall be as established at the commencement of the Constitution.³

2.

National symbols⁴

3.

Languages⁵

4.

³ See Constitutional Principle XVIII.

⁴ Still under consideration.

⁵ Still under consideration.

CHAPTER 2

CONSTITUTIONAL DEMOCRACY

Citizenship⁶

5.

Franchise⁷

6.

Supremacy of Constitution⁸

7. (1) This Constitution shall be the supreme law of the Republic.

(2) Any law, act or conduct inconsistent with this Constitution shall be invalid to the extent of the inconsistency.

(3) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

⁶ Still under consideration.

⁷ Still under consideration.

⁸ As discussed in the CC but not yet approved.

Amendment of the Constitution⁹

8. Parliament may by law repeal or amend any provision of this Constitution.

Any such repeal or amendment shall require the approval of at least two-thirds of the total number of members of the National Assembly provided for in this Constitution.

⁹ Should this section not be subject to repeal or amendment, the words "except this section" must be inserted at the end of the sentence.

The NP proposes the entrenchment of the Constitution at four levels:

- (i) absolute entrenchment of the commitment to a democratic form of state and democratic mechanisms;
- (ii) general entrenchment of the constitution by requiring a two-thirds majority for all other provisions;
- (iii) specific entrenchment of provincial matters by retaining section 62(2) of the interim Constitution; and
- (iv) 'judicial entrenchment' of the most basic fundamentals of a democratic state, articulated in a schedule to the Constitution, by requiring that the Constitutional Court certifies that any amendment is in accordance with these fundamental principles.

When considering this issue the CC should take cognisance of Constitutional Principle XVIII(4).

CHAPTER 3

FUNDAMENTAL HUMAN RIGHTS

9 - 35.

CHAPTER 4

PARLIAMENT

Constitution of Parliament

36. Parliament consists of the National Assembly ...¹⁰

THE NATIONAL ASSEMBLY

Composition of National Assembly

37. The National Assembly consists of ... members.¹¹

National elections

38. The election of members of the National Assembly shall be conducted in accordance with an electoral system¹² which shall be based on a common

voters' roll and, in general, proportional representation as provided for by national law.¹³

¹⁰ The question of a Senate is contentious. Consequently no provisions on the Senate were included in this draft. Although there appears to be broad agreement that there should be a Senate further clarity is required whether the Senate should be part of "Parliament" or whether it should be a separate institution. Depending on what is agreed about the Senate, some of the provisions on the National Assembly may have to be rephrased and relocated to a joint section on the NA and the Senate (as, e.g. in the case of sections 55 - 67 of the Interim Constitution).

¹¹ The size of the National Assembly is contentious. Contralesa proposed that the legislative chamber should include traditional leaders.

The CC Subcommittee agreed that the matter be debated in the CA.

¹² The CC Subcommittee recommends that the electoral system be debated in the CA.

¹³ As approved by TC 2 Report of 7 August 1995 on electoral system. The majority of parties

Duration of National Assembly

39. (1) The National Assembly as constituted in terms of a general election shall continue **[serve]**¹⁴ for a term of five years¹⁵ as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.¹⁵

(2) The National Assembly may be dissolved before the end of the term for which it was elected if a vote of no-confidence in the Cabinet is passed by the National Assembly.¹⁶

(3) When the term for which the National Assembly was elected expires or if the National Assembly is dissolved before its term expires, the National Assembly as then constituted shall remain competent to function, and its members shall

and public submissions favour a system which includes party lists and constituency elections resulting in proportional representation.

¹⁴ It was suggested in the CC that the word in bold brackets be replaced by "serve". The Law Adviser and the Technical Advisers recommended to the CC Subcommittee that the word "continue" be retained as an indication of the *duration* of the National Assembly. It was agreed by the CC Subcommittee that the word "continue" should be used.

¹⁵ The DP proposes a term of four years.

¹⁶ In terms of section 20 of the Draft on the National Executive the State President may either resign or dissolve the NA if a motion of no confidence is passed in the Cabinet (including the President).

The DP proposed that the words underlined be inserted in subsection (1) and that subsection (2) be deleted. The ANC posed the question of snap elections and whether provision should be made for the dissolution of Parliament otherwise than as a result of a motion of no confidence.

In the CC Subcommittee it was observed that the question whether subsection (2) should be retained, is contingent upon the provisions pertaining to votes of no-confidence. It was decided by the CC Subcommittee that the inclusion of this provision should be reconsidered once finality has been reached on the dissolution of Parliament.

continue as members, until the day before polling for the next National Assembly.¹⁷

Speaker and Deputy Speaker¹⁸

40. (1) The National Assembly shall at its first sitting after a general election, and thereafter as and when it becomes necessary to fill a vacancy, elect a Speaker and a Deputy Speaker from amongst its members.¹⁹

¹⁷ As per Block 10 of the Report on Parliament. As presently worded the National Assembly and its members remain competent to function after a dissolution up to the day before polling for the next NA. However, there was some discussion (and support) in the Theme Committee on whether this should be changed so that members of the NA only vacate their seats the day before the newly elected members take up their seats. However, in the CC debate concern was expressed that an extension of the National Assembly beyond an election may open the door for a government, after having lost an election, to legislate for instance on the validity of the election.

The Technical Advisers reported that among 15 other jurisdictions, three were found with a provision resembling the above section (Botswana, Bangladesh and Namibia). None was found that provided for the continuation of membership or the functioning of Parliament between the day of the election and the first session of the newly elected Parliament. It was agreed in the CC Subcommittee that if such provision was required, stringent safeguards would have to be built in to prevent the "dissolved" parliament from abusing its ability to sit after the day of the next election (e.g. by legislating on the election, changing the Constitution, voting its members undue privileges and benefits).

¹⁸ This section is based on section 41 of the Interim Constitution as per agreement.

¹⁹ Agreed to in the CC.

(2) The Chief Justice²⁰ or a judge designated by him or her shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

(3) The procedure set out in Schedule ... shall apply to the election of the Speaker and the Deputy Speaker.²¹

(4) The Speaker and the Deputy Speaker have the powers and functions assigned to them by this Constitution and the law, including the rules and orders of the National Assembly.²²

(5) The Speaker or Deputy Speaker ceases to hold office if he or she resigns from office or ceases to be a member of the National Assembly. The Speaker or Deputy Speaker may be removed from office by resolution of the National Assembly.²³

Qualifications of members of National Assembly

41. (1) Only South African citizens qualified to vote²⁴ in elections of the

²⁰ In terms of the Interim Constitution the Chief Justice presides over the election of a Speaker. As the Constitutional Court is the highest court as far as constitutional matters are concerned the question arises whether the President of the Constitutional Court rather than the Chief Justice should not fulfil constitutional functions such as presiding at the election of a Speaker. The CC agreed that it was not vital to decide this issue at this stage. It should be settled in private discussions between the parties. To be revisited once the overall competencies of the courts had been dealt with.

²¹ The procedure referred to here is similar to that contained in Schedule 5 of the Interim Constitution. The CC agreed to this clause.

²² Agreed to in the CC.

²³ Agreed to in the CC.

²⁴ The franchise is dealt with by TC 1. Discussion of clause stands over pending TC 1's report.

National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

(2) The following persons are disqualified from being members of the National Assembly:

- (a) Unrehabilitated insolvents.²⁵
- (b) Persons declared to be of unsound mind by the courts of the Republic.²⁶
- (c) Persons who at the commencement of the Constitution are serving a sentence of more than 12 months imprisonment without the option of a fine.²⁷

²⁵ **Agreed to in the CC.**

²⁶ **Agreed to in the CC.**

²⁷ **Agreed to in the Subcommittee.**

- (d) Persons convicted after the commencement of the Constitution [27 April 1994]²⁸ of an offence in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, and sentenced to more than 12 months' imprisonment without the option of a fine. A person shall not be regarded as convicted until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired **[or if such person has received a pardon or amnesty]**.
- (e) Persons who are members of [the Senate], a provincial legislature or a local government.²⁹
- (f) Persons holding office of profit under the Republic, excluding -
- (i) the Deputy State President;

²⁸ (a) In the CC debate there was a suggestion that the date could be deleted if "amnesty" is added at the end of the paragraph. However, it would appear that the inclusion of a reference to amnesty in the paragraph is inappropriate as the paragraph only deals with convicted persons. This provision should be understood against the background of the amnesty process which may indemnify persons who would otherwise have been convicted. It was agreed by the CC Subcommittee that reference to "amnesty" could be omitted.

(b) The Technical Advisers raised the issue of pardon as foreseen by the proposed paragraph (d) as it may be superfluous. Pardon has three possible meanings. First a free pardon expunges the conviction and sentence (in terms of section 327 of the Criminal Procedure Act of 1977). A person receiving a free pardon would thus not be disqualified by section 7(2)(c) as there is no conviction or sentence. Second, a pardon may wipe out the sentence only (section 325 of the Criminal Procedure Act). Where there is no sentence, the disqualification does not apply either. Third, a pardon may reduce a sentence (usually referred to as remission of sentence of imprisonment). For example, a person's 20 year sentence may be reduced to 10 years. The judicially imposed sentence is not reduced, merely the length of execution. Whether a person is disqualified would depend on the length of the original sentence of imprisonment.

The CC Subcommittee agreed that reference to "pardon" may be omitted.

²⁹ Stands over pending decisions on the Senate.

- (ii) Ministers and Deputy Ministers' and
- (iii) any other office declared by national law not to be incompatible with the functions and duties of members of Parliament.³⁰

(3) The disqualification imposed by this section on a person who served a prison sentence of more than 12 months shall lapse 5 years after completion of the sentence.³¹

(4) A person not qualified to be a member of the National Assembly and who sits or votes in the National Assembly knowing that he or she is not qualified, shall be liable to a fine prescribed by the rules and orders of the National Assembly.³²

Vacation of seats³³

42. A member of the National Assembly shall vacate his or her seat upon -

- (a) ceasing to be eligible to be a member;
- (b) resigning as a member;
- (c) becoming a member of **[the Senate]** a provincial legislature or a

³⁰ Formulation agreed to in Subcommittee.

³¹ Agreed to in Subcommittee with suggestion that it be combined with clause 41(2)(c).

³² Agreed to in the CC.

³³ Approved by the Subcommittee. The issue of including in the new Constitution the current requirement in section 43(b) of the Interim Constitution that a member vacates his or her seat upon ceasing to be a member of the party which nominated him or her, was referred to the CC Subcommittee. The CC Subcommittee is of the opinion that this question should be referred to the CA.

local government; or

- (d) unauthorised absence as provided for in the rules of Parliament.

Filling of vacancies³⁴

43. Vacancies in the National Assembly shall be filled in accordance with national law.

Oaths or affirmation by members

44. (1) Every member of the National Assembly, before taking his or her seat in the Assembly, shall make and sign an oath or solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her.

(2) A member filling a casual vacancy in the National Assembly shall make and sign the oath or solemn affirmation before the Speaker.³⁵

Sittings and recess periods

45. (1) The National Assembly may determine the time and duration of its sittings and its recess periods. The first sitting of the National Assembly after a **[general]** election shall take place not more than 10 days after the declaration of the result of the election at a time and on a date determined by the Chief Justice.³⁶

(2) The State President³⁷ may at any time summon the National

³⁴ **Agreed to in the CC.**

³⁵ **Agreed to in the CC.**

³⁶ **Agreed to in the CC.**

³⁷ **The term "State President" agreed to by the parties.**

Assembly to an extraordinary sitting for the conduct of urgent business.³⁸

(3) The seat of the National Assembly is ...³⁹ where all sittings of the National Assembly shall ordinarily take place. Sittings at other venues are only permitted on the grounds of public interest, security or convenience and if provided for in the rules and orders of the National Assembly.

Decisions

46. (1) Except where the Constitution provides otherwise, all questions before the National Assembly shall be determined by a majority of the votes cast by the members present. When, in terms of this section, a vote is taken on a Bill, a majority of all the members of the National Assembly shall be present, and when it is taken on any other matter, one third of all the members shall be present.⁴⁰

(2) The member of the National Assembly presiding in the Assembly has no deliberative vote, but does have and shall exercise a casting vote in the event of an equality of votes.⁴¹

³⁸ **The National Party is in favour of a clause along the following lines:**

"At the written request of 20% of its members, the Speaker shall convene a sitting of the National Assembly during a recess."

Joint sittings of the Houses of Parliament to be revisited once the role and status of the Senate have been clarified.

The CC decided that this provision should be shelved until states of emergencies are discussed.

³⁹ **Legislative seats still to be dealt with. Subsection otherwise approved by the CC.**

⁴⁰ **As approved by the CC. Constitutional amendments, and the majorities required, are yet to be dealt with.**

⁴¹ **Agreed to in the CC.**

Note: The provisions following below (i.e. sections 47 - 54) will apply to both the National Assembly and the Senate should agreement be reached on a second House of Parliament.

State President's rights in National Assembly

47. The State President is entitled to and to speak in the National Assembly, but may not vote.⁴²

Internal autonomy

48. (1) The National Assembly shall determine its internal arrangements and make rules and orders in connection therewith.⁴²

(2) The salaries, allowances and benefits of members of the National Assembly shall be as provided for by national law.⁴²

Parliamentary privilege

49. (1) Members of the National Assembly shall have freedom of speech and debate in the National Assembly and its committees subject to the rules and orders. This freedom may not be limited by or questioned in the courts.⁴³

(2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages as a result of anything they have said, produced or submitted in or before or to the National Assembly or its committees. The same immunity applies in respect of anything revealed as a result of what they have

⁴² Agreed to in the CC.

⁴³ Amended and approved in the CC.

said, produced or submitted.⁴⁴

(3) Other privileges, immunities and powers of Parliament shall be as prescribed by a national law.⁴⁴

Ordinary Bills

50.⁴⁵

Money Bills

51. ...⁴⁵

Bills affecting provincial matters

52. ...⁴⁵

Assent to Bills

53. (1) A Bill duly passed by Parliament in accordance with the Constitution shall without delay be assented to and signed by the State President.⁴⁶

(2) If the State President has reservations or concerns about the constitutionality of a Bill, or whether it has duly been passed by Parliament in

⁴⁴ **Agreed to in the CC.**

⁴⁵ **These provisions are dependent on the role of the Senate in the legislative process. Consideration should also be given to the inclusion here of a provision similar to section 98(9) of the Interim Constitution which provides for the referral to the Constitutional Court of Bills where at least one-third of the members of the NA petitions the Speaker to do so. This provision has already been agreed to in TC 5, and has for present purposes been included in the Draft on the Administration of Justice.**

accordance with the Constitution, the State President may refer the Bill back to Parliament with a clear indication of any defects. If the Bill is passed again, giving effect to the State President's reservations or concerns, the State President shall sign the Bill.

If Parliament does not agree with the State President reservations or concerns, the Speaker shall refer the Bill to the Constitutional Court for a ruling on the constitutionality of the Bill, or whether it has been duly passed in accordance with the Constitution. If the Constitutional Court finds the Bill to be consistent with the Constitution, the State President shall sign the Bill. If the Constitutional Court finds the Bill to be inconsistent with the Constitution, it shall be referred back to Parliament for further consideration, failing which, it shall lapse.⁴⁷

(3) A Bill assented to and signed by the State President becomes an Act of Parliament upon its promulgation.

Safe keeping of and public access to Acts of Parliament

54. (1) All Bills duly signed by the State President shall immediately after their promulgation as Acts of Parliament be entrusted to the Appellate Division/Constitutional Court for safe keeping.⁴⁸

(2) The signed copies of the Acts of Parliament entrusted to the Appellate Division/Constitutional Court shall be conclusive evidence of the provisions of

⁴⁶ **Agreed to in the CC.**

⁴⁷ **The CC subcommittee agreed that the above formulation contained the principle agreed to but that it required reformulation. The issue should be revisited following debate in the CC.**

⁴⁸ **Administration requested to obtain the views of the Constitutional Court and the AD on this matter. The CC Subcommittee agreed to propose that the words Appellate Division be inserted next to Constitutional Court.**

the Acts.⁴⁹

⁴⁹ **The question of official languages and the language(s) in which laws are to be drawn up still to be dealt with. Principle of the signed copy to be conclusive agreed to in the CC.**

CHAPTER 5

THE NATIONAL EXECUTIVE

Executive authority of the Republic⁵⁰

55. (1) The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament vests in the national government consisting of the State President⁵¹ and other members of the Cabinet, which shall exercise and perform its powers and functions subject to and in accordance with this Constitution.

(2) The national government may, with the concurrence of the provincial government or of a local government, appoint such provincial government or local government as its agent to perform a specified function within its competence in terms of subsection (1).

(3) The national government may, with the concurrence of a provincial government or of a local government, delegate to such provincial government or local government the performance of a specified function within its competence in terms of subsection (1).

The State President

Head of State and National Executive

⁵⁰ As developed in the Subcommittee.

⁵¹ The term "State President" to be further considered in the CA.

56. (1) The State President is the Head of State, the Head of the National Executive and the Commander-in-Chief of the National Defence Force.⁵²

(2) The State President shall at all times uphold, defend and respect the Constitution as the supreme law of the land and shall be responsible for the observance of the Constitution by the national government.⁵³

Election of State President

57. (1) The National Assembly⁵⁴ shall at its first sitting after a national election, and thereafter as and when it becomes necessary to fill a vacancy during the term for which it was elected, elect a member of the National Assembly as the State President.⁵⁵

(2) The Chief Justice⁵⁶ or a judge designated by him or her, shall preside over the election of the State President. The procedure set out in Schedule ... shall apply to the election of the State President.

(3) A member of the National Assembly shall upon being elected as the State President vacate his or her seat in the National Assembly.⁵⁷

⁵² **Agreed to in the CC.**

⁵³ **Agreed to in the CC.**

⁵⁴ **The role of the Senate in the election of the President will be revisited when finality is reached on the question of a second House.**

⁵⁵ **The DP prefers a directly elected President. Matter was not resolved in the CC.**

⁵⁶ **The CC decided that the question which judge should preside must be resolved in private discussions between the parties.**

⁵⁷ **Agreed to in the CC.**

(4) A sitting of Parliament to fill a vacancy in the office of State President shall take place within 30 days after the vacancy occurred, at a time and on a date determined by the Chief Justice [**President of the Constitutional Court**].

Assumption of office

58. The State President-elect shall assume office within ... days of his or her election and shall, before assuming office, make and sign an oath or a solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her.

Term and vacation of office and filling of casual vacancies

59. (1) The State President shall be elected for a term of office commencing when he or she assumes office and ending when the person elected as the State President after the next election of the National Assembly assumes office.⁵⁸

(2) No person may hold office as State President for more than two full terms of office.⁵⁹

(3) The State President shall vacate office during his or her

⁵⁸ **The life of Parliament generally determines the length of tenure. As the life of Parliament has a fixed term of 5 years, the term of office of the State President is limited to 5 years. The term of office may be shorter than 5 years where Parliament is dissolved before its full term of where the State President resigns or is removed from office. In order to ensure continuity the State President's term normally expires only when his or her successor assumes office.**

The IFP prefers a seven year term for the State President.

⁵⁹ **The CC Subcommittee agreed to this having in mind that the term may go beyond elections. The members of the Subcommittee are to consider the implications of this.**

term upon -

- (a) resigning from office by notice in writing to the Speaker; or
- (b) adoption by the National Assembly of a resolution in terms of this Constitution removing him or her from office.

(4) A vacancy in the office of State President shall be filled as soon as a meeting of the National Assembly can be convened for the election of a new State President.⁶⁰

Powers and functions⁶¹

60. (1) The State President has the powers and functions entrusted to him or her by the Constitution and the laws of the Republic.

(2) All powers and functions shall be discharged by the State President in consultation with the other members of the Cabinet, except where the Constitution provides or implies otherwise.⁶²

(3) The following powers and functions are vested in the State President alone with due regard to any specific provisions of the Constitution relating to them, and in the discharge of such powers and functions the State President is not

⁶⁰ Removal from office is dealt with below. Section 57 (1) provides for the election of a State President not only after a general election but also whenever a casual vacancy may occur.

⁶¹ To be further discussed at CC Subcommittee level. The Subcommittee requested the Panel of Experts and the Technical Advisers to report on the issue of presidential powers and "prerogatives". See separate Report.

⁶² In section 233(3) of the Interim Constitution the term "in consultation with" is defined to mean that the concurrence of the other functionary is required.

obliged to act in consultation with the other members of the Cabinet -⁶³

- (a) to summon the National Assembly to an extraordinary sitting for the conduct of urgent business;⁶⁴
- (b) to dissolve the National Assembly after a motion of no confidence in the Cabinet has been passed by the National Assembly;⁶⁵
- (c) to assent to and sign Bills passed by Parliament;⁶⁶

- (d) to refer a Bill passed by Parliament back to Parliament for reconsideration or to the Constitutional Court for a ruling on its constitutionality;⁶⁷
- (e) to confer honours;⁶⁸
- (f) to appoint, receive and recognise diplomatic representatives;⁶⁹

⁶³ **The NP is not in favour of the State President acting alone, but prefers an arrangement whereby these powers are exercised in accordance with provisions similar to section 82(2) of the Interim Constitution, i.e. that there should be an obligation on the State President to consult the Executive Deputy President(s).**

⁶⁴ **The issue of summoning the two Houses to a joint sitting to be dealt with upon clarification of the role of the Senate. Otherwise approved in principle by the CC.**

⁶⁵ **Agreed to in the CC.**

⁶⁶ **Agreed to in the CC.**

⁶⁷ **See section 53(2) above.**

⁶⁸ **Agreed to in the CC.**

⁶⁹ **The NP and the DP prefer a system of prior Parliamentary approval of diplomatic representatives. To be further discussed in CC Subcommittee.**

- (g) to negotiate and sign international agreements, and to delegate such power;⁷⁰
- (h) to appoint and dismiss Ministers and Deputy Ministers;⁷¹
- (i) to convene Cabinet meetings;⁷² and
- (j) to appoint commissions of enquiry.⁷³

Confirmation of executive acts of State President

61. (1) Decisions of the State President taken in the discharge of his or her powers and functions shall be in writing under his or her signature.⁷⁴

(2) Decisions of the State President taken in consultation with the other members of the Cabinet shall be countersigned by a Minister.⁷⁵

⁷⁰ It is advisable for practical reasons that provision also be made for the delegation of the power to negotiate and sign international agreements. The Theme Committee was of the view that this provision should be considered together with the question of Parliamentary approval of international agreements. See for instance sec. 231 of the Interim Constitution.

The CC Subcommittee agreed that a decision would be held in abeyance until the reports from TC 1 and 5 had been tabled in this regard.

⁷¹ NP prefers appointment and dismissal of Ministers and Deputy Ministers to be the same as in section 88 of the Interim Constitution (which would require a government of national unity with minority parties forming part of the Cabinet).

"Flagged" for further discussion.

⁷² Agreed to in the CC.

⁷³ In the CC the question was raised whether the President should have the power to appoint commissions without consulting the Cabinet.

⁷⁴ Amended and approved by the CC.

⁷⁵ The CC Subcommittee agreed that the confirmation of a presidential signature by the seal of the Republic should not be a constitutional requirement and this provision could thus be deleted. However, technical advisers must look into this.

Remuneration

62. The salary, allowances and benefits of the State President shall be determined by Parliament.⁷⁶

Deputy State President(s)/Prime Minister⁷⁷

63.⁷⁸ (1) The State President shall appoint a Deputy President/Prime

Minister to assist him or her in the execution of the functions of government.

⁷⁶ Agreed to in the CC.

Subclause (2) "The State President may not hold any other public office or perform any other paid work." The CC Subcommittee agreed that there should be a general provision pertaining to the conduct of all members of the Cabinet and this provision is thus unnecessary and can be deleted. Section 70 should be reformulated to cover all the members of the Cabinet.

⁷⁷ The question whether there should be a Deputy President or a Prime Minister or more than one Deputy Presidents is in contention.

The ANC proposes a Deputy State President elected by the NA from among its members. The State President may assign duties and functions to the Deputy. The NP proposes more than one Deputy, one of whom should come from the second largest party in the NA. See s 84(1) interim Constitution for a formulation. The State President must assign substantial executive powers to them and they must be consulted on important policy decisions, ministerial appointments, as provided in the interim Constitution. The IFP prefers a ceremonial head of state and a prime minister who appoints the cabinet. The DP proposes a Deputy President to assist the State President in the execution of duties as Head of State. In addition there should be a prime minister, appointed by the State President, to assist in the execution of the functions of government; the PM is leader of the Government in Parliament and coordinates the work of the Cabinet and in the absence of the State President presides over the Cabinet. The FF proposes a Deputy State President and/or a PM to assist the State President in the execution of the functions of head of state and head of the executive. The PAC proposes a Deputy President.

⁷⁸ This formulation is based on the proposal of the DP for the appointment of the Deputy State President. There is no agreement on this issue. The NP proposes an appointment of two Deputy State Presidents. For such proposal this formulation can be considered:

"63. (1) The State President shall appoint two Deputy State Presidents from the National Assembly who shall each be nominated by the largest and the second largest parties in the National Assembly.

(2) The State President shall assign substantial powers to the Deputy Presidents and shall consult them on all important policy decisions."

(2) The Deputy President/Prime Minister shall

- (a) be the leader of the government business in Parliament;
- (b) assist the State President in co-ordinating the work of the Cabinet;
and
- (c) in the absence of the State President, preside at meetings of the Cabinet.

(3) The State President may at any time dismiss the Deputy President/Prime Minister and appoint a new one.

Acting State President⁷⁹

64. (1) If the State President is absent from the Republic or is otherwise unable to fulfil the duties of the office, or if the office of State President is vacant, an office-bearer in the order mentioned below shall act as the State President during the State President's absence or inability or until the vacancy is filled:

- (a) The Deputy State President.
- (b) If the Deputy State President is not available or if the office of Deputy State President is vacant, a Minister of the Cabinet designated by the State President.

⁷⁹ The formulation may have to be adjusted depending on how the issue of more than one Deputy President and a possible Prime Minister is resolved.

To be taken further in CC Subcommittee. The DP proposed that par. (d) be replaced by a provision conferring power on the NA to elect an Acting President. The CC Subcommittee agreed that the issue would be held in abeyance until the Deputy State President/Prime Minister issue had been finalised.

- (c) If the designation of a Minister by the State President is for any reason not possible, a Minister designated by the other members of the Cabinet.
- (d) If the designation of a Minister by the other members of the Cabinet is not possible, the [Speaker?].

(2) An acting State President has all the responsibilities, powers and functions of the State President.

Removal of State President or Deputy State President

65. (1) The National Assembly may remove from office the State President [or the Deputy State President] by a resolution adopted by a majority of at least two-thirds of its members, but only on the grounds of a serious violation of the Constitution or the laws of the Republic, or of serious misconduct or inability rendering him or her unfit to exercise and perform his or her powers and functions.

(2) A person who has been removed from the office of State President in terms of subsection (1) shall not be entitled to any benefits or pension from that office, or to be elected to any public office or the National Assembly. A person removed from office as a result of inability shall not forfeit pension due to him or her.⁸⁰

⁸⁰ This is per agreement in the CC Subcommittee and Subsection (2) has been amended according to the instructions of the Subcommittee.

Cabinet

66. (1) The Cabinet consists of the State President, the Deputy State President⁸¹ and the Ministers.⁸²

(2) The State President or, in his or her absence, the Deputy State President or, in the absence of the Deputy State President, another member of the Cabinet designated by the President, shall preside at meetings of the Cabinet.

⁸¹ The NP prefers two Deputy Presidents.

⁸² Some of the parties propose provision also for a Prime Minister. It is a contentious issue whether the number of Ministers should be prescribed by the Constitution and whether the Cabinet should proportionally include members of minority parties.

To be further discussed in CC Subcommittee.

Appointment and dismissal of Ministers and Deputy Ministers

67.⁸³

Oath or solemn affirmation⁸⁴

68. A person appointed as a Minister or Deputy Minister shall before assuming office make and sign an oath or solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her.

Accountability of Ministers and Cabinet⁸⁵

⁸³ There are two approaches; one basically in line with sections 88(2) to (6) and 94 of the Interim Constitution, the other more or less as follows:

- "(1) The State President shall appoint the Ministers of the Cabinet from amongst the members of the National Assembly* to administer the various portfolios for which the national government is responsible.
- (2) The State President may appoint Deputy Ministers from amongst the members of the National Assembly* to assist in the administration of portfolios for which the national government is responsible.
- (3) A Minister and a Deputy Minister hold office for as long as it pleases the State President, but shall vacate office if he or she resigns from office or ceases to be a member of the National Assembly.**

* Appointment of Ministers and Deputy Ministers from the Senate will depend on the role and function of the Senate. Furthermore, the NP favours the appointment of a limited number of Ministers from outside Parliament. The IFP proposed that Ministers should be appointed by the Prime Minister subject to ratification by Parliament.

The CC Subcommittee agreed that the issue should be held in abeyance .

⁸⁴ Approved by the CC as amended, subject to a decision on which judge should take the oath/affirmative action.

⁸⁵ The DP is of the view that the Deputy State President/Prime Minister should have a special responsibility to formally represent the Cabinet in Parliament.

Matter to be discussed at CC Subcommittee level.

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69. (1) Ministers are individually accountable both to the State President and the National Assembly for the administration of the portfolios entrusted to them, and all members of the Cabinet are collectively accountable to the National Assembly for the performance of the functions of the national government and its policies.

(2) All Ministers shall administer their portfolios in accordance with the policies of the Cabinet.

Conduct of the Cabinet and Deputy Ministers⁸⁶

70. Members of the Cabinet and Deputy Ministers shall at all times act in accordance with a code of ethical conduct which shall be prescribed by a national law.

It shall be particularly forbidden for members of the Cabinet and Deputy Ministers -

- (a) to take up any other paid work;
- (b) to engage in activities inconsistent with that of their office or to expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; and
- (c) to enrich themselves or any other person by using⁸⁷ their position or any information entrusted to them.

⁸⁶ The CC Subcommittee agreed that (1) the section should be reformulated to include the State President; (2) in paragraph (a) the word employment should be replaced by work; (3) the issue of public office be clarified; (4) and paragraph (c) be reformulated.

The Technical Advisors report as follows:

(a) The State President is prohibited from holding "any other public office or perform any other paid work". This provision could be retained if an adequate definition can be given to the term "public office". "Public office" is best defined as any position which attracts public money, be it from the central, provincial or local government or any other statutory board or institution. In short, it is "an office of profit under the Republic". This definition repeats the prohibition against paid work which includes the receiving of remuneration from both public and private institutions. Ministers and Deputy Ministers will in any event be disqualified as MP's (and thus also as Ministers) should they hold an "office of profit under the Republic". The holding of a public office (in the sense that it is a position created by statute in a state or semi-state institution) which does not normally attract any remuneration, such as the ceremonial position of chancellor of a university, should not be prohibited. It is thus suggested that any reference to the holding of a public office could be omitted.

(b) The central concern of the provision is to prevent the abuse of position and access to information. The original the provision - "to use their position, or any official information entrusted to them, to enrich themselves or any other person." - referred only to abuse which leads to the enrichment of a Cabinet member or any other person. "Official information" refers to information that is public. The focus of the provision should rather be on confidential information which only members of the cabinet have access to. A reference to "information" would include both confidential and official information.

⁸⁷ **The Technical Advisors to advise whether "misuse" be more appropriate. It was suggested that the word "improperly" could be inserted before "enrich".**

Remuneration⁸⁸

71. The salaries, allowances and benefits of Ministers and Deputy Ministers shall be as provided for by national law.

Temporary assignment of Minister's powers and functions to another Minister⁸⁹

72. Whenever a Minister is absent or unable to exercise and perform any of the powers and functions entrusted to him or her, or whenever the office of a Minister is vacant, the State President may appoint any other Minister to exercise or perform any or all of the first-mentioned Minister's powers and functions.

Transfer of Minister's powers and functions to another Minister⁹⁰

73. The State President may assign the administration of a law entrusted to a particular Minister, or the discharge of any power or function entrusted by a law to a particular Minister, to any other Minister.

Votes of no confidence⁹¹

74. (1) If the National Assembly passes a vote of no confidence in the

⁸⁸ Agreed to in the CC.

⁸⁹ Reformulated to simplify the clause as per instruction of the CC.

⁹⁰ Agreed to in the CC.

⁹¹ Dissolution of the NA and votes of no confidence to be taken further by CC Subcommittee. The CC Subcommittee requested a further report from the Technical Advisors dealing with both impeachment and motions of no confidence. See separate report.

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Cabinet, the State President shall resign or shall dissolve the National Assembly and call an election of the National Assembly.

(2) If the National Assembly passes a vote of no confidence in the State President alone, he or she shall resign.

(3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the State President, the State President shall either resign or reconstitute the Cabinet.

CHAPTER 6

PROVINCIAL LEGISLATURES

Provincial Legislatures and their authority

75. (1) There shall be a legislature for each province.

(2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature.

(3) Laws made by a provincial legislature shall, subject to any exceptions as may be provided for by an Act of Parliament, be applicable only within the territory of the province.

(4) A provincial legislature shall have such other powers and authority as may be conferred on it by this Constitution or any other law.

Composition of provincial legislatures

76. (1) A provincial legislature shall consist of not fewer than ... and not more than ... members elected in accordance with an electoral system which shall be based on a common voter's roll and, in general, proportional representation as provided for by national law.

(2) The number of seats in a provincial legislature shall be determined in accordance with ...⁹²

⁹² **The method of determining the number of members needs to be revisited.**

Duration and dissolution of provincial legislatures⁹³

77. (1) A provincial legislature as constituted in terms of a general election shall continue for a term of five years⁹⁴ as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.

(2) A provincial legislature may be dissolved before the end of the term for which it was elected if a vote of no-confidence in the Premier and the Executive Council is passed by a provincial legislature.

(3) When the term for which a provincial legislature was elected expires or if a provincial legislature is dissolved before its term expires, a provincial legislature as then constituted shall remain competent to function, and its members shall continue as members, until the day before polling for the next provincial legislature.

(4) If a provincial legislature is dissolved the Premier of the province shall upon such dissolution, by proclamation in the *Provincial Gazette* call an election of such legislature, which election shall take place within 90 days after the dissolution of the legislature on a date or dates specified in the proclamation.

Speaker and Deputy Speaker of provincial legislature

78. (1) A provincial legislature shall at its first sitting after a general

⁹³ This section and most subsequent sections are a repetition of provisions in the National Assembly and National Executive drafts. Unresolved issues which are germane to the latter institutions are therefore applicable to provincial level of governments.

A query was raised in the CC as to what the position would be if a provincial legislature should fail to function. Technical advisers instructed to look into this.

⁹⁴ The DP proposes a term of four years.

election, and thereafter as and when it becomes necessary to fill a vacancy, elect a Speaker and a Deputy Speaker from amongst its members.

(2) A judge designated by the Chief Justice shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

(3) The procedure set out in Schedule ... shall apply to the election of the Speaker and the Deputy Speaker.

(4) A Speaker and a Deputy Speaker have the powers and functions assigned to them by this Constitution and the law, including the rules and orders of a provincial legislature.

(5) A Speaker or a Deputy Speaker ceases to hold office if he or she resigns from office or ceases to be a member of the provincial legislature. A Speaker or a Deputy Speaker may be removed from office by resolution of the provincial legislature.

Qualification for membership of provincial legislatures

79. (1) No person shall be qualified to become or remain a member of a provincial legislature unless he or she is qualified to become a member of the National Assembly.

(2) A Premier or members of the Executive Council of a province shall not be deemed to hold an office of profit under the Republic.

(3) ..⁹⁵

⁹⁵ (a) It is a contentious whether residency in a province (or registration as a voter in a province) is required.

(b) The question of membership of provincial legislatures by traditional leaders has been raised in TC 2 by the NP.

Vacation of seats and filling of vacancies⁹⁶

80. (1) A member of a provincial legislature shall vacate his or her seat upon -

- (a) ceasing to be eligible to be a member;
- (b) resigning as a member;
- (c) becoming a member of the National Assembly, the ...⁹⁷ or a local government.

(2) Vacancies in a provincial legislature shall be filled in accordance with national law.

Oath or affirmation by members

81. (1) Every member of a provincial legislature before taking his or her seat in a legislature, shall make and sign an oath or solemn affirmation in the terms set out in Schedule ... before a judge designated by the Chief Justice.

(2) A member filling a casual vacancy in a provincial legislature shall make and sign the oath or solemn affirmation before the Speaker.

Sittings and recess periods

⁹⁶ The consequences of unauthorized absence and crossing the floor, are still to be dealt with by the CC.

⁹⁷ This gap will be filled in once there is agreement on the details relating to a second chamber.

82. (1) A provincial legislature may determine the time and duration of its sittings and its recess periods. The first sitting of a provincial legislature after an election shall take place not more than 7 days after the declaration of the result of the election at a time and on a date determined by the secretary of the provincial legislature.

(2) A premier of a province may at any time summon a provincial legislature to an extraordinary sitting for the conduct of urgent business.

(3) A provincial legislature shall determine the place where all sittings shall ordinarily take place, subject to such exceptions as it may make.

Decisions

83. (1) Except where the Constitution provides otherwise, all questions before a provincial legislature shall be determined by a majority of the votes cast by the members present. When, in terms of this section, a vote is taken on a Bill, a majority of all the members of a provincial legislature shall be present, and when it is taken on any other matter, one third of all the members shall be present.

(2) The member of a provincial legislature presiding in the legislature has no deliberative vote, but does have and shall exercise a casting vote in the event of an equality of votes.

Internal autonomy

84. (1) A provincial legislature shall determine its internal arrangements and make rules and orders in connection therewith.

(2) The salaries, allowances and benefits of members of a provincial legislature shall be as provided for by national law.

Powers, privileges and immunities of provincial legislatures

85. (1) Members of a provincial legislature shall have freedom of speech and debate in a provincial legislature and its committees subject to its rules and orders. This freedom may not be limited by or questioned in the courts.

(2) Members of a provincial legislature are not liable to civil or criminal proceedings, arrest, imprisonment or damages as a result of anything they have said, produced or submitted in or before or to a provincial legislature or its committees. The same immunity applies in respect of anything revealed as a result of what they have said, produced or submitted.

(3) Other privileges, immunities and powers of a provincial legislature shall be as prescribed by law.

Assent to Bills

86. (1) A Bill duly passed by a provincial legislature in accordance with this Constitution shall without delay be assented to and signed by the Premier of the province.

(2) If a Premier has reservations or concerns about the constitutionality of a Bill, or whether it has duly been passed by a provincial legislature in accordance with the Constitution, the Premier may refer the Bill back to the provincial legislature with a clear indication of any defects. If the Bill is passed again, giving effect to the Premier's reservations or concerns, the Premier shall sign the Bill. If the provincial legislature does not agree with the premier's reservations or concerns, the

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Premier shall refer the Bill to the Constitutional Court for a ruling on the constitutionality of the Bill, or whether it has been duly passed in accordance with the Constitution. If the Constitutional Court finds the Bill to be consistent with the Constitution, the Premier shall sign the Bill. If the Constitutional Court finds the Bill to be inconsistent with the Constitution, it shall be referred back to the provincial legislature for further consideration, failing which, it shall lapse.

(3) A Bill assented to and signed by a Premier becomes a law of a provincial legislature upon its promulgation in the national government gazette.

Promulgation of provincial laws

87. (1) All Bills duly signed by a Premier shall immediately after their promulgation as laws of a provincial legislature be entrusted to the Appellate Division for safe keeping.

(2) The signed copies of the laws of a provincial legislature entrusted to the Appellate Division shall be conclusive evidence of the provisions of the laws.

Provincial Constitutions

Adoption

88. (1) A provincial legislature shall be competent to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members as provided for by this Constitution.

(2) A provincial legislature may make such arrangements as it deems appropriate in connection with its proceedings relating to the drafting and consideration

of a provincial constitution.

(3) A provincial constitution shall not be inconsistent with a provision of this Constitution, and shall be [subject to the constitutional principles set out in Schedule ...]⁹⁸ Provided that a provincial constitution may provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province.

(4) The text of a provincial constitution passed by a provincial legislature or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision of this section.

(5) A decision of the Constitutional Court in terms of subsection (4) certifying that the text of a provincial constitution is not inconsistent with this section, shall be final and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such a text or any provision thereof.

⁹⁸ **Flagged for further discussion.**

CHAPTER 7

PROVINCIAL EXECUTIVES

Executive power of the provinces

89. (1) The executive power of a province shall vest in the provincial government consisting of the Premier and the Executive Council of a province, who shall exercise and perform their powers and functions subject to and in accordance with this Constitution.

(2) A province shall have executive authority over all matters in respect of which such province has exercised its legislative competence, matters assigned to it by the State President, or any law, and matters delegated to it by or under any law.⁹⁹

Election of Premiers

90. (1) A provincial legislature shall at its first sitting after an election, and thereafter as and when it becomes necessary to fill a vacancy during the term for which it was elected, elect a member of the provincial legislature as the Premier.

(2) A judge designated by the Chief Justice shall preside over the election of a Premier. The procedure set out in Schedule ... shall apply to the election of a Premier.

(3) A sitting of a provincial legislature to fill a vacancy in the office of a Premier shall take place within 30 days after the vacancy occurred, at a time and on a

⁹⁹ The provisions pertaining to executive powers should be reformulated when the powers and competencies of the provincial government have been finalised.

date determined by a judge designated by the Chief Justice.

Assumption of office

91. A premier-elect shall assume office within days of his or her election and shall, before assuming office, make and sign an oath or a solemn affirmation in the terms set out in Schedule ... before a judge designated by the Chief Justice.

Term and vacation of office and filling of casual vacancies

92. (1) A Premier shall be elected for a term of office commencing when he or she assumes office and ending when the person elected as a Premier after the next election of a provincial legislature assumes office.¹⁰⁰

(2) No person may hold office as a Premier for more than two full terms.¹⁰¹

(3) A Premier shall vacate office during his or her term

upon -

(a) resigning from office by notice in writing to the Speaker; or

(b) adoption by a provincial legislature of a resolution in terms of this Constitution removing him or her from office.

(4) A vacancy in the office of a Premier shall be filled as soon as a

¹⁰⁰ The life of a provincial legislature determines the length of tenure.

¹⁰¹ In TC 2 questions were raised whether there should be any restrictions on the tenure of a premier.

meeting of a provincial legislature can be convened for the election of a new Premier.

Powers and functions

93. (1) A Premier has the powers and functions entrusted to him or her by the Constitution and any other law.

(2) All powers and functions shall be discharged by a premier in consultation with the other members of the Executive Council, except where the Constitution provides or implies otherwise.

(3) The following powers and functions are vested in a Premier alone with due regard to any specific provisions of the Constitution relating to them, and in the discharge of such powers and functions a premier is not obliged to act in consultation with the other members of the Provincial Executive:

- (a) to summon a provincial legislature to an extraordinary sitting for the conduct of urgent business;
- (b) to dissolve a provincial legislature after a motion of no confidence in the Executive Council has been passed by the provincial legislature;
- (c) to assent to and sign Bills passed by a provincial legislature;
- (d) to refer a Bill passed by a provincial legislature back to the legislature for reconsideration or to the Constitutional Court for a ruling on its constitutionality;

- (e) to appoint and dismiss members of the Executive Council;¹⁰²
- (j) to convene Cabinet meetings; and
- (k) to appoint commissions of enquiry.

(4) An Executive Council may delegate its consultation function in terms of this subsection, with reference to any particular power or function of the Premier, to any member or members of the Executive Council.¹⁰³

Acting Premiers

94. (1) A Premier of a province shall appoint one of the members of the Executive Council of the province to act as Premier during his or her absence or temporary incapacity.

(2) Should it be necessary that an Acting Premier be appointed and the Premier is absent or unable to make such an appointment, or if the office of Premier is vacant, the other members of the Executive Council shall make such appointment.

(3) An acting Premier shall while acting as Premier have all the powers and functions vested in the office of Premier.

Executive Councils

95. (1) The Executive Council of a province shall consist of a Premier and not less than 5 and not more than 10 members appointed by a Premier.

¹⁰² The NP prefers a government of provincial unity, where the appointment and dismissal of members of the Executive Council is done according to proportional party representation.

¹⁰³ This provision does not apply to State President. It appears in the interim Constitution (proviso to section 147(2)).

(2) A Premier shall appoint the members of the Executive Council from amongst the members of the provincial legislature to administer the various portfolios for which the provincial government is responsible.

(3) A member of the Executive Council shall hold office for as long as it pleases the Premier, but shall vacate office if he or she resigns from office or ceases to be a member of the provincial legislature.

(3) A person appointed as a member of the Executive Council shall before assuming office make and sign an oath or solemn affirmation in the terms set out in Schedule ... before a judge designated by the Chief Justice.

Accountability of members of Executive Councils

96. (1) Members of a Executive Council are individually accountable both to a Premier and a provincial legislature for the administration of the portfolios entrusted to them, and all members of the Executive Council are collectively accountable to the provincial legislature for the performance of the functions of the provincial government and its policies.

(2) All members of an Executive Councils shall administer their portfolios in accordance with the policies of that Executive Council.

Conduct of members of Executive Councils

97. Members of an Executive Council shall at all times act in accordance with a code of ethical conduct which shall be prescribed by law. It shall be particularly forbidden for members -

- (a) to take up any other paid work;
- (b) to engage in activities inconsistent with that of their office or to expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; and
- (c) to enrich themselves or any other person by using their position or any information entrusted to them.

Temporary assignment of powers and functions to Executive Council members

98. Whenever a member of an Executive Council is absent or unable to exercise and perform any of the powers and functions entrusted to him or her, or whenever the office of a member is vacant, a Premier may appoint any other member to exercise or perform any or all of the first-mentioned member's powers and functions.

Transfer of powers and functions from one member to another member of an Executive Council

99. A Premier may assign the administration of a law entrusted to a particular member of an Executive Council, or the discharge of any power or function entrusted by a law to a particular member, to any other member.

Votes of no confidence¹⁰⁴

100. (1) If a provincial legislature passes a vote of no confidence in the

¹⁰⁴ **The motions of no confidence and impeachment should be revisited in the light of decisions taken with respect to the National Assembly and National Executive.**

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Executive Council, including the Premier, the Premier shall, unless he or she resigns, dissolve such legislature and call an election.

(2) If a provincial legislature passes a vote of no confidence in the Premier, but not in the other members of the Executive Council, the Premier shall resign.

(3) If a provincial legislature passes a vote of no confidence in the Executive Council, excluding the Premier, the Premier shall either resign or reconstitute the Executive Council.

CHAPTER 8

NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCIES

Legislative authority of the Republic

101. The legislative authority of the Republic vests in Parliament, which shall be competent to make laws in terms of this Constitution on any matter including matters falling within the functional areas specified in Schedule ...

Legislative authority of provinces

102. (1) The legislative authority of a province vests in its provincial legislature which shall be competent to make laws in and for its province in terms of this Constitution.

(2) A provincial legislature shall have the competence to legislate on any matter which falls within a functional area specified in Schedule (X).¹⁰⁵

Framework legislation

103. (1) Framework legislation comprises Acts of Parliament in terms of which principles or standards are laid down to ensure uniformity across the nation and shall apply equally in all provinces and shall empower provincial legislatures to make laws for the achievement of the objectives set out in the framework legislation.

(2) Parliament is competent to establish framework legislation only

¹⁰⁵ It was indicated by the CC Subcommittee at its meeting on 4 September that Schedule 6 of the present Constitution should be used as point of departure for the discussion of the content of the Schedule.

regarding the matters specified in Schedule Y.¹⁰⁶

(3) Framework legislation shall be binding upon all legislatures and shall be implemented in a province in accordance with the laws of the provincial legislature.

(4) Should a provincial legislature fail to implement framework legislation within a reasonable period of time, Parliament shall be competent to implement such legislation until the provincial legislature complies with its duty in this regard.

Necessary ancillary powers

104. The legislative competence referred to in sections 101, 102 and 103 shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

Conflict of laws

105. (1) In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule X, the Act of Parliament shall prevail over the provincial law where the elements of the Act that are in conflict with the provincial law are necessary for -

¹⁰⁶ Only one political party (the NP) has submitted proposals regarding the content of Schedule 2. In the submission it is proposed that the following matters be listed in Schedule 2 for discussion purposes: agriculture, casinos, environment, forestry, general principles and standards of education, excluding universities and technikons, land matters, local government, nature conservation, police, registration of persons, marriages and deaths, and the issue of ID's and passports, road traffic, soil conservation and water affairs.

The PAC has stated that it does not see any need for such a Schedule, and that there should be only one schedule detailing the powers allocated to the provinces.

- (a) the establishment of generally applicable standards¹⁰⁷
regarding -
 - (i) services rendered by the state;¹⁰⁸
 - (ii) the maintenance of economic unity; or
 - (iii) the determination of national economic policies;¹⁰⁹ or
- (b) the maintenance of the security of the Republic;¹¹⁰ or
- (c) the prevention of prejudice to the Republic or any province thereof
caused by the activities of another province.

(2) A Bill designed to become an Act of Parliament intended in subsection (1) shall be introduced in the Senate and shall require the approval of both the Senate and the National Assembly.

(3) The Constitutional Court shall, upon application by at least one fifth of the members of the Senate, and prior to the promulgation of a Bill intended in subsection (2), expeditiously determine whether the Bill conforms with the objective

¹⁰⁷ It is submitted that the expression "generally applicable standards" covers both "essential national standards" and "minimum standards" as employed in CP XXI 2.

¹⁰⁸ It is assumed that the phrase "rendering of services" in CP XXI 2 can refer only to services rendered by the various organs of the state at all levels of government, which is covered by the reference to "the state".

¹⁰⁹ The expression "national economic policies", it is submitted, is wide enough to cover both "economic unity" in CP XXI 2 and CP XXI 5, especially if the latter CP is further satisfied by the manner in which the functional areas are allocated in the Schedule(s).

¹¹⁰ Use of the expression "security of the Republic" is suggested here in order to avoid the (historical) vagueness of the term "national security", while still satisfying the requirements of the CP.

criteria prescribed in subsection (1).¹¹¹

(4) In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, which cannot be resolved by a competent court on a construction of this Constitution, precedence shall be given to the Act of Parliament.

Integrity of provinces

106. An Act of Parliament shall not empower an organ of state to encroach upon the geographical, functional or institutional integrity of a province.

¹¹¹ The formulation of subclauses (2) and (3) is offered as one approach to the expressed need to involve the Senate substantially in matters of this nature, without however excluding the possibility of minorities seeking the protection of the Constitution. The reference to "*objective* criteria" will safeguard the Constitutional Court from becoming involved in policy matters, which are frequently characterised by subjective considerations.

CHAPTER 9

LOCAL GOVERNMENT

Sections 107 - 117.

CHAPTER 10

INDIGENOUS LEADERS

Sections 118 - 120.

CHAPTER 11

COURTS AND ADMINISTRATION OF JUSTICE

Judicial Authority

121. (1) The judicial authority of the Republic shall vest in the courts established by the Constitution or an Act of Parliament.

(2) The courts shall be independent and subject only to this Constitution and the law.

(3) The courts shall apply the Constitution and the law impartially and without fear, favour or prejudice.

(4) No person and no organ of state shall interfere with the courts in the performance of their functions.

(5) The orders issued by the courts within their respective jurisdictions shall bind all persons and organs of state.

(6) Organs of state shall, through legislative and other measures, give the courts the necessary assistance to protect and ensure their independence, dignity and effectiveness.

(7) The constitutional jurisdiction¹¹² of all courts and the jurisdiction of the Supreme Court of Appeal shall be determined only by this Constitution; the ordinary jurisdiction of all other courts shall be determined by an Act of Parliament.

(8) All other matters pertaining to the functioning of any court shall be

¹¹² "Constitutional jurisdiction" - used here and elsewhere to be defined in a definition section - as "jurisdiction in respect of all matters relating to the interpretation, protection and enforcement of this Constitution and all Provincial Constitutions."

regulated by **national law**.

The judicial system

113. There shall be the following courts of law in the Republic:

- (i) The Constitutional Court, which shall be the highest court with constitutional jurisdiction, and which shall consist of a President, a Deputy President and nine other judges.
- (ii) The Supreme Court of Appeal¹¹³, which shall be the highest court of appeal in all matters other than those within constitutional jurisdiction, and which shall consist of the Chief Justice, a Deputy Chief Justice and such number of judges of appeal as may be determined.
- (iii) Such Courts of Appeal as may be established by Act of Parliament¹¹⁴, to hear appeals from the High Court or courts of similar status.
- (iv) The provincial and local divisions of the High Court and other

¹¹³ The SCA is a redesignation of the Appellate Division, with the addition of constitutional jurisdiction. Transitional provisions must provide for any reference in any other law to the AD to be construed as a reference to the SCA.

¹¹⁴ The creation of Courts of Appeal (intermediate between the High Court - currently the inappropriately named "Supreme Court" - and the Supreme Court of Appeal - currently the AD) was canvassed in materials before TC 5 and has been under discussion since February. It is supported by the Chief Justice, the President of the Constitutional Court and Justice Ackermann, Judge President Eloff, the ALS, BLA, GCB and by the Law Commission. They are accepted in Principle by the parties, but their exact ambit will have to await the Hoexter Commission Report and a consequent consultative process. The Chief Justice has, however, stressed the need for a provision of this kind for their future establishment to be included in the Constitution.

courts of similar status.¹¹⁵

- (v) Magistrates' Courts and other courts of similar status.¹¹⁶
- (vi) Other courts established by law.¹¹⁷

Jurisdiction of the Constitutional Court

114. (1) Only the Constitutional Court shall have jurisdiction:

- (a) to determine constitutional disputes between the national and provincial governments or between provincial governments.
- (b) to consider the constitutionality of any parliamentary or provincial Bill referred to it in terms of the provisions of this Constitution or any provincial constitution.

(2) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.

(3) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.

(4) There shall be direct access to the Constitutional Court, with leave of the court, where the interests of justice so require.

¹¹⁵ Such as the Water Court, Labour Appeal Court, Special Income Tax Court, and perhaps now the Land Claims Court.

¹¹⁶ The NP proposal to move "other courts" to paragraph (vi) has been deferred to allow other parties to consider the proposal.

¹¹⁷ This section makes provision for the establishment of courts such as traditional land community courts, should this upon further investigation be determined to be desirable and feasible.

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- (5) (a) If the Constitutional Court finds any law, executive or administrative act to be inconsistent with the Constitution, it shall declare such, law or act invalid to the extent of its inconsistency.
- (b) The Constitutional Court may in any matter make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation, and an order as to costs.
- (c) The Constitutional Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions in that regard as it may decide.
- (6) (a) All other courts having constitutional jurisdiction may make the orders set out in subsection (5).
- (b) If any court other than the Constitutional Court holds a national or provincial statute or any executive action of the President to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it or on application to it by any person or organ of state with a sufficient interest.

Jurisdiction of other courts¹¹⁸

115. (1) The Supreme Court of Appeal, a Court of Appeal, a provincial or local division of the High Court and any other court of similar status shall have -

- (a) such inherent jurisdiction as vested in it at the commencement of this Constitution;¹¹⁹
- (b) constitutional jurisdiction, subject to section 114(1); and
- (c) the other jurisdiction conferred by an Act of Parliament.

(2) All other courts, including Magistrates' Courts shall have¹²⁰ -

- (a) constitutional jurisdiction, excluding jurisdiction to enquire into or rule on the validity of an Act of Parliament or a law of a provincial legislature **or any other law determined by law**, and
- (b) the other jurisdiction conferred by an Act of Parliament.

Appointment of judicial officers

116. (1) No person shall be qualified to be appointed a judicial officer or acting judicial officer unless he or she is a South African citizen and is a fit and proper person to be a judicial officer.

¹¹⁸ This section has been reformulated in order to clarify the jurisdiction of the Courts concerned, and to ensure that jurisdiction vested exclusively in the Constitutional Court is not conferred upon other courts.

¹¹⁹ Transitional provisions must ensure that inherent jurisdiction vesting in the present divisions of the Supreme Court continues in respect of the High Court, any Court of Appeal which may be established, and Supreme Court of Appeal.

¹²⁰ Reformulated as per instruction of the Constitutional Committee that these Courts should have constitutional jurisdiction, but that they should not have the power to declare laws invalid. The words in bold refer to subordinate legislation, such as regulations.

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(2) A judicial officer shall, before commencing to perform the functions of his or her office, make and subscribe an oath or solemn affirmation in the terms set out in Schedule (...) before a judge.

(3) The Chief Justice and the President of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.¹²¹

(a) The judges of the Constitutional Court shall be appointed by the President in consultation with the Cabinet after consultation with the President of the Constitutional Court.

(b) When an appointment needs to be made, the Judicial Service Commission shall draw up a recommended list of nominees of not more than three persons in excess of the number of persons to be appointed.

(c) The President shall make the required number of appointments from such a list with due regard to the reasons for such recommendations.

(d) If the President decides not to accept any or some of such recommendations, he/she shall inform the Judicial Service Commission and furnish it with reasons for his/her decision.

(e) After having been informed in terms of paragraph (d), the Judicial

¹²¹ **The National Party reserved its position and argued that their agreement to these formulations was subject to how the matter of the National Executive was finalised.**

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Service Commission shall, in accordance with paragraph (b) submit further recommendations, whereafter the President shall make the appointment or appointments from the recommendation as supplemented in terms of this paragraph.

(f) Four judges of the Constitutional Court shall be appointed from among the judges of the Supreme Court of Appeal, the Court of Appeal or the High Court.

(5) The Deputy Chief Justice, Deputy President of the Constitutional Court, and all other judges shall be appointed by the President on the advice¹²² of the Judicial Service Commission.

(6) The appointment of other judicial officers shall be regulated by an Act of Parliament.

(7) Members of the Constitutional Court shall hold office for non-renewable terms not exceeding nine years.

(8) The five oldest members of the Constitutional Court in office at the time of the expiration of the terms of office of the present judges of the Constitutional Court shall retire at such expiration and all other members after the expiration of a further period of four years.¹²³

(9) Acting judges shall be appointed by the Minister of Justice on the

¹²² In order to make it quite clear that the President is bound to act on the advice of the Judicial Service Commission, it might be necessary to insert a provision to that effect in the section dealing with interpretation (as was done in, e.g., the Independent Broadcasting Authority Act, 1993).

¹²³ This is a transitional mechanism and subject to further debate. It could be shifted to the part dealing with transitional provisions.

advice of the President of the Constitutional Court, the Chief Justice, or the Judge President of the appropriate division of the High Court or other court constituted in terms of section 2(v), as the case may be. An Acting judge to the Constitutional Court shall not serve for a total period exceeding 6 months.

Removal of judges from office

117. (1) The President may remove a judge from office on grounds of incapacity, gross misconduct or gross incompetence upon a finding to that effect by the Judicial Service Commission and the adoption by Parliament in joint session and by a majority of two-thirds of members of a resolution calling for the removal of such judge from office.

(2) A judge who is the subject of an investigation may be suspended by the President on the advice of the Chief Justice pending the finalisation of such investigation.

(3) The emoluments and pension and other benefits of judges and acting judges shall be prescribed by national law and shall not be subject to reduction.

Judicial Service Commission

118. (1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of -

- (a) the Chief Justice, who shall preside at meetings of the Commission;
- (b) the President of the Constitutional Court;

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- (c) one Judge President designated by the Judges President;
 - (d) the Minister responsible for the administration of justice or his or her nominee;
 - (e) two practising advocates designated by the advocates' profession;
 - (f) two practising attorneys designated by the attorneys' profession;
 - (g) one professor of law designated by the deans of all the law faculties at South African universities;
 - (h) four senators designated *en bloc* by the Senate by resolution adopted by a majority of at least two-thirds of its members;
 - (i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;
 - (j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.
- (2) The functions of the Judicial Service Commission shall be -
- (a) to make recommendations regarding the appointment and removal from office of judges in terms of sections 116 and 117;
 - (b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;

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(3) When the Commission performs its functions in terms of subsection (2)(b), it shall sit without the four senators referred to in subsection (1)(h).

(4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decision.

(5) The Commission may appoint committees from among its number and assign any of its powers and functions to such committee.

CHAPTER 12

SECURITY SERVICES

STATEMENT OF PRINCIPLE

Since there is a need

- that national security should be based on the resolve of all South Africans, as individuals and as a nation, to live as equals and in peace and harmony, to be free from fear and want, and to seek a better life;
- that national security should be pursued in strict compliance with this Constitution, the law and all applicable international conventions and norms; and
- that national security shall be subject to the authority of Parliament and the Executive.¹²⁴

The following provisions are enacted to govern national security and the security services of the Republic, and these provisions shall be interpreted and understood in the spirit of this Statement of Principle.

Composition and structuring of security services

¹²⁴ As approved by the CC.

119. (1) The security services of the Republic consist of a single defence force, the police service and such intelligence services as may be established in terms of this Constitution.¹²⁵

(2) The security services shall be structured and regulated by national law.

(3) The security services and its members shall act and train its members to act in accordance with and within the confines of this Constitution and the law, including the norms of international customary law and treaties binding on the Republic and no member shall obey a manifestly illegal order.¹²⁵

(4) The security services shall discharge their powers and functions in the national interest. It shall, therefore, be unlawful for the security services or its members to perform their duties or functions so as to further or prejudice party political interests.¹²⁵

(5) The security services shall be broadly representative of the South African people.

(6) Mechanisms and procedures for regulating labour relations and for the accommodation of the specific needs of the security services may be established.¹²⁶

DEFENCE

Defence force

120. (1) The defence force shall be structured and managed as a

¹²⁵ As approved by the CC.

¹²⁶ As approved by the CC.

disciplined military force.

(2) The primary objective of the defence force shall be to defend and protect the Republic, its territorial integrity and its people. In pursuing this objective the defence force shall be guided by the principles of international law regulating the use of force.

(3) Save for the defence force, no other armed or military force or armed organisation or service may be established in or for the Republic other than as provided for in this Constitution¹²⁷

Political responsibility and accountability

121. (1) A member of the Cabinet shall be responsible for defence.¹²⁸

(2) A (joint) multi-party committee of Parliament shall oversee all defence matters.¹²⁹

Command of defence force

122. (1) The defence force shall be under the command of a Chief of the defence force, who shall be appointed by the President.

(2) The Chief of the defence force shall exercise command of the

¹²⁷ Formulation derived from section 224(3) of the Interim Constitution as by instruction of the CC.

¹²⁸ As approved by the CC.

¹²⁹ In particular the committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of and draft legislation on the defence force, and to perform such other functions relating to parliamentary supervision of the defence force as prescribed by law.

defence force in accordance with the directions of the member of the Cabinet responsible for defence and, during a state of national defence, of the President.

Civilian secretariat

123. A civilian secretariat for defence functioning under the direction and control of the member of the Cabinet responsible for defence, shall be charged with the administration of such matters in connection with defence as may be entrusted to it by law or that member of the Cabinet.

Employment of defence force

124. The defence force may be employed only in the national interest and as authorised by law.

POLICE¹³⁰

Police service

125. (1) There shall be one national police service structured to function at national and provincial levels as set out in national legislation.

(2) National legislation shall set out the powers and functions of the police service and shall enable the police service to discharge its responsibilities effectively.

(3) The objective of the police service shall be to prevent and investigate crime, to maintain public order and to protect and secure the safety and

¹³⁰ The NP provisionally agreed to the formulations contained in the section on police but reserved their position depending on the outcome of discussions on national and provincial

security of the Republic and its inhabitants, including the protection of their lives and property.]¹³¹

Political responsibility and accountability

126. (1) A member of the Cabinet shall be responsible for police.¹³²

(2) A (joint) multi-party committee of Parliament shall oversee all police matters.

Control of police service

127. (1) The President shall appoint and may dismiss the National Commissioner who shall exercise command of the police service in accordance with the directions of the member of the Cabinet responsible for police.

(2) The National Commissioner shall appoint provincial commissioners for each province and may dismiss such commissioners in accordance with national law.

(3) Subject to the directions of the National Commissioner, the Provincial Commissioner shall be responsible for such policing functions in the province as prescribed by national law.

(4) The provincial government shall be responsible for the monitoring and oversight of the conduct and efficiency of the police service and may establish such

legislative and executive competencies.

¹³¹ As approved by the CC.

¹³² As approved by the CC.

mechanisms as are necessary to accomplish this function.

(5) Provincial government shall be responsible for and may establish mechanisms in regard to the promotion of police community relations at local level.

(6) A civilian secretariat functioning under the direction and control of the member of the Cabinet responsible for police, shall exercise such powers and functions in connection with police as may be entrusted to it by law or that member of the Cabinet.¹³³

¹³³ As approved by the CC.

INTELLIGENCE

Establishment and control of intelligence services

128. (1) The President may establish an intelligence service or services apart from those in the defence force and police service.

(2) The President may assume political responsibility for the control and direction of these intelligence services or designate a member of the Cabinet to assume such responsibility.

(3) The President shall appoint the head(s) of the intelligence service or services.

Powers and functions and oversight

129. The objectives, powers and functions of any intelligence service or services established in terms of section 128(1) shall be set out and regulated by national law which shall make provision for:

(1) the co-ordination of the intelligence services and, where they exist, the intelligence divisions of the defence force and the police service.

(2) a parliamentary oversight committee which shall have oversight over the budget of the intelligence services.

(3) a civilian inspector or inspectors appointed by the President with the approval of two-thirds of the members of the National Assembly to monitor the activities of the intelligence services.]¹³⁴

CHAPTER 13

¹³⁴ As approved by the CC.

FINANCE

General financial matters

National Revenue Fund

130. (1) There shall be a National Revenue Fund. All revenues, as determined by a national law, raised or received by the national government shall be paid into the National Revenue Fund. Parliament shall make appropriations from the National Revenue Fund in accordance with national law.

(2) No money may be withdrawn from the National Revenue Fund except under appropriation made by a national law. Revenue to which a province is entitled in terms of this Constitution shall form a direct charge against the National Revenue Fund to be credited to the Provincial Revenue Fund concerned.¹³⁵

¹³⁵ This refers to the provision in the new Constitution dealing with provinces' share of revenue collected at national level, which is a matter still under consideration by TC 3. The NP requires clarity on the meaning of the word "credit". The DP prefers the words "paid into". See block 2 of the Report.

Annual budget

131. ...¹³⁶

Procurement administration

132. (1) The procurement of goods and services for any level of government shall be regulated by national and provincial laws. Such laws shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

(2) The tendering system shall be fair, public and competitive. A tender board shall give reasons for its decision if requested by an interested party.

(3) No person and no organ of state shall improperly interfere with a tender board in the discharge of its functions.

¹³⁶ The parties broadly agree that there is a need for inclusion into the new Constitution of a provision such as section 186 of the interim Constitution. However, there is no consensus on what should go into such a clause. The following are issues that have been debated in the TC:

- (a) The issue of a balanced budget;
- (b) The issue of disclosure and reporting of government accounts and budgets; and
- (c) the issue of including a statement of costs of compliance with all bills laid before Parliament.

As these issues are still under consideration, drafting would be premature at this stage. If the substance of section 186 of the interim Constitution is to be retained, the following wording is proposed:

Annual budget

"The Minister responsible for national financial affairs shall in respect of every financial year lay an annual budget before Parliament. The annual budget shall reflect the estimates of revenue and expenditure, which shall, among other things, reflect capital and current expenditure of the government for that year."

(4) All decisions of a tender board shall be recorded and shall be open to public inspection.

Guarantees by national government¹³⁷

133. The national government may not guarantee provincial or local government loans, unless -

- (a) the guarantee complies with the norms and conditions for such a guarantee as set out in a national law; and
- (b) the Financial and Fiscal Commission has made a recommendation concerning compliance of the guarantee with such norms and conditions.

Accountability of Public Enterprises¹³⁸

134. Any enterprise in which public money is invested or whose sources of revenue are regulated by law or which is able to raise revenue in terms of legislation may, in a manner determined by national law, be required to report to and to give evidence before Parliament.

Financial and Fiscal Commission

¹³⁷ As per block 7 of the Report and a reformulation of section 188 of the interim Constitution. Consensus on this provision was with the understanding that its finalisation should await the final decisions of TC 3. Once the envisaged role of the FFC in this regard has been clarified, this provision could possibly be simplified. Further clarity was also required on the issue of national government guarantees for loans by parastatals.

¹³⁸ Formulated as per block 11 of the Report. The NP further suggests that the autonomy of the Commissioner for Inland Revenue be constitutionalised, which according to the ANC is a matter which can be dealt with by subsidiary legislation.

Establishment

135. There shall be a Financial and Fiscal Commission for the Republic. The Commission shall be independent and impartial and subject only to this Constitution and the law.

Powers and functions¹³⁹

136. (1) The Commission shall apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development. It shall render advice and make recommendations to the relevant authorities regarding the financial and fiscal requirements of the national, provincial and local governments in terms of this Constitution, including -

- (a) financial and fiscal policies;¹⁴⁰

¹³⁹ There seems to be broad agreement regarding powers and functions of the FCC as reflected in Blocks 3 - 8 of the TC Schematic Summary. However, some of the parties have registered their concern on some issues:

1. The ANC has expressed the view that section 199 of the interim Constitution should be incorporated in the final constitution in an abbreviated and revised form (see Block 22 of the TC Report).
2. The NP is of the opinion that provision should be made for the FFC in much the same way as outlined in the Interim Constitution.
3. The DP does not believe there is any need to change the formulation of section 199, but it has indicated that the primary purpose of the FFC should be to make recommendations on equitable financial and fiscal allocations between different levels of government. (See also Block 27 of the TC Report).
4. The PAC and the Commission on Provincial Government submitted that the Constitution should only contain the framework of the functions of the FFC. (See also Block 28 of the TC Report).

¹⁴⁰ This is per agreement in Block 3 of the Schematic Summary. However, the ANC holds the view that the Constitution should state clearly that the Commission has advisory and mediatory powers which must be reflected in the procedures for drafting budgets and fiscal

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- (b) equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level;¹⁴¹
 - (c) any form of taxes, levies, imports and surcharges that a provincial government intends to levy;¹⁴²
 - (d) the raising of loans by a provincial or local government and the financial norms applicable thereto;
 - (e) criteria for the allocation of financial and fiscal resources; and
 - (f) any other matter assigned to the Commission by the Constitution or any other law.
- (2) In performing its functions the Commission shall take into account
- (a) the national interest, economic disparities between the provinces as well as the population and development needs, administrative responsibilities and other legitimate interests of each of the provinces;
 - (b) and the provisions of this Constitution dealing with the allocation of

legislation. The DP believes that there is no change required in this matter.

¹⁴¹ This is per agreement in Block 4 of the TC Schematic Summary. The ANC is of the view that the allocation of equities should apply horizontally and vertically; it is concerned that with the present reference there is doubt as to whether that is the case. As regards the term "revenue collected", the ANC requires a clarification of meaning. Other parties are silent, on the issue whilst the DP is of the view that no change is required. [See Block 35 of the Report].

¹⁴² This is per agreement reached in Block 5 of the TC Schematic Summary, but the ANC argues for a new term that would take away the distinction between taxes. The DP does not see any need for change whilst all the other parties have not commented.

revenue to provinces.¹⁴³

Appointments, qualifications, tenure and dismissal of members¹⁴⁴

137. ...

Reports

138. (1) The Commission shall present regular reports to both Parliament and provincial legislatures as may be prescribed by national law.¹⁴⁵

¹⁴³ Constitutional Principle XXVII. Par. (b) refers to the substitute for the present section 155(4)(b) (if there is to be such a provision in the new Constitution).

¹⁴⁴ Blocks 10 - 19 of the Report of the Theme Committee deal with appointment procedure etc set out in section 200 of the interim Constitution, broadly covering:

- (i) Method/manner of appointment of a Commissioner;
- (ii) tenure of office;
- (iii) qualitative requirements of a Commissioner;
- (iv) dismissal and removal from office of a Commissioner.

The parties are not in agreement on these issues. It may be advisable to refer the matter to the CC Subcommittee presently looking at a formulation of an omnibus clause that deals with the appointment procedures regarding the Independent Structures of Government *viz*: Auditor General; Public Protector and Public Administration Commission. If such an omnibus clause is agreed to, the following formulation may be considered:

- (1) The members of the Commission shall be appointed in accordance with the requirements set out in section ... (being the omnibus clause).

The parties have agreed that section 200(2) of the interim Constitution, dealing with the first appointment of the members of the Commission, should not be incorporated in the new draft. See Block 11 of the TC Schematic Summary.

There is agreement on the sentiments expressed in section 200(9) (prohibiting Commissioners from holding an office in a political party/organisation) and section 200(10) (influencing a member of the Commission). The parties have nevertheless expressed uncertainty as to where these issues should be covered in legislation or in the Constitution. In terms of Constitutional principle XXVII each province must be represented on the FFC.

¹⁴⁵ As per blocks 95 and 102. The NP proposes that the Constitution should make provision for the establishment of provincial bodies similar to the FFC to attend to financial and fiscal relations between provinces and local authorities, and that provinces and local authorities should have equal representation in this body.

CENTRAL BANK

Establishment

139. The South African reserve Bank, established and regulated by national law, shall be the central bank of the Republic.¹⁴⁶

Primary objective

140. (1) The primary objective of the South African Reserve Bank shall be to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank shall, in the pursuit of its primary objective exercise its powers and functions independently and without fear, favour or prejudice, subject only to a national law: Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.

Powers and functions

141. The powers and functions of the South African Reserve Bank shall be those customarily exercised and performed by central banks. Such powers and

¹⁴⁶ The DP proposed that this clause be substituted as follows:

- "(1) There shall be a South African Reserve Bank which shall be the central bank of the Republic.
- (2) The South African Reserve Bank shall be independent, impartial and subject only to this Constitution and the law."

functions shall be determined by a national law.

CHAPTER 14

PUBLIC ADMINISTRATION

Basic values and principles governing public administration

142. Public administration at all levels of government, including institutions which are dependent on government funds or other sources of public money, shall be governed by the democratic values and principles enshrined in this Constitution. In particular the following principles shall be applicable:

- (a) A high standard of professional ethics shall be promoted and maintained in the public administration.
- (b) Good human resource management and development practices to maximise human potential shall be cultivated in the public administration.
- (c) Efficiency and the economic and effective use of resources shall be promoted in the public administration.
- (d) Public administration shall be accountable. Transparency through the provision of accessible, accurate and timeous information to the public shall be fostered.
- (e) Public administration shall be development oriented and the provision of services shall be conducted on the basis of impartiality and equity to all.
- (f) Public administration shall function on a basis of fairness and shall

serve the public in an unbiased and impartial manner.

- (g) Public administration shall be oriented towards public participation in policy-making. It shall be responsive to the needs of the people.
- (h) Public administration shall be broadly representative of the South African people. Employment and personnel management practices in the public administration shall be based on ability, objectivity and fairness and the need to redress the imbalances of the past to achieve the required representation.

(2) The appointment in the public administration of a number of persons on policy considerations as regulated by law shall not be precluded.

(3) Laws regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.

Public Administration Commission

143. (1) There shall be a single Public Administration Commission for the Republic as prescribed by a national law. Each of the provinces shall be entitled to nominate a representative for appointment in the Commission.

(2) The Public Administration Commission shall be independent and impartial.

(3) The function of the Public Administration Commission shall be to promote the basic values and principles of public administration as prescribed by a national law.

(4) Provincial representatives in the Public Administration Commission

shall be competent to exercise and perform the powers and functions of the Commission with regard to provinces as prescribed by national law.

(5) The Public Administration Commission shall be accountable to Parliament for its activities.

Public Service

144. (1) There shall be a public service for the Republic structured and functioning in terms of a law. The public service shall loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of service of employees in the public service shall be regulated by law. Employees shall be entitled to a fair pension as regulated by law.

CHAPTER 15

INSTITUTIONS TO PROTECT PUBLIC INTEREST

PUBLIC PROTECTOR

Establishment and functions

145. (1) There shall be a Public Protector for the Republic.¹⁴⁷

(2) The Public Protector shall have power, as regulated by law, to investigate and report on any conduct in the affairs of the State or public administration at any level of government which is alleged or suspected to be improper or to result in any impropriety or prejudice, and to take such remedial action as is appropriate in the circumstances. In addition, the Public Protector shall have such other powers and functions as may be prescribed by law.¹⁴⁸

(3) The Public Protector shall be accessible to all persons and communities.¹⁴⁸

(4) The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.¹⁴⁹

(5) Reports issued by the Public Protector in connection with the

¹⁴⁷ **Approved by CC Subcommittee.**

¹⁴⁸ **Approved by CC Subcommittee. NP reserved its position to revisit the clause.**

¹⁴⁹ **This clause was criticized on a number of points in the CC, *vis***

- **that the negative nature of the provision is inappropriate;**
- **that its operation should be limited to judicial decisions;**
- **that it should be moved to the chapter on the administration of justice.**

The CC decided to defer further discussion of this clause pending discussion of the Draft on the Administration of Justice.

discharge of his or her powers and functions shall except in exceptional circumstances be open to the public.¹⁵⁰

Appointment, qualifications and tenure of office

146. (1) The Public Protector shall be appointed in accordance with section 157 and may be dismissed from office in accordance with section 158.¹⁵¹

(2) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who complies with any other requirements prescribed by law.¹⁵²

(3) The Public Protector shall be appointed for a period of seven years.¹⁵³

Provincial public protectors

147. ...¹⁵⁴

HUMAN RIGHTS COMMISSION

¹⁵⁰ Agreed to by the CC Subcommittee, the NP reserving its right to revisit the clause.

¹⁵¹ Subcommittee agreed that appointment and dismissal be incorporated in general clauses in this regard.

¹⁵² Agreed to in Subcommittee.

¹⁵³ Agreed to in Subcommittee.

¹⁵⁴ Stands over for discussion on provincial competencies.

Establishment and functions

147. (1) There shall be a Human Rights Commission for the Republic.¹⁵⁵

(2) The Human Rights Commission shall promote the development, protection and attainment of, and respect for, human rights and, generally, the development of a culture of human rights in the Republic. It shall for this purpose have the necessary powers accorded to it by law, including powers to monitor, investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached and to perform research and educative functions.¹⁵⁶

¹⁵⁵ **Agreed to.**

¹⁵⁶ **Agreed to in Subcommittee.**

Appointment of members¹⁵⁷

149. ...¹⁵⁸

¹⁵⁷ Although the HRC falls under the category of Institutions to Protect Public Interest, a concern was raised in the CC Subcommittee that because of the nature of its role; function and the manner of operation, appointment of its Commissioners should be different from that of other Institutions in this category and therefore cannot be put in the general clauses on Appointments and Dismissals.

¹⁵⁸ There is no agreement among the parties on the method of selection and appointment of commissioners. There are two views, the one supports the approach in section 115(3) of the interim Constitution. The other view calls for the creation of an independent panel to select and recommend persons to the President for appointment as commissioners. Qualifications for members of the Commission also need further debate. These are the two options:

Option 1:

"150. (1) The members of the Human Rights Commission shall be appointed by the President on recommendation by Parliament.

(2) Parliament shall only recommend a person for appointment to the Commission -

(a) who has been nominated by a committee of Parliament composed of one representative of each party represented in Parliament and willing to participate in the committee: and

(b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least 75% of the members present and voting.

(3) A member of the Commission shall be an independent and impartial person of integrity who has a personal commitment to the promotion of fundamental rights."

Option 2:

"150. (1) The members of the Human Rights Commission shall be appointed by the President on recommendation by an independent panel of human rights experts, who do not hold office in any political party or organisation.

(2) Such panel of human rights experts shall be appointed by a multi-party parliamentary committee by resolution of a majority of at least two-thirds of its members.

(3) A member of the Commission shall be an independent and impartial person of integrity who has a personal commitment to the promotion of fundamental rights."

Establishment¹⁶⁰ and functions

150. (1) There shall be a Commission for Gender Equality for the Republic.
(2) ... (role and functions)¹⁶¹

Appointment of members

151. ...¹⁶²

¹⁵⁹ Name still to be clarified.

¹⁶⁰ All parties accept the establishment and constitutionalisation of this Commission, except that the ACDP has not indicated whether or not it wants it to be included in the Constitution. However, the FF accepts this with reservation as it is of the view that there is no real need for this Commission as its tasks could be assigned to the Human Rights Commission, whilst the DP proposes an inclusion of a sunset clause somewhere in the Constitution which would allow for this Commission to be eventually absorbed by the Human Rights Commission once its objectives are realised. (See par. 5.1.1 and 5.1.2 of the TC Report.)

¹⁶¹ All the parties are in agreement as to what the general Powers and Functions of this Commission should be. However, the ACDP and NP have slightly different views. The ACDP envisages a Commission dealing with issues broader than gender equality. The NP is of the view that the Commission has to deal with gender issues at first and eventually be broadened to cover other disadvantaged groups and communities. (See par. 5.1.2 and 5.3 of the TC Report).

Despite the agreement as to what the Powers and Function of the Commission should be, there is disagreement as to whether or not these should be included in the Constitution or not. The ANC is against the listing of the Powers and Functions of the Commission in the Constitution, preferring only an inclusion of a clause that defines the role of the Commission in advancing gender equality. The NP and DP prefer inclusion of a broad definition of these. The other parties have not committed themselves to any choice. The formulations contained below are to cater for both choices.

Option 1:

"The role of the Commission shall be to advance gender equality and all its powers and functions shall be prescribed by national law."

Option 2:

"The Commission shall promote the development, protection, attainment of, and respect for gender equality. It shall for this purpose have the necessary powers accorded to it by national law, including powers to monitor, research, educate and advise on issues relating to gender equality."

¹⁶² No procedure has been agreed to, as is reflected in par. 5.2.3 of the Report. The DP and NP

ELECTORAL COMMISSION

Establishment and functions

152. (1) There shall be an Electoral Commission.

(2) The Electoral Commission shall be responsible for the management of free and fair elections conducted at national, provincial and local levels of government.

Composition of the Commission

153. The Electoral Commission shall be composed of a minimum of three persons appointed in accordance with section ...

AUDITOR GENERAL

Establishment and functions

154. (1) There shall be an Auditor General for the Republic.

suggest the same procedure as adopted for the Human Rights Commissioners and Public Protector, the IFP requires a selection of both male and female Commissioners by women members of Parliament and the ANC has not committed itself to any preference but submits that the Appointment Procedure should be left to legislation. There is to be considered whether Appointment Procedure of members of the Commission should not be in terms of the standard procedure clause for other independent structures presently under consideration by the CC Subcommittee, which would include Public Protector and Auditor General, in which case the formulation would be:

"A member of the Commission for Gender Equality shall be appointed in accordance with section 157."

(2) The Auditor General shall audit, and report on, the accounts and financial statements of all national and provincial state departments and administrations and of all local governments, and also all such other accounts and financial statements as may be required by law to be audited by the Auditor General.¹⁶³

(3) The Auditor General may audit, and report on, the accounts and financial statements of any institution funded from public money, as may be regulated by law.¹⁶⁴

(4) The Auditor General shall submit reports on audit to all authorities which have a direct interest in the relevant audit and also to any authorities as may be prescribed by law. All reports shall be made public.¹⁶⁵

Appointment, qualifications of the Auditor General and tenure of office

155. (1) The Auditor General shall be appointed in accordance with section 157 and may be dismissed in accordance with section 158.¹⁶⁶

(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office. The Auditor General shall be appointed with due regard to his or her specialised knowledge of or experience in auditing, state finances and public administration, and shall not hold office in any political party or

¹⁶³ **Approved by CC Subcommittee.**

¹⁶⁴ **Agreed to in the Subcommittee.**

¹⁶⁵ **The CC Subcommittee agreed that this formulation should replace the previous one.**

¹⁶⁶ **Previous clauses dealing with Appointment and Dismissal have been moved to the general provisions clause where various options on Appointment and Dismissal Mechanisms regarding all Institutions to Protect Public Interest are dealt with as per instructions of the CC Subcommittee.**

organisation.¹⁶⁷

(3) The Auditor General shall be appointed for a non-renewable term of not less than 5 years and not more than 10 years.¹⁶⁸

GENERAL PROVISIONS

General principles

156. (1) The institutions provided for in this Chapter shall be independent, impartial and subject only to the Constitution and the law. They shall discharge their powers and functions without fear, favour or prejudice.

(2) Organs of state shall through legislative and other measures accord the said institutions the necessary assistance and protection to ensure their independence, impartiality, dignity and effectiveness.

(3) No person and no organ of state shall interfere with the said institutions in the discharge of their powers and functions.

(4) The said institutions shall be accountable to Parliament and shall report to Parliament on their activities at least once per year.

Appointments¹⁶⁹

¹⁶⁷ Agreed to in Subcommittee.

¹⁶⁸ Agreed to in Subcommittee.

¹⁶⁹ The appointment mechanisms in this clause are for consideration for possible applications to all the Institutions to Protect Public Interest except the HRC (See footnote 157). It became apparent in the Subcommittee that due to the differences between these Institutions a uniform clause on the Appointment Mechanisms may not be practicable. The Subcommittee has to consider various options for possible application to the various institutions as was decided in the Subcommittee.

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157. (1) Where a provision in this Chapter requires an appointment to be made in accordance with this section, such appointment shall be made by the President acting on the recommendation of Parliament.

(2) The person recommended by Parliament shall be a person -

- (a) nominated by a committee of Parliament ...;¹⁷⁰
and
- (b) approved by Parliament by a resolution adopted by a majority of at least ...%¹⁷¹ of the members present and voting.

Removal from office¹⁷²

158. (1) Where the Constitution provides for the removal from office of a person in accordance with this section, that person may be removed from office only on the grounds of misbehaviour, incapacity and incompetence upon -

- (a) ...¹⁷³ and participating in the committee; and

¹⁷⁰ These are the four options suggested at the Subcommittee, as to the composition of such Committee.

Option 1:

- (a) nominated by a committee of Parliament which is broadly representative of the parties in Parliament,

Option 2:

- (a) nominated by a committee of Parliament composed of one representative from each party in Parliament.

Option 3:

- (a) nominated by a committee of Parliament consisting of at least one representative of each party in Parliament,

Option 4:

- (a) nominated by an ad hoc or portfolio committee of Parliament,

¹⁷¹ There has been no agreement as to the majority required here. To be debated further.

¹⁷² The Subcommittee has directed that the Removal Procedure should conform to the Appointment Procedures.

¹⁷³ These options are the same as those applicable to Appointment Procedure.

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- (b) the adoption by Parliament of a resolution supported by at least ...¹⁷⁴ of the members present and voting calling for his or her removal from office.

(2) The President may suspend a person from office when his or her removal from office is under consideration by Parliament, and shall without delay discuss him or her from office upon adoption of the said resolution.

-
- (a) A finding to that effect by -

Option 1:

a committee of Parliament that is broadly representative of the parties in Parliament,

Option 2:

a committee of Parliament consisting of one representative of each party in Parliament,

Option 3:

a committee of Parliament consisting of at least one representative of each party in Parliament,

Option 4:

an ad hoc or portfolio committee of Parliament,

¹⁷⁴ There has been no agreement regarding the majorities required.