

PREAMBLE CHAPTER 1

FOUNDING PROVISIONS

Republic of South Africa

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

[(2) The territory of the Republic is described in Schedule 1.]¹

Supremacy of the Constitution

2. (1) This Constitution is the supreme law of the Republic. It binds the Republic, its institutions, its citizens and all persons within its borders; law or conduct inconsistent with it is invalid.

(2) All constitutional obligations must be performed diligently and without delay.²

Citizenship

3. (1) There is a common South African citizenship.

(2) Every citizen is equally -

(a) entitled to the rights, privileges and benefits of citizenship; and

(b) subject to the duties, obligations and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

Territory of the Republic³

4...

National symbols

¹ This section was moved up from section 4.

² This section means that the phrase "without delay" need not be repeated in other parts of the constitution.

³ See 1(2).

5. The national flag is black, gold, green, white, red and blue as sketched and described in Schedule 2.⁴

Languages

6. *Option 1*

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

Option 2

The same as section 3 of the interim Constitution.

Option 3

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

⁴ This description is more reader-friendly than a mere reference to the schedule. The full description follows in the attached schedule. The National Anthem is still under discussion.

CHAPTER 2 BILL OF RIGHTS

State's duty to respect and protect rights

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

Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) *Option 1*

Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, legislative and other measures that are designed [and likely to] protect and advance groups or categories of persons disadvantaged by [unfair] discrimination may be used.

Option 2

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

(3) Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including [but not limited to] race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵

(4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.⁶

Human dignity

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

⁵ NP proposal to insert the words "without derogating from the generality of" of "but not limited to".

⁶ FF proposal: to delete this clause which reverses the onus of proof.

Life

10.

Option 1

Everyone has the right to life [and the death penalty is hereby abolished.]

Option 2

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

Freedom and security of the person

11. (1) Everyone has the right to freedom of the person, including the right not to be -

- (a) deprived of liberty arbitrarily or without just cause; or
- (b) detained without trial.

(2) Everyone has the right to security of the person, [bodily and psychological integrity] including the right -

- (a) to be free from all forms of violence; and
- [(b) to be secure in, and control their own body.]⁷

(3) No one may be -

- (a) tortured in any way;
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experiments without that person's consent.

Slavery, servitude and forced labour

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

Privacy

13. Everyone has the right to privacy, including the right not to have -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; and⁸

⁷ Freedom and Security of the Person: NP objection - may be constitutionalising right to abortion - flagged for 1996.

⁸ Privacy : DP proposal to insert "intercepted" after "communications" - flagged for 1996.

- (d) the privacy of their communications violated.

Freedom of religion, belief and opinion

- 14.** (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions provided that -
- (a) those observances follow rules made by an appropriate authority;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) The Constitution does not prevent legislation recognising the validity of marriages concluded under a system of religious law [or other recognised traditions], or a system of personal and family law adhered to by persons professing a particular religion to the extent that the system is consistent with the Bill of Rights.⁹

Freedom of expression

- 15.** (1) Everyone has the right to freedom of expression, including -
- (a) freedom of the press and other media; and
 - (b) freedom to receive and impart information and ideas.
- (2) The protection in subsection (1) does not extend to -
- (a) propaganda for war;
 - (b) the incitement of imminent violence; or
 - [(c) advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to discrimination.]¹⁰
- (3) **Option 1**
The state must regulate any media¹¹ that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

⁹ **Freedom of religion, belief and opinion: ANC concern that "religious law" may provide for more than intended - flagged for 1996.**

¹⁰ **Freedom of Expression: DP object to inclusion of hate speech.**

¹¹ **The use of the word "media" and other aspects of this subclause are being considered.**

Option 2

The state must regulate any newspapers and electronic media that it finances or controls to ensure that they are impartial and represent broadly the views of society.

Assembly, demonstration and petition

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

Freedom of association

17. Everyone has the right to freedom of association.

Political rights

18. (1) Every citizen is free to make political choices, which includes the right -
- (a) to form a political party;
 - (b) to participate in the activities of, or to recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every [adult] citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution, to vote in those elections and to do so in secret.¹²
- (3) Every citizen has the right to stand for election to public office and, if elected, to hold office.¹²

Citizenship

19. No citizen may be deprived of citizenship.

Freedom of movement and residence

20. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter and to remain in the Republic.
- (4) Every citizen has the right to a passport.¹³

¹² **Political Rights: adult franchise - decision on voting age.**

¹³ **Freedom of Movement and Residence: FF proposal that this be subject to legislation relating to fugitive offenders - flagged for 1996.**

Economic activity

21.

Option 1

No provision regarding a right to economic activity.

Option 2

- (1) Everyone has the right to pursue a livelihood and engage in economic activity anywhere in the Republic.
- (2) Subsection (1) does not preclude measures that are designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices, or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Option 3

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

Labour relations

22. (1) Everyone has the right to fair labour practices.
- (2) Workers have the right -
- (a) to form and join trade unions;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.¹⁴
- (3) Employers have the right -
- (a) to form and join employers' organisations;
 - (b) to participate in the activities and programmes of an employers' organisation; and
 - [(c) to lock-out.]¹⁵
- (4) Every trade union and every employers' organisation has the right -¹⁶

¹⁴ **Labour Relations: Right to Strike - DP proposal about political strikes - flagged for 1996.**

¹⁵ **Lock-out clause - political decision is required.**

¹⁶ **DP proposal to qualify this right - flagged for 1996.**

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

Environment

23. Everyone has the right -

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

Property

24.

Option 1

No property clause.

Option 2

- (1) No one may be deprived of property except in accordance with a law of general application.
- (2) Property may be expropriated only in terms of a law of general application -
 - (a) for a public purpose or in the public interest; and
 - (b) may be subject to the payment of compensation, within a time period and in a manner as agreed or decided by a court.
- (3) When any court decides either the amount of compensation, or the period within or the manner by which payment must be made, the court must determine an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including -
 - (a) the current use of the property;
 - (b) the history and value of its acquisition;
 - (c) its market value; and
 - (d) the ability of the state to pay.

- (4) This section does not apply to or invalidate measures aimed at bringing about land reform.
- (5) Every person and community dispossessed of land after 19 June 1913 as a result of discriminatory laws or practices has the right to restitution of that land, or equitable redress, subject to and in accordance with national legislation.
- (6) Every person and community whose tenure is legally insecure as a result of discriminatory laws or practices has the right to obtain legally enforceable security of tenure or, where appropriate, alternative redress subject to and in accordance with national legislation.

Option 3

- (1) Property, including the right to acquire, hold and dispose of property, is guaranteed.
- (2) No one may be arbitrarily deprived of property.
- (3) Property may be expropriated only in accordance with a law of general application -
 - (a) for public purposes or in the public interest which includes land reform;
 - (b) subject to the payment of just and equitable compensation, the amount, the timing and manner of payment of which have been either agreed or decided by a court.
- (4) When a court decides the amount, the timing and manner of payment of compensation it must equitably balance the public interest and the interests of those affected, considering all relevant factors including -
 - (a) the current use of the property;
 - (b) the history of its acquisition;
 - (c) its market value; and
 - (d) any beneficial improvements after acquisition.
- (5) Every person and community dispossessed of land after 19 June 1913 as a result of a discriminatory law or practice has the right to claim restitution of the land or equitable redress subject to and in accordance with this section and a law of general application.

- (6) In this section "discriminatory law or practice" means any law or practice that would have been inconsistent with section 8 had that section been in force at the time the law or practice dispossessed the person or community.

Housing and land

25. (1) Everyone has the right to have access to adequate housing. The state must take reasonable and progressive legislative and other measures to secure this right.
- (2) No one may be evicted from their home arbitrarily and without an order of court made after considering the relevant circumstances.
- (3) Everyone has the right to have equitable access to land. The state must take reasonable and progressive legislative and other measures to facilitate this access.]¹⁷

Health, food, water, and social security

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

Children

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

¹⁷ **Housing and Land: NP objection to including land in housing clause - flagged for 1996, PAC objects to grouping of socio-economic rights.**

inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and

- (f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest possible period of time and has the right to be -¹⁸
 - (i) kept separately from other detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.

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

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

Education

28. Option 1

- (1) Everyone has the right -
 - (a) to a basic education, including adult basic education, in a state or state-aided institution;
 - (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
 - (c) to choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.
- (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that -
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Option 2

Subsections (1) and (2) above and the following:-

¹⁸ **Children: ANC concern that section may need to be revisited in light of problems with detention of juveniles - flagged for 1996.**

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

Academic freedom

29. Option 1

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

Option 2

The right should form part of the right to freedom of religion, belief and opinion (section 14) and it should only apply to individuals, not to institutions.

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.¹⁹

Access to information

31. (1) Everyone has the right of access to -²⁰
- (a) any information held by the state; and
 - (b) any information that is held by another natural or juristic person and that is required for the exercise or protection of any rights.
- [(2) This right must be regulated by national legislation.]

Just administrative action

Option 1

32. (1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.

¹⁹ Language and Culture: NP proposal on cultural councils - deferred for 1996.

²⁰ Access to information. Application to juristic persons - flagged for 1996.

- (2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published.

Option 2

- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.
- (2) Everyone whose rights are adversely affected by administrative action has the right to fair procedure unless the administrative action is of general application.
- (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons.

Access to courts

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

Arrested, detained and accused persons

34. (1) Everyone who is arrested for allegedly committing an offence has the right -
 - (a) to remain silent;
 - (b) to be informed, promptly and in a language that the arrested person understands -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention; and

Option 1

to be released with or without bail, unless the interests of justice require that person to be detained [... if the interests of justice permit that person to be released].

Option 2

to be released from detention subject to reasonable conditions if the interests of justice permit.

- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed, promptly and in a language that the detained or imprisoned person understands, of the reason for being detained;
 - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly and in a language that the detained person understands;
 - (c) to have a legal practitioner provided by the state if substantial injustice would otherwise result, and to be informed of this right promptly and in a language that the detained person understands;
 - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and
 - (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused has a right to a fair trial, which includes the right -
- (a) to be informed of the charge with sufficient details to answer the charge;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial that begins and concludes without unreasonable delay in an ordinary court of law;
 - (d) to be present when being tried;
 - (e) to choose and be represented by a legal practitioner, to have a legal practitioner assigned to the accused person at state expense if substantial injustice would otherwise result [if the interests of justice require it], and to be informed of both of these rights in a language the accused person understands;
 - (f) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
 - (g) to adduce and challenge evidence;
 - (h) not to be compelled to give self-incriminating evidence;
 - (i) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that

- language;
 - (j) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (k) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - (l) to be sentenced within a reasonable time after being convicted; and
 - (m) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (n) of appeal to, or review by, a higher court.
- (4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.

Limitation of rights

35. (1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation of a right is -
- (a) [reasonable/reasonable and justifiable/reasonable and necessary/necessary/justifiable] in an open and democratic society based on freedom and equality;²¹
 - (b) compatible with the nature of the right that it limits; and
 - [(c) consistent with the Republic's obligations under international law]
- (2) The provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit [unfair] discrimination.
- (3) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency²²

36. (1) A state of emergency may be declared **only**²³ in terms of an Act of Parliament

²¹ Limitation of Rights: Reasonable or necessary - flagged for 1996.

²² ANC raised concern how section as a whole relates to state of war. A number of problems arise in this section, eg, (a) 36(2) may not be considered adequate because a state of emergency may prevent Parliament from meeting, (b) the list of non-derogable rights should be reviewed, (c) what happens if an election cannot be held. The problems are being investigated.

²³ Word "only" included for purposes of clarity.

and only when -²⁴

- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, national disaster, or other public emergency; and
 - (b) the declaration is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -²⁴
- (a) prospectively from the date of the declaration; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two thirds of its members, may resolve to extend a declaration of a state of emergency for a period of up to three months, or for consecutive periods of up to three months each [for no more than 14 days ... up to 60 days, or for consecutive periods of up to 60 days each].
- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -²⁴
- (a) is strictly required by the emergency;
 - (b) it is consistent with the Republic's obligations under international law;
 - (c) it conforms to subsection (4); and
 - (d) it is published in the national Government Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -²⁵
- (a) the creation of retrospective crimes or the imposition of retrospective

²⁴ ANC proposal that these be deleted and dealt with in legislation, flagged for 1996.

²⁵ Section 36(5) is incorporated in this subsection. The implication of 4(c) is that rights listed may not to be limited in any way under emergency legislation.

NP and DP concerned that this may allow for retrospectivity - flagged for 1996.

- penalties except for an act or omission that, at the time it was committed, was criminal in terms of international law;
- (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
 - (c) any derogation from this section or any of the sections listed below.

Section 8	Equality
Section 9	Human dignity
Section 10	Life
Section 11(3)	Freedom from torture and degrading treatment
Section 12	Freedom from slavery and servitude (excluding forced labour)
Section 14	Freedom of religion, belief and opinion
Section 22(1)	Fair labour practices
Section 22(2) and (3)	Right to form and join trade unions or employers' organisations
Section 27(1)(d)	Right of children to not be restricted, neglected or abused
Section 27(1)(e)	Right of children to freedom from exploitative labour practices
Section 27(1)(f)	Rights of children who are detained
Section 33	Access to courts
Section 34(1)(a) and (b)	Right to remain silent, and to be informed of that right
Section 34(1) (c)	Right not to be compelled to confess or make statements
Section 34(2) (d)	Right to challenge detention and be released
Section 34(3) and (4)	Fair trial
Section 35	Rights contained in limitation section
Section 38	Application of the Bill

(5) ...²⁵

[(6) Any superior court may enquire into the validity of²⁶

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, under a declaration of a state of emergency.]

(7) Whenever anyone is detained in consequence of a declaration of a state of emergency, the following conditions must be observed -

- (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
- (b) a notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name

²⁶ Is unnecessary because jurisdiction is dealt with comprehensively in Chapter 6.

and referring to the emergency measures under which that person has been detained;

- (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
- (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
- (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless the detention is necessary to restore peace and order;
- (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
- (g) the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
- (h) the state must present written reasons to the court to justify the detention or continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

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

Enforcement of rights

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

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

Application

38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state and, where applicable, binds all natural and juristic persons.

(2) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.

(3)

Option 1

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

Option 2

Juristic persons are only entitled to the rights in the following sections:

(An example of a list:)

Section 13(b),(c) and (d)	Privacy
Section 14(2)	Freedom of religion, belief and opinion
Section 15	Freedom of expression
Section 17	Freedom of association
Section 21	Economic activity
Section 22	Fair labour practices
Section 23(b)	Environment
Section 24	Property
Section 28(2)	Education
Section 29(1)	Academic freedom
Section 31	Access to information
Section 32	Just administration
Section 33	Access to courts
Section 34(3)	Rights of arrested, detained and accused persons

Interpretation of Bill of Rights

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

- (a) must promote the values that underlie an open and democratic society based on freedom and equality;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with the Bill of Rights over any alternative interpretation of the legislation that is inconsistent with the Bill.

- (3) When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.

CHAPTER 3 PARLIAMENT

Legislative authority of Republic²⁷

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

THE NATIONAL ASSEMBLY

Composition and election of National Assembly

- 41.** The National Assembly consists of [300 to 400] members, who are women and men elected in terms of an electoral system that is prescribed by national legislation, is based on a common voters roll and [results], in general, [in] proportional representation.

Membership²⁸

- 42.** (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except -
- (a) anyone who is appointed by or is in the service of the state and receives remuneration, other than the President, Deputy President, Ministers and Deputy Ministers and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of Parliament;²⁹
 - (b) members of [the second House,] a provincial legislature or a local government;
 - (c) unrehabilitated insolvents;
 - (d) anyone declared to be of unsound mind by a court of the Republic; or
 - (e) anyone who, after this section takes effect, has been convicted of an

²⁷ **Legislative Authority of the Republic: Revisit after competencies is finalised and when decision on Senate/Council of Provinces is taken.**

²⁸ **This section is renamed "Membership" and incorporates provisions relating to occurrence and filling of vacancies.**

²⁹ **The words in brackets replace the phrase "office of profit under the Republic". The President is included to provide for the election of an incumbent President to the next National Assembly.**

offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

- (2) A person loses membership of the National Assembly if that person -
 - (a) ceases to be eligible; or
 - (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.
- (3) Vacancies must be filled in terms of national legislation.

Vacancies

43. ...³⁰

Oaths or affirmation by members

44. Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Sittings and recess periods

45. (1) The first sitting of the National Assembly after an election must take place at a time and on a date determined by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. The National Assembly may determine the time and duration of its other sittings and its recess periods.

(2) The President may summon the National Assembly to an extraordinary sitting

³⁰ Incorporated in 42.

at any time to conduct urgent business.

- (3) The seat of the National Assembly is ... Sittings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.³¹

Elections and duration of National Assembly

- 46.** (1) The National Assembly is elected for a term of five years.
- (2) The National Assembly may be dissolved before the end of its term if it passes a vote of no confidence in the Cabinet.³²
- (3) When the National Assembly is dissolved, or its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved, or its term expired.
- (4) The National Assembly remains competent to function from the time it is dissolved or its term expires until the day before the first day of polling for the next Assembly.³³

Speaker and Deputy Speaker

- 47.** (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
- (2) The President of the Constitutional Court must preside over the election of the Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

³¹ **Sittings: Seat of Parliament - political decision is required. DP proposes Cape Town.**

³² **Elections: Revisit after decision on votes of no confidence.**

³³ **The TRT is satisfied that the wording, "first day of polling" is appropriate. A clause dealing with the National Assembly in the case where election results cannot be declared, or a court invalidates an election needs, to be inserted.**

- (3) The procedure set out in Schedule 4 applies to the election of the Speaker and the Deputy Speaker.
- (4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

Decisions

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

President's rights in National Assembly

49. (1) The President may attend, and may speak in the National Assembly, but may not vote.

Internal autonomy

50. (1) The National Assembly may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.
- (2) A committee of the National Assembly may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents.³⁴

³⁴ Internal Autonomy: NP proposal on committee system - flagged for 1996.

Parliamentary privilege

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

Bills

- 52.** ...³⁵

Constitutional amendments

- 53.** The Constitution may be amended by a Bill passed by Parliament if it is adopted by at least two thirds of the members of [both Houses of] Parliament.³⁶

Assent to Bills³⁷

- 54.** (1) The President must either assent to and sign a Bill passed by Parliament or, if the President has reservations about the constitutionality of the Bill, refer it back to Parliament for reconsideration.

³⁵ The procedure for the passage of Bills will be finalised when the matter of the Houses of Parliament is settled.

³⁶ Requires further development to comply with Constitutional Principles.

³⁷ The issue of the referral of Bills to the Constitutional Court by people other than the President is still being debated. This matter may usefully be considered together with the issue of "abstract review" of Acts as similar questions are raised in both contexts. (A process of abstract review need not affect the promulgation and implementation of legislation unless a court decides otherwise). The Panel is preparing a memo on this issue.

- (2) If the President refers a Bill back to Parliament the following procedure applies:
- (a) Parliament must reconsider the Bill, taking into account the President's reservations.
 - (b) If Parliament agrees with the President's reservations it must either reject the Bill, or pass it fully accommodating the President's reservations, and the President must assent to and sign the Bill.
 - (c) If Parliament disagrees with the President's reservations and confirms the Bill, or passes it again but without fully accommodating the President's reservations, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.
 - (d) If the Constitutional Court decides that the Bill is constitutional the President must assent to and sign it. If the Court decides that the Bill is unconstitutional the President may not assent to or sign it.

Promulgation

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

Safekeeping of Acts of Parliament

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

CHAPTER 4 COUNCIL OF PROVINCES/SENATE

OPTION 1 COUNCIL OF PROVINCES³⁸

Establishment

57. There is a Council of Provinces to represent the provinces at a national level.

Composition

58. (1) The Council of Provinces consists of delegates from the provincial legislatures [and local government].
- (2) A provincial legislature elects from among its members and within 10 days of its election the number of delegates as provided in Schedule 4. Each party represented in a provincial legislature is entitled to a number of delegates to the Council of Provinces in accordance with the principle of proportional representation.
- (3) A provincial legislature appoints no more than half of its delegates to the Council of Provinces to serve as permanent members of the Council.
- (4) A delegate elected to the Council of Provinces may at any time be recalled by the party of which the delegate is a member.

Powers and functions

59. (1) The Council of Provinces represents provincial [and local] government at national legislative and executive level.
- (2) The Council of Provinces monitors the establishment and co-ordinates the functioning of inter-governmental institutions.

³⁸ Inter-governmental relations: CPG Report: CC to consider how final report from CPG is to be handled.

- (3) The Council of Provinces promotes co-operative governance among the various levels of government to ensure -
- (a) mutual assistance and support;
 - (b) sharing of information;
 - (c) development and execution of joint policies;
 - (d) adherence to agreed procedures;
 - (e) maintenance of friendly relations; and
 - (f) harmony among the provinces and between the provinces and the national government.
- (4) The Council of Provinces must be consulted and is entitled to comment on and submit proposals in regard to -
- (a) the national budget;
 - (b) the budgets of national government departments; and
 - (c) the recommendations of the Financial and Fiscal Commission.
- (5) The Council of Provinces participates in the national legislative process in the manner provided for in the Constitution.

Participation in the national legislative process

- 60.** (1) The Council of Provinces may comment on and propose amendments to all Bills before the National Assembly and refer the comments or amendments for consideration to the Assembly.
- (2) The Council of Provinces may initiate legislation and submit Bills to the National Assembly on any matter falling within the functional areas provided for in Schedule 5.
- (3) With respect to Bills before the National Assembly falling within the functional areas listed in Schedule 5 the Council of Provinces participates in the national legislative process as follows:

- (a) The Council of Provinces considers all Bills, and may approve, propose amendments to or reject them.
 - (b) The National Assembly considers all amendments proposed by the Council of Provinces.
 - (c) If an amendment proposed by the Council of Provinces in terms of paragraph (a) is rejected by the National Assembly, or if a Bill is rejected by the Council, the Assembly refers the Bill to the Mediation Committee.
 - (d) The Mediation Committee must consider and take a discussion on the Bill within four weeks of its referral.
 - (e) If the Mediation Committee agrees on the contents of the Bill it refers the Bill to the National Assembly for adoption.
 - (f) If the Mediation Committee does not agree on the contents of the Bill, the Bill lapses unless it is passed in the National Assembly by at least two thirds of its members. The Bill must then be sent to and dealt with by the President.
- (4) Section 159 Option 3 subsection (3) does not apply to a Bill which is not approved by the Council of Provinces.
 - (5) The Council of Provinces participates in the amendment of the Constitution in the manner provided for in the Constitution.

Mediation Committee

- 61. (1) The Mediation Committee consists of an equal number of members of the Council of Provinces and the National Assembly.
- (2) Decisions of the Mediation Committee are taken by a majority of its members.

Chairperson

- 62. The Council of Provinces elects a chairperson from among the permanent delegates to serve for a period of three years.

Sitting and meetings

- 63.** (1) The Council of Provinces may determine the time and duration of its sittings and the dates of its meetings.
- (2) The Chairperson may summon the Council of Provinces to an extraordinary meeting at any time to conduct urgent business.
- (3) The seat of the Council of Provinces is the same as that of the National Assembly. Meetings at other places are permitted on the grounds of public interest, security or convenience, and in a manner provided for in the rules and orders of the Council.
- [(4) The Chairperson must convene the Council of Provinces if requested to do so by the majority of the delegates of at least two provinces.]

Decisions

- 64.** (1) A majority of the members of the Council of Provinces must be present before a vote may be taken on a Bill, and one third of the members must be present before a vote may be taken on any other matter.
- (2) All questions before the Council of Provinces are decided by a majority of the votes cast.

Internal autonomy

- 65.** The Council of Provinces may make its own rules and orders.

OPTION 2

SENATE

Composition and election of Senate

- 66.** (1) The Senate consists of 90 members.
- (2) Each provincial legislature elects, indirectly, 10 women and men as members of the Senate in accordance with the principle of proportional representation.

Purpose and functions of Senate

- 67.** (1) The purpose of the Senate is -
- (a) to represent the province in national decision-making; and
 - (b) to function as a second House of Parliament.
- (2) The Senate considers every Bill introduced in Parliament and passes or rejects it.
- (3) A Bill passed by the National Assembly but rejected by the Senate must be referred to a joint committee consisting of members of both Houses and of all the parties represented in Parliament and willing to participate in the joint committee. The committee must consider and report on any proposed amendments to the Bill. The Bill must then be referred to the two Houses, which at separate sittings may pass the Bill with or without amendment.
- (4) If one House passes the Bill as amended and the other House rejects that amended Bill, it must be referred to a joint sitting of the Houses at which it may be passed by a majority of the total number of members of both Houses.
- (5) A Bill which has been rejected in a joint sitting of the Houses may not be reintroduced within twelve months of its rejection.
- (6) Bills appropriating revenue or imposing taxes, other than Bills pertaining to matters contemplated in sections 148 to 153, must be considered by the Senate within thirty days after they have been passed by the National Assembly.
- (7) Bills affecting the boundaries of provinces or the exercise or performance of the powers and functions of provinces must be passed by both Houses and, in the case of a Bill other than a Bill referred to in subsection (8), affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, must also be approved by a majority of the senators of the province or provinces in question in the Senate.

- (8) Subject to subsection (9), a Bill amending the Constitution must be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two thirds of the total number of members of both Houses.
- (9) No amendment of Chapter 9 is of any force or effect unless passed separately by both Houses by a majority of at least two thirds of all the members in each House; provided that the boundaries and legislative and executive competencies of a province may not be amended without the consent of the relevant provincial legislature.
- (10) All Bills contemplated in subsections (7) and (9) must first be introduced in the Senate.
- (11) The Senate must participate in the nomination or appointment of ambassadors, high commissioners or other heads of missions, judges of the Constitutional Court, the Supreme Court of Appeal, the High Court and the Land Claims Court and any other judicial bodies other than courts referred to in section 95(e) the Public Protector, the Auditor-General and members of any commission or other similar bodies established under the Constitution.
- (12) The Senate, by resolution, must agree to the ratification of or accession to every international agreement.
- (13) Notwithstanding the provisions of subsections (2), (3), (4) or (5) or any other provision of the Constitution, the Senate, at any time, may refer a Bill to the Constitutional Court to determine the constitutionality of that Bill.

Qualification for membership of Senate

68. Every person who is eligible to be a member of the National Assembly and who ordinarily resides in the province which that person is to represent in the Senate, is eligible to be a member of the Senate.

Oath or affirmation by Senators

69. Before members of the Senate begin to perform their functions in the Senate, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Sittings

70. (1) The President of the Senate, or when the President is not available, the Deputy President of the Senate, after consultation with the Speaker of the National Assembly and the chief whips of all political parties represented in the Senate and in accordance with the rules and orders of the Senate, must determine the time and duration of sittings of the Senate.
- (2) When a majority of Senators representing at least two provinces or one fifth of Senators representing at least five provinces requests it, the President or Deputy President must convene a sitting of the Senate.
- (3) The President of the Republic may request the President of the Senate to summon members of the Senate to an extraordinary sitting in accordance with its rules and orders to conduct urgent business.
- (4) The seat of the Senate is ... Sittings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Senate.

President and deputy president of Senate

71. A provision similar to section 49 of the interim Constitution.

Quorum in Senate

72. A provision similar to section 54 of the interim Constitution.

Rights of members of national and provincial executives in Senate

73. (1) The President, Deputy Presidents, Ministers, Deputy Ministers, Premiers of provinces and members of executive councils of provinces may attend sittings of the Senate.
- (2) The President, Deputy Presidents, Ministers and Deputy Ministers may speak in the Senate.
- (3) The Premier of a province may speak in the Senate when business is conducted concerning the affairs of the province.

- (4) Members of Executive Councils of provinces may speak in the Senate with the permission of the President or Deputy President of the Senate.
- (5) Only members of the Senate may vote in the Senate.

Rules and orders

74. A provision similar to section 58 of the interim Constitution.

Inter-governmental relations

75. (1) A Bill must be introduced in Parliament within six months of the Constitution taking effect to provide for the establishment of structures, mechanisms, processes and procedures aimed at establishing and promoting inter-governmental relations at both the legislative and executive levels of government and in respect of national, provincial and local government, including but not limited to the Inter-governmental Forum and Ministerial Forums, as well as an Advisory Committee on Inter-governmental Relations and a Commission on provincial government.
- (2) Within six months of the Constitution taking effect, the Senate must establish a Senate Consultative Forum, which must establish mechanisms and structures to establish and promote liaison with and among provinces.
- (3) Within one month of its first sitting, the Senate must elect in accordance with the principle of proportional representation Senators to serve on the Financial and Fiscal Commission.

CHAPTER 5

THE NATIONAL EXECUTIVE³⁹

Executive authority of the Republic

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

The President

77. The President -⁴⁰
- (a) promotes the unity of the nation and that which will advance the Republic;
 - (b) is the Head of State, Head of the national executive and Commander-in-Chief of the defence force;
 - (c) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
 - (d) is responsible for the observance of the Constitution by the national executive.

Powers and functions of President⁴¹

78. (1) The President has the powers and functions entrusted to that office by the Constitution and any legislation.
- (2) The President must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Cabinet, except where -

³⁹ The panel is still investigating aspects of this Chapter.

⁴⁰ Has been re-organised.

⁴¹ If the proposal for a Government of National Unity is accepted, this section will need to be amended.

- (a) the Cabinet has determined that the President may act in consultation with a member or a committee of members; or
 - (b) the Constitution states or implies that the President may act alone.
- (3) The President may act alone when -
- (a) appointing and dismissing Cabinet members and Deputy Ministers and assigning powers and functions to them;⁴²
 - (b) convening Cabinet meetings;
 - (c) assenting to and signing Bills;
 - (d) referring a Bill back to Parliament for reconsideration of the Bill's constitutionality;
 - (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
 - (f) summoning the National Assembly to an extraordinary sitting to conduct urgent business;
 - (g) dissolving the National Assembly and calling an election after a vote of no confidence in the Cabinet has been passed by the Assembly;
 - (h) appointing commissions of enquiry;
 - (i) accrediting foreign diplomatic representatives;
 - (j) appointing ambassadors; and
 - (k) conferring honours.
- (4) Decisions of the President taken in consultation with the other members or a member or committee of the Cabinet, must be in writing, signed by the President, and countersigned by another Cabinet member.

Election of President

- 79.** (1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

⁴² **Appointment of Cabinet:** Outcome of this matter depends on decision on composition of cabinet.

- (2) The President of the Constitutional Court must preside over the election of the President, or designate another judge to do so. The procedure set out in Schedule 4 applies to the election of the President.
- (3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the President of the Constitutional Court, but not more than 30 days after the vacancy occurs.⁴³

Assumption of office by President

80. When elected President, a person ceases to be a member of the National Assembly, and, within five days, must assume the office of President by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Term of office of President

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

Vacancies

82. ...

Acting President⁴⁴

83. (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of the office of President, or during a vacancy in the office of President, an office-bearer in the order below acts as the President -

⁴³ Has been removed from 82(2). If the requirement of a written resignation is regarded as necessary, it could be added in 79. It might not be necessary in view of the publicity a resignation will inevitably receive.

⁴⁴ Acting President: Outcome would depend on decision on composition of cabinet.

- (a) the Deputy President;
 - (b) a Minister designated by the President;
 - (c) a Minister designated by the other members of the Cabinet;
 - (d) the Speaker;
 - (e) a member of the National Assembly elected by its members.
- (2) An acting President has the responsibilities, powers and functions of the President.

Removal of President

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

Cabinet

85. Option 1

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

Option 2

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

Option 3

A system of Government of National Unity based on the Interim Constitution.

Deputy Ministers

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

Continuation of Cabinet after elections

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

Oath of office

88. Before Ministers and Deputy Ministers begin to perform their functions, they must

swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Accountability of Ministers and Cabinet

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

Conduct of Cabinet members and Deputy Ministers

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

Temporary assignment of powers and functions

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

Transfer of powers and functions

- 92.** The President by proclamation may transfer to a member of the Cabinet-
- (a) the administration of any legislation entrusted to another member; or

- (b) any power or function entrusted by legislation to another member.

Votes of no confidence

- 93.** (1) If the National Assembly passes a vote of no confidence in the Cabinet, the President must either resign or dissolve the Assembly and call an election.⁴⁵
- (2) If the National Assembly passes a vote of no confidence in the President alone, the President must resign.
- (3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the President, the President must either resign or reconstitute the Cabinet.
- (4) [A majority/**two thirds**] of the members of the National Assembly must be present when a vote of no confidence is passed.⁴⁶

⁴⁵ Is still being debated, a decision on snap or mid-term elections is necessary. The Panel is also preparing an opinion.

⁴⁶ The quorum for votes of no confidence needs to be considered.

CHAPTER 6

COURTS AND ADMINISTRATION OF JUSTICE

Judicial authority

- 94.** (1) The judicial authority of the Republic is vested in the courts established in terms of the Constitution or an Act of Parliament.
- (2) The courts are independent, and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts, to ensure the independence, impartiality, dignity and effectiveness of the courts.
- (5) A decision of a court binds all the persons and organs of state to which the decision applies.

Judicial system⁴⁷

- 95.** The courts of the Republic are:
- (a) The Constitutional Court.
- (b) The Supreme Court of Appeal.
- (c) Any courts of appeal established by an Act of Parliament.
- (d) The provincial and local divisions of the High Court and other courts of similar status.
- (e) Magistrates' Courts and other courts of similar status.
- (f) Any other courts established in terms of an Act of Parliament.

⁴⁷ The position of traditional leaders in relation to this Chapter still needs to be addressed.

Constitutional Court

96. (1) The Constitutional Court, consisting of a President, a Deputy President and nine other judges, is the highest court in constitutional matters, [and its decisions bind all other courts].⁴⁸
- (2) The Constitutional Court makes the final decision whether a matter is a constitutional matter.
- (3) Only the Constitutional Court may -
- (a) decide disputes in constitutional matters between national, national and provincial, and provincial organs of state;⁴⁹
 - (b) declare unconstitutional an Act of Parliament, a Provincial Act, and any conduct of the President; and
 - (c) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only when the Bill is referred to it in terms of the Constitution.
- (4) National legislation and rules made by the Constitutional Court -⁵⁰
- (a) may determine the procedure of the Constitutional Court; and
 - (b) must allow any person to bring a matter directly to the Constitutional Court when it is in the interest of justice, and with leave of that Court.
- (5) The Constitutional Court has no jurisdiction other than that granted in the Constitution.

Supreme Court of Appeal

⁴⁸ The words in brackets are considered unnecessary.

⁴⁹ Constitutional Court: list in this clause not yet final and still under discussion.

⁵⁰ Automatic referral procedures may need to be provided for A memorandum on the matter will be distributed.

- 97.** (1) The Supreme Court of Appeal, consisting of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament, may decide appeals in all matters, and is the highest court of appeal except in constitutional matters.
- (2) The Supreme Court of Appeal has the inherent [and common law] jurisdiction that vested in the Appellate Division of the Supreme Court before the Constitution took effect.⁵¹
- (3) The Supreme Court of Appeal has no jurisdiction other than that granted in the Constitution.

Other courts

- 98.** (1) Other courts of appeal and the divisions of the High Court have -
- (a) jurisdiction in all constitutional matters except in matters that only the Constitutional Court may decide; and,
- (b) in all other matters, jurisdiction as determined by an Act of Parliament.
- (2) The provincial and local divisions of the High Court have the inherent [and common law] jurisdiction that vested in the provincial and local divisions of the Supreme Court before the Constitution took effect.⁵²
- (3) All other courts have jurisdiction as determined by an Act of Parliament; but, no Act of Parliament may grant jurisdiction to enquire into or rule on the constitutionality of any legislation or any conduct of the President.

Powers of courts in constitutional matters

⁵¹ Supreme Court of Appeal ANC suggested that another term be found for "inherent jurisdiction" - flagged for 1996.

This will be dealt with in a memorandum to follow. The inclusion in brackets will also be explained. Whether unintended consequences may follow is still being investigated.

⁵² See the note to 97(2).

- 99.** (1) In any constitutional matter, a court with jurisdiction -
- (a) must declare invalid law or conduct that is inconsistent with the Constitution;
 - (b) may make any order that is just and equitable, including an order as to costs, an order that a declaration of invalidity is to operate retrospectively, and the extent of that retrospective operation; and
 - (c) may suspend a declaration of invalidity, for a specified period and on any conditions, to allow the competent authority to correct the defect.
- (2) The Supreme Court of Appeal, a division of the High Court or a court deciding an appeal from the High Court may make a finding on the constitutionality of an Act of Parliament, a Provincial Act or any conduct of the President but may not declare the Act or conduct invalid; but, the court may grant a temporary interdict or other temporary relief to a party.
- (3) Any person or organ of state with a sufficient interest may appeal or apply to the Constitutional Court to confirm or vary a finding of unconstitutionality by a court in terms of subsection (2).

Appointment of judicial officers

100. *Option 1*

- (1) Any appropriately qualified woman or man who is [a citizen and,] a fit and proper person may be appointed as a judicial officer.
- (2) The President, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Constitutional Court and the Chief Justice and Deputy Chief Justice.
- (3) The other judges of the Constitutional Court are appointed by the President, after consulting the President of the Constitutional Court, in accordance with the following procedure:
 - (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and

submit the list to the President.

- (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
 - (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- (4) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
 - (5) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
 - (6) Other judicial officers must be appointed in terms of an Act of Parliament.
 - (7) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 3, that they will uphold and protect the Constitution.

Option 2

- (1) Any appropriately qualified woman or man who is a citizen and a fit and proper person may be appointed as a judicial officer.
- (2) A person appointed as the President, the Deputy President or a judge of the Constitutional Court must be -
 - (a) a judge; or
 - (b) qualified to be admitted as an advocate or attorney and, after qualifying, must have practised as an advocate or an attorney or lectured in law at a university for at least 10 years; or
 - (c) a person who, by reason of training or experience, has expertise in the field of constitutional law relevant to the application of the Constitution and the law of the Republic.

- (3) A person appointed as the Chief Justice, the Deputy Chief Justice or a judge must be qualified to be admitted as an advocate or attorney and, after qualifying, must have practised as an advocate or an attorney or lectured in law at a university for at least 10 years.
- (4) The President of the Constitutional Court and the Chief Justice must be appointed by the President on the advice of the Judicial Service Commission.
- (5) The Deputy President of the Constitutional Court and the other judges of the Constitutional Court must be appointed after advice by the Judicial Service Commission and in consultation with the leaders of all political parties in Parliament who wish to participate.
- (6) In the event of no consensus having been reached in terms of subsection (5), the judges must be appointed together by a majority of at least 75% of the members of the National Assembly [and the second House in a joint sitting].
- (7) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed and no more than three should have qualified for the Court in terms of subsection (2) (c).
- (8) The President must appoint the Deputy Chief Justice and all other judges on the advice of the Judicial Service Commission.
- (9) The appointment of other judicial offices must be made by an independent body established by an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against such judicial officers, take place without favour or prejudice, and that the applicable legislation and administrative directives are applied uniformly and properly, and that no victimisation or improper influencing of these judicial officers occurs.
- (10) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 3, that they will uphold and protect the Constitution.

Acting judges

- 101.** (1) The President may appoint an acting judge to the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting in consultation with the President of the Constitutional Court and the Chief Justice.
- (2) The appointment of an acting Constitutional Court judge may be for any period until the vacancy is filled or until the absent judge returns to the Court. A person may be appointed as an acting judge more than once but may not serve for a period of more than six months. A person continues as an acting judge to complete any unfinished case after the expiry of the period of appointment.
- (3) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts [on the advice of/after consultation with] the senior judge of the court on which the acting judge will serve.⁵³

Tenure and remuneration

- 102.** (1) Constitutional Court judges are appointed for non-renewable terms of up to nine years.
- (2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.
- (3) The salaries, allowances and benefits of judges may not be reduced.

Removal

- 103.** (1) A judge may be removed from office only if -
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is [grossly] incompetent, or is guilty of gross misconduct; and
- (b) the National Assembly [and the second House, at a joint sitting], adopt a resolution calling for that judge to be removed, which is supported by at least two thirds of the total number of members [of both Houses].

⁵³ The term "senior judge" in this provision will not present problems.

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

Judicial Service Commission

- 104.** (1) There is a Judicial Service Commission, consisting of -
- (a) the Chief Justice, who presides at meetings of the Commission;
 - (b) the President of the Constitutional Court;
 - (c) one Judge President designated by the Judges President;
 - (d) the Cabinet member responsible for the administration of justice, or that member's nominee;
 - (e) two practising advocates designated by the advocates' profession;
 - (f) two practising attorneys designated by the attorneys' profession;
 - (g) one professor of law designated by the deans of the law faculties at South African universities;
 - [(h) four senators designated together by the second House by resolution adopted by at least two thirds of its members;]⁵⁴
 - (i) four persons, two of whom are practising attorneys or advocates, designated by the President; and,
 - (j) when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier of the province concerned.
- (2) The Judicial Service Commission has the powers and functions assigned to it

⁵⁴ **104(1)(h) and (k):Add qualifications so that vacancy would be filled by political party to which relevant Senator belonged; insert new subsection to allow for inclusion of 2 additional AG's on JSC when considering matters relating to AG's - both flagged for 1996.**

Transitional Clause: Flagged for 1996.

in the Constitution and national legislation.

- (3) The Judicial Service Commission may advise the national and provincial governments on any matters relating to the judiciary and the administration of justice, [but when it does so, it must sit without the four senators referred to in subsection (1)(h)].

- (4) The Commission may determine its own procedure; but, decisions of the Commission must be taken by a majority of its members.

Other matters concerning courts⁵⁵

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

⁵⁵ The following provision will be included in the transitional provisions: "The terms of all but the five oldest Constitutional Court judges in office when the Constitution takes effect are extended for four years."

The issue of the appointment, structure and functions of the prosecutorial authority, or Attorney(s)-General, is still under discussion, including the question whether or not this office should be constitutionalised.

CHAPTER 7

STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Establishment and governing principles

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

PUBLIC PROTECTOR

Functions of Public Protector

107.(1)The Public Protector has the following powers, as regulated by national legislation -

- (a) to investigate any conduct in state affairs or the public administration at any level of government that is alleged or suspected to be improper or to result in any impropriety or prejudice;
 - (b) to report on that conduct; and
 - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.
- (3) The Public Protector may not investigate court decisions.
- (4) The Public Protector must be accessible to all persons and communities.
- (5) Any report issued by the Public Protector must be open to the public, unless exceptional circumstances to be prescribed by national legislation require that a report be kept confidential.

Tenure

108. The Public Protector is appointed for a period of seven years.⁵⁶

HUMAN RIGHTS COMMISSION

Functions of Human Rights Commission

109. (1) The Human Rights Commission must promote -

- (a) respect for human rights;
- (b) the development, protection and attainment of human rights; and
- (c) the development of a culture of human rights in the Republic.

(2) The Human Rights Commission has the power, as regulated by national

⁵⁶ **Tenure of Public Protector: Is term renewable - flagged for 1996.**

legislation, necessary to perform its functions, including the power to monitor, to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research, and to educate.

- (3) The Human Rights Commission has the additional powers and functions prescribed by national legislation.

[Functions of Human Rights Commission

109. (1) The Human Rights Commission must -⁵⁷

- (a) promote respect for human rights and the development of a culture of human rights in the Republic;
 - (b) promote the development, protection and attainment of human rights; and
 - (c) monitor the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research and to educate.
 - (3) The Human Rights Commission must require information from the relevant organs of state, annually, on the measures taken to secure the rights to housing, land, food, water, social security and education.
 - (4) In its annual report to Parliament the Human Rights Commission must include its assessment of the observance of human rights in the Republic.
 - (5) The Human Rights Commission has the additional powers and functions prescribed by national legislation.]

⁵⁷ **Alternative formulation of Section 109 proposed by Technical Refinement Team, for discussion, to strengthen the enforcement of socio-economic rights. See memorandum attached.**

COMMISSION FOR GENDER EQUALITY

Functions of Commission for Gender Equality⁵⁸

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

AUDITOR GENERAL

Functions of Auditor-General

111. (1) The Auditor-General must audit and report on -
 - (a) the accounts and financial statements of all national and provincial state departments and administrations;
 - (b) the accounts and financial statements of all local governments; and
 - (c) any other accounts and financial statements that are required by national legislation to be audited by the Auditor-General.
- (2) The Auditor-General may also audit and report on the accounts and financial statements of any institution funded from public money, as may be regulated by legislation.⁵⁹

⁵⁸ Commission of Gender Equality: NP reserved right to return to name of structure - wants to incorporate notion of development - flagged for 1996.

⁵⁹ Auditor General: Subject to ongoing discussions, and consultation with AG in January 1996.

- (3) The Auditor-General must submit audit reports to every legislature and other authority that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Tenure

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

ELECTORAL COMMISSION

Functions of Electoral Commission⁶⁰

113. (1) The Electoral Commission must manage [in accordance with national legislation] elections of national, provincial and local legislative bodies and ensure that they are free and fair.
- (2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

Composition of Electoral Commission

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

GENERAL PROVISIONS

Appointments

115. (1) The Public Protector and members of any Commission established by this Chapter must be women or men who are South African citizens, are fit and proper persons to hold the particular office, and who comply with any other requirements prescribed by national legislation.
- (2) The Auditor-General must be a woman or a man who is a South African citizen, is a fit and proper person to hold that office, and who does not hold

⁶⁰ Words in brackets are inserted in order to provide for "delegation" of functions, where necessary.

office in any political party or organisation. Specialised knowledge of, or experience in, auditing, state finances, and public administration must be given due regard in appointing the Auditor-General.

- (3) Any appointment under this Chapter must be made by the President acting on the recommendation of Parliament.
- (4) Parliament must recommend a person -
 - (a) nominated by a committee of Parliament in terms of the rules and orders; and
 - (b) approved by Parliament by a resolution adopted by at least two thirds of the members.

Removal from office

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

CHAPTER 8 PROVINCES

Provinces⁶¹

117. (1) The Republic has the following provinces:

- (a) Eastern Cape
- (b) Free state
- (c) Gauteng
- (d) KwaZulu-Natal
- (e) Mpumalanga
- (f) Northern Cape
- (g) Northern Province
- (h) North-West Province
- (i) Western Cape.

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

⁶¹ The possibility of including constitutional provisions for the right to selfdetermination, in terms of Constitutional Principle XXXIV, of any community sharing a common cultural and language heritage is still being discussed.

Earlier CC discussions on report from Volkstaat Council - ANC said that there must be significant support for a Volkstaat before the matter is considered by the CA. How is CC going to deal with the VSC report? In later discussion, was agreed that open-ended approach should be used and noted proposal of Ad Hoc Committee that retention of CP 34 might serve as interim measure should deadline be reached before there is agreement. Also noted the NP and FF proposals that the principle of cultural selfdetermination at least be accepted and provided for in Constitution, details of which subject to further negotiation.

Provincial Boundaries: Issue raised in CC on 15/9. ANC said provisions were needed to deal with these boundaries and disputes - Chair flagged issue for later discussion.

Application of this Chapter

118.

Option 1

The provisions of this Chapter apply to all provinces except to the extent that they are modified by a provincial constitution adopted and certified in terms of this Constitution.

Option 2

No provision.

[This Chapter might include a provision along the following lines:

Provincial homogeneity

- (1) Provinces are integral parts of the Republic and inseparable from the Republic which is one sovereign state.
- (2) Provincial governments must promote national unity and must pursue peace in their provinces. They must commit themselves to the well-being of all the people of the province, and co-operate in a spirit of ubuntu to reconstruct and develop their provinces.
- (3) Provinces are founded on respect for and the observation of human rights. They must promote the achievement of equality between men and women and people of all races.
- (4) Provinces must comply with the principles of constitutional democracy and the rule of law within the meaning of the Constitution to preserve homogeneity among the provinces.
- (5) In each province the people must be represented by a body elected by general, free, equal and secret ballot.

- (6) The provisions of the Constitution with regard to majority government, multi-party democracy, regular elections, the franchise, a common voters' roll, proportional or other representation, and the participation of minority parties in the legislative process in a manner consistent with democracy, apply to all provinces equally and undiminished.
- (7) Provinces must adhere to the separation of powers between the legislature and the executive in the province, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- (8) Provinces must maintain relations of good neighbourliness with all levels of government of the Republic. They must co-operate with, assist and support the national, other provincial and the local levels of the state.]

PROVINCIAL LEGISLATURES

Legislative authority of provinces

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

Composition and election of provincial legislatures

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

Membership

121. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except -⁶²

⁶² Amendments made to correspond with Chapter 3.

- (a) anyone [who is appointed by or is in the service of the state and receives remuneration], other than the Premier and other members of the Executive Council of a province, and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of a provincial legislature;
 - (b) members of the National Assembly, [the second House] or a local government;
 - (c) unrehabilitated insolvents;
 - (d) anyone declared to be of unsound mind by a court of the Republic; or
 - (e) anyone who, after this section takes effect, has been convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.
- (2) A person loses membership of a provincial legislature if that person -
- (a) ceases to be eligible; or
 - (b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership.
- (3) Vacancies must be filled in terms of national legislation.

Vacancies

122. ...

Oath or affirmation by members

123. Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm by solemn declaration their faithfulness to the

Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Sittings and recess periods

- 124.** (1) The first sitting of a provincial legislature after an election must take place at a time and on a date determined by a judge designated by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.
- (2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct urgent business.
- (3) A provincial legislature may determine where it ordinarily will sit.

Elections and duration of provincial legislatures

- 125.** (1) A provincial legislature is elected for a term of five years.
- (2) A provincial legislature may be dissolved before the end of its term if it passes a vote of no confidence in the Executive Council.
- (3) When a provincial legislature is dissolved, or its term expires, the President/Premier of the province, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved, or its term expired.
- (4) A provincial legislature remains competent to function from the time it is dissolved or its term expires until the day before the first day of polling for the next provincial legislature.

Speakers

- 126.** (1) At the first sitting after its election, and when necessary to fill a vacancy, a provincial legislature must elect a Speaker from among its members.
- (2) A judge designated by the President of the Constitutional Court must preside

over the election of a Speaker.

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

Decisions

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

Internal autonomy

- 128.** (1) A provincial legislature may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.
- (2) A committee of a provincial legislature may summon anyone to appear before it to give evidence under oath or affirmation or to produce documents.

Privileges and immunities of members

- 129.** (1) Members of a provincial legislature have freedom of speech and debate in the provincial legislature and in its committees, subject to its rules and orders.
- (2) Members of provincial legislatures are not liable to civil or criminal

proceedings, arrest, imprisonment or damages for -

- (a) anything they have said in, produced before, or submitted to their provincial legislature or any of its committees; or
 - (b) anything revealed as a result of anything that they have said, produced or submitted.
- (3) Other privileges and immunities of members of the provincial legislatures may be prescribed by legislation.

Assent to Bills

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

Promulgation

- 131.** (1) A Bill assented to and signed by the Premier of a province must be

promulgated and becomes an Act of the province upon its promulgation.

- (2) Provincial Acts must be published in the national Government Gazette.

Safekeeping of Provincial Acts

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

PROVINCIAL EXECUTIVES

Executive authority of provinces

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

Powers and functions of Premiers

134. (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.
- (2) The Premier must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Executive Council, except where -
 - (a) the Executive Council has determined that the Premier may act in consultation with a member or a committee of members; or
 - (b) the Constitution states or implies that the Premier may act alone.
- (3) The Premier may act alone when -
 - (a) appointing and dismissing Executive Council members and assigning

- powers and functions to them;
 - (b) convening Executive Council meetings;
 - (c) assenting to and signing Bills;
 - (d) referring a Bill to the legislature for reconsideration of the Bill's constitutionality;
 - (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
 - (f) summoning the provincial legislature to an extraordinary sitting to conduct urgent business; and
 - [(g) dissolving the provincial legislature and calling an election after a vote of no confidence in the Executive Council has been passed by the legislature.]
- (4) Decisions of the Premier in consultation with the other members or a member or committee of the Executive Council, must be in writing, signed by the Premier, and countersigned by another member.

Election of Premiers

- 135.** (1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be the Premier of the province.
- (2) A judge designated by the President of the Constitutional Court must preside over the election of the Premier. The procedure set out in Schedule 4 applies to the election of the Premier.
- (3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the President of the Constitutional Court, but not later than 30 days after the vacancy occurs.⁶³

Assumption of office by Premiers

- 136.** A Premier-elect assumes the office of Premier within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

⁶³ Changes made to match changes in Chapter 5.

Term of office of Premiers

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

Vacancies

138. ...

Acting Premiers

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

Executive Council

140. The Executive Council of a province consists of the Premier and no fewer than five

and no more than ten members appointed by the Premier.⁶⁴

Continuation of Executive Councils after elections

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

Oath or solemn affirmation

- 142.** Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Accountability of Members of Executive Councils

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

Conduct of members of Executive Councils

- 144.** (1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Executive Council of a province may not -
- (a) undertake any other paid work;
 - (b) act in any way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

⁶⁴ **Executive Council: NP proposal for multi-party provincial government - flagged for 1996.**

- (c) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

Temporary assignment of powers and functions

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

Transfer of powers and functions

146. The Premier by proclamation may transfer to a member of the Executive Council -

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

Votes of no confidence

- 147.** (1) If the provincial legislature passes a vote of no confidence in the Executive Council, the Premier must either resign or dissolve the legislature and call an election.
- (2) If the provincial legislature passes a vote of no confidence in the Premier alone, the Premier must resign.
- (3) If the provincial legislature passes a vote of no confidence in the Executive Council, excluding the Premier, the Premier must either resign or reconstitute the Council.
- (4) [A majority/two thirds] of the members of the legislature must be present when a vote of no confidence is passed.⁶⁵

PROVINCIAL FINANCIAL AND FISCAL MATTERS⁶⁶

Sources of provincial funding

⁶⁵ See note to 93(4).

⁶⁶ Provincial Financial and Fiscal Matters: Sections based on ANC/NP document.

148. A province -

- (a) is entitled to an equitable share of revenue collected nationally to enable it to provide services at affordable standards, and to exercise its powers and to perform its functions;
- (b) may receive other allocations from national revenue, either conditionally or unconditionally; and
- (c) may raise additional revenue from taxes and loans as provided in sections 150 and 151.

Allocations to provinces from national revenue

149. (1) National legislation must provide for the determination of -

- (a) the provinces' equitable share of revenue collected nationally; and
- (b) any other allocations to provinces from national revenue and the conditions on which those allocations may be made.

(2) Legislation referred to in subsection (1) may be enacted only after the provincial government has been consulted and any recommendations of the Financial and Fiscal Commission have been considered, and with due regard to -

- (a) the national interest;
- (b) any provisions that must be made in respect of the national debt;
- (c) the needs and interests of the national government based on objective criteria; and
- (d) the fiscal capacities, fiscal performances, efficiency of utilisation of revenue, needs and economic disparities within and among provinces, developmental needs, administrative responsibilities and other interests based on objective criteria.

(3) Additional revenue raised by provinces may not be deducted from their share of revenue collected nationally, or from other allocations made to them out of national revenue. Equally, there is no obligation on the national government to compensate provinces that do not raise revenue commensurate with their fiscal capacity and tax base.

- (4) A province's equitable share of revenue collected nationally must be transferred to the province expeditiously and without deduction except in the special circumstances provided for in section 188.

Provincial taxes

- 150. (1) Provincial legislatures may raise taxes, levies and duties, and surcharges on taxes, but may not raise -
 - (a) income tax, value-added tax or other sales tax, levies on the sale of fuel, customs and excise duties or any levies or surcharges on any taxes and duties collected nationally in terms of national legislation; or
 - (b) taxes, levies or surcharges that may detrimentally affect national economic policies, interprovincial commerce or the national mobility of goods, services, capital or labour.
- (2) The authority to raise taxes, levies, duties and surcharges must be regulated by national legislation which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

Provincial loans and guarantees

- 151. (1) A province may raise loans for capital expenditure within a framework of reasonable norms and conditions provided for in national legislation.
- (2) A province may raise loans for current expenditure only when necessary for bridging purposes during a fiscal year, and provided these loans are redeemed within 12 months and any reasonable conditions prescribed by national legislation are complied with.
- (3) National legislation referred to in subsections (1) and (2) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.
- (4) A province may not guarantee a loan unless the Financial and Fiscal

Commission has verified the need for, and recommended, the guarantee.

Allocations by national government

152. The allocation of revenue by the national government -

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

Provincial Revenue Funds

153. (1) There is a Provincial Revenue Fund for each province, into which all revenue, as determined by national legislation, allocated to, or raised or received by the provincial government, or allocated through it to a local government, must be paid.

- (2) No money may be withdrawn from a Provincial Revenue Fund except under appropriation made by legislation of the province concerned.

PROVINCIAL CONSTITUTIONS

Adoption and Certification

154. (1) A provincial legislature may adopt a constitution by resolution of at least two thirds of its members.

- (2) A provincial constitution must be consistent with the Constitution; but, provided that it does not deviate from the principles embodied in the Constitution, it may -

- (a) establish different legislative and executive structures and procedures; and
- (b) provide for the institution, role, authority and status of a traditional monarch in the province.

- (3) No provincial constitution and no amendment to a provincial constitution has force or effect unless the Constitutional Court has certified that all the provisions of the provincial constitution or of the amendment are consistent with this Constitution.

[A possible alternative formulation for section 154:

- (1) A provincial legislature may adopt a constitution by resolution of at least two thirds of its members.
- (2) A provincial constitution must embody the status and duties of a province according to this Constitution.
- (3) A provincial constitution must be consistent with this Constitution and the principles embodied in it, but a provincial constitution may -
 - (a) establish internal legislative and executive structures and procedures for the province different from those provided for in this Constitution, provided that -
 - (i) the provisions of the Constitution which preserve homogeneity among the provinces are not encroached upon:
 - [(ii) the second House consents to the advisability and necessity of the legislative and executive structures and procedures;] and
 - (iii) Parliament approves of the structures and procedures after apprising itself of their financial implications; and
 - (b) provide for the institution, role, authority and status of a traditional monarch according to indigenous law in the province.
- (4) No provincial constitution and no amendment to a provincial constitution has force or effect unless the Constitutional Court has certified that all the provisions of the provincial constitution or of the amendment are consistent with this Constitution.

- (5) The Republic must ensure that the exercise of powers under a provincial constitution conforms to the Constitution and the constitutional status and duties of provinces.]

CHAPTER 9
PROVINCIAL AND NATIONAL LEGISLATIVE
AND EXECUTIVE COMPETENCIES

Legislative authority of the Republic

155.

Option 1

The legislative authority of the Republic is vested in Parliament, which may make laws in terms of the Constitution on any matter, including matters falling within the functional areas listed in Schedule 5.

Option 2

- (1) The legislative authority of the Republic is vested in Parliament which may make laws in terms of the Constitution.

- (2) Parliament may make laws on matters which fall within a functional area listed in Schedule 5 only if such laws apply uniformly in all parts of the Republic and are necessary for -
 - (a) the establishment of essential national or minimum standards required for a service to be rendered; or
 - (b) the prevention of unreasonable action by a province which is materially and unjustifiably prejudicial to economic unity, or to the health, environmental or security interests of another province or the country as a whole.

Legislative authority of provinces

156. (1) The legislative authority of a province is vested in its provincial legislature which is competent to make laws in and for the province in terms of the Constitution.
- (2) A provincial legislature may make laws on any matter which falls within a functional area specified in Schedule 5.

Framework legislation

157.

Option 1

No provision for framework legislation.

Option 2

- (1) Subject to subsection (2), a provincial legislature may make laws for a province with regard to all matters which fall within the functional areas listed in Schedule 6.
- (2) With regard to the matters which fall within the functional areas listed in Schedule 6, Parliament may enact only framework legislation which sets out justifiable and necessary principles and which is generally applicable in all the provinces.

Option 3

Implemented by way of an override power (see section 159 option 3 subsection (1) (f)).

Necessary ancillary powers

158. The legislative competence of Parliament and provincial legislatures includes the competence to make laws which are reasonably necessary for, or incidental to, the effective exercise of such competence.

Conflict of legislation

159.

Option 1

- (1) In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act where the elements of the Act of Parliament that are in conflict with the Provincial Act are necessary for -
 - (a) the establishment of generally applicable standards regarding -

- (i) services rendered by the state;
 - (ii) the maintenance of economic unity; or
 - (iii) the determination of national economic policies; or
 - (b) the maintenance of the security of the Republic; or
 - (c) the prevention of prejudice to the Republic or any province caused by the activities of a province.
- (2) A national Bill concerning a matter which falls within a functional area listed in Schedule 5 must be introduced in the second House and requires the approval of both Houses. Upon application by at least one fifth of the members of the second House, and prior to the promulgation of the Bill, the Constitutional Court must determine whether it conforms with the objective criteria prescribed in subsection (1).
- (3) If a dispute concerning a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area specified in Schedule 5 cannot be resolved by a competent court on a construction of the Constitution, the Act of Parliament prevails.

Option 2 (applicable if section 155 option 2 is chosen)

In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act only to the extent that the Act of Parliament complies with section 155.

Option 3

- (1) In the event of a conflict between an Act of Parliament and a Provincial Act with regard to any matter which falls within a functional area listed in Schedule 5, the Act of Parliament prevails over the Provincial Act where the provisions of the Act of Parliament are necessary for -
- (a) a function in respect of which uniformity across the nation is desirable;
 - (b) the Republic to speak with one voice or to act as a single entity, in particular in relation to other states;
 - (c) the maintenance of essential national standards required for the

rendering of services, the maintenance of economic unity, the protection of the environment, the maintenance of national security, or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole;

- (d) the implementation of national economic policies or the promotion of equal living conditions, the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour;
 - (e) the provision of equality of opportunity in or access to a government service; or
 - (f) the establishment of a national framework for the provision of public services or the management of institutions relating to the provision of services.
- (2) Where a Provincial Act deals specifically with matters other than those referred to in subsection (1) (a) to (f) it prevails over national legislation.
- (3) In the event of a dispute concerning legislative competencies on any matter which falls within the functional areas listed in Schedule 5 -
- (a) legislation is deemed to be necessary in terms of the requirements set out in subsection (1) if it has been consented to by the second House;
 - (b) subject to paragraph (a), the Constitutional Court or another court with jurisdiction may decide whether an Act of Parliament meets the requirements set out in subsection (1); and
 - (c) if the dispute cannot be resolved by a court on a construction of the Constitution, the national legislation prevails.

Option 4

- (1) A Provincial Act prevails over an Act of Parliament which deals with a matter allocated to the provinces, except to the extent that -
- (a) the Act of Parliament deals with a matter that cannot be regulated

- effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that must be regulated or coordinated by uniform management or administrative norms or standards generally applicable throughout the Republic for that matter to be dealt with effectively;
 - (c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services;
 - (d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
 - (e) the Provincial Act materially prejudices the economic, health or security interests of another province or the Republic.
- (2) An Act of Parliament prevails over a Provincial Act under subsection (1) only if the Act of Parliament applies uniformly in all parts of the Republic.
- (3) An Act of Parliament and a Provincial Act must be construed as being consistent with each other, unless, and only to the extent that they are, expressly or by necessary implication, inconsistent with each other.
- (4) If a dispute concerning a conflict between an Act of Parliament and a Provincial Act cannot be resolved by the Constitutional Court on a construction of the Constitution, the Act of Parliament prevails.
- (5) This section must be construed in terms of the principle that a power must be allocated to the level of government at which it can be exercised most effectively.

Integrity of provinces

160. Parliament may not encroach on, or cause, enable or allow any encroachment on, the geographical, functional or institutional integrity of a province.

National executive authority and the provinces

161. With the agreement of a provincial executive or a local government, the national executive may -

- (a) appoint that provincial executive or local government as its agent to perform any of the functions of the national executive; or
- (b) delegate to that provincial executive or local government the authority to perform any of the functions of the national executive.

Executive authority of provinces

162. (1) A province has executive authority over -

- (a) all matters in respect of which the provincial legislature has passed legislation [legislative competence]; and
- (b) matters entrusted to the provincial executive in accordance with the Constitution.

(2) With the agreement of the national executive or a local government within the province, a provincial executive may -

- (a) appoint the national executive or that local government as its agent to perform any of the functions of the provincial executive; or
- (b) delegate to the national executive or that local government the authority to perform any of the functions of the provincial executive.

CHAPTER 10

LOCAL GOVERNMENT

Government at local level

163. Government at local level must be established as a distinct tier of government to:

- (a) enhance democracy and development;
- (b) empower civil society to participate in local self-governance;
- (c) improve service delivery to all communities;
- (d) enhance social and economic development, economic viability, sustainability and self supportiveness;
- (e) enhance partnership among the different tiers of government, and among the different categories of local government, civil society and international local government institutions; and
- (f) ensure accountability, responsiveness and openness.

Establishment of local government

- 164.** (1) The structures, powers and functions of government at the local level must be provided for in national or provincial legislation or in both in accordance with the framework provided by this Chapter.
- (2) Local government structures must be established for the whole territory of the Republic and the legislation referred to in subsection (1) must provide for the demarcation of the areas of jurisdiction of local governments.
- (3) A law referred to in subsection (1) may provide for different categories of local government with different powers, functions and structures.

General powers and functions of local government

- 165.** (1) A local government must have legislative and executive powers.
- (2) A local government may make by-laws provided that they are not inconsistent with national or provincial legislation.

- (3) A local government has executive authority over all matters in respect of which it has exercised its legislative competence, and matters assigned or delegated to it by national or provincial legislation, to allow it to function effectively.
- (4) A local government must provide services for the maintenance and promotion of the well-being and good government of all persons residing within its area of jurisdiction, provided that the services can be rendered in a sustainable manner and are financially and physically practicable. It must also promote local economic development within a safe and healthy environment.
- (5) A local government's competence to form and belong to associations for the protection and promotion of mutual interest and to co-operate with other local governments in this regard, is recognised.

Administration and finance

- 166.** (1) Legislation referred to in section 164 must contain provisions aimed at ensuring that local government administration is based on sound principles of public administration, good governance, transparency and public accountability.
- (2) An enforceable code of conduct for councillors and officials of local governments may be provided for by legislation.⁶⁷
 - (3) Subject to conditions prescribed by legislation after taking into consideration any recommendations of the Financial and Fiscal Commission, a local government may levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions.

⁶⁷ An enforceable code of conduct for councillors and officials of local government may be provided for by legislation.

- (4) A local government may be entitled by legislation to a specifically allocated portion of national and provincial revenue, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement and allocations, taking into account the different categories of local government.
- (5) Any transfer of responsibilities to local government by another level of government, must be accompanied by an allocation of the financial and other resources required for their fulfilment.
- (6) All financial arrangements within a local government must be conducted by way of publicised budgets which must be constructed in accordance with the relevant legislation of a competent legislature.
- (7) Operational budgets must balance in that expenditure and income must be projected to be equal or to show a surplus of income over expenditure, and such balance must be maintained in the local government's financial dealings on the operating account in accordance with the legislation mentioned in subsection (6).
- (8) Local government is entitled to be represented on the Financial and Fiscal Commission.

Elections

- 167.**
- (1) A local government must be elected democratically, and elections must take place in terms of applicable legislation.
 - (2) Elections for local government must take place at intervals of not more than five years.
 - (3) Members of a local government must be elected in accordance with a system of proportional representation, or ward representation, or both proportional and ward representation.
 - (4) Where a system of ward representation applies, independent candidates must not be discriminated against.

- (5) Every natural person is entitled to vote in an election of a local government if that person -
- (a) is qualified to vote in an election for the National Assembly;
 - (b) ordinarily resides in the area of that local government, or is liable for the payment of property rates, rent, service charges or levies to that local government in terms of any legislation; and
 - (c) is registered as a voter on the voters roll of that local government.
- (6) Subsection (5)(b) does not entitle a voter to more than one vote per local government.
- (7) No one is qualified to be a member of a local government if that person is -
- (a) not entitled to vote in terms of subsection (5);
 - (b) a member of any legislature at the national, provincial or local level, except for representing the local government in another legislature in terms of any legislation;
 - (c) not qualified to become a member of the national or a provincial legislature;
 - (d) an employee of a local government unless exempted by legislation; and
 - (e) disqualified in terms of any legislation on any other ground.

Legislative competencies, powers and functions

- 168.** The legislative competencies, powers and functions of local government or different categories of local government, must be prescribed by legislation referred to in section 164, and include local or service development of the following functional areas:

Cleansing

Community services

Economic development

Environmental protection

Elections
Electricity
Health
Housing
Library services
Licensing
Parks and recreation
Planning
Produce markets
Protection
Rates, tariffs and taxes
Roads
Sewage
Storm water
Traffic
Transport
Water

CHAPTER 11

TRADITIONAL AUTHORITIES

Recognition

- 169.** (1) The institution, status and role of traditional authorities, according to indigenous law, are recognised.
- (2) A traditional authority which observes a system of indigenous law and was recognised in terms of legislation immediately before the Constitution took effect, may continue to function subject to any applicable legislation and customs.
- (3) The courts must apply indigenous law when that law is applicable, subject to the Constitution and any relevant legislation.

Councils of traditional authorities

- 170.** National or provincial legislation may provide for the establishment of councils of traditional authorities to deal with matters of common interest.

CHAPTER 12

PUBLIC ADMINISTRATION

Basic values and principles governing public administration

171. (1) Public administration at all levels of government, including the administration of institutions that are dependent on government funds or other sources of public money, must be governed by the democratic values and principles enshrined in the Constitution, and the following principles apply:
- (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career - development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
- (2) The appointment in the public administration of a number of persons on policy considerations as regulated by national legislation is not precluded.⁶⁸
- (3) Legislation regulating the public administration may differentiate between

⁶⁸ Replacement of "administration" with "service" proposed by NP, still under consideration - flagged for 1996.

different sectors, administrations or institutions in the public administration.

Public Administration Commission

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

Public Service

- 173.** (1) Within the public administration there is a public service for the Republic, which must function, and be structured, in terms of [national] legislation, and which must loyally execute the lawful policies of the government of the day.
- (2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
- (3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.⁶⁹

⁶⁹ CC agreed to revisit clause - implications of "only" and interrelationship between political affiliation and work - concern raised by DP who want "only" deleted.

CHAPTER 13

SECURITY SERVICES

Governing principles

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

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

Establishment, structuring and conduct of security services

- 175.** (1) The security services of the Republic consist of a single defence force, a police service and any intelligence services established in terms of the Constitution.
- (2) The defence force is the only lawful military force in the Republic. Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.
- (3) The security services must be structured and regulated by national legislation.
- (4) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.
- (5) No member of any security force may obey a manifestly illegal order.

- (6) The security services must exercise their powers and perform their functions in the national interest; neither the security services nor any of their members may perform their functions in a manner that furthers, or prejudices, the interests of any political party.

DEFENCE

Defence force

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

Political responsibility

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

Command of defence force

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

Defence civilian secretariat

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

POLICE

Police service

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

Political responsibility and accountability

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

Control of police service

- 182.** (1) The President must appoint a woman or a man as National Commissioner of the police service, to control and manage the police service.⁷⁰
- (2) The National Commissioner must exercise control over and manage the police service in accordance with the directions of the Cabinet member responsible for policing.
- (3) The National Commissioner must appoint a woman or a man as provincial commissioner for each province, in accordance with national legislation.
- (4) The National Commissioner may direct the provincial commissioners, who are each responsible for policing in their province, as prescribed by national legislation.

⁷⁰

Control of Police Service NP reserved its position until competencies finalised.

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

Police civilian secretariat

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

INTELLIGENCE

Establishment and control of intelligence services

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

Powers, functions and monitoring

- 185.** National legislation must establish and regulate the objects, powers and functions of the intelligence services established in terms of section 184(1) and must provide for -
 - (a) a multi-party committee of Parliament to have oversight over the budgets of those services;
 - (b) civilian monitoring of the activities of those services by an inspector appointed by the President with the approval of the National Assembly by a resolution adopted by at least two thirds of its members; and
 - (c) co-ordination of all intelligence services, including any intelligence divisions of the defence force and the police service.

CHAPTER 14

FINANCE

GENERAL FINANCIAL MATTERS

National Revenue Fund

- 186.** (1) There is a National Revenue Fund into which all revenue, as determined by national legislation, raised or received by the national government, must be paid.
- (2) No money may be withdrawn from the National Revenue Fund except under appropriation made by Act of Parliament; but, a province's equitable share of revenue collected nationally is a direct charge against the National Revenue Fund to be credited [paid] to the Provincial Revenue Fund concerned.

National and provincial budgets

- 187.** (1) National legislation must prescribe the format of national and provincial budgets and the procedure which must be followed when drawing them up.
- (2) The national and provincial budgets must contain estimates of revenue and expenditure for the period to which they apply, including capital and current expenditure. The budgets must promote transparency, accountability and effective financial management of the public sector as a whole.

Treasury control

- 188.** (1) National legislation must -
- (a) prescribe effective measures to ensure transparency, uniform and generally accepted accounting practices and expenditure classifications, expenditure control, and uniform treasury norms and standards at all levels of government;
 - (b) establish a national treasury and prescribe the framework within which provincial treasuries must perform; and
 - (c) confer on the national treasury effective powers to stop the transfer of

funds to any organ of state in the event of serious or persistent maladministration.

- (2) Any action by the national treasury to stop the transfer of funds to a province must be ratified by Parliament within 30 days.

Contracts for goods and services⁷¹

189. (1) Organs of state must contract for goods and services in accordance with national legislation which provides for -

- (a) independent tender boards; and**
- (b) a fair, public and competitive tender system.**

(2) No person and no organ of state may interfere with a tender board.

(3) Decisions of a tender board must be recorded and open to public inspection.

[(4) A tender board must provide reasons for a decision if requested to do so by an interested party.]

Guarantees by national government

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

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

⁷¹ This section has been simplified. The new subsections (2), (3) and (4) are a reformulation of the existing subsections (3) and (4). Subsection (4) could be deleted because it is unnecessary in view of the provisions of section 32 on just administrative action.

Accountability of enterprises receiving public funds

191. Any enterprise may be required to report to or give evidence before Parliament, as determined by national legislation, if public money is invested in it, its sources of revenue are regulated by legislation, or it is able to raise revenue in terms of any legislation.⁷²

Remuneration of persons holding public office

- 192.** (1) Any salaries, allowances and benefits of holders of any of the following offices must be as determined in terms of national legislation:
- (a) Members of Parliament and the Cabinet, and Deputy Ministers.
 - (b) Members of provincial legislatures and Executive Councils.
 - (c) Members of local governments.
 - (d) Judges.
 - (e) The Public Protector, Auditor-General and members of any Commission established by Chapter 7.
 - (f) Traditional authorities and members of any councils of traditional leaders.
- (2) National legislation must provide for the establishment of a Commission on Remuneration.
- (3) The Commission may make recommendations -
- (a) to Parliament on any legislation referred to in subsection (1); and
 - (b) to the national and provincial executives, local governments and any other authorities on the implementation of that legislation.

⁷² This section may not be necessary in view of the NA provisions. It seems to limit the powers of Parliament in Section 50(2).

NP concern about implications for universities - flagged for 1996.

Persons holding more than one office⁷³

- 193.** (1) No one may hold more than one office of profit under the Republic.
- (2) Anyone holding an office under the Republic which does not involve the payment to that person of remuneration for services rendered, is not regarded as holding an office of profit under the Republic.

FINANCIAL AND FISCAL COMMISSION

Establishment

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

Functions

- 195.** (1) The Commission may give advice and make recommendations to Parliament, provincial legislatures and any other authorities determined by national legislation regarding the financial and fiscal requirements of the national, provincial and local governments, including -
- (a) financial and fiscal policies;
 - (b) criteria for the allocation of financial and fiscal resources;
 - (c) equitable allocations to national, provincial and local governments from revenue collected at national level;
 - (d) any taxes, levies, imposts, and surcharges that a provincial government intends to levy;
 - (e) the raising of loans by a provincial or local government and the norms and conditions that apply to those loans; and

⁷³

The attempt to find a clearer alternative for the phrase "office of profit" in this section proved to be difficult because of uncertainty about the mischief aimed at. Is it intended for example to prohibit a person employed half-time by one state institution from being contracted to do paid work for another state department for the remaining time, a person employed by the state or a parastatal from earning additional money by consulting outside office hours, or a person employed full time by a state institution from receiving an additional full salary from another state institution? Some debate around this issue will help the drafting process.

- (f) any other matter assigned to the Commission by the Constitution or national legislation.
- (2) In performing its functions, the Commission must consider all relevant information including the national interest, economic disparities between the provinces, and their population and development needs, administrative responsibilities and other legitimate interests.

Appointment, qualifications, tenure and dismissal of members

196. ...⁷⁴

Reports

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

CENTRAL BANK

Establishment

- 198.** There is a South African Reserve Bank which is the central bank of the Republic, and is regulated by national legislation.

Primary object⁷⁵

- 199.** (1) The primary object of the South African Reserve Bank is to protect the value of the currency of the Republic in the interests of balanced and sustainable economic growth in the Republic.
- (2) The South African Reserve Bank, in the pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, subject to national legislation; but, there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

⁷⁴ **This matter is still under discussion.**

⁷⁵ **Reserve Bank: Issue of primary object - flagged for 1996.**

Powers and functions

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

CHAPTER 15 GENERAL PROVISIONS

International agreements⁷⁶

- 201.** (1) The Republic may be bound by international agreements which require ratification or accession under international law only if Parliament agrees by resolution in both the National Assembly and [the second House]. In both the National Assembly and [the second House], a majority of the members must be present for the resolution to be passed.
- (2) An international agreement to which the Republic becomes a party and which does not require ratification or accession under international law must be tabled in the National Assembly and [the second House] within a reasonable time; but, an Act of Parliament may provide that an agreement that is published in the national Government Gazette need not be tabled.
- (3) An international agreement becomes law in the Republic when it is enacted as law in terms of an Act of Parliament and published in the national Government Gazette.

Customary international law

- 202.** Customary international law forms part of the law of the Republic except when it is inconsistent with the Constitution or an Act of Parliament.

⁷⁶ **International Agreements: DP raised issue of whether national government could use this to the detriment of powers of government at provincial and local level and proposed addition of a qualification - flagged for 1996.**

Application of international law

- 203.** Every court must presume that the law is consistent with customary international law and the Republic's obligations under any international agreement unless it is established that it is not.