

DRAFT FRAMEWORK FOR THE NEW CONSTITUTION

as at 30 August 1995

PREAMBLE

.....

CHAPTER 1

FOUNDING PRINCIPLES OF THE STATE AND NATION

Supremacy of this Constitution

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

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

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

Name, territory, seats of government and national symbols of the Republic

2.

Official languages

3.

Citizenship and the franchise

[4. (1) There shall be a common South African citizenship.

(2) The acquisition, loss and restoration of South African citizenship shall be regulated by an Act of Parliament, subject to any provision of the Chapter on Fundamental Rights which deals with these matters.

(3) Every South African citizen shall be entitled to enjoy all rights, privileges and benefits of such citizenship as are accorded to him or her in terms of this Constitution or an Act of Parliament.

(4) Every South African citizen shall be subject to all duties, obligations and responsibilities of such citizenship as are imposed upon him or her in terms of this Constitution or an Act of Parliament.

(5) Every South African citizen shall be entitled to vote in elections for the legislatures at all levels of government and in referenda contemplated in this Constitution, in accordance with the laws regulating such elections and referenda.]

CHAPTER 2

FUNDAMENTAL HUMAN RIGHTS

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CHAPTER 3

NATIONAL GOVERNMENT

Parliament

Legislative power

- [5. The legislative power of the Republic shall vest in Parliament.¹**

Constitution of Parliament

- 6. Parliament consists of the National Assembly and²**

The National Assembly

Composition of National Assembly

- 7. The National Assembly consists of ... members.³**

¹ This is merely a provisional clause and its only purpose at this stage is to serve as an "opening statement" for what follows. Legislative competencies are dealt with by TC 3.

² The question of a Senate is contentious. Consequently no provisions on the Senate were included in this draft. Although there appears to be broad agreement that there should be a Senate further clarity is required whether the Senate should be part of "Parliament" or whether it should be a separate institution. Depending on what is agreed about the Senate, some of the provisions on the National Assembly may have to be rephrased and relocated to a joint section on the NA and the Senate (as, e.g. in the case of sections 55 - 67 of the Interim Constitution).

³ The size of the National Assembly is contentious. See Block 5 of the Report on Parliament.

National elections

8. The election of members of the National Assembly shall be conducted in accordance with an electoral system⁴ which shall be based on a common voters' roll and, in general, proportional representation as provided for by national law.⁵

Duration of National Assembly

9. (1) The National Assembly as constituted in terms of a general election shall continue⁶ for a term of five years⁷ as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.⁷

(2) The National Assembly may be dissolved before the end of the term for which it was elected if a vote of no-confidence in the Cabinet is passed by the National Assembly.⁸

Contralesa proposed that the legislative chamber should include traditional leaders.

⁴ The CC Subcommittee recommends that the electoral system be debated in the CA.

⁵ As approved by TC 2 Report of 7 August 1995 on electoral system. The majority of parties and public submissions favour a system which includes party lists and constituency elections resulting in proportional representation.

⁶ It was suggested in the CC that the word in bold brackets be replaced by "serve". The Law Advisor and the Technical Advisors recommended to the CC Subcommittee that the word "continue" be retained as an indication of the *duration* of the National Assembly.

⁷ See Block 9 of the Report on Parliament. The DP proposes a term of four years.

(3) When the term for which the National Assembly was elected expires or if the National Assembly is dissolved before its term expires, the National Assembly as then constituted shall remain competent to function, and its members shall continue as members, until the day before polling for the next National Assembly.^{8]}

Speaker and Deputy Speaker⁹

10. (1) The National Assembly shall at its first sitting after a general election, and thereafter as and when it becomes necessary to fill a vacancy, elect a Speaker and a Deputy Speaker from amongst its members.¹⁰

[(2) The Chief Justice¹¹ or a judge designated by him or her

⁸ As per Block 10 of the Report on Parliament. As presently worded the National Assembly and its members remain competent to function after a dissolution up to the day before polling for the next NA. However, there was some discussion (and support) in the Theme Committee on whether this should be changed so that members of the NA only vacate their seats the day before the newly elected members take up their seats. However, in the CC debate concern was expressed that an extension of the National Assembly beyond an election may open the door for a government, after having lost an election, to legislate for instance on the validity of the election.

The Technical Advisers reported that among 15 other jurisdictions, three were found with a provision resembling section 5(3) (Botswana, Bangladesh and Namibia). None was found that provided for the continuation of membership or the functioning of Parliament between the day of the election and the first session of the newly elected Parliament. It was agreed in the CC Subcommittee that if such provision was required, stringent safeguards would have to be built in to prevent the "dissolved" parliament from abusing its ability to sit after the day of the next election (e.g. by legislating on the election, changing the Constitution, voting its members undue privileges and benefits).

⁹ Section 6 is based on section 41 of the Interim Constitution as per agreement in Block 16 of Report on Parliament.

¹⁰ Agreed to in the CC.

¹¹ In terms of the Interim Constitution the Chief Justice presides over the election of a Speaker. As the Constitutional Court is the highest court as far as constitutional matters are

shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.]

(3) The procedure set out in Schedule ... shall apply to the election of the Speaker and the Deputy Speaker.¹²

(4) The Speaker and the Deputy Speaker have the powers and functions assigned to them by this Constitution and the law, including the rules and orders of the National Assembly.¹³

(5) The Speaker or Deputy Speaker ceases to hold office if he or she resigns from office or ceases to be a member of the National Assembly. The Speaker or Deputy Speaker may be removed from office by resolution of the National Assembly.¹⁴

Qualifications of members of National Assembly¹⁵

11. [(1) Only South African citizens qualified to vote¹⁶ in elections

concerned the question arises whether the President of the Constitutional Court rather than the Chief Justice should not fulfil constitutional functions such as presiding at the election of a Speaker. The TC is of the view that this function should remain vested in the Chief Justice.

The CC agreed that it was not vital to decide this issue at this stage. It should be settled in private discussions between the parties.

¹² The procedure referred to here is similar to that contained in Schedule 5 of the Interim Constitution. The CC agreed to this clause.

¹³ Agreed to in the CC.

¹⁴ Agreed to in the CC.

¹⁵ Drafted as per Block 8 of the Report on Parliament.

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

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

- (a) Unrehabilitated insolvents.¹⁷
- (b) Persons declared to be of unsound mind by the courts of the Republic.¹⁸

¹⁶ The franchise is dealt with by TC 1. Discussion of clause stands over pending TC 1's report.

¹⁷ Agreed to in the CC.

[(c) Persons convicted [after 27 April 1994]¹⁸ of an offence in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the

¹⁸ The formulation of this paragraph is based on section 42(1)(b) of the Interim Constitution which applied only to convictions after promulgation of the Interim Constitution, i.e. 27 April 1994.

This formulation does not cover persons convicted of serious crimes before 27 April 1994 and who at the commencement of the new Constitution are still serving imprisonment. Inclusion in the above section of the following additional paragraph (based on section 42(1)(a) of the Interim Constitution) should perhaps be considered:

"Persons who at the commencement of the Constitution are serving a sentence of more than 12 months' imprisonment without the option of a fine."

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

Secondly, the deletion of the date would not cover persons who completed sentences, also for political offences, before 27 April 1994.

It is suggested that par. (c) be replaced by the following paragraphs:

- (c) Persons who at the commencement of the Constitution are serving a sentence of more than 12 months' imprisonment without the option of a fine.
- (d) Persons convicted after the commencement of the Constitution of an offence in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, and sentenced to more than 12 months' imprisonment without the option of a fine. A person shall not be regarded as convicted until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired, or if such person has received a pardon.

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

Republic, and sentenced to more than 12 months' imprisonment without the option of a fine. A person shall not be regarded as convicted until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired, or if such person has received a pardon or amnesty.

- (d) Persons who are members of [the Senate], a provincial legislature or a local government.¹⁹]**

¹⁹ **Stands over pending decisions on the Senate.**

- (e) Persons holding office of profit under the Republic²⁰, excluding-
 - (i) the Deputy State President;²¹
 - (ii) Ministers and Deputy Ministers;²²
 - (iii) persons receiving a pension from public funds or from a pension fund aided by public funds;²²
 - (iv) justices of the peace and appraisers;²² and
 - [(v) members of statutory bodies performing a public**

²⁰ Traditional leaders receiving payments from the State run the risk of being regarded as persons holding office of profit under the Republic in terms of this section, in which event they will be disqualified from being members of the National Assembly. Their inclusion in the above list should be considered.

The ad hoc committee on traditional authorities was instructed by the CC to go into this matter.

The Technical Advisers requested an opportunity to take another look at this paragraph. Inconsistency in the wording (e.g. that a pension from a public fund (subpar (iii) is hardly an office of profit) was pointed out. The Technical Advisers were instructed to produce an alternative wording.

The underlying principle of this disqualification is the separation of powers. Positions in the judiciary, civil service and other statutory bodies requiring political neutrality and judicial detachment are incompatible with the duties and functioning of members of Parliament. Moreover, lucrative positions in the executive or statutory bodies may undercut the independence of MPs. It may thus be incompatible for an MP to be a justice of the peace, an office which requires judicial impartiality before issuing warrants of arrest.

In all the Commonwealth constitutions surveyed, public office paid from state revenue is a disqualification for membership of Parliament. Exceptions to the rule are recognized but never exhaustively defined in the constitutions; instead reference is made to a law providing for a comprehensive list of exceptions. See e.g. Antigua, Bahamas, Bangladesh, Botswana, Cyprus, Dominica, Gambia, India, Jamaica, Kenya, United Kingdom. It is thus suggested that, apart from excluding the positions of the Deputy State President, Ministers and Deputy Ministers, further exceptions should be regulated by national law, possibly in the Electoral Act. Exceptions would be permissible only if such positions are not incompatible with the functions and duties of a member of Parliament. The following formulation is thus suggested:

"Persons holding office of profit under the Republic excluding

- (i) the Deputy State President;
- (ii) Ministers and Deputy Ministers; and
- (iii) any other office declared by national law not to be incompatible with the functions and duties of members of Parliament."

²¹ Agreed to in the CC.

**function who receive remuneration as such a member
not more than their salaries as members of the
National Assembly.²²]**

(3) The disqualification imposed by this section on a person who served a prison sentence of more than 12 months shall lapse 5 years after **[his or her release from prison]** completion of the sentence.²³

(4) A person not qualified to be a member of the National Assembly and who sits or votes in the National Assembly knowing that he or she is not qualified, shall be liable to a fine prescribed by the rules and orders of the National Assembly.²⁴

²² CC Subcommittee was requested to consider as a matter of principle whether a member of Parliament should be permitted to receive additional remuneration as a member of a statutory body.

²³ The CC supported the principle that persons who served prison sentences of more than 12 months should not be disqualified for life. A five year ban was also supported, subject to a comparative study to be done by the Technical Advisers. The Technical Advisers reported that among the 15 foreign constitutions that they have surveyed, only two contained a provision resembling section 7(3) [Bangladesh (5 years) and Namibia (10 years)].

The words in bold brackets were replaced by the words underlined.

²⁴ Agreed to in the CC.

Vacation of seats²⁵

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

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

[(d) unauthorised absence for 15 consecutive parliamentary sitting days.]

Filling of vacancies²⁶

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

Oaths or affirmation by members

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

²⁵ The CC approved paragraphs (a), (b) and (c) and inserted paragraph (d). It was pointed out in the CC Subcommittee that it was not agreed by the CC to insert subparagraph (d), and it is accordingly recommended that it be deleted.

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

²⁶ Agreed to in the CC.

[I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa and solemnly promise to perform my functions as a member of the National Assembly to the best of my ability.

(In the case of an oath: So help me God.)²⁷

(2) A member **[nominated to fill]** filling a casual vacancy in the National Assembly shall make and sign the oath or solemn affirmation before the Speaker.²⁸

Sittings and recess periods

15. (1) The National Assembly may determine the time and duration of its sittings and its recess periods. The first sitting of the National Assembly after a **[general]** election shall take place not more than 10 days after the declaration of the result of the election at a time and on a date determined by the Chief Justice.²⁹

[(2) The State President³⁰ **may at any time summon the**

²⁷ Subsection (1) amended by the CC as indicated. Words in bold brackets deleted and words underlined inserted.

See foot note 11 for which judge to take the oath/affirmation.

²⁸ Agreed to in the CC as amended.

²⁹ Agreed to in the CC subject to the insertion of the underlined words. See foot note 11 as far as this subsection vests a function in the Chief Justice.

³⁰ The TC prefers the term "State President" to distinguish the Head of State from the

National Assembly to an extraordinary sitting for the conduct of urgent business.³¹

(3) The seat of the National Assembly is³² where all sittings of the National Assembly shall ordinarily take place. Sittings at other venues are only permitted on the grounds of public interest, security or convenience and if provided for in the rules and orders of the National Assembly.]

Quorum

16. ...³³

Decisions

[17. (1) Except where the Constitution provides otherwise, all

President of the Constitutional Court, President of the Senate etc. See Block 1 of the Report on the Presidency. Term generally supported in the CC.

³¹ **As per Block 2 of the Report on Parliament. The National Party is in favour of a clause along the following lines:**

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

See also section 6(3)(a) of the Draft on the National Executive.

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

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

³² **Legislative seat to be dealt with by TC 1. Subsection otherwise approved by the CC.**

³³ **Agreed in the CC that quorums must be prescribed in the rules of the NA. No provision required. See section 15. The question of a quorum was raised in the CC Subcommittee. It was agreed that section 13 be amended to provide for the presence of a prescribed number of members for the purpose of decision-making.**

questions before the National Assembly shall be determined by a majority of the votes cast by the members present.³⁴

(2) The member of the National Assembly presiding in the Assembly has no deliberative vote, but does have and shall exercise a casting vote in the event of an equality of votes.³⁵]

Note: The provisions following below (i.e. sections 14 - 22) will apply to both the National Assembly and the Senate should agreement be reached on a second House of Parliament.

State President's rights in National Assembly

18. The State President is entitled to attend [sit] and to speak in the National Assembly, but may not vote.³⁶

³⁴ Section 13 approved by the CC. Constitutional amendments, and the majorities required, are yet to be dealt with. Following the discussion on a quorum, it was agreed in the CC Subcommittee that section 13(1) should be reworded along the lines of section 47 of the Interim Constitution to provide for a prescribed number of members to be present for decisions. The Technical Advisers submit the following:

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

³⁵ Agreed to in the CC. Depending on the nature of the Senate, this provision may be extended to entitle also Ministers and Deputy Ministers to sit and to speak in the House of which they are not members.

With regard to section 14, it was agreed in the CC Subcommittee that the word 'sit' be replaced with 'attend'.

Internal autonomy

19. (1) The National Assembly shall determine its internal arrangements and make rules and orders in connection therewith.³⁶

(2) The salaries, allowances and benefits of members of the National Assembly shall be as provided for by a national law.³⁷

Parliamentary privilege

20. (1) **[There is]** Members of the National Assembly shall have freedom of speech and debate in **[and before]** the National Assembly and its committees subject to the rules and orders **[of the National Assembly]**. This freedom may not be limited by or questioned in the courts.³⁷

(2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages as a result of anything they have said, produced or submitted in or before or to the National Assembly or its committees. The same immunity applies in respect of anything revealed as a result of what they have said, produced or submitted.³⁸

(3) Other privileges, immunities and powers of Parliament shall be

³⁶ Agreed to in the CC.

³⁷ Amended in the CC. Words in bold brackets denote deletion and words underlined insertion.

³⁸ Agreed to in the CC.

as prescribed by a national law.³⁹

Ordinary Bills

21.³⁹

Money Bills

22.⁴⁰

Bills affecting provincial matters

23.⁴⁰

Bills amending Constitution

24.⁴⁰

Assent to Bills

25. (1) A Bill duly passed by Parliament in accordance with the Constitution shall without delay be **[forthwith]** assented to and signed by the State President.⁴¹

[(2) If the State President is of the opinion that a Bill is

³⁹ These provisions are dependent on the role of the Senate in the legislative process. Consideration should also be given to the inclusion here of a provision similar to section 98(9) of the Interim Constitution which provides for the referral to the Constitutional Court of Bills where at least one-third of the members of the NA petitions the Speaker to do so. This provision has already been agreed to in TC 5, and has for present purposes been included in the Draft on the Administration of Justice.

⁴⁰ The TC has not yet reported on constitutional amendments.

inconsistent with the Constitution or that it has not been passed in accordance with the Constitution the State President may withhold assent to the Bill and refer it back to Parliament for reconsideration. If Parliament passes the Bill without correcting the defect the State President may again withhold assent and refer the Bill to the Constitutional Court for a ruling on its constitutionality.⁴²]

⁴¹ Agreed to in the CC as amended.

⁴² Stands over for further discussion in the CC Subcommittee. The Technical advisers were instructed to make a comparative analysis as to how this matter is dealt with in other jurisdictions. In the CC Subcommittee it was agreed that the Technical Advisers would produce another draft formulation, with an explanation of the system under the Interim Constitution. The following was received from the Technical Advisers:

In terms of the Interim Constitution, section 64(1), the President *shall* assent to a bill *duly* passed by Parliament, subject to section 82(1)(b). The latter section provides that the President may refer a bill back to Parliament *in the event of a procedural shortcoming in the legislative process*. This a very limited power, with no discretion (opinion) involved, and it is hard to imagine how this power would be exercised in practice.

The proposed section 21(3) introduces a wider and more subjective element - in paraphrased form, "if the State President reckons that a bill would be unconstitutional or that the correct constitutional procedure has not been followed ...". From a random number of other constitutions surveyed, it would appear that there is no single or preferred way in which assent to bills by the president is handled. In cases where provision is made for the withholding of assent, or referral back to the legislature, the patterns also differ. These differences would generally appear to be unrelated to the type of constitutional system (i.e. presidential, parliamentary or mixed). See attached addendum.

In order to accommodate the views expressed during the first debate on this subsection in the CC (see Minutes of the 24th Meeting of the CC, Friday 11 August, item 5.32), and the subsequent debate in the CC Subcommittee, the following reformulation is proposed:

(2) If the State President has reservations/concerns [NOTE: THE ONE OR THE OTHER] about the constitutionality of a Bill, or whether it has duly been passed by Parliament in accordance with the Constitution, the State President may refer the Bill back to Parliament with a clear indication of any defects. If the Bill is passed again, giving effect to the State President's reservations/concerns, the State President shall sign the Bill. If Parliament does not agree with the State President reservations/concerns, the Speaker may refer the Bill to the Constitutional Court for a ruling on the constitutionality of the Bill, or whether it has been duly passed in accordance with the Constitution. If the Constitutional Court finds the Bill to be consistent with the Constitution, the State President shall sign the Bill. If the Constitutional Court finds the Bill to be inconsistent with the Constitution, it shall be

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

Safe keeping of and public access to Acts of Parliament

[26. (1) All Bills duly signed by the State President shall immediately after their promulgation as Acts of Parliament be entrusted to the [Constitutional Court] for safe keeping.⁴³

(2) The signed copies of the Acts of Parliament entrusted to the Constitutional Court shall be conclusive evidence of the provisions of the Acts.⁴⁴

[(3) Members of the public shall have access to all Acts of Parliament entrusted to the Constitutional Court, subject to reasonable control imposed by a national law or the President of the Constitutional Court.]⁴⁵

referred back to Parliament for further consideration, failing which, it shall lapse.

⁴³ Administration requested to obtain the views of the Constitutional Court and the AD on this matter. The CC Subcommittee agreed to propose that the words Appellate Division be inserted after Constitutional Court.

⁴⁴ The question of official languages and the language(s) in which laws are to be drawn up will be dealt with by TC 1, possibly in consultation with TC 2 and TC 5. Principle of the signed copy to be conclusive agreed to in the CC.

⁴⁵ Agreed in the CC that subsection (3) be deleted.

The Senate

The National Executive

Executive power

[27. The executive power of the Republic as provided in the Constitution is vested in the national government consisting of [the State President]⁴⁶ and the Cabinet.⁴⁷]

[The State President]

Head of State and Government

28. (1) The State President is the Head of State, the Head of the National Executive and the Commander-in-Chief of the National Defence Force.⁴⁸

(2) The State President shall at all times uphold, defend and respect the Constitution as the supreme law of the land and shall be responsible for the observance of the Constitution by the national government.⁴⁹

⁴⁶ **The term "State President" to be further considered in the CA.**

⁴⁷ **As per Block 7 of the Report on the Presidency. This clause should be revisited when the powers and functions of provinces have been resolved.**

⁴⁸ **Agreed to in the CC.**

⁴⁹ **Agreed to in the CC.**

Election of State President

29. [(1) The National Assembly⁵⁰ shall at its first sitting⁵¹ after a national election, and thereafter as and when it becomes necessary to fill a vacancy during the term for which it was elected, elect a member of the National Assembly as the State President.⁵²

(2) The Chief Justice⁵³ or a judge designated by him or her, shall preside over the election of the State President. The procedure set out in Schedule ... shall apply to the election of the State President.⁵⁴]

(3) A member of the National Assembly shall upon being elected as the State President vacate his or her seat in the National Assembly.⁵⁵

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

⁵⁰ The role of the Senate in the election of the President will be revisited when finality is reached on the question of a second House.

⁵¹ The first sitting of Parliament will in terms of section 11(1) of the Draft on Parliament be convened by the Chief Justice within 10 days after the declaration of the result of a general election.

⁵² As per agreement in Block 3 of the Report on the Presidency. The DP prefers a directly elected President. Matter was not resolved in the CC.

⁵³ The CC decided that the question which judge should preside must be resolved in private discussions between the parties.

⁵⁴ The procedure referred to here has in the Interim Constitution been contained in a schedule (Schedule 5). Alternatively the procedure should be prescribed by a national law.

⁵⁵ Agreed to in the CC.

Assumption of office⁵⁶

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

[In the presence of those assembled here and in full realisation of the high calling I assume as State President in the service of the Republic of South Africa I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa, and do solemnly and sincerely promise at all times to promote that which will advance and to oppose all that may harm the Republic; to obey, observe, uphold and maintain the Constitution and all other Law of the Republic; to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice to all; and to devote myself to the well-being of the Republic and all its people.

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

Term and vacation of office and filling of casual vacancies⁵⁷

[31. (1) The State President shall be elected for a term of office commencing when he or she assumes office and ending when the person

⁵⁶ Amended by the CC. Underlined words inserted and words in bold brackets deleted. Outstanding aspects to be considered in CC Subcommittee.

⁵⁷ Section 5 to be further considered in CC Subcommittee.

elected as the State President after the next election of the National Assembly assumes office.⁵⁸

(2) No person may hold office as State President for terms of office exceeding a combined period of ... years.⁵⁹

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

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

(b) adoption by the National Assembly of a resolution in terms of this Constitution removing him or her from office.

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

Powers and functions⁶¹

32. [(1) The State President has the powers and functions

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

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

⁵⁹ The maximum period a State President may serve needs further debate. See Block 5 of the Report on the Presidency.

⁶⁰ Removal from office is dealt with in section 11 below. Section 3(1) provides for the election of a State President not only after a general election but also whenever a casual vacancy may occur.

⁶¹ To be further discussed at CC Subcommittee level.

entrusted to him or her by the Constitution and the laws of the Republic.

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

(3) The following powers and functions are vested in the State President **[alone]** with due regard to any specific provisions of the Constitution relating to them, and in the discharge of such powers and functions the State President is not obliged to act in consultation with the other members of the Cabinet:⁶³

[(a) to summon the National Assembly to an extraordinary sitting for the conduct of urgent business;⁶⁴]

(b) to dissolve the National Assembly after a motion of no confidence in the Cabinet has been passed by the National Assembly;⁶⁵

⁶² As per agreement in point 9 of Block 7 of Report on the Presidency. In section 233(3) of the Interim Constitution the term "in consultation with" is defined to mean that the concurrence of the other functionary is required.

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

⁶⁴ See point 6 Block 7 of the Report on the Presidency and also section 11(2) of the Draft on Parliament. The issue of summoning the two Houses to a joint sitting to be dealt with upon clarification of the role of the Senate. Otherwise approved in principle by the CC.

⁶⁵ Agreed to in the CC.

- (c) to assent to and sign Bills passed by Parliament;⁶⁶
- [(d) to refer a Bill passed by Parliament back to Parliament for reconsideration or to the Constitutional Court for a ruling on its constitutionality;⁶⁷]**
- (e) to confer honours;⁶⁸
- (f) to appoint, **[accredit]⁶⁹**, receive and recognise diplomatic representatives;⁷⁰
- (g) to negotiate and sign international agreements, and to delegate such power;⁷¹
- (h) to **[reprise and]** pardon offenders and to remit fines, penalties and forfeitures⁷²;

⁶⁶ Agreed to in the CC.

⁶⁷ See also section 21 of the Draft on Parliament. Matter to be taken forward at CC Subcommittee level.

⁶⁸ Agreed to in the CC.

⁶⁹ In the diplomatic sense "accredit" means to authorise as an envoy. It would appear that the word is superfluous and that it could be deleted.

⁷⁰ The NP and the DP prefer a system of prior Parliamentary approval of diplomatic representatives. To be further discussed in CC Subcommittee.

⁷¹ See point 4 Block 7 of the Report on the Presidency. It is advisable for practical reasons that provision also be made for the delegation of the power to negotiate and sign international agreements. The Theme Committee was of the view that this provision should be considered together with the question of Parliamentary approval of international agreements. See for instance sec. 231 of the Interim Constitution.

Matter to be discussed further when TC 5 reports on international law.

⁷² TC 4 must still report on the right to life and the question of capital punishment under the new Constitution. The words in bold brackets should be deleted if the parties agree to maintain the present position on capital punishment.

[(i) to appoint and dismiss Ministers and Deputy Ministers;⁷³]

(j) to convene Cabinet meetings;⁷⁴ and

[(k) to appoint commissions of enquiry.⁷⁵]

Confirmation of executive acts of State President

33. (1) Decisions of the State President taken in the discharge of his or her powers and functions shall be **[expressed]** in writing under his or her signature.⁷⁶

(2) Decisions of the State President taken in consultation with the other members of the Cabinet shall be countersigned by a Minister.⁷⁷

(3) The signature of the State President on any instrument shall be confirmed by [the Seal of the Republic].⁷⁷

Remuneration

34. (1) The salary, allowances and benefits of the State President shall

⁷³ See point 8 Block 7 of the Report on the Presidency. See also section 13 below. NP prefers appointment and dismissal of Ministers and Deputy Ministers to be the same as in section 88 of the Interim Constitution (which would require a government of national unity with minority parties forming part of the Cabinet).

"Flagged" for further discussion.

⁷⁴ Agreed to in the CC.

⁷⁵ In the CC the question was raised whether the President should have the power to appoint commissions without consulting the Cabinet. Matter stands over.

⁷⁶ Amended formulation agreed to in the CC.

⁷⁷ The Seal of the Republic is an issue for TC 1. Otherwise agreed to in the CC.

be determined by Parliament.⁷⁸

[(2) The State President may not hold any other public office or perform any other [remunerative] paid work.⁷⁹]

[Deputy State President(s)/Prime Minister]⁸⁰

35.

[Acting State President⁸¹

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

(a) The Deputy State President.

(b) If the Deputy State President is not available or if the office

⁷⁸ Agreed to in the CC.

⁷⁹ Stands over. CC Subcommittee must consider whether the clause is necessary.

⁸⁰ The question whether there should be a Deputy President or a Prime Minister or more than one Deputy Presidents is in contention. Further clarity is needed before any provisions can be drafted. See Blocks 3 and 6 of the Report on the Cabinet.

⁸¹ The issue of the Acting President was not dealt with in the Reports but was considered by the Theme Committee during its discussion of the Draft. The formulation may have to be adjusted depending on how the issue of more than one Deputy President and a possible Prime Minister is resolved.

To be taken further in CC Subcommittee. The DP proposed that par. (d) be replaced by a provision conferring power on the NA to elect an Acting President.

of Deputy State President is vacant, a Minister of the Cabinet designated by the State President.

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

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

Removal of State President or Deputy State President⁸²

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

Cabinet

⁸² No agreement on whether it is necessary to provide for the impeachment of the State President in view of the possibility of adopting a motion of no confidence in the State President. See section 20 below.

To be discussed at CC Subcommittee level.

38. (1) The Cabinet consists of the State President, the Deputy State President⁸³ and the Ministers.⁸⁴

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

Appointment and dismissal of Ministers and Deputy Ministers

[39.⁸⁵]

⁸³ The NP prefers two Deputy Presidents.

⁸⁴ As per Block 4 of the Report on the Cabinet. See also Blocks 7, 8, 9 and 13 of the Report on the Cabinet. Some of the parties propose provision also for a Prime Minister. It is a contentious issue whether the number of Ministers should be prescribed by the Constitution and whether the Cabinet should proportionally include members of minority parties.

To be further discussed in CC Subcommittee.

⁸⁵ See point 8 Block 7 of the Report on the Presidency. There are two approaches; one basically in line with sections 88(2) to (6) and 94 of the Interim Constitution, the other more or less as follows:

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

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

To be further discussed in CC Subcommittee.

Oath or solemn affirmation⁸⁶

40. A person appointed as a Minister or Deputy Minister shall before assuming office make and sign an oath or solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her, **[in the following form:]**

[I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa and undertake before those assembled here to hold my office as Minister/Deputy Minister with honour and dignity; to respect and uphold the Constitution and all other Law of the Republic of South Africa; to be a true and faithful counsellor; not to divulge directly or indirectly any matters which are entrusted to me under secrecy; and to perform the duties of my office conscientiously and to the best of my ability.

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

Accountability of Ministers and Cabinet⁸⁷

[41. (1) Ministers are individually accountable both to the State

⁸⁶ Approved by the CC as amended, subject to a decision on which judge should take the oath/affirmative action.

⁸⁷ As per agreement in Blocks 10 and 12 of the Report on the Cabinet. The DP is also of the view that the Deputy State President/Prime Minister should have a special responsibility to formally represent the Cabinet in Parliament.

Matter to be discussed at CC Subcommittee level.

President and the National Assembly for the administration of the portfolios entrusted to them, and all members of the Cabinet are collectively accountable to the National Assembly for the performance of the functions of the national government and its policies.

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

Conduct of Ministers and Deputy Ministers⁸⁸

42. Ministers and Deputy Ministers shall at all times act in accordance with a code of ethical conduct which shall be prescribed by a national law. It shall be particularly forbidden for Ministers and Deputy Ministers -

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

⁸⁸ It was suggested by one of the parties to insert the word "improperly" before "enrich".

Remuneration⁸⁹

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

Temporary assignment of Minister's powers and functions to another

Minister⁹⁰

44. Whenever a Minister is absent or **[for any reason]** unable to exercise and perform any of the powers and functions entrusted to him or her, or whenever the office of a Minister is vacant, **[a Minister has vacated his or her office and a successor has not yet been appointed]**, the State President may appoint any other Minister **[to act in the said Minister's stead, either generally or]** to exercise or perform any or all of the first-mentioned Minister's **[specific]** powers and functions.

Transfer of Minister's powers and functions to another Minister⁹¹

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

⁸⁹ **Agreed to in the CC.**

⁹⁰ **Reformulated to simplify the clause as per instruction of the CC.**

⁹¹ **Agreed to in the CC.**

[Votes of no confidence⁹²

46. (1) If the National Assembly passes a vote of no confidence in the Cabinet, the State President shall resign or shall dissolve the National Assembly and call an election of the National Assembly.

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

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

CHAPTER 4

PROVINCIAL GOVERNMENT

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CHAPTER 5

[RELATIONS BETWEEN THE NATIONAL GOVERNMENT AND THE PROVINCES

Distribution of Legislative Power

⁹² Dissolution of the NA and votes of no confidence to be taken further by CC Subcommittee.

Legislative authority of the Republic

47. The legislative authority of the Republic vests in Parliament, which shall be competent to make laws on any matter in and for the Republic in terms of this Constitution (CPXVI, CPXVIII(1), CPXIX).

Legislative authority of provinces

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

(2) A provincial legislature shall have the competence to legislate on any matter which falls within a functional area specified in Schedule 1 (Note: Schedule 1 could include functional areas such as provincial planning and development (CPXXI(6)(a)).

Framework legislation

49. (1) An Act of Parliament may make legislation which shall be binding on all provinces regarding any matter referred to in Schedule 2 in terms of which principles or standards are laid down to ensure uniformity across the nation.

(2) Such legislation shall be referred to as framework legislation.

(3) Every provincial legislature shall be empowered to make laws for the achievement of those objectives set out in the legislation referred

to in subsection (1).

Conflict of laws

50. (1) Parliament shall be competent to legislate on any matter which falls within a functional area specified in Schedule 1.

(2) In the event of a conflict between an Act of Parliament and a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the Act of Parliament shall prevail over the provincial law where:

- (i) the province is unable to regulate the particular subject matter effectively (CPXXI(1));⁹³**
- (ii) the Act of Parliament is necessary for the maintenance of essential national standards, for the establishment of minimum standards for the rendering of services, the maintenance of economic unity, the maintenance of social security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole (CPXXI(2));**
- (iii) the Act of Parliament deals with the determination of national economic policies, the promotion of inter-provincial commerce or the protection of the common**

⁹³ The subsections contain a particular application of the applicable Constitutional Principles. See our earlier opinion. It is however possible to interpret the Principles other than by the formulation of an override.

market in respect of the mobility of goods, services, capital and labour (CPXXI(5)).⁹⁴

(3) Notwithstanding subsection 2, Parliament shall not exercise its competence so as to encroach upon the geographical, functional or institutional integrity of the provinces (CPXXII).

(4) In the event of a conflict between an Act of Parliament and a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the provincial law shall prevail over the Act of Parliament if the provincial law deals with the specific socio-economic and cultural needs and the general well-being of the inhabitants of the province (CPXXI(6), CPXVIII(2), CPXIX).

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

Necessary ancillary powers

51. The legislative competence referred to in sections 1 and 2, shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence (CPXXI(8)).

⁹⁴ See footnote 1

Executive and Administrative Power

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Intergovernmental Relations

.....

Financial and Fiscal Relations

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CHAPTER 6

LOCAL GOVERNMENT

.....

CHAPTER 7

COURTS AND THE ADMINISTRATION OF JUSTICE

Judicial Authority

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

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

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

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

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

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

[(7) The constitutional jurisdiction⁹⁵ of all courts and the jurisdiction of the Supreme Court of Appeal shall only be determined by this Constitution; the ordinary jurisdiction of all other courts shall be determined by an Act of Parliament⁹⁶]

(8) All other matters pertaining to the functioning of any court shall be regulated only by an Act of Parliament or regulations or rules made thereunder.

⁹⁵ "Constitutional jurisdiction" - used here and in sections 3(1) and 4(1) - to be defined in a definition section - as "jurisdiction in respect of all matters relating to the interpretation, protection and enforcement of this Constitution and all Provincial Constitutions."

⁹⁶ This sub-clause may have to be reformulated once finality has been achieved as regards the constitutional jurisdiction of the Magistrate's Court and other Courts.

The judicial system

53. There shall be the following courts of law in the Republic:
- (i) The Constitutional Court, which shall be the highest court with constitutional jurisdiction, and which shall consist of a President, a Deputy President and nine other judges, four of whom shall be appointed from among the judges of the Supreme Court of Appeal or the High Court.
 - (ii) The Supreme Court of Appeal⁹⁷, which shall be the highest court of appeal in all matters other than those within constitutional jurisdiction, and which shall consist of the Chief Justice, a Deputy Chief Justice and such number of judges of appeal as may be determined.
 - [(iii) Such Courts of Appeal as may be established by Act of Parliament⁹⁸, to hear appeals from the High Court or courts of similar status.]**
 - (iv) The provincial and local divisions of the High Court and other

⁹⁷ The SCA is a redesignation of the Appellate Division, with the addition of constitutional jurisdiction. Transitional provisions must provide for any reference in any other law to the AD to be construed as a reference to the SCA.

⁹⁸ The creation of Courts of Appeal (intermediate between the High Court -currently the inappropriately named "Supreme Court" - and the Supreme Court of Appeal - currently the AD) was canvassed in materials before TC5 and has been under discussion since February. It is supported by the Chief Justice, the President of the Constitutional Court and Justice Ackermann, Judge President Eloff, the ALS, BLA, GCB and by the Law Commission. They are accepted in principle by the parties, but their exact ambit will have to await the Hoexter Commission Report and a consequent consultative process. the Chief Justice has however stressed the need for provision of this kind for their future establishment to be included in the Constitution.

courts of similar status⁹⁹.

[(v) Magistrates' Courts and other courts of similar status.¹⁰⁰]

(vi) Other courts established by law.¹⁰¹

Jurisdiction of the Constitutional Court

54. (1) The Constitutional Court only shall have jurisdiction:

(a) to determine constitutional disputes between the national and provincial governments or between provincial governments.

[(b) to consider the constitutionality of any Bill before (passed by) Parliament or a provincial legislature. At the request of the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature acting on a petition by not less than 20% of each of the Assembly or Senate, or legislature, as the case may be, or all the members of all parties not constituting the majority party in such body, and with the leave of the Constitutional Court.¹⁰²]

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

⁹⁹ Such as the Water Court, Labour Appeal Court, Special Income Tax Court, and perhaps now the Land Claims Court. Consider the insertion of the words "presided over by a judge".

¹⁰⁰ Consider the insertion of words "Presided over by a magistrate".

¹⁰¹ This section makes provision for the establishment of traditional land community courts, should this upon further investigation be determined to be desirable and feasible.

¹⁰² Two views on 3(1)(b) - retain (b) or delete (b). Formulation on (b) to be debated.

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

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

(5) (a) If the Constitutional Court finds any law, executive or administrative act to be inconsistent with the Constitution, it shall declare such, law or act invalid to the extent of its inconsistency.

(b) The Constitutional Court may in any matter make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation, and an order as to costs.

(c) The Constitutional Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions in that regard as it may decide.

(6) (a) All other courts having constitutional jurisdiction may make the orders set out in clauses 4(a), (b) and (c).

(b) If any other court other than the Constitutional Court holds a national or provincial statute or any executive action of the President to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it or on application to it by

any person or organ of state with a sufficient interest.

Jurisdiction of other courts

55. (1) The Supreme Court of Appeal, a Court of Appeal, a provincial or local division of the High Court and any other court of similar status shall, in addition to any inherent jurisdiction existing at the date this Constitution takes effect¹⁰³, have constitutional jurisdiction and any other jurisdiction conferred by an Act of Parliament.

(2) The Magistrate's Courts and all other courts shall have such constitutional and other jurisdiction as may be conferred by an Act of Parliament.¹⁰⁴

[Appointment of judicial officers

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

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

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

¹⁰³ See note 4. Transitional provisions must ensure that inherent jurisdiction vesting in the present divisions of the Supreme Court continues in respect of the High Court, any Court of Appeal which may be established, and Supreme Court of Appeal.

¹⁰⁴ No consensus has been reached on this aspect. The present formulation is based on the view that the matter needs further consideration and should be dealt with by Parliamentary legislation. If so, must clause 1(7) be reformulated?

National Party: The Chief Justice and the President of the Constitutional Court shall be appointed by the President (in consultation with the Cabinet and) on the advice of the JSC.

(4) Appointment of Constitutional Court Judges.

ANC : Section 99(4) and (5) of the Interim Constitution

National Party: The Deputy President of the Constitutional Court and all the judges of the Constitutional Court shall be appointed by the President after advice by the Judicial Service Commission and in consultation with the leaders of all political parties represented in Parliament. In the event of no consensus having been reached by the party leaders, the judges will be appointed by a majority of more than 75% of the members of the National Assembly and Senate sitting together.

(Please note that this is the compromise position of the NP. The original position being appointment in the same way as the Human Rights Commission is appointed in the present constitution but after advice from the JSC).

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

(6) The appointment of other judicial officers shall be regulated

by an Act of Parliament.¹⁰⁵

(7) Members of the Constitutional Court shall hold office for non-renewable terms not exceeding nine¹⁰⁶ years.

(8) The five oldest members of the Constitutional Court in office at the time of the expiration of the terms of office of the present judges of the Constitutional Court shall retire at such expiration and all other members after the expiration of a further period of four years.¹⁰⁷

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

Removal of judges from office

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

(2) A judge who is the subject of an investigation may be suspended

¹⁰⁵ Consensus still to be attained. Is it necessary to refer to the Magistrate's Commission?

¹⁰⁶ Advisor's suggested compromise.
ANC - 10 years. NP - 7 years.

¹⁰⁷ This is a transitional mechanism and subject to further debate.

by the President on the advice of the Chief Justice pending the finalisation of such investigation.

(3) The emoluments and pension and other benefits of judges and acting judges shall be prescribed by Act of Parliament or regulations made thereunder and shall not be subject to reduction.

[Judicial Service Commission¹⁰⁸

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

- (a) the Chief Justice, who shall preside at meetings of the Commission;**
- (b) the President of the Constitutional Court;**
- (c) one Judge President designated by the Judges President;**
- (d) the Minister responsible for the administration of justice or his or her nominee;**
- (e) two practising advocates designated by the advocates' profession;**
- (f) two practising attorneys designated by the attorneys' profession;**
- (g) one professor of law designated by the deans of all the law faculties at South African universities;**
- (h) four senators designated *en bloc* by the Senate by resolution**

¹⁰⁸ **Consensus issue:** Given the lack of consensus, the current section 105 is simply replicated here (with certain minor consequential changes arising from the other provisions of this

adopted by a majority of at least two-thirds of its members;

(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;

(j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.

(2) The functions of the Judicial Service Commission shall be -

(a) to make recommendations regarding the appointment and removal from office of judges in terms of sections 5 and 6;

(b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;

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

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

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

Seats of Courts

59. [TC 1 must report]

draft chapter).

Language

60. [TC 1 must report]

CHAPTER 8

PUBLIC ADMINISTRATION

Basic values and principles governing public administration

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

- (a) A high standard of professional ethics shall be promoted and maintained in the public administration.
- (b) Good human resource management and development practices to maximise human potential shall be cultivated in the public administration.
- (c) Efficiency and the economic and effective use of resources shall be promoted in the public administration.
- (d) Public administration shall be accountable. Transparency through the provision of accessible, accurate and timeous information to

the public shall be fostered.

- (e) Public administration shall be development oriented and the provision of services shall be conducted on the basis of impartiality and equity to all.
- (f) Public administration shall function on a basis of fairness and shall serve the public in an unbiased and impartial manner.
- (g) Public administration shall be oriented towards public participation in policy-making. It shall be responsive to the needs of the people.
- (h)¹⁰⁹ Public administration shall be broadly representative of the South African people. Employment and personnel management practices in the public administration shall be based on competency/ability¹¹⁰, objectivity and fairness and the need to redress the imbalances of the past to achieve the required representation.

(2) The appointment in the public administration of a number of persons on policy considerations as regulated by law shall not be precluded.¹¹¹

¹⁰⁹ The Subcommittee propose that paragraph (h) be reformulated as above to accommodate points made in the CC about the inclusion of the principle of affirmative action.

¹¹⁰ In the CC subcommittee the PAC made the point that "competency" may impede the application of affirmative action in the public administration as it emphasises formal qualifications as opposed to ability or capacity. Dictionary definitions of "competency" and "ability" would appear to support the PAC's view. "Competency" primarily suggests complete fitness for adequate performance. It denotes qualities such as efficiency, effectiveness, expertise, proficiency, experience, skills, know-how, knowledgeability, etc. "Ability" has a wider meaning and denotes the quality or state of being able to perform. Besides competency it includes capacity, capability, potential, intelligence, talent, flair, etc.

¹¹¹ Section 1(2) was reworded along the lines suggested above to avoid specific references to "political appointments".

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

Public Administration Commission

62. (1) There shall be a single Public Administration Commission for the Republic as prescribed by a national law. Each of the provinces shall be entitled to nominate a representative for appointment in the Commission.¹¹²

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

(3) The Public Administration Commission shall perform such functions to promote¹¹³ the basic values and principles governing the public administration as prescribed by a national law.

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

Public Service

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

(2) The terms and conditions of service of employees in the public

¹¹² This reformulation proposed by the ANC to combine section 2(1) and 2(5) in the previous Draft was accepted by all the parties.

service shall be regulated by law. Employees shall be entitled to a fair pension as regulated by law.¹¹⁴

CHAPTER 9

SECURITY SERVICES

STATEMENT OF PRINCIPLE

Since there is a need

- that national security should be based on the resolve of all South Africans, as individuals and as a nation, to live as equals and in peace and harmony, to be free from fear and want, and to seek a better life;

- that national security should be pursued in strict compliance with this Constitution, the law and all applicable international conventions and norms,

The following provisions are enacted to govern national security and the security services of the Republic, and these provisions shall be interpreted and

¹¹³ The Subcommittee proposes that the word "safeguard" be replaced by "promote".

¹¹⁴ Section 1(2) of the previous Draft has been amended to apply only to the public service and moved to this section on the public service. The reference to a pension scheme has been scrapped.

understood in the spirit of this Statement of Principle.¹¹⁵]

Composition and structuring of security services

64. (1) The security services of the Republic consist of a single defence force, **[the police service]**¹¹⁶ and such intelligence services as may be established in terms of this Constitution.

(2) The security services shall be structured and regulated by national law.¹¹⁷

(3) The security services shall at all times act in accordance with and within the confines of this Constitution and the law, including the norms of international customary law and treaties binding on the Republic.¹¹⁸

(4) The security services shall discharge their powers and functions in the **[national interest]**. It shall, therefore, be unlawful for the security services to further or prejudice party political interests.¹¹⁹

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

¹¹⁵ **This statement of principle has been redrafted as per instruction of the CC.**

¹¹⁶ **The notion of a single police service is an unresolved matter and has been referred to the Subcommittee of the CC for further debate.**

¹¹⁷ **Formulation as approved by the CC.**

¹¹⁸ **Redrafted at request of the CC.**

For example international customary law and treaties relating to piracy, torture and prisoners of war. These inevitably affect defence forces, the police and intelligence services.

¹¹⁹ **Contention on the definition of "national interest" has been referred to the CA.**

This subsection is obligatory in terms of CP XXXI.

African people.¹²⁰

Defence

Defence force

65. (1) The defence force shall be structured and managed as a disciplined military force.¹²¹

[(2) The primary objective of the defence force shall be to defend and protect the Republic, its territorial integrity and its people.¹²² In pursuing this objective the defence force shall be guided by the principles of international law regulating the use of force.¹²³]

¹²⁰ The question of representivity in the security services was raised by the CC. This formulation seeks to address this concern and is consistent with clause 1(1)(h) of the Public Administration draft, sixth draft, 13 June 1995.

¹²¹ Formulation as approved by the CC.

¹²² This objective includes the defence and protection of assets and interests not found within the borders of the Republic.

A transitional provision will be required to provide for the continuation of the SANDF which is presently established and structured in terms of the Interim Constitution. Transitional measures, however, can best be dealt with separately because of the temporary legal effect of such measures.

¹²³ Formulation as suggested by a member of the CC; it seemed to find approval.

Political responsibility and accountability

66. (1) A member of the Cabinet shall be charged with [ministerial] responsibility for defence and [shall be accountable to Parliament].¹²⁴

(2) A [joint]¹²⁵ multi-party committee of Parliament shall oversee all defence matters¹²⁶. [In particular the committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of and draft legislation on the defence force, and to perform such other functions relating to parliamentary supervision of the defence force as prescribed by law.]¹²⁷

Command of defence force

67. (1) The defence force shall be under the command of a Chief of the defence force, who shall be appointed by the President.¹²⁸

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

¹²⁴ Formulation as approved by the CC. The expression "ministerial responsibility" is used in the text, while the heading to the section refers to "political responsibility". Section 13 (Intelligence Services) also refers to "political responsibility". To avoid interpretation problems a single expression should be used.

¹²⁵ The question of a second chamber of Parliament must still be resolved.

¹²⁶ Formulation as approved by the CC.

¹²⁷ The Constitutional Committee noted with concern the depth of detail specified in this clause. However, as explained by members of the Theme Committee, the extent of the detail provided is necessary to provide substantial powers for a committee that functions in a manner dissimilar to other parliamentary portfolio committees.

¹²⁸ The procedure for appointing the Chief of the defence force is an area of disagreement. The understanding is that the appointment by the President involves consultation with the Cabinet.

The TC is further of the view that the procedure for the dismissal of the Chief of the defence force should accord with the appointment procedure.

This issue will be discussed in the CA.

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

Civilian secretariat

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

Employment of defence force

69. The defence force may be employed only in the **[national interest]** and as authorised by law.¹²⁹

¹²⁹ There is contention around the question of whether the Constitution should contain a definition of "national interest", and, if so, how such definition should be formulated. If a definition is included in the Constitution, the "law" referred to in the section will have to conform to the definition. Possible approaches include the following options:

Option 1: No definition of "national interest" in the Constitution, in which case it will be left to the courts to interpret and develop this concept as used in the section. In doing so a court will have regard to voluminous literature available in international jurisprudence on the meaning of "national interest".

Option 2: The Constitution should define "national interest" in specific terms to indicate the precise circumstances in which the defence force may be employed, for instance where it is necessary -

- (a) to comply with international obligations towards other states and international bodies;
- (b) for the preservation of life, health and property;
- (c) for the maintenance of essential services;
- (d) to assist the police service to uphold law and order; and
- (e) in support of reconstruction and development programmes and other efforts to improve socio-economic conditions.

A precise definition has the advantage of providing immediate legal certainty but leaves little room for legal development of the concept.

Option 3: The Constitution should define "national interest" in general terms to indicate that the concept embraces both the interest of the people and the

Police

Police service

70. (1) The police service shall be structured and managed as a disciplined police service. [Its primary objective shall be to prevent and investigate crime, to maintain public order, to protect property, and to secure safety and security [for] people and communities in the Republic].¹³⁰

[(2) The police service shall be structured to function at both national and provincial levels under the direction of the national government and the provincial governments, respectively. The police service at provincial level may include police formations operating at the local level].¹³¹

Political responsibility and accountability

71. (1) A member of the Cabinet shall be charged with [ministerial] responsibility for police and [shall be accountable to Parliament].¹³²

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

interest of the state.

¹³⁰ Reformulated as per instruction of the CC.

A transitional provision on the South African Police Service as presently structured will be necessary.

¹³¹ This clause is referred to the Subcommittee of the CC as it deals with matters related to national and provincial competencies.

¹³² Reformulated as per instruction of the CC. See footnote 10.

matters.¹³³

[Control of police service¹³⁴

72. (1) The police service shall be under the command of a national commissioner, who shall be appointed by the President.¹³⁵

(2) The national commissioner of the police service shall exercise command of the police service in accordance with the directions of the member of the Cabinet responsible for police.¹³⁶

(3) A provincial commissioner for each province shall be appointed by the national commissioner in accordance with a national law. He or she shall be responsible for all [visible] policing functions in the province and such other functions as prescribed by a national law.¹³⁷

Civilian secretariat

73. (1) A civilian secretariat functioning under the direction and

¹³³ Reformulated as per instruction of the CC.

¹³⁴ This section is referred to the Subcommittee of the CC.

¹³⁵ As per Block 4 of Theme Committee 6.4's Police Report. The command of the national commissioner over the entire police service or only that part of it operating at national level is still in contention.

Further instructions are required concerning the dismissal of the national commissioner, for instance where the occupant of the post no longer enjoys the confidence of the Cabinet.

¹³⁶ Subsection (2) is in line with the agreed position as per Blocks 8 and 9 of the General Report in so far as it relates to the national commissioner.

¹³⁷ A transitional provision will be required to provide for the continuation of the present division of responsibilities between the national and provincial commissioners as set out in the Interim Constitution.

control of the member of the Cabinet responsible for police, shall exercise such powers and functions in connection with police as may be entrusted to it by law or that member of Cabinet.¹³⁸

(2) A province may establish a civilian secretariat to function at the provincial level of the police service as prescribed by law.¹³⁹

Powers and functions of police service

74. The powers and functions of the police service shall be set out in a national law. Such a law shall entrust sufficient powers and functions to the police service in order to enable the national and provincial commissioners to discharge their responsibilities effectively.¹⁴⁰]

Intelligence

[Establishment of intelligence services

75. An intelligence service operating independently from the defence force and the police service may be established by the President only. The objectives, powers and functions of such an intelligence service shall be set out and regulated by a national law.¹⁴¹

¹³⁸ This subsection deals with the structure and functioning of a civilian secretariat; a concern was raised in the CC that this provision goes beyond what is needed in the Constitution.

¹³⁹ This section is referred to the Subcommittee of the CC.

¹⁴⁰ This section is referred to the Subcommittee of the CC.

¹⁴¹ As per agreement in Blocks 2 and 5 of Theme Committee 6.4's Intelligence Report.

Political responsibility and accountability

76. A member of the Cabinet shall be charged with the political responsibility for an intelligence service and [shall be accountable to Parliament].¹⁴²

Control of intelligence services

77. (1) An intelligence service shall operate in accordance with the control and directions of the President or the Minister of the Cabinet responsible for such an intelligence service.¹⁴³

(2) The head of an intelligence service shall be appointed by the President [subject to parliamentary approval].¹⁴⁴

Co-ordination of intelligence activities

78. A mechanism regulated by a national law for the co-ordination of intelligence services and the intelligence divisions of the defence force and the police service shall be established by the President.¹⁴⁵]¹⁴⁶

¹⁴² It was suggested in the CC that the President should maintain ultimate political responsibility. However, the intention is not clear, viewed in the light of the powers of the President in terms of the National Executive Draft.

¹⁴³ As per Block 5 of Theme Committee 6.4's Intelligence Report.

¹⁴⁴ As per Block 8 of Theme Committee 6.4's Intelligence Report. The words in brackets are in contention.

¹⁴⁵ As per Block 10 of Theme Committee 6.4's Intelligence Report.

¹⁴⁶ Although supported by the parties, there is uncertainty as to whether sections 12, 13, 14, 15 and 17 should be included in the Constitution in their current detail. The technical advisers and law advisers, as instructed by the CC, suggest the following alternative formulation for

Parliamentary oversight of intelligence activities

79. A (joint) multi-party committee of Parliament shall oversee intelligence matters as set out in a national law. Budgetary oversight of intelligence services shall be performed jointly with the parliamentary committee on public finance.¹⁴⁷

[Civilian inspectorate

80. A civilian inspectorate shall monitor the activities of intelligence services and perform such other functions as prescribed by law. Inspectors shall be appointed by the President with the approval of Parliament by resolution adopted by a majority of at least two thirds of the members.¹⁴⁸]

General

discussion:

"Establishment, control and co-ordination of intelligence services

12. An intelligence service operating independently from the defence force and the police service may be established by the President only. A member of the Cabinet shall be charged with the political responsibility, and shall be accountable to Parliament, for such an intelligence service. The objectives, powers and functions of such an intelligence service, and measures providing for the control and co-ordination of intelligence activities and the establishment and functions of a civilian inspectorate of intelligence activities shall be set out and regulated by a national law."

¹⁴⁷ As suggested in the CC, oversight of budgetary matters of intelligence services shall be performed jointly with the parliamentary committee on public finances. This provision is based on an assumption that a parliamentary committee on finance will be provided for in the Constitution.

¹⁴⁸ See footnote 32.

Code of conduct for members of security services

81. Members of the security services shall at all times act in accordance with a code of conduct prescribed by law. In particular members of the security services shall be obliged to -

- (a) comply with all lawful orders;
- (b) refuse to comply with a manifestly illegal order; and
- (c) refrain from furthering or prejudicing any party political interest.

Training

82. Members of the security services shall be properly trained in accordance with the relevant international standards of competency and discipline. The members shall be instructed in the applicable basic concepts of South African law, the inviolability of human rights and international conventions and law.

[Personnel administration

83. **The conditions of service and the rights and duties of members of the security services shall be regulated by law with appropriate mechanisms established to accommodate the specific needs of the security services. Mechanisms and procedures for the resolution of labour disputes within the**

security services shall be established.¹⁴⁹]

CHAPTER 10

[INDEPENDENT INSTITUTIONS]

General Provisions

General governing principles¹⁵⁰

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

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

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

¹⁴⁹ In response to the CC's question concerning the principle at stake in this section, the second sentence could be retained as containing that principle, and the first sentence deleted.

Section 20 should thus read:

"Resolution of labour disputes

20. Mechanisms and procedures for the resolution of labour disputes within the security services shall be established."

¹⁵⁰ The CC Subcommittee agreed that the provisions of this section shall remain as they are.

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

Auditor General

[Establishment, independence and impartiality¹⁵¹

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

(2) **The Auditor-General shall be independent.**

(3) **The Auditor General shall discharge his or her powers and functions impartially and without fear, favour or prejudice subject only to this Constitution and the law.**

(4) **Organs of state shall through legislative and other measures accord the Auditor General [and his or her assignees] the necessary assistance and protection to ensure the independence, impartiality, dignity and effectiveness of the Auditor General, [including all such immunities and privileges as are necessary for this purpose.]**

(5) **No person and no organ of state shall interfere with the Auditor General in the discharge of his or her powers and functions.]**

Powers and functions

86. (1) **The Auditor General shall audit and report on the accounts and**

¹⁵¹ Section 1 was generally supported in the CC save for the words in bold brackets which were regarded by some parties to be unnecessary detail. The CC decided that this provision should be compared with similar provisions in other drafts.

financial statements of all national and provincial state departments and administrations and of all local governments, and also all such other accounts and financial statements as may be required by law to be audited by the Auditor General.¹⁵²

(2) The Auditor General may in the public interest audit and report on the accounts and financial statements of any institution in control of public funds.¹⁵³

[(3) When the Auditor General performs an audit he or she shall have access to all information relevant to the audit and all persons in possession of such information shall be obliged to give their co-operation.¹⁵⁴]

Reports

87. **[(1) The Auditor General shall submit all reports on audits conducted by him or her-**

- (a) in the case of national and provincial state departments and administrations and local governments, to the relevant level of government; and**
- (b) in the case of any other institutions, to the persons prescribed by law:**

¹⁵² Approved by the CC.

¹⁵³ Approved by the CC.

¹⁵⁴ There was broad consensus that this subsection should be matter for ordinary legislation and that it should be deleted. It was pointed out that this provision is in any event covered by the principle of effectiveness contained in sec. 1(4).

Provided that, whenever the Auditor General deems it to be in the public interest, or in special circumstances as prescribed by law, to any other level of government, institution or person.¹⁵⁵]

(2) All reports of the Auditor General shall be made public.¹⁵⁶

Appointment, qualifications, tenure and dismissal

88. [(1) The President shall appoint as Auditor General a person -

(a) nominated by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and

(b) approved by Parliament by a resolution adopted, without debate, by a majority of at least two-thirds of the members present and voting.¹⁵⁷]

(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office, **[has specialised knowledge of or experience**

¹⁵⁵ Some parties felt that the level of detail in section 3(1) was unacceptable although all supported the principle of reporting by the AG. If consensus is reached that only the duty on the AG to submit audit reports to the appropriate authorities should be constitutionalised, the following formulation can be considered:

"The Auditor General shall submit reports on audits to the authorities prescribed by law or determined by the Auditor General."

¹⁵⁶ No objections to section 3(2) were noted in the CC.

¹⁵⁷ Section 4(1) is contentious. However, discussion of appointment procedures was deferred pending a comparative analysis of mechanisms proposed in drafts on other independent structures of government.

in auditing, state finances and public administration, and does not hold office in any political party or organisation.]¹⁵⁸

[(3) The Auditor General shall be appointed for a period of not less than five years. A person appointed for a period of less than ten years may be re-appointed to serve as the Auditor General for a further period, provided that his or her total period of service as the Auditor General shall not exceed ten years.]¹⁵⁹

(4) The remuneration and other conditions of service of the Auditor General shall be as prescribed by an Act of Parliament, and shall not be altered to his or her detriment during his or her term of office.¹⁵⁹

(5) The Auditor General may be removed from office only on the grounds of misbehaviour, incapacity or incompetence upon -

- (a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and**
- (b) the adoption by Parliament of a resolution supported by at least two-thirds of the members present and voting calling for his or her removal from office.^{159]}**

(6) The President may suspend the Auditor General from office when

¹⁵⁸ There was consensus in the CC on the first part of section 4(2). Some of the parties objected to that part of the section placed in bold brackets.

¹⁵⁹ Section 4(3), (4), (5) and (6) were referred for the comparative analysis.

his or her removal from office is under consideration by Parliament, and shall forthwith dismiss him or her from office upon adoption of the said resolution.¹⁵⁹

[Assignment of powers and functions and provision of funds¹⁶⁰

89. (1) The Auditor General may assign any of his or her powers or functions to such persons and subject to such conditions as may be prescribed by law.

(2) Expenditure incurred during the exercise and performance of the powers and functions of the Auditor General shall be paid from money which shall be set aside by Parliament for such purpose and from fees raised or money obtained in a manner authorised by law.]

Public Protector

[Establishment¹⁶¹

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

(2) The Public Protector shall be independent, impartial and subject only to the Constitution and the law. The Public Protector shall discharge his or her powers and functions without fear, favour or prejudice.

(3) Organs of state shall through legislative and other measures

¹⁶⁰ Parties queried the inclusion of detail such as contained in section 5.

¹⁶¹ The CC decided that section 1 should stand over pending the comparative analysis.

accord the Public Protector the necessary assistance and protection to ensure his or her independence, dignity and effectiveness.

(4) No person and no organ of state shall interfere with the Public Protector in the discharge of his or her powers and functions.

(5) The Public Protector shall be accessible to all persons and communities.]

Powers and functions

91. (1) The Public Protector shall have power, as regulated by law, to investigate and report on any conduct in the affairs of the State or public administration at any level of government which is alleged or suspected to be improper or to result in any impropriety or prejudice, and to take such remedial action as is appropriate in the circumstances. In Addition, the Public Protector shall have such other powers and functions as may be prescribed by law.¹⁶²

(2) The Public Protector shall not have the power to investigate the performance of judicial functions by the courts of the Republic.¹⁶³

[(3) Reports issued by the Public Protector in connection with the

¹⁶² The CC Subcommittee agreed to this formulation.

¹⁶³ Section 2(2) was not acceptable to the CC. It was criticized on a number of points, viz

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

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

discharge of his or her powers and functions shall in principle be open to the public.¹⁶⁴]

(4) The Public Protector shall be accountable to Parliament for his or her activities, and shall report to Parliament on such activities at least once a year.¹⁶⁵

Appointment, qualifications, tenure and dismissal

92. [(1) The President shall appoint a person recommended by Parliament as the Public Protector.

(2) Parliament shall only recommend a person for appointment as the Public Protector -

- (a) who has been nominated by a committee of Parliament ...;**
and
- (b) whose nomination has been approved by Parliament by a resolution adopted by a majority of at least ... per cent of the members present and voting at a meeting.]**

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

¹⁶⁴ There were suggestions that this provision should be deleted as this can be dealt with in legislation. There may be instances where premature disclosure of the PP's report may jeopardise police investigations.

¹⁶⁵ Approved by the CC.

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

(5) The President may remove the Public Protector from office only on the grounds of misbehaviour, incapacity or incompetence upon a finding to that effect by a committee of Parliament and the adoption by Parliament of a resolution calling for his or her removal from office.

(6) The President may suspend the Public Protector from office when his or her removal from office is under consideration.¹⁶⁶

¹⁶⁶ The CC decided to refer the whole of section 3 for the comparative analysis. The Option in foot note 6 of the Sixth Draft were rejected.

[Provincial public protectors/Deputy Public Protectors¹⁶⁷

93.]

Human Rights Commission

[Establishment and governing principles¹⁶⁸

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

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

(3) The Commission shall discharge its powers and functions impartially and without fear, favour or prejudice.

(4) Organs of state shall through legislative and other measures accord the Commission the necessary assistance and protection to ensure its independence, impartiality and effectiveness.

(5) The Commission shall be accountable to Parliament for its activities, and shall report to Parliament on such activities at least once a year.]

Powers and functions

95. The Human Rights Commission shall promote the development,

¹⁶⁷ To stand over for the discussion on provincial powers.

¹⁶⁸ Discussion of section 1 was deferred pending the comparative analysis to be undertaken in relation to all independent structures of government.

protection and attainment of, and respect for, human rights and, generally, the development of a culture of human rights in the Republic. It shall for this purpose have the necessary powers accorded to it by law, including powers to monitor, investigate and report on the observance of human rights, to take steps to secure appropriate redress where human rights have been breached and to perform research and educative functions.¹⁶⁹

¹⁶⁹ As agreed to in the CC Subcommittee.

[Appointments of members

96.¹⁷⁰]

Gender Commission

¹⁷⁰ There is disagreement among the parties on the method of selection and appointment of commissioners. There are two views, the one supports the approach in section 115(3) of the interim Constitution. The other view calls for the creation of an independent panel to select and recommend persons to the President for appointment as commissioners. Qualifications for members of the Commission also need further debate. These are the two options:

Option 1:

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

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

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

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

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

Option 2:

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

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

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

NB: The CC decided that appointment procedures be dealt with in the context of the comparative analysis of all appointment procedures. The same applies to the qualifications of members of the HRC.

.....

Electoral Commission

Establishment, powers and functions

97. (1) There shall be an Electoral Commission **[which shall be independent, impartial and accountable to Parliament.]**¹⁷¹

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

Appointment of members

98. The Electoral Commission shall be composed of a minimum of three persons **[who must be nominated by a representative Parliamentary Committee on Elections, approved by a seventy-five per cent majority of members of Parliament and appointed by the President.]**¹⁷²

CHAPTER 11

¹⁷¹ The application of the uniform provision on general principles (section 21) to the Electoral Commission may require the deletion of the words in bold brackets.

¹⁷² If the parties agree to a standardised appointment procedure the words in bold brackets can be replaced by the following:

"appointed in accordance with the requirements set out in section 22."

FINANCE

General Financial Matters

.....

Financial and Fiscal Commission

.....

Central Bank

Establishment

99. The South African Reserve Bank, established and regulated by a national law, shall be the central bank of the Republic.

Primary objective

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

(2) The South African reserve Bank shall, in the pursuit of its primary objective referred to in subsection (1), exercise its powers and functions independently and without fear, favour or prejudice, subject only to a national law: Provided that there shall be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters.

Powers and functions

101. The powers and functions of the South African Reserve Bank shall be those customarily exercised and performed by central banks. Such powers and functions shall be determined by a national law: Provided that such law shall not derogate from the primary independence and objective of the South African Reserve Bank as provided for in section 2.

CHAPTER 12

AMENDMENT OF THIS CONSTITUTION

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CHAPTER 13

GENERAL AND TRANSITIONAL PROVISIONS

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SCHEDULES

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