THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CERTIFICATION OF THE NATIONAL CONSTITUTION

SUBMISSIONS ON BEHALF OF THE CONSTITUTIONAL ASSEMBLY

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TABLE OF CONTENTS

I N T R O D U C T I O N ..... Page 5

THE BILL OF RIGHTS ..... Page 13
CP II (1) ..... Page 14
UNIVERSALLY ACCEPTED ..... Page 14
17. **"Everyone"** ..... Page 16
18. **Section 36: Limitation of rights** ..... Page 16
19. **Section 37: States of Emergency** ..... Page 18
20. **Section 9: Equality** ..... Page 19
21. **Section 10: Human Dignity** ..... Page 20
22. **Section 11: Life** ..... Page 21
23. **Section 12: Freedom and security of the person** ..... Page 21
24. **Section 13: Slavery, servitude and forced labour** ..... Page 22
25. **Section 14: Privacy** ..... Page 23
26. **Section 15: Freedom of religion, belief and opinion** ..... Page 23
27. **Section 16: Freedom of expression** ..... Page 24
28. **Section 17: Assembly, demonstration, picket and petition** ..... Page 25
29. **Section 18: Freedom of association** ..... Page 26
31. **Section 19: Political rights** ..... Page 27
32. **Section 20: Citizenship** ..... Page 28
33. **Section 21: Freedom of movement and residence** ..... Page 28
34. **Section 22: Freedom of trade, occupation and profession** ..... Page 28
35. **Section 23: Labour relations** ..... Page 29
36. **Section 24: Environment** ..... Page 31
37. **Section 25: Property** ..... Page 32
38. **Section 26: Housing** ..... Page 34
39. **Section 27: Health care, food, water and social security** ..... Page 34
40. **Section 28: Children** ..... Page 34
41. **Section 29: Education** ..... Page 35
42. **Section 30: Language and Culture** ..... Page 36
43. **Section 31: Cultural, Religious and Linguistic Communities** ..... Page 37
45. **Section 33: Just administrative action** ..... Page 37
46. **Section 34: Access to courts** ..... Page 37
47. **Section 35: Arrested, detained and accused persons** ..... Page 38
48. **Comparison of the Bill of Rights with the Two Covenants** ..... Page 38
CP II (2) ..... Page 41
CP II (3) ..... Page 41
CP III (1) ..... Page 43
CP III (2) ..... Page 44
CP III (3) ..... Page 45
CP V ..... Page 46
CP IX ..... Page 47
CP XXVIII ..... Page 49

THE ADMINISTRATION OF JUSTICE ..... Page 54
CPIV ..... Page 55
CPIV ..... Page 57
CPV ..... Page 58
CPVII ..... Page 59
CPVII ..... Page 60

CPVII ..... Page 61

THE STRUCTURE AND FUNCTIONING OF GOVERNMENT ..... Page 62
CP I ..... Page 63
CP VI ..... Page 66
98. **Separation of Function** ..... Page 66
99. **Checks and Balances to Ensure Accountability, Responsiveness, and Openness** ..... Page 67
CP VIII ..... Page 71
102. **Representative Government** ..... Page 71
103. **Multi-party Democracy** ..... Page 72
104. **Regular Elections** ..... Page 74
105. **Universal Adult Suffrage** ..... Page 75
106. **Common Voters' Roll** ..... Page 76
107. **In General, Proportional Representation** ..... Page 76
CP IX ..... Page 77
109. **Freedom of Information in the Legislative Process** ..... Page 77
(a) National Government ..... Page 77
(b) Provincial Government ..... Page 78
110. **Freedom of Information and Executive Decisions** ..... Page 78
CP X ..... Page 80
112. **National Government** ..... Page 80
113. **Provincial Government** ..... Page 82
115. **Municipal Councils** ..... Page 83
CP XIV ..... Page 84
CP XV ..... Page 87
119. **Special Procedures** ..... Page 87
120. **Special Majorities** ..... Page 87
CP XVI ..... Page 89
124. **Levels of Governments** ..... Page 89
CP XVII ..... Page 91
126. **Democratic Representation** ..... Page 91
127. **No Derogation from Principle XIII** ..... Page 91
CP XXIV ..... Page 92
129. **Framework for Local Government** ..... Page 92
130. **The specification of comprehensive powers, functions, and other features of local government.** ..... Page 93
CP XXV ..... Page 96
132. **Fiscal powers and functions common to all spheres of government** ..... Page 96
133. **Fiscal powers and functions which are not common to all spheres of government** ..... Page 97
134. **Different Categories of Local Government** ..... Page 98
CP XXVI ..... Page 99
CP XXVII ..... Page 101
142. **Provincial Representation** ..... Page 101
143. **Recommendations of the Commission** ..... Page 101
144. **Factors to be taken into account** ..... Page 101
CP XXIX ..... Page 103
CP XXX ..... Page 105
CP XXXI ..... Page 106
165. **Defence Force** ..... Page 106
169. **Police Service** ..... Page 107
175. **Intelligence Services** ..... Page 108

CP XXXII ..... Page 109
CP XXXIII ..... Page 110
OBJECTIONS ..... Page 111

PROVINCIAL POWERS ..... Page 112
INTRODUCTION ..... Page 113
DP OBJECTION 1 ..... Page 114
DP OBJECTION 2 ..... Page 115
DP OBJECTION 3 ..... Page 116
DP OBJECTIONS 3.3. AND 3.4 ..... Page 118
DP OBJECTION 3.5 ..... Page 119
DP OBJECTION 3.6 ..... Page 121
DP OBJECTION 3.7 ..... Page 122
DP OBJECTION 3.8 ..... Page 123
DP OBJECTION 3.9 ..... Page 124
DP OBJECTION 3.10 ..... Page 125
DP OBJECTION 4.1. ..... Page 126
DP OBJECTION 4.2. ..... Page 127
DP OBJECTION 4.3. ..... Page 128
DP OBJECTION 4.4. ..... Page 129
OBJECTIONS OF THE INKATHA FREEDOM PARTY AND THE NATIONAL PARTY ..... Page 130

TRADITIONAL AUTHORITIES ..... Page 131
CP XIII ..... Page 132
221. **Indigenous law as a source of law subject to the Constitution and legislation** ..... Page 132
222. **Provincial constitutions and traditional monarchs** ..... Page 133

CULTURE, COLLECTIVE RIGHTS, AND SELF-DETERMINATION ..... Page 134
CP XI ..... Page 135

SCHEDULES ..... Page 137
A. CONSTITUTIONAL PRINCIPLES IN RELATION WITH TO TEXT ..... Page 137
B. TEXT IN RELATION TO CONSTITUTIONAL PRINCIPLES ..... Page 142
C. CP'S, NEW TEXT AND THE 1993 CONSTITUTION ..... Page 155
D. PROVINCIAL LEGISLATIVE POWERS: 1993 CONSTITUTION vs TEXT ..... Page 170
E. PROVINCIAL EXECUTIVE POWERS: 1993 CONSTITUTION vs TEXT ..... Page 186
F. AFFIDAVIT OF HASSEN EBRAHIM ..... Page 189

I N T R O D U C T I O N

1. The National Assembly and the Senate, sitting jointly in terms of section 68 of the 1993 Constitution as the Constitutional Assembly, have passed a text of the Constitution of the Republic of South Africa in accordance with the procedures and with the requisite majorities provided for in section 73 of the Act, on 8 May 1996. The voting in the Constitutional Assembly was:

Vote on Second Reading of the Constitution of the Republic of South Africa Bill [B34A - 96] by all members of the Constitutional Assembly:

No of members present:	435	
No of members in favour of the Question:	421	
No of members opposed to the Question:		2
No of members abstaining:		12

Vote on provisions of the Bill relating to the boundaries, powers and functions of provinces, by members of the Constitutional Assembly who are members of the Senate:

No of members (i.e. Senators) present:	83	
No of members in favour of the Question:		80
No of members opposed to the Question		0
No of members abstaining		3

A certificate to the effect that the text was passed in accordance with the procedures and the necessary majorities has been filed by the Chairperson of the Constitutional Assembly, Mr. Cyril Ramaphosa and the Secretary of the Constitutional Assembly.[1]

2. The Constitutional Court is now called upon by section 71 of the 1993 Constitution to

[1] Inkatha Freedom Party ('IFP') members of the National Assembly and of the Senate were absent during the deliberations and the voting in the Constitutional Assembly. Their numbers are:
Total IFP members in National Assembly: 43
Total IFP Members in Senate: 5
Total IFP Members of Constitutional Assembly: 48

certify that all the provisions of the text comply with the constitutional principles forming part of the 1993 Constitution as Schedule 4. Consitutional Assemblies or National Conventions usually do not submit the text of the Constitution they have written to a court for approval. We have not been able to find a precedent for what the Constitutional Court is required to do in this matter.

3. We submit that in order to interpret the Constitutional Principles and decide whether or not the submitted text complies with them, the Court should have regard to their genesis. The Constitutional Principles form part of the 1993 Constitution. The Constitution as a whole, and particularly at its end, defines itself as

> *a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.*

As the Court has stated,[2] the Constitution is a historic bridge in two senses: a bridge between the past and the present, and also between the present and the future, which will be governed in terms of the new Constitution. The most important element in the building of that bridge is the Constitutional Principles. We submit that the Constitutional Assembly has satisfied its obligation to pass a constitutional text which accords with the Constitutional Principles, as it was required to do by section 71.

4. We will show that the New Text not only complies with the constitutional principles but generally goes much further than the Constitutional Assembly was required to, in that it:

(a) provides for and protects the fundamental rights, freedoms and civil liberties which are universally protected;

(b) establishes an independent judicial system;

(c) provide democratic structures and functions of government with the necessary checks and balances;

(d) provide the allocation of national, provincial and local powers;

(e) recognise traditional authorities and the right to self-determination.

5. The writing of a constitution by an elected constituent assembly which was obliged to have regard to a set of principles, and not entirely free, occurred in Namibia. On 21 November 1989, Namibia's Constituent Assembly formally adopted UN Resolution 435, which incorporated a set of constitutional principles laid down in 1982 by the Western Contact Group.[3] Although the Constitutional Principles may have been

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[2] Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others, 1995 (4) SA 877 (CC) at 895D-G per Chaskalson P.

[3] Marinus Wiechers, "Namibia: The 1982 Constitutional Principles and Their Legal Significance" (1990) SAYIL

inspired in part by the Namibian experience, their provenance is deeply rooted in South Africa's struggle for democracy.

6. South Africa was ruled by an oligarchy accustomed to exercising autocratic powers from 1910 to 1944. There were calls for change to democratic rule. Amongst the first were African Claims, formulated in 1943[4], and the Freedom Charter[5], in 1955. The Atlantic Charter in 1941, and the Universal Declaration of Human Rights in 1948, probably had an effect on the South African documents, and were no doubt the beginning of the international movement for democratic reform in South Africa. The call for the termination of South Africa's mandate to rule South-West Africa and for the establishment of Namibia as an independent state with a constitution that complied with a set of principles may have had led to the adoption of the Harare Declaration in 1989[6]. The South African Law Commission's interim report on Fundamental Human Rights' (No. 58 of 1991) recommendation that group political rights theories favoured by the then-government were inconsistent with democracy and only individual rights in the Bill of Rights became more acceptable even to those who opposed fundamental change in South Africa.

7. Historically, the principles arose out of the negotiating process as the result of a compromise between two extremes - on the one hand, the view that the multi-party negotiation at CODESA was an illegitimate forum in which to draft a constitution because the delegates there were unelected and unaccountable; and on the other hand, the fear that a constitutional assembly could be dominated by a single party, who could then draft the constitution of its choice. The principles struck a middle road, by being sufficiently precise so as to guarantee that the constitution-making body did not stray from certain fundamental notions, but not so detailed as to pre-empt the work of that body. The manner in which the constitutional principles came into being is recorded in Professor Hugh Corder's article, "Towards a South African Constitution".[7]

8. We submit that the Court ought not approach the matter as if the constitutional principles and the process in the Constitutional Assembly are in tension. On the contrary, both were different ways of achieving the same goal - to ensure the legitimacy

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4 Thomas Karis and Gail M. Gerhart: *Protest to Challenge, A Documentary History of African Politics in South Africa 1882 - 1964.* Vol. 2, pp. 209-211: Africans' Claims in South Africa including "The Atlantic Charter from the Standpoint of Africans within the Union of South Africa" and "Bill of Rights" adopted by the ANC Annual Conference.

5 Adopted by the Congress of the People in on June 26 1955 in *A Documentary History* supra, Vol. 3, at p. 205-208.

6 (1989) 5 SAJHR, p. 258-260. For the meaning and effect of the Harare Declaration and the ANC's constitution guidelines see: J.D. van der Vyver (1989) 5 SA JHR 133. The Democratic Draft Bill of Rights "Freedom under the Rule of Law: Advancing Liberty in the New South Africa" was published in May 1993. The National Party Government published "Proposals on Fundamental Rights" in 1992.

7 (1994) 57 Modern Law Review p. 491, particularly at 514-517. See also: Francois Venter, "Requirements for a New Constitutional Text: The Imperatives of the Constitutional Principles" (1995) 112 SALJ 32, especially at p. 32-33. Gretchen Carpenter, "The Republic of South Africa Constitution Act 200 of 1993 - an overview" (1994) 9 SAPL p. 222 at 227.

of the New Text. The complementary purposes of the constitutional principles and the process of constitutional drafting should condition the interpretation of the principles in the following way: a purposive reading of the principles which permits a range of choice for the Constitutional Assembly to determine the precise nature of the institutions and mechanisms laid down in the constitution does not undermine the legitimacy of the New Text; on the contrary, it strengthens it.

9. The Court has given some attention to the history and function of the constitutional principles. In the Executive Council of the Western Cape, Chaskalson P said at p. 8931-J:

> The constitutional principles are a set of 34 provisions in Schedule 4 of the Constitution. They represent principles which were agreed upon and adopted by the multi-party negotiating process to provide definitive guidelines for the drafting of the final constitution.

at p. 895B:

> The constitutional principles have a higher status than the rest of the constitution in that they cannot be amended and again this particular status stems from their special function in the matrix of the two-stage constitution-making process.

and again at p. 895E-F that the Interim Constitution is:

> a historic bridge ... not just between the past, with all that characterised it, and the present, which is governed by the Constitution, but also between the present and the future, which will be governed in terms of the new Constitution ... The Constitutional Principles form part of the future-directed framework, as do certain other provisions contained elsewhere in the current Constitution.

10. In addition to the history of the constitutional principles, their wording is a useful guide to their interpretation. A careful examination of the constitutional principles reveals that they fall into three broad categories, which differ in the degree to which they specify the features of the Final Text:

(a) An outer circle pertaining to the nature of the state, e.g. CPs I to XVI.

(b) A middle circle of more directive principles, e.g. CP XVII.

(c) An inner circle of principles such as CPs XXIX and XXX, with more specific instructions that must be followed.

The grouping of the principles into different categories is an aid to their interpretation. The outer circle of principles left a broader range of choice to the Constitutional Assembly in drafting the text, and thus should be interpreted more generously. The innermost circle left a narrower range of choice to the Constitutional Assembly, and

should be interpreted more restrictively. However, despite the usefulness of classifying the principles, it would not be helpful for the Court to group them into precise categories, because their degree of specificity and generality varies along a continuum. Moreover, the reasons and manner in which the principles came into being clearly indicate that all principles, despite their level of specificity, should be interpreted to leave some scope for political judgment by the Constitutional Assembly.

11. In interpreting a particular principle and others, it may be germane to the matter in issue that they be read together. The constitutional principles do not stand apart, but outline in combination the parameters of the new constitutional order. As a result, they should not be interpreted in isolation from one another, but as a whole. Professor Tribe has made this point with regard to constitutional interpretation:

> It seems axiomatic that, to be worthy of the label, any "interpretation" of a constitutional term or provision must at least seriously address the entire text of which a particular fragment has been selected for interpretation and must at least take seriously the architecture of the institutions the text defines.[8]

> Reading the constitutional principles together has the effect of altering their specificity. For example, CP XIX, if read alone, may appear specific and mechanical, but if read together with CP XVIII(2), CP XX, and CP XXI(2), it becomes a less strict yardstick against which to measure provincial powers in the Text. Furthermore, reading the principles together may be a way of reconciling principles which pull in opposite directions. When there are tensions between the principles, an attempt should be made to balance them in a manner which accords with the principles as a whole.

12. In dealing with the novel task of interpreting constitutional principles, the Court will no doubt have reference to maxims of constitutional interpretation, since the constitutional principles are part of the Interim Constitution. Some general guidance can be gleaned from the judgment of Mahomed JA (as he was then) in S v Acheson[9] where he said:

> The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between government and the governed. It is a 'mirror reflecting the national soul'. The identification of the ideals and aspirations of a nation. The articulation of the values wanting its people and disciplining its government. The spirit and tenure of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

The purposive approach to constitutional interpretation has been adopted by the Court. In S v Makwanyane and Another,[10] Chaskalson P cited with approval the judgment of Kentridge AJ giving judgment for the Court in S v Zuma and Others[11], where he discussed the importance of a purposive interpretation to constitutional adjudication.

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8 Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation" (1995) 108 Harv L Rev 1221 at 1233.

9 1991 (2) SA 805 NmHC at 813A-C.

10 1995 (3) SA 391 (CC) at 403C-G

11 1995 (2) (CC) SA 641 at 650-651 paras 13, 14 and 15.

Kentridge JA noted that a purposive interpretation could not be undertaken without due consideration to the South African context:

> regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood.

13. Other judgments have emphasized the importance of the South African context to constitutional interpretation. In Executive Council of the Western Cape, Chaskalson P stated that the power of Parliament to delegate legislative powers to the executive[12]:

> depends ultimately upon the language of the Constitution construed in the light of the country's own history.

This passage was quoted with approval in Dispute Concerning the Constitutionality of Certain Provisions of The National Education Policy Bill, No. 83 of 1995,[13] by Chaskalson P, who contined:

> Our history is different to the history of the United States of America and the language of our constitution differs materially from the language of the United States Constitution.

14. Although the Court has stated that the principles are "intended to be of substantive application in the drafting and adoption of the new Constitution",[14] it is submitted that certain provisions of the Interim Constitution may nevertheless be illustrative of how the principles may be implemented. For example, the Democratic Party's objection (no. 13) that the President's power to pardon and reprieve offenders, and to remit any fines, penalties, and forfeitures, is inconsistent with Principles V, VI, and VII, would have to reconciled with section 82(k) of the Interim Constitution. That provision grants the President the power:

> to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures.

Granting these powers to the head of the executive branch is a common practice found in other constitutions. To interpret the principles without reference to the Interim Constitution, as the Democratic Party has done, is to completely ignore an important source of constitutional experience which could assist the Court.

15. For the convenience of the Court we attach hereto comparative tables marked “A”, “B” and “C” to the provisions in the Interim Constitution and the New Text.

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12 Executive Council of the Western Cape at 904A.

13 1996 (4) BCLR 518 (CC) at 528.

14 Executive Council of the Western Cape at 896F.

THE BILL OF RIGHTS

CP II (1): "EVERYONE SHALL ENJOY ALL UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS, FREEDOMS AND CIVIL LIBERTIES"

16. "**Universally Accepted"**

(a) The requirement that the New Text provide for and protect all "universally accepted" fundamental rights, freedoms and civil liberties, is imprecise and difficult to apply with precision. We submit that the following guidelines are useful in its interpretation and application:

(i) Universally accepted fundamental rights, freedoms and civil liberties, are not limited to those recognised by all states. Our courts have held in relation to the requirement of "universal acceptance" of rules of customary international law, that widespread and general recognition suffices[15].

(ii) The requirement should be purposively interpreted with due regard to its context as part of the Interim Constitution[16]. It is apparent from the provisions of the Interim Constitution[17], that the purpose of the constitutional principles was to set an immutable standard for the New Text. The purpose of the requirement that all universally accepted fundamental rights, freedoms and civil liberties be provided for and protected, could never have been limited to those fundamental rights, freedoms and civil liberties recognised by every single state. Such an interpretation would reduce the requirement to the lowest common denominator which requires no more than that the New Text meet the standard of the worst human rights offenders in the world.

(iii) We submit that it is apparent from the Interim Constitution as a whole and its preamble, postscript and section 33(1) in particular, that it seeks to uphold the values of open and democratic societies based on freedom and equality. We accordingly submit that the requirement of universal acceptance means acceptance by open and democratic societies based on freedom and equality.

(iv) It follows that the fundamental rights, freedoms and civil liberties which have to be provided for and protected in the New Text, are those about which there is widespread and general consensus in open and democratic societies based on freedom and equality, that they constitute the fundamental rights, freedoms and civil liberties to which

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15 Inter-Science Research & Development Services v Republica Popular de Mozambique 1980 (2) SA 111 (T) 125; S v Petane 1988 (3) SA 51 (C) 56-57.

16 In terms of section 232(4) of the Interim Constitution, this requirement "shall for all purposes be deemed to form part of the substance of this Constitution" despite the fact that it is embodied in a schedule to the Constitution.

17 particularly sections 71(1)(a) and 74(1)

every person is entitled.

(v) The constitutional principle only concerns itself with those rights which are universally accepted "fundamental" rights, freedoms and civil liberties. It in other words demands protection only of those rights of which it is universally accepted that they constitute "fundamental" rights, fundamental freedoms and fundamental civil liberties.

(vi) The requirement that "everyone" shall enjoy the fundamental rights, freedoms and civil liberties which are universally accepted, implies that it is confined to individual rights, freedoms and civil liberties. Only those which are universally accepted as the rights, freedoms and civil liberties to which everyone is entitled, need to be provided for and protected. It follows that the principle does not demand provision for and protection of the collective rights which might vest in peoples or communities but not in individuals.

(vi) We accordingly submit that the principle demands provision for and protection of all those individual fundamental rights, freedoms and civil liberties which enjoy widespread and general recognition as fundamental rights, freedoms and civil liberties in open and democratic societies based on freedom and equality.

(b) There is no definitive list of universally accepted fundamental rights, freedoms and civil liberties.

International treaties and declarations offer a useful but imperfect guide to the fundamental rights, freedoms and civil liberties which enjoy universal acceptance. They are useful because they formulate the scope of the fundamental rights, freedoms and civil liberties concerned and the measure of their international acceptance is usually a matter of record. They are, however, for present purposes imperfect insofar as they concern the obligations of states under international law rather than the rights of their subjects under domestic national law.

National constitutions are also not a reliable guide to that which is universally accepted. They are by definition the product of their own particular history and the socio-political circumstances in which they were created. They are not always exhaustive of the fundamental rights, freedoms and civil liberties accepted within the societies to whom they apply.

(c) Our task is, however, considerably alleviated by the fact that the New Text generally goes much further than merely to provide for and protect the fundamental rights, freedoms and civil liberties which are universally accepted. We will in two ways seek to demonstrate that it does so. We will firstly examine each of the rights entrenched in the Bill of Rights and demonstrate that it is at least as extensive as that which is universally accepted. We will secondly compare the Bill of Rights in the New Text with the two leading international covenants, namely the International Covenant on Civil and

Political Rights and the International Covenant on Economic, Social and Cultural Rights, to check for any omissions from the Bill of Rights of fundamental rights, freedoms and civil liberties which might be regarded as universally accepted.

17. **"Everyone"**

The universally accepted rights, freedoms and liberties have to be afforded to "everyone". Most of the rights are expressly conferred on "everyone". The exceptions seem well within the bounds of what is universally accepted. They are:

(a) The rights associated with citizenship in sections 19 (political rights), 20 (citizenship), 21(3) (freedom of movement within, into and out of SA) and 21(4) (passport).

(b) Section 22 also limits the right freely to choose one's trade, occupation or profession, to citizens. There does not appear to be a universally accepted fundamental right of this kind conferred on non-citizens. The limitation is accordingly permissible.

(c) Certain rights are in their nature unsuited to universal application. They are sections 23(2) to (4) (worker/employer rights), 28 (children's rights) and 31 (the rights of members of cultural, religious or linguistic communities).

(d) In terms of section 8(4) juristic persons enjoy the protection of the Bill of Rights "to the extent required by the nature of the rights and the juristic persons". Whatever the precise meaning of this phrase, it does not violate the constitutional principle because there is no universally accepted rule that juristic persons should be vested with all fundamental rights, freedoms and civil liberties.

18. **Section 36: Limitation of rights**

(a) None of the universally accepted fundamental rights, freedoms and civil liberties is absolute. They are all subject to limitation. The New Text also provides for the limitation of all fundamental rights. Any comparison between the fundamental rights, freedoms and civil liberties which are universally accepted on the one hand, and those which are provided for and protected in the New Text on the other, should accordingly have regard to the extent to which they are subject to limitation. What has to be compared, is not the *prima facie* formulation of the rights before limitation but their "net" content after limitation. We will, where appropriate, have regard to the limitations to which particular rights are subject in their universally accepted form and the limitations to which they are subject in terms of the New Text. It would, however, be useful in general terms, to consider whether the general limitation provision in section 36 of the New Text conforms to universally accepted standards.

(b) Section 36(1) only permits limitation which "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" taking into account all relevant factors including those specifically enumerated. We submit that this requirement by definition ensures that the limitation goes no further than that which is universally accepted. We have already submitted that the requirement of universal acceptance, postulates universal acceptance in all open and democratic societies based on freedom and equality. The general limitations clause, demands of every limitation, that it should be reasonable and justifiable in such a society. Both standards accordingly use the same benchmark, namely the values of open and democratic societies based on human dignity, equality and freedom. The proper application of the general limitation provision would therefore permit limitation only within the bounds of that which is universally accepted.

(c) Few international and national human rights instruments incorporate general limitation provisions:

- The Universal Declaration of Human Rights contains a general limitation provision which permits limitations "as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" - article 29(2)

- The International Covenant on Economic, Social and Cultural Rights also contains a general limitation provision which permits "only such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" - article 4.

- The Canadian Charter of Rights and Freedoms permit only "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" - section 1.

(d) The standard for limitation prescribed by section 36(1) of the New Text, is at least as high as that of the aforegoing general limitation provisions. It can accordingly in general terms clearly be said to be within the bounds of what is universally accepted.

(e) Most other international and national human rights instruments prescribe specific and varying standards for the limitation of particular rights. We will, where appropriate, refer to these standards in our discussion of the rights concerned.

19. **Section 37: States of Emergency**

(a) This section permits and controls the derogation of fundamental rights in the event of a state of emergency. The control of the circumstances under which a state of emergency may be declared and the protection of fundamental rights in any state of emergency, constitute universally accepted norms of international human rights law.

(b) Many international human rights instruments permit the derogation of fundamental rights during a state of emergency but seek strictly to control the circumstances under which a state of emergency may be declared and the extent to which derogation is then permitted. They include,

- the International Covenant on Civil and Political Rights: article 4;
- the European Convention on Human Rights: article 15;
- the European Social Charter: article 30; and
- the American Convention on Human Rights: article 27.

(c) There are a number of standards drafted by private expert bodies which enjoy significant international standing with regard to the rules governing public emergencies. They are,

- the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights;
- the Paris Minimum Standards of Human Rights Norms in a State of Emergency;
- the Turku Declaration of Minimum Humanitarian Standards.

(d) Not all national constitutions expressly provide for and control the derogation of fundamental rights in emergencies. The Canadian Charter for instance makes no such provision beyond its general limitation clause. Examples of constitutions which do expressly provide for and control emergency derogation are the constitutions of,

- India: articles 352 to 360;
- Germany: article 115 and
- Namibia: articles 24 and 26.

(e) The inclusion of an express emergency clause serves to important purposes. The first is to preserve the distinction between the normal legal regime on the one hand, and the legal regime governing exceptional and temporary circumstances constituting a genuine emergency on the other. This distinction is important to prevent emergency measures becoming an institutionalised feature of the normal public order. The second purpose is strictly to control the declaration of an emergency and the exercise of emergency powers by the executive. Fundamental human rights are best protected during a state of emergency if expressly circumscribed rather than to be subject to broad and ill-defined emergency executive powers.

(f) Section 37(1) permits a state of emergency to be declared only if “the life of

the nation is threatened" by public emergency and

“the declaration is necessary to restore peace and

order”.

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l a t u r e i n t e r m s o f s e c t i o n 3 7 (2) a n d t h e j u d i c i a r y

in terms of section 37(3). Sections 37(2)(a) and

4(8) limit and control the derogation of fundamen

tal rights in an emergency.

In terms of section 3

7(3) these limits and controls are also judicially

enforceable.

These restrictions and controls are

well within the parameters of what is universally

accepted.

20. **Section 9: Equality**

(a) The right to equality is also entrenched by CP I, III and V.

(b) The right is found in the following international conventions and declarations:

- The Universal Declaration of Human Rights: article 2
- The United Nations Charter: preamble, article 55(c)
- The International Covenant on Civil and Political Rights: articles 2(1), 4, 26
- The International Covenant on Economic, Social and Cultural Rights: article 2(2)
- The European Convention on Human Rights: article 14
- The American Convention on Human Rights: articles 2(1), 24
- The African Charter on Human and Peoples' Rights: articles 2, 3
- The Convention against Discrimination in Education
- The International Covenant on the Elimination of all forms of Racial Discrimination
- The Convention on the Elimination of all forms of discrimination against Women
- The Convention on the Rights of the Child: article 2(1)

(c) This right is also found in most national constitutions for example:

- The Constitution of the USA: article XIV, section 1
- The German Constitution: article 3

- The Indian Constitution: articles 14, 15, 16

- The Canadian Charter: section 15.

(d) The New Text entrenches the right to equality in section 9 and reinforces this right in sections 1(a) and (b), 3(2), 7(1), 36(1), 37(5)(c), 39(1)(a) and 187.

(e) The protection afforded to this right in section 9 of the New Text, manifestly goes beyond that which is universally accepted, most notably in the following respects:

(i) The right to equality is protected in its own right in sections 9(1) and (2) and is not confined to the prohibition of discrimination in sections 9(3) and (4).

(ii) The section is not confined to formal equality but also aspires to substantive equality. Section 9(2) says that "equality includes the full and equal enjoyment of all rights and freedoms" and permits legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, to promote the achievement of equality.

(iii) The prohibition of discrimination in sections 9(3) and (4) extends to more grounds than those universally accepted (such as sexual orientation), is not limited to the enumerated grounds and binds not only the state but also every other person.

21. **Section 10: Human Dignity**

(a) The right to dignity is a core human rights value which constitutes the justification for a variety of universally accepted fundamental rights (such as the rights to equality, liberty of the person, privacy, personality rights, the right to a name, the right to physical, mental and moral integrity, and the prohibition of cruel and unusual punishment and of slavery, servitude and forced labour) but does not enjoy universal protection in its own right.

(b) The right to dignity does enjoy recognition in certain international instruments such as,

- the Universal Declaration of Human Rights: preamble and section 1

- the African Charter on Human and Peoples' Rights: section 5

- the American Convention on Human Rights: section 11(1).

(c) The right to dignity is expressly recognised in certain national constitutions (such as the German Constitution: article 1) but not in others (such as the constitutions of the USA, India and Canada).

(d) The New Text entrenches the right to dignity in section 10 and reinforces this

right in sections 1(a), 7(1), 36(1), 37(5)(c) and 39(1)(a).

(e) The protection of the right to dignity in the New Text extends further than that which is universally accepted at least insofar as,

- it is protected in its own right;

- it demands of the state not merely to respect but also to protect the dignity of every person; and

- it elevates the dignity of every person to a core value of the constitution.

22. **Section 11: Life**

(a) The right to life is a universally accepted fundamental right but is frequently limited specifically to permit capital punishment[18]. In other words, insofar as the New Text protects the right to life without qualification, it provides greater protection than the right which is universally accepted.

(b) The bearer of the right under the New Text, is "everyone". It is not expressly extended to the protection of pre-natal life. It can however not be said that the protection of pre-natal life is a universally accepted fundamental right, freedom or civil liberty. The varied responses of open and democratic societies is based on human dignity, equality and freedom, to the issue of abortion, make it clear that there is no universally accepted standard which demands the constitutional protection of pre-natal life.

23. **Section 12: Freedom and security of the person**

(a) The prohibition against torture is a peremptory norm of customary international law. No limitation or derogation of this right is permitted. Although the prohibition in section 12(1)(d) of the New Text is nominally subject to limitation in terms of the general limitation provision in section 36(1), no limitation is in fact conceivable because torture can never be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

(b) The rights to freedom and security of the person are universally accepted human rights protected in various forms under international instruments such as,

- the Universal Declaration of Human Rights: articles 3 and 9;

- the International Covenant on Civil Political Rights: article 9;

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[18] S v. Makwanyane 1995(6) BCLR 665 (CC) at 701, paras 80-86.

- the European Convention on Human Rights: article 5;

- the American Convention on Human Rights: article 7;

- the African Charter on Human and Peoples' Rights: article 6;

(c) Various dimensions of these rights are also protected in national constitutions, for example,

- the USA Constitution: article V;
- the Canadian Charter of Rights and Freedoms: sections 7, 9 and 12;

- the German Constitution: article 2(2);

- the Indian Constitution: articles 21 and 22.

(d) The protection the New Text affords to freedom and security of the person, is not limited to section 12. Specific aspects of freedom and security of the person are also protected under sections 21, 22, 35 and 37.[19] All those provisions have accordingly to be taken into account when the New Text is compared with that which is universally accepted. We will deal later with the other provisions which also protect aspects of freedom and security of the person. We submit that the protection afforded by section 12 is at least as extensive as that which is universally accepted.

24. **Section 13: Slavery, servitude and forced labour**

(a) The prohibition of slavery is one of the oldest and most widely accepted fundamental rights. It has hardened into a norm of customary international law from which no derogation is permitted.

(b) The prohibition of slavery, servitude and forced labour is also widely prohibited in international human rights instruments such as,

- the Universal Declaration of Human Rights: article 4 and

- the International Covenant on Civil and Political Rights: article 8.

(c) The prohibition is also incorporated in most national constitutions such as,
- the Constitution of the USA: article XIII and

- the German Constitution: article 12.

(d) The right is entrenched without qualification in section 13 of the New Text. It is also reinforced by the entrenchment of every citizen's right freely to choose

[19] Ferreira v. Levin NO 1996(1) BCLR 1 (CC) at 100 paras 169-185.

their trade, occupation or profession in terms of section 22 of the New Text.

(e) Section 13 which prohibits slavery, servitude and forced labour in unqualified terms, accordingly goes at least as far as that which is universally accepted.

25. **Section 14: Privacy**

(a) The right to privacy is recognised in a number of international instruments such as,

- the Universal Declaration of Human Rights: article 12;
- the International Covenant on Civil and Political Rights: article 17;
- the European Convention on Human Rights: article 8(1); and
- the American Convention on Human Rights: articles 11, 14.

(b) Very few national constitutions protect the right of privacy as such but some of them, such as the constitutions of the USA and Canada, protect certain aspects of the right to privacy.

(c) Section 14 of the New Text recognises and protects a general right to privacy which includes, but is not limited to, the specific protections enumerated. It clearly goes at least as far as that which is universally accepted.

26. **Section 15: Freedom of religion, belief and opinion**

(a) The right to freedom of religion, belief and opinion is widely recognised in international instruments such as,

- the Universal Declaration of Human Rights: article 18;
- the International Covenant on Civil and Political Rights: article 18;
- the European Convention on Human Rights: article 9;
- the American Convention on Human Rights: article 12; and
- the African Charter on Human and Peoples' Rights: article 8.

(b) Nearly all national constitutions protect the freedom of religion, belief and opinion but do so in varying terms, for example,

- the Constitution of the USA: first amendment;
- the Canadian Charter of Rights and Freedoms: section 2;
- the Constitution of India: sections 25(1) and 26; and

- the German Constitution: section 4.

(b) The right to freedom of conscience, religion, thought, belief and opinion is recognised and protected in unqualified terms in section 15(1) of the New Text.

(c) Section 15(2) preserves the freedom to conduct religious observances at state and state-aided institutions provided that certain conditions are met, one of which is that attendance must be free and voluntary. The universally accepted right to freedom of religion, belief and opinion does not demand that such religious observances at state and state-aided institutions be prohibited.

(d) Section 15(3) permits legislation recognising,

- marriages concluded under any tradition or a system of religious, personal or family law; and

- systems of personal and family law under any tradition or adhered to by persons professing a particular religion,

provided that such recognition is consistent with the right to freedom of conscience, religion, thought, belief and opinion and with the provisions of the constitution as a whole. Insofar as this section limits the right to religion, belief and opinion, it does so within the parameters permissible by what is universally accepted.

27. **Section 16: Freedom of expression**

(a) The right to freedom of expression is widely recognised in international human rights instruments such as,

- the Universal Declaration of Human Rights: article 19;

- the International Covenant on Civil and Political Rights: article 19;

- the European Convention on Human Rights: article 10;
- the American Convention on Human Rights: article 13 and

- the African Charter on Human and Peoples' Rights: article 9(2).

(b) It is also widely recognised in national constitutions such as,

- the Constitution of the USA: first amendment;

- the Canadian Charter: article 2(b);

- the German Constitution: article 5;

- the Indian Constitution: article 19.

(c) Section 16(1) of the New Text entrenches the right to freedom of expression in general and unqualified terms and then extends it without limiting it, to five enumerated freedoms.

(d) Section 16(2) of the New Text excludes certain forms of expression from constitutional protection. The exclusion is comparable to that in international instruments such as,

- the International Covenant on Civil and Political Rights: article 20;

- the European Declaration of Human Rights: article 10;

- the International Convention on the Elimination of All Forms of Racial Discrimination: article 4; and

- the American Convention on Human Rights: article 13(5).

(e) We accordingly submit that the protection of the right to freedom of expression subject to the limitations which permit the prohibition or restriction of "hate speech" , is well within the bounds of what is internationally accepted.

28. **Section 17: Assembly, demonstration, picket and petition**

(a) The right to freedom of assembly is guaranteed in various international instruments such as,

- the Universal Declaration of Human Rights: article 20;

- the International Covenant on Civil and Political Rights: article 21;

- the European Convention on Human Rights: article 11;

- the American Convention on Human Rights: article 15; and

- the African Charter and Human and Peoples' Rights: article 11.

(b) The right to freedom of assembly is also widely recognised in national bills of rights such as,

- the Constitution of the USA: first amendment;

- the Indian Constitution: section 19(1); and

- the German Constitution: section 8(1).

(c) The unqualified protection in section 17, of the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions, goes as far as and further than that which is universally accepted.

29. **Section 18: Freedom of association**

(a) The right to freedom of association is guaranteed in many international instruments such as,

- the Universal Declaration of Human Rights: article 20;

- the International Covenant on Civil and Political Rights: article 22;

- the European Convention on Human Rights: article 11;

- the American Convention on Human Rights: article 16; and

- the African Charger on Human and Peoples' Rights: article 10.

(b) Most national instruments protect aspects of the right of freedom of association but not always the right itself without qualification:

- The Indian Constitution,section 19(1)(d) protects the right of all citizens "to form associations and trade unions".

- The Canadian Charter, section 2(d) protects the freedom of association in unqualified terms.

30. - The German Constitution, section 9 guarantees a general right to form associations, and a specific right to form trade unions and employers' associations.

- The USA Constitution does not expressly protect the right to freedom of association but it does protect it as an aspect of the "liberty" protected by the due process clause of the Fourteenth Amendment and as a right derived by implication from the guarantees of speech, press, petition and assembly in the First Amendment.[20]

(c) Section 18 of the New Text expressly guarantees the right of freedom of association in unqualified terms. It is also reinforced and extended by sections 19(1) and 23(2), (3) and (4). It clearly goes as far as and further than that which is universally accepted.

(d) The right to freedom of association is limited by section 23(5). We deal with the limitation in our discussion of section 23.

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[20] Tribe: American Constitutional Law 1010; NCAAP v Alabama (1958) 357 US 449

31. **Section 19: Political rights**

(a) Certain political rights are recognised and protected under various international instruments such as,

- the Universal Declaration of Human Rights: article 21;
- the International Covenant on Civil and Political Rights: article 25;
- the First Protocol to the European Convention on Human Rights: article 3;
- the American Convention on Human Rights: article 23; and
- the African Charter on Human and People's Rights: article 13.

(b) Most national constitutions also recognise various and diverse aspects of citizens' political rights. The enumeration of those provisions would serve no greater purpose than to illustrate their diversity.

(c) Section 19 entrenches a variety of fundamental political rights. We submit that it goes well beyond or at least as far as that which is universally accepted.

32. **Section 20: Citizenship**

(a) This section protects every citizen against deprivation of his or her citizenship. It does so in unqualified terms. It is not contradicted by section 3(3) which provides that national legislation must provide for the acquisition, loss and restoration of citizenship. Insofar as such legislation provides for the deprivation of citizenship, it would have to conform to the general requirements for limitation prescribed by section 36(1).

(b) Accordingly, insofar as section 20 protects every citizen in unqualified terms against deprivation of his or her citizenship, it goes at least as far as that which is universally accepted.

33. **Section 21: Freedom of movement and residence**

(a) The right to freedom of movement is guaranteed in various international instruments such as,

- the Universal Declaration of Human Rights: articles 9, 13;
- the International Covenant on Civil and Political Rights: article 12;
- the European Convention on Human Rights Protocol 4: article 2;
- the American Convention on Human Rights: article 22 and

- the African Charter on Human and Peoples' Rights: article 12.

(b) Most national bills of rights protect various aspects of freedom of movement but usually do so in qualified terms. The Canadian Charter is a good example. Section 6(2) protects the right of every citizen and every person who has the status of a permanent resident of Canada, "to move to and take up residence in any province" and "to pursue the gaining of a livelihood in any province". Those rights are, however, subject to limitation in terms of section 6(3) and exclusion in terms of section 6(4).

(c) It is submitted that the protection of the freedom of movement and residence in section 21 of the New Text goes at least as far as and further than, that which is universally accepted.

34. **Section 22: Freedom of trade, occupation and profession**

(a) This right reinforces the prohibition of slavery, servitude and forced labour in terms of section 13.

(b) Whilst the latter prohibition certainly constitutes a universally accepted right, the right of every citizen freely to choose his or her trade, occupation or profession, cannot be said to be a universally accepted right.

(c) The section seems to be modelled on article 12 of the German constitution which provides that all Germans have the right freely to choose their occupation or profession, their place of work, study or training.

(d) In other words, although there is some precedent for the protection of this right, it is not one demanded by that which is universally accepted, insofar as it goes beyond the prohibition of slavery, servitude and forced labour.

35. **Section 23: Labour relations**

(a) Those fundamental rights, freedoms and civil liberties in the field of labour relations which can be said to be universally accepted, are amply protected in section 23 of the New Text. Those who object to the inadequacy of this section, do not contend that it fails to conform to the requirement that all universally accepted fundamental rights, freedoms and civil liberties be provided for and protected.

(b) Article 22 of the International Covenant on Civil and Political Rights provides:

"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restriction may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (Ordre

Public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right.

3. Nothing in this article shall authorise State's Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organise, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that convention."

(c) Article 8 of the International Covenant on Economic, Social and Cultural Rights provides:

"1. The State's Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organisations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the state.

3. Nothing in this article shall authorise State's Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organise, to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that convention."

(d) Article 11(1) of the European Convention on Human Rights provides:

"Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests."

(e) Article 16(1) of the American Convention on Human Rights provides:

"Everyone has the right to associate freely for ideological, religious, political,

economic, labour, social, cultural, sports or other purposes."

(f) Convention 87 of the International Labour Organisation concerns the freedom of association and protection of the right to organise. It provides firstly, that workers and employers without distinction shall have the right to establish and join organisations of their own choosing without previous authorisation; secondly, that workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives, to organise their administration and activities, and to formulate their programmes; thirdly, it prohibits the suspension and dissolution of workers' and employers' organisations by administrative authority; and fourthly, it provides that workers' and employers' organisations shall have the right to establish and join federations and confederations, which will have the same rights as their constituent organisations, and to affiliate with international organisations of workers and employers.

(g) Convention 98 of the International Labour Organisation concerns the application of the principles of the right to organise and bargain collectively. The convention requires adequate protection against acts of anti-union discrimination; interference in or domination of workers' or employers' organisations; machinery for ensuring respect for the right to organise; and measures to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations or workers' organisations to regulate terms and conditions of employment by collective agreement.

(h) Many national constitutions entrench the right of workers and employers to join and form trade unions and employers' organisations. Some guarantee the right to strike. Very few recognise the right to lock-out.

(i) The United States Constitution does not contain any specific constitutional protection of collective labour rights. Such protection as has been afforded to the right to establish and join employers' and workers' organisations and to organise and bargain collectively, has been founded on the constitutional freedom of assembly. Its protection has however generally been narrowly interpreted.[21]

(j) The Canadian Charter also does not contain any express protection of labour rights and such protection as is afforded to the right to establish and join employers' and workers' organisations and to organise collectively, is founded upon the constitutional right of freedom of association.[22]

(k) The Supreme Court of India has held that the constitutional right to form

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[21] Abood v. Detroit Board of Education 431 US 209 (1977); Citizens against Rent Control v. Berkley 454 US 290 (1981);

[22] Re: Public Service Employee Relations Act (1978) 38 DLR 4th 161 SC; PSAC v Government of Canada (1987) 38 DLR 4th 249 SC; Government of Saskatchewan v RWDSU (1987) 38 DLR 4th 277 SC; Professional Institute of the Public Service of Canada v. Northwest Territories (1990) 49 CRR 193 SC.

associations or unions does not incorporate a right to engage in collective bargaining or strike action.[23]

(l) It may be difficult to define the precise parameters of those fundamental rights, freedoms and civil liberties in the field of labour relations which can be said to be universally accepted. It is, however not necessary for present purposes because, whatever the precise parameters might be, they are amply protected under section 23 of the New Text and certainly do not extend beyond the protection afforded by that section.

36. **Section 24: Environment**

(a) There is clearly a strong trend in international law towards recognition of a right to an environment conducive to human health and well-being. This reflects a growing acceptance internationally that there is an inextricable bond between the environment and all other universally recognised human rights, particularly the rights to life and health. Some of the more recent international instruments and a number of national constitutions afford limited protection of the environment. It is, however, still at least doubtful whether it can be said that there is a universally accepted right to environmental protection. Such core right as might conceivably be said to have achieved universal acceptance, is in any event amply protected in section 24 of the New Text.

(b) Article 24 of the African Charter on Human and Peoples' Rights which is the most recent international human rights instrument, provides:

> "All peoples shall have the right to a generally satisfactory environment favourable to their development."

(c) The American Convention on Human Rights in the area of economic, social and cultural rights has not yet come into force. Article 11 of the Convention provides:

> "Right to a healthy environment.
>
> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The State's Parties shall promote the protection, preservation and improvement of the environment."

(d) Articles 48A and 51A(g) of the Indian Constitution, Article 45 of the Spanish Constitution, Article 66 of the Portuguese Constitution and Article 225 of the Brazilian Constitution, are examples of the limited constitutional protection of the environment afforded by some national constitutions.

(e) There is no evidence of a universally accepted right to protection of the

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[23] All India Bank Employees Association v. National Industrial Tribunal 1962 AIR 171 SC;

environment any wider than that provided for under section 24 of the New Text. It accordingly clearly meets the requirement of protection of that which might conceivably be said to be universally accepted.

37. **Section 25: Property**

(a) Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights, protects a right to property. There are however a number of international instruments which afford limited protection of that right.

(b) Article 17 of the Universal Declaration of Human Rights provides:

> "1. Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property."

(c) Article 1(1) of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions: No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

(d) Article 5(d)(v) of the International Convention on the Elimination of all Forms of Racial Discrimination requires states to prohibit racial discrimination and to guarantee the right of everyone, without discrimination, to equality before the law, notably in the enjoyment of "the right to own property alone as well as in association with others".

(e) The European Convention on Human Rights does not protect a right to property. Such protection was however created under article 1 of the First Protocol to the Convention of 1952:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

(e) Article 21 of the American Convention on Human Rights provides:

> "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interests of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reason of public utility or social interest, and in the cases and according to the forms established by law."

(g) Article 14(1) of the African Charter of Human and People's Rights provides:

> "The right to property shall be guaranteed. It may only be encroached upon in the interests of public need or in the general interests of the community and in accordance with the provision of appropriate laws."

(h) The right to property is protected in many national constitutions but significantly omitted from some. It is for instance protected under the Fifth Amendment of the USA Constitution. The Canadian Charter however does not include protection of a right to property.

(i) We accordingly submit that there is probably no universally accepted right to property. It is, however not necessary to determine whether there is because, insofar as there might be such a right which enjoys universal acceptance, it is in any event one amply protected by section 25 of the New Text. There clearly cannot be said to be a universally accepted right wider than that which is protected under section 25 of the New Text.

38. **Section 26: Housing**

(a) Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights, both recognise the right of everyone to an adequate standard of living including adequate food and other necessities of life. The right to housing enjoys some recognition in terms of Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 14(2)(h) of the International Convention on the Elimination of All Forms of Discrimination against Women; article 27(3) of the International Convention on the Rights of the Child; article 8(1) of the European Convention on Human Rights and Fundamental Freedoms and article 1 of the First Protocol to the Convention.

(b) The right to housing is also recognised in some national constitutions such as article 23(3) of the Belgium Constitution; article 4 of the Mexican Constitution; article 22(2) of the Netherlands Constitution and article 17(2)(d) of the Nigerian Constitution.

(c) The majority of national constitutions however do not recognise a right to housing. Those who do not recognise or protect this right, include some of the leading democratic societies. It can accordingly probably not be said that the right to housing is universally accepted as a fundamental right, freedom or civil liberty.

(d) The protection of the right under section 26 of the New Text, in any event, goes at least as far as that which might be universally accepted.

39. **Section 27: Health care, food, water and social security**

(a) These social rights enjoy widespread recognition in international law for instance in terms of articles 22 and 25(1) of the Universal Declaration of Human Rights; articles 9, 11 and 12 of the International Covenant on

Economic, Social and Cultural Rights; articles 11 to 14 of the European Social Charter and article 16 of the African Charter on Human and Peoples' Rights.

(b) These social rights also enjoy some recognition under national constitutions but this is the exception rather than the rule. They clearly do not enjoy universal acceptance as fundamental rights, freedoms or civil liberties.

(c) Section 24 clearly goes further than that which is universally accepted.

40. **Section 28: Children**

(a) The rights of children enjoy wide recognition in international law,. for instance in terms of article 25(2) of the Universal Declaration of Human Rights; article 26 of the International Covenant on Civil and Political Rights and article 10(3) of the International Covenant on Economic, Social and Cultural Rights. The mounting international recognition of the rights of children culminated in the Convention on the Rights of the Child which was adopted unanimously by the UN General Assembly in 1989 and which ended into force in 1990. South Africa recently became a signatory to this convention.

(c) Children's rights enjoy special recognition in terms of some national constitutions. For instance those of Germany and Namibia, but this is again the exception rather than the rule. These rights cannot be said to be universally accepted fundamental rights, freedoms and civil liberties.

(d) Section 28 accordingly clearly goes further than that which is universally accepted.

41. **Section 29: Education**

(a) The right to education and various aspects of this right enjoy widespread international recognition for instance in terms of,

- article 26 of the Universal Declaration of Human Rights;
- articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights;
- article 2 of the First Protocol to the European Convention on Human Rights;
- article 17 of the African Charter on Human and Peoples' Rights; and
- articles 28 and 29 on the Convention of the Rights of the Child.

(b) Various aspects of the right to education are also protected under national constitutions such as,

- the Indian Constitution: articles 28 to 30 and directive principles 41, 45 nd 46;

- the Canadian Charter: section 23;
- the German Constitution: articles 7 and 12(1);
- the Portuguese Constitution: articles 43, 74 and 75;
- the Danish Constitution: articles 76;
- the Namibian Constitution: article 20; and
- the Italian Constitution: article 33.

(c) The right is, however, not recognised or protected in the national constitutions of a significant number of leading democratic societies. It can accordingly probably not be said to be a universally accepted fundamental right, freedom or civil liberty. Insofar as its core elements might however conceivably be said to enjoy universal acceptance, they are all protected under section 29 of the New Text.

42. **Section 30: Language and Culture**

(a) This section should be read together with the other provisions of the New Text which protect and promote cultural diversity, of which the most important are sections 6, 31, 185 and 186.

(b) The right freely to participate in cultural life including the right to use the language of one's choice, is widely recognised in international law for instance in terms of,

- the Universal Declaration of Human Rights: article 27;
- the International Covenant on Civil and Political Rights: article 27;
- the International Covenant on Economic, Social and Cultural Life: article 15;
- the International Convention on the Elimination of All Forms of Racial Discrimination: article 5(3)(vi);
- the Convention on the Elimination of All Forms of Discrimination against Women: article 13(c);
- the African Charter on Human and Peoples' Rights: article 22;
- the Convention on the Rights of the Child: article 31.

(c) Language and cultural rights also enjoy protection in a number of national constitutions, for instance those of,

- India: article 29;

- Germany: article 5(3);

- Canada: sections 16 to 23; and

- Namibia: article 19.

(d) These cultural rights however probably do not yet enjoy universal acceptance as fundamental rights, freedoms or civil liberties insofar as they go beyond the protection of afforded by the first generation of rights to equality, dignity, freedom of association and freedom of expression. They are, however, amply protected in the New Text insofar as they might enjoy universal acceptance.

43. **Section 31: Cultural, Religious and Linguistic Communities**

Our submissions in relation to Section 30 of the New Text are also applicable to this section.

44. **Section 32: Access to information**

The General Assembly of the United Nations declared in its Resolution 59(1) of December 1946, that *"freedom of information is a fundamental right and it is the touchstone of all freedoms to which the United Stations is consecrated"*. Despite this sweeping assertion, the right does, however, manifestly not enjoy universal acceptance as a fundamental right, freedom or civil liberty in international law or domestic constitutional law of open and democratic societies.

45. **Section 33: Just administrative action**

The right to administrative justice does not enjoy recognition as a free standing fundamental right, freedom or civil liberty in international law or the domestic constitutional law of open and democratic societies.

46. **Section 34: Access to courts**

(a) The right in this section is reinforced by the provisions of section 38 which entrenches the right to access to court and to appropriate relief in the event of an actual or threatened infringement of the Bill of Rights.

(b) The right of access to an impartial and independent court enjoys significant recognition in international law for instance in terms of,

- the Universal Declaration of Human Rights: article 10;
- the International Covenant on Civil and Political Rights: article 14(1);

- the European Convention on Human Rights: article 6;

- the African Charter on Human and Peoples' Rights: article 7 and

- the American Convention on Human Rights: article 8(1).

(c) Aspects of the right also enjoy protection under the domestic constitutions of some societies such as article 19 of the German Constitution and article 12(1) of the Namibian Constitution.

(d) The right afforded by section 34 is unqualified and all-encompassing. It clearly goes at least as far as and probably considerably further than that which might be universally accepted.

47. **Section 35: Arrested, detained and accused persons**

(a) This section entrenches a series of rights which undoubtedly enjoy universal acceptance as fundamental rights, freedoms and civil liberties.

(b) These rights enjoy recognition in international law, for instance, in terms of,

- the Universal Declaration of Human Rights: article 11(1);
- the International Covenant on Civil and Political Rights: articles 9 and 14;
- the European Convention on Human Rights: article 6;
- the American Convention on Human Rights: article 8(2);
- the African Charter on Human and Peoples' Rights: article 7(1).

(c) These rights are also widely protected under most national constitutions.

(d) The only practical way to get an idea of the adequacy of the protection afforded by section 35 of the New Text, is probably to compare it with articles 9 and 14 of the International Covenant on Civil and Political Rights which enjoy significant standing as a statement of the rules under international law governing the requirements of a fair trial in criminal proceedings. We submit that the comparison demonstrates the adequacy of the protection afforded by section 35 of the New Text.

48. **Comparison of the Bill of Rights with the Two Covenants**

(a) A comparison with the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights gives some idea of the extent to which all the universally accepted fundamental rights are recognised and protected in the Bill of Rights in the New Text:

RIGHT	ICCPR	ICESCR	NEW TEXT
Remedy	2(2),(3)	-	38
Equality	2(1),3,14(1), 24(1), 26	-	9
Emergency	4	-	37
Life	6	-	11
Torture	7	-	12
Slavery	8	-	13
Liberty	9,10,11,14,15	-	12, 35
Movement	12	-	21
Personhood	16	-	9,10
Privacy	17	-	9,10
Conscience	18	-	15
Expression	19,20	-	16
Assembly	21	-	17
Association	22	-	18,23
Family	23	10	-
Children	10(2)(b),24	-	28
Public Affairs	25	-	3, 9, 19, 20
Minorities	26	-	30,31
Work	-	6	-
Conditions of Work	-	7	23(1)
Trade Unions	-	8	23
Social Security	-	9	27(1)(c)
Living Standard	-	11	27

Health	-	12	24,27,28(1)
Education	-	13,14	29
Culture	-	15(1)(a)	31
Scientific Progress	-	15(1)(b)	-
Intellectual Property	-	15(c)(c)	25

(b) As appears from the schedule, the only rights recognised in the two conventions but not protected in the New Text, are, the protection of the family,[24] the right to work,[25] and the right to enjoy the benefits of scientific progress.[26]

(c) We submit, however, that those aspects of these rights which are not protected in the New Text, in any event do not constitute universally accepted fundamental rights, freedoms and civil liberties. This is vividly illustrated by their absence from very many national constitutions of leading open and democratic societies.

49. We accordingly submit that the New Text conforms to the first requirement of CP II that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.

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[24] Article 23 of the International Covenant on Civil and Political Rights and article 10 of the International Covenant on Economic, Social and Cultural Rights.

[25] Article 6 of the International Covenant on Economic, Social and Cultural Rights.

[26] Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights.

CP II (2): THESE FUNDAMENTAL RIGHTS, FREEDOMS AND CIVIL LIBERTIES "SHALL BE PROVIDED FOR AND PROTECTED BY ENTRENCHED AND JUSTICIABLE PROVISIONS IN THE CONSTITUTION"

50. All the rights recognised in the Bill of Rights are "provided for and protected" in the constitution.

51. They are also "entrenched" insofar as they may be amended or repealed only by constitutional amendment which is permissible only by super-majority in terms of section 74(1).

52. They are expressly made justiciable in terms of section 38 read with sections 2, 8(1), 34 and 172.

53. Chapter 9 of the New Text provides for a variety of institutions whose task it will be to protect and promote fundamental rights, freedoms and civil liberties. The most notable of those institutions are the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality.

CP II (3): THE AFOREGOING PROVISIONS "SHALL BE DRAFTED AFTER HAVING GIVEN DUE CONSIDERATION TO *INTER ALIA* THE FUNDAMENTAL RIGHTS CONTAINED IN CHAPTER 3" OF THE INTERIM CONSTITUTION

54. This requirement, unlike most of the other constitutional principles, relates to the process of drafting the new constitution rather than the end product. It requires the new constitution to be drafted "after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this constitution".

55. The requirement of "due consideration" in the context of this principle, means that the drafters of the constitution are required, in drafting the new constitution, to consider the fundamental rights in Chapter 3 of the Interim Constitution with a view to their inclusion in or exclusion from the new constitution. This consideration must be undertaken in good faith, seriously and properly. The drafters must take account of the considerations for retaining each right and for excluding or amending it.

56. The principle does not require the retention of all the rights entrenched in Chapter 3 of the Interim Constitution. They are merely entitled to due consideration. The language of the principle ("*inter alia")* moreover makes it clear that they are not the only matters to be considered.

57. Objections to the New Text founded solely on the basis that rights entrenched in Chapter 3 of the Interim Constitution have been omitted, are accordingly unfounded,

firstly because the constitutional principle relates to the process of drafting and not the end product and secondly because it only demands due consideration of the rights entrenched in Chapter 3 of the Interim Constitution and not their retention.

58. It is apparent from a comparison of the texts of Chapter 3 of the Interim Constitution and the Bill of Rights in the New Text, that the former served as basis of and inspired the latter. The format, language and content of Chapter 3 of the Interim Constitution were largely maintained. There are a few carefully crafted amendments and some minor omissions. There are significant new additions. This comparison makes it clear that Chapter 3 of the Interim Constitution was very carefully considered in the creation of the new Bill of Rights. That is also borne out by the accompanying affidavit of Hassen Ebrahim.

59. We accordingly submit that there has been due compliance with this requirement.

CP III (1): "THE CONSTITUTION SHALL PROHIBIT RACIAL, GENDER AND ALL OTHER FORMS OF DISCRIMINATION"

60. Sections 9(3) and (4) prohibit all forms of unfair discrimination by the state or any other person. We submit that they satisfy the demand of the constitutional principle.

61. Whereas the constitutional principle demands that all discrimination be prohibited, sections 9(3) and (4) only prohibit "unfair" discrimination. We submit, however, that "discrimination" in any event connotes unfairness. There is no difference between the prohibition of all "discrimination" and the prohibition of all "unfair discrimination". The demand for the former is accordingly satisfied by the latter.

62. Might it not be argued that these sections fall short of the demand of the constitutional principle for the following reasons:

(a) The constitutional principle does not confine its demand to the prohibition of discrimination practised by the state. It accordingly also demands the prohibition of private discrimination.

(b) The first sentence of section (4) purports to prohibit private discrimination but should be read together with the second sentence. When the two are read together, the section does not prohibit private discrimination but merely provides that national legislation must be enacted to prevent or prohibit private discrimination.

63. We submit that such an argument would fail because it is founded upon unduly narrow interpretation of section 9(4). The section does two things. It prohibits private discrimination and requires national legislation to put flesh to the bones of this prohibition. This wider and more generous interpretation is to be preferred for two reasons. It firstly accords with the plain meaning of the language of the section. It secondly accords with the constitutional principle and it is for that reason to be preferred over an interpretation which does not.

CP III (2): THE CONSTITUTION "SHALL PROMOTE RACIAL AND GENDER EQUALITY"

64. The New Text meets the demand of the constitutional principle by,

- establishing non-racialism and non-sexism as founding values in section 1(b);
- guaranteeing equality before the law and the right to equal protection and benefit of the law, including the full and equal enjoyment of all rights and freedoms, in terms of sections 9(1) and (2);
- permitting the state to take legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, to promote the achievement of equality in terms of section 9(2);
- prohibiting race and gender discrimination by the state in section 9(3);
- prohibiting race and gender discrimination by any other person in section 9(4);
- making an open and democratic society based on human dignity, "equality" and freedom, the benchmark for limitation in terms of section 36(1) and for interpreting the Bill of Rights in terms of section 39(1);
- establishing a Human Rights Commission in terms of section 184; and
- establishing a Commission for Gender Equality in terms of section 187.

CP III (3): THE CONSTITUTION "SHALL PROMOTE ... NATIONAL UNITY"

65. This principle does not strictly relate to the Bill of Rights. The constitution as a whole promotes national unity *inter alia* by its accommodation of diversity within one sovereign democratic state. The more notable provisions designed to serve this end, are those of chapters 1 and 3 of the New Text.

CP V: "THE LEGAL SYSTEM SHALL ENSURE THE EQUALITY OF ALL BEFORE THE LAW ... EQUALITY BEFORE THE LAW INCLUDES LAWS, PROGRAMMES OR ACTIVITIES THAT HAVE AS THEIR OBJECT THE AMELIORATION OF THE CONDITIONS OF THE DISADVANTAGED, INCLUDING THOSE DISADVANTAGED ON THE GROUNDS OF RACE, COLOUR OR GENDER"

66. This principle is satisfied by the provisions referred to in our discussion of the first and second parts of CP III. They are sections 1(b), 9, 36(1), 39(1), 184 and 187.

CP IX: PROVISION SHALL BE MADE FOR FREEDOM OF INFORMATION SO THAT THERE CAN BE OPEN AND ACCOUNTABLE ADMINISTRATION AT ALL LEVELS OF GOVERNMENT

67. This principle is satisfied by section 32 which entitles everyone to access to any information held by the state and, if required for the exercise or protection of any rights, also to any information held by any other person and obliges the state to enact national legislation to give effect to this right.

68. There may, however, be an argument for a restrictive interpretation of this right which, it might be argued, falls short of the requirement of the constitutional principle:

(a) The restrictive interpretation is based on section 32(2) read with section 23 of the Transitional Arrangements in Schedule 6. The effect of those provisions is:

(i) The state is obliged to enact national legislation to give effect to the right of access to information, within three years. The legislation may moreover "provide for reasonable measures to alleviate the administrative and financial burden on the state".

(ii) Until the state enacts the proposed legislation, a limited transitional right of access to information will apply.

(iii) If it fails to do so, the requirement that the state enact national legislation to give effect to the right, will lapse.

(b) The restrictive interpretation would argue that the intention is that the proposed national legislation will be exhaustive of the right.

69. We submit however that such a restrictive interpretation would not be correct:

(a) The language of section 32(1) is clear. It creates a free-standing and direct right of access to information. It is not dependent on the legislation to be enacted in terms of section 32(2). The latter section enjoins the state to enact legislation which does two things. It firstly gives effect to the right of access to information, by putting flesh on the bare bones of the right. It would do so by giving practical effect to the right in the very many situations in which it is applicable, creating machinery for the enforcement of the right and imposing justifiable limitations upon it. It may secondly also provide "for reasonable measures to alleviate the administrative and financial burden on the state".

(b) The new and very wide right of access to information created in section 32(1) does not come into effect until the state has had an opportunity enact legislation in terms of section 32(2) regulating and limiting the right. In the meantime, the more limited transitional right of access to information applies.

(c) There is in other words no reason to interpret the section to mean that the national legislation enacted in terms of section 32(2) is to be exhaustive of the right created in terms of section 32(1).

70. But the demand of the constitutional principle would in any event satisfied even on the restrictive interpretation. The constitutional principle requires no more than that the constitution should make provision for freedom of information. It does so even if it does no more than to require of the state to enact legislation to give effect to the right.

CP XXVIII: "NOTWITHSTANDING THE PROVISIONS OF PRINCIPLE XII, THE RIGHT OF EMPLOYERS AND EMPLOYEES TO JOIN AND FORM EMPLOYER ORGANISATIONS AND TRADE UNIONS AND TO ENGAGE IN COLLECTIVE BARGAINING SHALL BE RECOGNISED AND PROTECTED. PROVISION SHALL BE MADE THAT EVERY PERSON SHALL HAVE THE RIGHT TO FAIR LABOUR PRACTICES."

71. This constitutional principle is satisfied by section 23 of the New Text.

72. The National Party, the Democratic Party, the Inkatha Freedom Party and Business South Africa argue that section 23 fails to meet the demand of the constitutional principle insofar as it,

- fails to entrench employers' right to lock out; and
- confers the right to bargain collectively, on employers' organisations and not on individual employers.

Employers' right to lock out

73. The NP, the DP and BSA argue that the failure to entrench employers' right to lock out, violates the constitutional principle because:

(a) it fails to ensure equality between employers and employees ("the equality argument");

(b) it denudes employers' right to collective bargaining of all meaningful content ("the collective bargaining argument") and

(c) it fails to ensure that every person has the right to fair labour practice ("the fairness argument").

We will deal with each of these three arguments in turn.

74. The constitutional principle does not demand that employers and employees be equally treated. The objectors all contend for a principle of equality but do so on different bases:

(a) The NP says that a balance is struck in the Interim Constitution by the protection of workers' right to strike in section 27(4) and employers' right to lock out in section 27(5) and that this balance should have been maintained in the New Text.[27] The latter contention is apparently founded on the demand of

[27] National Party Objection p.2, para. 5.

CP II that the New Text be drafted "after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3" of the Interim Constitution. But it obviously does not mean that all of the provisions of Chapter 3 of the Interim Constitution have to be re-enacted.

(b) The DP founds their equality argument on the constitutional principles which demand equality before the law[28]. But the principle of equality before the law, does not demand that all people be treated the same, whatever their circumstances. On the contrary, it demands that people whose circumstances differ, be treated differently. There is a vast difference between circumstances of employers and labour in their collective bargaining confrontation. There is simply no basis for the suggestion that the principle of equality before the law demands that every collective bargaining tool given to the one has to be matched by a corresponding tool given to the other.

(c) BSA on the other hand, founds its equality argument on CP XXVIII itself. It argues that the constitutional principle requires that "parity be maintained between the collective bargaining rights conferred upon employees and those conferred upon employers".[29] It apparently finds this requirement in the demand of the constitutional principle that employers' right to engage in collective bargaining be recognised and protected. It says that a necessary feature of collective bargaining is that there must be a degree of parity between the two sides so that neither obtains an enduring and decisive advantage over the other.[30] But this argument confuses balance of power and strict parity of arms. We accept that healthy collective bargaining requires some balance of power between the two sides in the long term. It does not demand parity of arms. On the contrary, if the one side starts from a position of strength and the other from a position of weakness, a balance of power between them can be achieved only by giving more arms to the weak than to the strong. The initial imbalance of power would be perpetuated by a principle of strict parity of arms.

75. There are important differences between workers' right to strike and employers' right to lock out. They are not simply two sides of the same coin:

(a) The right to strike is workers' only weapon in collective bargaining[31]. They do not have any other. They have no other way to resist employers' demands or to secure compliance with their own. The right to strike is recognised as "an essential and integral element of collective bargaining", [32] because it is the only tool available to workers in pursuit of collective bargaining.

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28 DP Objections, p. 8, para. 5

29 BSA Objections, p. 2, para. 3.3.

30 BSA Objections, p. 3, paras. 7-8

31 We assume for purposes of this discussion that neither employers nor workers are entitled to demand that their disputes be submitted to arbitration. The New Text does not provide for such compulsory arbitration.

32 Barlows Manufacturing Co v. Metal & Allied Workers Union 1990 (2) SA 315 (T) 322F-G; National Union of Mineworkers v. East Rand Gold & Uranium Co 1992 (1) SA 700 (A) 734F.

(b) The right to strike is also not a tool used only in collective bargaining. It is also a democratic right. It is a tool legitimately used to defend and advance workers' rights and interests generally. It is, for instance, commonly used to defend and advance workers' political and socio-economic rights and interests. The legitimacy of its use for these purposes, is well established both locally and internationally.

(c) Employers' right to lock out on the other hand, is no more than a weapon used in collective bargaining. It is moreover not the only weapon available to employers in collective bargaining. They have a range of weapons in their armoury. There are broadly four kinds. The first is the right to lock out. The second is the right to discipline workers. The third is the right to dismiss workers. The fourth is the right unilaterally to implement changes in workers' terms of employment. Employers are accordingly not dependent upon a right to lock out in order to pursue collective bargaining meaningfully and effectively.

(d) Because of these differences of function and importance between the right to strike and the right to lock out, the former is universally recognised as a fundamental right whilst the latter is not. The right to strike is expressly recognised in article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights and article 6(4) of the European Social Charter. The right to lock out on the other hand, does not enjoy any such recognition.

76. The objectors however complain that employers may be deprived of all their collective bargaining tools because none of them enjoy constitutional protection. They say that this would not only disturb the balance of power between the two sides but would also denude employers' right to engage in collective bargaining, of all meaningful content and reduce it to "a hollow right, devoid of substance".[33] It is in other words at this point where their equality argument overlaps with their collective bargaining argument.

77. We submit, however, that their fears are unfounded. The state may not unfairly deprive employers of all their collective bargaining tools and reduce their right to collective bargaining to a hollow right devoid of substance:

(a) Section 23(1) of the New Text affords everyone "the right to fair labour practices". Fairness demands a balance of power between employers and employees. Any unfair disturbance of that balance, would violate this constitutional right. A fair balance of power between the two, is thus constitutionally protected.

(b) The state may also not deprive employers of all their collective bargaining tools and so reduce their right to engage in collective bargaining to a hollow

[33] BSA Objections, p. 7, para. 15

right devoid of substance, precisely because that would violate their right to engage in collective bargaining. The right entitles employers to engage in meaningful collective bargaining and not merely to engage in a meaningless simulation of it. The state may not take away the right either directly or indirectly by denuding it of all meaningful content.

78. The objectors' fairness argument is for the same reason ill-founded. Section 23(1) of the New Text guarantees everyone the right to fair labour practices. It does so in unqualified terms. It follows that, in striking a balance between employers and employees, the state may not unfairly deprive the one of the means fairly to confront the other in collective bargaining. Any unfair bias would violate the constitutional guarantee of fairness.

79. We accordingly submit that the failure to afford constitutional protection to employers' right to lock out, does not violate the constitutional principle.

Employers' right to engage in collective bargaining

80. The constitutional principle does not demand that the right to engage in collective bargaining, be afforded to individual employers and individual employees. It demands merely that it be afforded to "employers and employees", that is, to employers as a class and to employees as a class.

81. It also does not prescribe how the right is to be afforded to them. The New Text does so by protecting the right of employers and workers,

- to form, join and participate in employers' organisations and trade unions; and

- to engage in collective bargaining through those employers' organisations and trade unions.

82. BSA complains that the New Text does not protect the right of individual employers to engage in collective bargaining at plant level[34]. But this objection misses the point:

(a) The New Text protects employers' and workers' right to engage in collective bargaining through their employers' organisations and trade unions. By doing so, the New Text affords constitutional protection to the right to bargain in multi-employer bargaining units, which may be at industry level. Although it does not protect individual employers' right to collective bargaining at plant level, it also does not preclude the possibility of bargaining at that level. By protecting the one option and leaving the other open, the constitution does not preclude either.

(b) If the New Text had instead afforded constitutional protection to the right to

[34] BSA Objections, p. 3, para. 5

engage in collective bargaining at plant level, it may effectively have excluded the option of collective bargaining at industry level. It is a feature of collective bargaining at industry level, that agreements made between the parties be made binding, not only on the parties to the agreement, but on all employers and employees in the industry. That may however be made impossible if every employer had an individual right to engage in collective bargaining. In other words, if constitutional protection were afforded to the right of every individual employer to engage in collective bargaining, then it may also have implied a constitutional choice in favour of plant level bargaining to the exclusion of industry level bargaining. The one option would have been chosen and the other precluded forever.

(c) The objectors would have it that the constitutional principle can be satisfied only by protecting the right of every individual employer to engage in collective bargaining at plant level. Because that may forever preclude collective bargaining at industry level. The implication of the objectors' contention is that the choice was in effect already made in the constitutional principle to opt for plant level bargaining to the exclusion of industry level bargaining. We submit however that the constitutional principle was never intended to make the choice between industry level and plant level bargaining.

(d) It is accordingly also appropriate that the New Text should follow the route that would at least leave both options open.

83. We accordingly submit that the New Text does not violate the constitutional principle by its failure to afford the right to engage in collective bargaining to every individual employer.

THE ADMINISTRATION OF JUSTICE

CPIV: "THE CONSTITUTION SHALL BE THE SUPREME LAW OF THE LAND"

84. Sections 1(c), 2 and 172(1)(a) give effect to this principle.

85. The Democratic Party[35] and Business South Africa[36] contend that this section is violated by section 241(1) of the New Text which in effect insulates the provisions of the Labour Relations Act 66 of 1995 from the constitution until their amendment or appeal. We submit however that this objection is unfounded:

(a) Although the whole LRA is insulated against the constitution, most of its provisions are entirely consistent with the constitution and accordingly in any event not vulnerable to constitutional attack. All these limitations are arguably permissible in terms of section 36(1) of the New Text. But it is not necessary to decide whether they are all within permissible limits. The point is that the insulation afforded by section 241(1) of the New Text, if it has any meaningful content at all, only insulates a few provisions of the LRA within a very narrow ambit which might otherwise have been vulnerable to constitutional attack.

(b) The effect of section 241(1) is in other words no more than to permit certain specific provisions which might otherwise have been inconsistent with the constitution.

(c) Such exclusions from the general ambit of the constitution, are not uncommon. Chapter 3 of the Interim Constitution includes a few examples. Section 8(3) permits corrective measures to redress inequalities of the past, even if those measures should impinge upon the guarantee of equality and the prohibition of discrimination. Section 14(2) permits religious observance at state and state-aided institutions despite the fact that such observance might otherwise have violated the general right to freedom of religion.

(d) Section 241(1) of the New Text is a limitation of the same genus. The only difference is that it is of a more limited variety. Whereas sections 8(3) and 14(2) permits any exception of the kind described in those paragraphs, section 241(1) only permits a particular set of exceptions, namely those made under the current provisions of the LRA, and permits those exceptions only for the lifetime of those provisions. The legislature is in other words not given freedom, within the ambit of the exceptions, to legislate with impunity in violation of the general terms of the constitution. The constitution itself gives its blessing to a particular set of provisions by way of exception to its general terms.

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[35] Objections, p. 9, para. 7

[36] Objections, p. 6, para. 14

(e) Exceptions of this kind, do not detract from the supremecy of the constitution. They derive their validity from the constitution itself. They serve to define its ambit. They may restrict its scope. But they do not undermine its supremecy.

CPIV: THE CONSTITUTION "SHALL BE BINDING ON ALL ORGANS OF STATE AT ALL LEVELS OF GOVERNMENT"

86. Section 8(1) makes the Bill of Rights applicable to "the legislature, the executive, the judiciary, and all organs of state". It is however limited to the Bill of Rights.

87. There is no other provision which expressly makes the rest of the constitution binding on all organs of state at all levels of government. That is however clearly implied by sections 1(c), 2 and 172(1)(a).

CPV: THE LEGAL SYSTEM SHALL ENSURE "AN EQUITABLE LEGAL PROCESS"

88. This principle is satisfied by,

- the right of access to court in terms of section 34, which entitles everyone to have any dispute that can be resolved by the application of law, decided "in a fair public hearing in a court or, where appropriate, another independent and impartial forum" and
- the right of every accused to a fair trial in terms of section 35(3).

CPVII: THE JUDICIARY SHALL BE APPROPRIATELY QUALIFIED

89. This principle is satisfied by section 174(1) of the New Text which provides in effect that only an "appropriately qualified woman or man who is a fit and proper person" may be appointed as a judicial officer.

CPVII: THE JUDICIARY SHALL BE "INDEPENDENT AND IMPARTIAL"

90. This principle is satisfied by,

- section 1(c) which identifies "the rule of law" as one of the founding values of the state;
- section 34 which entitles everyone to have any justiciable dispute resolved "in a fair public hearing in a court or, where appropriate, another independent and impartial forum";
- section 35(3) which entitles every accused to "a fair trial";
- section 165(2) which provides that the courts are "independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice";
- section 165(3) which provides that "no person or organ of state may interfere with the functioning of the courts";
- section 165(4) which provides that "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"; and
- sections 176 and 177 which affords judges security of tenure.

CPVII: THE JUDICIARY "SHALL HAVE THE POWER AND JURISDICTION TO SAFEGUARD AND ENFORCE THE CONSTITUTION AND ALL FUNDAMENTAL RIGHTS"

91. This principle is satisfied by,

- section 1(c) which identifies "the rule of law" as one of the founding values of the state;
- section 8(3)(a) which empowers the courts to apply and develop the common law to give effect to the horizontal application of the constitution;
- section 37(3) which empowers the courts to determine the validity of a declaration of a state of emergency, any extension of the declaration of a state of emergency and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency;
- section 38 which empowers the courts to "grant appropriate relief" whenever a right in the constitution had been infringed or threatened;
- section 165 (5) which provides that "an order or decision issued by a court binds all persons and organs of state to which it applies";
- section 172(1)(a) which provides that a court must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency.

THE STRUCTURE AND FUNCTIONING OF GOVERNMENT

CP I: "THE CONSTITUTION OF SOUTH AFRICA SHALL PROVIDE FOR THE ESTABLISHMENT OF ONE SOVEREIGN STATE, A COMMON SOUTH AFRICAN CITIZENSHIP AND A DEMOCRATIC SYSTEM OF GOVERNMENT COMMITTED TO ACHIEVING EQUALITY BETWEEN MEN AND WOMEN AND PEOPLE OF ALL RACES."

92. CPI has special importance, because it lays down in general outline the basic parameters of the new constitutional order which is established by the text. The importance of CPI is reflected by the special majority of the National Assembly needed to amend section 1 of the New Text, the principal provision which gives expression to CP I. Under section 74(2) of the New Text, 75% of the members of the National Assembly must agree to the amendment of section 1.

93. The most important provisions which give specific expression to this principle can be found in **Chapter 1.**

(a) **One sovereign state:** the opening words to section 1 provide that "The Republic of South Africa is one sovereign democratic state". Sovereignty has both an internal and an external aspect. Internally, it means that there is only one state within the territory of South Africa, notwithstanding national and subnational divisions. All legislative bodies derive their authority from the same written constitution. This point was made by Chaskalson P with respect to the 1993 Constitution, when he stated that:

94.

> the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.[37]

Externally, sovereignty means that South Africa is not subject to the authority of any other state.

(b) **Democratic system of government**: the commitment to democracy is found in the opening words of section 1, and section 1(d), which specifies what democracy means in the South African context. This list includes "Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system". These terms are defined later on by the provisions which give expression to CP VIII. Democracy is a foundational value of the Republic, in large part, because the apartheid era was fundamentally anti-democratic. The goal of democratic government is to ensure "accountability, responsiveness, and openness"; this is also an aspect of CP VI, the separation of powers.

(c) **Equality between men and women** and people all races: section 1(b) lists "Non-racialism and non-sexism" as a foundational value of the Republic. The

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[37] *Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill, No. 83 of 1995*, CCT 46/85 at para. 23.

commitment of the new constitutional order to racial equality, in particular, is a foundational value because the apartheid regime was premised on racial inferiority. As well, s. 1(a) includes a more general reference to "the achievement of equality".

(d) **A common South African citizenship**: section 3(1) establishes a common South African citizenship. Once again, a common citizenship is of foundational importance to the new constitution, because a major policy of the apartheid regime was to deny South African citizenship to many black South Africans by making them citizens of "independent homelands". Section 3(2) provides that this citizenship is not only common, but equal, because all citizens are "equally entitled to rights, privileges and benefits of citizenship" and are "equally subject to the duties and responsibilities of citizenship". This also reflects a response to South Africa's racist past, where the worth of one's citizenship was a function of one's race.

95. **Provisions in other Chapters also give effect to Principle I.**

(a) **Equality between men and women and people of all races**:

(i) Section 9 is the equality rights guarantee. The right to equality seems to embrace not only formal equality (e.g. equal before the law, equal protection and benefit of the law), but substantive equality as well, in particular its commitment to "legislative and other measures designed to protect or advance persons, or categories of persons" (section 9(2)). More specifically, Section 9(3) prohibits the state from unfairly discriminating directly or indirectly on one or more grounds, which include race, gender and sex; s. 9(4) prohibits unfair discrimination by any "person" on the same grounds.

(ii) Section 184 establishes the Human Rights Commission, which must promote respect for and promote the protection, development, and attainment of human rights. Although these rights are not listed in section 184, they must include the right to non-discrimination on the basis of sex and race.

(iii) Section 186(2)(b) establishes that the membership of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities must "broadly reflect the gender composition of South Africa".

(iv) Section 174(2) provides that when judicial officers are being appointed, "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered".

(v) Section 193(2) provides that appointments to the various Commissions established in Chapter 9 should "reflect broadly the race and gender composition of South Africa".

(b) **Democratic system of government**: the structure of democratic government is spelled out by provisions which we discuss in relation to other constitutional principles. In particular, CP VI provides for the central role of elected legislative bodies in ensuring the accountability of the executive to the electorate, and CP VIII provides the framework for representative government.

CP VI: "THERE SHALL BE A SEPARATION OF POWERS BETWEEN THE LEGISLATURE, EXECUTIVE AND JUDICIARY, WITH APPROPRIATE CHECKS AND BALANCES TO ENSURE ACCOUNTABILITY, RESPONSIVENESS AND OPENNESS."

96. The doctrine of the separation of powers, protected by CP VI, has two distinct, but related aspects to it. The first is a separation of functions among the three different branches of government: the passing of laws (legislative), the administration of those laws (executive), and the interpretation of those laws in particular circumstances (judicial). The dispersal of governmental power is designed to protect the liberty of the subject, and is sometimes reinforced by a separation of identity between the membership of the different branches, although this is not always the case.

The second aspect of the separation of powers requires "appropriate checks and balances" among the different branches of government "to ensure accountability, responsiveness and openness", because the strict separation of function may not be a sufficient means to control the accumulation of governmental power. Sometimes this may require a partial relaxation of the strict separation of function among the different branches of government. However, this partial relaxation is justified to ensure the goal of the separation of powers - the control of governmental power. Checks and balances are therefore not an exception to the separation of powers; they are an integral part of it.

97. A number of provisions in the New Text give effect to both aspects of Principle VI.

98. **Separation of Function**

(a) Section 36, the limitations clause, curtails the power of the executive to limit rights in the Bill of Rights. Since rights can only be limited "in terms of law of general application", by implication, purely executive action to limit rights, which is unauthorized by the constitution, legislation, the common law, or customary law, is excluded.

(b) Sections 44 and 104 outline the jurisdiction of national legislative authority and provincial legislative authority, respectively. By comparison, sections 85 (national government) and 125 (provincial government) establish the constitutional basis of the executive branches. Judicial authority for the whole country is vested in the courts through section 165.

(c) The separation between the legislature and the executive is reinforced by sections 57 and 58, 70 and 71, and 116 and 117. Sections 57, 70, and 116 reserve to the National Assembly, the National Council of Provinces, and provincial legislatures, respectively, the power to determine their own internal arrangements, proceedings and procedures, which safeguards the legislative process from executive encroachment. Sections 58, 71, and 117 also preserve the independence of these legislative bodies by conferring on members of these bodies immunity from "civil or criminal proceedings, arrest, imprisonment or damages for:

(i) anything that they have said in, produced before, or submitted to" the legislative body to which they belong "or any of its committees"; or

(ii) anything revealed as a result of anything that they have said in, produced before, or submitted to" the legislative body to which they belong "or any of its committees".

(d) Section 54 reinforces a partial separation between the executive and the legislature, by prohibiting the President and members of the Cabinet who are not members of the National Assembly from voting in the National Assembly, although they may attend and speak at meetings. Section 66(1) provides for a stricter separation between the national executive and National Council of Provinces (NCOP), by prohibiting Cabinet members and Deputy Ministers from voting at meetings of NCOP, although they may attend and speak at meetings.

(e) Provision is made in the text for some separation of identity between the executive and legislative branches. Section 47(1)(a) makes "anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service" ineligible to be a member of the National Assembly. This does not affect the President, Deputy President, Ministers, and Deputy Ministers, and persons whose functions are compatible with the functions of a member of the National Assembly and who have been so designated by national legislation. Similar provisions exist for the provinces (section 106(1)(a)) and municipalities (section 158(1)(a) and (b)). Under section 62(4)(b), as soon as a person is appointed to the Cabinet, that person becomes disqualified to be a member of the National Council of Provinces, while under section 87, as soon as a person is elected President, she or he ceases to be a member of the National Assembly.

99. **Checks and Balances to Ensure Accountability, Responsiveness, and Openness**

(a) Section 33 establishes the constitutional foundation for judicial review of administrative action, which enables the judiciary to hold the executive accountable to standards, *inter alia*, of reasonableness and fairness.

(b) Section 55(2) requires the National Assembly to provide for mechanisms to ensure the accountability of all executive organs in the national sphere of government; this responsibility is supplemented by section 56(a), which empowers the National Assembly or any of its committees to "summon any person to appear before it to give evidence on oath or affirmation or to produce documents"; section 56(c) gives it the power to compel any person to comply with a summons "in terms of national legislation or the rules and orders" of the Assembly. Ministers can therefore be compelled to appear. Likewise, section 114(2) allows provincial legislatures to establish mechanisms to ensure the accountability of all provincial executive organs, and section 115 grants provincial legislatures and any of its committees comparable powers to

those under section 56.

(c) Section 66(2) permits (but does not require) the National Council of Provinces (NCOP) to require a Cabinet Minister, a Deputy Minister or an official in the national or provincial executive to attend a meeting of the Council or a committee of the Council. Presumably, this is designed to ensure that those officials can be questioned in the proceedings, and is supplemented by section 69(a), which empowers the NCOP to "summon any person to appear before it to give evidence on oath or affirmation or to produce documents", and section 69(c), which empowers the NCOP to compel any person to comply with a summons "in terms of national legislation or the rules and orders" of the NCOP. As under sections 56 and 115, Ministers can be compelled to appear.

(d) Section 79(1) gives the President the power to refuse assent to and to refuse to sign a Bill, if he or she has reservations about its constitutionality. A similar power is vested in the Premier of a province by section 121(1).

(e) Section 86 gives the National Assembly the power to elect the President, which helps to ensure that the President is accountable to the legislature. Section 128 confers a similar power on provincial legislatures with respect to the election of Premiers.

(f) Section 89 ensures the ultimate accountability of the President to the National Assembly, by empowering that body to remove the President from Office. However, the scope of this power is limited to extreme circumstances (a serious violation of the Constitution or the law, serious misconduct, or inability to perform the functions of office).

(g) Sections 92(2) and 92(3)(b) entrench the principle of individual and collective Ministerial Responsibility, by holding them accountable to Parliament for the performance of their functions. Sections 133(2) and 133(3)(b) entrench the same principles with respect to provincial ministers (members of the Executive Council) and provincial legislatures.

(h) Section 101(3) helps to reduce the dangers of executive legislation, by enabling Parliament to pass laws which require such instruments to be tabled in and approved by Parliament. Similarly, see section 140(3) for matters within provincial jurisdiction.

(i) Section 102 provides for motions of no-confidence in the National Assembly to ensure the accountability of the executive to the legislature. If a motion is passed against the Cabinet (s. 102(1)), the President must reconstitute the Cabinet; if a motion is passed against the President (s. 102(2)), the President and the Cabinet must resign. Likewise, see s. 141 for the ability of provincial legislatures to hold members of the Executive Council and Premiers accountable through no-confidence motions.

(j) Section 37 governs the constitutionality of states of emergency. Although the

declaration of a state of emergency confers enormous power on the executive to derogate from many of the protections in the Bill of Rights, the provision includes important checks and balances by the legislature and the judiciary. A state of emergency can only be declared in terms of an Act of Parliament (section 37(1)), and the initial declaration must be renewed after 21 days (section 37(2)(b)); extensions thereafter may be granted for three months, again only by the National Assembly. Furthermore, the legality of a declaration, an extension, and "any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency", is expressly justiciable (section 37(3)); section 37(1) lays down two jurisdictional facts which serve as the basis for judicial review.

(k) Legislative oversight of the executive is enhanced by section 188, which establishes the office and powers of the Auditor-General. The Auditor-General is under a duty to "audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations; all municipalities; and any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General" (section 188(1)). These reports must be directly submitted to "any legislature that has a direct interest in the audit" (section 188(3)), thereby providing legislatures with information to enhance executive accountability.

(l) Section 182 establishes the office and powers of the Public Protector, who can "as regulated by national legislation investigate any conduct in state affairs, or in the public administration of any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice" and "to report on" and "take appropriate remedial action" in response to that conduct (section 182(1)). Although the Public Protector seems to be primarily charged with redressing individual grievances, "Any report issued by the Public Protector must be open to the public" unless national legislation prescribes otherwise in "exceptional circumstances" (section 182(5)). The public availability of these reports also enhances legislative oversight of the executive.

(m) The Public Service Commission, established by section 196, also enhances legislative oversight of the executive. The Commission is charged with promoting "the values and principles of public administration in the public service" (section 196(1)), which include, *inter alia*, "A high standard of professional ethics" and the "Efficient, economic and effective use of resources" (section 195(1)). Since the Commission is accountable to the National Assembly (section 196(5)), it will assist the Assembly in holding the executive accountable.

(n) Section 199(8) establishes another check on executive power, by granting "multi-party parliamentary committees ... oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament".

(o) Sections 174 and 177 safeguard the independence of the judiciary. Section 174(7) provides that judicial officers, other than members of the Constitutional Court and the Chief Justice and Deputy Chief Justice, "must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice". Section 177 lays down stringent requirements for the removal of judges, who must be found to be suffering from an incapacity, be grossly incompetent, or guilty of gross misconduct. These sections are more fully discussed under CP VII.

CP VIII: "THERE SHALL BE REPRESENTATIVE GOVERNMENT EMBRACING MULTI-PARTY DEMOCRACY, REGULAR ELECTIONS, UNIVERSAL ADULT SUFFRAGE, A COMMON VOTERS' ROLE, AND, IN GENERAL, PROPORTIONAL REPRESENTATION."

100. This provision defines some of the specific features of South African democracy. It therefore represents an articulation of and elaboration upon the commitment to a democratic system of government found in section 1. It also presents, in stark form, a contrast with the system of undemocratic government which prevailed during the apartheid era. Multi-party democracy is a sharp break from a state of affairs where political parties were banned for the positions they took (e.g. the ANC and the PAC); universal adult suffrage a contrast to conferring the right to vote only on persons of a certain race and/or gender; a common voters' role a departure from a system where those races who were entitled to vote did so in elections for legislative bodies which were segregated on the basis of race. Proportional representation, in the South African context, also marks a break from the apartheid era, because it premises the number of seats that a party possess in the legislature on the degree of support it receives from South Africans as a whole, regardless of their race. A constituency system, by contrast, would carry forth an odious legacy of apartheid - the Group Areas Act - into electoral politics, by facilitating race-based voting and the racial fragmentation of political life.

101. Provisions based on this principle can be found throughout the New Text. Section 1(d), discussed above, lists universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government as foundational values of the Republic. We have attempted to organize these provisions under the individual components of principle VIII.

102. **Representative Government**

(a) Section 42(3) establishes the democratic credentials of the National Assembly, by providing that the Assembly "is elected to represent the people and to ensure government by the people under the Constitution." It promotes democratic government "by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action".

(b) Section 46(1) reaffirms the democratic credentials of the National Assembly, by providing that the "electoral system" which governs the election of the Assembly is, *inter alia*, based on the national common voter's roll.

(c) Section 57(1)(b) provides that the National Assembly may make rules and orders concerning its business, with due regard, *inter alia*, to representative democracy.

(d) Section 86 provides that the National Assembly, a representative body, is charged with electing the President of the Republic; furthermore, sections 89

(Removal of the President) and 102 (Motions of no-confidence) provide for the removal of the President by the National Assembly. In this way, the President is accountable to elected representatives, which helps to ensure that the Presidency is a representative institution.

(e) Section 105(1) (compare section 46(1)) establishes the democratic credentials of provincial legislatures, by providing that the electoral system which governs the election of a legislature shall be based, *inter alia*, on that province's segment of the national common voters roll.

(f) Section 116(1)(b) (compare section 57(1)(b)) provides that a provincial legislature may make rules and orders concerning its business, with due regard, *inter alia*, to representative democracy.

(g) Section 128 (compare section 86) provides that a provincial legislature, a representative body, is charged with electing the Premier of a Province; furthermore, section 141 (motions of no-confidence) provides for the removal of the Premier by a provincial legislature. In this way, the Premier is accountable to elected representatives, which helps to ensure that the Premiership is a representative institution.

103. **Multi-party Democracy**

(a) Section 19 enshrines political rights which protect the ability of citizens to meaningfully participate in democratic governance. These include a set of rights relating to political parties, in section 19(1): the right of every citizen to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause.

(b) Section 57(2) protects multi-party democracy in the National Assembly in three ways:

(i) by requiring that "all minority parties represented in the Assembly" be allowed to participate "in the proceedings of the Assembly, and its committees ... in a manner consistent with democracy" (section 57(2)(b)), the text seeks to ensure that all political parties, not just a majority party, are given the means to influence the legislative process;

(ii) by requiring that the rules and orders of the National Assembly provide for

> financial and administrative assistance to each political party represented in the Assembly in proportion to their representation, to enable each party and its leader to perform its functions in the Assembly effectively

(section 57(2)(c)), political parties are given the financial means to influence the political process; and

(iii) by requiring the recognition of the leader of the largest minority party in the Assembly as the Leader of the Opposition (section 57(2)(d)). Although the Constitution does not specifically provide for the rights and responsibilities of the Leader of the Opposition, the entrenchment of this position recognizes the importance of opposition parties to the democratic process.

(c) Section 70(1)(b) requires that the National Council of Provinces make rules and orders concerning its business, which must have regard to "representative ... democracy".

(d) Section 116(2) protects multi-party democracy in the provincial legislatures in three ways (see discussion of sections 52(2) above):

(i) by requiring that "all minority parties represented in the legislature" be allowed to participate "in the proceedings of the legislature ... in a manner consistent with democracy" (section 116(2)(b); compare section 57(2)(b)), the text seeks to ensure that all political parties, not just a majority party, are given the means to influence the legislative process;

(ii) by requiring that the rules and orders of the provincial legislature provide for

> financial and administrative assistance to each political party represented in the legislature in proportion to their representation, to enable each party and its leader to perform its functions in the Assembly effectively

(section 116(2)(c)), political parties are given the means to influence the financial political process; and

(iii) by requiring the recognition of the leader of the largest minority party in the legislature as the Leader of the Opposition (section 57(2)(d)). Although the Constitution does not specifically provide for the rights and responsibilities of the Leader of the Opposition, the entrenchment of this position recognizes the importance of opposition parties to the democratic process.

(e) Multi-party democracy is also protected by section 61(2), which governs the allocation of delegates to the National Council of Provinces (NCOP) from the various provincial legislatures, and seeks to ensure that minority parties in provincial legislatures are represented in the NCOP. As discussed below under CP XIV, the provision leaves the calculation of minority party

representation to national legislation.

(f) The rules and orders of the NCOP also further multi-party democracy, by providing for the participation of minority political parties in a manner consistent with democracy, with respect to Bills falling outside the functional areas listed in Schedule 4 (section 70(2)(c).

(g) Section 78(1)(a) promotes multi-party democracy in the Mediation Committee, by requiring that representation of parties on the Committee be in substantially the same proportion that parties are represented in the Assembly.

(h) Section 199(8) charges multi-party committees with the task of overseeing "all security services".

(i) Section 236 provides that national legislation must fund "political parties participating in national and provincial legislatures on an equitable and proportional basis".

(j) In general, reference should be made to CP XIV, which requires provision to be made for the participation of minority political parties in the legislative process in a manner consistent with democracy.

104. **Regular Elections**

(a) Section 19(2) enshrines the right of every citizen to free, fair, and regular elections for any legislative body established in terms of the Constitution.

(b) Section 49 governs the duration of the National Assembly, which ensures that there are regular elections:

(i) Section 49(1) sets the term of the National Assembly at a maximum of 5 years, thereby guaranteeing regular elections.

(ii) Under section 49(2), if the National Assembly is dissolved by the President or Acting President (pursuant to section 50) before the expiry of its term, or when its terms expires, then the President must call an election which must held within 90 days of the dissolution of the Assembly or the expiry of the Assembly's term.

(iii) If the result of an election is not declared within the period established under s. 190 or if an election is set aside by a court, the President must call an election to held within 90 days of the expiry of that period or the date of the court decision (section 49(3)).

(c) Section 86(1) provides that the National Assembly shall elect the President of the Republic "At its first sitting after its election". The President's term of office runs until "the person next elected President assumes office" or when a vacancy arises (section 88(1)). It follows from these two provisions that

regular elections of the National Assembly in turn guarantee regular elections of the President.

(d) Section 108 governs the duration of provincial legislatures, which ensures that elections are held regularly (compare section 49 above):

(i) Section 108(1) sets the term of a provincial legislature at a maximum of 5 years, which ensures that elections are held regularly.

(ii) Under section 108(2), if a provincial legislature is dissolved by the Premier of the province (pursuant to section 109) before the expiry of its term, or when its terms expires, then the Premier must call an election which must be held within 90 days of the dissolution of the legislature or the expiry of the legislature's term.

(iii) If the result of an election is not declared within the period established under s. 190 or if an election is set aside by a court, the President must call an election to be held within 90 days of the expiry of that period or the date of the court decision (section 108(3)).

(e) Section 128(1) provides that a provincial legislature shall elect the Premier of the province "At its first sitting after its election". The Premier's term of office runs until "the person next elected Premier assumes office" or when a vacancy arises (section 130(1)). It follows these two provisions that regular elections of the provincial legislatures in turn guarantee regular elections of the Premiers (compare sections 86(1) and 88(1) above).

(f) Section 190 establishes the Electoral Commission, which is charged with, *inter alia*, ensuring that those elections are free and fair.

105. **Universal Adult Suffrage**

(a) Section 19(3)(a) protects the right of every adult citizen to vote in elections for legislative bodies established in terms of the Constitution by secret ballot.

(b) Section 46(1)(c) requires the electoral system which governs the election of the National Assembly to provide "for a minimum voting age of 18 years". This section limits the suffrage to adult voters, but would also seem to permit limits on adult suffrage to classes of adults over 18. However, section 46(1)(c) must be read subject to s. 19(3)(a), which clearly establishes the right of all adult citizens to vote. Section 46(1)(c), in this light, merely establishes a minimum voting age.

(c) Section 105(1)(c) requires that the electoral system which governs the election of the provincial legislature to provide "for a minimum voting age of 18 years" (For discussion, see s. 41(1)(c) above).

106. **Common Voters' Roll**

(a) Section 46(1)(b) requires that the electoral system which governs the election of the National Assembly must be "based on the national common voters' roll".

(b) Section 105(1)(b) requires that the electoral system which governs the election of a provincial legislature must be "based on that province's segment of the national common voters roll".

(c) Section 157(2) requires that the electoral system which governs the election of a Municipal Council must rely on that municipality's segment of the national common voters roll.

107. **In General, Proportional Representation**

(a) Section 46(1)(d) requires the electoral system which governs the election of the National Assembly to result "in general, in proportional representation". Section 46(2) seems to provide that an Act of Parliament will provide the details of how proportional representation would work.

(b) Section 105(1)(d) requires the electoral system which governs the election of a provincial legislature to result "in general, in proportional representation". Section 105(2) seems to provide that an Act of Parliament will provide the details of how proportional representation would work.

(c) Section 157(2) requires that the electoral system for the election of Municipal Councils must prescribe a system of proportional representation, which may be combined with a system of ward representation. Section 157(3) spells out the requirement for proportional representation further, by requiring that "the total number of members elected from each party reflects the total proportion of the votes recorded for those parties".

CP IX: "PROVISION SHALL BE MADE FOR FREEDOM OF INFORMATION SO THAT THERE CAN BE OPEN AND ACCOUNTABLE ADMINISTRATION AT ALL LEVELS OF GOVERNMENT."

108. Principle IX serves two interlocking purposes. The first is to make democratic government a reality, by ensuring that the citizenry is possessed of the information necessary to make informed electoral choices, and that elected representatives are possessed of the information necessary to hold the executive accountable. The second is the protection of individual rights, since knowledge possessed by the state about a person gives the state enormous power over that person; freedom of access to that information by that person helps to undermine the basis of that power. This chapter only deals with the first of these two purposes. The second has already been dealt with in the chapter on the Bill of Rights.

109. **Freedom of Information in the Legislative Process**

(a) National Government

(i) Section 55(2) promotes freedom of information by requiring the National Assembly to provide for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and to ensure that all executive organs of state in the national sphere are accountable to it. This may include a requirement that proclamations, regulations and other instruments of subordinate legislation be tabled in and/or approved by Parliament (section 104(3)). Since the National Assembly must conduct its business in an open manner (see section 59(b) below), legislative supervision of the executive will expose executive decisions to public scrutiny.

(ii) Section 56 empowers the National Assembly or any of its committees to summon any person to appear before it to give evidence on oath or affirmation or to produce documents, and to require any person or institution to report to it.

(iii) Section 57(1)(b) confers on the National Council of Provinces the power to make rules and orders concerning its business, with due regard, *inter alia* to "accountability" and "transparency". Accountable and transparent procedures, by implication, bring with them freedom of information.

(iv) Section 59(b) requires the National Assembly to "conduct its business in an open manner" and to "hold its sittings, and those of its committees, in public", although reasonable measures can be taken to regulate public access.

(v) Section 70(1)(b) (see section 57(1)(b) above) confers on the National Council of Provinces the power to make rules and orders concerning its business, with due regard, *inter alia* to "accountability" and

"transparency".

(vi) Section 72(b) requires the National Council of Provinces to "conduct its business in an open manner" and to "hold its sittings, and those of its committees, in public", although reasonable measures can be taken to regulate public access (see section 59(b)).

(vii) Section 81 provides that an Act of Parliament "must be published promptly" once assented to and signed by the President.

(b) Provincial Government

(i) Section 114(2) promotes freedom of information by requiring the provincial legislatures to provide for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and to ensure the accountability of all provincial executive organs of state in the province. This may include a requirement that proclamations, regulations and other instruments of subordinate legislation be tabled in and/or approved by a provincial legislature (section 140(3)). Since provincial legislatures must conduct their business in an open manner (see section 118(b) below), legislative supervision of the executive will expose executive decisions to public scrutiny (see above section 55(2)).

(ii) Section 115 empowers a provincial legislation or any of its committees to summon any person to appear before it to give evidence on oath or affirmation or to produce documents, and to require any person or institution to report to it.

(iii) Section 118(b) requires a provincial legislation to "conduct its business in an open manner" and to "hold its sittings, and those of its committees, in public", although reasonable measures can be taken to regulate public access (see above sections 55(b) and 72(b)).

(iv) Section 123 provides that an Act of a provincial legislature "must be published promptly" once assented to and signed by the Premier of a province.

110. **Freedom of Information and Executive Decisions**

(a) Section 101(2) provides that proclamations, regulations and other instruments of subordinate legislation of the national government must be accessible to the public.

(b) Section 140(2) provides that proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.

(c) Section 188, discussed above in relation to CP VI, promotes freedom of information with respect to executive decisions, because all reports of the

Auditor-General must be made public (section 188(3)).

(d) Section 182(5), discussed above in relation to CP VI, promotes freedom of information with respect to executive decisions, by requiring that "Any report issued by the Public Protector must be open the public", save for "exceptional circumstances".

(e) Section 195(1)(g) promotes freedom of information in public administration, by making enshrining the following principle:

> Transparency must be fostered by providing the public with timely, accessible and accurate information.

CP X: "FORMAL LEGISLATIVE PROCEDURES SHALL BE ADHERED TO BY LEGISLATIVE ORGANS AT ALL LEVELS OF GOVERNMENT."

111. This principle is designed to protect the integrity and legitimacy of the legislative process, by ensuring that laws are passed in a regular fashion set down by the Constitution. The constitutionalization of legislative process is an important strategy to control the excesses of majority power, and distinguishes a mere government of numbers (simple majoritarianism) from a system of government committed to the use of deliberative bodies such as legislatures.

112. **National Government**

Section 42(2) establishes that the National Assembly and the National Council, which together comprise Parliament, "participate in the legislative process in the manner set out in the Constitution". The core features of this process can be found in sections 73 to 82 of Chapter 4 ('Parliament'), which are under the heading "National Legislative Process":

(a) Any Bill can be introduced in the National Assembly (section 73(1)); however, only Bills which fall within a functional area listed in Schedule 4 ('Functional Areas of Concurrent National and Provincial Legislative Competence'), and which is not a money Bill, may be introduced in the National Council of Provinces (section 73(3).

(b) Bills in the National Assembly can only be introduced by Cabinet members, Deputy Ministers, or members or committees of the National Assembly; but money Bills can only be introduced by "the Cabinet members responsible for national financial matters" (section 73(2); also see section 55(1)(b)). In the National Council of Provinces, Bills may only be introduced by "a member, or a committee, of the National Council of Provinces" (section 73(4); also see section 68(b)).

(c) When a Bill is passed by one chamber of Parliament, it must be referred to the other body (section 73(5)).

(d) The National Assembly enjoys privileged status in the national legislative process. It has the power to "consider, pass, amend or reject any legislation" that comes before it (section 55(1)). The National Council of Provinces, by contrast, can "consider, pass, amend or reject any legislation" before it "in accordance with the Chapter" (section 68); its role depends on the subject-matter of the legislation:

(i) Section 74 establishes special procedures for the passage of Bills outside Schedule 4. The thrust of these provisions is that the NCOP exercises reduced legislative powers with respect to these subject-matters.

(ii) By comparison, section 76 puts the NCOP in a more equal footing with the National Assembly with respect to matters falling within Schedule 4. If the NCOP and the National Assembly are unable to agree on a Bill, it must go through the Mediation Committee, which has equal representation from both chambers (section 78). If the Committee is unable to agree within 30 days, the Bill lapses, although the National Assembly by at least a two-thirds majority can adopt its own Bill without the NCOP (section 78(1)(e)).

(e) There are a number of miscellaneous provisions which outline important features of the national legislative process:

(i) Section 45(a) requires the National Assembly and National Council of Provinces to "establish a joint rules committee to make rules and orders concerning the business of the Assembly and Council, including rules and orders ... to determine procedures to facilitate the legislative process".

(ii) Section 57(1)(b) empowers the National Assembly to make rules and orders concerning its business; under section 57(2)(a), these rules and orders must provide for the establishment, composition, powers, functions, procedures and duration of its committees, which are involved in the legislative process.

(iii) Section 70(1)(b) (compare section 57(1)(b)) empowers the National Council of Provinces to make rules and orders concerning its business; under section 70(2)(a) (compare section 57(2)(a)), these rules and orders must provide for the establishment, composition, powers, functions, procedures and duration of its committees.

(iv) Section 56, discussed above, establishes in rough outline the powers of the National Assembly or any of its committees with respect to summoning witnesses, etc.

(v) Section 69 (compare section 56), discussed above, establishes in rough outline the powers of the National Council of Provinces or any of its committees with respect to summoning witnesses, etc.

(vi) Section 53 governs the manner in which the National Assembly votes on decisions, including quorum.

(vii) Section 65 governs the manner in which the National Council of Provinces may take decisions.

(viii) Section 79 provides that the President must either assent to and sign a Bill, or refer it back to the National Assembly for reconsideration if he or she has reservations about the constitutionality of the Bill (section

79(1)). If after the reconsideration, the President still has reservations, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision (section 79(4)). If the Bill is held to be constitutional, the President must assent to and sign it (section 79(5)).

(ix) Section 81 provides that an Act of Parliament does not take effect until published (or on a later date determined in terms of the Act), thereby preventing the passage of secret laws.

113. **Provincial Government**

(a) All Bills must be introduced in the provincial legislature (section 119), which is the unicameral organ vested with legislative authority in the province (section 104).

(b) Section 119 provides that only members of the Executive Council of a province or a committee or a member of a provincial legislature may introduce a Bill in the legislature, but only the member of the Executive Council responsible for financial matters in the province may introduce a money Bill.

(c) Section 114 provides that in exercising its legislative power, a provincial legislature may "consider, pass, amend or reject any legislation before the Assembly".

(d) There are a number of miscellaneous provisions governing the provincial legislative process:

114. (i) Section 112 (compare section 53) governs the manner in which the provincial legislature votes on decisions, including quorum.

(ii) Section 115 (compare section 56), discussed above, establishes in rough outline of the powers of a provincial legislature or any of its committees with respect to summoning witnesses, etc.

(iii) Section 116(1)(b) (compare section 57(1)(b)) empowers a provincial legislature to make rules and orders concerning its business; under section 116(2)(a) (compare section 57(2)(a)), these rules and orders must provide for the establishment, composition, powers, functions, procedures and duration of its committees.

(iv) Section 121 provides that the Premier must either assent to and sign a Bill, or refer it back to the provincial legislature for reconsideration if he or she has reservations about the constitutionality of the Bill (section 121(1)). If after the reconsideration, the Premier still has reservations, the Premier must either assent to and sign the Bill or refer it to the Constitutional Court for a decision (section 121(2)). If the Bill is held to be constitutional, the Premier must assent to and

sign it (section 121(3).

(v) Section 123 provides that an Act of a provincial legislature does not take effect until published (or on a later date determined in terms of the Act), thereby preventing the passage of secret laws.

115. **Municipal Councils**

(a) Section 160(1) empowers a Municipal Council to make rules and orders governing its business and proceedings, and the establishment, composition, procedures, powers and functions of its committees.

(b) Section 162(1) provides that a municipal by-law is only in force after it has been published in the official gazette of the relevant province.

CP XIV: "PROVISION SHALL BE MADE FOR PARTICIPATION OF MINORITY POLITICAL PARTIES IN THE LEGISLATIVE PROCESS IN A MANNER CONSISTENT WITH DEMOCRACY."

116. This principle aims to secure a voice for minority political parties, and therefore seeks to address the danger that a majority party will use its power to deny minorities a role in the legislative process altogether. However, the internal limit on the principle is a purposive one, because it recognizes that the point of a role for minority parties is not to grant them a veto over legislative decisions they disagree with, but to ensure that they have a full opportunity to state their views.

117. A number of provisions put this principle into effect.

(a) National Government

(i) Minority party participation is fostered by proportional representation, which sections 46(1)(d) and 46(2) establish as the system for electing members of the National Assembly. In contrast to a constituency system, proportional representation is more favourable to parties whose support is geographically dispersed.

(ii) Section 57(2)(b) requires that the rules and orders of the National Assembly provide for "the participation in the proceedings of the Assembly, and its committees, of all minority political parties represented in the Assembly, in a manner consistent with democracy". (This provision has been discussed with respect to CP VIII.)

(iii) Section 57(2)(c) requires that the rules and orders of the National Assembly provide for "financial and administrative assistance to each political party represented in the Assembly in proportion to their representation, to enable each party and its leader to perform its functions in the Assembly effectively" (this provision has been discussed with respect to CP VIII).

(iv) Section 57(2)(d) requires that the rules and orders of the National Assembly provide for "the recognition of the leader of the largest minority party in the Assembly as the Leader of the Opposition" (this provision has been discussed with respect to CP VIII).

(v) Section 61(2) governs the allocation of delegates to the National Council of Provinces (NCOP) from the various provincial legislatures, and seeks to ensure that minority parties in provincial legislatures are represented in the NCOP. The formula to determine party representation in provincial delegations are contained in Schedule 3.

(vi) Section 70(2)(c) provides that the rules and orders of the National Council of Provinces must provide for the participation of minority political parties in a manner consistent with democracy, with respect

to Bills falling outside the functional areas listed in Schedule 4.

(vii) Section 78(1)(a) protects the role of minority parties on the Mediation Committee, by requiring that the representation of parties on the committee be substantially the same proportion that parties are represented in the Assembly.

(b) Provincial Government

(i) Minority party participation is fostered by proportional representation, which section 105(1)(d) establishes as the system for electing members of the provincial legislatures.

(ii) Section 116(2)(b) (see s. 57(2)(b) above) requires that the rules and orders of a provincial legislature provide for "the participation in the proceedings of the legislature, and its committees, of all minority political parties represented in the legislature, in a manner consistent with democracy". (This provision has been discussed with respect to CP VIII.)

(ii) Section 116(2)(c) (see s. 57(2)(c) above) requires that the rules and orders of a provincial legislature provide for "financial and administrative assistance to each political party represented in the legislature in proportion to its representation, to enable each party and its leader to perform its functions in the legislature" (this provision has been discussed with respect to CP VIII).

(iii) Section 116(2)(d) (see s. 57(2)(d) above) requires that the rules and orders of a provincial legislature provide for "the recognition of the leader of the largest minority party in the legislature as the Leader of the Opposition" (this provision has been discussed with respect to CP VIII).

(c) **Municipal Government**

(i) Minority party participation is fostered by proportional representation, which section 157(2) and 157(3) establish as an element of the system for electing members of Municipal Councils.

(ii) Minority parties' involvement in Municipal Councils and their committees is protected by section 160(3)(a), which requires that "Members of a Municipal Council must be able to participate in its proceedings and those of its committees in a manner that ... allows parties and interests reflected in the Council to be fairly represented".

CP XV: "AMENDMENTS TO THE CONSTITUTION SHALL REQUIRE SPECIAL PROCEDURES INVOLVING SPECIAL MAJORITIES."

118. The purpose of this provision is to secure the Constitution against the political agendas of simple majorities in legislative bodies. An amendment to the fundamental document of the country should not be treated like any other legislative decision; if it were, the constitution would have no effect as a document which limits legislative sovereignty.

119. **Special Procedures**

The procedures governing constitutional amendments are found in section 74. The procedures vary depending on the subject-matter of the amendment.

(a) Authority to amend the Constitution normally vests in the National Assembly (section 74(1)(a)). In contrast to votes on normal Bills, for which the quorum is one-third, bills to amend the Constitution seem to require a quorum of two-thirds, since the Constitution can only be amended by the National Assembly by a vote of at least two-thirds vote of "its members".

(b) However, under section 74(1)(b), for a constitutional amendment which

(i) affects the Council of Provinces (NCOP),

(ii) alters provincial boundaries, powers, functions or institutions, or

(iii) amends a provision that deals specifically with a provincial matter,

the NCOP must vote on the amendment as well.

(c) Under section 74(3), if a constitutional amendment "concerns only a specific province or provinces, the National Council of Provinces may not pass it unless the Bill has been approved by the relevant provincial legislature or legislatures". This is a further departure from normal procedure.

(d) Under section 74(4), Parliament "may not pass a Bill that amends the Constitution and concerns the powers, boundaries, or functions or provinces until it has been referred to the provincial legislatures for their views", which is again a departure from normal procedure. The weaker duty of consultation, as opposed to consent, arises because the amendment merely "concerns", but does not "alter" provincial boundaries, powers, functions.

120. **Special Majorities**

(a) Section 74(1)(a) requires that a Bill to amend the Constitution be passed by at least two thirds of the members of the National Assembly, instead of the normal simple majority (section 53(1)(c)).

(b) Section 74(1)(b) requires that a Constitutional Amendment which (i) affects

the Council of Provinces, (ii) alters provincial boundaries, powers, functions or institutions, or (iii) amends a provision that deals specifically with a provincial matter be approved by six provinces out of nine (as opposed to the usual five: section 65(1)(b)).

CP XVI: "GOVERNMENT SHALL BE STRUCTURED AT NATIONAL, PROVINCIAL AND LOCAL LEVELS."

121. The whole scheme of Chapters 3, 4, 5, 6 and 7 of the Text complies with this Principle.

122. Section 40(1) provides as follows:

(i) "In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.

(ii) "All spheres of government must observe and adhere to the principles in this Chapter and must conduct the activities within the parameters that the Chapter provides."

123. Section 43 dealing with legislative authority reads as follows:

> "43. In the Republic, the legislative authority -
>
> (a) of the national sphere of government is vested in Parliament, as set out in section 44;
>
> (b) of the provincial sphere of government is vested in the provincial legislature of a province, as set out in section 104; and
>
> (c) of the local sphere of government is vested in Municipal Councils, as set out in section 156."

124. **Levels of Governments**:

(a) National Government:

Sections 42 and 44 of the Text deal with the composition of Parliament and the powers of the national legislative authority, respectively. Section 85 deals with the national executive authority.

(b) Provincial Government:

Sections 104 and 105 deal with the legislative authority and composition of provincial legislatures, respectively. Section 125 provides for the executive authority of provinces.

(c) Local Government:

Section 151 provides for the structure and the executive and legislative authority of municipalities. Section 156 deals with the powers and functions of municipality.

CP XVII: "AT EACH LEVEL OF GOVERNMENT THERE SHALL BE DEMOCRATIC REPRESENTATION. THIS PRINCIPLE SHALL NOT DEROGATE FROM THE PROVISIONS OF PRINCIPLE XIII."

125. This principle reiterates and clarifies the requirement laid down by CP VII, that "There shall be representative government", by underlining that *each* level of government must have democratic representation. Since the principles contemplate three levels of government - national, provincial, and local (CP XVI) - CP XVII therefore requires that the each of these three levels be democratic. However, the principle contains an exception which shields the institution of traditional leadership, whose role and status are protected by CP XIII, from the need for democratic representation. It is submitted that the text satisfies CP XVII.

126. **Democratic Representation**

(a) Section 46 provides that the National Assembly shall be "elected" in terms of an electoral system which is, *inter alia*, based on the national common voters roll.

(b) Section 105 (compare section 46) provides that a provincial legislature shall be elected in terms of an electoral system which is, *inter alia*, based on that province's segment of the national common voters roll.

(c) Section 157 provides that a Municipal Council is either elected and/or appointed by another Municipal Council to represent that other Council (section 157(1)). The provision specifies two different ways that a Municipal Council may be elected: (i) by proportional representation, or (ii) proportional representation combined with a system of ward representation (section 157(2)).

127. **No Derogation from Principle XIII**.

(a) Section 211(2) provides that a traditional authority that observes a system of customary law may function, subject to any applicable legislation and customs (including amendments and repeals). The provision is broad enough to embrace the exercise of government authority by traditional leaders. No mention is made of the need for democratic representation.

(b) Under section 212(1), "National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities". This provision seems to contemplate a governmental role for traditional leaders, and does not make any mention of democratic representation.

CP XXIV: "A FRAMEWORK FOR LOCAL GOVERNMENT POWERS, FUNCTIONS AND STRUCTURES SHALL BE SET OUT IN THE

CONSTITUTION. THE COMPREHENSIVE POWERS, FUNCTIONS AND OTHER FEATURES OF LOCAL GOVERNMENT SHALL BE SET OUT IN PARLIAMENTARY STATUTES OR IN PROVINCIAL LEGISLATION OR BOTH."

128. This principle mandates that local government have constitutional status alongside the national and provincial governments as a sphere of government. By comparison, local governments in some other countries are strictly creatures of statute. However, this principle differs from those governing the distribution of legislative and executive powers to the provinces and the national government (e.g. principles XIX and XXI) in that the comprehensive specification of local government powers will come from legislation passed by the other two spheres of government, not the constitution itself. Thus, although local government has constitutional status and powers, it is in an important sense dependent on the other two spheres of government.

129. **Framework for Local Government**

Chapter 7 establishes the framework for local government powers, functions, and structures.

(a) Section 151(1) establishes that local government consists of municipalities, which must be established for the whole territory of the Republic. The executive and legislative authority of a municipality is vested in its Municipal Council (section 151(2)). A municipality has the right to govern, on its own initiative, the local government affairs of its community (section 151(3)).

(b) The objects of local government are spelled out in section 152, which include, e.g. the promotion of social and economic development, and the provision of services to communities in a sustainable manner.

(c) Section 153 imposes two "developmental duties" on municipalities: (i) to structure and manage its administration, financing, etc. in order to give priority to the basic needs of the community and the social and economic development of the community, and (ii) to participate in national and provincial development programmes.

(d) Section 154 situates municipalities within the text's commitment to co-operative government, by imposing on national and provincial governments a duty to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions", and to publish any Bill "that affects the status, institutions, powers or functions of local government" in order to allow for representations by municipalities (and other parties) with regard to the Bill.

(e) Section 156 establishes the powers and functions of a municipality:

(i) its executive authority encompasses: the right to administer "local

government matters listed in Part B of Schedule 4 and Part B of Schedule 5"; "any other matter assigned or delegated to it by national or provincial legislation" (section 156(1)), which includes matters which national and provincial government must assign or delegate because they "necessarily" relate to local government, would most effectively be administered locally, and the municipality has the capacity to administer it (section 156(4); by-laws which it has enacted (section 156(2)); and "the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions" (section 156(5));

(ii) its legislative authority includes the power to make by-laws "for the effective administration of matters which it has the right to administer" (section 156(2)), although by-laws must give way to conflicting national or provincial legislation unless that legislation is itself inoperative (section 156(3)). A by-law is only in force "after it has been published in the official gazette of the relevant province" (section 162(1)).

(f) Sections 157 and 158 provide for the composition and election, and the membership, respectively, of Municipal Councils.

(g) Section 160 concerns the internal procedures of Municipal Councils, including its "business and proceedings", and the "establishment, composition, procedures, powers and functions of its committees" (section 160(1)). As well, it establishes a presumption that meetings of a Municipal Council and its committees be open (section 160(2)), and that members of a Municipal Council have the right to participate in its and its committees' proceedings in a manner that allows the fair representation of the parties and interests within the Council, and "is consistent with democracy (section 160(3)).

130. **The specification of comprehensive powers, functions, and other features of local government.**

(a) Section 151(3) underlines the importance of national and provincial legislation by qualifying a municipality's "right to govern" by "national and provincial legislation, as provided for in the Constitution". However, notwithstanding section 151(3), "National and provincial government may not compromise or impede a municipality's ability or right /to exercise its powers or perform its functions" (section 151(4)). Read together, these provisions suggest that the national and provincial governments must facilitate local government, not thwart it.

(b) Section 155 spells out the precise role for national and provincial governments:

(i) national legislation must determine "the different categories of municipality that may be established" (section 155(1)(a)),

"appropriate fiscal powers for each category" (section 155(1)(b)), and "procedures and criteria for the demarcation of municipal boundaries by an independent authority" (section 155(1)(c)).

(ii) provincial governments, "by legislative or other measures" must "establish municipalities" (section 155(2)(a)), "provide for the monitoring and support of local government in the province" (section 155(2)(b)), and "promote the development of local government capacity to perform its functions and its ability to manage its own affairs" (section 155(2)(c)).

(c) The imperative wording of the language in section 155 imposes a duty on provincial and national governments to undertake the measures referred to therein. However, the broad language of the provision would seem to leave considerable scope to the national and provincial governments to choose the means of satisfying these duties.

(d) There is a slight difference in language between principle XXIV and section 155(2), in that the former refers to "provincial legislation", but the latter "legislative or other measures". The broader wording of section 155(2) seems to comprehend executive action by provincial governments in relation to local government, and might refer to the power of provincial governments to supervise municipalities which cannot or do not fulfil their executive obligations in terms of legislation, under section 139.

(e) This slight departure from CP XXIV can be justified by reference to CP XX, which states that "Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each to function effectively". Since section 139 is premised on the failure of a municipality to "fulfil an executive obligation" (section 139(1)), the provincial power can be seen as attempt to balance CP XXIV and CP XX.

(f) Section 161 permits "Provincial legislation, within the framework of national legislation", to "provide for privileges and immunities of Municipal Councils and their members".

(g) Section 163 requires that Parliament enact legislation providing for the recognition of national and provincial organizations representing municipalities, and determine procedures by which local government may consult with national and provincial governments, and designate representatives.

(h) Section 164 leaves residuary powers with respect to municipalities with the national government, by providing that "All other matters relating to local government not dealt with in the Constitution may be prescribed by national legislation or provincial legislation within the framework of national legislation".

CP XXV: "THE NATIONAL GOVERNMENT AND PROVINCIAL GOVERNMENTS SHALL HAVE FISCAL POWERS AND FUNCTIONS WHICH WILL BE DEFINED IN THE CONSTITUTION. THE FRAMEWORK FOR LOCAL GOVERNMENT REFERRED TO IN PRINCIPLE XXIV SHALL MAKE PROVISION FOR APPROPRIATE FISCAL POWERS AND FUNCTIONS FOR DIFFERENT CATEGORIES OF LOCAL GOVERNMENT."

131. CP XXV arises out a recognition that governments require financial resources to plan, propose, and implement policies. The principle has two different components, each applying to different spheres of government. National and provincial governments "have fiscal powers and functions" laid down by the constitution. By contrast, the constitution only prescribes a "framework for local government" which "shall make provision for appropriate fiscal powers. Read together with CP XXIV, which confers on the national and provincial governments the authority and duty to specify the "comprehensive powers, functions, and other features of local government", the second component of CP XXV requires relatively less detail in the text itself. However, the text does provide some detail about the financial powers of local government.

132. **Fiscal powers and functions common to all spheres of government**

(a) Section 215 implies that each sphere of government has the power to set a budget. The text requires that all spheres of government adopt "budgets and budgetary processes" that "promote transparency, accountability, and the effective financial management of the economy, debt and the public sector" (section 215(1)), and that budgets must contain estimates of revenue and expenditure, proposals for deficit financing if necessary, etc. (section 215(3)). It is left to national legislation to prescribe the form, timing, and detailed revealing of "sources of revenue and the way in which proposed expenditure will comply with national legislation" (section 215(2)).

(b) Section 217 defines the scope of government procurement powers. Although procurement systems must be "fair, equitable, transparent, competitive and cost-effective" (section 217(1)), procurement policies be preferential (section 217(2)). "National legislation must prescribe a framework within which" preferential policies can be implemented (section 217(3)).

(c) Section 218 provides that all three spheres of government have the power to guarantee loans, but only if those guarantees comply with "conditions set down in national legislation" (section 218(1)).

133. **Fiscal powers and functions which are not common to all spheres of government**.

(a) National government

(i) A number of the above provisions refer to national legislation in framing the powers of all three spheres of government: budgetary powers (section 215(2)), preferential procurement (section 217(2)), and government guarantees (section 217(3)).

(ii) Treasury control (section 216), by contrast, largely resides with the national government. The text imposes a duty to adopt national legislation to "establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government" (section 216(1)). The national treasury may withhold transfer payments to any organ of state "for serious or persistent material breach" of these measures, but only "with the concurrence of the Cabinet members responsible for national financial matters" (section 216(2)). The decision to withhold funds must be approved, and can be renewed by Parliament (section 216(3)).

(iii) The remuneration of persons holding public office (section 219) is also left to national legislation. The legislation must establish "an independent commission to make recommendations concerning the salaries, allowances and benefits" of persons holding public office (section 219(2)). The legislation may set the salaries, allowances and benefits of persons holding national offices and the upper limits of salaries, allowances or benefits of persons holding provincial and municipal offices. Separate legislation is contemplated for judges, the Public Protector, the Auditor-General, and members of Commissions established by the Constitution, including the Broadcasting Authority (section 219(5)).

(b) Provincial governments

(i) Section 226 establishes a provincial revenue fund for each province, which contains all money "specified by an Act of Parliament" but "received by the provincial government" (section 226(1)). Despite the importance of national legislation, money can be withdrawn only "in terms of an appropriation by a provincial Act", or as a direct charge against the Fund, established by the constitution or provincial legislation.

(ii) Section 228 gives the province the power to imposes taxes "other than income tax, value-added tax, general sales tax, rates on property, or customs duties" and "flat-rate surcharges on the tax bases of any national tax, levy or duty" except "the tax bases of corporate income tax, value-added tax, rates on property, or customs duties" (section 228(1)). Provincial taxation powers are limited by the imperatives of national economic policies, inter-provincial economic activity, and the national common market, and must be regulated by national legislation (section 228(2)).

(iii) The power of the provinces to raise loans is set out in section 230. Loans may be raised for capital or current expenditure, but loans for current expenditure can only be raised for bridging purposes during a fiscal year and must be repaid within twelve months.

(c) Municipal governments

(i) Municipalities have the power to "impose rates on property, and excise taxes, and, subject to national legislation, may impose other taxes, levies or duties". However, no municipality may "impose any income tax, value-added tax, general sales tax, surcharge or customs duty" (section 229(1)).

(ii) The power of the municipalities to raise loans is set out in section 230. Loans may be raised for capital or current expenditure, but loans for current expenditure can only be raised for bridging purposes during a fiscal year and must be repaid within twelve months.

134. **Different Categories of Local Government**

Notwithstanding the above provisions, which seem to apply to all municipal governments, section 155(1) provides national legislation must determine different categories of municipalities and appropriate fiscal powers and functions for each.

CP XXVI: "EACH LEVEL OF GOVERNMENT SHALL HAVE A CONSTITUTIONAL RIGHT TO AN EQUITABLE SHARE OF REVENUE COLLECTED NATIONALLY SO AS TO ENSURE THAT PROVINCES AND LOCAL GOVERNMENTS ARE ABLE TO PROVIDE BASIC SERVICES AND EXECUTE THE FUNCTIONS ALLOCATED TO THEM."

135. As is apparent from the above discussion, CP XXV permits, and the text relies to a great extent on, national legislation to frame the scope of provincial and municipal fiscal powers and functions, including the ability to raise revenue. CP XXVI seeks to provide a safeguard for provincial and municipal autonomy, by guaranteeing to each "an equitable share of revenue collected nationally". A clue to the meaning of equitable can be found from the latter portion of CP XXVI, which frames the purpose of the provision as enabling provincial and local governments "to provide basic services and execute the functions allocated to them".

136. The core provisions which give effect to CP XXVI are sections 213, 217, and 227.

(a) Section 213 establishes a National Revenue Fund. All money specified by an Act of Parliament and received by the national government, i.e. **revenue collected nationally**, goes into this Fund. A province's equitable share of revenue raised nationally is a direct charge against the Fund (section 213(3)).

(b) Section 214 provides for the equitable division of "revenue raised nationally" among the national, provincial and local spheres of government. The equitable division among the three spheres of government, and the task of determining each province's equitable share is left to national legislation (section 214(1)), although the failure of the legislation to provide adequate payments would presumably be unconstitutional. The national legislation can only be enacted after consulting provincial governments, organized local government and the Financial and Fiscal Commission and recommendations of the Commission, and must take into account a variety of factors listed in section 214(2).

(c) Section 227(1)(a) reiterates section 214, providing that "local government and each province is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and exercise the functions allocated to it." The formulation is more specific than section 214, because it frames the purpose for which equitable funding is granted. A province is entitled to immediate transfer of its immediate share, subject to section 216 (section 227(3)).

137. CP XXVI requires a sharing of 'revenue collected nationally'. In the new text the phrase used to capture this idea is 'revenue raised nationally', The reason for the changed wording may well be that the meaning of revenue 'collected' nationally may be open to misrepresentation. It could refer to *revenue raised and collected at national level or to all revenue collected at national level* whether for the national government or on behalf of the provinces and local government. (It is, in fact, envisaged that, as in Canada, taxes imposed (or raised) by provincial governments will be collected

nationally.)

The principle is understood to refer to taxes raised by the national government. This understanding is based, firstly, on an interpretation of constitutional principles related to different levels of government in general and, secondly, on the model used in the Interim Constitution which the CP's appear to mirror.

138. It is submitted that in repeating the words of the principle in section 220(3) which requires the Commission to take into account "all relevant factors including those listed in section 214(2)" when making recommendation and that although section 214(2) does not repeat all the words of the principle, it captures the meaning. The interests of the provinces are well protected by the provisions of section 214(2) of the Text.

139. Although section 214(2) does not repeat all the words of the principle, it captures its meaning. In particular,

> '**population and development needs ... of each of the provinces'** is covered by 214(2)(d) ('the need to ensure that the provinces ... are able to provide basic services and exercise the functions allocated to them') and by 214(2)(f) ('developmental and other needs of provinces, local government and municipalities'); and
>
> **'administrative responsibilities ... of each of the provinces'** is covered by 214(2)(d), (f) and (h) ((h) refers to 'obligations of the provinces ... in terms of national legislation').

140. It is submitted therefore that CP XXVI has been complied with.

CP XXVII: "A FINANCIAL AND FISCAL COMMISSION, IN WHICH EACH PROVINCE SHALL BE REPRESENTED, SHALL RECOMMEND EQUITABLE FISCAL AND FINANCIAL ALLOCATIONS TO THE PROVINCIAL AND LOCAL GOVERNMENTS FROM REVENUE COLLECTED NATIONALLY, AFTER TAKING INTO ACCOUNT THE NATIONAL INTEREST, ECONOMIC DISPARITIES BETWEEN THE PROVINCES AS WELL AS THE POPULATION AND DEVELOPMENTAL NEEDS, ADMINISTRATIVE RESPONSIBILITIES AND OTHER LEGITIMATE INTERESTS OF EACH OF THE PROVINCES."

141. This principle seeks to inject some fairness into the allocation of revenue collected nationally, by giving an important role to a body which is broadly representative of the parties who have an interest. The use of a Financial and Fiscal Commission should be contrasted, for example, with allowing the National Assembly or Parliament to make these decisions without outside consultation.

142. **Provincial Representation**

Section 221 governs the appointment and tenure of the members of the Financial and Fiscal Commission. The Executive Council of each province is allowed to nominate one person (section 221(1)(b); in addition, there is the requirement that members "have appropriate expertise" (section 221(2). Appointments are made by the President as head of the National Executive.

143. **Recommendations of the Commission**

The Commission's role in determining the equitable division of revenue raised nationally is mentioned in section 214(2), although it is not spelled out in detail. The provision imposes a duty on Parliament to consult the Commission and consider any of its recommendations. Presumably, the precise details are left to the Act of Parliament which spells out the Commission's functions (section 220(3)).

144. **Factors to be taken into account**

Section 220(3) provides that in performing its functions, the Commission must consider "all relevant factors including those listed in section 214(2)". The list in 214(2) encompasses the factors listed in CP XXVII:

(a) Section 214(2)(a) lists the "national interest" as a factor, which is a factor in CP XXVII.

(b) Section 214(2)(f) lists "developmental and other needs of provinces, local governments and municipalities", which corresponds to "developmental needs".

(c) Section 214(2))(g) lists "economic disparities within and among the provinces", which is a more precise wording of "economic disparities between

the provinces" in CP XXVII.

(d) A number of different sections correspond to "administrative responsibilities and other legitimate interests of each of the provinces":

(i) "the need to ensure that the provinces and municipalities are able to provide basic services and exercise the functions allocated to them" (section 214(2)(d));

(ii) "the fiscal capacity and efficiency of the provinces and municipalities" (section 214(2)(e));

(iii) "obligations of the provinces in terms of national legislation" (section 214(2)(h)); and

(iv) "the desirability of stable and predictable allocations of revenue shares" (section 214(2)(i)).

CP XXIX: "THE INDEPENDENCE AND IMPARTIALITY OF A PUBLIC SERVICE COMMISSION, A RESERVE BANK, AN AUDITOR-GENERAL AND A PUBLIC PROTECTOR SHALL BE PROVIDED FOR AND SAFEGUARDED BY THE CONSTITUTION IN THE INTERESTS OF THE MAINTENANCE OF EFFECTIVE PUBLIC FINANCE AND ADMINISTRATION AND A HIGH STANDARD OF PROFESSIONAL ETHICS IN THE PUBLIC SERVICE."

145. This principle is complied with.

146. Sections 181 (1) and (2) provide, inter alia, that the Public Protector and the Auditor-General are independent, and are 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.

147. Section 181(3) provides that other organs of State, through legislative and other measures must assist and protect the Public Protector and the Auditor-General, *inter alia*, to ensure their impartiality, dignity and effectiveness.

148. Their independence is further buttressed by section 181(4) which states that no person or organ of State may interfere with their functioning.

149. The functions of the Public Protector are set out in Section 182.

150. The functions of the Auditor-General are set out in Section 188.

151. The Public Protector and the Auditor-General 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 the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office and adopted by a majority of the members of the Assembly [Section 194(1)].

152. The President -

(a) may suspend a person from office at any time after the start of the proceedings of the said committee of the National Assembly, for the removal of that person; and

(b) must remove a person from office upon adoption of the said resolution calling for that person's removal. [Section 194(2)]

153. Section 195(1) sets out the basic values and principles that govern the public service

and these include the following:

(a) a high standard of professional ethics must be promoted and maintained;

(b) efficient, economic and effective use of resources must be promoted;

(c) services must be provided impartially, fairly, equitably and without bias.

154. Section 195(3) provides that national legislation must ensure the promotion of the values and principles listed above.

155. Section 196(1) provides for a Public Service Commission to promote the values and principles listed in Section 195(1).

156. In terms of Section 196(2):

> "The Commission is independent and must be impartial and regulated by national legislation."

157. In terms of Section 223:

> "The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament."

158. The Reserve Bank in pursuit of its primary object of protecting the value of the currency in the interests of balanced and sustainable economic growth in the Republic must perform its functions 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 [Section 224].

CP XXX: "**1. THERE SHALL BE AN EFFICIENT, NON-PARTISAN, CAREER-ORIENTATED PUBLIC SERVICE BROADLY REPRESENTATIVE OF THE SOUTH AFRICAN COMMUNITY, FUNCTIONING ON A BASIS OF FAIRNESS AND WHICH SHALL SERVE ALL MEMBERS OR THE PUBLIC IN AN UNBIASED AND IMPARTIAL MANNER, AND SHALL, IN THE EXERCISE OF ITS POWERS AND IN COMPLIANCE WITH ITS DUTIES, LOYALLY EXECUTE THE LAWFUL POLICIES OF THE GOVERNMENT OF THE DAY IN THE PERFORMANCE OF ITS ADMINISTRATIVE FUNCTIONS. THE STRUCTURES AND FUNCTIONING OF THE PUBLIC SERVICE, AS WELL AS THE TERMS AND CONDITIONS OF SERVICE OF ITS MEMBERS, SHALL BE REGULATED BY LAW.**
2. EVERY MEMBER OF THE PUBLIC SERVICE SHALL BE ENTITLED TO A FAIR PENSION."

159. The basic values and principles governing public administration are set out in section 195(1) and include the following:

(a) efficient, economic and effective use of resources must be promoted;

(b) services must be provided impartially, fairly, equitably and without bias;

(c) good human-resource management and career development practices to maximise human potential, must be developed;

(d) 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.

160. In terms of Section 197(1), provision is made for the public service to be structured and function in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

161. Section 197(2) provides as follows:

> "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."

CP XXXI: "EVERY MEMBER OF THE SECURITY FORCES (POLICE, MILITARY AND INTELLIGENCE), AND THE SECURITY FORCES AS A WHOLE, SHALL BE REQUIRED TO PERFORM THEIR FUNCTIONS AND EXERCISE THEIR POWERS IN THE NATIONAL INTEREST AND SHALL BE PROHIBITED FROM FURTHERING OR PREJUDICING PARTY POLITICAL INTEREST."

162. This principle has been complied with in the Text.

163. The principles that govern national security in the Republic are set out in Section 198.

164. The establishment, structuring and conduct of security services is provided for in Section 199. In terms thereof:

(a) 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;

(b) the security services must be structured and regulated by national legislation;

(c) 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;

(d) no member of any security service may obey a manifestly illegal order;

(e) neither the security services nor any of their members may, in the performance of their functions -

(i) prejudice a political party interest that is legitimate in terms of the constitution;

(ii) further, in a partisan manner, any interest of a political party;

(g) to give effect to the principles of transparency and accountability multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules or orders of Parliament.

165. **Defence Force**

The primary object of the defence force is to defend and protect the Republic, its territory, integrity and its people, in accordance with the constitution and the principles of international law regulating the use of force. [Section 200(1)]

166. Section 201 deals with the question of political responsibility for the defence force and prescribes under what circumstances the defence force may be employed in co-

operation with the police service, in defence of the Republic or in fulfilment of an international obligation. It sets out the powers and responsibility of:

(a) the Cabinet Minister in charge of the defence portfolio;

(b) the President; and

(c) Parliament.

167. Section 202 sets out the command structure of the defence force with the President as commander-in-chief.

168. Section 204 provides for civilian oversight of defence by a civilian secretariat established by national legislation to function under the direction of the Cabinet Minister responsible for defence.

169. **Police Service**

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and reinforce the law. [Section 205(3)]

170. The national police service must be structured to function in the national, provincial and, where applicable, local spheres. [Section 205(1)]

171. National legislation must establish the powers and functions of the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces. [Section 205(2)]

172. A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting provincial governments and taking into account the needs of provinces. [Section 206(1)]

173. Section 207 deals with control of the police service:

(a) At the head is the Cabinet Minister responsible for policing.

(b) Under him or her is the National Commissioner who is appointed by the President, and must exercise control over and manage the police service in accordance with national policing policy and the directions of the said Cabinet member.

(c) The National Commissioner must appoint a person as provincial commissioner for each province after consulting the provincial executive.

174. In terms of section 208 civilian oversight of the police service by means of a civilian secretariat established by national legislation and to function under the direction of the

Cabinet Minister concerned is provided for.

175. **Intelligence Services**

Section 209 provides for the establishment in terms of national legislation of an intelligence service other than an intelligence division of the defence force or the police service.

176. The President must appoint a head of the intelligence service established in terms of section 209(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. [Section 209(2)]

177. In terms of section 210 "National Legislation" must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or 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 the National Assembly by a vote supported by at least two-thirds of its members.

CP XXXII: "THE CONSTITUTION SHALL PROVIDE THAT UNTIL 30 APRIL 1999 THE NATIONAL EXECUTIVE SHALL BE COMPOSED AND SHALL FUNCTION SUBSTANTIALLY IN THE MANNER PROVIDED FOR IN CHAPTER 6 OF THIS CONSTITUTION"

178. This principle has been complied with in Schedule 6 of the Text.

CP XXXIII: "THE CONSTITUTION SHALL PROVIDE THAT, UNLESS PARLIAMENT IS DISSOLVED ON ACCOUNT OF ITS PASSING A VOTE OF NO-CONFIDENCE IN THE CABINET, NO NATIONAL ELECTION SHALL BE HELD BEFORE 30 APRIL 1999."

179. This principle is given effect to by item 6 in Schedule 6, which provides that:

> No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 50(2) after a motion of no-confidence in the President in terms of section 102(2) of the new Constitution.

The presumption against holding a general election can be displaced by a vote of no-confidence in the President, after which the President and any other members of the Cabinet and any Deputy Ministers must resign. Section 50(2) then empowers the Acting President to dissolve the Assembly in the face of a vacancy in the office of the President, but only if the Assembly fails to elect a new President within 30 days.

180. There is a slight difference in wording between CP XXXIII and Schedule 6. Whereas the former allows for a national election if a motion of no-confidence in the Cabinet is passed, the latter only allows for an election if a motion of no-confidence in the President is passed. Section 102(2) makes a motion of no-confidence in the President in effect a motion of no-confidence in the Cabinet as well. But section 102(1) provides for motions of no-confidence in just the Cabinet, but not the President.

It may be argued that the failure to include section 102(1) as a permissible ground for dissolving Parliament and holding a national election does not comply with CP XXXIII. However, in response it can be argued that the principle establishes motion of no-confidence in the Cabinet as a necessary, but not a sufficient condition for dissolving Parliament. Since motions of no-confidence in the President are also motions of no-confidence in the Cabinet, CP XXXIII is met.

OBJECTIONS

181. Various objections have been raised under the constitutional principles dealt with in this chapter. Insofar as they have not yet been expressly dealt with, we will do so in reply.

PROVINCIAL POWERS

INTRODUCTION

182. CP XVIII to CP XXIII deal with the powers of the provinces. Those constitutional principles cannot be read and considered separately. They are best dealt with as a whole. They are also most conveniently considered in the light of the objections raised by the Democratic Party and the Inkatha Freedom Party. We will accordingly deal with each of those objections in turn.

183. In order to facilitate a comparison of the powers and functions of the provinces in the Interim Constitution and the New Text, two schedules have been prepared which are annexed hereto marked "D" and "E", dealing with the legislative and executive powers of the provinces respectively. There is an assessment as to whether or not there has been an increase or a diminution of power or function and assessment of the importance or otherwise of the change.

DP OBJECTION 1: CP XIX CONTRAVENED BY SECTIONS 44(2) TO 76(4)(a), 147(1)(b), 147(2), and 228(2).

184. It is submitted that the objection is not well founded. Our primary submission is that CP XIX should not be read without regard to CP XX and CP XXI(2), both of which qualify the kind of exclusive power that provinces may have. CP XX requires that the allocation of powers be made on a basis which is conducive to financial viability at each level of government and effective public administration and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity. CPXXI(2) sets out the circumstances in which the national government must be empowered to intervene. They include the maintenance of essential national standards, the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security, and the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole.

185. The suggestion that the exclusive powers of the provincies are nullified by section 44(2) of the Text in contravention of CP XIX, overlooks the meaning of exclusive in the context of a united country where there are both exclusive and concurrent powers. A concurrent power means that both the provinces and the national government can legislate in the same field. An exclusive power, by contrast, means that only one level of government may legislate in relation to that field. Thus, under Schedule 5 of the Final Text, only the provinces may legislate in relation to provincial roads and traffic. However, the presence of exclusive provincial areas of legislative competence does not prevent the national government from invoking other norms to legislate with respect to those areas, such as the intervention power laid down by section 44(2). The power to intervene does not undermine the exclusivity of provincial jurisdiction, because the national legislation is not in relation to that field. National legislative power can only be exercised where certain jurisdictional facts are met, for instance, those described in CP XX1(2). Section 44(2) of the Text protects the national power of intervention from being abused, because of the jurisdictional facts which condition the exercise of the power. The structures laid down in Chapter 3 also serve to control the intervention.

DP OBJECTION 2: OMISSION OR NULLIFICATION OF EXCLUSIVE PROVINCIAL EXECUTIVE POWERS

186. CP XIX requires the Text to provide for exclusive powers and functions of the national and provincial levels of government, but does not speak of exclusive executive powers. The exclusive legislative powers granted to the provinces therefore satisfies this principle.

187. Nevertheless, the Text does grant exclusive executive powers to the provinces, both explicitly and implicitly. Section 125(5) of the Text explicitly provides that the implementation of provincial legislation in a province is an exclusive provincial executive power. The exclusive power to legislate with respect to the matters listed in Schedule 5, will by implication give the provinces exclusive executive powers with respect to those matters. Whenever the province legislates, whether exercising an exclusive or concurrent power, it will of necessity grant executive power to the structure charged with the implementation of the legislation to exercise that power.

188. To the extent that intervention by the national government under section 100 detracts from that exclusivity, it is justified for the reasons outlined above. It is authorized and indeed demanded by CP XXI(2), and the notion of exclusivity does not preclude national intervention. The abuse of the national power of intervention will be checked by the provisions of section 100(2) of the Text. Moreover, the legality of the national intervention power in section 100 is premised on the existence of one of a set of jurisdictional facts set out in section 100(1)(b)(i) to (iv), thereby allowing the court to control the abuse of this power as well.

DP OBJECTION 3: PRINCIPLE XVIII(2) - THE POWERS IN THE TEXT ARE SUBSTANTIALLY LESS OR INFERIOR TO THOSE IN THE INTERIM CONSTITUTION

189. The comparative analysis of provincial legislative powers in the Interim Constitution and the New Text annexed hereto, clearly show that the objection is not well founded.

190. The expression "shall not be substantially less than or substantially inferior to those provided for in this Constitution" is a clear indication that the powers and functions of the provinces provided in the text may be less than and inferior to those found in the Interim Constitution; however, they may not be substantially less or substantially inferior. It is submitted that the most apposite meaning of "substantial" in this context is the seventh meaning given by the Shorter Oxford English Dictionary, 3rd edition (1973, 1974): "of ample or considerable amount, quantity, or dimensions". Similar definitions of the word "substantial" are found in other dictionaries.[38] Although there are a number of cases dealing with the meaning of "substantial" they deal in the main with other contexts not germane to the present enquiry. However, some of them may be of assistance.[39]

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[38] **The Pocket Oxford Dictionary** defines substantial (at p. 910) as "1. of real importance of value; ... 5 real; existing.". The **Concise Oxford Dictionary** defines substantially as "having substance, actually existing, not illusory." The New Shorter Oxford Dictionary, Vol. 2, (at p. 3124) defines substantially as " 4. having solid worth or value, of real significance; solid; weighty; important, worthwhile".

[39] In S v. Xakana 1966 (1) 733 (O) at 735E-G "substantial financial loss" in section 21(2)(g) of Act 76 of 1962 was held to mean "not slight or nominal". In, R v. de Beer 1959(4) SA 81, it was held that "Two residents of substantial means" were not in possession of substantial means even though one of them had four donkeys, a trolley and three cattle and the other had a plough. In De Wet v. Union Government 1933 AD, it was held that £75 was a "substantial" and not a trivial amount for the purposes of an application for leave to appeal. In Duncker v. Paddon & Brock Ltd., 1903 TS at 468/9, it was held that Plaintiff had agreed to accept a "substantially reduced" rent, which, in that case, amounted to a reduction of 50%. In National Trading Co Ltd v. CIR 1943 AD 496 at 505 the issue was whether the preference shareholders are "substantially" interested in the company. It was held that they were indeed substantially interested because their shares represented half of the issued capital of the company. The same issue was dealt with by the court in Searles Ltd v. CIR 1943 OPD 157 at 161, where Fischer JP expressed himself in the following terms:

> "Now substantial may mean 'predominant' but I am of opinion that its more usual meaning with reference to an interest, and the one here intended, is 'not illusory' or 'not nominal'. In other words it has reference to an interest that has some substance in it.

In Birch v. Lombard 1949 (3) SA 1093 (SR) at 1099 it was held that "substantial ground" in section 76(3) of the Mental Disorders Act Chapter 141 (SR) is not the same as "prima facie ground". "The word 'substantial' indicates something somewhat stronger than prima facie". See also: Henri Viljoen (Pty) Ltd v. Awerbuch 1953 (2) SA 151 (O) at 166 in connection with the expression "direct and substantial interest" when dealing with joinders and interventions; Botha v. Ventersdorp Liquor Licensing Board 1956(1) SA 625 (AD) at 635 with regard to the expression "substantial prejudice" in connection with alleged irregularities; Claassens v. Landrost Bloemfontein 1964 (4) SA 4 (O) at 13A-D which considered the meaning of the expression "substantial and peculiar interest in the issue of the inquest" as appears in section 11(2) of Act 58 of 1959 (The Inquest Act).

191. The use of the word “substantially” was a deliberate choice by the framers of the Constitutional Principles designed to give the Constitutional Assembly a range of choice as to how the different levels of government should be structured. It also follows from this interpretation that CP XVIII(2) was not intended to freeze the provisions of the Interim Constitution regarding provincial powers and carry them forth as a carbon copy, without modification, into the Final Text. Thus understood, CP XVIII(2) does not deprive the Constitutional Assembly from removing some powers given to the provinces in the Interim Constitution nor from giving other powers to the provinces in the Final Text. If the province’s loss is compensated adequately by gaining other powers it cannot be said that the powers and functions of the provinces are on balance substantially less or substantially inferior to those provided in the Interim Constitution. What CP XVIII(2) requires is that on balance, both quantitatively and qualitatively, the provinces have not suffered a substantial dimunition in their powers.We have performed our analysis in the attached Schedule on this basis.

192. We term this approach to CP XVII(2) the "balance sheet" or the "basket" approach. It is submitted that a cumulative reading of CPs XVIII(2) with the rest of CP XVIII, and along with CPs XIX, XX and XXI justifies the proposed approach. Furthermore, the principles state neither that the concurrent and executive powers of the provinces should be examined separately, nor that they must remain the same, contrary to what Objection 2 of the Democratic Party seems to suggest.

193. Far from having their powers reduced, on careful analysis reveals that the legislative powers of the provinces have been enhanced by the Final Text relative to the Interim Constitution. As the Court has stated, [40] there were no exclusive legislative powers for the provinces in the Interim Constitution. By contrast, there are now exclusive powers in Schedule 5; the national government can only legislate in these areas under its intervention power, because it does not have concurrent jurisdiction in these subject-matters.

194. In addition, it is submitted that a comparison of the executive powers under the Interim Constitution and the Final Text (see attached Schedule) shows that the executive powers in the Text are greater in number and not inferior in substance.

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[40] National Education Policy Bill at para 23.

DP OBJECTIONS 3.3. AND 3.4: EXCLUSIVE AND CONCURRENT LEGISLATIVE POWERS OF THE PROVINCES AND THE EXECUTIVE POWERS CONFERRED ON THE PROVINCES, ARE SUBSTANTIALLY LESS OR INFERIOR TO THOSE IN THE INTERIM CONSTITUTION

195. It is submitted that the Schedules "D" and "E", hereto annexed, relating to the legislative and executive powers negative the submission made on behalf of the objector. Cumulatively, the provinces have greater powers than they had under the Interim Constitution. In particular, section 125(2)(b), which authorises the Premier and other members of the Executive Council to implement all national legislation within the functional areas listed in Schedule 4 or 5, read together with section 85(2)(a), substantially enhances the executive powers of the provinces.

DP OBJECTION 3.5: THE FINANCIAL AND FISCAL POWERS IN THE TEXT ARE SUBSTANTIALLY INFERIOR TO THOSE IN THE INTERIM CONSTITUTION

196. It is submitted that a comparison between the taxing powers of provinces under the Interim Constitution are neither less nor inferior to those provided in the Text. The provision for the division of national revenue into three parts and the provisions which set out the factors which must be considered in allocating the province's equitable share of revenue, particularly section 214, secure provincial rights in this regard more firmly than the equivalent provisions in the Interim Constitution. Furthermore the procedural safeguards incorporated into section 216 of the Text afford the provinces more protection than they had previously.

197. Section 156 specifies the types of taxes the provinces may impose and stipulates the conditions under which they may be imposed. The Text does the same in section 228.

198. Section 156(1) of the Interim Constitution permits a province to impose taxes, levies and duties other than income tax, value added or other sales tax and to impose surcharges on taxes, if authorized by national legislation. Section 156(2) of the Interim Constitution gives provinces the exclusive power to impose taxes, levies and duties, but excluding income tax, value added or other sales tax on casinos, gambling, wagering and lotteries and betting.

199. The Text provides with the power to impose custom duties or the exclusive right to impose taxes, levies and duties on casinos, gambling, wagering, lotteries and betting. The powers to impose custom duties and the exclusive right to impose taxes, levies and duties on casinos, etc., are no longer included in provincial powers.

200. It is submitted that the removal of the power to impose custom duties was a matter upon which the Constitutional Assembly had a choice, which it probably exercised the way it did mindful of the fact that customs duties are generally a national function. Moreover, the change in the Text is therefore more apparent than real, because the power to impose customs duties has always been a national power and no legislation enacted in terms of section 156(1)(a) has given or was likely to give a province this power.

201. If one takes into account the fact that provinces have no independent constitutional taxing power in this regard under the Interim Constitution, it is obvious that this change to the Text is of no great importance, because in practical terms there is no change.

202. Section 156(1)(b) of the Interim Constitution allows provinces to raise taxes only when this is authorised by Parliament whereas Section 228(2) of the New Text gives provinces a taxing right which may merely be regulated by Parliament. It is submitted that the difference between the Interim Constitution and the Text clearly favour the provinces. The thrust of the difference is that the Interim Constitution gives provinces no constitutional right to impose taxes (with the exception of a casino provision).

Instead it permits the national government to authorise provinces to raise certain types of taxes. The Text on the other hand **entitles** provinces to raise taxes requiring the national government to regulate the power. Parliament may not remove the taxing power of provinces. Regulating legislation could only deal with procedures and mechanisms for raising taxes to ensure compliance with the substantive requirements of section 228(2)(a).

203. It is submitted therefore that the Text confers taxing powers on provinces that they did not have under the Interim Constitution and in that respect the provisions of Principle XXV has been complied with.

204. In relation to fiscal powers and functions for different categories of local government, it is submitted that the principle simply requires that the "provision" should be made for differing fiscal powers. Section 155(1) makes provision for different categories of local government and for different fiscal powers and functions for different categories. Although section 155(1)(b) merely repeats the principle this is a situation in which no more was required of the Constitutional Assembly. In contrast to the requirement that the fiscal powers of the national and provincial governments to define and in keeping with the idea that the Constitution did provide only a framework for local government, the requirement of the principle has been complied with.

DP OBJECTION 3.6: PROVINCIAL COMPETENCE TO ADOPT PROVINCIAL CONSTITUTIONS

205. It is submitted that the provisions in relation to provincial constitutions in the Interim Constitution and the New Text are not substantially less or substantially inferior. See the sections referred to in Schedule D, page 9, Item 33.

206. It is submitted that section 143 of the Text gives the provinces more scope to write their own constitutions. They are not bound by the CPs. The section only makes clearer what was implicit before. Furthermore 143(2)(a) is more in consonant with CP XXII read together with CP I. In view of the paucity of detail in the objection, we will deal with this issue more fully in reply.

DP OBJECTION 3.7: THE POWERS AND FUNCTIONS OF THE SOUTH AFRICAN POLICE SERVICE

207. For the different provisions in relation to police see Schedule D, page 8, Item 28. It is submitted that insofar as there are differences it will be shown that in fact the powers of the provinces are neither substantially less nor substantially inferior to those in the Interim Constitution which provided in a less than clear manner created dual authority without providing sufficient guidance as to how that authority was to be exercised.

208. The Constitutional Assembly was free to make a choice by providing that policing is a national power and giving the provinces lower level powers including the right to regulate visible policy and monitoring power which they did not have previously. Their monitoring power can be exercised both in a legislative and in an executive capacity (see section 206(2)). If the provisions of the Interim Constitution had been embodied in the Final Text they may have contradicted CP XXI(4) requiring uniformity across the nation in relation to policing and the portion of CP XX that calls for effective function and effective public administration.

209. It is submitted that the Constitutional Assembly had the right to make a choice. The reasons for that choice are fairly clear and having regard to the additional powers conferred on provinces taken away some of the power does not render the New Text deficient. The provincial powers as a whole are not substantially less than or substantially inferior to those provided in the Interim Constitution.

DP OBJECTION 3.8: PUBLIC PROTECTORS, SERVICE COMMISSION

210. It is submitted that the power to appoint a public protector by the provinces was an illusionary one in terms of the provisions of 114 and 213 of the Interim Constitution. The provincial public protector could hardly do anything without the authority of the national public protector. They had in fact lost no real power. In the alternative, it is submitted that lack of an explicit provision in the Final Text authorizing the provinces to appoint their own public protector may not prevent them from doing so, with respect to matters within provincial jurisdiction.

211. The right given to provinces to appoint a representative on the national service commission, is a greater power than the subsidiary power they had under the Interim Constitution. The New Text gives provinces the power to nominate representatives to a Commission with the authority to formulate and implement policies nationally. This is not a power the provinces possessed before.

DP OBJECTION 3.9: THE POWERS OF THE NATIONAL COUNCIL OF PROVINCES IN RELATION TO BILLS APPROPRIATING OR ALLOCATING MONEY OR SHARES OF NATIONAL REVENUE TO THE PROVINCES OR DETERMINING THE CONDITIONS FOR PROVINCIAL LOANS FOR CURRENT CAPITAL EXPENDITURE, BILLS AFFECTING PROVINCIAL MATTERS, AND BILLS AMENDING THE CONSTITUTION

212. This objection is factually incorrect, because the National Council of Provinces and the Senate with respect to these matters are substantially the same. Please see Schedule D for more details. In the absence of more detailed submissions, we will address this issue more fully in reply.

DP OBJECTION 3.10: REFERENCES TO THE CONSTITUTIONAL COURT BY MEMBERS OF LEGISLATURE WITH RESPECT TO DISPUTES CONCERNING THE CONSTITUTIONALITY OF BILLS

213. This objection is misconceived for the following reasons:

(a) The power in terms of sections 98(2)(d) and 98(9) of the Interim Constitution to request that a dispute over the constitutionality of a bill be referred to the Constitutional Court, is not a true provincial power. It is one which vests in the members of the legislatures concerned, and not in the legislatures themselves. When one-third of the members of a provincial legislature petition for the referral of a dispute over the constitutionality of a bill, the petition is made by the members concerned, and not by the legislature in which they constitute a minority.

(b) On a proper interpretation of sections 98(2)(d) and 98(9) of the Interim Constitution, the members of a provincial legislature do not have the power to request that a dispute about the constitutionality of a bill before the National Parliament, be referred to the Constitutional Court.

DP OBJECTION 4.1.: THE TEXT VIOLATES CP XX

214. The objection does not have regard to the fact that CP XX is not to be read alone, but in the context of the other constitutional principles relating to national and provincial government. The submission assumes that it is the function of the court to substitute its view for that of the Constitutional Assembly in a manner which would have the effect of depriving the Assembly of the choices it had in terms of the principles as a whole.

DP OBJECTION 4.2.: THE POWER OF THE NATIONAL EXECUTIVE TO ASSUME RESPONSIBILITY FOR A PROVINCIAL EXECUTIVE OBLIGATION VIOLATES CP XI

215. The objection overlooks that the constitutional principles do not prescribe that the grounds stated in them are exhaustive. The Constitutional Assembly has the right to go beyond the grounds envisaged in the constitutional principle; the principle only sets a minimum.

DP OBJECTION 4.3.: THE TEXT VIOLATES CP XXII

216. The objection overlooks the powers of the national government to intervene which is envisaged in CP XXI(2).

DP OBJECTION 4.4.: THE PROVINCES ARE NOT GUARANTEED AN EQUITABLE SHARE OF REVENUE COLLECTED NATIONALLY IN VIOLATION OF CP XXVI

217. The objection ignores provisions in the Final Text which give content to the "equitable share" of revenue that provinces are entitled to. Section 214(1) provides that an Act of Parliament must provide for the determination of each province's equitable share of revenue collected nationally. Section 227(1)(a) futher provides that an equitable share should be sufficient to enable the province "to provide basic services and exercise the functions allocated to it". Presumably, national legislation which failed to meet this definition would be declared unconstitutional.

OBJECTIONS OF THE INKATHA FREEDOM PARTY AND THE NATIONAL PARTY

218. At the time of the preparation of these Heads of Argument the only document available to the Applicant's legal representatives was the letter from Inkatha of the 20th May 1996. Some of the objections appear to be similar to those made by the Democratic Party but most of them lack particularity. It is submitted therefore that it would be more appropriate for their objections to be dealt with in reply after the additional document promised in the second last paragraph of their letter and the Heads of Argument referred to in the last paragraph of their letter. The National Party's second objection in relation to provincial powers advances substantially similar reasons to those advanced by the Democratic Party and will be dealt with together.

TRADITIONAL AUTHORITIES

CP XIII: **1. THE INSTITUTION, STATUS AND ROLE OF TRADITIONAL LEADERSHIP, ACCORDING TO INDIGENOUS LAW, SHALL BE RECOGNISED AND PROTECTED IN THE CONSTITUTION. INDIGENOUS LAW, LIKE COMMON LAW, SHALL BE RECOGNISED AND APPLIED BY THE COURTS, SUBJECT TO THE FUNDAMENTAL RIGHTS CONTAINED IN THE CONSTITUTION AND TO LEGISLATION DEALING SPECIFICALLY THEREWITH.**

2. PROVISIONS IN A PROVINCIAL CONSTITUTION RELATING TO THE INSTITUTION, ROLE, AUTHORITY AND STATUS OF A TRADITIONAL MONARCH SHALL BE RECOGNISED AND PROTECTED IN THE CONSTITUTION.

219. Although there are provisions which speak directly to the issue of indigenous leadership, the focus of debate will be whether the Constitution has "protected" the institution, status, and role of traditional leadership.

220. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected.

This aspect of principle XIII(1) is given effect to by a number of provisions in Chapter 12, which is entitled "Traditional Leaders":

(a) Section 211(1) recognises the institution, status and role of traditional leadership according to "customary law".

(b) Section 211(2) provides that traditional authorities which observe a system of customary law "may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs".

(c) Section 212 is a permissive provision which grants jurisdiction to:

(i) the national government to "provide for a role for traditional leadership as an institution at local level on matters affecting local communities", to establish "houses of traditional leaders", and to "establish a council of traditional leaders"; and

(ii) the provincial government to "provide for the establishment of houses of traditional leaders".

221. **Indigenous law as a source of law subject to the Constitution and legislation**

Section 211(3) explicitly provides that "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

222. **Provincial constitutions and traditional monarchs**

(a) Section 143(1)(b) explicitly permits a provincial constitution to provide for "the institution, role, authority and status of a traditional monarch, where applicable".

(b) However, section 143(2) qualifies the content of the provisions in s. 143(1)(b) in two respects:

(i) the provisions on traditional monarchs must comply with the values of section 1 and the provisions of Chapter 3 (Principles of Co-operative Government); and

(ii) the said provisions must not exceed the competence of the provinces.

Although it is clear that provisions in provincial constitutions regarding traditional monarchs have been recognised, the debate once again is whether they have been protected. It should be argued that they have been protected in as much as any other provisions of provincial constitutions are, i.e. they prevail over conflicting provincial legislation, but must give way to conflicting national legislation where the constitution specifically envisages national legislation with regard to any particular matter (as governed by section 147).

CULTURE, COLLECTIVE RIGHTS, AND SELF-DETERMINATION

CP XI ***"THE DIVERSITY OF LANGUAGE AND CULTURE SHALL BE ACKNOWLEDGED AND PROTECTED, AND CONDITIONS FOR THEIR PROMOTION SHALL BE ENCOURAGED."***

CPXII ***"COLLECTIVE RIGHTS OF SELF-DETERMINATION IN FORMING, JOINING AND MAINTAINING ORGANS OF CIVIL SOCIETY, INCLUDING LINGUISTIC, CULTURAL AND RELIGIOUS ASSOCIATIONS, SHALL, ON THE BASIS OF NON-DISCRIMINATION AND FREE ASSOCIATION, BE RECOGNISED AND PROTECTED."***

CP XXXIV:"1. THIS SCHEDULE AND THE RECOGNITION THEREIN OF THE RIGHT OF THE SOUTH AFRICAN PEOPLE AS A WHOLE TO SELF-DETERMINATION, SHALL NOT BE CONSTRUED AS PRECLUDING, WITHIN THE FRAMEWORK OF THE SAID RIGHT, CONSTITUTIONAL PROVISION FORT A NOTION OF THE RIGHT TO SELF-DETERMINATION BY ANY COMMUNITY SHARING A COMMON CULTURAL AND LANGUAGE HERITAGE, WHETHER IN A TERRITORIAL ENTITY WITHIN THE REPUBLIC OR IN ANY OTHER RECOGNISED WAY.

223. 2. THE CONSTITUTION MAY GIVE EXPRESSION TO ANY PARTICULAR FORM OF SELF-DETERMINATION PROVIDED THERE IS SUBSTANTIAL PROVEN SUPPORT WITHIN THE COMMUNITY CONCERNED FOR SUCH A FORM OF SELF-DETERMINATION.

224. 3. IF A TERRITORIAL ENTITY REFERRED TO IN PARAGRAPH 1 IS ESTABLISHED IN TERMS OF THIS CONSTITUTION BEFORE THE NEW CONSTITUTIONAL TEXT IS ADOPTED, THE NEW CONSTITUTION SHALL ENTRENCH THE CONSTITUTION OF SUCH TERRITORIAL ENTITY, INCLUDING ITS STRUCTURES, POWERS AND FUNCTIONS."

225. These principles are satisfied by the text.

226. ***The provisions of section 6 of the New Text guarantee the use and promotion of languages, and mechanisms are provided for their protection and promotion.***

227. Section 9, the equality clause, would guarantee that there is no discrimination. The right to language and culture in section 30 is guaranteed. The rights of cultural, religious and linguistic communities to enjoy their culture, to practise their religion, to use their language, and

to form associations to promote them are guaranteed in section 31. The establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities in sections 185 and 186 of the New Text, to promote respect for the rights of cultural, religious and linguistic communities, and similar functions, will facilitate the promotion of these rights. The obligation of the Broadcasting Authority to ensure fairness and have regard to the diversity of views broadly represented in South African society (section 192) is intended to promote the rights of communities, as is the provision of section 235 which recognises the right to self-determination.

228. It is submitted that CP XII has been given effect to in section 6 of the New Text relating to language. Section 15 of the Text guarantees freedom of conscience, religion, thought, belief and opinion. Section 18 of the Text guarantees the right of everyone to freedom of association. Section 30 guarantees everyone the right to use the language and to participate in the cultural life of their choice. Section 31 of the New Text guarantees the right to enjoy the culture, practice and religion and use of language, and section 185 of the New Text which establishes the Commission for the Promotion and Protection of the Rights of Cultural and Religious and Linguistic Communities.

229. Section 235 permits the recognition of the right of self-determination as envisaged in Section 1 of the said Principle.

230. In terms of Item 20(5)(a) and (b) of Schedule 6 of the Text, the life and functions of the Volkstaat Council established in terms of Sections 184A and 184B are extended.

231. ***These three Principles must have placed the Constitutional Assembly in the dilemma envisaged by Francois Venter in his article, "Requirements for a New Constitutional Text: The Imperatives of the Constitutional Principles" (1995) 112 SALJ 32 at 36, under the sub-heading 1.5: "Self-determination".***

232. Because of the lack of a precise meaning of the concepts dealt with in these Principles, it is submitted that the Constitutional Assembly has, in the circumstances, complied with the Principles. Evidently every effort was made to recognise and guarantee the rights by the establishment of appropriate structures to achieve the objects required by the Principles.

DATED AT JOHANNESBURG ON THIS THE 4TH DAY OF JUNE 1996.

G. BIZOS SC
W.H. TRENGOVE SC
M.T.K. MOERANE SC
N. GOSO
K.D. MOROKA

SCHEDULES

A. CONSTITUTIONAL PRINCIPLES IN RELATION WITH TO TEXT

SCHEDULE A

CONSTITUTIONAL PRINCIPLES AND THE CLAUSES IN THE ADOPTED CONSTITUTIONAL TEXT TO WHICH THEY RELATE.

KEY

Where a clause of the New Constitution is:
- bolded-it means that the clause is directly related to the CP;
- **in plain print**- it means that the clause is indirectly related to the CP;
- **in brackets-** it means that the clause contributes to the fulfilment of the CP.

PRINCIPLES	CHAPTER	CLAUSE
CP I	1 2 4 6 7 9	**1**;3 9; 19 **74(2)**; 46 105 157 184;187; 190; [193]
II	1 2 9 schedule 6	1; 2 **7-39** [184]; [185]; [186]; [187]; 190 [item 23]
III	1 2 9	1 **9**; [30] **184**; **187**
IV	1 4 5 6 8 11	**1**; **2**; 42 83; [89]; 92 104; **165** 198; 199
V	1 2 8 12	[1] **9**; **34**; **35**; **38** **165**; 166; **167(6)**; **172(2)** [211]
VI	2 4 5 6 7 8 9 10 11	34; 35; 37 **42; 43**; **44**; 47; 54; **55**;[57]; 66; [69]; [70]; [73]; [80] 85; 87; [88]; 89; **92**; [96]; 102 104; [106]; 109;[116];121; **133**; [136]; 141; 158 **165**; 174; 177 182; 188 196 199
VII	2 8 12	34; 35; 37; **38** **165**; 174; 176 [211]
VIII	1 2 4 5 6	1 **19** **42**; **46**; 49; 57; [60]; [70]; [88] 105; [108]; [130]; 157

PRINCIPLES	CHAPTER	CLAUSE
	9 14	190 236
IX	2 4 5 7 11 schedule 6	**32** [55; 56]; 59; [69; 70]; 72; [74; 75; 76; 77] 101; [114; 115]; 118 16O 195; [199] schedule 6 item 23.
X	4 6 7	applies generally esp. 73-79 applies generally esp. 112; 119-121 applies generally esp. 160-162
XI	1 2 9 14	**6** [**9**]; **30**; **31** **185**; **186**; [192] [235]
XII	1 2 9 14	6 **15**; **18**; **30**; **31** **185** **235**
XIII	2 8 12	[30]; [31]; 36 166 **211**; **212**
XIV	2 4 7 6	[19] **46**; **57**; **61**; [67]; 70; 78 **105; 116**; 157; 160
XV	4	**74**
XVI	3 5 6 7	**40**; [43]; 44 **85**; **104**; **125** **151**; 156
XVII	4 6 7 9	46; [60]**;** [67] **105** **157** 190
XVIII **(1)** **(2)** **(3)** **(4)** **(5)**	 3 4 5 6 6 6 4 4	 [41] **43; 44** **85** **103; 104; 125** 142; 143 **103** **74** **74(4)**
XIX	3 4 6 14	[41] **44** **104**; 126

PRINCIPLES	CHAPTER	CLAUSE
	schedules 4&5	**238**
XX	4 5 6 7 schedules 4 & 5	apply generally
CP XXI (1)	6 schedules 4 &5	104; **125**
(2)	4 5 6	**44(2)** **100** **146**
(3)	5 6 14	**84** **146** **231**
(4)	4 6	**44** **146**; **147**
(5)	4 5 6 13	**44;** 44(2); 100 **146** 228(2)
(6)	3 6 Schedules 4&5	[41] 104; **146** apply generally [41]
(7)	3 6 schedule 4	[146] **44(1); 44(3)**
(8)	4 6	**104(4)**
XXII	3 4 5	applies generally esp**. 41** [44(2)]; [76] 100 **146**
XXIII	6	**148**
XXIV	7	apply generally
XXV	4 7 13	**45(1)** **155(1)** applies generally esp. 226; **228**; **229**
XXVI	13	**214**; **227**
XXVII	13	220; 221; 214(2)
XXVIII	2	**23**

PRINCIPLES	CHAPTER	CLAUSE
CP XXIX	9 10 13	**181**; **182**; **183**; **188**; **189**; **194** 196 223-225
XXX **(1)** **(2)**	 10 10	 **195; 197** **197(2)**
XXXI	11	applies generally esp. **198-210**
XXXII	schedule 6	item 9(2) and annexure B
XXXIII	schedule 6	item 6
XXXIV	9 14 schedule 6	185 235 item 20(5)

SCHEDULE B

B. TEXT IN RELATION TO CONSTITUTIONAL PRINCIPLES

SCHEDULE B

CLAUSES OF THE ADOPTED CONSTITUTIONAL TEXT AND THE CONSTITUTIONAL PRINCIPLES TO WHICH THEY RELATE

Chapter no. & heading	Clause no. & heading	Constitutional principles
Chapter 1 **Founding Provisions**		
	1. Republic of South Africa	I; II; III; IV; V; VI; VIII
	2. Supremacy of Constitution	IV
	3. Citizenship	I
	4. National Anthem	
	5. National Flag	
	6. Languages	XI; XII
Chapter 2 **Bill of Rights**		*CP II applies to all rights and provisions in this Chapter*
	7. Rights	
	8. Application	
	9. Equality	I; III; V
	10. Human Dignity	
	11. Life	
	12. Freedom and security of the person	
	13. Slavery, servitude and forced labour	
	14. Privacy	
	15. Freedom of religion, belief and opinion	XII; XIII
	16. Freedom of expression	
	17. Assembly, demonstration, picket and petition	
	18. Freedom of association	XII
	19. Political rights	VIII
	20. Citizenship I	
	21. Freedom of movement and residence	
	22. Freedom of trade, occupation and profession	
	23. Labour relations	XXVIII

	24.	Environment	
	25.	Property	
	26.	Housing	
	27.	Health care, food, water, and social security	
	28.	Children	
	29.	Education	
	30.	Language and culture	III; XI; XII; XIII
	31.	Culture, religion and linguistic communities	XI; XII; XIII
	32.	Access to information	IX
	33.	Just administrative action	VI; IX
	34.	Access to courts	V; VI; VII
	35.	Arrested, detained and accused persons	V; VI; VII
	36.	Limitation of rights	
	37.	States of emergency	IV; VI; VII
	38.	Enforcement of rights	V
	39.	Interpretation of Bill of Rights	
Chapter 3: Co-operative Government			
	40.	Government of the Republic	XVI
	41.	Principles of co-operative government and intergovernmental relations	XIX; XXI; XXII
Chapter 4: Parliament			
	42.	Composition of Parliament	IV; VI; VIII; X
	43.	Legislative authority of Republic	XX
	44.	National legislative authority	
	45.	Joint rules and orders	
The National Assembly	46.	Composition and election	VIII; XVII
	47.	Membership	VI
	48.	Oath or affirmation	
	49.	Duration of National Assembly	VIII

	50.	Dissolution of National Assembly before expiry of its term	XXXIII
	51.	Sittings and recess periods	
	52.	Speaker and Deputy Speaker	
	53.	Decisions	XV
	54.	Rights of certain members in National Assembly	VI
	55.	Powers of National Assembly	IX; VI
	56.	Evidence or information before National Assembly	IX
	57.	Internal arrangements, proceedings and procedures of National Assembly	VIII; XIV
	58.	Privilege	
	59.	Public access to and involvement in National Assembly	IX
National Council of Provinces	60.	Composition of National Council	IV; VI; VIII; X
	61.	Allocation of delegates	XIV
	62.	Permanent Delegates	
	63.	Sittings of National Council	
	64.	Chairperson and Deputy Chairperson	
	65.	Decisions	
	66.	Participation by members of National Executive	VI
	67.	Participation by local government representatives	XVII; XIV
	68.	Powers of National Council	X
	69.	Evidence or information before National Council	IX
	70.	Internal arrangements, proceedings and procedures of National Council	VIII, XIV

	71.	Privilege	
	72.	Public access to and involvement in National Council	IX
National Legislative Process	73.	All Bills	VI; X
	74.	Bills Amending the Constitution	XV; IX; XVIII(4)
	75.	Bills outside Schedule 4	IX
	76.	Bills within Schedule 4	IX
	77.	Money Bills	IX
	78.	Mediation Committee	XIV
	79.	Assent to Bills	
	80.	Application by members of National Assembly to Constitutional Court	IV; VI
	81.	Publication of Acts	X
	82.	Safekeeping of Acts of Parliament	X
Chapter 5: The President and National Executive			VI
	83.	The President	IV
	84.	Powers and functions of President	XX
	85.	Executive authority of the Republic	XX
	86.	Election of President	
	87.	Assumption of office by President	VI
	88.	Term of office of President	VIII
	89.	Removal of President	VI; IV
	90.	Acting President	
	91.	Cabinet	VI
	92.	Accountability and Responsibilities	IV; VI
	93.	Deputy Ministers	
	94.	Continuation of Cabinet after elections	
	95.	Oath or affirmation	
	96.	Conduct of Cabinet Ministers and Deputy Ministers	VI

	97. Transfer of functions	
	98. Temporary assignment of functions	
	99. Assignment of functions	
	100. National supervision of provincial administration	XXI(2); XXII
	101. Executive decisions	IX
	102. Motions of no-confidence	VI
Chapter 6: Provinces		
	103. Provinces	XVIII
Provincial Legislatures	104. Legislative authority of provinces	XVI; IV;
	105. Composition and election of provincial legislatures	XVII
	106. Membership	VI
	107. Oath and affirmation	
	108. Duration of provincial legislatures	VIII
	109. Dissolution of provincial legislatures before expiry of term	VI
	110. Sittings and recess periods	
	111. Speakers and Deputy Speakers	
	112. Decisions	X
	113. Permanent delegates' rights in provincial legislatures	VI
	114. Powers of provincial legislatures	X
	115. Evidence or information before provincial legislatures	IX
	116. Internal arrangements, proceedings and procedures of provincial legislatures	X
	117. Privilege	
	118 Public access to and involvement in provincial legislatures	IX

	119. Introduction of Bills	
	120. Money Bills	X
	121. Assent to Bills	VI
	122. Application by members to Constitutional Court	IV
	123. Publication of provincial Acts	X
	124 Safekeeping of provincial Acts	X
Provincial Executives	125. Executive authority of provinces	XX
	126. Assignment of functions	XIX
	127 Functions of Premiers	XX
	128. Election of Premiers	XX
	129. Assumption of office by Premiers	
	130. Term of office of Premiers	VIII
	131. Acting-Premiers	XX
	132. Executive Councils	XX
	133. Accountability and responsibilities	VI
	134. Continuation of Executive Councils after elections	
	135. Oath or affirmation	
	136. Conduct of members of Executive Councils	VI
	137. Transfer of functions	
	138. Temporary Assignment of functions	
	139. Provincial supervision of local government	XXI; XXIV
	140. Executive decisions	
	141 Motions of no-confidence	VI
Provincial Constitutions	142. Adoption of provincial constitutions	XVIII(2)
	143. Contents of provincial constitutions	XVIII(2); IV; XIII; XVIII
	144. Certification or provincial constitutions	XVIII(2)
	145. Signing, publication and safekeeping of provincial	X

	constitutions	
conflicting Laws	146. Conflicts between national and provincial legislation	XXI(1); XX(2)
	147. Other Conflicts	XXI(2)
	148. Conflicts that cannot be resolved	XXIII
	149. Status of legislation that does not prevail	
	150. Interpretation of conflicts	
Chapter 7: Local Government		
	151. Status of municipalities	XVI; XX; XXIV
	152. Objects of local government	
	153. Development duties of municipalities	
	154. Municipalities in co-operative government	
	155. Establishment of municipalities	XXV
	156. Powers and functions of municipalities	XXI; XVI; XIX
	157. Composition and election of Municipal Councils	XVI; XVII; VIII
	158. Membership of Municipal Councils	VI
	159. Terms of Municipal Councils	
	160. Internal proceedings	X
	161. Privilege	
	162. Publication of municipal by-laws	X
	163. Organised local government	XXVII
	164. Other matters	XXIV
Chapter 8: Courts and Administration of Justice		
	165 Judicial authority	IV; VI; VII
	166. Judicial system	V
	167. Constitutional Court	
	168. Supreme Court of	

	Appeal	
	169. High Courts	
	170. Magistrates' Courts and other courts	
	170. Court procedure	
	171. Court procedures	
	172. Powers of courts in constitutional matters	
	173. Inherent power	
	174. Appointment of judicial officers	VII
	175. Acting judges	
	176. Terms of office and remuneration	VII
	177. Removal	VI
	178. Judicial Services Commission	
	179. Prosecuting Authority	V
	180. Other matters concerning administration of justice	
Chapter 9: State Institutions Supporting Constitutional Democracy		
	181. Establishment and governing principles	XXIX
Public Protector	182. Functions of Public Protector	XXIX; VI; X
	183. Tenure	
Human Rights Commission	184. Functions of Human Rights Commission	I;II;III
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities	185. Functions of Commission	II; XII; XI; XXXV;
	186. Composition of Commission	XI; I; II; III
Commission of Gender Equality	187. Functions of Commission for Gender Equality	I; II; III
Auditor- General	188. Functions of Auditor General	XXIX; VI
	189. Tenure	

Electoral Commission	190. Functions of Electoral Commission	I; II; VIII; XVII
	191. Composition of Electoral Commission	
Independent Authority to Regulate Broadcasting	192. Broadcast Authority	XI
General Provisions	193. Appointments	I; II; III
	194. Removal from office	XXIX
Chapter 10: Public Administration		
	195. Basic values and principles governing public administration	XXX
	196. Public Service Commission	XXIX; VI
	197. Public Service	XXX(1); XXX(2)
Chapter 11: Security Services		
	198. Governing principles	XXXI
	199. Establishment, structuring and conduct of security services	IV; II; XXXI; VI; VIII; IX
Defence	200. Defence Force	
	201. Political Responsibility	
	202. Command of defence force	
	203. State of national defence	
	204. Defence civilian secretariat	
Police	205. Police service	
	206. Political responsibility	
	207. Control of police service	
	208. Police civilian secretariat	
Intelligence	209. Establishment and control of intelligence services	
	210. Powers, functions and monitoring	
Chapter 12: Traditional Leaders		*CP XIII applies to all provisions in this Chapter*
	211. Recognition	IV; V; VII
	212. Role of traditional leaders	XXIV; XVII

Chapter 13: Finance		
	213. National Revenue Fund	XXIX
	214. Equitable shares and allocations or revenue	XXVI
	215. National, provincial and municipal budgets	
	216. Treasury control	
	217. Procurement	
	218. Government guarantees	
	219. Remuneration of persons holding public office	
Fiscal and financial Commission	220. Establishment and functions	XXVII
	221. Appointment and tenure of members	
	222. Reports	
Central Bank	223. Establishment	
	224. Primary object	
	225. Powers and functions	
Provincial and Local Financial Matters	226. Provincial Revenue Funds	
	227. National sources of provincial and local government funding	XXVI; XXV
	228. Provincial taxes	XXV
	229. Municipal rates and taxes	
	230. Provincial and Municipal loans	
Chapter 14: General Provisions		
International law	231. International agreements	
	232. Customary international law	
	233. Application of international law	
other matters	234. Charters of Rights	
	235. self-determination	XXXIV
	236. Funding for political parties	VIII
	237. Diligent performance of obligations	
	238. Agency and delegation	

	239. Definitions	
	240. Inconsistencies between different texts	
	241. Labour relations Act, 1995	
	242. Transitional arrangements	
	243. Repeal of Laws	
	244. Short title and commencement	
Schedule I:		
Schedule 2:		
Schedule 3:		
Schedule 4:		*CPs XIX; XX; XXI apply to the provisions in this schedule.*
Schedule 5:		*CPs XVIII; XIX; XX; XXI apply to the provisions in this schedule.*
Schedule 6:	The constitutional principles apply to the following items.	
	6. Election of National Assembly	XXXIII
	9. National executive	XXXII
	23. Bills of Rights	II; X
Annexure B	1. Government of National Unity: National Sphere	XXXII
Schedule 7 **Laws Repealed**		

SCHEDULE C

C. CP'S, NEW TEXT AND THE 1993 CONSTITUTION

SCHEDULE C
A "BIRD'S-EYE VIEW" OF THE CONSTITUTIONAL PRINCIPLES APPLYING TO CLAUSES OF THE ADOPTED CONSTITUTIONAL TEXT AND THE SECTIONS OF THE INTERIM CONSTITUTION WHICH APPROXIMATE OR CORRESPOND TO CLAUSES IN THE ADOPTED CONSTITUTIONAL TEXT.

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
CP	**Chapter 1** **Founding Provisions**	
I; II; III; IV; V; VI; VIII	1. Republic of South Africa	1
IV	2. Supremacy of Constitution	4
I	3. Citizenship	5
	4. National Anthem	2(2)
	5. National Flag	2(1)
XI; XII	6. Languages	3
CP II applies to all rights and provisions in this Chapter	**Chapter 2** **Bill of Rights**	
	7. Rights	
	8. Application	7
I; III; V	9. Equality	8
	10. Human Dignity	10
	11 Life	9
	12. Freedom and security of the person	11
	13. Slavery, servitude and forced labour	12
	14. Privacy	13
XII; XIII	15. Freedom of religion, belief and opinion	14
	16. Freedom of expression	15
	17. Assembly, demonstration, picket and petition	16
XII	18. Freedom of association	17
VIII	19 Political rights	21
I	20. Citizenship	20
	21. Freedom of movement and residence	18

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	22. Freedom of trade, occupation and profession	26
XXVIII	23. Labour relations	27
	24. Environment	29
	25. Property	28
	26. Housing	
	27. Health care, food, water, and social security	
	28. Children	30
	29. Education	32
III; XI; XII; XIII	30. Language and culture	31
XI; XII; XIII	31. Culture, religion and linguistic communities	
IX	32. Access to information	23
VI; IX	33. Just administrative action	24
V; VI; VII	34. Access to courts	22
V; VI; VII	35. Arrested, detained and accused persons	25
	36. Limitation of rights	33
IV; VI; VII	37. States of emergency	34
V	38. Enforcement of rights	7(4)
	39. Interpretation of Bill of Rights	35
	Chapter 3: **Co-operative Government**	
XVI	40. Government of the Republic	
XIX; XXI; XXII; VI; XVI	41. Principles of co-operative government and intergovernmental relations	
	Chapter 4: **Parliament**	
IV; VI; VIII; X	42. Composition of Parliament	36
XX	43. Legislative authority of Republic	37
	44. National legislative authority	
	45. Joint rules and orders	
VIII; XVII	46. Composition and election	40
VI	47. Membership	42

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	48. Oath or affirmation	45
VIII	49. Duration of National Assembly	38
XXXIII	50. Dissolution of National Assembly before expiry of its term	
	51. Sittings and recess periods	46
	52. Speaker and Deputy Speaker	41
XV	53. Decisions	
VI	54. Rights of certain members in National Assembly	66
IX; VI	55. Powers of National Assembly	
IX	56. Evidence or information before National Assembly	
VIII; XIV	57. Internal arrangements, proceedings and procedures of National Assembly	55
	58. Privilege	55
IX	59. Public access to and involvement in National Assembly	67
IV; VI; VIII; X	60. Composition of National Council	
XIV	61. Allocation of delegates	
	62. Permanent Delegates	
	63. Sittings of National Council	
	64. Chairperson and Deputy Chairperson	
	65. Decisions	
VI	66. Participation by members of National Executive	
XVII; XIV	67. Participation by local government representatives	
X	68. Powers of National Council	
IX	69. Evidence or information before National Council	
VIII, XIV	70. Internal arrangements, proceedings and procedures of National Council	
	71. Privilege	
IX	72. Public access to and involvement in National Council	

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
VI; X	73. All Bills	59
XV; IX; XVIII(4)	74. Bills Amending the Constitution	62
IX	75. Bills outside Schedule 4	
IX	76. Bills within Schedule 4	
IX	77. Money Bills	60
XIV	78. Mediation Committee	
	79. Assent to Bills	64
IV; VI	80. Application by members of National Assembly to Constitutional Court	
X	81. Publication of Acts	
X	82. Safekeeping of Acts of Parliament	
VI	**Chapter 5: The President and National Executive**	
IV	83. The President	81
XX	84. Powers and functions of President	82
XX	85. Executive authority of the Republic	75
	86. Election of President	77
VI	87. Assumption of office by President	
VIII	88. Term of office of President	
VI; IV	89. Removal of President	87
	90. Acting President	86
VI	91. Cabinet	88
IV; VI	92. Accountability and Responsibilities	92
	93. Deputy Ministers	94
	94. Continuation of Cabinet after elections	
	95. Oath or affirmation	88(7)
VI	96. Conduct of Cabinet Ministers and Deputy Ministers	
	97. Transfer of functions	91

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	98. Temporary assignment of functions	90
	99. Assignment of functions	
XXI(2); XXII	100. National supervision of provincial administration	
IX	101. Executive decisions	
VI	102. Motions of no-confidence	93
	Chapter 6: Provinces	
XVIII	103. Provinces	124
XVI; IV;	104. Legislative authority of provinces	125; 126
XVII	105. Composition and election of provincial legislatures	127
VI	106. Membership	132
	107. Oath and affirmation	134
VIII	108. Duration of provincial legislatures	
VI	109. Dissolution of provincial legislatures before expiry of term	
	110. Sittings and recess periods	130
	111. Speakers and Deputy Speakers	131
X	112. Decisions	
VI	113. Permanent delegates' rights in provincial legislatures	
X	114. Powers of provincial legislatures	125
IX	115. Evidence or information before provincial legislatures	
X	116. Internal arrangements, proceedings and procedures of provincial legislatures	135
	117. Privilege	135
IX	118 Public access to and involvement in provincial legislatures	142
	119. Introduction of Bills	
X	120. Money Bills	

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
VI	121. Assent to Bills	140
IV	122. Application by members to Constitutional Court	
X	123. Publication of provincial Acts	
X	124 Safekeeping of provincial Acts	
XX	125. Executive authority of provinces	144
XIX	126. Assignment of functions	
XX	127 Functions of Premiers	147
XX	128. Election of Premiers	145
	129. Assumption of office by Premiers	
VIII	130. Term of office of Premiers	140
XX	131. Acting-Premiers	148
XX	132. Executive Councils	149
VI	133. Accountability and responsibilities	153
	134. Continuation of Executive Councils after elections	
	135. Oath or affirmation	
VI	136. Conduct of members of Executive Councils	
	137. Transfer of functions	152
	138. Temporary Assignment of functions	151
XXI; XXIV	139. Provincial supervision of local government	
	140. Executive decisions	
VI	141 Motions of no-confidence	154
XVIII(2)	142. Adoption of provincial constitutions	160
XVIII(2); IV; XIII; XVIII	143. Contents of provincial constitutions	160
XVIII(2)	144. Certification or provincial constitutions	160(4)
X	145. Signing, publication and safekeeping of provincial constitutions	
XXI(1); XX(2)	146. Conflicts between national and	126

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	provincial legislation	
XXI(2)	147. Other Conflicts	126
XXIII	148. Conflicts that cannot be resolved	
	149. Status of legislation that does not prevail	
	150. Interpretation of conflicts	
	Chapter 7: **Local Government**	
XVI; XX; XXIV	151. Status of municipalities	174
	152. Objects of local government	
	153. Development duties of municipalities	
	154. Municipalities in co-operative government	
XXV	155. Establishment of municipalities	174
XXI; XVI; XIX	156. Powers and functions of municipalities	175
XVI; XVII; VIII	157. Composition and election of Municipal Councils	179
VI	158. Membership of Municipal Councils	
	159. Terms of Municipal Councils	
X	160. Internal proceedings	
	161. Privilege	
X	162. Publication of municipal by-laws	
XXVII	163. Organised local government	
XXIV	164. Other matters	
	Chapter 8: **Courts and Administration of Justice**	
IV; VI; VII	165 Judicial authority	96
V	166. Judicial system	
	167. Constitutional Court 167(6)	98 100
	168. Supreme Court of Appeal	101

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	169. High Courts	101
	170. Magistrates' Courts and other courts	103
	170. Court procedure	
	171. Court procedures	
	172. Powers of courts in constitutional matters	
	173. Inherent power	
VII	174. Appointment of judicial officers	104
	175. Acting judges	
VII	176. Terms of office and remuneration	104
VI	177. Removal	104
	178. Judicial Services Commission	105
V	179. Prosecuting Authority	108
	180. Other matters concerning administration of justice	
	Chapter 9: **State Institutions Supporting Constitutional Democracy**	
XXIX	181 Establishment and governing principles 181(1)(a) 181(1)(b) 181(1)(d) 181(1)(e) 181(2) 181(3) 181(4)	 110 115 119 191 111(1) 111(4) 111(2)
XXIX; VI; X	182. Functions of Public Protector	112
	183. Tenure	110(5)
I;II;III	184. Functions of Human Rights Commission	116
II; XII; XI; XXXV;	185. Functions of Commission	
XI; I; II; III	186. Composition of Commission	
I; II; III	187. Functions of Commission for Gender Equality	119(3)
XXIX; VI	188. Functions of Auditor General	193
	189. Tenure	191(4)

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
I; II; VIII; XVII	190. Functions of Electoral Commission	
	191. Composition of Electoral Commission	
XI	192. Broadcast Authority	
I; II; III	193. Appointments 193(3)	 191
XXIX	194. Removal from office	
	Chapter 10: **Public Administration**	
XXX	195. Basic values and principles governing public administration	212(2)
XXIX; VI	196. Public Service Commission	209
XXX(1); XXX(2)	197. Public Service	212
	Chapter 11: **Security Services**	
XXXI	198. Governing principles	227
IV; II; XXXI; VI; VIII; IX	199. Establishment, structuring and conduct of security services	227
	200. Defence Force	224
	201. Political Responsibility	228
	202. Command of defence force	225
	203. State of national defence	
	204. Defence civilian secretariat	
	205. Police service	215; 215
	206. Political responsibility	216
	207. Control of police service 207(1) 207(2)	 216(2) 218
	208. Police civilian secretariat	
	209. Establishment and control of intelligence services	
	210. Powers, functions and monitoring	
CP XIII applies to all provisions in this Chapter	**Chapter 12:** **Traditional Leaders**	
IV; V; VII	211. Recognition	181

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
XXIV; XVII	212(1). Role of traditional leaders 212(2)	182 183; 184
	Chapter 13: **Finance**	
XXIX	213. National Revenue Fund	185
XXVI	214. Equitable shares and allocations or revenue	
	215. National, provincial and municipal budgets	
	216. Treasury control	
	217. Procurement	187
	218. Government guarantees	188
	219. Remuneration of persons holding public office	
XXVII	220. Establishment and functions	198; 199; 200
	221. Appointment and tenure of members	200
	222. Reports	
	223. Establishment	195
	224. Primary object	196
	225. Powers and functions	197
	226. Provincial Revenue Funds	
XXVI; XXV	227. National sources of provincial and local government funding	
XXV	228. Provincial taxes	
	229. Municipal rates and taxes	
	230. Provincial and Municipal loans	
	Chapter 14: **General Provisions**	
	231. International agreements	
	232. Customary international law	
	233. Application of international law	
	234. Charters of Rights	
XXXIV	235. self-determination	
VIII	236. Funding for political parties	
	237. Diligent performance of	

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	obligations	
	238. Agency and delegation	
	239. Definitions	233
	240. Inconsistencies between different texts	
	241. Labour relations Act, 1995	
	242. Transitional arrangements	
	243. Repeal of Laws	230
	244. Short title and commencement	251
	Schedule I: **National Flag**	
	Schedule 2: **Oaths and affirmations**	
	1. Oath or solemn affirmation of President and Acting President	
	2. Oath or solemn affirmation of Deputy President	
	3. Oath or solemn affirmation of Ministers and Deputy Ministers	
	4. Oath or solemn affirmation of Members of the National Assembly, Permanent Delegates to the National council of Provinces and members of provincial legislatures	
	5. Oath or solemn affirmation of Premiers and members of Provincial Executive Councils	
	6. Oath or solemn affirmation of Judicial Officers	
	Schedule 3: **Election Procedures**	
	1. Application	
	2. Nominations	
	3. Formal Requirements	
	4. Announcement of names of candidates	
	5. Single candidate	
	6. Election procedure	
	7. Elimination procedure	

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	8. Further meetings	
	9. Rules	
CPs XIX; XX; XXI apply to the provisions in this schedule.	**Schedule 4: Functional Areas of Concurrent National and Provincial Legislative Competence**	
CPs XVIII; XIX; XX; XXI apply to the provisions in this schedule.	**Schedule 5: Functional Areas of Exclusive Provincial Legislative Competence**	
	Schedule 6: Transitional Arrangements	
	1. Definitions	
	2. Continuation of existing law	
	3. Interpretation of existing legislation	
	4. National Assembly	
	5. Unfinished business before Parliament	
XXXIII	6. Election of National Assembly	
	7. National Council of Provinces	
	8. Former Senators	
XXXII	9. National executive	
	10. Provincial Legislatures	
	11. Election of provincial legislatures	
	12. Provincial Executives	
	13. Provincial constitutions	
	14. Assignment of legislation to provinces	
	15. Existing legislation outside Parliament's legislative power	
	16. Courts	
	17. Cases pending before courts	
	18. Prosecuting authority	
	19. Oaths and Affirmations	
	20. Other constitutional institutions	
	21. Enactment of legislation	

Constitutional principles	Clause no. & heading: New Constitution	Corresponding or approximate section in the Interim Constitution
	required by new Constitution	
	22. National unity and reconciliation	
II; X	23. Bills of Rights	
	24. Public administration and security services	
	25. Additional disqualification for legislatures	
	26. Local government	
	27. Safekeeping of Acts of Parliament and Provincial Acts	
	1. Amendments to Schedule 2 to previous Constitution	
XXXII	1. Government of National Unity: National Sphere	
	1. Government of National Unity: Provincial Sphere	
	1. Public administration and security services: Amendments to sections of the previous constitution	
	Schedule 7 **Laws Repealed**	

SCHEDULE D

D. PROVINCIAL LEGISLATIVE POWERS: 1993 CONSTITUTION vs TEXT

SCHEDULE D

COMPARATIVE ANALYSIS OF PROVINCIAL LEGISLATIVE POWERS IN 1993 CONSTITUTION AND THE NEW TEXT

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
1.	Abattoirs	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 5 exclusive provincial power, subject to sec. 44(2) national intervention	No change	Upgraded to exclusive provincial power, subject to sec. 44(2) national intervention
2.	Administration of indigenous forests	None	Schedule 4 concurrent power, subject to sec 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides
3.	Agriculture	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
4.	Airports other than international and national airports	Schedule 6 concurrent power, subject tot sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
5.	Ambulance services	Schedule 6 concurrent power under "Health Services". Subject to sec. 126 overrides	Schedule 5 exclusive provincial power, subject to section 44(2) national intervention	No change	Upgraded to exclusive provincial power, subject to sec. 44(2) national intervention
6.	Animal control and	Schedule 6 concurrent power, subject to sec. 126	Schedule 4 concurrent power, subject to sec.	No change	No change, except extent of

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
	diseases	overrides	146 overrides		overrides
7.	Archives other than national achieves	None	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides
8.	Casinos, racing, gambling and wagering.	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides. Lotteries and sports pools now excluded	Diminishment of provincial powers (by excluding lotteries and sport pools)	No change, except extent of overrides
9.	Consumer protection	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
10.	Cultural affairs	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
11.	Delegated powers	None	Section 104(1)(b)(iii) provides for the assignment of additional legislative powers to provinces	Potential extension of provincial powers	Provincial legislation under these additional powers will have status of delegated legislation
12.	Disaster management	None	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides
13.	Education at all levels	Schedule 6 concurrent power, subject to sec. 126 overrides. Only university and technikon education	Schedule 4 concurrent power, subject to sec. 146 overrides. All tertiary education now	Diminishment of provincial powers (by excluding all tertiary education)	No change, except extent of overrides

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
		excluded	excluded		
14.	Environment	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
15.	Health services	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
16.	Housing	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec, 146 overrides	No change	No change, except extent of overrides
17.	Incidental powers	Section 126(2) provides for incidental powers for provinces in relation to Schedule 6 matters	Section 104(4) provides for incidental powers in relation to Schedule 4 matters only.	Diminishment of provincial powers in that provinces have no incidental powers in relation to matters specified in Schedule 5	No change in quality of remaining provincial powers
18.	Indigenous law and customary law	1. Schedule 6 concurrent power, subject to sec. 126 overrides 2. Section 183 (establishment of provincial houses of trasitional leaders)	1. Schedule 4 concurrent power, subject to sec. 146 overrides and Chapter 12 2. Section 212(2) (establishment of houses of traditional leaders)	No change	No change, except extent to overrides and exercise of power now subject to Chapter 12
19.	Industrial promotion	Schedule 6 concurrent power under "Trade and Industrial Promotion".	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
		Subject to sec. 126 overrides.			
20.	Language plicy and the regulation of official languages	1. Schedule 6 concurrent power, subject to sec. 126 overrides and section 3 2. Section 3(5) and (8)	Schedule 4 concurrent power, subject to - (a) sec. 146 overrides; and (b) the extent that section 6 expressly confers legislative competence on provinces	Diminishment of provincial powers to the extent that provinces can legislate only where expressly provided in section 6	No change, except extent of overrides
21.	Local government	1. Schedule 6 concurrent power, subject to sec 126 overrides 2. Various sections of Chapter 10 conferring provincial legislative competence, viz - sections 174(1), (2), (3) 175(1), (6) 177 178(2) 179(1), (2), (3) 180	1. Schedule 4 concurrent powers: The following local government matters to the extent set out in section 155(3): - Air pollution - Building regulations - Child care facilites - Electricity and gas reticulation - Firefighting services - Local tourism - Municipal airports - Municipal health services - Municipal planning	Diminishment of provincial powers. Firstly, under 1993 Constitution provinces could legislate on all local government matters. Under the new Text provinces can only legislate in regard to local government matters contained in the lists. Secondly, section 155(3) limits provincial legislative power to - - monitoring the listed matters; - regulating the exercise	No change as regards first list (concurrent matters), except for the section 155(3) limitations.

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
			- Municipal public transport	of municipal	
			- Municipal public works - Pontoons, ferries, piers and harbours (excluding shipping) - Stormwater management in built up areas - Trading regulations - Aspects of water and sanitation services 2. Schedule 5 exclusive powers: The following local government matters to the extent set out in section 155(3): - Beaches and amusement facilities - Advertisement in public places - Cemetaries, funeral parlours, crematoria - Cleansing - Control of public nuisance		As regards second list, provincial power upgraded to exclusive.
			- Control of liquor sales		

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
			to the public - Accommodation, care and burial of animals - Fencing and fences - Licensing of dogs - Licensing and control of places selling food to the public - Local amenities - Local sports facilities - Markets - Municipal abattoirs - Municipal parks and recreation - Municipal roads - Noise pollution - Pounds - Public places - Refuse removal and dumps - Street trading - Street lighting - Traffic and parking 3. Sections 155(2), 161 and 164 161	Diminishment of provincial powers when Chapter 12 of new Text is compared to Capter 10 of the 1993 Constitution	In Chapter 12 of the new Text all provincial legislation subject to national framework legislation. national
22.	Libraries excluding	None	Schedule 5 exclusive provincial power, subject	Extension of provincial	New exclusive provincial power, subject to sec. 44(2)

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
	national libraries		to sec. 44(2) national intervention	powers	national intervention
23.	Liquor licenses	None	Schedule 5 exclusive provincial power, subject to sec. 44(2) national intervention	Extension of provincial powers	New exclusive provincial power, subject to sec. 44(2) national intervention
24.	Museums except national museums	None	Schedule 5 exclusive provincial power, subject to sec. 44(2) national intervention	Extension of provincial powers	New exclusive provincial power, subject to sec. 44(2) national intervention
25.	Markets and pounds	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 5. Local government aspects of markets and pounds exclusive provincial power, subject to - sec. 44(2) national intervention; and - sec. 155(3) limitations	Diminishment of provincial powers. Aspects of markets other than those pertaining to local government now excluded	Diminished power upgraded to exclusive, subject to sec. 44(2) national intervention
26.	Nature conservation	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
27.	Media service	"Provincial public media" a Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides. Limited to media service "directly controlled or provided	No change	No change except - (a) extent of overrides; and (b) now subject to

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
			by provincial government subject to section 192".		Independent Broadcasting Authority, sec. 192
28.	Police	1. Schedule 6 concurrent power, subject to - sec. 126 overrides; and - Chapter 14 2. Section 217(3) and (4)	Schedule 4 concurrent power, subject to - sec. 146 overrides; and - the extent that Chapter 11 confers legislative competence on provinces	Chapter 11 confers no legislative competence on provinces, except perhaps by implication in sec. 206(2) (which may be narrower than section 217(3) and (4) of the 1993 Constitution)	No change
29.	Pollution control	None	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides
30.	Population development	None	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides
31.	Privileges and remuneration of members of provincial legislatures	Section 135(1) and (4)	None	Diminishment of provincial powers. Section 117(2) and 219(1)(b) now require national legislation for these matters	-
32.	Property transfer fees	None, but see section 155(2)(d)	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
33.	Provincial constitutions	Section 160. Provincial constitutions to be consistent with Constitution, but may provide for - (a) legislative and executive structures and procedures different from those "provide for in this Constitution in respect of a province"; and	Sections 142 and 143. Provincial constitutions to be consistent with the Constitution, but may provide for - (a) provincial legislative and executive structures and procedures that differ from those "provided for in this Chapter"; and (b) the institution, role, authority and status of a traditional monarch.	No change	New Text now clearly states that adoption of provincial constitutions is an exclusive provincial matter
		(b) the constitution, role, authority and status of a traditional monarch in the province	Provincial constitutions must further comply with section 1 and Chapter 3, and may not confer on provinces powers outside Schedules 4 and 5 or other provisions of the Constitution		
34.	Provincial public enterprises in respect of Schedule 4 and 5 functional areas	None	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers, except to the extent covered by incidental powers referred to in section 126(2) of	New concurrent power, subject to sec. 146 overrides

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
				1993 Constitution	
35.	Provincial planning	None, except under "Regional planning and development" in Schedule 6	Schedule 5 exclusive power, subject to sec. 44(2) national intervention	No change	"Provincial" aspect of regional planning upgraded to exclusive, subject to sec. 44(2) national intervention
36.	Provincial cultural matters	None, except under "Cultural matters" in Schedule 6	Schedule 5 exclusive power, subject to sec. 44(2) national intervention	No change	"Provincial" aspect of cultural affairs upgraded to exclusive provincial power, subject to sec. 44(2) national intervention
37.	Provincial public protectors	Section 114 provides for provincial public protectors who perform their functions with the concurrence of the National Public Protector	one	No explicit provisions for provinces to appoint own public protectors	Not substantial diminishment because provincial public protectors could in any event not perform their functions independently from National Public Protector
38.	Provincial revenue funds	Section 159(2). Withdrawals only in terms of provincial legislation	Section 226(2) . Withdrawals only in terms of provincial legislation	No change	No change
39.	Provincial service commissions	Section 213 provides for provinces to establish their own service commissions	Section 196 provides for "single" Public Service Commission for the Republic. Provision is made for provincial representa-tives to perform the Commission’s functions	Diminishment of provincial powers in that provinces can no longer appoint their own service commissions	-

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
			in the provinces		
40.	Provincial sport	Schedule 6 concurrent power under "Provincial sport and recreation". Subject to sec. 126 overrides	Schedule 5 exclusive provincial power, subject to sec. 44(2) national intervention	No change	Upgraded to exclusive provincial power, subject to sec. 44(2) national intervention
41.	Provincial roads and traffic	Schedule 6 concurrent power under "Roads". Subject to sec, 146 overrides	Schedule 5 exclusive power, subject to sec. 44(2) national intervention	Diminished to the extent that provinces can now only legislate on "provincial" roads	Diminished power upgraded to exclusive, subject to sec. 44(2) national intervention
42.	Public transport	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
43.	Public works in respect of needs of provincial government departments	Incidental power under sec. 126(2)	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change
44.	Referenda	Section 147(1)(f)	Section 127(2)(f)	Diminishment of provincial powers. Referenda in provinces can now only be called in terms of national legislation	-
45.	Regional planning and development	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides (But see "Provincial planning" in item 35 above)
46.	Road traffic regulation	Schedule 6 concurrent power, subject to sec. 126	Schedule 4 concurrent power, subject to sec.	No change	No change, except extent to

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
		overrides	146 overrides		of overrides
47.	Soil conservation	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
48.	Tax	1. Section 156(1) empowers provinces to levy taxes, levies and duties, other than income tax, value-added to sales tax, if authorised thereto in an Act of Parliament.	1. Section 228(1)(a) empowers provinces to impose taxes, levies or duties, other than income tax, value-added tax, rates on property or customs duties, subject only to regulation by national legislation.	1. No change, except that rates on property and customs duties now included in list of exclusions	1. Provincial power upgraded in that national legislation can now only "regulate" imposition of taxes by provinces. Previously Act of Parliament had to "authorise".
		2. Section 156(1B) confers on provinces the exclusive competence to impose taxes, levies and duties (excluding income tax, value added or sales tax) on - - casinos; - gambling, wagering and lotteries; and - betting	2. Section 228(1)(b) empowers provinces to impose flat-rate surcharges on tax bases of any tax, levies or duties (except corporate income tax, value-added tax, rates on property or customs duties)	2. Extension of provincial powers in that provinces are now empowered to impose flat-rate surcharges on national tax eg. income tax).	2. Exclusive provincial power to levy taxes on gambling now downgraded. (not withdrawn)
49.	Tourism	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides

SEQUENCE NO.	SUBJECT MATTER	1993 CONSTITUTION	NEW TEXT	ASSESSMENT	
				QUANTITATIVE	QUALITATIVE
50.	Trade	Schedule 6 concurrent power under "Trade and industrial promotion". Subject to sect. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers from "Trade promotion" in 1993 Constitution to "Trade".	No change, except extent of overrides
51.	Traditional leadership	Schedule 6 concurrent power under "Traditional authorities". Subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides and Chapter 12 of the new Text	No change	No change, except extent of overrides and now subject to Chapter 12
52.	Urban and rural development	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides
53.	User charges	Section 156(3)	None	Diminishment, unless imposition of user changes is an implied power	-
54.	Vehicle licensing	None	Schedule 4 concurrent power, subject to sec. 146 overrides	Extension of provincial powers	New concurrent power, subject to sec. 146 overrides
55.	Veterinary services excluding regulation of profession	None	Schedule 5 exclusive provincial power, subject to sec. 44(2) national intervention	Extension of provincial powers	New exclusive provincial power, subject to sec. 44(2) national intervention
56.	Welfare services	Schedule 6 concurrent power, subject to sec. 126 overrides	Schedule 4 concurrent power, subject to sec. 146 overrides	No change	No change, except extent of overrides

SCHEDULE E

E. PROVINCIAL EXECUTIVE POWERS: 1993 CONSTITUTION vs TEXT

Schedule E

COMPARATIVE ANALYSIS OF PROVINCIAL EXECUTIVE POWERS IN 1993 CONSTITUTION AND THE NEW TEXT

No	Subject matter	1993 Constitution	New Text	Assessment Quantitative	Assessment Qualitative
1.	Implementation of provincial legislation	Section 144(2), in regard to all legislation enacted by the provinces	Section 125(2)(a). Implementation of provincial legislation by provinces now an exclusive provincial power (section 125(5), but subject to national intervention in terms of section 100	No change	Upgraded to exclusive provincial power, but subject to national intervention in terms of section 100
2.	Implementation of national legislation within schedular areas	None, except section 144(2) which provides for delegation of matters to provinces by law	Section 125(2)(b) giving provinces constitutional right to implement national laws within Schedules 4 and 5, except where an Act of Parliament or the Constitution provides otherwise	Extension of provincial powers in that provinces now have constitutional right to implement national legislation within Schedules 4 and 5	Extension of provincial powers because implementation of national legislation by provinces no longer dependent upon statutory delegation
3.	Administration of national legislation outside schedular areas	None, except section 144(2) which provides for the delegation of matters to provinces	Section 125(2)(c) which provides for provinces to administer national legislation outside Schedules 4 and 5 when assigned to them in terms of an Act of Parliament	No change	No change
No.	Subject matter	1993 Constitution	New Text	Assessment Quantitative	Assessment Qualitative
4.	Administration of existing legislation	Section 144(2) provides for provinces to implement pre-1993 Constitution laws assigned to them in terms of section 235	1. Old order legislation continues to be implemented by the authorities which administered them before commencement of the above Text Item 2(2)(a) of Schedule 6) 2. Provision for further	Extension of provincial power in that old order legislation falling within Schedule 5 can only be administered by provinces, subject to item 15 of Schedule 6	No change

			assignments to provinces in items 14 and 15 of Schedule 6		
5.	Assignment of powers and functions to members of provincial Executive Councils	None	Section 99 permits Cabinet members to assign statutory functions to members of provincial executive councils	Extension of provincial powers	
6.	Delegation	Section 144(2)	Section 238. Delegation and agency	No change	No change

SCHEDULE F

F. AFFIDAVIT OF HASSEN EBRAHIM

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE: CCT 23/96

CERTIFICATION OF THE CONSTITUTION OF SOUTH AFRICA BILL

SUPPORTING AFFIDAVIT

I, the undersigned

HASSEN EBRAHIM

make the following statement under oath:

1. I am employed in the position of Executive Director of the Constitutional Assembly and have been so employed since the commencement of the Constitutional Assembly.

2. I managed the establishment of the Theme Committees whose task it was to consider various aspects of the new constitutional draft.

3. Theme Committee Four was established to consider and prepare the Bill of Rights to be included in the new constitutional text.

4. The new text was only drafted after the drafters had given due consideration *inter alia* to the fundamental rights in Chapter 3 of the Interim Constitution as required by Constitutional Principle 11.

5. In drafting the Bill of Rights, they considered all the fundamental rights in Chapter 3 of the Interim Constitution with a view to their inclusion in, or exclusion from, the new constitution. They did so seriously, properly and in good faith. They took into account all the considerations for attaining each right and for excluding or amending it.

6. Chapter 3 of the Interim Constitution served as basis for and inspired the Bill of Rights in the New

Text. As appears from the Bill of Rights itself, it largely maintained the format, language and content of Chapter 3 of the Interim Constitution. The omissions from, and amendments and additions to, Chapter 3 of the Interim Constitution were all very carefully considered, closely negotiated and only made for what were considered to be good and substantial reasons.

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HASSEN EBRAHIM

I hereby certify that the deponent acknowledged that he knew and understood the contents of this affidavit which was signed and sworn to before me at JOHANNESBURG on this the 4th day of June 1996, after I had administered the oath or affirmation to the deponent in the manner prescribed by regulation.

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COMMISSIONER OF OATHS