

DRAFT FRAMEWORK AND ORGANISATION OF THE NEW CONSTITUTION

Explanatory Memorandum

- 1 The suggested organisation and framework, of the new constitution, be designed to highlight the following:-
 - a) South Africa is a constitutional democracy;
 - b) There are three distinct levels of government;
 - c) There is a distinct separation of powers;
 - d) There are fundamental human rights;
 - e) There are independent institutions to protect public interests.
- 2 It is recommended that the following be also considered:-
 - a) That the provision defining provincial territories immediately follow the definition of the national territory in **Chapter 1** dealing with the **Formal Provisions**.
 - b) The provision permitting amendments to the constitution should immediately follow the provision dealing with the supremacy of the constitution in a separate chapter entitled **"Constitutional Democracy"**.
 - c) A separate **chapter (8)** entitled **"National and Provincial Legislative Competencies"** should deal with all provisions related to legislative authority. Consequently, those provisions previously placed under the title of National Assembly and dealing with the various types of bills have also be placed in this new chapter.
 - d) Different chapters should deal with legislative and executive powers.
 - e) All independent institutions be placed in one chapter.
 - f) There should be a separate chapter dealing with finance matters.
 - g) The following are the suggested Chapters:-

PREAMBLE	
CHAPTER 1	FORMAL PROVISIONS
CHAPTER 2	CONSTITUTIONAL DEMOCRACY
CHAPTER 3	FUNDAMENTAL HUMAN RIGHTS
CHAPTER 4	NATIONAL REPRESENTATIVES
CHAPTER 5	THE NATIONAL EXECUTIVE
CHAPTER 6	PROVINCIAL REPRESENTATIVES
CHAPTER 7	PROVINCIAL EXECUTIVE
CHAPTER 8	NAT. & PROV. LEGISLATIVE COMPETENCIES
CHAPTER 9	LOCAL GOVERNMENT
CHAPTER 10	COURTS AND THE ADMINISTRATION OF JUSTICE
CHAPTER 11	SECURITY SERVICES
CHAPTER 12	FINANCE
CHAPTER 13	PUBLIC ADMINISTRATION
CHAPTER 14	INSTITUTIONS TO PROTECT PUBLIC INTERESTS
SCHEDULES	

**WORKING DRAFT
- CONSTITUTION OF THE REPUBLIC OF
SOUTH AFRICA -**

PREAMBLE

CHAPTER 1 - FORMAL PROVISIONS

Republic of South Africa

1. (1) The Republic of South Africa shall be one, sovereign state.

(2) The national territory of the Republic comprises the areas of the provinces of -

(a) ...

Establishment of Provinces

2. The following provinces are hereby established, and they shall, for the purposes of this Constitution, be recognised as the provinces of the Republic:

(a) ...

(b) ...

Provided that Parliament shall at the request of a provincial legislature alter the name of a province in accordance with the request of such legislature.

Provincial Boundaries

3. The areas and boundaries of the respective provinces shall be as defined in the Constitution of the Republic of South Africa, 1993 (Act No. 200, 1993).

Seats of Authority

4. ...

National Symbols

5. ...

Languages

6. ...

CHAPTER 2 - CONSTITUTIONAL DEMOCRACY

Citizenship and Franchise

7. ...

Supremacy of this Constitution

8. ...

Amendment of this Constitution

9. Parliament may by law repeal or amend any provision of this Constitution. Any such repeal or amendment shall require the approval of at least two-thirds of the total number of members of the National Assembly provided for in this Constitution.

Should this section not be subject to repeal or amendment, the words "except this section" must be inserted at the end of the sentence.

The NP proposes the entrenchment of the Constitution at four levels:

(i) absolute entrenchment of the commitment to a democratic form of state and democratic mechanisms; (ii) general entrenchment of the constitution by requiring a two-thirds majority for all other provisions; (iii) specific entrenchment of provincial matters by retaining section 62(2) of the interim Constitution; and (iv) 'judicial entrenchment' of the most basic fundamentals of a democratic state, articulated in a schedule to the Constitution, by requiring that the Constitutional Court certifies that any amendment is in accordance with these fundamental principles.

When considering this issue the CC should take cognisance of Constitutional Principle XVIII(4)

CHAPTER 3 - FUNDAMENTAL HUMAN RIGHTS

CHAPTER 4 - NATIONAL REPRESENTATIVES

Parliament

Constitution of Parliament

10. Parliament consists of the National Assembly and

Depending on what is agreed about the Senate, some of the provisions on the National Assembly may have to be rephrased and relocated to a joint section on the NA and the Senate.

THE NATIONAL ASSEMBLY

Composition of National Assembly

11. The National Assembly consists of ... members.

The size of the National Assembly is contentious.

National elections

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

The majority of parties and public submissions favour a system which includes party lists and constituency elections resulting in proportional representation.

Duration of National Assembly

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

The DP proposes a term of four years

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

In terms of section 20 of the Draft on the National Executive the State President may either resign or dissolve the NA if a motion of no confidence is passed in the Cabinet (including the President). See also section 6(3)(b) of the Draft on the National Executive.

The DP proposed that the words underlined be inserted in subsection (1) and that subsection (2) be deleted. The ANC posed the question of snap elections and whether provision should be made for the dissolution of Parliament otherwise than as a result of a motion of no confidence.

In the CC Subcommittee it was observed that the question whether subsection (2) should be retained, is contingent upon the provisions pertaining to votes of no-confidence (dealt with under the National Executive, section 20). It was decided by the CC Subcommittee that the inclusion of this provision should be reconsidered once finality has been reached on the dissolution of Parliament.

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

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

Speaker and Deputy Speaker

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

(2) The Chief Justice or a judge designated by him or her shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

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

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

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

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

Qualifications of members of National Assembly

15. (1) Only South African citizens qualified to vote in elections of the National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

Franchise

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

(a) Unrehabilitated insolvents.

(b) Persons declared to be of unsound mind by the courts of the Republic.

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

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

(e) Persons who are members of [the Senate], a provincial legislature or a local government.

(f) Persons holding office of profit under the Republic, excluding-

(i) the Deputy State President;

(ii) Ministers and Deputy Ministers; and

(iii) any other office declared by national law not to be incompatible with the functions and duties of members of Parliament.

(3) The disqualification imposed by this section on a person who served a prison sentence of more than 12 months shall lapse 5 years after completion of the sentence.

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

Vacation of seats

16. A member of the National Assembly shall vacate his or her seat upon - (a) ceasing to be eligible to be a member;
(b) resigning as a member;
(c) becoming a member of [the Senate] a provincial legislature or a local government; or
[(d) unauthorised absence for 15 consecutive parliamentary sitting days.]

The CC approved paragraphs (a), (b) and (c) and inserted paragraph (d). It was pointed out in the CC Subcommittee that it was not agreed by the CC to insert subparagraph (d), and it is accordingly recommended that it be deleted. At the CC Subcommittee it was further pointed out that the termination of membership through the rules and orders of Parliament may be constitutionally unsound. If Parliament should have the power to terminate membership, it should be provided for in the Constitution, the details being regulated in the rules and orders of Parliament. The issue of including in the new Constitution the current requirement in section 43(b) of the Interim Constitution that a member vacates his or her seat upon ceasing to be a member of the party which nominated him or her, was referred to the CC Subcommittee. The CC Subcommittee is of the opinion that this question should be referred to the CA.

Filling of vacancies

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

Oaths or affirmation by members

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

(2) A member filling a casual vacancy in the National Assembly shall make and sign the oath or solemn affirmation before the Speaker.

Sittings and recess periods

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

(2) The State President may at any time summon the National

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

The National Party is in favour of a clause along the following lines: "At the written request of ...% of its members, the Speaker shall convene a sitting of the National Assembly during a recess." The CC decided that this provision should be shelved until states of emergencies are discussed.

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

Decisions

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

Section 13 approved by the CC. Constitutional amendments, and the majorities required, are yet to be dealt with.

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

Note: The provisions following below will apply to both the National Assembly and the Senate should agreement be reached on a second House of Parliament.

State President's rights in National Assembly

21. The State President is entitled to attend and to speak in the National Assembly, but may not vote.

Internal autonomy

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

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

Parliamentary privilege

23. (1) Members of the National Assembly shall have freedom of speech and debate in the National Assembly and its committees subject to the rules and orders. This freedom may not be

limited by or questioned in the courts.

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

(3) Other privileges, immunities and powers of Parliament shall be as prescribed by a national law.

Assent to Bills

24. (1) A Bill duly passed by Parliament in accordance with the Constitution shall without delay be assented to and signed by the State President.

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

The CC subcommittee agreed that the above formulation contained the principle agreed to but that it required reformulation. The issue should be revisited following debate in the CC.

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

Safe keeping of and public access to Acts of Parliament

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

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

The Senate

CHAPTER 5 - THE NATIONAL EXECUTIVE

Executive power

26. The executive power of the Republic as provided in the Constitution is vested in the national government consisting of the State President and other members of the Cabinet.

The State President

Head of State and National Executive

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

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

Election of State President

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

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

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

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

Assumption of office

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

Term and vacation of office and filling of casual vacancies

30. (1) The State President shall be elected for a term of office commencing when he or she assumes office and ending when the person elected as the State President after the next election of the National Assembly assumes office.

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

It is thus submitted that the most practical way would be to limit the tenure of office by reference to a set number of years.

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

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

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

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

Powers and functions

31. (1) The State President has the powers and functions entrusted to him or her by the Constitution and the laws of the Republic.

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

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

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

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

(c) to assent to and sign Bills passed by Parliament;

(d) to refer a Bill passed by Parliament back to Parliament for reconsideration or to the Constitutional Court for a ruling on its constitutionality;

(e) to confer honours;

(f) to appoint, receive and recognise diplomatic representatives;

(g) to negotiate and sign international agreements, and to delegate such power;

It is advisable for practical reasons that provision also be made for the delegation of the power to negotiate and sign international agreements. See for instance sec. 231 of the Interim Constitution. The CC Subcommittee agreed that a decision would be held in abeyance until the reports from TC 1 and 5 had been tabled in this regard.

(h) to appoint and dismiss Ministers and Deputy Ministers;

- (j) to convene Cabinet meetings; and
- (k) to appoint commissions of enquiry.

Confirmation of executive acts of State President

32. (1) Decisions of the State President taken in the discharge of his or her powers and functions shall be in writing under his or her signature.

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

Remuneration

33. (1) The salary, allowances and benefits of the State President shall be determined by Parliament.

Deputy State President(s)/Prime Minister

34. ...

The question whether there should be a Deputy President or a Prime Minister or more than one Deputy Presidents is in contention. Further clarity is needed before any provisions can be drafted.

Acting State President

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

(a) The Deputy State President.

(b) If the Deputy State President is not available or if the office of Deputy State President is vacant, a Minister of the Cabinet designated by the State President.

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

(d) If the designation of a Minister by the other members of the Cabinet is not possible, the [Speaker?].

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

Removal of State President or Deputy State President

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

powers and functions.

The Technical Advisors suggest the following formulation:Section 11(2) A person who has been removed from the office of State President in terms of subsection (1), shall not be entitled to any benefits or pension from that office, or to be elected to any public office / the National Assembly.

Cabinet

37. (1) The Cabinet consists of the State President, the Deputy State President and the Ministers.

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

Appointment and dismissal of Ministers and Deputy Ministers

38.

There are two approaches; one basically in line with sections 88(2) to (6) and 94 of the Interim Constitution, the other more or less as follows: "(1) The State President shall appoint the Ministers of the Cabinet from amongst the members of the National Assembly* to administer the various portfolios for which the national government is responsible. (2) The State President may appoint Deputy Ministers from amongst the members of the National Assembly* to assist in the administration of portfolios for which the national government is responsible. (3) A Minister and a Deputy Minister hold office for as long as it pleases the State President, but shall vacate office if he or she resigns from office or ceases to be a member of the National Assembly.*"
--

Oath or solemn affirmation

39. A person appointed as a Minister or Deputy Minister shall before assuming office make and sign an oath or solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her.

Accountability of Ministers and Cabinet

40. (1) Ministers are individually accountable both to the State President and the National Assembly for the administration of the portfolios entrusted to them, and all members of the Cabinet are collectively accountable to the National Assembly for the performance of the functions of the national government and its policies.

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

Conduct of Ministers and Deputy Ministers

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

The Technical Advisors report as follows: (a) The State President is prohibited by s 8(2) from holding "any other public office or perform any other paid work". This provision could be retained if an adequate definition can be given to the term "public office". "Public office" is best defined as any position which attracts public money, be it from the central, provincial or local government or any other statutory board or institution. In short, it is "an office of profit under the Republic". This definition repeats the prohibition against paid work which includes the receiving of remuneration from both public and private institutions. Ministers and Deputy Ministers will in any event be disqualified as MPs (and thus also as Ministers) should they hold an "office of profit under the Republic" (see s 7(2)(f) on NA). The holding of a public office (in the sense that it is a position created by statute in a state or semi-state institution) which does not normally attract any remuneration, such as the ceremonial position of chancellor of a university, should not be prohibited. It is thus suggested that any reference to the holding of a public office could be omitted.

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

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

Remuneration

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

Temporary assignment of Minister's powers and functions to another Minister

43. Whenever a Minister is absent or unable to exercise and

perform any of the powers and functions entrusted to him or her, or whenever the office of a Minister is vacant, the State President may appoint any other Minister to exercise or perform any or all of the first-mentioned Minister's powers and functions.

Transfer of Minister's powers and functions to another Minister

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

Votes of no confidence

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

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

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

CHAPTER 6 - PROVINCIAL REPRESENTATIVES

Provincial Legislatures and their authority

46. (1) There shall be a legislature for each province.

(2) The legislative authority of a province shall, subject to this Constitution, vest in the provincial legislature, which shall have the power to make laws for the province in accordance with this Constitution.

(3) Laws made by a provincial legislature shall, subject to any exceptions as may be provided for by an Act of Parliament, be applicable only within the territory of the province.

(4) A provincial legislature shall have such other powers and authority as may be conferred on it by this Constitution or any other law.

Legislative competence of provinces

47. ...

Composition of provincial legislatures

48. (1) A provincial legislature shall consist of not fewer than ... and not more than ... members elected in accordance with an electoral system which shall be based on a common voters' roll and, in general, proportional representation as provided for by national law.

(2) The number of seats in a provincial legislature shall be determined in accordance with ...

This depends on agreement on the electoral system.

(3) The members of a provincial legislature shall be elected from ...

This depends on agreement on the electoral system.

Duration and dissolution of provincial legislatures

49. (1) A provincial legislature, as constituted in terms of an election of such legislature under this Constitution, shall, subject to subsection (2), continue for five years as from the date of such election, at the expiry of which it shall be dissolved.

(2) If during the period referred to in subsection (1) a provincial legislature is dissolved in terms of section ... the provincial legislature as constituted therein, shall continue for the period up to the day immediately preceding the commencement of polling for the election of the provincial legislature held in pursuance of such dissolution.

(3) Notwithstanding any dissolution of a provincial legislature -

(a) every person who at the date of the dissolution is a member of the provincial legislature shall remain a member thereof;

(b) the provincial legislature shall remain competent to perform its functions; and

(c) the Premier of the province shall be competent to summon the provincial legislature by proclamation in the Provincial Gazette to an extraordinary sitting for the dispatch of urgent business, during the period for which the provincial legislature continues in terms of subsection (2) after the dissolution.

Elections

50. (1) If a provincial legislature is dissolved in terms of section ... the Premier of the province shall upon such dissolution, by proclamation in the Provincial Gazette call an election of such legislature, which election shall take place within 90 days after the dissolution of the legislature on a date or dates specified in the proclamation.

(2) An election referred to in subsection (1), shall be conducted in accordance with the ... Act, 19...

(3) An election contemplated in subsection (1) shall be held on...

Sittings and recess periods of provincial legislature

51. (1) The secretary of a provincial legislature shall convene such legislature within seven days after an election of such legislature.

(2) A provincial legislature shall sit during such periods and on such days and during such hours as it may determine: Provided that the Premier of a province may at any time by proclamation in the Provincial Gazette summon the provincial legislature to an extraordinary sitting for the dispatch of urgent business.

(3) A provincial legislature shall determine the duration of its recess periods.

(4) A provincial legislature shall determine the place where all sittings shall ordinarily take place, subject to such exceptions as it may make.

Speaker and Deputy Speaker of provincial legislature

52. (1) At its first sitting after it has been convened under section 8, and after the election of the Premier of the province, a provincial legislature with a judge of the High Court designated by the Chief Justice acting as the chairperson, shall elect one of its members to be the Speaker and shall thereafter elect another member to be the Deputy Speaker of such legislature.

(2) The Speaker shall be vested with all powers and functions assigned to him or her by this Constitution, an Act of a provincial legislature and the rules and orders.

(3) If the Speaker is absent or for any reason unable to exercise or perform the powers or functions vested in the office of the Speaker, or when the office of the Speaker is vacant, the Deputy Speaker shall act as Speaker during the Speaker's absence or inability or until a Speaker is elected.

(4) If any of the circumstances described in subsection (3) applies with reference to both the Speaker and the Deputy Speaker, a member of the National Assembly designated in terms of the rules and orders shall act as Speaker whilst the said circumstances prevail.

(5) The Deputy Speaker or the member designated under subsection (4), while acting as Speaker, may exercise the powers and shall perform the functions vested in the office of Speaker.

(6) The Speaker, the Deputy Speaker or any other member of a provincial legislature designated for that purpose in terms of the rules and orders, shall preside over sittings of a provincial legislature.

(7) While presiding at a sitting of a provincial legislature, the Speaker, Deputy Speaker or other member presiding shall not have a deliberative vote, but shall have and exercise a casting vote in the case of an equality of votes.

(8) The Speaker or Deputy Speaker shall vacate his or her office if he or she ceases to be a member of a provincial legislature, and may be removed from office by resolution of the provincial legislature, and may resign by lodging his or her resignation in writing with the Secretary to the provincial

legislature.

(9) If the office of Speaker or Deputy Speaker becomes vacant, the provincial legislature, under the chairpersonship of a judge designated by the Chief Justice shall elect a member to fill the vacancy: Provided that the Speaker shall, if the Deputy Speaker has to be elected, preside over such election.

Qualification for membership of provincial legislatures

53. (1) No person shall be qualified to become or remain a member of a provincial legislature unless he or she is qualified to become a member of the National Assembly.

(2) A member of a provincial legislature who is elected as the Premier or appointed as a member of the Executive Council of a province shall for the purposes of section ... be deemed not to hold an office of profit under the Republic.

(3) ...

Vacation of seats and filling of vacancies

54. (1) A member of a provincial legislature shall vacate his or her seat if he or she -

(a) ceases to be eligible to be a member of the provincial legislature in terms of section 10;

(b) ceases to be a member of the party which nominated him or her as a member of the provincial legislature;
a)

(c) resigns his or her seat by submitting his or her resignation in writing to the Secretary of the provincial legislature;

(d) absents himself or herself voluntarily from sittings of the provincial legislature for 30 consecutive sitting days, without having obtained the leave of the provincial legislature in accordance with the rules and orders;
or

Note that TC2 seems to favour 15 days

(e) becomes a member of the National Assembly, the ... or a local government.

(2) The provisions of section ... shall apply mutatis mutandis in respect of the filling of vacancies in a provincial legislature, and in any such application a reference to the National Assembly shall be construed as a reference to a provincial legislature.

Oath or affirmation by members

55. Every member of a provincial legislature, before taking his or her seat, shall make and subscribe an oath or solemn affirmation in the terms set out in ... before a judge of the Supreme Court designated by the Chief Justice for this purpose, or, in the case of a member nominated under section 11, before

the Speaker of the provincial legislature.

Powers, privileges and immunities of provincial legislatures and [benefits of members]

56. (1) A provincial legislature shall have full power to control, regulate and dispose of its internal affairs and shall have all such other powers, privileges and immunities as may, subject to this Constitution, be prescribed by a law of such legislature.

(2) Subject to the rules and orders of a provincial legislature there shall be freedom of speech and debate in such legislature and any committee thereof, and such freedom shall not be impeached or questioned in any court.

(3) A member of a provincial legislature shall not be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of anything which he or she has said, produced or submitted in or before or to such legislature or any committee thereof or by reason of anything which he or she may have said, produced or submitted in or before or to such legislature or any committee thereof.

(4) (Salaries) ...

Penalty for sitting or voting when disqualified

57. Any person who in terms of this Constitution is disqualified to sit as a member of a provincial legislature and who, while so disqualified and knowing that he or she is so disqualified, sits or votes as such a member, shall be liable to a penalty determined by the rules and orders for each day on which he or she so sits or votes, which may be recovered for credit of the Provincial Revenue Fund concerned by action in a court of law.

Rules and orders

58. (1) A provincial legislature may make rules and orders in connection with the conduct of its business and proceedings.

(2) The provisions of section ... shall apply *mutatis mutandis* in respect of a provincial legislature.

Quorum

59. The presence of at least one third or, when a vote is taken on a Bill, of at least one half of all the members of the provincial legislature other than the Speaker or other presiding member, shall be necessary to constitute a sitting of such legislature.

Requisite majorities

60. Save where otherwise required in this Constitution, all questions before a provincial legislature shall be determined by a majority of votes cast.

Assent to Bills

61. (1) A Bill duly passed by a provincial legislature in accordance with this Constitution shall without delay be assented to by the Premier of the province subject to section

(2) A Bill referred to in subsection (1) to which the Premier has assented and a copy of which he or she has signed, shall upon its promulgation be a law of the provincial legislature in question.

Signature and enrolment of provincial laws

62. (1) A law of a provincial legislature referred to in section 18(2) shall be enrolled of record in the office of the Registrar of the Constitutional Court in such official languages as may be required in terms of section ... and copies of the law so enrolled shall be conclusive evidence of the provisions of such law.

(2) In the case of a conflict between copies of a law enrolled in terms of subsection (1), the copy signed by the Premier shall prevail.

(3) The public shall have the right of access to copies of a law so enrolled, subject to such laws as may be passed by a provincial legislature to protect the safety and durability of the said copies and with due regard to the convenience of the staff of the Constitutional Court.

Public access to provincial legislatures

63. Sittings of a provincial legislature shall be held in public, and the public, including the media, shall have access to such sittings: Provided that reasonable measures may be taken to regulate such access, and to provide for the search of and, where appropriate, the refusal of entry or the removal of any person.

Administration of provincial legislatures

64. (1) The Speaker shall appoint a Secretary and such other staff as may be necessary for the discharge of the work of such legislature.

(2) Persons appointed under this section shall be remunerated out of and as a charge on the Provincial Revenue Fund of the province.

CHAPTER 7 - PROVINCIAL EXECUTIVE

Executive power of the provinces

65. (1) The executive power of a province shall vest in the provincial government consisting of the Premier and the other members of the Executive Council of a province, who shall exercise and perform their powers and functions subject to and

in accordance with this Constitution.

(2) A province shall have executive authority over all matters in respect of which such province has exercised its legislative competence, matters assigned to it by or under section ... or any law, and matters delegated to it by or under any law.

This refers to the section empowering the President to assign laws
--

Election of Premiers

66. (1) (a) The provincial legislature of a province shall at its first sitting after it has been convened in terms of section 8 elect one of its members as the Premier of the province.

(b) A provincial legislature shall thereafter, as often as it again becomes necessary to elect a Premier, elect one of its members as the Premier of the province.

(c) The provisions of ... shall apply mutatis mutandis in respect of the election of the Premier of a province.

This hinges on the electoral system and on the procedure for the election of the State President.

(2) A judge of the Supreme Court designated by the Chief Justice for this purpose, shall preside over an election referred to in subsection (1).

(3) The election of a Premier in terms of subsection (1)(b) shall take place at a time and on a date fixed by the judge so designated: Provided that -

(a) if such election of a Premier is occasioned by reason of a dissolution of the provincial legislature, it shall take place within 14 days after the election of the provincial legislature held in pursuance of such dissolution; or

(b) if such election of a Premier is occasioned by reason of a vacancy in the office of Premier, it shall take place within 30 days after the vacancy arose.

Tenure of and removal from the office of Premiers

67. The Premier of a Province elected in terms of section 23(1) shall, subject to subsection (2) and section 32 hold office-

(a) for the period referred to in section ...; or

Will there be a limit to the number of combined years a premier may serve?
--

(b) if the provincial legislature is dissolved during such period, for the period until such dissolution, and shall thereafter remain in office until a Premier has been elected in

terms of section ... after dissolution and has assumed office.

...

The impeachment provisions have been omitted in the light of decisions taken.

Responsibilities, powers and functions of Premiers

68. (1) The Premier of a province shall at all times be responsible for the observance of the provisions of this Constitution and all other laws by the Executive Council of the province, and shall, acting alone, be competent to exercise and perform the following powers and functions, namely -

(a) to assent to, sign and promulgate Bills duly passed by the provincial legislature;

(b) in the event of a procedural shortcoming in the legislative process, or where he or she is of the opinion that a Bill is inconsistent with the Constitution or that it has not been passed in accordance with the law, to refer a Bill passed by the provincial legislature back for further consideration by such legislature;

(c) to convene meetings of the Executive Council;

(d) to appoint commissions of inquiry;

(e) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other law; and

(f) to proclaim referenda and plebiscites in terms of this Constitution or a provincial law.

(2) The Premier of a province shall exercise and perform all powers and functions assigned to him or her by this Constitution or any other law, except those specified in subsection (1) or where otherwise expressly or by implication provided in this Constitution, in consultation with the Executive Council of the province: Provided that the Executive Council may delegate its consultation function in terms of this subsection, with reference to any particular power or function of the Premier, to any member or members of the Executive Council.

Acting Premiers

69. (1) The Premier of a province shall appoint one of the members of the Executive Council of the province to act as Premier during his or her absence or temporary incapacity.

(2) Should it be necessary that an Acting Premier be appointed and the Premier is absent or unable to make such an appointment, or if the office of Premier is vacant, the other members of the Executive Council shall make such appointment.

(3) An acting Premier shall while acting as Premier have all the powers and functions vested in the office of Premier.

Executive Councils

70. (1) The Executive Council of a province shall consist of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) (a) The Premier shall appoint the members of the Executive Council from amongst the members of the provincial legislature to administer the various portfolios for which the provincial government is responsible.

(b) A member of the Executive Council shall hold office for as long as it pleases the Premier, but shall vacate office if he or she resigns from office or ceases to be a member of the provincial legislature.

(3) The Premier or a member of the Executive Council shall assume office within ... days and shall, before formally assuming office, make and subscribe an oath or solemn affirmation in the terms set out in ... before a judge of the High Court designated by the Chief Justice for this purpose.

(4) Members of an Executive Council shall at all times act in accordance with a code of ethical conduct which shall be prescribed by a national law. It shall be particularly forbidden for Ministers and Deputy Ministers -

(a) to take up any other paid employment;

(b) to engage in activities inconsistent with that of their office or to expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; and

(c) to use their position, or any official information entrusted to them, to enrich themselves or any other person.

(5) There shall be paid out of and as a charge on the Provincial Revenue Fund of a province to the Premier or a member of an Executive Council of such province such salary and allowances, and upon his or her retirement, or to his or her widow or widower upon his or her death, such pension and pension benefits, as may be prescribed by a law of the provincial legislature.

Executive Council procedure

71. (1) Meetings of the Executive Council shall be presided over by the Premier.

(2) The Executive Council shall determine its own procedure and shall, in so doing, take into account the need for effective government.

Temporary assignment of powers and functions to Executive Council members

72. Whenever a member of an Executive Council of a province is absent or for any reason unable to exercise and perform any of the powers and functions assigned to him or her,

or whenever a member of an Executive Council has vacated his or her office and a successor has not yet been appointed, the Premier may appoint any other member of the Council to act in the said member's stead, either generally or in the exercise or performance of any specific power or function.

Transfer of powers and functions from one member to another member

73. (1) The Premier of a province may assign the administration of a law which is entrusted to any particular member of the Executive Council or which entrusts to any particular member of the Council any power or function, to any other member of the Council.

(2) Any reference in such a law to a particular member of the Executive Council as the member to whom the administration of such a law is entrusted, shall upon the assignment under subsection (1) of the administration of such a law to another member of the Council, be construed as a reference to the latter.

Accountability of members of Executive Councils

74. (1) A member of an Executive Council of a province shall be accountable individually both to the Premier and the provincial legislature of the province for the administration of the portfolio allocated to him or her, and all members of an Executive Council shall correspondingly be accountable collectively for the performance of the functions of the provincial government and for its policies.

(2) A member of an Executive Council shall administer his or her portfolio in accordance with the policy determined by the Executive Council.

(3) If a member of an Executive Council of a province fails to administer his or her portfolio in accordance with the policy of the Executive Council, the Premier of the province may require the member concerned to bring the administration of the portfolio into conformity with such policy.

(4) If the member concerned fails to comply with a requirement of the Premier under subsection (3), the Premier may, after consultation with the member remove the member from the office.

Votes of no confidence

75. (1) If a provincial legislature passes a vote of no confidence in the Executive Council, including the Premier, the Premier shall, unless he or she resigns, dissolve such legislature and call an election in accordance with section

(2) If a provincial legislature passes a vote of no confidence in the Premier, but not in the other members of the

Executive Council, the Premier shall resign.

(3) If a provincial legislature passes a vote of no confidence in the Executive Council, excluding the Premier, the Premier may-

- (a) resign;
- (b) reconstitute the Executive Council in accordance with section ...; or
- (c) dissolve such legislature and call an election in accordance with section

(4) The Premier shall where required, or where he or she elects to do so, in terms of this section, dissolve the provincial legislature by proclamation in the Provincial Gazette within 14 days of the vote of no confidence.

(d.) Provincial Finance and Fiscal Affairs

Provinces' share of revenue collected nationally

76. ...

Levying of taxes by provinces

77. ...

Raising of loans by provinces

78. ...

Revenue allocations by national government

79. ...

Provincial Revenue Funds

80. ...

CHAPTER 8 - NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCIES

National

Ordinary Bills

81.

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

Money Bills

82.

Bills affecting provincial matters

83.

Legislative authority of the Republic

84. The legislative authority of the Republic vests in Parliament, which shall be competent to make laws in terms of this Constitution on any matter including matters falling within the functional areas specified in Schedule 1 (CPXVI, CPXVIII(1), CPXIX).

Legislative authority of provinces

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

(2) A provincial legislature shall have the competence to legislate on any matter which falls within a functional area specified in Schedule 1.

Schedule 1 shall include functional areas such as provincial planning and development CPXXI(6)(a)

Framework legislation

86. (1) Framework legislation comprises Acts of Parliament in terms of which principles or standards are laid down to ensure uniformity across the nation (CPXXI(4)) and shall apply equally in all provinces and shall empower provincial legislatures to make laws for the achievement of the objectives set out in the framework legislation.

(2) Parliament is competent to establish framework legislation only regarding the matters specified in Schedule 2.

(3) Framework legislation shall be binding upon all legislatures and shall be implemented in a province in accordance with the laws of the provincial legislature.

(4) Should a provincial legislature fail to implement framework legislation within a reasonable period of time, Parliament shall be competent to implement such legislation until the provincial legislature complies with its duty in this regard.

Necessary ancillary powers

87. The legislative competence referred to in sections 1, 2 and 3 shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence (CPXXI(8)).

Conflict of laws

88. (1) In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the Act of Parliament shall prevail over the provincial law where the elements of the Act that are in conflict with the provincial law are necessary for -

(a) the maintenance of essential national standards;
(b) the establishment of minimum standards required for the rendering of any services to the public mentioned in the Act of Parliament;

(c) the maintenance of the economic unity of the Republic;
(d) the maintenance of national security;
(e) the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole (**CPXXI(2)**); or

(f) the determination of national economic policies or the protection of the common market in respect of the mobility of goods, services, capital and labour (**CPXXI(5)**);

Paragraph (f) reflects a particular application of Constitutional Principle XXI(5) as an override. It is however possible to apply the Principle other than by the formulation of an override, that is, in the form of an allocation of the relevant powers or leaving the powers as "residual" powers - see our previous opinion in this regard.

- and the Senate has consented to such Act.

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

Subsection (2) reflects the application of Constitutional Principle XXI(6)(b) as an override. It is however possible to apply this Principle other than by the formulation of an override, that is, in the form of the allocation of the relevant powers or in the form of framework legislation - see our previous opinion in this regard.

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

Integrity of provinces

89. An Act of Parliament shall not empower an organ of state to encroach upon the geographical, functional or institutional integrity of a province (**CPXXII**).

Executive authority of the Republic

90. (1) The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament vests in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution.

(2) The President may, with the concurrence of the provincial Premier or of a local government, appoint such Premier or local government as his or her agent to perform a specified function within his or her competence in terms of subsection (1) (**CPXIX**).

(3) The President may, with the concurrence of the provincial Premier or of a local government, delegate to such Premier or local government the performance of a specified function within his or her competence in terms of subsection (1) (**CPXIX**).

Executive authority of provinces

91. (1) The executive authority of a province vests in the Premier of the province, who shall exercise and perform his or her powers subject to and in accordance with this Constitution.

(2) The Premier may, with the concurrence of the President or of a local authority within the province, appoint the President or such local government as his or her agent to perform any specified function within his or her competence in terms of subsection (1) (**CPXIX**).

(3) The Premier may, with the concurrence of the President or of a local government within the province, delegate to the President or to such local authority the performance of a specified function within his or her competence in terms of subsection (1) (**CPXIX**).

Provincial
Provincial Constitutions

Adoption of provincial constitutions

92. (1) A provincial legislature shall be competent to pass a constitution for its province by a resolution of a majority of at least two-thirds of all its members.

(2) A provincial legislature may make such arrangements as it deems appropriate in connection with its proceedings relating to the drafting and consideration of a provincial constitution.

(3) The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no

force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection (3). Subject to the proviso to that subsection.

(4) A decision of the Constitutional Court in terms of subsection (4) certifying that the text of a provisional constitution is not inconsistent with the said provisions, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

The constitutional principles are still being debated and this clause will be revisited.
--

CHAPTER 9 - LOCAL GOVERNMENT

CHAPTER 10 - COURTS AND THE ADMINISTRATION OF JUSTICE

Judicial Authority

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

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

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

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

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

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

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

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

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

The judicial system

94. There shall be the following courts of law in the Republic:

(i) The Constitutional Court, which shall be the highest court with constitutional jurisdiction, and which shall consist of a President, a Deputy President and nine other judges, four of whom shall be appointed from among the judges of the Supreme Court of Appeal or the High Court.

(ii) The Supreme Court of Appeal, which shall be the highest court of appeal in all matters other than those within constitutional jurisdiction, and which shall consist of the Chief Justice, a Deputy Chief Justice and such number of judges of appeal as may be determined.

(iii) Such Courts of Appeal as may be established by Act of Parliament, to hear appeals from the High Court or courts of similar status.

(iv) The provincial and local divisions of the High Court and other courts of similar status.

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

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

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

(vi) Other courts established by law.

Jurisdiction of the Constitutional Court

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

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

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

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

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

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

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

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

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

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

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

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

Jurisdiction of other courts

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

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

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

Appointment of judicial officers

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

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

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

(4) Appointment of Constitutional Court Judges

The appointment of the Chief Justice, President of the Constitutional Court and other Constitutional Court judges is subject to agreement being reached on the structure of the National Executive.

(a) The judges of the Constitutional Court shall be appointed by the President in consultation with the Cabinet after consultation with the President of the Constitutional Court.

(b) When an appointment needs to be made, the Judicial Services Commission shall draw up a recommended list of nominees of not more than three persons in excess of the number of persons to be appointed.

(c) The President shall make the required number of appointments from such a list with due regard to the reasons for such recommendations.

(d) If the President decides not to accept any or some of such recommendations, he/she shall inform the Judicial Services Commission and furnish it with reasons for his/her decision.

(e) After having been informed in terms of paragraph (d), the Judicial Services Commission shall, in accordance with paragraph (b) submit further recommendations, whereafter the President shall make the appointment or appointments from the recommendation as supplemented in terms of this paragraph.

(f) Four judges of the Constitutional Court shall be appointed from amongst the judges of the High Court, Court of Appeal and Supreme Court of Appeal.

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

(6) The appointment of other judicial officers shall be regulated by an Act of Parliament.

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

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

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

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

Removal of judges from office

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

(2) A judge who is the subject of an investigation may be suspended by the President on the advice of the Chief Justice pending the finalisation of such investigation.

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

Judicial Service Commission

<u>Consensus issue:</u> Given the lack of consensus, the current section 105 is simply replicated here (with certain minor consequential changes arising from the other provisions of this draft chapter).
--

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

(a) the Chief Justice, who shall preside at meetings of the Commission;

(b) the President of the Constitutional Court;

(c) one Judge President designated by the Judges President;

(d) the Minister responsible for the administration of justice or his or her nominee;

(e) two practising advocates designated by the

advocates' profession;

(f) two practising attorneys designated by the attorneys' profession;

(g) one professor of law designated by the deans of all the law faculties at South African universities;

(h) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two-thirds of its members;

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

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

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

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

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

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

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

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

Seats of Courts

100. [TC 1 must report]

Language

101. [TC 1 must report]

CHAPTER 11 - SECURITY SERVICES

STATEMENT OF PRINCIPLE

Since there is a need

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

compliance with this Constitution, the law and all applicable international conventions and norms,

The following provisions are enacted to govern national security and the security services of the Republic, and these provisions shall be interpreted and understood in the spirit of this Statement of Principle.

Composition and structuring of security services

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

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

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

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

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

Contention on the definition of "national interest" has been referred to the CA. This subsection is obligatory in terms of CP XXXI.

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

DEFENCE

Defence force

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

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

Political responsibility and accountability

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

(2) A (joint) multi-party committee of Parliament

shall oversee all defence matters. [In particular the committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of and draft legislation on the defence force, and to perform such other functions relating to parliamentary supervision of the defence force as prescribed by law.]

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

Command of defence force

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

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

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

This issue will be discussed in the CA.

(2) The Chief of the defence force shall exercise command of the defence force in accordance with the directions of the member of the Cabinet responsible for defence and, during a state of national defence, of the President.

Civilian secretariat

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

Employment of defence force

107. The defence force may be employed only in the national interest and as authorised by law.

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

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

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

(a) to comply with international obligations towards other states and international bodies;

(b) for the preservation of life, health and property;

(c) for the maintenance of essential services;

(d) to assist the police service to uphold law and order; and

(e) in support of reconstruction and development programmes and other efforts to improve socio-economic conditions.

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

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

POLICE

Police service

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

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

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

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

Political responsibility and accountability

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

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

[Control of police service

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

The command of the national commissioner over the entire police service or only that part of it operating at national level is still in contention. Further instructions are required concerning the dismissal of the national commissioner, for instance where the occupant of the post no longer enjoys the confidence of the Cabinet.

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

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

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

Civilian secretariat

111. [(1) A civilian secretariat functioning under the direction and control of the member of the Cabinet responsible for police, shall exercise such powers and functions in connection with police as may be entrusted to it by law or that member of Cabinet.]

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

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

This section is referred to the Subcommittee of the CC.

Powers and functions of police service

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

This section is referred to the Subcommittee of the CC.

INTELLIGENCE

Establishment of intelligence services

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

Political responsibility and accountability

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

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

Control of intelligence services

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

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

Co-ordination of intelligence activities

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

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

"Establishment, control and co-ordination of intelligence services

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

Parliamentary oversight of intelligence activities

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

[Civilian inspectorate

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

GENERAL

Code of conduct for members of security services

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

- (a) comply with all lawful orders;
- (b) refuse to comply with a manifestly illegal order; and

(c) refrain from furthering or prejudicing any party political interest.

Training

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

Personnel administration

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

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

Section 20 should thus read: "Resolution of labour disputes
20. Mechanisms and procedures for the resolution of labour disputes within the security services shall be established."

CHAPTER 12 - FINANCE

General Financial Matters

National Revenue Fund

122. (1) There shall be a National Revenue Fund. All revenues, as determined by a national law, raised or received by the national government shall be paid into the National Revenue Fund. Parliament shall make appropriations from the National Revenue Fund in accordance with national law.

(2) No money may be withdrawn from the National Revenue Fund except under appropriation made by a national law. Revenue to which a province is entitled in terms of this Constitution shall form a direct charge against the National Revenue Fund to be credited to the Provincial Revenue Fund concerned.

This refers to the provision in the new Constitution dealing with provinces' share of revenue collected at national level, which is a matter still under consideration by TC 3. The NP requires clarity on the meaning of the word "credit". The DP prefers the words "paid into". See block 2 of the Report.

Annual budget

123. ...

The parties broadly agree that there is a need for inclusion into the new Constitution of a provision such as section 186 of the interim Constitution. However, there is no consensus on what should go into such a clause. The following are issues that have been debated in the TC:

- (a) The issue of a balanced budget;
- (b) The issue of disclosure and reporting of government accounts and budgets; and
- (c) the issue of including a statement of costs of compliance with all bills laid before Parliament.

As these issues are still under consideration, drafting would be premature at this stage. If the substance of section 186 of the interim Constitution is to be retained, the following wording is proposed:

Annual budget

2. The Minister responsible for national financial affairs shall in respect of every financial year lay an annual budget before Parliament. The annual budget shall reflect the estimates of revenue and expenditure, which shall, among other things, reflect capital and current expenditure of the government for that year.

Procurement administration

124. (1) The procurement of goods and services for any level of government shall be regulated by national and provincial laws. Such laws shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

(2) The tendering system shall be fair, public and competitive. A tender board shall give reasons for its decision if requested by an interested party.

(3) No person and no organ of state shall improperly interfere with a tender board in the discharge of its functions.

(4) All decisions of a tender board shall be recorded and shall be open to public inspection.

Guarantees by national government

125. The national government may not guarantee provincial or local government loans, unless -

(a) the guarantee complies with the norms and conditions for such a guarantee as set out in a national law; and

(b) the Financial and Fiscal Commission has made a recommendation concerning compliance of the guarantee with such norms and conditions.

As per block 7 of the Report and a reformulation of section 188 of the interim Constitution. Consensus on this provision was with the understanding that its finalisation should await the final decisions of TC 3. Once the envisaged role of the FFC in this regard has been clarified, this provision could possibly be simplified. Further clarity was also required on the issue of national government guarantees for loans by parastatals.

Accountability of Public Enterprises

126. Any enterprise in which public money is invested or whose sources of revenue are regulated by law or which is able to raise revenue in terms of legislation may, in a manner determined by national law, be required to report to and to give evidence before Parliament.

Formulated as per block 11 of the Report. The NP further suggests that the autonomy of the Commissioner for Inland Revenue be constitutionalised, which according to the ANC is a matter which can be dealt with by subsidiary legislation.

Financial and Fiscal Commission

Establishment

127. There shall be a Financial and Fiscal Commission for the Republic. The Commission shall be independent and impartial and subject only to this Constitution and the law.

Powers and functions

There seems to be broad agreement regarding powers and functions of the FCC as reflected in Blocks 3 - 8 of the TC Schematic Summary. However, some of the parties have registered their concern on some issues:

1. The ANC has expressed the view that section 199 of the interim Constitution should be incorporated in the final constitution in an abbreviated and revised form (see Block 33 of the TC Report).

2. The NP is of the opinion that provision should be made for the FFC in much the same way as outlined in the Interim Constitution.

3. The DP does not believe there is any need to change the formulation of section 199, but it has indicated that the primary purpose of the FFC should be to make recommendations on equitable financial and fiscal allocations between different levels of government. (See also Block 27 of the TC Report).

4. The PAC and the Commission on Provincial Government submitted that the Constitution should only contain the framework of the functions of the FFC. (See also Block 28 of the TC Report).

128. (1) The Commission shall apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development.

It shall render advice and make recommendations to the relevant authorities regarding the financial and fiscal requirements of the national, provincial and local governments in terms of this Constitution, including -

(a) financial and fiscal policies;

This is per agreement in Block 3 of the Schematic Summary.

However, the ANC holds the view that the Constitution should state clearly that the Commission has advisory and mediatory powers which must be reflected in the procedures for drafting budgets and fiscal legislation. The DP believes that there is no change required in this matter.

(b) equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level;

This is per agreement in Block 4 of the TC Schematic Summary. The ANC is of the view that the allocation of equities should apply horizontally and vertically; it is concerned that with the present reference there is doubt as to whether that is the case. As regards the term "revenue collected", the ANC requires a clarification of meaning. Other parties are silent, on the issue whilst the DP is of the view that no change is required. [See Block 35 of the Report].

(c) any form of taxes, levies, imports and surcharges that a provincial government intends to levy;

This is per agreement reached in Block 5 of the TC Schematic Summary, but the ANC argues for a new term that would take away the distinction between taxes. The DP does not see any need for change whilst all the other parties have not commented.

(d) the raising of loans by a provincial or local government and the financial norms applicable thereto;

(e) criteria for the allocation of financial and fiscal resources; and

(f) any other matter assigned to the Commission by this Constitution or any other law.

(2) In performing its functions the Commission shall take into account (a) the national interest, economic disparities between the provinces as well as the population and development needs, administrative responsibilities and other legitimate interests of each of the provinces;

(b) and the provisions of this Constitution dealing with the allocation of revenue to provinces.

Constitutional Principle XXVII. Par. (b) refers to the substitute for the present section 155(4)(b) (if there is to be such a provision in the new Constitution).

Appointment, qualifications, tenure and dismissal of members

Blocks 10 - 19 of the Report of the Theme Committee deal with appointment procedure etc set out in section 200 of the interim Constitution, broadly covering:

- (i) Method/manner of appointment of a Commissioner;
- (ii) tenure of office;
- (iii) qualitative requirements of a Commissioner;
- (iv) dismissal and removal from office of a Commissioner.

The parties are not in agreement on these issues. It may be advisable to refer the matter to the CC Subcommittee presently looking at a formulation of an omnibus clause that deals with the appointment procedures regarding the Independent Structures of Government viz: Auditor General; Public Protector and Public Administration Commission. If such an omnibus clause is agreed to, the following formulation may go into Section 3(1):

- (1) The members of the Commission shall be appointed in accordance with the requirements set out in section ... (being the omnibus clause).

The parties have agreed that section 200(2) of the I/C, dealing with the first appointment of the members of the Commission, should not be incorporated in the new draft.

See Block 11 of the TC Schematic Summary.

There is agreement on the sentiments expressed in section 200(9) (prohibiting Commissioners from holding an office in a political party/organisation) and section 200(10) (influencing a member of the Commission). The parties have nevertheless expressed uncertainty as to where these issues should be covered in legislation or in the Constitution.

In terms of Constitutional principle XXVII each province must be represented on the FFC.

129. (1)

Reports

130. (1) The Commission shall present regular reports to both Parliament and provincial legislatures as may be prescribed by a national law.

As per blocks 95 and 102. The NP proposes that the Constitution should make provision for the establishment of provincial bodies similar to the FFC to attend to financial and fiscal relations between provinces and local authorities, and that provinces and local authorities should have equal representation in this body.

Other provisions

In Blocks 21 to 26 the Theme Committee Report deals with:

- (I) Block 21 - Section 201 of the interim Constitution, providing for Meetings of the Commission.
- (Ii) Block 22 - Section 202 of the interim Constitution, dealing with Committees of the Commission.
- (Iii) Block 23 - Section 203 of interim Constitution, providing for co-option of persons by committees.
- (Iv) Block 24 - Section 204 of interim Constitution, dealing with remuneration for members of the Commission.
- (V) Block 25 - Section 205 of interim Constitution, providing for appointment of staff of the Commission.
- (Vi) Block 26 - Section 205 of interim Constitution, dealing with regulations for the Commission.

No agreement has been reached on any of the matters covered here. Regarding sections 201 to 205, covered in Blocks 21 to 25 of the Report, the ANC is of the opinion that these should be covered by legislation. On section 201, dealing with meetings, the DP concurs, with no other party committing itself. With regards to section 202 to 205 the NP concurs with the ANC; all other parties are silent. Regarding Block 26; on regulations, the parties' views have not been finalised.

Central Bank

Establishment

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

Primary objective

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

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

Powers and functions

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

Reserve Bank as provided for in section 2.

CHAPTER 13 - PUBLIC ADMINISTRATION

Basic values and principles governing public administration

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

In particular the following principles shall be applicable:

(a) A high standard of professional ethics shall be promoted and maintained in the public administration.

(b) Good human resource management and development practices to maximise human potential shall be cultivated in the public administration.

(c) Efficiency and the economic and effective use of resources shall be promoted in the public administration.

(d) Public administration shall be accountable. Transparency through the provision of accessible, accurate and timeous information to the public shall be fostered.

(e) Public administration shall be development oriented and the provision of services shall be conducted on the basis of impartiality and equity to all.

(f) Public administration shall function on a basis of fairness and shall serve the public in an unbiased and impartial manner.

(g) Public administration shall be oriented towards public participation in policy-making. It shall be responsive to the needs of the people.

(h) Public administration shall be broadly representative of the South African people. Employment and personnel management practices in the public administration shall be based on competency/ability, objectivity and fairness and the need to redress the imbalances of the past to achieve the required representation.

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

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

Public Administration Commission

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

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

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

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

Public Service

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

(2) The terms and conditions of service of employees in the public service shall be regulated by law. Employees shall be entitled to a fair pension as regulated by law.

CHAPTER 14 - INDEPENDENT INSTITUTIONS TO PROTECT PUBLIC INTERESTS

Auditor General

Establishment, independence and impartiality

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

(2) The Auditor-General shall be independent.

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

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

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

Powers and functions

138. (1) The Auditor General shall audit and report on the accounts and financial statements of all national and provincial state departments and administrations and of all local governments, and also all such other accounts and financial statements as may be required by law to be audited by the Auditor General.

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

Reports

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

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

(a) in the case of national and provincial state departments and administrations and local governments, to the relevant level of government; and

(b) in the case of any other institutions, to the persons prescribed by law;

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

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

Appointment, qualifications, tenure and dismissal

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

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

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

(2) The Auditor General shall be a South African citizen who is a fit and proper person to hold such office, **[has specialised knowledge of or experience in auditing, state finances and public administration, and does not hold office in any political party or organisation.]**

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

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

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

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

(a) a finding to that effect by a committee of Parliament composed of one member of each party represented in Parliament and participating in the committee; and

(b) the adoption by Parliament of a resolution supported by at least two-thirds of the members present and voting calling for his or her removal from office.

(6) The President may suspend the Auditor General from office when his or her removal from office is under consideration by Parliament, and shall forthwith dismiss him or her from office upon adoption of the said resolution.

Electoral Commission

Establishment and governing principles

141. (1) There shall be an Election Commission for the Republic.

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

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

(4) Organs of State shall through legislation and other measures accord the Commission the necessary assistance and protection to ensure its independence and effectiveness.

(5) The Commission shall be accountable to Parliament for its activities.

Powers and Functions

142. The Electoral Commission shall, for the purpose of securing free and fair elections, manage elections conducted at National, Provincial and Local levels of government as prescribed by law.

Appointment and Composition of the Commission

143. (1) The President shall appoint not less than three persons as Commissioners:

(a) who must be nominated by a representative Parliamentary Committee on Elections; and

(b) whose nominations must be approved by Parliament by a resolution adopted by a majority of at least 75% of the members present and voting at a meeting.

Public Protector

Establishment

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

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

(3) Organs of state shall through legislative and other

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

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

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

Powers and functions

The CC indicated a preference for Option 2 as contained in the Sixth Draft. However, certain concerns were expressed, such as

- whether maladministration is adequately covered;
- whether the Public Protector can initiate an investigation;
- whether it covers all the powers listed in Option 3;
- whether the phrase "a body or person performing a public function" is sufficiently clear;
- that the reference to conducts which result in improper "prejudice" limit the PP's power to investigate only prejudicial consequences and not other harmful consequences.

We have consulted a wide range of dictionaries and in our view the key phrase "any conduct ... which is alleged or suspected to be improper or to result in improper prejudice" is wide enough

- to cover maladministration, corruption, unfair, inconsistent or discourteous conduct, undue delays, irregular or unlawful acts or any other impropriety; and
- to provide for an investigation by the Public Protector on own initiative where he or she has the required suspicion.

However, it would appear that conducts which "result in improper prejudice" may require broadening. This can be achieved if the phrase is changed to refer to conducts which "result in any impropriety".

145. (1) ...

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

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

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

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

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

Appointment, qualifications, tenure and dismissal

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

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

(a) who has been nominated by a committee of Parliament ...; and

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

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

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

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

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

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

Provincial public protectors/Deputy Public Protectors

147.

To stand over for the discussion on provincial powers.

Human Rights Commission

Establishment and governing principles

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

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

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

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

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

Powers and functions

149.

<p>Broad consensus emerged in the CC on Option 2 provided in the Third Draft subject to certain reservations about</p> <ul style="list-style-type: none">- the appropriateness of the term "fundamental rights";- the absence of an interventionist role for the HRC;- the lack of a proper focus on the promotion of a human rights culture; and- the necessity of subsection (2) of the Option. <p>Taking these reservations into account we suggest the Option to be reformulated as follows:</p> <p>"The Human Rights Commission shall promote the development, protection and fulfilment of human rights and generally the cultivation of a culture of human rights in South Africa. It shall for this purpose have the necessary powers accorded to it by law, including such powers as are necessary to monitor, investigate and report on the observance of human rights and to secure appropriate redress where human rights have been breached."</p>

Appointments of members

150.

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

Option 1:

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

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

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

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

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

Option 2:

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

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

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

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

Commission for Gender Equality

Establishment and governing principles

151. (1) There shall be a Commission for Gender Equality for the Republic.

(2) The Commission shall be independent, impartial and

subject only to this Constitution and the law. It shall discharge its powers and functions without fear, favour or prejudice.

(3) The Commission shall be accountable to ... for its activities and shall report to on such activities.¹

There is a difference of opinion as to whom the Commission shall be answerable. The NP, ANC and implicitly, IFP are of the view that it should be accountable to Parliament and the DP argues that it should be accountable to the Executive. The other parties have not committed themselves on this issue.

Powers and functions

152. (1)

Although the parties are broadly in agreement as to what the Powers and Function of the Commission should be, there is disagreement as to whether or not these should be included in the Constitution or not. The ANC is against the listing of the Powers and Functions of the Commission in the Constitution, preferring only an inclusion of a clause that defines the role of the Commission in advancing gender equality. The NP and DP prefer inclusion of a broad definition of these. The other parties have not committed themselves to any choice. The formulations contained below are to cater for both choices, the first being for the ANC and the second for the NP & DP, is suggested as a broad formulation of the powers envisaged by the parties.

Appointment of members

No procedure has been agreed to, as is reflected in par. 5.2.3 of the Report. The DP & NP suggest the same procedure as adopted for the Human Rights Commissioners and Public Protector, the IFP requires a selection of both male and female Commissioners by women members of Parliament and the ANC has not committed itself to any preference but submits that the Appointment Procedure should be left to legislation. There is to be considered whether Appointment Procedure of members of the Commission should not be in terms of the standard procedure clause for other independent structures presently under consideration by the CC Subcommittee, which would include Public Protector and Human Rights Commissioners and Auditor General. In which case the formulation would be:
A member of the Commission for Gender Equality shall be appointed in accordance with the requirement set out in ... (this being the general clause).

SCHEDULES

NB:- It is recommended that all transitional provisions be placed in a separate statutory instrument with the necessary limitations on amendments.