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Refined Working  
Draft**

**Constituitial Committee**

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## CHAPTER 1 FOUNDING PROVISIONS

### Republic of South Africa<sup>1</sup>

1. The Republic of South Africa is one sovereign democratic state founded on-
  - (a) a commitment to promote and protect human dignity, to achieve equality and to advance human rights and freedoms;
  - (b) supremacy of the constitution;
  - (c) universal adult suffrage, a common voters roll, regular elections, and a multi-party system of democratic government;
  - (d) separation of powers of the legislature, the executive and the judiciary with checks and balances to ensure accountability, responsiveness and openness;
  - (e) co-operative government; and
  - (f) the independence of the courts.

### Supremacy of the Constitution

2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid.

### Citizenship

3. All citizens are -
  - (a) equally entitled to the rights, privileges and benefits of a common South African citizenship; and
  - (b) equally subject to the duties and responsibilities of that citizenship.

### National flag

5. The national flag is black, gold, green, white, red and blue as sketched and described in Schedule 1.

### Languages

6. *Option 1*
  - (1) The official languages of the Republic are Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu.
  - (2) The Pan South African Language Board must promote the conditions for the development and use of the official languages.
  - (3) The Pan South African Language Board is also responsible for promoting respect for and the development of languages including German, Greek, Gujarati, Hindi, Portugese, Tamil, Telegu, Urdu, Khoi, San and sign language and other languages commonly used by communities in South Africa, and Arabic, Hebrew, Sanskrit and other languages used for religious purposes.
  - (4) National and provincial government may use particular official languages for the purposes of government taking into account usage, practicality and expense.

#### *Option 2*

The same as section 3 of the interim Constitution.

#### *Option 3*

- (1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu are recognised as the national languages of the Republic.
- (2) The use of these languages as official languages must be regulated by national and provincial legislation.

### Provinces<sup>2</sup>

8. (1) The Republic has the following provinces:
  - (a) Eastern Cape

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1 New proposed formulation of section 1 as an opening statement; also relevant for the section on constitutional amendments under National Assembly in chapter 4.

2 TRT has inserted this clause here and in chapter 8 - Provinces. Consideration should be given to placing it here, ahead of the first major discussion of provinces in chapter 3.

- (b) Free State
  - (c) Gauteng
  - (d) KwaZulu-Natal
  - (e) Mpumalanga
  - (f) Northern Cape
  - (g) Northern Province
  - (h) North-West
  - (i) Western Cape.
- (2) The boundaries of the provinces are those existing when the Constitution took effect.

## CHAPTER 2 BILL OF RIGHTS

### Rights

9. (1) As a cornerstone of democracy in South Africa, this Bill of Rights affirms human dignity, equality and freedom. The rights in it are subject only to the limitations contained or referred to in it.<sup>3</sup>
- (2) The state must respect, protect, promote, and fulfil the rights in this Bill of Rights.

### Application

10. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state.
- (2) A right in the Bill of Rights binds all natural and juristic persons, if applicable.
- [(2) If a right in the Bill of Rights can bind a natural or juristic person, it does bind them.]<sup>4</sup>
- (3) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

### Equality<sup>5</sup>

11. (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 promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, who are disadvantaged by [unfair] discrimination may be taken.<sup>3</sup>
- (3) Neither the state [nor any person] may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, [pregnancy,]<sup>6</sup> marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.<sup>7</sup>
- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.
- (5) 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.

### Human dignity

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

### Life

13. Everyone has the right to life.<sup>8</sup>

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3 Reformulated first clause proposed, and application clause moved here, to improve structure of chapter and to meet request made to the TRT.

4 The final wording of subsection (2) depends on solution of the equality and limitation issues.

5 For grammatical reasons, the TRT recommends reordering this section as follows - Equality includes the full and equal enjoyment of all rights and freedoms. Legislative and other measures designed to protect or advance persons or categories of persons who are disadvantaged by unfair discrimination may be taken to promote the achievement of equality.

6 TRT is not certain whether a decision was taken to include pregnancy. TC4 and TRT recommend inclusion.

7 Parties to consider different formulations suggested by Panel and Technical Committee. This will also have an effect on Section 8(4) and, depending upon which option is chosen, further sub-clauses of Section 8.

8 6 The NP remains firmly committed to secure a special constitutional limitation of this right which will provide for the death penalty following conviction for specified crimes laid down by an Act of Parliament and after due process of law.  
The FF also wants to provide for the death penalty.  
The PAC proposes a provision that expressly prohibits the death penalty.  
The ACDP proposes the following formulation:

### Freedom and security of the person

14. (1) Everyone has the right to freedom and security of the person, which includes the right -
- (a) not to be deprived of liberty arbitrarily or without just cause;
  - (b) not to be detained without trial;
  - (c) to be free from all forms of violence from both public and private sources;
  - (d) not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right -
- (a) to make decisions concerning reproduction;
  - (b) to security in and control over their body;<sup>9</sup> and
  - (c) not to be subjected to medical or scientific experiments without their informed consent.

### Slavery, servitude and forced labour

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

### Privacy

16. Everyone has the right to privacy, which includes the right not to have -
- (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; or
  - (d) the privacy of their communications infringed.

### Freedom of religion, belief and opinion

17. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided<sup>10</sup> institutions provided that -
- (a) those observances follow rules made by the appropriate public authorities;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising -
- (i) marriages concluded under any tradition or a system of religious, personal or family law; and
  - (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
- (b) Marriages, or systems of personal and family law, recognised by legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution.<sup>11</sup>

### Freedom of expression

18. (1) Everyone has the right to freedom of expression, which includes -
- (a) freedom of the press and other media;
  - (b) freedom to receive and impart information and ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to -
- (a) propaganda for war;
  - (b) incitement of imminent violence; or
  - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that

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"Everyone has the right to life from conception until natural death except by execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament."

9 The NP reserved its position and recorded its opposition.

10 The words "state or state-aided" should be revisited and consistency with the wording in section 31 (once it is settled) considered.

11 3(b) reformulated for clarity.

constitutes incitement to cause harm.

### **Assembly, demonstration and petition**

19. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions.

### **Freedom of association**

20. Everyone has the right to freedom of association.

### **Political rights**

21. (1) Every citizen is free to make political choices, which includes the right -
- (a) to form a political party;
  - (b) to participate in the activities of, or 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 elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right -
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.

### **Citizenship**

22. No citizen may be deprived of citizenship.

### **Freedom of movement and residence**

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

### **Freedom of occupation**

24. Every citizen has the right to choose a trade, occupation or profession freely. The practice of an occupation may be regulated by law.

### **Labour relations<sup>12</sup>**

25. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right -
- (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of a trade union; and
  - (c) to strike.
- (3) Every employer has the right -
- (a) to form and join an employers' organisation;
  - (b) to participate in the activities and programmes of an employers' organisation; and
  - [(c) to lock-out. ]
- (4) Every trade union and every employers' organisation has the right -
- (a) to determine its own administration, programmes and activities;
  - (b) to organise;
  - (c) to bargain collectively; and
  - (d) to form and join a federation.

### **Environment**

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12 10 Section 25 still under discussion.

The ANC proposes the inclusion of the following provision: "The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements."

26. Everyone has the right -
- (a) to an environment that is not harmful to their health, well-being [and quality of life]; and
  - (b) to have their environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
    - (i) prevent pollution and ecological degradation;
    - (ii) promote conservation; and
    - (iii) secure the ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

### Property<sup>13</sup>

27. (1) No one may be deprived of property except in accordance with law of general application, and no such law may permit arbitrary deprivation of property. This provision does not preclude reasonable measures to regulate property.
- (2) Property may be expropriated only in terms of a law of general application -
- (a) for public purposes or in the public interest; and
  - (b) subject to compensation, the amount, timing and manner of which must be agreed, or decided<sup>14</sup> by a court.
- (3) The amount, timing and manner of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors including -
- (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of state investment and subsidy in the acquisition and beneficial improvement of the property;
  - (e) the purpose of the expropriation; and
  - (f) the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.<sup>15</sup>
- (4) For the purposes of this section, the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws and or practices is entitled, subject to and in accordance with an Act of Parliament, either legally to secure the legal rights to that land or to comparable redress subject to and in accordance with an Act of Parliament.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, subject to and in accordance with an Act of Parliament, either to restitution of that property, or to equitable redress subject to and in accordance with an Act of Parliament.
- (8) No provision of this section may unreasonably impede the state from taking reasonable legislative and other measures to achieve land reform and or in order to redress the results of past racial discrimination.

### Housing

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- 13 New formulation recommended by technical experts and party legal advisors to form basis of discussion. The recommendation is contingent on the clause standing as a whole.
- 14 There may be a technical difficulty with the word "decided". Consideration needs to be given to the possible inclusion of the word "approval".
- 15 The criterion is reflected both as a factor affecting compensation, and in subsection (4), as defining the public interest. The committee has no difficulty with either.



28. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

### **Health care, food, water, and social security**

29. (1) Everyone has the right to have access to -
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

### **Children**

30. (1) Every child has the right -
  - (a) to a name and a nationality from birth;
  - (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services, and social services;
  - (d) to be protected from maltreatment, neglect, abuse, or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) 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 risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development;
  - (g) 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 appropriate 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; and
  - (h) to have a legal practitioner assigned to the child at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result; and
  - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A 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.

### **Education<sup>16</sup>**

31. (1) Everyone has the right -
  - (a) to a basic education, including adult basic education, in a state or state-aided institution;<sup>17</sup>

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16 This section is still under discussion. Parties agreed to drop Option 2 but to seek ways of accommodating the sentiments embodied in it:

(3) Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there must be no discrimination on the grounds of race and provided further that the state may 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.

17 TC4 points out in memo on public submissions that the phrase "state or state-aided institutions" is problematic.

- (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
  - (c) to choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.
- (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; and
  - (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

### Language and culture

32. 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 a constitutional right of anyone else.

### Access to information

33. (1) Everyone has the right of access to -
- (a) any information held by the state; and
  - (b) any information that is held by another natural or juristic person [that is required for the exercise or protection of any rights].<sup>18</sup>
- (2) The state must give effect to this right by way of national legislation.

### Just administrative action

34. (1) Everyone has the right to administrative action that is lawful, reasonable and [unless it is of general application] procedurally fair.
- (2) Everyone [whose rights have been adversely affected by administrative action] has the right to be given written reasons for the administrative action.
- (3) The state must give effect to the rights in (1) and (2) by way of national legislation.
- (4) The legislation referred to in (3) must -
- (a) provide for the review of the administrative action by a court of law or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state and the organs of state to give effect to the rights in subsections (1) and (2);
  - (c) be justifiable in an open and democratic society based on human dignity, freedom and equality; and
  - (d) promote an efficient administration.

### Access to courts

35. Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in a court or, where appropriate<sup>19</sup>, another independent and impartial forum.

### Arrested, detained and accused persons

36. (1) Everyone who is arrested for allegedly committing an offence has the right-
- (a) to remain silent;
  - (b) to be informed promptly -
    - (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) to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; but, if that period expires outside ordinary court hours, to be brought before a court on the first court day after the end of that period;

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18 TC4 experts to prepare unanimous opinion for consideration by parties.

19 TRT removed the words “or necessary” because they are superfluous, being fully covered by the word “appropriate”.

- (e) at the first court appearance after being arrested, to be released unless charged and the court orders further detention; and
  - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed promptly of the reason for being detained;
  - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly;
  - (c) to have a legal practitioner assigned to the accused by the state if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (d) to challenge the lawfulness of the detention in person before a court 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, exercise and medical treatment at state expense; and
  - (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 details to answer it;
  - (b) to have adequate time and facilities to prepare a defence;
  - (c) to a public trial in an ordinary court;
  - (d) to have their trial begin and conclude without unreasonable delay;
  - (e) to be present when being tried;
  - (f) to choose and be represented by a legal practitioner and to be informed of this right;
  - (g) to have a legal practitioner assigned to the accused at state expense if substantial injustice would otherwise result, and to be informed of this right;
  - (h) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
  - (i) to adduce and challenge evidence;
  - (j) not to be compelled to give self-incriminating evidence;
  - (k) 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;
  - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (o) of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

### **Limitation of rights**

37. (1) The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.
- (2) Any limitation in terms of subsection (1) must -
- (a) be related to its purpose;
  - (b) limit the right as little as is reasonably possible; and
  - (c) take into account -
    - (i) the nature of the right;

- (ii) the importance of the purpose of the limitation; and
  - (iii) the nature and extent of the limitation.<sup>20</sup>
37. (1) The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom, which must be determined taking into account -
- (i) the nature of the right;
  - (ii) the importance of the purpose of the limitation;
  - (iii) the nature and extent of the limitation
  - (iv) whether the limitation is related to the purpose;
  - (v) whether the purpose of the limitation can reasonably be achieved through less restrictive means/ whether the limitation limits the right as little as reasonably possible.<sup>21</sup>
- (2) Except as provided in subsection (1)[and (2)], or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

### States of emergency

38. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -
- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and
  - (b) the declaration is necessary to restore peace or order.
- (2) A 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 [14] days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a resolution adopted by at least two thirds of its members<sup>22</sup>, may extend a declaration of a state of emergency for no more than 3 months [60 days] at a time.
- (3) Any High 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.
- (4) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) the derogation is strictly required by the emergency; and
  - (b) the legislation -
    - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
    - (ii) conforms to subsection (5); and
    - (iii) is published in the national Government Gazette immediately after being enacted.
- (5) 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 -
- (a) indemnifying the state, or any person, for any unlawful act;
  - (b) any derogation from this section; or
  - (c) any derogation from a section mentioned in column 1 and 2 of Table 1, to the extent indicated opposite that section in column 3 of that table.

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20 Formulation proposed by Panel/TC4 in draft of 20 March.

21 ANC proposal for consideration.  
TC4 advisors and members of the panel to suggest a resolution.

22 The two thirds is under consideration. Compromise proposal tabled: a simple majority for the first extension, but two thirds for further extensions.

Table 1 - Non-Derogable Rights

1 Section Number	2 Section Title	3 Extent to which the right is protected
11	Equality	With respect to race and sex only
12	Human dignity	Entirely
13	Life	Entirely
14	Freedom and Security of person	with respect to subsections (1)(d), (1)(e) and (2)(c) only.
15	Slavery, servitude and forced labour	With respect to slavery & servitude only.
30	Children	With respect to subsection (1)(d) and (1)(e) only.
36	Arrested, detained and accused persons	with respect to the following subsections only: (1)(a), (b) and (c) (2)(d) (3)(a), (b), (c), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (o) (4)

- (6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from 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 place of detention<sup>23</sup> 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 court must release the detainee unless it is necessary to continue the detention to restore peace and order;
  - (f) a detainee who is not released in terms of paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention any time more than 10 days after the previous review, and in either case, the court must release the detainee unless it is necessary to continue the detention to restore peace and order;<sup>24</sup>

<sup>23</sup> TC suggests addition of “and place of detention” to comply with Siracusa Principles (see memo).

<sup>24</sup> Re-formulated for certainty that the right to review recurs every 10 days.

- (g) the detainee must be allowed to appear in person before any court considering the detention, 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 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.
- (7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.
- (8) Sub-sections (6) and (7) do not apply to persons who are not citizens of South Africa and who are detained in consequence of international armed conflicts. Instead, the State must comply with the standards binding on the Republic under international humanitarian law in respect of the detention those persons.<sup>25</sup>

### **Enforcement of rights**

39. 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 members.

### **Interpretation of Bill of Rights**

40. (1) When interpreting the Bill of Rights, every court -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) 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.
- (3) 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.<sup>26</sup>

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25 This provision was added to reflect political agreements, and appears for the first time.

26 This subsection was moved from the application clause (now section 10).

## **CHAPTER 3 PRINCIPLES OF CO-OPERATIVE GOVERNMENT**

### **Basic structure**

40. (1) Government in the Republic is constituted as national, provincial and local spheres of government.
- (2) Government within each sphere -
- (a) must be loyal to the Republic and its people;
  - (b) must respect the constitutional status, institutions, powers and functions of other governments in that sphere and of government in the other spheres;
  - (c) may not assume any power or function other than those conferred on it in terms of the Constitution; and
  - (d) may not exercise its powers or perform its functions in a manner which encroaches on the [geographical,] functional or institutional integrity of other governments in that sphere and of government in the other spheres.

### **Intergovernmental co-operation**

41. (1) Government within each sphere must -
- (a) co-operate with the other governments in that sphere and with government in the other spheres in the interest of -
    - (i) preserving the peace, national unity and the indivisibility of the Republic;
    - (ii) securing the well-being of the people of the Republic; and
    - (iii) providing effective, transparent, accountable and coherent government for the Republic as a whole; and
  - (b) be committed to -
    - (i) fostering friendly relations;
    - (ii) supporting and assisting the other governments in that sphere and government in the other spheres;
    - (iii) consulting on matters of common interest;
    - (iv) co-ordinating its actions with the other governments in that sphere and with government in the other spheres in terms of agreed procedures; and
    - (v) cultivate mutual trust and co-operation.
- (2) National legislation may establish inter- governmental structures to secure executive co-operation and to co-ordinate the exercise of executive authority.

## CHAPTER 4 PARLIAMENT

### Composition of Parliament

43. (1) Parliament consists of the National Assembly except when the Constitution requires the National Council of Provinces to participate in the national legislative process, in which case Parliament consists of both the National Assembly and the National Council of Provinces.
- (2) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a forum for public consideration of issues, by passing legislation and by scrutinising and controlling executive action.
- (3) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account when national legislation is passed. It does this by participating in the national legislative process and by providing a forum for public consideration of issues affecting the provinces.

### Legislative authority of Republic

44. (1) The legislative authority of the Republic is vested in Parliament; accordingly, Parliament may -
- (a) amend the Constitution; and
  - (b) pass legislation concerning any matter excluding only a matter within the exclusive legislative powers of the provinces.
- (2) Parliament is bound only by the Constitution, and must act in accordance with the Constitution.

## THE NATIONAL ASSEMBLY

### Composition and election

45. The National Assembly consists of [350] women and men elected as members in terms of a system of proportional representation based on a common voters roll, and prescribed by national legislation which provides for the election of members -
- (a) from national and provincial, or only provincial, lists of party candidates drawn up in a party's order of preference; and
  - (b) in a manner which ensures that -
    - (i) the number of members fixed for each province is elected from the lists for that province only; and
    - (ii) the members elected reflect the proportions of the votes recorded for the respective parties nationally and in the provinces.

### Membership

46. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except -
- (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than -
    - (i) the President, Deputy President, Ministers and Deputy Ministers; and



- (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
  - (b) delegates to the National Council of Provinces, or members of a provincial legislature or a municipal council;
  - (c) unrehabilitated insolvents;
  - (d) anyone declared to be of unsound mind by a court of the Republic; or
  - (e) anyone who, after this section took 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. A disqualification under this paragraph ends five years after the sentence has been completed.
- (2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1) (a) and (b) may be a candidate for the Assembly, subject to limits and conditions established by national legislation.
- (3) A person loses membership of the National Assembly if that person -
- (a) ceases to be eligible; or
  - (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.
- (4) Vacancies in the National Assembly must be filled in terms of national legislation.

### **Oaths or affirmation by members**

47. 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, in accordance with Schedule 2.

### **Duration of National Assembly**

48. (1) The National Assembly is elected for a term of five years.
- (2) If the National Assembly is dissolved in terms of section 49, or when its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved, or its term expired.
- (3) If the results of an election of the National Assembly are not declared within the period established in terms of section 178 or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
- (4) The National Assembly remains competent to function from the time it is dissolved, or its term expires, until the day before the first day of polling for the next Assembly.

### **Dissolution of National Assembly before expiry of its term**

49. (1) The President may dissolve the National Assembly if the Assembly, by resolution adopted by [a majority/at least two thirds] of its members supports dissolution.
- (2) The Acting-President must dissolve the National Assembly if -
- (a) the President has resigned after a vote of no-confidence in terms of section 97; and
  - (b) the Assembly fails to elect a new President within [21 days] of the vote of no-confidence.

[Suggested alternative formulation:

- (2) The Acting-President must dissolve the National Assembly if -
- (a) there is a vacancy in the office of President; and
  - (b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.]

### **Sittings and recess periods**

50. (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 National Assembly sits at the Houses of Parliament in Cape Town; but, the Assembly, in the national interest and by resolution adopted by a majority of its members, may determine that it sits elsewhere.

### **Speaker and Deputy Speaker**

51. (1) At the first sitting after its election, or 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 the members of the Assembly must be present when the resolution is adopted.

### **Decisions**

52. (1) Unless the Constitution provides otherwise -
- (a) a majority of the members of the National Assembly must be present

- before a vote may be taken on a Bill or an amendment to a Bill;
  - (b) one third of the members must be present before a vote may be taken on any other question before the Assembly; and
  - (c) all questions before the Assembly are decided by a majority of the votes cast.
- (2) 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**

53. The President may attend, and may speak in, the National Assembly, but may not vote.

### **Parliamentary control**

54. (1) The National Assembly must take measures necessary to -
- (a) ensure that all national executive organs of state are accountable to it; and
  - (b) maintain proper parliamentary oversight of the exercise of national executive authority.
- (2) The National Assembly may -
- (a) require anyone to appear before it or any of its committees to answer questions or to produce documents, or to give evidence on oath or affirmation;
  - (b) require any person or organ of state to report to it or any of its committees on any matter;
  - (c) receive representations; or
  - (d) authorise a committee of the Assembly to exercise these powers.
- (3) Answers given, documents produced or evidence given by a person in terms of subsection (2) may not be used against that person in any court - except
- (a) on a charge of perjury in respect of the evidence given; or
  - (b) [if the court in the interest of justice decides otherwise].

### **Internal autonomy**

55. (1) The National Assembly may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers, functions, procedures and duration of its committees.
- (2) The rules and orders of the National Assembly must provide for the participation of minority parties in its proceedings in a manner consistent with democracy.

### **Privilege**

56. (1) The President and the members of the National Assembly have freedom of speech and debate in the Assembly and in its committees, subject to its rules and orders.
- (2) The President and the 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 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 established by national legislation.

### **Public participation and access**

57. (1) The National Assembly must -
- (a) facilitate public involvement in the law-making process; and
  - (b) conduct business and proceedings in an open manner.
- (2) Sittings of the National Assembly must be open to the public.
- (3) Reasonable measures may be taken to regulate public access to sittings of, and documents before, the National Assembly.

## **NATIONAL COUNCIL OF PROVINCES**

### **Composition of National Council**

58. (1) The National Council is composed of a single delegation from each province consisting of ten delegates allocated among the parties in the provincial legislature substantially in the same proportion that each party is represented in that legislature.
- (2) The ten delegates are -
- (a) four special delegates, including
    - (i) the Premier of the province, or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council, as head of the delegation; and
    - (ii) three other special delegates, who are members of the provincial legislature designated by the legislature either generally or for any specific business before the National Council; and
  - (b) six permanent delegates appointed in terms of section 59 to serve for a term that expires immediately before the first sitting of the provincial legislature after its next election.

### **Nomination of permanent delegates**

59. (1) At its first sitting after its election, a provincial legislature must appoint permanent delegates in the province's delegation to the National Council of Provinces.
- (2) Candidates must be eligible to be members of the provincial legislature and must be nominated by parties represented in the legislature, in accordance with a nomination procedure that -
- (a) is prescribed by national legislation; and
  - (b) results in a representation of parties in the delegation in substantially the same proportion that the parties are represented in the legislature.

### **Permanent delegates**

60. (1) A member of a provincial legislature appointed as a permanent delegate ceases to be a member of the legislature.
- (2) Any party which has at least [10 per cent] of the seats in the provincial legislature is entitled to participation in the permanent component of the delegation.
- (4) A person ceases to be a permanent delegate if that person -
- (a) ceases to be eligible to be a member of the provincial legislature;
  - (b) has lost the confidence of the provincial legislature and is recalled by the party which nominated that person;
  - (c) ceases to be a member of the party that nominated that person, and is recalled by that party; or
  - (d) is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the National Council prescribe loss of office as a permanent delegate.
- (5) Vacancies among the permanent delegates must be filled in terms of national legislation without changing the proportions of party representation in the delegation.
- (6) Before permanent delegates begin to perform their functions in the National Council, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

### **Sittings of National Council**

61. (1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.
- (2) The President may summon the National Council to an extraordinary meeting at any time to conduct urgent business.
- (3) The National Council meets in the same place as the National Assembly. Meetings at other places are permitted on the grounds of public interest, security or convenience, and in a manner provided for in the rules and orders of the Council.

### **Chairperson and Deputy Chairpersons**

62. (1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.
- (2) The Chairperson and one of the Deputy Chairpersons are elected for five years or until their term as a delegate expires, if earlier.
- (3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.
- (4) The President of the Constitutional Court must preside over the election of

the Chairperson, or designate another judge to do so. The Chairperson presides over the election of a Deputy Chairpersons.

- (5) The procedure set out in Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.
- (6) The National Council may remove the Chairperson or the Deputy Chairpersons from office by a resolution supported by at least six provinces.

### **Decisions**

63. (1) Except where the Constitution provides otherwise -
- (a) each province has one vote which is cast on behalf of the province by the head of its delegation [in accordance with a mandate given by the provincial legislature];
  - (b) at least five provinces must be represented in the National Council of Provinces before a vote may be taken on any matter; and
  - (c) all questions before the National Council are decided by a vote of a majority of the provinces.

### **Cabinet members' participation in National Council**

64. (1) A Cabinet member may attend, and may speak in, the National Council of Provinces, but may not vote.
- (2) The National Council may require a Minister, a Deputy Minister or an official of national government to attend a meeting of the Council or a committee of the Council.

### **Local government's participation in National Council**

65. Representatives of local government designated in terms of section 151 may attend, and may speak in, the National Council of Provinces and its committees, but may not vote.

### **Internal autonomy**

66. (1) The National Council of Provinces may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers, functions, procedures and duration of its committees.
- (2) The rules and orders of the National Council must provide for the participation of all the provinces in its legislative proceedings in a manner consistent with democracy.
- (3) A committee of the National Council may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents.<sup>27</sup>

### **Privilege**

67. (1) Delegates to the National Council of Provinces, and the persons referred to in sections 64 and 65 -

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27 1 This provision does not mirror the equivalent provision concerning the National Assembly. Should it?

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

### **Public access**

68. (1) The National Council of Provinces must conduct its business and proceedings in an open manner.
- (2) Sittings of the National Council must be open to the public; but, reasonable measures may be taken to regulate public access.

## **NATIONAL LEGISLATIVE PROCESS**

### **All Bills**

69. (1) Bills may be introduced only in the National Assembly, by -
  - (a) a Cabinet member or a Deputy Minister;
  - (b) a member, or a committee, of the Assembly; or
  - (c) the National Council of Provinces, but only with regard to a matter within the functional areas listed in Schedule 4.
- (2) Any Bill passed by the National Assembly that requires the approval, consent or support of the National Council must be referred to the Council for approval.
- (3) Any other Bill passed by the National Assembly must be submitted to the President for assent.

### **Bills amending the Constitution**

70. (1) The Constitution may be amended by a Bill -
  - (a) passed by the National Assembly with at least two thirds of its members voting in favour of the Bill; and
  - (b) approved by the National Council of Provinces with the delegations of at least six provinces supporting the Bill, if the Bill alters -
    - (i) this Chapter;
    - (ii) provincial boundaries, powers, functions or institutions; or
    - (iii) a provision that deals specifically with a provincial matter.
- (2) If a Bill referred to in subsection (1)(b) concerns only a specific province or provinces, the National Council of Provinces may not approve it unless the Bill has been approved by the relevant provincial legislature or legislatures.
- [(3) No amendment of the Constitution may repeal or amend this subsection or section 1, or violate any of the principles listed in section 1.

Alternatively, add a clause providing for amendment by special procedure or majority to effect a section 1 principle, for example -

"An amendment of the Constitution which repeals or amends this subsection or section 1, or violates any of the principles listed in section 1, must be passed by a resolution adopted by . . . percent of the members of Parliament"<sup>28</sup>

#### **Bills outside Schedule 4**

71. (1) When a Bill falling outside the functional areas listed in Schedule 5 is referred to the National Council of Provinces, the following procedure applies:
- (a) The National Council must either -
    - (i) consent to the Bill;
    - (ii) consent to the Bill subject to amendments proposed by it; or
    - (iii) object to the Bill.
  - (b) If a Bill is consented to by the National Council it must be submitted to the President for assent.
  - (c) If the National Council objects to the Bill or consents to it subject to amendment, the National Assembly must reconsider the Bill taking into account any amendment proposed by the National Council, and may -
    - (i) pass the Bill again, either with or without amendment; or
    - (ii) decide not to proceed with the Bill.
  - (d) A Bill passed by the National Assembly in terms of paragraph (c) must be submitted to the President for assent.
- (2) When the National Council votes on a question in terms of this section, section 63 does not apply, and instead -
- (a) each delegate in a provincial delegation has one vote;
  - (c) one third of the delegates must be present before a vote may be taken on the question; and
  - (d) the question is decided by a majority of the votes cast, but if there is an equal number of votes on both sides of the question, the delegate presiding must cast a deciding vote.

#### **Bills within Schedule 4**

72. When a Bill falling within a functional area listed in Schedule 4 is referred to the National Council of Provinces in terms of section 69(2) the following procedure applies:
- (a) The National Council must either -
    - (i) support the Bill;
    - (ii) support the Bill subject to amendments proposed by it; or

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28 NP proposes the following provision:

- (a) A committee of Parliament must review the Constitution regularly and when necessary report to the National Assembly on proposed amendments to the Constitution.
- (b) The committee must be composed of -
  - (i) members of the National Assembly drawn from all parties desiring to participate in the committee;
  - (ii) delegates to the National Council of Provinces drawn from all provincial delegations desiring to participate in the committee; and
  - (iii) representatives of local government designated in terms of section 175.



- (iii) oppose the Bill.
- (b) If the National Council supports the Bill, it must be submitted to the President for assent.
- (c) If the National Council supports the Bill, but proposes amendments to it, or if it opposes the Bill, the Bill, together with any proposed amendments, must be referred to the Mediation Committee, which may agree -
  - (i) the version of the Bill passed by the National Assembly;
  - (ii) the version of the Bill proposed by the National Council; or
  - (iii) another version of the Bill.
- (d) If the Mediation Committee is unable to agree within 30 days, the Bill lapses unless the National Assembly later passes the Bill with at least two thirds of its members voting in favour of the Bill.
- (e) If the Mediation Committee agrees on the version of the Bill as passed by the National Assembly, the Bill must be re-submitted to the National Council, and if the National Council supports the Bill, the Bill must be submitted to the President for assent.
- (f) If the Mediation Committee agrees on the version of the Bill proposed by the National Council, the Bill must be referred to the National Assembly, and if it is passed by the National Assembly, it must be submitted to the President for assent.
- (g) If the Mediation Committee agrees on a version of the Bill different from both the version passed by the National Assembly and the version proposed by the National Council, the agreed version of the Bill must be referred to the National Assembly, and to the National Council and if it is passed by the National Assembly, and supported by the National Council, it must be submitted to the President for assent.
- (h) If the agreed version of a Bill is submitted to the National Council, but is not supported by the National Council, the Bill lapses unless the National Assembly later passes the Bill with at least two thirds of its members voting in favour of the Bill.

### **Money Bills**

73. (1) Money Bills may provide only for appropriating money or imposing tax; but, a Bill providing for the imposition or appropriation of fines or other monetary penalties is not a money Bill.
- (2) Only the Cabinet member responsible for national financial matters, or another Cabinet member acting with the concurrence of that member, may introduce a money Bill in the Assembly.
  - (3) Subsection (2) does not prevent the National Assembly from amending a money Bill introduced in the Assembly.
  - (4) When money Bills are referred to the National Council of Provinces, the procedure set out in section 71 must be followed.

### **Mediation Committee**

74. (1) The Mediation Committee consists of -
- (a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders

- of the Assembly and results in a representation of parties in substantially the same proportion that the parties are represented in the Assembly; and
- (b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.
- (2) The Mediation Committee has agreed a version of a Bill, or decided a question, when that version, or one side of a question, is supported by -
- (a) a majority of the representatives of the National Assembly; and
  - (b) a majority of the representatives of the National Council.

### **Joint rules and orders**

75. The National Assembly may make any rule or order that is consistent with this Chapter and supported by the National Council of Provinces, to -
- (a) determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process;
  - (b) establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in section 71, and to regulate the proceedings of those committees;
  - (c) regulate the proceedings of the Mediation Committee; and
  - (d) determine the manner in which the National Council participates in the reconsideration of a Bill which the President has referred back to the National Assembly in terms of section 76.

### **Assent to Bills**

76. (1) The President must either assent to and sign a Bill adopted in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- (2) If the President refers a Bill back to the National Assembly, the following procedure applies:
- (a) The Assembly must either allow the Bill to lapse, or reconsider the Bill in the light of the President's reservations.
  - (b) If the Assembly passes the Bill fully accommodating the President's reservations, the President must assent to and sign the Bill.
  - (c) If the Assembly confirms the Bill or passes it without fully accommodating the President's reservations, the President must 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. If the court decides the Bill is unconstitutional, the Bill lapses.
- (3) The National Council of Provinces participates in the reconsideration of a Bill which the President has referred back to the National Assembly, but only if -
- (a) the President's reservations about the constitutionality of the Bill relate to a procedural matter which involves the Council; or
  - (b) the Assembly amends the Bill to accommodate any or all the President's reservations and the amendment detrimentally affects the interests of the provinces.

### **Application by members of National Assembly to Constitutional Court**

77. (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of a Bill, or if already promulgated, an Act, passed by the National Assembly is unconstitutional.
- (2) An application -
- (a) must be supported by at least one third of the members of the Assembly; and
  - (b) must be made after the President has assented and signed the Bill, and within 30 days of that date.
- (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if -
- (a) the interests of justice require this; and
  - (b) the application has a reasonable prospect of success.
- (4) If an application is unsuccessful, the Constitutional Court must order the applicants to pay costs unless the application had a reasonable prospect of success.

### **Promulgation**

78. A Bill assented to and signed by the President must be promulgated and becomes an Act of Parliament upon its promulgation.

### **Safekeeping of Acts of Parliament**

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

## **CHAPTER 5**

### **THE PRESIDENT AND THE NATIONAL EXECUTIVE<sup>29</sup>**

#### **The President**

80. The President -

- (a) is the Head of State, head of the national executive and Commander-in-Chief of the defence force;
- (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
- (c) promotes the unity of the nation and that which will advance the Republic.

#### **Powers and functions of President**

81. (1) The President has the power entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State, head of the national executive and Commander-in-Chief of the defence force.

- (2) The President is responsible for-
  - (a) assenting to and signing Bills;
  - (b) referring a Bill back to Parliament for reconsideration of the Bill's constitutionality;
  - (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
  - (d) summoning the National Assembly to an extraordinary sitting to conduct urgent business;
  - (e) dissolving the National Assembly and calling an election after a vote of no-confidence in the Cabinet has been passed by the Assembly;
  - (f) appointing commissions of enquiry;
  - (g) accrediting foreign diplomatic representatives;
  - (h) appointing ambassadors; and
  - (i) conferring honours.

#### **Executive authority of the Republic**

82. (1) The executive power of the Republic, including the power of the Commander-in-Chief of the defence force, is vested in the President.

- (2) The executive power is exercised by the President and the other members of Cabinet, who are collectively responsible for -
  - (a) implementing national legislation;
  - (b) developing and implementing national policy; and
  - [(c) coordinating the functioning of government departments.]

- (3) The President may declare a state of national defence. A declaration of a state of national defence lapses unless it is approved by Parliament within 14 days.<sup>30</sup>

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29 In this chapter, the proposals of the Panel, subsequently agreed to by the parties, are integrated with the Fourth Draft, and other consequential or agreed changes.

30 The ad hoc committee on security suggested that this provision be included here. TRT suggests that it may be better placed in the Security chapter, but it should not be included at all unless "a state of national defence" has constitutional meaning.

### **Election of President**

83. (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 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.
- (3) 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.

### **Assumption of office by President**

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

### **Term of office of President**

85. (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; 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.

### **Removal of President**

86. (1) The National Assembly, by a resolution adopted by 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 law;
  - (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 serve in any public office.

### **Acting President**

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

### **Cabinet**

88. (1) The Cabinet consists of the President, a Deputy President and Ministers.
- (2) The President appoints the Deputy President and Ministers, assigns their functions, and may dismiss them.
- (3) The President -
- (a) must select the Deputy President from among the members of the National Assembly;
  - (b) may select any number of Ministers from among the members of the National Assembly; and
  - (c) may select no more than two Ministers from outside the Assembly.
- (4) Members of the Cabinet must act in accordance with the Constitution and may perform any act required to give effect to the Constitution.
- (5) Members of the Cabinet are accountable collectively and individually to Parliament for the performance of their functions.
- [(6) The Deputy President and Ministers are responsible for the functions of the executive assigned to them by the President.]<sup>31</sup>
- (7) The Deputy President must assist the President in the execution of the functions of government.
- (8) Ministers must provide Parliament with full and regular reports concerning matters under their control.

### **Deputy Ministers**

89. 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.

### **Continuation of Cabinet after elections**

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

### **Oath of office**

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

### **Conduct of Cabinet members and Deputy Ministers**

92. (1) Members of the Cabinet and Deputy Ministers must act in accordance with a

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31 The TRT suggests that this provision is may not be necessary, since other subsections of this section address the issues contained in it. Specifically Subsection (2) empowers the President to assign functions, and subsection (5) makes Ministers accountable to Parliament for the performance of those functions. The TRT is investigating further.

code of ethics prescribed by national legislation.

- (2) Members of the Cabinet and Deputy Ministers may not -
  - (a) undertake any other paid work;
  - (b) act in any way that is 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.

### **Transfer of functions**

93. 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 function entrusted by legislation to another member.

### **[Temporary assignment of functions**

94. The President may assign to a Cabinet member any functions of another member who is absent from office or is unable to perform those functions.]<sup>32</sup>

### **National executive action in provinces<sup>33</sup>**

95. The national executive may assume the administration of any legislation or the performance of -
- (a) any executive function vested in the executive of a province in terms of the constitution, when it is necessary -
    - (i) to maintain essential national standards or to establish minimum standards required for the rendering of services;
    - (ii) to maintain economic unity;
    - (iii) to maintain national security;
    - (iv) to prevent that province from taking action which is unreasonable and prejudicial to the interest of another province or to the country as a whole; and
  - (b) any executive function vested in the executive of a province in terms of legislation -
    - (i) for any purpose listed in paragraph (a); or
    - (ii) because that legislation is not being effectively administered in the province.

### **Executive decisions**

96. (1) A written decision by the President in the exercise of a power in terms of legislation falling within a function assigned to another member of Cabinet must be countersigned by that other member.
- (2) Promulgations, regulations and other instruments of subordinate legislation must be accessible to the public.

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32 TRT suggests that this section is unnecessary, as it is entirely covered within the general power of the President to assign functions to the members of Cabinet.

33 The section is included in this chapter, and attempts to reflect agreement reached in discussion of provincial competences.

- [(3) Legislation must specify the manner in which, and the extent to which, instruments mentioned in subsection (2) must be -
- (a) tabled in Parliament; and
  - (b) approved by Parliament.]<sup>34</sup>

**Votes of no-confidence**

97. (1) If the National Assembly, by a vote of the majority of its members, passes a motion of no-confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.
- (2) If the National Assembly, by a vote of the majority of its members, passes a motion of no-confidence in the President, the President and the other members of the Cabinet must resign.

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34 TRT suggests that this is unnecessary, since the function of the legislation is only to enhance Parliament's ability to scrutinize executive action. And, even without this subsection, parliament, if it wishes to have this ability, has the power to pass this legislation.



## CHAPTER 6 PROVINCES

### Provinces<sup>35</sup>

98. (1) The Republic has the following provinces:
- (a) Eastern Cape
  - (b) Free State
  - (c) Gauteng
  - (d) KwaZulu-Natal
  - (e) Mpumalanga
  - (f) Northern Cape
  - (g) Northern Province
  - (h) North-West
  - (i) Western Cape.
- (2) The boundaries of the provinces are those existing when the Constitution took effect.

### PROVINCIAL LEGISLATURES

#### Legislative authority of provinces

99. (1) The legislative authority of a province is vested in its provincial legislature; which accordingly has the power -
- (a) to adopt a constitution for the province or to amend any constitution adopted by it; and
  - (b) to pass legislation for the province with regard to -
    - (i) any matter within the functional areas listed in Schedule 4; and
    - (ii) any matter outside those functional areas expressly delegated to the province by national legislation.
- (2) A provincial legislature is bound by the Constitution and must act in accordance with the Constitution. A province which has adopted a provincial constitution is also bound by that constitution, and must act in accordance with it.
- (3) The adoption of a provincial constitution and of any amendment to it is an exclusive provincial legislative power.
- (4) A province's power to legislate with regard to a matter within the functional areas listed in Schedule 4 includes the power to pass any law which is reasonably necessary for, or incidental to, the effective exercise of its legislative power.

#### Composition and election of provincial legislatures

100. (1) A provincial legislature consists of women and men elected as members in terms of a system of proportional representation based on a common voters roll for the province, and prescribed by national legislation which provides for the election of members -

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35 Whether to move this section to chapter 1 needs to be considered, for reasons given in bar note in chapter 1.

- (a) from lists of party candidates drawn up in a party's order of preference; and
  - (b) in a manner which ensures that the members elected reflect the proportions of the votes recorded for the respective parties in the province.
- (2) A province may have between 30 and 80 members of its legislature. In each province, the number of members must be determined in accordance with national legislation.

### **Membership**

101. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except -
- (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than -
    - (i) the Premier and other members of the Executive Council of a province; and
    - (ii) other office-bearers whose functions are compatible with the functions of a member of a provincial legislature, and have been declared compatible with those functions by national legislation;
  - (b) members of the National Assembly, permanent delegates to the National Council of Provinces or members of a municipal council;
  - (c) unrehabilitated insolvents;
  - (d) anyone declared to be of unsound mind by a court of the Republic; or
  - (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. A disqualification under this paragraph ends five years after the sentence has been completed.
- (2) A person who is not eligible to be a member of a provincial legislature in terms of subsection (1) may be a candidate for the legislature, subject to limits and conditions established by national legislation.
- (3) A person loses membership of a provincial legislature if that person -
- (a) ceases to be eligible; or
  - (b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership.
- (4) Vacancies must be filled in terms of national legislation.

### **Oath or affirmation by members**

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

### **Duration of provincial legislatures**

103. (1) A provincial legislature is elected for a term of five years.
- (2) If a provincial legislature is dissolved in terms of section 124, or when its term expires, the Premier of the province, by proclamation, 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.
- (3) If the results of an election of a provincial legislature are not declared within the period referred to in section ... or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
- (4) A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

#### **Dissolution of provincial legislatures before expiry of term**

104. (1) The Premier of a province may dissolve the provincial legislature if the legislature, by resolution adopted by [a majority / at least two thirds] of its members supports dissolution.
- (2) An Acting Premier of a province must dissolve the provincial legislature if -
- (a) the Premier has resigned after a vote of no-confidence in terms of section ... ; and
  - (b) the legislature fails to elect a new Premier within [21 days] of the vote of no confidence.

[Suggested alternative formulation:

- "(2) An Acting Premier must dissolve the provincial legislature if -
- (a) there is a vacancy in the office of Premier; and
  - (b) the legislature fails to elect a new Premier within 30 days after the vacancy occurred."]

#### **Sittings and recess periods**

105. (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.

#### **Speakers and Deputy Speakers**

106. (1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.

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

### **Decisions**

107. (1) Unless the Constitution provides otherwise -
- (a) a majority of the members of a provincial legislature must be present before a vote may be taken on a Bill or an amendment to a Bill;
  - (b) one third of the members must be present before a vote may be taken on any other question before the legislature; and
  - (c) all questions before a provincial legislature are decided by a majority of the votes cast.
- (2) The presiding member of a provincial legislature has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

### **Permanent delegates' rights in provincial legislatures**

108. The permanent delegates of a province to the National Council of Provinces may attend, and may speak in, their provincial legislature and its committees, but may not vote.

### **Control by provincial legislatures**

109. (1) A provincial legislature must take measures necessary to -
- (a) ensure that all provincial executive organs of state are accountable to it; and
  - (b) maintain proper legislative oversight of the exercise of provincial executive authority.
- (2) A provincial legislature may -
- (a) require anyone to appear before it or any of its committees to answer questions or to produce documents, or to give evidence on oath or affirmation;
  - (b) require any person or provincial organ of state to report to it or any of its committees on any matter;
  - (c) receive representations; or
  - (d) authorise a committee of the legislature to exercise these powers.
- (3) Answers given, documents produced or evidence given by a person in terms of subsection (2) may not be used against that person in a court except -
- (a) on a charge of perjury in respect of the evidence given; or
  - (b) [if the court in the interest of justice decides otherwise].

### **Internal autonomy**

110. (1) A provincial legislature may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers, functions, procedures and duration of its committees.
- (2) The rules and orders of a provincial legislature must provide for the participation of minority parties in its legislative proceedings in a manner consistent with democracy.

### **Privilege**

111. (1) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces have freedom of speech and debate in the provincial legislature and in its committees, subject to its rules and orders.
- (2) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces 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.

### **Public participation and access**

112. (1) A provincial legislature must -
  - (a) facilitate public involvement in its law-making process; and
  - (b) conduct its business and proceedings in an open manner.
- (2) Sittings of a provincial legislature must be open to the public.
- (3) Reasonable measures may be taken to regulate public access to sittings of, and documents before, a provincial legislature.

### **Assent to Bills**

113. (1) The Premier of a province must 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 either allow the Bill to lapse, or reconsider the Bill in the light of the Premier's reservations.
  - (b) If the legislature passes the Bill, fully accommodating the Premier's reservations, the Premier must assent to and sign the Bill.
  - (c) If the legislature confirms the Bill or passes it without fully accommodating the Premier's reservations, the Premier must 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. If the court decides the Bill is unconstitutional, the Bill lapses.

### **Application by members to Constitutional Court**

114. (1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a Bill, or if already promulgated, an Act, passed by the legislature is unconstitutional.
- (2) An application -
- (a) must be supported by at least one third of the members of the legislature; and
  - (b) must be made after the Premier has assented to and signed the Bill, and within 30 days of that date.
- (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application, if -
- (a) the interest of justice requires this; and
  - (b) the application has a reasonable prospect of success.
- (4) If an application is unsuccessful the Constitutional Court must order the applicants to pay costs unless the application had a reasonable prospect of success.

### **Promulgation**

115. (1) A Bill assented to and signed by the Premier of a province must be promulgated and becomes an Act of the province upon its promulgation.
- (2) Provincial Acts must be published in the national Government Gazette.

[Alternative formulation.

"A Bill assented to and signed by the Premier of a province must be published in the national Government Gazette and becomes an Act of the province upon its publication."]

### **Safekeeping of Provincial Acts**

116. The signed copy of an Act of a provincial legislature is conclusive evidence of the provisions of that Act and, [immediately] after promulgation, must be entrusted to the Constitutional Court for safekeeping .

## **PROVINCIAL EXECUTIVES**

### **Executive authority of provinces**

117. (1) A province has executive authority -
- (a) to administer matters within the functional areas listed in Schedule 4, to the extent that it has the administrative capacity to assume effective responsibility, which capacity must be assessed in terms of national legislation;
  - (b) to administer provincial legislation in the province;
  - (c) to administer national legislation in the province, the administration of

- which has been assigned to it in terms of national legislation enacted with the support of the National Council of Provinces, or to which the National Council has consented; and
- (d) to perform any other function assigned to it in terms of the Constitution or national legislation.
- (2) The administration of provincial legislation in a province is an exclusive provincial matter; but, this subsection does not limit section 95.
- [(3) The executive authority of a province is vested in the Premier and is exercised by the Premier and the other members of the Executive Council, who are collectively responsible for implementing legislation and developing and implementing policy in the province.

### **Functions of Premiers**

118. (1) The Premier of a province has the functions entrusted to that office by the Constitution and any legislation.
- (2) The Premier of a province is responsible for-
- (a) assenting to and signing Bills;
  - (b) referring a Bill back to the legislature for reconsideration of the Bill's constitutionality;
  - (c) a referral of a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
  - (d) summoning the legislature to an extraordinary sitting to conduct urgent business;
  - [(e) dissolving the legislature and calling an election after a vote of no confidence in the Executive Council has been passed by the legislature.]

### **Election of Premiers**

119. (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 the Premier of the province.
- (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 3 applies to the election of the Premier.
- (3) 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.

### **Assumption of office by Premiers**

120. A Premier-elect must assume office within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

### **Term of office of Premiers**

121. (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 Premier assumes

office.

- (2) No person may hold office as Premier for more than two terms; 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 is not regarded as a term.

### **Acting Premiers**

122. (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;
  - (b) a member of the Executive Council designated by the other members of the Executive Council;
  - (c) a member of the provincial legislature elected by its members.
- (2) An Acting-Premier has the responsibilities, powers and functions of the Premier.

### **Executive Councils**

123. (1) 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 from among the members of the provincial legislature.
- (2) The Premier of a province appoints the members of the Executive Council, assigns their functions, and may dismiss them.
- (3) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.
- (4) Members of the Executive Council of a province must act in accordance with the Constitution.
- (5) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the performance of their functions.
- (6) Members of the Executive Council of a province must provide the legislature with full and regular reports concerning matters under their control.

### **Continuation of Executive Councils after elections**

124. 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**

125. 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 in accordance with Schedule 2.

### **Conduct of members of Executive Councils**

126. (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) act in any way that is 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.

### **Transfer of powers and functions**

127. 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.

### **[Temporary assignment of powers and functions**

128. The Premier of a province may assign to a member of the Executive Council any powers or functions of another member who is absent from office or is unable to perform those powers or functions.]<sup>36</sup>

### **Executive decisions**

129. (1) A written decision by a premier in the exercise of a power in terms of legislation falling within a function assigned to another member of an executive council must be countersigned by that other member.
- (2) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.
- [(3) Legislation must specify the manner in which, and the extent to which, instruments mentioned in subsection (1) must be -
- (a) tabled in the provincial legislature; and
  - (b) approved by the provincial legislature.]

### **Votes of no-confidence**

130. (1) If a provincial legislature, by resolution adopted by a majority of its members, passes a motion of no-confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council.
- (2) If a provincial legislature, by resolution adopted by a majority of its members, passes a motion of no-confidence in the Premier, the Premier and the other members of the Executive Council must resign.

## **PROVINCIAL CONSTITUTIONS**

### **Adoption of provincial constitutions**

131. (1) A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

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36 TRT suggests that this section is unnecessary as it is entirely covered within the general power of the president to assign functions to the members of the council.

### **Contents of provincial constitutions**

132. (1) A provincial constitution, or constitutional amendment, must be consistent with this Constitution, but may provide for -
- (a) provincial legislative or executive structures and procedures that differ from those provided for in this Constitution; or
  - (b) the institution, role, authority and status of a traditional monarch.
- (2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) and (b) of subsection (1) -
- (a) must comply with -
    - (i) the principles set out in section 1; and
    - (ii) the principles of co-operative government set out in Chapter 3;
  - (b) may not confer on the province or any of its legislative or executive structures, any power or function that falls outside the area of provincial competence in terms of this Constitution.

### **Certification of provincial constitutions**

133. (1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution to the Constitutional Court for certification.
- (2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified -
- (a) that the text has been passed in accordance with section 131; and
  - (b) that all the provisions of the text comply with section 132.

### **Signing, promulgation and safekeeping of provincial constitutions**

134. (1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.
- (2) A text assented to and signed by the Premier must be promulgated and becomes law upon its promulgation.
- (3) A provincial constitution or constitutional amendment must be published in the national government gazette.

[Alternative formulation for subsections (2) and (3).

"The text assented to and signed by the Premier must be published in the national Government Gazette and becomes law upon its publication."

- (4) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, [immediately] after promulgation, must be entrusted to the Constitutional Court for safekeeping.

## **CONFLICTING LAWS<sup>37</sup>**

### **Conflicts between national and provincial legislation**

135. (1) If there is a conflict between national legislation and provincial legislation

falling within a functional area listed in Schedule 4, subsections (2) and (3) apply.

- (2) The national legislation prevails over the provincial legislation if the national legislation applies uniformly with regard to the country as a whole and if it -
  - (a) deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;
  - (b) establishes -
    - (i) norms and standards;
    - (ii) frameworks; or
    - (iii) national policies,which provide for uniformity across the nation with regard to a matter which in the interest of the country as a whole requires uniformity;
  - (c) is necessary for -
    - (i) the maintenance of national security;
    - (ii) the maintenance of economic unity;
    - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
    - (iv) the promotion of economic activities across provincial boundaries;
    - (v) the promotion of equal opportunity or equal access to government services; or
    - (vi) the protection of the environment; or
  - (d) is aimed at preventing unreasonable action by a province which is prejudicial to the economic, health or security interest of another province or the country as a whole.
- (3) National legislation enacted -
  - (a) before the Constitution took effect;
  - (b) with the support of the National Council of Provinces or consented to by the Council; or
  - (c) in terms of legislation referred to in paragraph (b) must be regarded as necessary for the purposes set out in subsection (1) (c) if it deals with any of the matters referred to in that subsection.
- (4) The provincial legislation prevails over the national legislation if subsection (2) does not apply.

### **Conflicts between national legislation and provincial constitutions**

136. If there is a conflict between national legislation and a provision of a provincial constitution with regard to -

- (a) a matter where this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; or
- (b) a matter within the functional areas listed in Schedule 4, section 135 applies as if the affected provision of the provincial constitution were provincial legislation contemplated in that section.

### **Conflicts that cannot be resolved**

137. If a dispute concerning a conflict between national legislation and provincial

legislation which fails within Schedule 4, or between national legislation and a provincial constitution, cannot be resolved by the court in terms of sections 135 and 136, respectively, the national legislation prevails over the provincial legislation or provincial constitution.

**Status of legislation that does not prevail**

138. A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.

## CHAPTER 7 LOCAL GOVERNMENT<sup>38</sup>

### General Objectives

139. (1) The objectives of local government as a distinct level/sphere of government are -
- (a) to secure democratic government for local communities and to enhance democracy in general;
  - (b) to promote the social and economic development of local communities within the framework of national and provincial development policies and to enhance social and economic development generally;
  - (c) to provide in the basic socio-economic needs of local communities;
  - (d) to promote the participation of local communities and community organisations in the affairs of local government; and
  - (e) to assist in the development and maintenance of a safe and healthy environment.
- (2) National and provincial government must assist in the realisation of these objectives by actively developing local government and broadening and strengthening its capacity.

### Establishment of local government structures

140. (1) Local government in the Republic must be administered / executed through municipalities exercising power within their respective municipal areas.
- (2) Municipalities must be established for the whole of the Republic.
- (3) Provincial legislation within the framework of national legislation must provide for -
- (a) an independent body to demarcate the whole of a province into municipal areas; and
  - (b) the establishment of a municipality for each municipal area.
- (4) National legislation must determine the different categories of municipalities that may be established.

### Developmental duties of municipalities

141. Municipalities must endeavour to achieve the objectives set out in section 139 and must -
- (a) align their administrations and their budgeting and planning processes to the social, economic and political development of their areas and communities;
  - (b) provide basic services in a sustainable manner within their financial and physical capacity;
  - (c) assist with the implementation of national and provincial development programmes when required to do so; and
  - (d) provide mechanisms through which communities and community

organisations in their areas may participate in their processes.

### **Local self-government**

142. (1) Municipalities are entitled to regulate and manage on their own responsibility the local government affairs of their communities within the limits set by national and provincial legislation.

(2) Each municipality has its own municipal council.

### **Municipal legislative authority**

143. (1) The legislative authority of a municipality is vested in its council and confers on the council the power -

- (a) to pass legislation for its municipal area not inconsistent with national or provincial legislation with regard to -
  - (i) any matter within the functional areas listed in Schedule 6; and
  - (ii) any matter outside these functional areas expressly delegated to it by national or provincial legislation;

(2) Legislation passed by a municipal council which is reasonably necessary for or incidental to the effective exercise of its power to legislate with regard to a matter within the functional areas listed in Schedule 5, is deemed to fall within those functional areas.

(3) Municipal legislation inconsistent with national or provincial legislation is invalid; but, municipal legislation which is inconsistent with national or provincial legislation that is inoperative because of a conflict referred to in section 137, must be regarded as valid for as long as that legislation is inoperative.

### **Municipal executive authority**

144. The executive authority of a municipality is vested in its council and confers on the council the power -

- (a) to administer legislation passed by it; and
- (b) to administer national or provincial legislation in its municipal area where the administration of the legislation has been assigned to it in terms of national or provincial legislation.

### **Composition of municipal councils**

145. A municipal council consists of the women and men elected as members in accordance either -

- (a) a system of proportional representation based on a common voters roll for the municipal area and prescribed by national legislation which provides for the election of members -
  - (i) from lists of party candidates drawn up in a party's order of preference; and
  - (ii) in a manner which ensures that the number of members elected reflect the proportions of the votes recorded for the respective parties in the municipal area; or
- (b) both a system described in paragraph (a) and a system of ward representation based on common voters rolls for the wards, and prescribed by national legislation.

### **Membership**

146. Every citizen who is qualified to vote for a municipal council is eligible to be a member of that council, except -
- (a) anyone who is appointed by or is in the service of the state and receives remuneration and who has not been exempted from this disqualification in terms of national legislation;
  - (b) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 46(1) (c), (d) or (e) to be a member of the Assembly;
  - (c) a member of the National Assembly, the National Council of Provinces or a provincial legislature; or
  - (d) a member of another municipal council; but, this disqualification does not apply to a member of a municipal council representing that council in another municipal council of a different category.

### **Elections**

147. (1) Elections of municipal councils must take place at intervals of not more than five years.
- (2) Anyone may vote for a municipal council if they -
- (a) are qualified to vote for the National Assembly;
  - (b) ordinarily reside in the municipal area [or are ratepayers on property within the municipal area]; and
  - (c) are registered as voters on the municipality's common voters roll.
- (3) Where an electoral system applies which includes ward representation, provincial legislation within the framework of national legislation must provide for an independent body to demarcate the wards.

### **Internal autonomy**

148. A municipal council may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions and procedures of its committees.

### **Privilege**

149. Provincial legislation within the framework of national legislation may provide for privileges and immunities of municipal councils.

### **Promulgation of municipal legislation**

150. Municipal legislation must be published in the official gazette of the relevant province, and may only be enforced when it has been published.

### **Organised local government**

151. (1) National legislation must -
- (a) provide for municipalities to organise themselves into a national representative body; and
  - (b) determine the powers and functions of that body, including the power to elect / appoint people to consult or interact with national or provincial government on behalf of local government, or to represent

local government in -  
(i) the National Council of Provinces;  
(ii) any structures of executive intergovernmental relations referred to in section 42(2); and  
[(iii) the parliamentary review committee referred to in section 70(4).]<sup>39</sup>

- (2) Provincial legislation must -
- (a) provide for municipalities in a province to organise themselves into a provincial representative body; and
  - (b) determine the powers and functions of that body, including the power to elect / appoint people to consult or interact with the provincial government on behalf of local government in the province.

### **Consultation with local government**

152. National and provincial Bills which materially affect the status, institutions, powers and functions of local government may not be introduced in the National Assembly or a provincial legislature unless organised local government has been given a reasonable opportunity to make representations with regard to these Bills.

### **Other matters**

153. All matters concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.



## **CHAPTER 8 COURTS AND ADMINISTRATION OF JUSTICE**

### **Judicial authority**

154. (1) The judicial authority of the Republic is vested in the courts.
- (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.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order issued by a court binds [and must be complied with by,]<sup>40</sup> all persons and organs of state to which it applies.

### **Judicial system**

155. The courts are:
- (a) The Constitutional Court.
- (b) The Supreme Court of Appeal.
- (c) The High Courts, including any high court of appeal that may be established in terms of an Act of Parliament to hear appeals from High Courts.
- (d) The Magistrates' Courts.
- (e) Any other court established in terms of an Act of Parliament, including any court of a status similar to the High Courts or the Magistrates' Courts.

### **Constitutional Court**

156. (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
- (2) A matter before the Constitutional Court must be decided by at least eight judges.
- (3) The Constitutional Court -
- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- (4) Only the Constitutional Court may -
- (a) decide disputes between organs of state at national or provincial level concerning the constitutional status, powers or functions of any of those organs of state;<sup>41</sup>
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but

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40 TRT recommends that these words should be deleted because they are superfluous.

41 Still to be considered.

- may do so only where this is required by the Constitution;
- (c) decide that Parliament or the President has failed to comply with a constitutional duty; or
  - (d) decide whether an Act of Parliament, a provincial Act, or any conduct of the President is constitutionally valid, including any Act or conduct in respect of which the Supreme Court of Appeal or a High Court has made an order concerning constitutional validity.
- (5) National legislation and the rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court -
- (a) to bring a matter directly to the Constitutional Court; or
  - (b) to appeal directly to the Constitutional Court from any other court.
- (6) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

### **Supreme Court of Appeal**

157. (1) The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament.
- (2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined by an Act of Parliament.<sup>42</sup>
- (3) The Supreme Court of Appeal may decide appeals in all matters, and is the highest court of appeal except in constitutional matters. It may decide only -
- (a) appeals;
  - (b) issues connected with appeals; and
  - (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

### **High Courts**

158. A High Court may decide -
- (a) any constitutional matter except a matter that only the Constitutional Court may decide; and
  - (b) any other matter not excluded by an Act of Parliament.

[any other matter not assigned to another court by an Act of Parliament.]<sup>43</sup>

### **Magistrates' Courts and other courts**

159. Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament; but, no Act of Parliament may allow those courts -
- (a) to enquire into or rule on the constitutionality of any legislation or any conduct of the President; or
  - (b) to decide that any organ of state has failed to comply with a constitutional duty.

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42 The DP suggests that the number of judges be fixed by the Constitution.

43 Alternative wording suggested by TRT.

### **Court procedures**

- 160 (1) All courts function in terms of national legislation, but the Constitutional Court, the Supreme Court of Appeal and the High Courts, respectively, may make their own rules.
- (2) Rules made in terms of subsection (1) are subject to approval of a body established by national legislation for that purpose.

### **Powers of courts in constitutional matters<sup>44</sup>**

161. (1) When deciding a constitutional matter within its power, a court -
- (a) must declare that law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including -
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2) The Supreme Court of Appeal, or a High Court [or a court with similar powers], may -
- (a) make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but the order has no force unless it is confirmed by the Constitutional Court; and
  - (b) make an order concerning the constitutional validity of any law or conduct that is not -
    - (i) referred to in paragraph (a); or
    - (ii) within the matters that only the Constitutional Court may decide in terms of section 156(4).
- (3) If a court makes an order of constitutional invalidity in terms of subsection (2)(a), it may grant a temporary interdict or other temporary relief to a party pending a decision of the Constitutional Court on the validity of that Act or conduct.
- (4) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.<sup>6</sup>
- (5) 7(a) Any person or organ of state with a sufficient interest may appeal, or apply directly, to the Constitutional Court to confirm or vary a order of constitutional invalidity by a court in terms of subsection (2).

### **Inherent power**

162. The Constitutional Court, Supreme Court of Appeal and High Courts have the

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44 Suggested reformulation of section 161.

This subsection has been reformulated in view of the concerns raised at the CC subcommittee meeting of 15 March 1996.

inherent power customarily attributed to courts to protect their own process and to ensure that justice prevails.

### **Interpretation**

[163. When interpreting any legislation, a court may prefer any reasonable interpretation of the legislation that is consistent with the Constitution.]<sup>45</sup>

### **Appointment of judicial officers**

164. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a citizen of South Africa.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed.<sup>46</sup>
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the Constitutional Court; and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.
- (4) The other judges of the Constitutional Court are appointed by the President as head of the national executive, after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
- (a) The Judicial Service Commission must prepare a list of nominees with three names more than 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 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 the President must make the remaining appointments from the supplemented list.
- (5) 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.
- (6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
- (7) Other judicial officers must be appointed in terms of an Act of Parliament.

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45 This provision has been moved from the Bill of Rights because, if it is included at all, it should apply to the whole constitution. However, the TRT suggests that it is well established as a principle of constitutional interpretation.

46 Submissions from the public suggest that this provision could be replaced by a general one covering the appointment of members to all constitutional institutions.

- (8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

### **Acting judges**

165. (1) The President may appoint an acting judge to the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting in consultation with the President of the Constitutional Court and the Chief Justice.
- (2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consultation with the senior judge of the court on which the acting judge will serve.

### **Terms of office and remuneration**

166. (1) Constitutional Court judges are appointed for non-renewable term of [10/11]<sup>47</sup> years, but must retire by the age of 70.
- (2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.
- (3) The salaries, allowances and benefits of judges may not be reduced.

### **Removal**

167. (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 National Council of Provinces each] adopt a resolution calling for that judge to be removed, which is supported by at least two thirds of the members of [each of] the National Assembly [and National Council of Provinces].
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) 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).

### **Judicial Service Commission**

- 168 (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 teacher of law designated by teachers of law at South African universities;
  - (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
  - (i) four members of the National Council of Provinces designated together by the Council, by resolution adopted by at least two thirds of its members;
  - (j) four persons designated by the President, as head of the national executive and after consulting with the leaders of all the parties in the National Assembly; and,
  - (k) 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) If a dispute arises during the designation process referred to in subsection (1) (e) or (f), the President, after consulting with the relevant profession, may designate one of the practitioners to be designated from that profession.
- [(3) Members designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs among their number. Other members who were designated to the Commission serve until they are replaced by those who designated them.]
- (4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
- (5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice; but, when it considers any matter except the appointment of a judge, it must sit without the members appointed in terms of subsection (1) (h) and (i).
- (6) The Judicial Service Commission may determine its own procedure; but, decisions of the Commission must be supported by a majority of its members.

### **Prosecuting Authority**

169. (1) There is a single national prosecuting authority in the Republic, structured in terms of national legislation, and consisting of -
- (a) a national Attorney-General, who is the head of the prosecuting authority, and is appointed by the President as head of the national executive; and
  - (b) other Attorneys-General and prosecutors as determined by national legislation.
- (2) The prosecuting authority has the power to institute prosecutions on behalf of the state, and to carry out any necessary functions incidental to instituting prosecutions.
- (3) The prosecuting authority must exercise its functions without fear, favour or prejudice.
- (4) All other matters concerning the prosecution authority must be determined by

national legislation.

- (5) The national Attorney-General -
  - (a) must determine prosecution policy which must be observed in the prosecution process;
  - (b) must issue policy directives which must be observed in the prosecution process;
  - (c) may intervene in the prosecution process when policy directions are not complied with; and
  - (d) may review any decision not to prosecute, and issue directions to prosecute in specific cases.
  
- (6) The cabinet member responsible for the administration of justice must exercise final responsibility over the prosecution authority.

**Other matters concerning administration of justice**

170. National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including -
- (a) training programmes for judicial officers;
  - (b) procedures for dealing with complaints about judicial officers; and
  - (c) the participation of people other than judicial officers in decisions.

## **CHAPTER 9**

### **STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

#### **Establishment and governing principles**

171. (1) The following state institutions strengthen constitutional democracy in the Republic:
- (a) The Public Protector.
  - (b) The Human Rights Commission.
  - (c) The Commission for Gender Equality.
  - (d) The Auditor-General.
  - (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.
- (4) No person or organ of state may interfere with the functioning of these institutions.
- (5) These institutions are accountable to Parliament, and must report on their activities and functions to Parliament at least once a year.

### **PUBLIC PROTECTOR**

#### **Functions of Public Protector**

172. (1) The Public Protector has the following powers, as regulated by national legislation -
- (a) to investigate any conduct in state affairs, or in 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.
- (2) The Public Protector has any additional 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 determined in accordance with national legislation, require that a report be kept confidential.

#### **Tenure**



173. The Public Protector is appointed for a period of seven years.<sup>48</sup>

## **HUMAN RIGHTS COMMISSION**

### **Functions of Human Rights Commission**

174. (1) The Human Rights Commission must -
- (a) promote respect for human rights and a culture of human rights;
  - (b) promote the development, protection and attainment of human rights; and
  - (c) monitor and assess the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power -
- (a) to investigate and to report on the observance of human rights;
  - (b) to take steps to secure appropriate redress where human rights have been violated;
  - (c) to carry out research; and
  - (d) to educate.
- (3) Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights to housing, health care, food, water, social security and education.
- (5) The Human Rights Commission has the additional powers and functions prescribed by national legislation.

## **COMMISSION FOR GENDER EQUALITY**

### **Functions of Commission for Gender Equality**

175. (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**

176. (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of -
- (a) all national and provincial state departments and administrations;
  - (b) all municipalities; and
  - (c) any other institution or accounting entity required by national or

provincial legislation to be audited by the Auditor-General.

- (2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of -
  - (a) any institution funded from the national revenue fund, a provincial revenue fund or municipality; or
  - (b) any institution, other than a registered charity or private enterprise, that is authorised in terms of any law to receive money for a public purpose.
- (3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.
- (4) The Auditor-General has the additional powers and functions prescribed by national legislation.

### **Tenure**

177. The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

## **ELECTORAL COMMISSION**

### **Functions of Electoral Commission**

178. (1) The Electoral Commission must -
- (a) manage elections of national, provincial and local legislative bodies, in accordance with national legislation;
  - (b) ensure that those elections are free and fair; and
  - (c) declare the results of those elections within a period that must be prescribed by national legislation and as short as reasonably possible.
- (2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

### **Composition of Electoral Commission**

179. The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

## **INDEPENDENT AUTHORITY TO REGULATE BROADCASTING**

### **Broadcasting Authority**

180. National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

## **GENERAL PROVISIONS**

### **Appointments**

181. (1) The Public Protector and members of any Commission established by this Chapter must be women or men who are South African citizens, each of

whom is fit and proper to hold the particular office and complies 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 and fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances, and public administration must be given due regard in appointing the Auditor-General.
- (3) The President, on the recommendation of Parliament, must appoint the Public Protector, the Auditor-General and members of any commission established by this Chapter.
- (4) Parliament must recommend persons -
  - (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.<sup>49</sup>
- (5) National legislation must provide for the appointment of an acting Public Protector, Auditor-General or commission member when it is necessary to ensure the effective functioning of the relevant institution.

#### **Removal from office**

182. (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 misconduct, incapacity or incompetence;
  - (b) a finding to that effect by a committee of Parliament;<sup>50</sup> and
  - (c) the adoption by Parliament of a resolution, calling for that person's removal from office, and adopted by at least two thirds of the members.
- (2) The President -
- (a) may suspend a person from office at any time during a parliamentary committee's proceedings for the removal of that person; and
  - (b) must remove a person from office upon adoption by Parliament of a resolution calling for that person's removal.

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49 Parties to further consider sub-section (4).

50 The details of the procedure for appointment and removal under this chapter are still being discussed.

## CHAPTER 10 PUBLIC ADMINISTRATION<sup>51</sup>

### Basic values and principles governing public administration

183. (1) Public administration includes -
- (a) administration at all levels of government; and
  - (b) the administration of institutions that are dependent on government financial support [or are authorised in terms of any law to impose any tax, levy or duty].<sup>52</sup>
- (2) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
- (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.
- (3) National legislation must ensure the promotion of the basic values and principles listed in subsection (2).
- (4) The appointment in the public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
- (5) Legislation regulating the public administration may differentiate between different sectors, administrations or institutions.
- (6) The nature and functions of different sectors, administrations or institutions of the public administration are relevant factors to be taken into account in legislation regulating the public administration.

### Public Service Commission

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51 This is the final draft, as agreed to by all the parties, in the multilateral discussion held at Arniston.

52 The TRT suggests the phrase in brackets to ensure that parastatals that charge levies etc. are covered (see Arniston agreement).

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

**Public Service**

185. (1) Within the public administration there is a public service for South Africa, 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) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

## CHAPTER 11 SECURITY SERVICES

### **Governing principles**<sup>53</sup>

186. The following principles govern national security in the Republic:

- (a) National security must reflect the resolve of 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.
- (c) National security is subject to the authority of Parliament and the national executive.

### **Establishment, structuring and conduct of security services**

187. (1) The security services of the Republic consist of a single defence force, a single 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.
- (3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
- (4) The security services must be structured and regulated by national legislation.
- (5) 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 international agreements binding on the Republic.
- (6) No member of any security service may obey a manifestly illegal order.
- (7) Neither the security services, nor any of their members, may perform their functions in a manner that -
  - (a) prejudices a political party interest that is legitimate in terms of this constitution; or
  - (b) furthers any private interest of a political party.
- (8) Multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

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53 Ad hoc committee on Chapter 13 suggests that consideration be given to including a provision in the Constitution forbidding SA citizens from becoming mercenaries. See TRT memo.

## DEFENCE

### Defence force

188. (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

189. (1) A member of the Cabinet must be responsible for defence. (
- (2) When the defence force is deployed in co-operation with the police service, or in defence of the Republic, the President must inform Parliament, at a reasonable time and in appropriate detail, of -
- (a) the reasons for the use of the defence force;
  - (b) any place where the force is being used;
  - (c) the number of people involved; and
  - (d) the period for which the force is expected to be used.<sup>54</sup>

### Command of defence force 190.

- (1) The President, as head of the national executive, must appoint one or more senior military officers to command the defence force.
- (2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence.

### Defence civilian secretariat 191.

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 perform any functions entrusted to it by that Cabinet member, or by that legislation.

## POLICE

### Police service

192. (1) The national police service must be structured to function at national, provincial and, where necessary, local levels.<sup>55</sup>
- (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.<sup>56</sup>

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54 Ad hoc Committee on Security Services proposed including this section in the chapter on the National Executive. TRT thinks that it is more appropriately included here.

55 DP suggest provincial legislation should regulate local police. The question of provincial legislative competences is still under consideration.

56 DP concerned about limited power of provincial executives and suggests the insertion of words like 'taking into account the requirements of the provinces'.

- (3) The objects of the police service are to prevent and investigate crime, to maintain public order, and to protect and secure the inhabitants of the Republic and their property.

### **Political responsibility**

193. A member of the Cabinet must be responsible for policing.

### **Control of police service**

194. (1) The President, as head of the national executive, 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 over and manage the police service 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.<sup>57</sup>
  - (4) Provincial commissioners are responsible for policing-
    - (a) as prescribed by national legislation; and
    - (b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).<sup>58</sup>

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57 The DP proposes the following formulation -  
“The National Commissioner must, in consultation with the responsible member of the Executive Council of a province, appoint a woman or a man as provincial commissioner, in accordance with national legislation.”

58 DP proposes the following formulation -  
“The National Commissioner may, in accordance with national legislation, direct the provincial commissioners, who are each responsible for policing in their provinces in operational matters; but, each provincial commissioner shall be subject to policy directions from the responsible member of the Executive Council of a province. The National Commissioner must consult each provincial commissioner with regard to the police service budget for the province concerned.”



- (5) Each provincial government is responsible for monitoring and oversight of the conduct and efficiency of the police service, and for cultivating good relations between the police and the rest of the community in its province.<sup>59</sup>

#### **Police civilian secretariat**

195. 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 perform any functions entrusted to it by that Cabinet member, or by the legislation.

## **INTELLIGENCE**

#### **Establishment and control of intelligence services**

196. (1) Any intelligence service, other than the intelligence divisions of the defence force and police service, may be established only by the President as head of the national executive, and only in terms of national legislation.
- (2) The President as head of the national executive 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**

197. National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence divisions of the defence force and police service, and must provide for -

- (a) co-ordination of all intelligence services; and
- (b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by at least two thirds of the members of the National Assembly.

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59 DP reserves its position on 194(5) as well as 192(1) and (2); it believes provincial executive should have more power in order to fulfil their responsibilities in relation to policing. In addition the DP believes 'police' should form part of Schedule 5.

DP proposes the following -

"Each provincial government is accountable, through the responsible member of the Executive Council, and as may be developed by provincial legislation, for crime prevention, visible policing, protection services and public order in a province, as well as for developing mechanisms to monitor and oversee the conduct and efficiency of the police service and good community-police relations in a province."

## CHAPTER 12 TRADITIONAL LEADERS

### **Recognition**<sup>60</sup>

198. (1) The institution, status and role of traditional leadership, according to customary law, are recognised.
- (2) A traditional authority that observes a system of customary law may continue to function subject to any applicable legislation and customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

### **Councils of traditional leaders**

199. National or provincial legislation may provide for the establishment of councils of traditional leaders to deal with matters of common interest.

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60 TRT considers that the formulation of subsection (1) and (2) is problematic and that it needs reformulation.

## CHAPTER 13 FINANCE

### GENERAL FINANCIAL MATTERS

61

#### National Revenue Fund

200. (1) There is a National Revenue Fund into which all money received by the national government must be paid.
- (2) No money may be withdrawn from the National Revenue Fund except in terms of an appropriation by an Act of Parliament, or as a direct charge in terms of subsection (2).
- (3) The following items are direct charges against the National Revenue Fund -
- (a) a province's equitable share of revenue raised at national level; and
  - (b) The salaries, allowances and benefits payable to members of the National Assembly, and to the permanent delegates to the National Council of Provinces.

#### Equitable shares and allocations of revenue<sup>62</sup>

- 201 (1) Revenue raised at national level must be equitably divided among the national, provincial and local levels of government in accordance with the following principles:
- (a) The division of revenue must be in terms of national legislation adopted after the provincial governments and organised local government have been consulted and any recommendations of the Financial and Fiscal Commission have been considered.
  - (b) The national legislation must take into account -
    - (i) the national interest;
    - (ii) any provision that must be made in respect of the national debt;
    - (iii) the needs and interests of the national government determined by objective criteria;
    - (iv) the need to ensure that the provinces and municipalities are able to provide basic services and exercise the functions allocated to them;
    - (v) the fiscal capacity and efficiency of provinces and municipalities;
    - (vi) developmental and other needs of local government and each province;
    - (vii) economic disparities within and among provinces;
    - (viii) obligations of provinces and municipalities in terms of national legislation; and

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61 This section has been reorganized to incorporate the section (previously numbered 148) dealing with national sources of provincial and local government revenue so that all principles concerning the distribution of revenue raised nationally are dealt with in the same place.

62 The Sub-committee agreed to delete the following formulation:  
 193(3) The allocation of revenue by the national government -

- (a) to a provincial or local government may be made only in terms of an appropriation by an Act of Parliament; and
- [(b) to a local government must be made, ordinarily, through the provincial government of the province in which the local government is located.]

- (ix) the stability of revenue shares and allocations.<sup>2</sup>
- (2) Each province's equitable share of the provincial share of the revenue must be determined in accordance with the principles set out in subsection (1) and the following additional principles:
- (a) Each province is entitled to an equitable share of revenue raised at national level to enable it to provide basic services and exercise the functions allocated to it.
  - (b) Additional revenue raised by provinces may not be deducted from their share of revenue raised at national level, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces that do not raise revenue commensurate with their fiscal capacity and tax base.
- (3) The provisions of subsections (2) (a) and (b) apply to local government, with the changes required by context.
- (4) Local government or a province may receive other allocations from the national government's share of national revenue, either conditionally or unconditionally. Those allocations, and any conditions on which they may be made, must be determined in accordance with the principles set out in subsection (1).
- (5) A province's equitable share of revenue raised at national level must be transferred to the province expeditiously and without deduction except when the transfer has been stopped in terms of section 203.
- (6) A province must provide for itself any resources that it requires, in terms of a provision in its provincial constitution, that are additional to its requirements anticipated by this Constitution.

### **National, provincial and municipal budgets**

- 202 (1) Budgets and budgetary processes must promote transparency, accountability, and the effective financial management of the economy, debt and the public sector.
- (2) National legislation must prescribe -
- (a) the format of national, provincial and municipal budgets;
  - (b) when budgets must be tabled in Parliament and provincial legislatures; and
  - (c) that budgets at all levels of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.
- (3) Budgets at all levels of government must contain estimates of revenue and expenditure, and proposals for financing any anticipated deficit for the period to which they apply, and must differentiate between capital and current expenditure.

### **Treasury control**

- 203 (1) National legislation must establish a national treasury and prescribe

measures to ensure both transparency and expenditure control at every level of government, by introducing -

- (a) generally recognised accounting practice;
  - (b) uniform expenditure classifications; and
  - (c) uniform treasury norms and standards.
- (2) The National Treasury may stop the transfer of funds to any organ of state for serious or persistent material financial maladministration.
- (3) A decision to stop the transfer of funds to a province -
- (a) may be enforced immediately but will lapse retrospectively unless Parliament<sup>63</sup> approves it within 30 days; and
  - (b) may not stop the transfer of funds for more than 120 days.
  - (c) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time.
  - (d) Before Parliament may approve or renew a decision -
    - (i) the Auditor-General must report to Parliament; and
    - (ii) the province must be given an opportunity to state its case and answer the allegations against it.
  - [(e) A majority of the members of Parliament must be present when Parliament approves the decision.]<sup>64</sup>

### **Contracts for goods and services**

204. When organs of state contract for goods or services, they must do so in accordance with national and provincial legislation which establishes a system which is fair, transparent, competitive and cost-effective.

### **Government guarantees**

205. (1) The national government, a province or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.
- (2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.
- (3) Each year, every government must publish a report on the guarantees it has granted.

### **Remuneration of persons holding public office**

206. (1) National legislation must establish a framework for determining-
- (a) the salaries, allowances and benefits of members of National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders;
  - (b) the upper limit of salaries, allowances or benefits of members of

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63 The role of the National Council of Provinces in making this decision is still to be settled.

64 To be reconsidered when Parliament and COP are finalised. The DP proposes a majority in each house would be needed to approved the decision.

- provincial legislatures, members of Executive Councils and members of municipal councils; and
- (c) the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution.
- (2) National legislation must establish an independent commission to make recommendations concerning salaries, allowances and benefits as anticipated by this section.
- (3) Parliament may adopt the legislation referred to in subsections (1)(a) and (b) only after considering any recommendations of the commission established in terms of subsection (2).
- (4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsections (1)(a) and (b) only after considering any recommendations of the commission established in terms of subsection (2).

## **FINANCIAL AND FISCAL COMMISSION**

### **Establishment and functions**

207. (1) There is a Financial and Fiscal Commission for the Republic to make recommendations anticipated in this Chapter or in national legislation to Parliament, provincial legislatures and any other authorities determined by national legislation.
- (2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.
- (3) The Commission must function in accordance with national legislation and, in performing its functions, must consider all relevant factors including those listed in section 201(1)(b).

### **Appointment and tenure of members**

208. (1) The Commission consists of the following women and men appointed by the President as head of the national executive -
- (a) a chairperson and a deputy chairperson who are full-time members;
- (b) nine persons, each of whom is nominated by the Executive Council of a different province; and
- (c) seven persons, some of whom must be experts in local government finance.
- (2) Members of the Commission must have appropriate expertise.<sup>65</sup>
- (3) Members may serve for a term established in terms of national legislation. During a member's term of office the President may remove the member from office on grounds of misconduct, incapacity or incompetence.

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65 The DP proposes a provision in the interpretation section stating that no member of any commission established in terms of the constitution may hold office in a political party.

### **Reports**

209. The Commission must report regularly both to Parliament and to provincial legislatures.

## **CENTRAL BANK**

### **Establishment**

210. The South African Reserve Bank is the central bank of the Republic and is regulated by national legislation.

### **Primary object**

211. (1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interests of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank must perform any functions in pursuit of its primary object independently and without fear, favour or prejudice; but, there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

### **Powers and functions**

212. The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, and must be determined by national legislation.

## **PROVINCIAL AND LOCAL FINANCIAL MATTERS**

### **Provincial Revenue Funds**

213. (1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid.

(2) No money may be withdrawn from a Provincial Revenue Fund except in terms of an appropriation by a provincial Act; [but, revenue allocated to a municipality through a province in terms of sections 201(4) is a direct charge against the provincial revenue fund.]

### **Provincial taxes**

214. (1) A provincial legislature may impose -

- (a) any tax, levy or duty other than income tax, value-added tax, general sales tax or customs duties;<sup>66</sup> and
- (b) flat-rate surcharges on the tax bases of any taxes, levies or duties that are imposed by national legislation, other than the tax bases of corporate income tax, value-added tax or customs duties.

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges -

- (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across

- provincial boundaries or the national mobility of goods, services, capital or labour; and
- (b) must be regulated by national legislation which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

### **Municipal rates and taxes**

215. (1) A municipality may impose rates on property and, subject to national legislation, may impose other taxes, levies and duties; but, a local government may not impose any income tax, value-added tax, general sales tax, surcharge or customs duty.
- (2) The legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.<sup>67</sup>

### **Provincial and municipal loans**

216. (1) A province or a municipality may raise loans for capital or current expenditure in accordance with reasonable conditions determined by national legislation; but, loans for current expenditure -
- (a) may be raised only when necessary for bridging purposes during a fiscal year; and
- (b) must be repaid within twelve months.
- (2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.<sup>68</sup>

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67 The NP and DP want a provision requiring a uniform tax structure in each local government's area of jurisdiction.

68 The DP is considering the need to include the following provision:  
"Provincial user charges  
18AA provincial legislature may impose user charges after considering any recommendations of the Financial and Fiscal Commission.



## CHAPTER 14 GENERAL PROVISIONS

### INTERNATIONAL LAW

#### **International agreements**

217. (1) An international agreement binds the Republic only if it has been approved by resolution in both the National Assembly [and the National Council of Provinces].
- (2) Despite subsection (1), an international agreement of a technical or administrative nature entered into by the national executive binds the Republic without approval by the National Assembly [and the National Council of Provinces], but must be tabled in the National Assembly [and the National Council of Provinces] within a reasonable time.
- (3) Any international agreement becomes law in the Republic when it is enacted into law by national legislation.<sup>69</sup>
- (4) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.<sup>2</sup>

#### **Customary international law**

218. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

#### **Application of international law**

219. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Transition and commencement

#### **Diligent performance of obligations**

220. All constitutional obligations must be performed diligently and without delay. Constitution Complementary Act, 1996 221.
- (1) The Constitution Complementary Act, 1996, is for all purposes deemed to be part of the Constitution. [Sections . . . . of that Act] may not be amended or repealed other than in accordance with section . . . of the Constitution.
- (2) Any reference to the Constitution, either in the Constitution or in any legislation, must be construed equally as a reference to the Constitution Complementary Act, 1996.

#### **Short title and commencement**

222. This Act is called the Constitution of the Republic of South Africa, 1996, and

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<sup>69</sup> This term covers both an Act of Parliament and subordinate legislation (e.g. proclamation in terms of an enabling statute.)

comes into force on a date set by the President by proclamation in the national Government Gazette.

## **SCHEDULE 1 NATIONAL FLAG**

### **Flag**

- (1) The national flag is rectangular; it is one and a half times longer than it is wide.
- (2) It is black, gold, green, white, chilli red and blue.
- (3) It has a green Y-shaped band that is one fifth as wide as the flag. The centre lines of the band start in the top and bottom corners next to the post, converge in the centre of the flag, and continue horizontally to the middle of the free edge.
- (4) The green band is edged, above and below in white, and on the post end, in gold. Each edging is one fifteenth as wide as the flag.
- (5) The triangle next to the post is black.
- (6) The upper horizontal band is chilli red, and the lower horizontal band is blue. Each band is one third as wide as the flag.

## **SCHEDULE 2 OATHS OF OFFICE AND SOLEMN AFFIRMATIONS**

### **Oath of office or solemn affirmation of President**

1. The President, before the President of the Constitutional Court, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President of the Republic of South Africa, I A.B. swear / solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always -

- promote that which will advance, and oppose all that may harm, the Republic;
- protect and promote the fundamental rights of all South Africans;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

### **Oath of office or solemn affirmation of Deputy President**

2. The Deputy President, before the President of the Constitutional Court, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I A.B. swear / solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always -

- promote that which will advance, and oppose all that may harm, the Republic;
- be a true and faithful counsellor;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

### **Oath of office or solemn affirmation of Deputy President, Ministers and Deputy Ministers**

3. The Deputy President<sup>70</sup>, and each Minister and Deputy Minister, before the President of the Constitutional Court or another judge designated by the President of the Constitutional Court, must swear / affirm as follows:

I, A.B. swear / solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Deputy President / Minister / Deputy Minister with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the duties of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

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<sup>70</sup> TRT suggests that there can be a separate oath for the Deputy President, (as in paragraph 2) or the same oath as used for other Cabinet members.

**Oath of office or solemn affirmation of Members of the National Assembly, Permanent Delegates to the National Council of Provinces and members of provincial legislatures**

4. Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the President of the Constitutional Court or a judge designated by the President of the Constitutional Court, must swear or affirm as follows:  
I, A.B. swear / solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic, and I solemnly promise to perform my functions as a member of the National Assembly/ permanent delegate to the National Council of Provinces/member of the legislature of the province of CD to the best of my ability.

**Oath of office or solemn affirmation of Premiers and members of provincial Executive Councils**

5. The Premier of a province, and each member of the Executive Council of a province, before the President of the Constitutional Court or another judge designated by the President of the Constitutional Court, must swear / affirm as follows:  
I, A.B. swear / solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier / member of the Executive Council of the province of CD with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the duties of my office conscientiously and to the best of my ability.  
(In the case of an oath: So help me God.)

**Oath of office or solemn affirmation of Judicial Officers**

6. (1) Each judge or acting judge, before the Chief Justice of the Supreme Court of Appeal or another judge designated by the Chief Justice, must swear or affirm as follows:  
I, A.B. swear / solemnly affirm that, as a Judge of the Constitutional Court/ Supreme Court of Appeal / High Court of EF/ GH Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution; and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.  
(In the case of an oath: So help me God.)
- (2) A person appointed to the office of Chief Justice of the Supreme Court of Appeal who is not already a judge at the time of that appointment must swear or affirm before the President of the Constitutional Court.
- (3) Judicial officers, and acting judicial officers, other than judges, must swear / affirm in terms of national legislation.

## **SCHEDULE 3 ELECTION PROCEDURE: CONSTITUTIONAL OFFICE BEARERS**

### **Application**

1. The procedure set out in this Schedule applies whenever -
  - (a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;
  - (b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or
  - (c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

### **Nominations**

2. The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the meeting.

### **Formal requirements**

3. (1) A nomination must be made on the form prescribed by the rules mentioned in paragraph 8.
  - (2) The form on which a nomination is made must be signed -
    - (a) by two members of the National Assembly, if the President or the Speaker or Deputy Speaker of the Assembly is to be elected;
    - (b) on behalf of two provincial delegations, if the Chairperson or a Deputy Chairperson of the National Council of Provinces is to be elected; or
    - (c) by two members of the relevant provincial legislature, if the Premier of the province or the Speaker or Deputy Speaker of the legislature is to be elected.
  - (3) A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.

### **Announcement of names of candidates**

4. At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but must not permit any debate.

### **Single candidate**

5. If only one candidate is nominated, the person presiding must declare that candidate elected.

### **Election procedure**

6. If more than one candidate is nominated -
  - (a) a vote must be taken at the meeting by secret ballot;
  - (b) each member present, or if it is a meeting of the National Council of Provinces, each province represented, at the meeting may cast one vote; and
  - (c) the person presiding must declare elected the candidate who receives a majority of the votes.

### **Elimination procedure**

7. (1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with paragraph 6. This procedure must be repeated until a candidate receives a majority of the votes.
- (2) When applying subparagraph (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.

#### **Further meetings**

8. (1) If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days, at a time determined by the person presiding.
- (2) If a further meeting is held in terms of subsection (1), the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.

#### **Rules**

9. (1) The President of the Constitutional Court must make rules prescribing -
  - (a) the procedure for meetings to which this Schedule applies;
  - (b) the duties of any person presiding at a meeting, and any person assisting the person presiding;
  - (c) the form on which nominations must be submitted; and
  - (d) the manner in which voting is to be conducted.
- (2) These rules must be made known in the way that the President of the Constitutional Court determines.

## **SCHEDULE 4 CONCURRENT FUNCTIONAL AREAS**

### **PART A**

Agriculture

Abattoirs

Airports, other than international and national airports

Animal control and diseases

Casinos, racing, gambling and wagering, excluding lotteries and sports pool

Consumer protection

Cultural affairs

Education at all levels, excluding university and technikon education

Environment

Health Services

Housing

Indigenous Law and customary law

Language policy and the regulation of official languages within a province subject to section 6

Local government, subject to the provisions of Chapter 10

Markets and pounds

Nature conservation, excluding national parks, national botanical gardens and marine resources

Provincial public media

Provincial sport and recreation

Public transport

Regional planning and development

Road traffic regulation

Roads

Soil conservation

Tourism

Trade and industrial promotion

Traditional authorities

Urban and rural development

Welfare services

### **PART B**

Any matter where a provision of the Constitution specifically requires the enactment of provincial legislation.



**SCHEDULE 5  
LOCAL GOVERNMENT  
LEGISLATIVE COMPETENCES**

Child care facilities  
Cleansing  
Community services  
Cultural services  
Economic and social development  
Environmental protection and conservation  
Municipal elections  
Electricity  
Housing  
Land-use planning and development  
Library services  
Licensing  
Parks and recreation  
Planning  
Primary health care  
Primary welfare services  
Produce markets  
Protection  
Public works  
Rates, tariffs and taxes  
Roads and storm water management  
Sanitation  
Traffic  
Transportation facilities  
Water  
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