

PREAMBLE

CHAPTER 1 FOUNDING PROVISIONS

Republic of South Africa¹

1. The Republic of South Africa is one sovereign democratic state founded on a commitment to achieve equality, to promote and protect human dignity, and to advance fundamental human rights and freedoms.

Supremacy of the Constitution

2. (1) This Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid.
(2) All organs of state, citizens, and all persons within the borders of the Republic must respect the Constitution.

Citizenship²

3. (1) There is a common South African citizenship.
(2) Every citizen is equally-
 - (a) entitled to the rights, privileges and benefits of citizenship; and
 - (b) subject to the duties, obligations and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship in compliance with the Constitution and international law.

Territory of the Republic

4. The territory of the Republic is described in Schedule 1.

National symbols

5. (1) The national flag of the Republic when the Constitution

¹ The result of discussion between political parties and subsequent language refinements.

² Franchise is dealt with in the Bill of Rights.

takes effect continues to be the national flag.

(2) The national anthem is ...

Languages³

6. (1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu are the official languages of the Republic.
(2)...

CHAPTER 2 BILL OF RIGHTS

State's duty to respect and protect rights⁴

7. The state must respect and protect the rights in this Bill of Rights.

Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, legislative and other measure that are designed to protect and advance groups or categories of persons disadvantaged by [unfair] discrimination may be used.⁵
(3) Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation,

³ Application of languages still to be considered.

⁴ See Supplementary Memorandum.

⁵ DP Proposal: " ... measures designed and likely to protect ..."; or " ... reasonable measures designed to protect ..."

NP Proposal:

"This section shall not preclude measures likely to achieve the adequate protection and advancement of persons or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights, freedoms and liberties".

Whether CP V is adequately addressed.

See Supplementary Memorandum.

- age, disability, religion, conscience, belief, culture, language and birth.⁶
- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.⁷

Human dignity⁸

9. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life⁹

10.

Option 1

Everyone has the right to life.

Option 2

Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction of a crime for which the death penalty is prescribed by an Act of Parliament.

Option 3

- (1) Everyone has the right to life, which must be respected by others and protected by law from the moment of conception to natural death.

⁶ The use of the term "unfair discrimination"
ACDP proposal for omission of "sexual orientation" and "gender"
NP proposal - To insert after "including" : "without derogating from the generality of ..." or "but not limited to..." -
See Supplementary Memorandum.

⁷ Referred to Technical Committee for reformulation
FF proposal : delete this sub-section
See Supplementary Memorandum.

⁸ Agreed to by CC Subcommittee.

⁹ The ANC and DP support Option 1, the NP supports Option 2, the ACDP and FF support Option 3.
The ANC proposes that only Options 1 & 2 be set out in the Draft Constitution - The debate on Option 3 to continue.

- (2) No one may be deprived of life except by execution of a court sentence following conviction of a crime for which the death penalty is prescribed by an Act of Parliament.

Freedom and integrity of the person¹⁰

11. (1) Everyone has the right to freedom of the person, including the rights not to be -
 - (a) deprived of liberty arbitrarily or without just cause; or
 - (b) detained without trial.
- (2) Everyone has the right to security of the person, [bodily and psychological integrity] including the rights -
 - (a) to be free from all forms of violence; and
 - (b) to be secure in, and control their own body.
- (3) No one may be -
 - (a) tortured in any way;
 - (b) treated or punished in a cruel, inhuman or degrading way; or
 - (c) subjected to medical or scientific experiments without that person's consent or the necessary legal consent.

Slavery, servitude and forced labour¹¹

12. No one may be subjected to slavery, servitude or forced labour.

Privacy

13. (1) Everyone has the right to privacy, including the right not

¹⁰ Section reformulated as instructed by Sub-Committee to incorporate ANC proposal. Some parties indicated opposition to ANC proposal (see sub-section 2) DP and NP wanted "bodily and psychological integrity" replaced with "security of the person". The FF proposed, "the necessary legal consent" added to sub-section 3(c). See Supplementary Memorandum.

¹¹ Agreed to by Sub-Committee.

to have -¹²

- (a) their person, home, or property searched;
- (b) their possessions seized; or
- (c) the privacy of their communications violated.

(2) Every juristic person has the right not to have -¹³

- (a) their property searched;
- (b) their possessions seized; or
- (c) the privacy of their communications violated.

Freedom of religion, belief and opinion

- 14.** (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion, including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public.¹⁴
- (2) Religious observances may be conducted at state or state-aided institutions provided -¹⁵
- (a) that those observances follow any rules established by an appropriate authority;¹⁶
 - (b) that they are conducted on an equitable basis;

¹² Agreed to by Sub-Committee. DP proposal on sub-section 1(c) and 2(c) : "... their communications violated or intercepted." See Supplementary Memo.

¹³ A decision is subject to the rights of juristic persons. The Technical Committee was instructed to compile a list of rights borne by human beings only and another list of rights borne by legal persons as well, for further discussion. See Supplementary Memorandum on "juristic persons".

¹⁴ Agreed to at Sub-Committee. ANC proposal delete: "including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public". ACDP proposed the insertion of the words "... including freedom to proselytize and to change religion..." was noted. See Supplementary Memorandum.

¹⁵ Agreed to at Sub-Committee. ACDP reserved its position.

¹⁶ FF proposal replace "any" with "all". See Supplementary Memorandum.

- and
 - (c) that attendance at them is free and voluntary.
- (3) Nothing in the Bill of Rights precludes legislation recognising, to the extent consistent with the Bill -¹⁷
 - (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

Freedom of expression

- 15.** (1) Everyone has the right to freedom of expression, including -¹⁸
- (a) freedom of the press and other media; and
 - (b) freedom to receive and impart information and ideas.
- (2) The protection in subsection (1) does not extend to either -¹⁹
- (a) propaganda for war; or²⁰
 - (b) advocacy of hatred that constitutes incitement to discrimination, hostility or violence, and that is based on race, ethnicity, gender, or religion.²¹

¹⁷ Referred to Technical Committee, to consider in the light of draft formulations on customary law in the chapter on the Judiciary.
 NP proposal: insert "to the extent consistent with this Bill".
 See Supplementary Memorandum.

¹⁸ Agreed to.

¹⁹ NP and DP proposal: the deletion of sub-section (2) to be reflected as an option.
 ACDP reserved its position.

²⁰ ANC proposal to read: "propaganda for war or imminent violence".

²¹ ANC proposal delete "and that is based on gender, ethnicity and religion"
 DP proposes deletion of discrimination, hostility and the words that follow violence.

- (3) The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.²²

Assembly, demonstration and petition²³

16. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, or to present petitions.

Freedom of association²⁴

17. Everyone has the right to freedom of association.

Political rights²⁵

18. (1) Every citizen is free to make political choices which includes the rights -²⁶
- (a) to form a political party;
 - (b) to participate in the activities of, or to recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular

²² Technical Committee to reformulate to better distinguish between government produced media and state-aided public media. The DP proposed 3 alternative formulations to deal with the problem. FF proposal to replace "a diversity of opinion" by the words "a survey of the diverse opinions held". See Supplementary Memorandum.

²³ Agreed to by CC Subcommittee. FF proposal to delete "to present petitions" see Supplementary Memorandum.

²⁴ Agreed to by Sub-Committee.

²⁵ Agreed to by CC Subcommittee. FF proposed insert "adult" in sub-sections (1), (2) and (3), after the word "Every" - See Supplementary Memorandum. Issue of voting age needs to be considered and instructions given.

²⁶ Results from discussions between the different parties as refined by the chairperson. The franchise is dealt with in the Bill of Rights. Elections are dealt with under the national, provincial and local legislatures.

elections for any legislative body established in terms of the Constitution, to vote in such elections and to do so in secret.

- (3) Every citizen has the right to stand for election to public office and, if elected, to hold office.

Citizenship²⁷

19. No citizen may be deprived of citizenship.

Freedom of movement and residence²⁸

20. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter and to remain in the Republic.
- (4) Every citizen has the right to a passport.²⁹

Economic activity³⁰

- 21.

Option 1

No provision regarding a right to economic activity.

Option 2

- (1) Everyone has the right to pursue a livelihood and engage in economic activity anywhere in the Republic.
- (2) Subsection (1) does not preclude measures that are designed to promote the protection or the improvement of the quality of life, economic growth, human

²⁷ Agreed to by Sub-Committee.

²⁸ Agreed to by Sub-Committee.

²⁹ The FF proposed that the right is guaranteed subject to criminal legislation relating to fugitive offenders. See Supplementary Memorandum.

³⁰ The Technical Committee was instructed to:
- further examine international instruments, taking into account the views expressed by political parties at the Subcommittee meeting,
- report on its understanding of the term, "economic activity" and why it considered the term to be problematic, in the present context, and
- to consider the inclusion of a German-type clause as an option.

development, social justice, basic conditions of employment, fair labour practices, or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.³¹

Option 3

Everyone shall have the right to pursue the livelihood of their choice, including the right to freely choose their occupation or profession, their place of work and their place of training.

Labour relations³²

- 22.** (1) Everyone has the right to fair labour practices.
- (2) Workers have the right -
- (a) to form and join trade unions;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.³³
- (3) Employers have the right -
- (a) to form and join employers' organisations; and
 - (b) to participate in the activities and programmes of an employers' organisation.
 - [(c)to lock-out.].³⁴
- (4) Every trade union and every employers' organisation has the right -

³¹ **Option 2(2) - the FF propose the insertion of "authorized by law" after the term "measures". The NP is opposed to Option 1, and the DP proposes and supports Option 3. See Supplementary Memorandum.**

³² **Agreed to by Sub-Committee.**

³³ **DP proposal: "Right to strike for the purposes of collective bargaining"
FF proposal - Right to strike should not extend to essential services.**

³⁴ **FF proposal - Right to lock-out should be retained.**

- (a) to determine its own administration, programmes and activities;³⁵
- (b) to organise;
- (c) to bargain collectively; and
- (d) to form and join a federation.

Environment³⁶

23. Everyone has the right -

- (a) to an environment that is not harmful to their health or well-being;
- (b) to have their environment protected through reasonable measures, including legislation, designed to -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure sustainable development and use of natural resources.

Property³⁷

24. (1) Property is guaranteed. It imposes duties and its use should serve the public interest.³⁸

(2) The content and limits of property, including its deprivation, may be determined only by law of general

³⁵ Discussion was deferred to give political parties an opportunity to consider a proposal from the DP.
 DP proposal: "Every trade union and every employers' organisation has the right -(a)to determine its own administration, programmes, activities provided that nothing in this constitution shall preclude laws and measures designed to promote honest, efficient, democratic and accountable governance".
 See Supplementary Memorandum.

³⁶ Agreed to by Sub-Committee.

³⁷ This option is the draft clause giving effect to the tentative understanding that emerged in the CC Sub-Committee on 10 October 1995 (page 9 of the Minutes). See Supplementary Memorandum. Subsections (1) and (2) are a combination of the wording gleaned from the German Basic Law and section 28(2) of the interim constitution.

³⁸ The DP have indicated that they do not accept the German sub-clause (1) and have proposed an alternative clause. See Supplementary Memorandum.

- application.³⁹
- (3) Property may be expropriated in terms of legislation of general application -
- (a) for a public purpose or in the public interest which includes land reform;
 - (b) subject to the payment of compensation, the amount, the timing and manner of which have been either agreed or decided by a court.
- (4) When a court decides the amount, timing or manner of compensation, it must equitably balance the public interest and the interests of those affected, considering all relevant factors including -⁴⁰
- (a) the current use of the property;
 - (b) the history of its acquisition; and
 - (c) its market value.
- (5) Every person and community dispossessed of land after 19 June 1913 as a result of discriminatory law or practice has the right to restitution of that land, or equitable redress, subject to and in accordance with national legislation.
- (6) Every person and community whose tenure is legally insecure as a result of discriminatory law or practice has the right to obtain legally enforceable security of tenure or, where appropriate, alternative redress subject to and in accordance with national legislation.⁴¹

³⁹ The DP proposed that the provision be amended so as to preclude "arbitrary" deprivation of property alternatively that any deprivation is "fair and justifiable". The FF proposes the deletion of 20(2) as reflected on page 19 of the Refined Working Draft of 12 October 1995.

⁴⁰ It was agreed that TCs 4 & 6.3 review the factors. Some members of the TCs proposed the addition of the following factor: "the State's ability to pay". The concern underlying the addition is that, where subparas (a) and (b) do not apply, the cost of land reform measures to undo the inequitable distribution of land as a result of apartheid will be so high that land reform will be effectively stifled.

⁴¹ The FF objects to this formulation on the grounds that it makes tenure reform dependent on the passage of legislation. DP does not believe that the clauses on insecure rights/tenure belong in the property clause.

- (7) In this section, “discriminatory law or practice” means any law or practice that would have been inconsistent with section 8 had that section been in force at the time the law or practice dispossessed a person of land or affected a person's tenure to land.⁴²

Housing and land⁴³

25. (1) Everyone has the right to have access to adequate housing which the state must take reasonable and progressive legislative and other measures to secure.
- (2) No one may be evicted from their home arbitrarily and without an order of court [made after considering the circumstances under which such home is occupied, the duration of the occupation and the availability of suitable alternative accommodation].⁴⁴
- (3) Everyone has the right to reasonable and progressive legislative and other measures by the state to facilitate equitable access to land.

Health, food, water, and social assistance⁴⁵

26. (1) Everyone has the right to have access to -

⁴² Section 4 is the Equality clause.
The NP proposes that the Property rights clause reflected as option 1 on page 19 of the Draft Bill of Rights published on 9 October 1995, be included as an alternative option.

⁴³ The Technical Committee was requested to consider the grouping of this right with other rights, and to use a consistent formulation to describe the state's obligations. The NP made various supplementary proposals on this right.
See Supplementary Memorandum on these aspects.

⁴⁴ The DP had reservations on the section in brackets, and the NP did not support the section in brackets.
The FF proposed the deletion of "the availability of suitable alternative accommodation".
The DP had reservations regarding the phrase “equitable access to land”, and the NP did not support it.

⁴⁵ The Technical Committee was requested to consider the grouping of this right with other rights, and to use a consistent formulation to describe the state's obligations. The NP and DP made various supplementary proposals on these rights.
See Supplementary Memorandum on these aspects.
The FF proposed that

- reproductive health care be limited to sterilisation
- the ambit of social assistance from the state should be reduced

- (a) health care services, including reproductive health care, of the highest attainable standard;
 - (b) sufficient food and clean water;
 - (c) a social security system, including appropriate social assistance where they are unable to support themselves and their dependants.
- (2) The state must take reasonable and progressive legislative and other measures to secure access to each of these rights.
- (3) No one shall be refused emergency medical treatment.

Children

27. (1) Every child has the right to -
- (a) a name and a nationality from birth;⁴⁶
 - (b) family care, [parental care], or appropriate alternative care when removed from the family environment;⁴⁷
 - (c) basic nutrition and health and social services;⁴⁸
 - (d) be protected from maltreatment, neglect, or abuse;⁴⁹
 - (e) be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at

⁴⁶See Supplementary Memorandum on the alternative wording in these sub-sections. See Supplementary Memorandum on these aspects.

⁴⁷ The inclusion of "parental care" was referred to the Technical Committee - See Supplementary Memorandum.
 NP proposal : that this section be incorporated with other social and economic rights. See Supplementary Memorandum on social and economic rights.

⁴⁸ NP proposal: insert "and shelter".
 DP expressed concern.

⁴⁹ NP proposal: replace "or abuse" with "and all forms of abuse and degradation". See Supplementary Memorandum on social and economic rights.

risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and

(f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest possible period of time and has the right to be -

(i) kept separately from other detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age.

(2) The child's best interest is of paramount importance in every matter concerning the child.

(3) In this section, 'child' means a person under the age of 18 years.

Education⁵⁰

28. (1) Everyone has the right to -

(a) a basic education, including adult basic education, in a state or state-aided institution;

(b) further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and⁵¹

(c) choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.⁵²

⁵⁰ Agreed to by CC Subcommittee.

⁵¹ As instructed by Sub-Committee section 28(1)(b) uses the same phrase as the other rights: "reasonable and progressive legislative and other measures".

⁵² FF proposal: "mother tongue should be compulsory".

- (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that -
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and⁵³
 - (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Alternative wording proposed by NP suggested for subsection (2)(c)

[Everyone has the right]

- (c) to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion.

Academic freedom⁵⁴

29. [(1) Every institution of higher learning and everyone within these institutions has the right to academic freedom.
- (2) Everyone has the right to freedom of artistic creativity and scientific research [activity].]

Language and culture⁵⁵

⁵³ FF proposal : "the state to have an obligation to finance private educational institutions not wholly able to finance themselves".
See Supplementary Memorandum.

⁵⁴ The Technical Committee to redraft in terms of the CC Subcommittee instructions - This is still under consideration by the Technical Committee. See Supplementary Memorandum.
ANC proposal: To be incorporated in Freedom of Expression
FF proposal: Supports above formulation.

⁵⁵ NP proposal : to retain section as in Interim Constitution. A compromise solution is proposed above. See Supplementary Memorandum.

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.

Access to information⁵⁶

31. Everyone has a right to access -
- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

Administrative justice⁵⁷

Option 1

32. (1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.
- (2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published.

Option 2

The same as Option 1, except delete the words 'lawful' and 'procedurally' from subsection (1).

Option 3

- (1) Everyone whose rights or interests are affected or threatened by administrative action has the right -
- (a) to have that administrative action be fair, reasonable, and justifiable; and
 - (b) to be given written reasons for that administrative action, unless those reasons have been published.
- (2) Anyone whose rights or legitimate expectations are

⁵⁶ Technical committee to give opinion on possible qualification of the right, based on a comparative analysis. See Supplementary Memorandum.

⁵⁷ The Technical Committee is to redraft taking into account the discussions at the Sub-Committee meeting. Still under consideration by Technical Committee. See Supplementary Memorandum.

affected or threatened by administrative action has the right to have that administrative action be reasonably fair.

Access to justice⁵⁸

33. Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in either a court of law or another independent and impartial forum.

Arrested, detained and accused persons

34. (1) Everyone who is arrested for allegedly committing an offence has the right -

- (a) to remain silent;
- (b) to be informed, promptly and in a language that the arrested person understands -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) as soon as reasonably possible, but at least within 48 hours of being arrested, either to be released or to be brought before a court of law and, while there, to be either charged or informed of a reason for the detention to continue; but, if the period of 48 hours after a person has been arrested expires outside ordinary court hours, that person may be detained until the next court day; and
- (e) to be released with or without bail, unless the interests of justice require that person to be detained. [If the interests of justice permit that

⁵⁸

Agreed to by CC Subcommittee

NP proposal: The insertion of "in either a court of law or where appropriate or necessary ...". See Supplementary Memorandum.

FF proposal: Section to be re-worded to exclude the possibility that litigants in civil cases or accused in criminal cases can insist that the State should pay for such litigation and/or provide legal representation.

See Supplementary Memorandum.

person to be released.]⁵⁹

- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed, promptly and in a language that the detained or imprisoned person understands, of the reason for being detained;
 - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly and in a language that the detained person understands;
 - (c) to have a legal practitioner provided by the state if substantial injustice would otherwise result, and to be informed of this right promptly and in a language that the detained person understands;
 - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and⁶⁰
 - (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused has a right to a fair trial, which includes the right -
- (a) to be informed of the charge with sufficient

⁵⁹ After further investigation, the Technical Committee has proposals for alternative wording on this sub-section. See Supplementary Memorandum.

⁶⁰ Amended as per CC Subcommittee instructions.

- details to answer the charge;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial that begins, and concludes, without unreasonable delay in an ordinary court of law;
- (d) to be present when being tried;
- (e) to choose and be represented by a legal practitioner, to have a legal practitioner provided at state expense if substantial injustice would otherwise result, [where the interests of justice require it,] and to be informed of both of these rights;
- (f) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
- (g) to adduce and challenge evidence;
- (h) not to be compelled to give self-incriminating evidence;
- (i) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (j) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (k) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (l) to be sentenced within a reasonable time after being convicted; and
- (m) to the benefit of the least severe of the prescribed punishments, if the prescribed punishment for the offence has been changed during the period between the time that the offence was committed and the time of sentencing;
- (n) of appeal to, or review by, a higher court.

[(4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.]

Limitation of rights

35. (1) The rights in the Bill of Rights, except the rights in section 36, may be limited by or pursuant to law of general application only to the extent that the limitation of a right is -⁶¹
- (a) [reasonable and justifiable\necessary] in an open and democratic society based on freedom and equality;⁶²
 - (b) compatible with the nature of the right that it limits; and
 - [(c) consistent with the Republic's obligations under international law]⁶³
- (2) The provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit unfair discrimination.⁶⁴
- (3) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.⁶⁵

⁶¹ Under consideration by Technical Committee.

⁶² ANC proposal: "(a) reasonable in an equal, open and democratic society in which every citizen shall be enabled to enjoy the full range of rights and freedoms"
DP proposal: (a) reasonable and necessary in an open and democratic society based on freedom and equality of the kind envisaged by the Bill of Rights read as a whole".
FF proposal: delete "reasonable and justifiable".
NP proposal: "reasonable and necessary".

⁶³ The DP proposes that any limitation of a fundamental right be "consistent with international human rights standards". See Supplementary Memorandum.

⁶⁴ NP and FF propose deletion.

⁶⁵ NP proposal: that the phrase "including the common law, customary law or legislation or any other measure with legal effect or impact" be inserted after the word "law". The word "law" has been used throughout to include the common law, customary law and legislation. The phrase "or any other measure with legal effect or impact" is unnecessary because any measure that has legal effect or impact will have a legal rule authorising the measure. The rule may only permit a measure that limits rights if the rule itself complies with subsection (1).
The NP also seeks clarity on the words "or any other provision of the Constitution" in subsection (3). This aspect will be addressed in the Supplementary Memorandum.

States of emergency⁶⁶

36. (1) An Act of Parliament may provide that a state of emergency may be declared whenever -
- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, national disaster, or other public emergency; and
 - (b) declaring a state of emergency is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two thirds of its members, may resolve to extend a declaration of a state of emergency for a period of up to three months, or for consecutive periods of up to three months each. [For no more than 14 days . . . up to 60 days, or for consecutive periods of up to 60 days each.]
- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) is strictly required by the emergency;
 - (b) it is consistent with the Republic's obligations under international law;

⁶⁶

Agreed to in principle by CC Subcommittee.

The Technical Committee was requested to consider the relationship between this section and the sections of the Constitution dealing with states of national defence. This aspect is still being researched and considered.

The ANC is considering:

- the necessity of including sub-sections (1) - (3)
- sub-section (7)(a) - "a friend of the detainee".

- (c) it conforms to subsection (4); and
 - (d) it is published in the national Government Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -⁶⁷
- (a) the creation of retrospective crimes or the imposition of retrospective penalties;
 - (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
 - (c) any derogation from this section or any of the sections listed below.

| | |
|----------------------|---|
| Section 8 | Equality |
| Section 9 | Human Dignity |
| Section 10 | Life |
| Section 11(3) | Freedom from torture and degrading treatment |
| Section 12 | Freedom from slavery and servitude (excluding forced labour) |
| Section 14 | Freedom of Religion, Belief and opinion |
| Section 22(1) | Right to fair labour practices |
| Section 22(2)&(3) | Right to form and join trade unions or employers' organisations |
| Section 27(1)(d) | Right of children to not be abused or neglected |
| Section 27(1)(e) | Right of children to freedom from exploitative labour practices |
| Section 27(1)(f) | Rights of children who are detained |
| Section 33 | Right of access to justice |
| Section 34(2)(d) | Right to challenge detention and be released |
| Section 34(1)(a)&(b) | Right to remain silent, and to be informed of that right |
| Section 34(1)(c) | Right not to be compelled to confess or make statements |

⁶⁷ FF propose: The rights mentioned in 36(4)(c) to be carefully scrutinised and debated for exclusions and additions.

Section 34(3) (4)
Section 35
Section 38

Right to a fair trial
Rights contained in limitation section.
Application of the Bill

- (5) Despite subsection (4)(a), nothing in this section prevents the state trying and punishing anyone for an act or omission that, at the time it was committed, was criminal according to the general principles of international law.⁶⁸
- (6) Any superior court may enquire into the validity of
- (a) a declaration of a state of emergency;
 - (b) any extension of a declaration of a state of emergency; or
 - (c) any legislation enacted, or other action taken, under a declaration of a state of emergency.
- (7) Whenever anyone is detained in consequence of a declaration of a state of emergency, the following conditions must be observed -
- (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
 - (b) a notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and referring to the emergency measures under which that person has been detained;
 - (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
 - (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
 - (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the

⁶⁸ This provision may not be necessary because the Right to a Fair Trial is a non-derogable right. NP opposes this section.

court must release the detainee unless the detention is necessary to restore peace and order;

- (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
- (g) the detainee must be allowed to appear in person before any court considering the detention, and to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
- (h) the state must present written reasons to the court to justify the detention or continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

- (8) If a court releases a detainee, that person may not be detained again unless the state first shows a court good cause for re-detaining that person.

Enforcement of rights⁶⁹

37. (1) Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. The persons who may apply for relief are:

- (a) anyone acting in their own interests;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its

⁶⁹ Agreed to by CC Subcommittee.

members.

- (2) If anyone, acting as a member of, or in the interests of, a group or class of persons, applies for relief and the court makes an order that may prejudice the members of that group or class, that order is not binding on the members of that group or class unless they have received notice of the action and have had an opportunity to exclude themselves from the group or class.

Application⁷⁰

38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state and, where applicable, binds all natural and juristic persons.⁷¹
- (2) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.⁷²

Option 1

Juristic persons are entitled to the rights in the Bill of Rights, to the extent that the nature of the rights, and of the juristic persons, permit.

Option 2

Juristic persons are entitled to the following rights ...

Interpretation of the Bill of Rights

39. (1) When interpreting the Bill of Rights, every court -

⁷⁰ Agreed to by Sub-Committee.

⁷¹ NP seeks clarity on the inclusion of the judiciary in Subsection 1. See Supplementary Memorandum.

⁷² FF proposal to start with: "This Bill of Rights does not detract from..." See Supplementary Memorandum.

- (a) must promote the values that underlie an open and democratic society based on freedom and equality;
 - (b) must consider all applicable international law; and
 - (c) may consider comparable foreign case law.
- (2) When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with the Bill of Rights over any alternative interpretation of the legislation that is inconsistent with the Bill.
- (3) When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.

CHAPTER 3 PARLIAMENT

Legislative authority of Republic⁷³

- 40.** (1) The legislative authority of the Republic is vested in Parliament, which may make laws for the Republic in terms of the Constitution.
- (2) Parliament consists of the National Assembly and the Senate.

The National Assembly

Composition and election of National Assembly⁷⁴

- 41.** The National Assembly consists of ... members, who are women and men elected in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and results, in general, in proportional

⁷³ Refer to the provisions on provincial competencies.

⁷⁴ The matter of the electoral system is still under discussion.

representation.

Qualifications of members of National Assembly⁷⁵

42. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except:

- (a) anyone holding office of profit under the Republic, other than the Deputy President, Ministers and Deputy Ministers and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of Parliament;⁷⁶
- (b) members of the Senate, a provincial legislature or a local government;
- (c) unrehabilitated insolvents;
- (d) anyone declared to be of unsound mind by a court of the Republic;
- (e) anyone who, after this section takes effect, has been convicted of an offence and sentenced to more than 12-months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. Any disqualification of anyone under this paragraph ends five years after the sentence has been completed.

⁷⁵ The section regarding "anyone who was serving a sentence...when the Constitution takes effect" has been removed as it is a transitional arrangement and will be provided for in the relevant section.

⁷⁶ 42(a) - Traditional leaders are catered for in 42(a).
42(a) - Regarding "office of profit", consideration has been given to the concern that "double benefits" received by MP's should be examined to see whether some constitutional provision might be used to prevent this. This section appears to cater for all situations except those relating to persons receiving pensions from a state source. It is perhaps too restrictive to prevent retired persons in receipt of pensions from standing for election to Parliament unless they forfeit their benefits. It is more appropriate to seek solutions to problems arising out of persons being able to receive more than one pension through the enactment of appropriate and equitable pension legislation.

Vacancies

43. (1) A vacancy exists in the National Assembly when -
- (a) a member ceases to be eligible;
 - (b) a member resigns or dies; or
 - (c) a member is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.
- (2) Vacancies in the National Assembly must be filled without delay, in terms of national legislation.

Oaths or affirmation by members

44. Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Sittings and recess periods

45. (1) The first sitting of the National Assembly after an election must take place at a time and on a date determined by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. The National Assembly may determine the time and duration of its other sittings and its recess periods.
- (2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct urgent business.
- (3) The seat of the National Assembly is ... Sittings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.

Elections and duration of National Assembly

46. (1) The National Assembly is elected for a term of five years.
- (2) The National Assembly may be dissolved before the end of its term if it passes a vote of no confidence in the Cabinet.

- (3) When the National Assembly is dissolved, or its term expires, the President, by proclamation and without delay, must call and set dates for an election, which must be held within 90 days of the date the National Assembly was dissolved, or its term expired.
- (4) If an election of the National Assembly is declared not free and fair, the President, by proclamation and without delay, must call and set dates for another election, which must be held within 90 days of the declaration.⁷⁷
- (5) The National Assembly remains competent to function from the time it is dissolved or its term expires until the day before polling begins for the next Assembly; but, if an election is not declared free and fair, the Assembly again becomes competent to function until the day before polling begins in the next election.⁷⁸

Speaker and Deputy Speaker

47. (1) At the first sitting after its election, and when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
- (2) The President of the Constitutional Court must preside over the election of the Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.
- (3) The procedure set out in Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
- (4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of

⁷⁷ The provision regarding elections that are not declared free and fair was included for consideration by the CC. The period which would elapse before a new election can be held might be too long to warrant leaving the country in the hands of and the executive alone. It must also be borne in mind that a state of emergency might need to be declared after elections are declared not to have been free or fair and that this would necessitate Parliamentary approval.

⁷⁸ The Refinement team was asked to ensure the power of the executive between the day before polling and the coming into existence of a new Parliament. S 60 provides for the President to remain in office until his successor is in office. A similar provision is tentatively included under the Executive to provide for other Cabinet members to stay on while they are not members of Parliament.

the members of the Assembly must be present when the resolution is adopted.

Decisions⁷⁹

- 48.** (1) A majority of the members of the National Assembly must be present before a vote may be taken on a Bill, and one third of the members must be present before a vote may be taken on any other matter, except where the Constitution provides otherwise.
- (2) All questions before the National Assembly must be decided by a majority of the votes cast, except where the Constitution provides otherwise.
- (3) The presiding member of the National Assembly has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

President's rights in National Assembly

- 49.** The President may attend, and may speak in the National Assembly, but may not vote.

Internal autonomy

- 50.** (1) The National Assembly may make its internal arrangements, rules and orders.
- (2) A committee of the National Assembly may summon persons to appear before it to assist the committee in its work.⁸⁰

Parliamentary privilege⁸¹

⁷⁹ Provisions relating to special quorums are inserted in the relevant sections.

⁸⁰ This is a tentative provision included by decision of the CC, incorporating s 58 of the Interim Constitution, to refer to a committee system. This provision may not be necessary as it does not entrench the committee system, but only allows rules and orders.

(before 51)... All remuneration clauses have been replaced by one general clause in the chapter on Finance.

⁸¹ Formulations depend on political agreement.
(next to Chapter 4 heading): Provisional chapter pending outcome of political agreement.

- 51.** (1) Members of the National Assembly have freedom of speech and debate in the National Assembly and in its committees, subject to its rules and orders.
- (2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
- (a) anything they have said in, produced before, or submitted to the National Assembly or any of its committees; or
 - (b) anything revealed as a result of anything that they have said, produced or submitted.
- (3) Other privileges and immunities of members of the National Assembly may be prescribed by national legislation.

Bills

52. ...

Constitutional amendments

53. ...

Assent to Bills

- 54.** (1) The President must, without delay, either assent to and sign a Bill passed by Parliament or, if the President has reservations about the constitutionality of the Bill, refer it back to Parliament for reconsideration.
- 2) If the President refers a Bill back to Parliament the following procedure applies:
- (a) Parliament must reconsider the Bill taking into account the President's reservations.
 - (b) If Parliament agrees with the President's reservations it must either reject the Bill, or pass it fully accommodating the President's reservations, and the President must assent to and sign the Bill without delay.
 - (c) If Parliament disagrees with the President's reservations and confirms the Bill or passes it without fully accommodating the President's reservations, the President must, without delay, either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its

- constitutionality.
- (d) If the Constitutional Court decides that the Bill is constitutional the President must assent to and sign it, without delay. If the Court decides that the Bill is unconstitutional the President may not assent to or sign it.

Promulgation

55. A Bill assented to and signed by the President must be promulgated without delay, and becomes an Act of Parliament upon its promulgation.

Safekeeping of Acts of Parliament⁸²

56. The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and must be entrusted for safekeeping to the Constitutional Court immediately after promulgation.

CHAPTER 4 SENATE/COUNCIL OF PROVINCES

Establishment

57. There is a SENCOP consisting of members, who are women and men nominated in accordance with Schedule 3 to represent the provinces [and local governments].

Powers and functions

58. The SENCOP -
- (a) participates in the legislative process of Parliament as provided for in the Constitution;

⁸² The issue of the referral of Bills to the Constitutional Court by persons or parties other than the President still has to be considered. Questions to be addressed include:

1. whether such a procedure should be provided for at all (inter alia in view of considerations about the political involvement of the CC)?
2. at what stage should referral take place?
3. who/how many members can refer?
4. what happens after a Bill has been referred?

- (b) must be informed of, and may comment on, national budget proposals;
- (c) must promote co-operative governance by overseeing and co-ordinating intergovernmental relations among all levels of government and among governments on the same level;
- [(d) may ratify international agreements; and⁸³
- (e) approves appointments of ambassadors and high commissioners.]⁸³

Qualifications

59. Anyone qualified to be a member of a provincial legislature may be a member of the SENCOP.

Oaths or affirmations by members

60. Before members of the SENCOP begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Sittings/meetings⁸⁴

- 61.**
- (1) The SENCOP may determine the time and duration of its sittings and recess periods/the dates of its meetings.
 - (2) The President may summon the SENCOP to an extraordinary sitting/meeting at any time to conduct urgent business.
 - (3) The seat of the SENCOP is ... Sittings/meetings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the SENCOP.
 - (4) The President of the Senate/Chairperson of the Council of Provinces must convene the SENCOP if the majority of the members from at least two provinces so demand.

President/Chairperson

62. (1) The SENCOP must elect from among its members a President/Chairperson to serve for three years.

⁸³ **Concerns with the technical correctness of these provisions.**

⁸⁴ **A transitional provision is required to provide for the first meeting.**

- (2) The procedure set out in Schedule 3 applies to the election of the President/Chairperson.
- (3) The SENCOP may remove the President/Chairperson from office by resolution.

Decisions

- 63.** (1) The majority of the members of the SENCOP must be present before a vote may be taken on a matter when the SENCOP participates in the legislative process of Parliament, and one-third of the members must be present before a vote may be taken on any other matter.
- (2) All questions before the SENCOP must be decided by a majority of the votes cast.
 - (3) The presiding member of the SENCOP has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

Rights of members of Cabinet and Executive Councils

- 64.** Cabinet members, and Executive Council members who are not members of the SENCOP, may attend, and may speak in the SENCOP, but may not vote.

Internal autonomy

- 65.** The SENCOP may make its internal arrangements, rules and orders.

Privileges and immunities

- 66.** The members of the SENCOP have the same privileges and immunities as members of the National Assembly.

SENCOP and the legislative process

Option 1

SENCOP functions as a second house of the national legislature. All Bills, except money Bills, must be discussed and passed by it. It may have a special role with respect to legislation affecting provinces and their functional areas.

Option 2

SENCOP may comment on all Bills, may submit to the National assembly, and, with respect to Bills concerning the functional areas of the provinces, may, in addition, propose

amendments or request their withdrawal. If SENCOP proposes an amendment to or the withdrawal of a Bill, and the National Assembly does not agree, the Assembly must refer the Bill to a mediation body. A decision by the mediation body to adopt a Bill is equivalent to adoption by the National Assembly with a two-thirds majority.

SENCOP and intergovernmental relations

According to Option 2, SENCOP plays a role in the legislative process but a primary function is to facilitate cooperative governance by facilitating cooperation, coordination and consultation in executive matters among all levels of government and among governments on the same level. This could include monitoring the operation of intergovernmental executive actions and relations, facilitating the development of policy in matters of mutual interest, and mediating in disputes among executive institutions.

CHAPTER 5 The National Executive

Executive authority of the Republic

67. (1) The executive authority of the Republic is vested in the President.
- (2) The national executive consists of the President and other members of the Cabinet, who must act in accordance with the Constitution and who may perform any act required to give effect to the Constitution.

The President

68. (1)

Option 1

The President promotes the unity of the nation and that which will advance the Republic, and opposes that which may harm it Republic.

Option 2

The President represents the unity of the nation and promotes that which will advance the Republic and opposes that which may harm it Republic.

- (2) The President is the Head of State, Head of the

national executive and Commander-in-Chief of the defence force, must uphold, defend and respect the Constitution as the supreme law of the Republic, and is responsible for the observance of the Constitution by the national executive.⁸⁵

Powers and functions of the President

- 69.** (1) The President has the powers and functions entrusted to that office by the Constitution and any legislation.
- (2) The President must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Cabinet, except where –
- (a) the Cabinet has determined that the President may act in consultation with a member or a committee of members; or
 - (b) the Constitution states⁸⁶ or implies that the President may act alone.
- (3) In performing the following functions the President may act alone -
- (a) appointing and dismissing Cabinet members and Deputy Ministers and assigning powers and functions to them;
 - (b) convening Cabinet meetings;
 - (c) assenting to and signing Bills;
 - (d) referring a Bill back to Parliament for reconsideration of the Bill's constitutionality;
 - (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
 - (f) summoning the National Assembly to an extraordinary sitting to conduct urgent business;
 - (g) dissolving the National Assembly and calling an election after a vote of no confidence in the

⁸⁵ Has been removed because it is covered by ss 1 and 68(2).

⁸⁶ At present the President may act alone only if the Constitution provides so. Whether or not an Act of Parliament may add to the President's power to act alone must be decided. Such a provision would change the nature of the Presidency and consideration would have to be given to his/her accountability to Parliament.

- Cabinet has been passed by the Assembly;
 - (h) accrediting foreign diplomatic representatives;
 - (i) conferring honours.
- (4) Decisions of the President in consultation with the other members or a member or committee of the Cabinet, must be in writing, signed by the President, and countersigned by another Cabinet member.

Election of President

- 70.** (1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.
- (2) The President of the Constitutional Court must preside over the election of the President, or designate another judge to do so. The procedure set out in Schedule 3 applies to the election of the President.

Assumption of office by President

- 71.** When elected President, a person ceases to be a member of the National Assembly, and, within five days, must assume the office of President by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Term of office of President

- 72.** (1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.
- (2) No person may hold office as President for more than two terms of office; but, when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term of office.

Vacancies

- 73.** (1) A vacancy occurs in the office of President when -
- (a) the President dies, or resigns from office by notice in writing to the Speaker;

- (b) the National Assembly passes a vote of no confidence in the President alone; or
 - (c) the National Assembly, by resolution, removes the President from office.
- (2) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the President of the Constitutional Court, but not more than 30 days after the vacancy occurs.

Acting President

- 74.** (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of the office of President, or during a vacancy in the office of President, an office-bearer in the order below acts as the President -
- (a) the Deputy President;
 - (b) a Minister designated by the President;
 - (c) a Minister designated by the other members of the Cabinet;
 - (d) the Speaker;
 - (e) a member of the National Assembly elected by its members.
- (2) An acting President has the responsibilities, powers and functions of the President.

Removal of President

- 75.** (1) The National Assembly, by a resolution of at least two-thirds of its members, may remove the President from office only on the grounds of -
- (a) a serious violation of the Constitution or the laws;
 - (b) serious misconduct; or
 - (c) inability to perform the functions of office.
- (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not be elected to any public office.

Cabinet

76. Option 1

- (1) The Cabinet consists of the President, a Deputy President and Ministers.
- (2) The President appoints the Deputy President and Ministers from among the members of the National Assembly, and may dismiss them.
- (3) The Deputy President and Ministers are responsible for the functions of the executive assigned to them by the President.

Option 2

- (1) The Cabinet consists of the President, a Prime Minister and Ministers.
- (2) The President appoints the Prime Minister and Ministers from among the members of the National Assembly, and may dismiss them.
- (3) The Prime Minister and Ministers are responsible for the functions of the executive assigned to them by the President.
- (4) The Prime Minister -
 - (a) must assist the President in the execution of the functions of government;
 - (b) is the leader of Government business in Parliament;
 - (c) must co-ordinate the work of the Cabinet; and
 - (d) in the absence of the President, must preside at meetings of the Cabinet.

Option 3

A system of Government of National Unity based on sections 84, 85, 88, 89 and 95 of the Interim Constitution.

Deputy Ministers⁸⁷

- 77.** The President may appoint Deputy Ministers from among the members of the National Assembly to assist the members of the Cabinet, and may dismiss them.

⁸⁷ It is questionable whether this must be constitutionalised.

Continuation of Cabinet after elections

78. When an election of the National Assembly is held, the Cabinet, its members and the Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.

Oath of office

79. Before Ministers or Deputy Ministers begin to perform their functions, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Accountability of Ministers and Cabinet

- 80.** (1) The Deputy President and Ministers are individually accountable both to the President and the National Assembly, and all members of the Cabinet are collectively accountable to the Assembly for the performance of the national government and its policies.⁸⁸
- (2) In the performance of their functions, Ministers are bound by the policies of the Cabinet.

Conduct of Cabinet members and Deputy Ministers

- 81.** (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Cabinet and Deputy Ministers may not -
- (a) undertake any other paid work;
 - (b) engage in activities inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - (c) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

⁸⁸ **Impeachment and vote of no-confidence procedures, and collective cabinet responsibility make the President accountable. If more direct accountability is considered account must be taken of the President's dual roles as Head of State and Head of the Executive.**

Temporary assignment of powers and functions

82. The President may assign to a Cabinet member any powers and functions of another member who is absent from office or is unable to exercise those powers or perform those functions.

Transfer of powers and functions

83. The President by proclamation may transfer to a member of the Cabinet -

- (a) the administration of any legislation entrusted to another member; or
- (b) any power or function entrusted by legislation to another member.

Votes of no-confidence⁸⁹

- 84.**
- (1) If the National Assembly passes a vote of no confidence in the Cabinet, the President must either resign or dissolve the Assembly and call an election.
 - (2) If the National Assembly passes a vote of no confidence in the President alone, the President must resign.
 - (3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the President, the President must either resign or reconstitute the Cabinet.

CHAPTER 6 Courts and Administration of Justice

Judicial authority

- 85.**
- (1) The judicial authority of the Republic is vested in the courts established in terms of the Constitution or an Act of Parliament.
 - (2) The courts are independent, and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
 - (3) No person or organ of state may interfere with the functioning of the courts.

⁸⁹ A reformulation of this section is being considered.

- (4) Organs of state, through legislative and other measures, must assist and protect the courts, to ensure the independence, dignity and effectiveness of the courts.
- (5) A decision of a court binds all the persons and organs of state to which the decision applies.⁹⁰

Judicial system

86. The courts of the Republic are:

- (a) The Constitutional Court consisting of a President, a Deputy President and nine other judges.
- (b) The Supreme Court of Appeal consisting of the Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined in terms of an Act of Parliament.
- (c) Any courts of appeal established in terms of an Act of Parliament to hear appeals from the High Court or other courts of similar status.
- (d) The provincial and local divisions of the High Court and other courts of similar status.
- (e) Magistrates' Courts and other courts of similar status.
- (f) Any other courts established in terms of an Act of Parliament.

Constitutional Court

- 87.** (1) The Constitutional Court is the highest court in constitutional matters, and its decisions bind all other courts.
- (2) The Constitutional Court makes the final decision whether a matter is a constitutional matter.
- (3) Only the Constitutional Court may -
- (a) decide disputes in constitutional matters between national, national and provincial, and provincial organs of state;⁹¹

⁹⁰ Note that "decisions" covers "orders".

⁹¹ The possible unintended consequences of the Constitutional Court's exclusive jurisdiction in disputes between national organs of state are being investigated.

- (b) declare invalid an Act of Parliament, a Provincial Act, and any conduct of the President; and⁹²
 - (c) decide on the constitutionality of any parliamentary or provincial Bill, and it may do so only when the Bill is referred to it in terms of the Constitution.
- (4) National legislation, and rules made by the Constitutional Court -
- (a) may determine the procedure of the Constitutional Court; and
 - (b) must allow any person to bring a matter directly to the Constitutional Court when it is in the interest of justice, and with leave of that Court.
- [(5) The Constitutional Court has no jurisdiction other than that granted in the Constitution.]⁹³

Supreme Court of Appeal

- 88.** (1) The Supreme Court of Appeal may decide appeals in all matters and is the highest court of appeal except in constitutional matters. It has the inherent jurisdiction that vested in the Appellate Division of the Supreme Court before the Constitution took effect.
- [(2) The Supreme Court of Appeal has no jurisdiction other than that granted in the Constitution.]⁹⁴

Other courts

- 89.** (1) Other courts of appeal and the divisions of the High Court have -

⁹² The Refinement Team was requested to consider the inclusion of "and other Cabinet members" after "conduct of the President". This inclusion is not considered advisable.

⁹³ This section might be redundant and even problematic.

⁹⁴ This subsection might be problematic.

- (a) jurisdiction in all constitutional matters except in matters that only the Constitutional Court may decide; and,
 - (b) in all other matters, jurisdiction as determined by an Act of Parliament.
- (2) The provincial and local divisions of the High Court have the inherent jurisdiction that vested in the provincial and local divisions of the Supreme Court before the Constitution took effect.
- (3) All other courts have jurisdiction as determined by an Act of Parliament; but, no Act of Parliament may grant jurisdiction -
- (a) in matters which only the Constitutional Court may decide; or
 - (b) to enquire into or rule on the validity of any legislation or any conduct of the President.⁹⁵

Decisions in Constitutional matters

- 90.** (1) In any constitutional matter, a court with jurisdiction -
- (a) must declare invalid law or conduct that is inconsistent with the Constitution;
 - (b) may make any order that is just and equitable, including an order as to costs, an order that a declaration of invalidity is to operate retrospectively, and the extent of that retrospective operation; and
 - (c) may suspend a declaration of invalidity, for a specified period and on any conditions to allow the competent authority to correct the defect.
- (2) The Supreme Court of Appeal, a division of the High Court or a court deciding an appeal from the High Court may make a finding on the constitutionality of an Act of Parliament, a Provincial Act or any conduct of the

⁹⁵ This limits the existing jurisdiction of Magistrates' Courts by removing Magistrates' Courts' jurisdiction to consider the validity of regulations.

- President but may not declare the Act or conduct invalid; but, the court may grant a temporary interdict or other temporary relief to a party.
- (3) Any person or organ of state with a sufficient interest may appeal or apply to the Constitutional Court to consider a finding of any court in terms of subsection (2), and the Constitutional Court may -
- (a) set aside the finding of invalidity; or
 - (b) confirm or vary the finding of invalidity and declare the Act or conduct invalid to the extent that it is inconsistent with the Constitution.

Appointment of judicial officers

- 91.** (1) Any appropriately qualified woman or man who is [a citizen and,] a fit and proper person is eligible to be appointed as a judicial officer.⁹⁶
- (2) The President, in consultation with the Cabinet and after consulting the Judicial Service Commission, must appoint the President and Deputy President of the Constitutional Court and the Chief Justice and Deputy Chief Justice.
- (3) The other judges of the Constitutional Court are appointed by the President, in consultation with the Cabinet and after consultation with the President of the Constitutional Court, in accordance with the following procedure:
- (a) The Judicial Service Commission must prepare a list of nominees with no more than three names in excess of the number of appointments to be made, and submit the list to the President.
 - (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with written reasons, if any of the nominees are unacceptable and any appointment remains to be made.
 - (c) The Judicial Service Commission must [supplement the list with further nominees] and

⁹⁶ "Appropriately qualified" may be insufficient for compliance with CP VII (as indicated in the Panel memo of 19 September 1995).

the President must make the remaining appointments from the supplemented list.

- (4) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
- (5) The President must appoint all other judges on the advice of the Judicial Service Commission.
- (6) The Cabinet member responsible for the administration of justice must appoint acting judges [on the advice of/after consultation with] the senior judge of the court on which the acting judge will serve.
- (7) Other judicial officers must be appointed in terms of an Act of Parliament.⁹⁷
- (8) Before judicial officers begin to perform their functions, they must swear or affirm to uphold and protect the Constitution of the Republic, by solemn affirmation in accordance with Schedule 2.

Tenure and remuneration

- 92.** (1) Members of the Constitutional Court are appointed for non-renewable terms of up to nine years. An acting member of the Constitutional Court may serve for no more than six months. Other judges hold office until they retire at an age determined in terms of an Act of Parliament.
- (2) The salaries, allowances and benefits of judges may not be reduced.

Removal

- 93.** (1) A judge may be removed from office only if -
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is [grossly] incompetent, or is guilty of gross misconduct; and
 - (b) the National Assembly and the second house, at

⁹⁷ The NP suggests a Magistrates' Commission.

a joint sitting, adopt a resolution calling for that judge to be removed, which is supported by at least two thirds of the total number of members of both Houses.

- (2) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1), and must dismiss a judge upon the adoption of a resolution calling for that judge to be removed.

Judicial Service Commission

- 94.** (1) There is a Judicial Service Commission, consisting of -
- (a) the Chief Justice, who presides at meetings of the Commission;
 - (b) the President of the Constitutional Court;
 - (c) one Judge President designated by the Judges President;
 - (d) the Cabinet member responsible for the administration of justice, or that member's 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 all the deans of the law faculties at South African universities;
 - (h) four senators designated together by the second house by resolution adopted by at least two thirds of its members;
 - (i) four persons, two of whom are practising attorneys or advocates, designated by the President; and
 - (j) when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier of the province concerned.
- (2) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
- (3) The Judicial Service Commission may advise the national and provincial governments on any matters

relating to the judiciary and the administration of justice, but when it does so, it must sit without the four senators referred to in subsection (1)(h).

- (4) The Commission may determine its own procedure.⁹⁸
- [(5) Decisions of the Commission must be supported by majority of its members.]⁹⁸
- [(6) The Commission may appoint committees from among its members and assign any of its powers and functions to any committee.]

Other matters concerning courts⁹⁹

- 95.** Any matter concerning any court or the administration of justice, that is not dealt with in the Constitution, including training programmes for judicial officers, procedures for dealing with complaints about judicial officers, and the participation of people other than judicial officers in decisions, may be provided for by national legislation.

CHAPTER 7

[Institutions Supporting Constitutional Democracy]¹⁰⁰

Establishment and governing principles

- 96.** (1) The following institutions strengthen constitutional democracy in the Republic -

⁹⁸ These provisions seem unnecessary in the light of s 94(4) that empowers the JSC to determine its own procedure.

⁹⁹ Provision for training programmes, complaints and lay participation in courts has been included, as requested. An alternative is to empower the Judicial Service Commission to deal with complaints and/or training. Thus a tentative provision regarding additional functions given to the JSC by legislation is included in the section 94(2).

¹⁰⁰ New name to be found.

- (a) the Public Protector;
 - (b) the Human Rights Commission;
 - (c) the Commission for Gender Equality;
 - (d) the Auditor - General; and
 - (e) the Electoral Commission.
- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (3) Organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.¹⁰¹
- (4) No person and no organ of state may interfere with the functioning of these institutions.
- (5) These institutions are accountable to Parliament, and must report on their activities to Parliament at least once a year.

Public Protector

Functions of Public Protector

- 97.** (1) The Public Protector has the following powers, as regulated by national legislation -
- (a) to investigate any conduct in state affairs or the public administration at any level of government that is alleged or suspected to be improper or to result in any impropriety or prejudice;
 - (b) to report on that conduct; and
 - (c) to take appropriate remedial action.

¹⁰¹ The Refinement Team was asked to make it clear that these institutions are organs of state by inserting "Other" at the beginning of (3). However, this creates problems elsewhere in the Draft. A better alternative is expressly to include these institutions as organs of state in a definition section.

- (2) The Public Protector has the additional powers and functions prescribed by national legislation.
- (3) The Public Protector may not investigate court decisions.
- (4) The Public Protector must be accessible to all persons and communities.
- (5) Any report issued by the Public Protector must be open to the public, unless exceptional circumstances to be prescribed by national legislation require that a report be kept confidential.

Tenure¹⁰²

98. The Public Protector is appointed for a period of seven years.

Human Rights Commission

Functions of Human Rights Commission

- 99.** (1) The Human Rights Commission must promote -
- (a) respect for human rights;
 - (b) the development, protection and attainment of human rights; and
 - (c) the development of a culture of human rights in the Republic.
- (2) The Human Rights Commission has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached, to carry out research, and to educate.
- (3) The Human Rights Commission has the additional powers and functions prescribed by national legislation.

Commission for Gender Equality

Functions of Commission for Gender Equality

¹⁰² The issue whether the term is renewable is still under consideration.

- 100.** (1) The Commission for Gender Equality must promote respect for gender equality and the development, protection and attainment of gender equality.
- (2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, to investigate, to research, to educate, to lobby, to advise and to report on issues concerning gender equality.
- (3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

Auditor - General

Functions of Auditor - General

- 101.** (1) The Auditor - General must audit and report on -
- (a) the accounts and financial statements of all national and provincial state departments and administrations;
 - (b) the accounts and financial statements of all local governments; and
 - (c) any other accounts and financial statements that are required by national legislation to be audited by the Auditor General.
- (2) The Auditor - General may also audit and report on the accounts and financial statements of any institution funded from public money, as may be regulated by legislation.
- (3) The Auditor - General must submit audit reports to every legislature and other authority that has a direct interest in the audit and to any other authority prescribed by national legislation. All reports must be made public.

Tenure

- 102.** The Auditor - General is appointed for a non-renewable term of not fewer than five years and not more than 10 years.

Electoral Commission

Functions of Electoral Commission

- 103.** (1) The Electoral Commission must manage elections of national, provincial and local legislative bodies and ensure that they are free and fair.¹⁰³
- (2) As soon as possible after polling the Electoral Commission must declare whether the election was free and fair.¹⁰⁴
- (3) The Electoral Commission has the additional powers and functions prescribed by national legislation.¹⁰⁴

Composition of Electoral Commission

- 104.** The Electoral Commission must be composed of at least three persons appointed for a period prescribed by national legislation.

General Provisions

Appointments

- 105.** (1) The Public Protector and members of any Commission established in this Chapter must be women or men who are South African citizens, are fit and proper persons to hold the particular office, and who comply with any other requirements prescribed by national legislation.
- (2) The Auditor - General must be a woman or a man who is a South African citizen, is a fit and proper person to hold that office, and who does not hold office in any political party or organisation. Specialised knowledge of, or experience in, auditing, state finances, and public administration must be given due regard in appointing the Auditor-General.
- (3) Any appointment under this Chapter must be made by the President acting on the recommendation of

¹⁰³ It is not apparent whether the term "manage" indicates that the EC is responsible for the manner in which the elections are conducted.

¹⁰⁴ Have been inserted to ensure consistency with the section on elections under national and provincial legislatures.

- Parliament.
- (4) Parliament must recommend a person -
- (a) nominated by a committee of Parliament in terms of the rules and orders; and
 - (b) approved by Parliament by a resolution adopted by at least two thirds of the members.

Removal from office

- 106.** (1) The Public Protector, the Auditor - General or a member of a Commission established by this Chapter may be removed from office only on -
- (a) the grounds of misbehaviour, incapacity and incompetence;
 - (b) a finding to that effect by a committee of Parliament; and
 - (c) the adoption by Parliament of a resolution, calling for that person's removal from office, and supported by at least two thirds of the members.
- (2) The President may suspend a person from office when Parliament is considering removing that person from office, and must dismiss a person from office upon adoption of a resolution calling for that person's removal from office.

CHAPTER 8 PROVINCES

Provinces¹⁰⁵

- 107.** (1) The Republic has the following provinces:
- (a) Eastern Cape
 - (b) Free State
 - (c) Gauteng
 - (d) KwaZulu-Natal

¹⁰⁵ The location of this section might be considered further. Changes of name to be dealt with in clause on constitutional amendments.

- (e) Mpumalanga
- (f) Northern Cape
- (g) Northern Province
- (h) North-West Province
- (i) Western Cape.

- (2) The territories of the provinces are described in Schedule 1.

Application of this chapter¹⁰⁶

108. This Chapter applies to a province unless the province has adopted its own constitution in terms of this Constitution.

Provincial Legislatures

Provincial legislative authority

109. The legislative authority of a province is vested in its provincial legislature.

Composition of provincial legislatures

- 110.** (1) A provincial legislature consists of the women and men elected as members in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll, and results, in general, in proportional representation.
- (2) The number of members in a provincial legislature must be determined in terms of national legislation and must be no fewer than 30 and no more than 100/80.

Qualification for membership of provincial legislatures

111. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except -

- (a) anyone holding office of profit under the Republic, other than the Premier and other members of the Executive Council of a province, and any other office-bearers whose functions have been declared by national legislation to be

¹⁰⁶ This provision has been inserted so that the reader is aware that the following provisions might not apply to provinces (see section 138).

- compatible with the functions of a member of a provincial legislature;
- (b) members of the National Assembly, the second house or a local government;
 - (c) unrehabilitated insolvents;
 - (d) anyone declared to be of unsound mind by a court of the Republic;
 - (e) anyone who, after this section takes effect, has been convicted of an offence and sentenced to more than 12-months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. Any disqualification of anyone under this paragraph ends five years after the sentence has been completed.

Vacancies

112. (1) A vacancy exists in a provincial legislature when -

- (a) a member ceases to be eligible;
- (b) a member resigns or dies;
- (c) a member is absent from the provincial legislature without permission in circumstances for which the rules and orders of the provincial legislature prescribe loss of membership.

(2) Vacancies in the provincial legislatures must be filled without delay, in terms of national legislation.

Oath or affirmation by members

113. Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm by solemn declaration their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Sittings and recess periods

114. (1) The first sitting of a provincial legislature after an

election must take place at a time and on a date determined by a judge designated by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.

- (2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct urgent business.
- (3) A provincial legislature may determine where it ordinarily will sit.

Elections and duration of provincial legislatures

- 115.** (1) A provincial legislature is elected for a term of five years.
- (2) A provincial legislature may be dissolved before the end of its term if it passes a vote of no confidence in the Executive Council.
 - (3) When a provincial legislature is dissolved, or its term expires, the President/Premier of the province, by proclamation and without delay, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved, or its term expired.
 - (4) If an election of a provincial legislature is declared not free and fair, the President/Premier of the province, by proclamation and without delay, must call and set dates for another election, which must be held within 90 days of the declaration.¹⁰⁷
 - (5) A provincial legislature remains competent to function from the time it is dissolved or its term expires until the day before polling begins for the next provincial legislature; but, if an election is not declared free and fair, that legislature again becomes competent to function until the day before polling begins in the next election.

Speakers

- 116.** (1) At the first sitting after its election, and when necessary to fill a vacancy, a provincial legislature must elect a

¹⁰⁷ **Consistent with National Assembly.**

- Speaker from among its members.
- (2) A judge designated by the President of the Constitutional Court must preside over the election of a Speaker.
 - (3) The procedure set out in Schedule 3 applies to the election of a Speaker.
 - (4) A provincial legislature may remove its Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.

Decisions

- 117.** (1) A majority of the members of a provincial legislature must be present before a vote may be taken on a Bill and one third of the members must be present before a vote may be taken on any other matter, except where the Constitution provides otherwise.
- (2) All questions before a provincial legislature must be decided by a majority of the votes cast, except where the Constitution provides otherwise.
 - (3) The presiding member of a provincial legislature has no deliberative vote, but must cast a deciding vote if there is an equal number of votes on both sides of a question.

Internal autonomy

- 118.** (1) A provincial legislature may make its internal arrangements, rules and orders.
- (2) A committee of a provincial legislature may summon persons to appear before it to assist the committee in its work.

Privileges and immunities of members of provincial legislatures

- 119.** (1) Members of a provincial legislature have freedom of speech and debate in the provincial legislature and in its committees, subject to its rules and orders.
- (2) Members of provincial legislatures are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
 - (a) anything they have said in, produced before, or submitted to their provincial legislature or any of its committees; or
 - (b) anything revealed as a result of anything that

they have said, produced or submitted.

- (3) Other privileges and immunities of members of the provincial legislatures may be prescribed by legislation.

Assent to Bills

- 120.** (1) The Premier of a province must, without delay, either assent to and sign a Bill passed by the provincial legislature or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.
- (2) If the Premier refers a Bill back to the provincial legislature the following procedure applies:
- (a) The legislature must reconsider the Bill taking into account the Premier's reservations.
 - (b) If the legislature agrees with the Premier's reservations it must either reject the Bill, or pass it fully accommodating the Premier's reservations, and the Premier must assent to and sign the Bill without delay.
 - (c) If the legislature disagrees with the Premier's reservations and confirms the Bill or passes it without fully accommodating the Premier's reservations, the Premier must, without delay, either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.
 - (d) If the Constitutional Court decides that the Bill is constitutional the Premier must assent to and sign it, without delay. If the Court decides that the Bill is unconstitutional the Premier may not assent to or sign it.

Promulgation

- 121.** (1) A Bill assented to and signed by the Premier of a province must be promulgated without delay, and becomes an Act of the province upon its promulgation.
- (2) Provincial Acts must be published in the national Government Gazette.

Safekeeping of Provincial Acts

- 122.** The signed copy of an Act of a provincial legislature is conclusive evidence of the provisions of that Act and must be

entrusted for safekeeping to the Constitutional Court immediately after promulgation.

Provincial Executives

Executive authority of provinces

- 123.** (1) The executive authority of a province is vested in the Premier.
- (2) The provincial executive consists of the Premier and other members of the Executive Council, who must act in accordance with the Constitution.

Powers and functions of Premiers

- 124.** (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.
- (2) The Premier must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Executive Council, except where -
- (a) the Executive Council has determined that the Premier may act in consultation with a member or a committee of members; or
 - (b) the Constitution states or implies that the Premier may act alone.
- (3) In performing the following functions the Premier may act alone -
- (a) appointing and dismissing Executive Council members and assigning powers and functions to them;
 - (b) convening Executive Council meetings;
 - (c) assenting to and signing Bills;
 - (d) referring a Bill to the legislature for reconsideration of the Bill's constitutionality;
 - (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
 - (f) summoning the provincial legislature to an extraordinary sitting to conduct urgent business;
 - [(g) dissolving the provincial legislature and calling an election after a vote of no confidence in the

Executive Council has been passed by the legislature;]

- (4) Decisions of the Premier in consultation with the other members or a member or committee of the Executive Council, must be in writing, signed by the Premier, and countersigned by another member.

Election of Premiers

- 125.** (1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be Premier.
- (2) A judge designated by the President of the Constitutional Court must preside over the election of the Premier. The procedure set out in Schedule 2 applies to the election of the Premier.

Assumption of office by Premiers

- 126.** A Premier-elect assumes the office of Premier within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2

Term of office of Premiers

- 127.** (1) A Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected assumes office.
- (2) No person may hold office as Premier for more than two terms of office; but, when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier will not be regarded as a term of office.

Vacancies

- 128.** (1) A vacancy occurs in the office of Premier when the Premier dies, or resigns from office by notice in writing to the Speaker of the provincial legislature.
- (2) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the President of the Constitutional Court, but not later than 30 days after the vacancy occurs.

Acting Premiers

129. (1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier -
- (a) a member of the Executive Council designated by the Premier;
 - (c) a member of the Executive Council designated by the other members of the Executive Council;
 - (d) the Speaker of the provincial legislature;
 - (e) a member of the provincial legislature elected by its members.
- (2) An acting Premier has the responsibilities, powers and functions of the Premier.

Executive Council

130. The Executive Council of a province consists of the Premier and no fewer than five and no more than ten members appointed by the Premier.

Continuation of Executive Councils after elections

131. When an election of a provincial legislature is held, the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office.

Oath or solemn affirmation

132. Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 2.

Accountability of Members of Executive Councils

133. (1) The members of the Executive Council of a province are individually accountable both to the Premier and the provincial legislature, and members of the Council are collectively accountable to the legislature for the performance of the functions of the provincial government and its policies.
- (2) In the performance of their functions, members of the Executive Council are bound by the policies of the Council.

Conduct of members of Executive Councils

- 134.** (1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Executive Council of a province may not -
- (a) undertake any other paid work;
 - (b) engage in activities inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - (c) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

Temporary assignment of powers and functions

- 135.** The Premier may assign to a member of the Executive Council any powers and functions of another member who is absent from office or is unable to exercise those powers or perform those functions.

Transfer of powers and functions

- 136.** The Premier by proclamation may transfer to a member of the Executive Council -
- (a) the administration of any legislation entrusted to another member; or
 - (b) any power or function entrusted by legislation to another member.

Votes of no confidence

- 137.** (1) If the provincial legislature passes a vote of no confidence in the Executive Council, the Premier must either resign or dissolve the legislature and call an election.
- (2) If the provincial legislature passes a vote of no confidence in the Premier alone, the Premier must resign.
- (3) If the provincial legislature passes a vote of no confidence in the Executive Council, excluding the

- Premier, the Premier must either resign or reconstitute the Council.
- (4) A majority of the members of the legislature must be present when a vote of no confidence is passed.

Provincial Constitutions

Adoption and Certification

- 138.** (1) A provincial legislature may adopt a constitution by resolution of at least two-thirds of its members.
- (2) A provincial constitution must be consistent with the Constitution; but, provided that it does not deviate from the principles embodied in the Constitution, it may -
- (a) establish different legislative and executive structures and procedures; and
 - (b) provide for the institution, role, authority and status of a traditional monarch in the province.
- (3) No provincial constitution and no amendment to a provincial constitution has force or effect unless the Constitutional Court has certified that all the provisions of the constitution or the amendment are consistent with the Constitution.

CHAPTER 9

Provincial and National Legislative and Executive Competencies¹⁰⁸

Legislative authority of the Republic

- 139.** The legislative authority of the Republic is vested 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 4.

Legislative authority of provinces¹⁰⁹

¹⁰⁸ This chapter was drafted by the Technical Advisers of TC3 and was not included in the refinement process.

¹⁰⁹ This will be amended after political agreement to ensure legal and language consistency.

- 140.** (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 be competent to legislate on any matter which falls within a functional area specified in Schedule 4.

Framework legislation¹¹⁰

141. Option 1

No provision for framework legislation.

Option 2

- (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 regarding the matters specified in Schedule 5.
- (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.

Option 3

Implemented by way of an override power (see option 3 - of clause 5(1)(f)).

Necessary ancillary powers

- 142.** The legislative competence referred to in sections 1, 2 and 3 shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

Conflict of legislation

¹¹⁰ This will be amended after political agreement to ensure legal and language consistency.

143. Option 1

- (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 4, 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 -
 - (a) the establishment of generally applicable standards regarding-
 - (i) services rendered by the state;
 - (ii) the maintenance of economic unity, or
 - (iii) the determination of national economic policies; or
 - (b) the maintenance of the security of the Republic, 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 second house and shall require the approval of both the second house and the National Assembly.
- (3) The Constitutional Court shall, upon application by at least one fifth of the members of the second house, and prior to the promulgation of a Bill intended in subsection (1), expeditiously determine whether the Bill conforms with the objective criteria prescribed in subsection (1).
- (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 4, which cannot be resolved by a competent court on a construction of this Constitution, precedence shall be given to the Act of Parliament.

Option 2

- (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 4, the Act of Parliament shall prevail over the provincial law only to the extent that such Act applies

uniformly in all parts of the country, and is necessary for -

- (a) the establishment of essential national or minimum standards required for a service to be rendered; or
 - (b) the prevention of unreasonable action taken by a province which is materially and unjustifiably prejudicial to economic unity, or the health, environmental or security interests of another province or the country as a whole.
- (2) A Bill designed to become an Act of Parliament intended in subsection (1) shall be introduced in the second house and shall require the approval of both the second house and the National Assembly.
- (3) The Constitutional Court shall, upon application by at least one fifth of the members of the second house, and prior to the promulgation of a Bill intended in subsection (1), expeditiously determine whether the Bill conforms with the requirements of subsection (1).

Option 3

- (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 4, the Act of Parliament shall prevail over the provincial law where the elements of the Act in conflict with the provincial law are necessary for -
- (a) a function in respect of which uniformity across the nation is desirable;
 - (b) South Africa to speak with one voice or to act as a single entity, in particular in relation to other states;
 - (c) the maintenance of essential national standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole;
 - (d) the implementation of national economic policies or the promotion of equal living conditions, the

- power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour;
- (e) the provision of equality and opportunity or access to a government service, or
 - (f) the establishment of a national framework for the provision of public services or the management of institutions relating thereto.
- (2) Where a provincial law deals specifically with matters other than those referred to in subparagraph (1) such law shall prevail over national legislation.
- (3) In the event of a dispute concerning the legislative competencies on any matter which fall within the functional areas specified in Schedule 1-
- (a) Such legislation shall be deemed to be necessary or desirable in terms of the requirements set out in subparagraph (1) if such legislation has been consented to by the Council of Provinces, or by mediation or where Parliament, consisting of the National Assembly adopts the Bill with a majority of two thirds of those members present and voting.
 - (b) Subject to paragraph (a) the Constitutional Court, or other courts where applicable, shall have jurisdiction on the constitutionality of legislation in such disputes to decide whether the Acts of Parliament meets the requirements as set out in subparagraph (1).
 - (c) If such a dispute cannot be resolved by a court on a construction of the Constitution, precedence shall be given to national legislation.

Integrity of provinces

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

Executive authority of the Republic

145. (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 President 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).

Executive authority of provinces

- 146.** (1) A province shall have executive authority over -¹¹¹
- (a) all matters in respect of which the provincial legislature has passed laws; and
 - (b) matters entrusted to the provincial government in accordance with this Constitution.
- (2) The executive authority of the province vests in the provincial government consisting of the Premier and the other members of the Executive Council.
 - (3) The provincial government may, with the concurrence of the national government or of a local government within the province, appoint the national government or such local government as its agent to perform any specified function within its competence in terms of this section.
 - (4) The provincial government may, with the concurrence of the national government or of a local government within the province, delegate to the national government or to such local government the performance of a specified function within its competence in terms of this section.

¹¹¹ These provisions will need to be finalised when decisions are taken on legislative and executive competencies of provinces.

CHAPTER 10

LOCAL GOVERNMENT AND TRADITIONAL AUTHORITIES

Local Government

Establishment and status of local governments¹¹¹

- 147.** (1) National legislation must provide for the demarcation of the Republic into areas of local government, and the establishment of local governments in those areas.
- (2) Legislation referred to in subsection (1) may provide for metropolitan, urban and rural local government structures taking into account economic, physical and environmental conditions, demography, and other relevant considerations.
- (3) Local governments [are autonomous and] may regulate their affairs within the limits prescribed by national or provincial legislation. Their primary responsibility is to the people in their areas.¹¹²
- (4) Parliament and the provincial legislatures may not encroach on the powers, functions and structure of a local government in any way which compromises fundamental status, purpose or character of local government.
- (5) Draft national or provincial legislation which materially affects the status, powers or functions of local governments or the boundaries of their areas, may not be introduced in Parliament or a provincial legislature unless it has been published for public comment and local governments and interested persons have been given a reasonable opportunity to submit written representations.

Powers and functions

- 148.** (1) National and provincial legislation must assign to local governments legislative and executive powers

¹¹² The autonomous status of local government is in contention.

necessary to perform their functions effectively. This legislation must enable local governments to provide [effective and efficient] services to the communities in their areas and to assist the development of those communities.¹¹³

- (2) Legislation passed by a local government which is inconsistent with national or provincial legislation is invalid.

Finance

- 149.** (1) Local governments may raise revenue, as regulated by national or provincial legislation, by recovering rates, levies and fees. Rates, levies and fees must be based on a uniform structure applicable throughout the area of a local government.
- (2) Local governments are entitled to a fair share of national and provincial revenue. The national and provincial governments must determine the amounts to which local governments are entitled, taking into account any criteria recommended by the Financial and Fiscal Commission
 - (3) A local government may raise revenue, including its share of national and provincial revenue, only in proportion to its financial responsibilities.

Elections

- 150.** (1) A local government consists of members, who are women and men elected in terms of an electoral system that is prescribed by national/provincial legislation, is based on a common voters roll, and results, in part in proportional representation and in part in ward representation.¹¹⁴

(2)

Option 1

Elections must be held at least every five years.

¹¹³ **There is no agreement as to whether the Constitution should list the functional areas of local government.**

¹¹⁴ **Unclear whether electoral system should be prescribed by national or provincial legislation.**

Option 2

Elections must be held at intervals of not fewer than three years and not more than five years.

- (3) Anyone who is ordinarily resident in the area of a local government, is registered on the voters roll of the local government, and is qualified to vote in elections of the National Assembly, is entitled to vote in an election of the local government.

Traditional Authorities

Recognition of traditional authorities

- 151.**
- (1) The institution, status and role of traditional authorities, according to indigenous law, are recognised.
 - (2) A traditional authority which observes a system of indigenous law and was recognised in terms of legislation immediately before the Constitution took effect, may continue to function subject to any applicable legislation and customs.
 - (3) The courts must apply indigenous law when that law is applicable, subject to the Constitution and any relevant legislation.
 - (4) National or provincial legislation may provide for the establishment of councils of traditional authorities to deal with matters of common interest.

CHAPTER 11 Public Administration

Basic values and principles governing public administration

- 152.**
- (1) Public administration at all levels of government, including the administration of institutions that are dependent on government funds or other sources of public money, must be governed by the democratic values and principles enshrined in the Constitution, and the following principles apply:
 - (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.

- (c) Public administration must be development oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career - development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
- (2) The appointment in the public administration of a number of persons on policy considerations as regulated by national legislation is not precluded.
- (3) Legislation regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.

Public Administration Commission

- 153.** (1) There is a single Public Administration Commission for the Republic, which is independent and must be impartial and regulated by national legislation. Each of the provinces may nominate a representative to be appointed to the Commission.
- (2) The object of the Public Administration Commission is to promote the basic values and principles of public administration as prescribed by national legislation.
- (3) Provincial representatives in the Public Administration Commission may exercise the powers and perform the functions of the Commission within the provinces, as prescribed by national legislation.
- (4) The Public Administration Commission must account to Parliament.

Public Service

- 154.** (1) Within the public administration there is a public service for the Republic, which must function, and be structured, in terms of [national] legislation, and which must loyally execute the lawful policies of the government of the day.
- (2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3)¹¹⁵

Option 1

No employee or prospective employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

Option 2

Insert 'career oriented' or 'non-partisan' in section 154(1).

CHAPTER 12

SECURITY SERVICES

Governing principles

- 155.** The following principles govern the national security in the Republic:

- (a) National security must reflect the resolve of all South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.
- (b) National security must be pursued in compliance with the law, including international law.

¹¹⁵ This clause may resolve the need to fully comply with CPXXX by capturing the element of "career-oriented" relating to the long term nature of a career, and the essence of the term "non-partisan" (The earlier reference to "career development" does go part of the way towards meeting the need which might exist in the view of the Panel.)

- (c) National security is subject to the authority of Parliament and the Executive.

Establishment, structuring and conduct of security services

- 156.** (1) The security services of the Republic consist of a single defence force, a police service and any intelligence services established in terms of the Constitution.
- (2) The defence force is the only lawful military force in the Republic. Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
- (3) The security services must be structured and regulated by national legislation.
- (4) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and treaties binding on the Republic.
- (5) No member of any security force may obey a manifestly illegal order.
- (6) The security services must exercise their powers and perform their functions in the national interest; neither the security services nor any of their members may perform their functions in a manner that furthers, or prejudices, the interests of any political party.

Defence

Defence force

- 157.** (1) The defence force must be structured and managed as a disciplined military force.
- (2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people, in accordance with the principles of international law regulating the use of force.

Political responsibility

- 158.** (1) A member of the Cabinet must be responsible for defence.
- (2) A multi-party committee of Parliament must have oversight over all defence matters.

Command of defence force

- 159.** (1) The President must appoint a woman or a man as Chief of the defence force, to command the defence force.
- (2) The Chief of the defence force must exercise command in accordance with the directions of the Cabinet member responsible for defence.

Defence civilian secretariat

- 160.** A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence, and to administer any matters entrusted to it by that Cabinet member, or by the legislation.

Police

Police service

- 161.** (1) The national police service must be structured to function at national and provincial levels, as set out in national legislation.
- (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.
- (3) The objects of the police service are to prevent and investigate crime, to maintain public order, and to protect and secure the Republic, its inhabitants and their property.

Political responsibility and accountability

- 162.** (1) A member of the Cabinet must be responsible for policing.
- (2) A multi-party committee of Parliament must have oversight over all police matters.

Control of police service

- 163.** (1) The President must appoint a woman or a man as National Commissioner of the police service, to control and manage the police service.
- (2) The National Commissioner must exercise control and management in accordance with the directions of the

- Cabinet member responsible for policing.
- (3) The National Commissioner must appoint a woman or a man as provincial commissioner for each province, in accordance with national legislation.
 - (4) The National Commissioner may direct the provincial commissioners, who are each responsible for policing in their province, as prescribed by national legislation.
 - (5) Each provincial government is responsible for monitoring and oversight over the conduct and efficiency of the police service and for cultivating good relations between the police and the rest of the community in their province.

Police civilian secretariat

164. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing, and to exercise any powers and functions entrusted to it by that Cabinet member, or by the legislation.

Intelligence

Establishment and control of intelligence services

- 165.** (1) The President may establish an intelligence service or services.
- (2) The President must appoint a woman or a man as head of each intelligence service established in terms of subsection (1) and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

Powers, functions and monitoring

166. National legislation must establish and regulate the objects, powers and functions of the intelligence services established in terms of section 165(1) and must provide for -

- (a) a multi-party committee of Parliament to have oversight over the budgets of those services;
- (b) civilian monitoring of the activities of those services by an inspector appointed by the President with the approval of the National Assembly by a resolution adopted by at least two thirds of its members; and

- (c) co-ordination of all intelligence services in the Republic.

CHAPTER 13

Finance

General financial matters

National Revenue Fund

- 167.** (1) There is a National Revenue Fund into which all revenue, as determined by national legislation, raised or received by the national government, must be paid.
- (2) Parliament may make appropriations from the National Revenue Fund only in accordance with national legislation.
- (3) No money may be withdrawn from the National Revenue Fund except under appropriation made by national legislation; but, revenue to which a province is entitled [in terms of this Constitution] is a direct charge against the National Revenue Fund to be credited [paid] to the Provincial Revenue Fund concerned.

Annual budget¹¹⁶

- 168.** Each year, the Cabinet member responsible for national financial affairs must lay a budget for the next financial year before the National Assembly. The budget must reflect the estimates of revenue and of capital and current expenditures for that financial year.

Procurement administration¹¹⁷

- 169.** (1)

Option 1

The procurement of goods and services by organs of state at any level must be regulated in terms of national legislation, which must provide for independent and impartial tender boards to be appointed to deal with procurement.

¹¹⁶ This provision is not complete. Other elements are still to be considered.

¹¹⁷ These provisions have an identical effect except one is longer than the other.

Option 2

The procurement of goods and services by organs of state at any level must be regulated by national legislation, and provincial legislation enacted within the framework of national legislation, which must provide for independent and impartial tender boards to be appointed to deal with procurement.

- (2) The tendering system must be fair, public and competitive.
- (3) No person and no organ of state may interfere with a tender board.
- (4) All decisions of a tender board must be recorded and open to public inspection, and a tender board must provide reasons for a decision if requested to do so by an interested party.

Guarantees by national government

170. The national government may guarantee a provincial or local government loan, only if -

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

Accountability of enterprises receiving public funds

171. Any enterprise may be required to report to or give evidence before Parliament, in a manner determined by national legislation, if public money is invested in it, its sources of revenue are regulated by legislation, or it is able to raise revenue in terms of any legislation.

Remuneration of persons holding public office

172. (1) Any salaries, allowances and benefits of holders of any of the following offices must be as determined in terms of national legislation:

- (a) Members of Parliament and the Cabinet, and Deputy Ministers.
- (b) Members of provincial legislatures and Executive Councils.

- (c) Members of local governments.
 - (d) Judges.
 - (e) Public Protector, Auditor-General and members of any Commission established in Chapter 7.
 - (f) Traditional authorities and members of councils of traditional leaders.
- (2) National legislation must provide for the establishment of a Commission on Remuneration.
 - (3) The Commission may make recommendations -
 - (a) to Parliament on any legislation referred to in subsection (1); and
 - (b) to the national and provincial executives, local governments and any other authorities on the implementation of that legislation.

Financial and Fiscal Commission

Establishment¹¹⁸

173. There is a Financial and Fiscal Commission for the Republic, which is independent and subject only to this Constitution and the law, and which must be impartial.

Functions

174. (1) The Commission may give advice and make recommendations to Parliament, provincial legislatures and any other authorities determined by national legislation regarding the financial and fiscal requirements of the national, provincial and local governments, including -

- (a) financial and fiscal policies;
- (b) criteria for the allocation of financial and fiscal resources;
- (c) equitable allocations to national, provincial and local governments from revenue collected at

¹¹⁸ This provision

- (i) replaces separate provisions on remuneration: and
- (ii) suggests wording for the establishment of a Commission of Remuneration; but, a political decision must still be taken on the inclusion of such a provision in the Constitution.

- (d) national level;
 - (d) the form of any taxes, levies, imposts, and surcharges that a provincial government intends to levy;
 - (e) the raising of loans by a provincial or local government and the norms and conditions that apply to those loans; and
 - (f) any other matter assigned to the Commission by the Constitution or national legislation.
- (2) In performing its functions, the Commission must consider all relevant information including the national interest, economic disparities between the provinces, and their population and development needs, administrative responsibilities and other legitimate interests.

Appointments, qualifications, tenure and dismissal of members

175. ...¹¹⁹

Reports¹²⁰

176. The Commission must report regularly both to Parliament and to provincial legislatures as prescribed by national legislation.

Central Bank

Establishment

177. There is a central bank for the Republic, which is regulated by national legislation.

Primary object

- 178.** (1) The primary object of the central bank is to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic.
- (2) The central bank, in the pursuit of its primary object,

¹¹⁹ Political debate on this matter is still required.

¹²⁰ Political debate on this matter is still required.

must perform its functions independently and without fear, favour or prejudice, subject to national legislation; but, there must be regular consultation between the central bank and the Cabinet member responsible for national financial matters.

Powers and functions

179. The powers and functions of the central bank are those customarily exercised and performed by central banks, and must be determined by national legislation.

CHAPTER 14

General Provisions

International agreements

- 180.** (1) Only Parliament may ratify or accede to an international agreement which requires ratification or accession under international law. Ratification or accession takes place by resolution of the National Assembly and the second house. In both the National Assembly and the second house, a majority of the members must be present for the resolution to be passed.
- (2) An international agreement which does not require ratification or accession under international law must be tabled in the National Assembly and the second house within a reasonable time; but, an Act of Parliament may provide that an agreement that is published in the national Government Gazette need not be tabled.
- (3) An international agreement becomes law in the Republic when it is enacted as law in terms of an Act of Parliament and published in the national Government Gazette.

Customary international law

181. The rules of customary international law binding on the Republic form part of the law of the Republic unless they are inconsistent with the Constitution or national legislation. When interpreting South African law, or when considering any apparent inconsistency between customary international law and any part of the law, every court must presume that the law

is consistent with customary international law, unless it is established that it is not.