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***COMBINED REPORTS  
OF THE  
TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES***

***MAY - AUGUST 1993***





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<b>FIRST REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL: 13 MAY 1993</b>
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## 1. INTRODUCTION

- 1.1 Our instructions require us to prepare systematic documentation to facilitate discussion in the Negotiating Council. It has been made clear to us that we are not ourselves to engage in negotiation. What is expected is that we should address the issues raised in the Codesa documents, the discussions in the Negotiating Forum and the Negotiating Council, and the submissions and inputs of the participants in the current negotiating process which are relevant to the terms of reference of our committee, and on the basis of such information prepare documentation for the Negotiating Council which will enable the debate to be taken forward in that forum. For that purpose we can also have regard to submissions that may be made to our committee in writing by individual experts and interest groups.
- 1.2 On one issue we have been asked to go beyond these instructions and to make recommendations to the Planning Committee. That issue concerns the process to be followed in dealing with the debate on the boundaries, powers and functions of regions. This is clearly a core issue in the negotiations and directly relevant to the disputes which exist in relation to the form of the state and self determination. The way in which this matter is dealt with will have a bearing on several matters that are included in our terms of reference.
- 1.3 We were asked to make our report to the Planning Committee by Thursday 13 May, and to deal with the process for taking the regional debate further in that report. We have done so.
- 1.4 We are of the opinion that the debates in the Planning Committee and the Negotiating Council will be facilitated by a brief analysis of the constitutional issues that have been identified in our instructions as being the concern of our committee. The issues are interrelated and reflect in particular the concerns of the different participants in respect of the legitimacy of the constitution making process, and the position of minorities in any new constitutional order. The process for determining the boundaries, powers and functions of regions could be crucial to finding an acceptable solution to these fundamental concerns.
- 1.5 The framework within which the earlier debates took place, and the particular issues that have been raised appear from the documents with which we have been briefed. They include three documents dealing with deliberations at Codesa. These are a bundle of Codesa agreements, a summary of these agreements and a consolidated document based on Codesa reports. We will



refer to these documents as the agreements, the summary and the consolidated document respectively. We have also been briefed with a resolution on the transition process taken by the Negotiating Forum on the 1st and 2nd April, extracts from minutes of the Negotiating Council of the 26th April, 30th April and the 7th May, the declaration of intent on the negotiating process made by the Negotiating Council on the 30th April, and a transcript of discussions held in the Negotiating Council of matters relating to the transitional process.

1.6 We have not yet received representations from all the participants in regard to these issues. Once we have the representations we will be able to identify the compatibilities and differences that may exist. We may then be able to suggest appropriate ways of addressing these matters.

2. We begin our report by setting out our views on the relationship between the questions concerning self determination and the form of state and the other issues which form part of our terms of reference. As directed, we have given consideration to each of the issues mentioned in our terms of reference, using the terminology thereof.

### 3. SELF-DETERMINATION

3.1 Self-determination, in the sense of making one's own choices, developing one's own potential, securing one's own well-being and of not being subjected to undue external pressures and domination, is certainly a very basic human need and aspiration. Similarly, it has to be conceded that nations and national sub-groups have similar aspirations. It is therefore only natural that the law, which is a normative system defining and regulating human freedoms and aspirations, should also give recognition to this very essential need. For this reason it is unproductive and not even necessary to contest the existence of the general right of self-determination of individuals, organised groups and nations. Stated succinctly, self-determination, being the expression of a basic urge to be master of one's own destiny, is recognised in law. What is of importance for the purposes of this report, is not the existence of such a right, but the **actual content, scope, application and protection of this right.**

3.2 In **international law**, the right of self-determination has been one of the strongest factors in promoting the liberation of countries and peoples from colonial rule, foreign subjection and external domination. In recent years some countries and peoples, especially in certain parts of Eastern Europe, have exercised their right of self-determination to liberate themselves from foreign rule.



3.3 In **national legal systems**, the right of self-determination manifests itself at different levels of society and of the life of the nation, as regards the individual as well as groups. It would be wrong to assert that the right of self-determination is a right which finds application in only one sphere of life or pertains only to some individuals or groups. For this reason, it is more appropriate to speak of the **rights** of self determination. In order to understand the scope of the rights of self-determination and their manifestations in a national legal system, it is necessary to distinguish between the recognition and the protection of the rights of self-determination and, at the same time, to appreciate the limitations which the law imposes on these rights ( in the same way that all rights and freedoms have certain limits).

3.4 In a democratic constitutional system, the rights of self-determination are recognised in different ways:

3.4.1 Generally, when mention is made of the rights of self-determination, it is immediately thought of the rights of organised and other national groups to protect themselves from undue influence or coercion. It is often forgotten that the individual's rights to self-determination takes precedence and that virtually no collective rights of self-determination can be recognised effectively without ensuring the individual's rights to freedom, own choice and self-fulfilment. Individual self-determination covers a whole range of human activities: thus, the right to life, liberty and property and public freedoms of contract, conscience, movement, association, etc, all serve to secure the individual's overall right to self-determination, in one way or another. (It is noteworthy that the German Constitution goes even further and expressly recognises the right to the full development of every person's personality).

3.4.2 Collective rights of self-determination necessarily require preceding constitutional rights and freedoms such as freedom of association, assembly, conscience, etc. to give effect and meaning to these rights. It is self-evident that no group or groups will be able to maintain their identity and pursue their interests if they are not allowed to contract freely, associate at will, disseminate their views openly, etc. Collective rights of self-determination, either separately or conjunctively, are exercised in different ways: in the labour field, trade unions, either on their own, or with employers' organisations, exercise collective rights of self-determination by means of collective bargaining, the withholding of labour, etc; in the civic field citizen organisations also exercise their collective rights of self-determination in various recognised forms of group activities, be they of social, cultural, linguistic or religious nature (as a matter of fact, it is through the exercise of these rights of self determination that the foundations for a civil society are established and fortified); in the political field collective rights of self-determination are best ensured by a pluralistic electoral system which allows free participation in elections and



institutions of government.

( In this respect it might very well be necessary to have representative institutions on different levels of government to give greater opportunities of representation to political parties which enjoy less support on the national level, for effective representation, for it is clear that a political party with stronger regional support will feel more comfortable in the exercise of its right of self-determination if it is well-represented in the regional institutions where its support lies.) What needs to be emphasised, is that collective rights of self-determination in a democratic society are not singular, solitary rights which can be claimed and exercised as such, but entail a totality of specific legal rights and freedoms which groups can rely on in the context of predetermined social, economic and political relationships.

3.4.3 The rights of self-determination of linguistic, cultural and religious groups are of particular importance, especially if these groups constitute minorities *vis-à-vis* the general population. These groups are often well-organised and influential and this allows them to exert influence and demand protection in all spheres of life and levels of society. This is not always the case, however, and especially in the face of an uncaring or unsympathetic and even hostile majority the law would require special recognition and safeguarding of linguistic, cultural and religious expression (e g allowing mother-tongue instruction, special schools, support of cultural activities, etc). In this respect Article 27 of the International Covenant on Civil and Political Rights still provides the most useful criterion: " In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

3.5 In a democratic state, individual and collective rights of self-determination (which are, as explained, a totality of multi-faceted rights and freedoms pertaining to individuals and groups) are protected and safeguarded by various legal instruments and state institutions, the most important being:

3.5.1 A justiciable bill of rights and an independent judiciary.

3.5.2 Watchdog bodies, such as ombudsmen, independent human rights commissions and generally a free press and an open society.

3.5.3 Regional and local institutions as well as national bodies in which collective interests can be accommodated.

3.5.4 Specially recognised and accredited linguistic, cultural and religious bodies of a representative nature and freely associated which can act in conjunction with governmental bodies and institutions to safeguard the interests of cultural, linguistic and religious groups.



3.6 Rights of self-determination, whether they are individual or collective, and which form the basis of a democratic society, have certain limitations. They may not be exercised in such a way that they impinge upon the rights and freedoms of others or endanger national safety or the integrity of the state. It is for this reason that international law is extremely hesitant to recognise any unilateral secession from national state territory. What is of the utmost importance is that the law will not recognise or enforce rights of self-determination which may lead to discrimination or unequal treatment on the basis of colour, race, gender, etc. In other words, this means that the law does not recognise one person's rights of self-determination in such a way that it infringes on another's rights, particularly where issues of colour, race, gender, ethnic origin or creed are concerned.

3.7 Conclusion: The Committee is convinced that, bearing in mind what has been said about the contents, scope and limitations of these rights of self-determination, a much more fruitful and constructive discussion will follow in the Council if these rights are viewed and assessed under the headings of concrete topics such as the recognition and protection of fundamental rights and freedoms; regionalism and the form of state; representative institutions; free political activities; etc.

#### 4. FORM OF STATE

The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.

The form of state will be shaped by decisions taken in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state. It seems to us that the most expeditious way of dealing with this matter is to deal with these component parts. By resolving them, the Negotiating Council will determine the form of the South African state. Our report on Regional Demarcation and Related Issues (13/5/93) to the Planning Committee is consistent with this approach and should serve to advance the debate on the form of state.



## 5. CONSTITUTIONAL PRINCIPLES

The process of developing constitutional principles has as its object the establishment of a broad framework within which a future constitution could be developed. The development of such a framework commends itself as a sensible mechanism for the promotion of a successful resolution of constitutional negotiations.

A multi - party agreement on constitutional principles would in the first place provide fundamental direction to the constitutional debate, and secondly, should they be formalised as a set of principles binding on further constitution making, they will give direction and security to all relevant interests. The adoption of a comprehensive set of constitutional principles could therefore be an expression of a national consensus on the constitutional way forward for South Africa.

From the documentation provided to this committee, it appears that a broad area of agreement has already emerged. Thus the notion of a constitutional state seems to enjoy wide acceptance, implying the establishment of a modern democracy based upon universal adult suffrage, the supremacy of the constitution, the separation of the legislative, executive and judicial powers and justiciable fundamental rights binding all organs of the state. Furthermore it has become clear that the idea of the constitutional distribution of governmental powers and functions between the different levels of government has received general acceptance. These and other principles, when finalised and formalised, should serve as an important factor in the debate on the future form of state, the constitution making process and self determination.

The Committee therefore urges the Negotiating Council to discuss the content of a set of constitutional principles as a matter of urgency. As soon as this may be practicable, the Committee proposes to compile a report on the inputs received from all parties regarding constitutional principles in which it will identify areas of commonality, and issues which require further discussion and debate within the Negotiating Council.

## 6. CONSTITUTION MAKING BODY/CONSTITUENT ASSEMBLY

- 6.1 As appears from paragraph 5 of this report the principles are directed towards the development of a constitutional structure which would offer a democratic form of government, protection of minority interests, and safeguards against the abuse of power. They would provide guarantees in respect of such matters in an elected constitution making body/constituent assembly.
- 6.2 It appears to have been accepted by working groups 2 and 3 at Codesa that the final constitution would be drawn up by an elected constitution making body/constituent assembly within the framework of agreed constitutional principles, and that the body/assembly would also be vested with powers enabling it to act as a interim legislature. See: The report on the status of



discussions in working group 2 at page 33 of the agreements, and paragraph 2 of the section dealing with the constitution-making process at pages 34 to 36 of the consolidated document.

- 6.3 The Declaration of Intent on the Negotiating Process adopted by the Negotiating Council on 30 April 1993 records a commitment by the Council to reach agreement on binding constitutional principles, the constitutional framework and the constitution making process in terms of which elections will be held. It contemplates that a date will be set before the end of May 1993 for an election to be held not later than the end of April 1994.
- 6.4 If the Negotiating Forum agrees in due course that the final constitution will be drawn up by an elected constitution making body/constituent assembly within the framework of agreed constitutional principles, then in addition to agreement upon the relevant principles, agreement will also be required on the following matters:

#### *Constitution Making*

- 6.4.1. How the constitution making body/constituent assembly will be structures, including whether it will be unicameral or bicameral
- 6.4.2 How many members will it have.
- 6.4.3 What electoral system will be adopted.
- 6.4.4 Who will be entitled to vote.
- 6.4.5 How will decisions be taken.
- 6.4.6 Will time frames be set for the taking of decisions.
- 6.4.7 How will conflicts be resolved and deadlocks be broken.
- 6.4.8 How and by whom will questions concerning the application of the constitutional principles be resolved.

#### *Acting as a Legislative Function*

- 6.4.9 How will the body/assembly be composed, how will it function when it acts as a legislature.

#### *A Transitional/Interim Executive*

- 6.4.10 How will the transitional/interim executive be appointed, how will it be composed and how will it take decisions



### *The Constitutional Framework*

6.4.11 A constitutional framework dealing with the above matters will be required. This will have to be done either through an amendment to the existing constitution or through the adoption of a transitional/interim constitution.

6.5 If the Negotiating Forum decided upon a process other than the one envisaged in 6.4, it should specify the details and constitutional and legislative framework which will be necessary to implement it.

## **7. TRANSITIONAL/INTERIM CONSTITUTION**

7.1 A Transitional/Interim Constitution will be necessary if it is decided by the Negotiating Forum that the Constitution should be adopted by an elected constitution making body/constitutional assembly within the framework of agreed constitutional principles. The transitional/interim constitution will ensure constitutional continuity and provide the legislative framework for the functioning of a constitution making body/constituent assembly with legislative power.

7.2 If this process is adopted the Negotiating Forum will have to reach agreement on the structure of the transitional/interim constitution, which will require it to give consideration to and take decisions on the following matters:

7.2.1 The constitutional principles by which the constitution making body/constituent assembly will be bound.

7.2.2 The constitutional framework governing the functioning of the assembly when it sits as a constitution making body.

7.2.3 The constitutional framework governing the functioning of the assembly when it sits as a legislature.

7.2.4 The way in which the transitional executive will be composed, what its powers will be and how it will function.

7.2.5 Regional government, including the position of the self governing territories and the TBVC states prior to and subsequent to the election of the constitution making body/constituent assembly.

7.2.6 Local government, including the periods prior to and subsequent to the election of the constitution making body/constituent assembly.



7.2.7 Whether provision should be made in the transitional constitution for the protection of certain fundamental rights. This issue is being considered by the Technical Committee on Fundamental Rights in the Transition.

7.2.8 Constitutional amendments during the transitional period.

7.2.9 The structure, functioning and powers of the judiciary, including whether there should be a special constitutional tribunal or court to deal with matters arising out of the provisions of the transitional constitution.

7.2.10 National symbols

7.2.11 Miscellaneous provisions including transitional provisions needed to ensure constitutional and legal continuity and effective government. Under this heading would be included any special structures or procedures that the Negotiating Forum may require to be included in the interim constitution.

7.3 These matters will have to be addressed in the Negotiating Council as a matter of urgency if the commitment made in the Declaration of Intent is to be met.

7.4 If we receive instructions to that effect we would be able to prepare a draft transitional/interim constitution for discussion and development by the Negotiating Council. The instructions should contain sufficient detail to direct us in regard to the main structures of the contemplated constitution.

## 8. TRANSITIONAL REGIONAL/LOCAL GOVERNMENT

This is dealt with in paragraph 7.2.5 and 7.2.6 above.

## 9. FUTURE OF THE TBVC STATES

If reincorporation takes place, it will be necessary to formulate the draft legislation according to which this will happen, and to address the practical implications of absorbing existing administrations into appropriate regional and local structures. The issue of the future of these states is closely linked to the demarcation of regions and regional powers. It requires urgent resolution, to facilitate the work of the Commission referred to in our report to the Planning committee on Regional Demarcation and Related Issues of 13 May 1993.



## 10. Submissions by Parties

As at 18h00 on 13 May we had received submissions from the following participants. These reports will be discussed as soon as possible.

1.	ANC	12/05/93	Form of state and Constitutional principles
2.	AZANYU	27/4/93	Demand for a constituent assembly
3.	AVU	13/05/93	Constitutional proposals
4.	Bophuthatswana	12/05/93	Submission on constitutional matters
5.	Ciskei	12/5/93	Constitutional Affairs
6.	Democratic	12/05/93	Submission re constitutional Party matters
7.	Dikwaketla	28/4/93	Constitution making process
8.	IFP	13/05/93	Heads of argument and positions on the form of state
9.	PAC	29/4/93	Input on constitutional principles and the form of state
10.	SA GOVT	12/05/93	Principles governing constitution making in SA
11.	Venda	13/05/93	Position paper on the form of state

## SECOND REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL: 19 MAY 1993

### 1. Introduction

1.1 The resolution adopted by the Negotiating Council at its meeting on 18 May 1993 records broad agreement that the most suitable form of government for the future will be one which involves the allocation of powers to central and regional governments. We were asked to take into account the concerns and views of delegates expressed at the meeting of 18 May, and in their submissions to us, and to undertake the following tasks:

- 1.1.1 Provide the Negotiating Council with a report on constitutional principles.
- 1.1.2 Consider and report on the structures, powers and functions of states/provinces/regions (SPR).
- 1.1.3 Present proposals on various issues pertaining to the constitution-making process.
- 1.1.4 Provide the Negotiating Council with recommendations on how best the discussions within the Negotiating Council on these issues should be structured.

These issues are interrelated and consistently with the debate in the Negotiating Council, can be approached on an holistic basis.

1.2 The debate on the constitution-making process and the powers and functions of the SPR foreshadowed in the written representations that we have received from participants is likely once again to reflect the tension identified, for example 6.4 and 7.1 in our First Report to the Negotiating Council (13 May 1993). On the one hand a concern as to the legitimacy of the constitution-making process which underlies the position of many participants, that the constitution be drawn up by an elected body; on the other a concern reflected in the position of other participants that their interests will not adequately be protected if decisions are taken by a majority in a democratically elected constitution-making body.



- 1.3 The question is whether these two positions can be reconciled through the mechanism of developing a set of constitutional principles at the Negotiating Forum, which will be binding on the elected constitution-making body and provide sufficient assurances to meet the objections to a process which requires the constitution to be drawn up by an elected body.
- 1.4 Our task is to help in the structuring of the discussions and thereby to facilitate the negotiations. It is in that spirit that we have addressed the instructions given to us by the Negotiating Council on the 18 May.
- 1.5 The key to unlocking the differences that exist, and enabling the process to move forward, is to develop a set of constitutional principles. These should be sufficient to offer assurance to those who are concerned that their interests will not be adequately protected if the constitution is drawn up by an elected constitution making body, without being so detailed as to pre-empt the work of an elected constitution making body. They should guarantee that the constitution will be democratic in substance as well as in form, that basic rights will be respected and upheld, and that mechanisms will exist to prevent the abuse of power by the government of the day.
- 1.6 In this report we address:
  - 1.6.1 An approach to the formulation of constitutional principles, drawing on the work done in that regard at Codesa and the representations of the participants to us. We look at the common ground that exists and make suggestions that may help to take the process forward.
  - 1.6.2 We deal specifically with the SPR and make suggestions as to what may be necessary to provide the assurances that are sought in regard to the integrity and viability of the SPR.
  - 1.6.3 We locate our suggestions in the context of the broader debate involving self-determination and the form of state, and the process of constitution making.

## 2. An Approach to Constitutional Principles

In its Declaration of Intent on the Negotiating Process of 7 May 1993, the Negotiating Council committed itself inter alia:

- 3.1 To reach agreements on binding constitutional principles, the constitutional framework and the constitution-making process in terms of which elections will be held.

In the Negotiating Council's mandate to the Technical Committee on Constitutional Issues of 18 May 1993, this Committee was instructed, inter alia, to: Provide the Negotiating Council with a report on constitutional principles.



The Technical Committee also received submissions from various participating parties on constitutional principles.

The following paragraphs reflect the preliminary conclusions of the Technical Committee based upon a consideration of the relevant documents.

## 2.1 On the purpose and nature of a set of constitutional principles

Constitutional principles could play an important role in providing participants with the security they need in the process of constitutional transition with regard to future opportunities for political participation and other basic concerns. (Refer to the First Report of the Technical Committee on Constitutional Issues to the Negotiating Council : 13 May 1993 paragraph 5) The principles should therefore incorporate basic rights of political participation, multi-party democracy, checks and balances, separation of powers and secure SPR representation in order to ensure that a future constitutional system provides for the protection of minority and regional interests.

**The principles should provide a clear framework for the drafting and adoption of a future Constitution.**

**The principles should not have the character of constitutional provisions as such, but they should establish clear parameters within which a future Constitution must be drafted.**

**The principles must be formulated in clear language which is capable of effective judicial interpretation and adjudication.**

Although the principles and constitution making process are related, it may be desirable to reach agreement on constitutional principles first. This could facilitate agreement being reached on the constitution-making process. In drafting such principles, regard may be had to other precedents, international instruments, the CODESA documents and the submissions of parties.

## 2.2 Emerging consensus

It appears from the documents and submissions that we have considered, that with a few exceptions, consensus so far has emerged in relation to the following:

- (a) Democracy in the form of universal adult suffrage at all levels of government.



- (b) Supremacy of a rigid Constitution, whereby the validity of all laws and all acts of government is made subject to consistency with the provisions of the Constitution, such consistency being justiciable by an independent judiciary.
- (c) The inclusion in the Constitution of a set of fundamental rights authoritatively protecting the individual in a non-discriminatory manner against the state and all its organs.
- (d) The constitutional separation of the executive, legislative and judicial powers.
- (e) The constitutional distribution of the powers of government among democratically elected national, regional and local institutions.
- (f) Constitutional recognition and accommodation of the variety of cultures and religions being practised, and languages used by various segments of the population.

It should be noted that the above wording is not intended as formulations of constitutional principles as such, but simply to indicate areas of consensus.

### 3. Structures, Powers and Functions of the SPR: Remarks relevant to the form of state and confederation:

3.1 In our First Report of 13 May 1993, point 4, it was stated:

**"The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.**

**The form of state will be shaped by decisions in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state."**

From the submissions received from the parties as well as the discussions of our First Report in the Negotiating Council on 18 May 1993, it is evident that most parties consider the form of state as a matter directly linked to the way in which powers and functions of the state are distributed on central, regional and local level and the way in which these powers and functions are exercised.



- 3.2 A primary observation must be made: all states in the world, whether unitary or federal, must decentralize government powers and functions in order to achieve effective government. Considerations of scale (i.e. physical proportions of countries), diversity of people and economies, etc. all influence the degree of decentralization. Decentralization in the modern state is a fact of life and is made possible through many constitutional mechanisms, e.g. delegation of powers and functions, deconcentration of government activities, etc. Generally, and broadly stated, it can be said that decentralization in the modern state rests on the principle of devolution of powers which, in turn, assures that government is brought close to the people and the principle of subsidiarity is given effect to. In all states, decentralized government has to be performed by state institutions, on central, regional and local level. It is wrong to assert that the unitary state does not apply mechanisms of decentralization; in fact, some unitary states abound with structures and institutions at regional and local levels which all assure a high measure of decentralized government. The major distinguishing feature between the unitary state and the other form of state organisation which can be broadly labelled "federal", is that in the unitary state the central government retains the ultimate say over the distribution as well as the exercise of government powers and functions. (This does not mean, however, that the central government in exercising this ultimate authority, can act at will and ignore constitutional requirements and procedures).
- 3.3 An analysis based on the empirical evidence provided may very well conclude that a particular state exhibits so many federal characteristics and complies in so many respects with the federal idea, that it can be called a federation. Conversely, that its characteristics are such that it can more appropriately be called unitary. This is, however, a consequence of and not necessarily the determining factor of the constitutional order and governmental structures.
- 3.4 To conclude: There is no universally accepted definition of federalism, and we are not convinced that in a discussion on the form of state, it would be useful or indeed possible to use as a point of departure preconceived concepts such as unitary or federal states. We should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a bearing on the form of state.
- 3.5 Finally, some remarks must be made about a confederation. A confederation is not a form of state since confederation, per definition, is a combination of separate, independent states which finds its basis for cooperation and cohesion, not in one constitutional system (although, of course, the respective constitutional system of the independent, separate states may reflect confederal agreements and arrangements), but according to rules of international law. Being of an international nature, each of the confederal states should enjoy international recognition in order to have their confederal pact sanctioned by international law. A clear example of a confederation which was not sanctioned by international law, is the confederation of the Republic of South



Africa and its TBVC states. International recognition of the independent status of the separate states in the confederation will to a very large extent depend on how these states gained their independence.

Independence founded on partition and secession which does not conform to international norms of human rights and self-determination (ie. mutual agreement by the mother

country and the secessionist state based on the free and voluntary expression of the will of the people concerned) is unlikely to meet with international approval. Furthermore, it would be difficult to promote confederal ties of mutual trust, cooperation and support between independent states which do not necessarily hold the same convictions about democracy or, do not subscribe to the same norms on human rights and liberties. In the latter respect, the European Confederation of States in the form of the European Community provides a clear example of the type of co-operation that is required.

- 3.6 It would be helpful if participants in the Negotiating Council in favour of confederation as an option would provide us with more clarity on their proposals and in particular the territory and population of the envisaged separate state, and how it will meet the international law requirements of secession and self-determination.

#### 4. The Integrity and viability of the SPR

- 4.1 Following upon the Codesa debates there seems to be broad agreement that provision should be made for organs of government at central and SPR levels and that for this purpose the constitutional principles should require:
  - 4.1.1 Democratic representation at each level of government.
  - 4.1.2 Appropriate and adequate legislative and executive powers and functions to be vested in each level of government to enable each to function effectively.
  - 4.1.3 The entrenchment of such powers and functions in the Constitution.
  - 4.1.4 The general principles of the Constitution, including fundamental rights to be applicable at each level of government.
  - 4.1.5 Provision to be made for tasks to be carried out at different levels of government on an agency or delegation basis, where this would be appropriate.
- 4.2 In addition to these areas of broad agreement there are proposals from participants that the constitutional principles should also address:
  - 4.2.1 Procedures for amending the provision of the Constitution entrenching SPR boundaries, powers and functions.



- 4.2.2 The fiscal powers of and financial allocations to the SPR.
  - 4.2.3 The distinction between exclusive and concurrent powers, and how conflicts arising out of the exercise of concurrent powers should be addressed.
  - 4.2.4 Whether residual powers - i.e. those not specifically allocated to the central government or the SPR in the constitution, should vest in the central government or in the SPR.
- 4.3 There are sound reasons for the constitutional principles to address each of the matters referred to in paragraph 4.2. By doing so, the Negotiating Forum may be able to provide all the assurances necessary to guarantee the integrity and viability of the SPR, without pre-empting the work of any elected constitution making body. A decision as to process could then be taken in the knowledge that the integrity and viability of the SPR are not disputed.

#### 4.4 Amendments to the constitution

- 4.4.1 We think that consideration should be given to the need for special procedures to be followed in regard to amendments to the boundaries, powers and functions of the SPR.
- 4.4.2 This offers an assurance that the SPR will be protected against the whims of a central government wishing to concentrate its power. There is a recent example in our own history of this having been done, and it is reasonable that the Constitution should contain safeguards against such actions.
- 4.4.3 Because circumstances change and the future can never be foreseen, constitutions should be capable of being amended to meet changed circumstances. Possibly some objective standard should be prescribed which would be justiciable in a court if disputed. Provision could also be made for a special role for the SPR in the making of any amendments which affect their boundaries, powers or functions.

#### 4.5 Fiscal powers and financial allocation

- 4.5.1 It stands to reason that SPR's will have divergent financial and developmental capabilities.
- 4.5.2 Provision could be made for a fiscal commission to be involved in the allocation process, and for an objective standard to be followed (i.e. reasonable, having regard to the national interest and the interests of the SPR) which would be justiciable and a safeguard against the abuse of power.



#### 4.6 Exclusive or concurrent powers, and residual powers

- 4.6.1 Any constitution that makes provision for the allocation of powers to more than one level of government, has to address the issue of where particular powers reside.
- 4.6.2 The Codesa principle that "appropriate and adequate" legislative and executive powers and functions shall be vested in each level of government to enable each to function effectively, does not specify where residual powers will lie, nor does it specify the basis for the allocation of powers either exclusively or concurrently, or how possible conflicts in respect of the exercise of concurrent powers will be resolved. Whilst there are no clear rules for determining these issues, we think that there is a need to address them in the Negotiating Council and to establish whether they can be made the subject of a constitutional principle or principles.
- 4.6.3 Where there are concurrent powers, the Central Government usually has an overriding power, but this can be made subject to objective criteria to prevent abuses. We suggest that this be debated, as well as the site of residual powers, and possible criteria for determining how the allocation of powers should be made.
- 4.6.4 The question of asymmetry of powers has been raised by a number of participants. It is a matter which calls for careful consideration. We would appreciate receiving a more detailed explanation of what particular participants have in mind so that we can deal with this matter in a later report.

### 5. CONSTITUTION MAKING PROCESS

- 5.1 From the proposals on the constitution making process submitted to us on Constitutional Issues by the participants, it appears that:
  - 5.1.1 There exists an overall unanimity that South Africa, [including the TBVC states] requires a new constitutional dispensation to replace the present one:
  - 5.1.2 The parties hold divergent views on the constitution making process and consequently on the process of transition to a new constitutional order:
  - 5.1.3 The proposals of the parties on the creation of a new constitution or constitutions for South Africa evince substantive differences on two cardinal issues:
    - 5.1.3.1 The structure, composition and function of the constitution making body, and
    - 5.1.3.2 The mechanism of transition from the present to a new constitutional order.



## 5.2 The proposals of the parties

There are differences between the various proposals. They have been developed over a period of time, during which positions have been modified in part to meet the concerns of some of the participants. Allowing for differences in emphasis and detail, the proposals of the parties may be classified **within two categories:**

- 5.2.1 On constitution making, an elected constituent assembly acting as a national constitution making body, on the one hand, and the present Negotiating Forum ["MPNP"] acting as a constitution making body, on the other.
- 5.2.2 On constitutional transition, a one phase transition or two or more phases of transition.

## 5.3 The structure, function and composition of CA.

One proposal which in broad terms has the support of a number of parties is that a CA should draw up and adopt the final new Constitution, subject *inter alia* to the following important qualifications.

- 5.3.1 Members of the CA shall be elected on the basis of a non racial unqualified franchise including citizens of the TBVC States, in an electoral system based on regional and national proportional representation within the CA.
- 5.3.2 The CA shall be sovereign and not limited in any way in its constitution making mandate subject to what is stated hereinbelow:
- 5.3.3 The CA shall fashion a new constitution within the framework of binding the general constitutional principles agreed upon in the MPNP.
- 5.3.4 The CA shall be required to adopt the new constitution within fixed time frames, by predetermined and entrenched adoption procedures and shall be subject to an agreed dead-lock breaking mechanism.
- 5.3.5 Regional boundaries for purposes of elections of the CA shall be determined by the Multi Party Negotiation Council upon the recommendation of the Commission on demarcation of SPR.

## 5.4 The other proposal, supported broadly by participants opposed to the CA, is that the present negotiation forum should draft and adopt the final national constitution/s subject to the following:

- 5.4.1 The MPNP should agree beforehand on the form of state, the boundaries, powers and functions of SPR as well as on constitutional principles;
- 5.4.2. A panel of experts appointed by MPNP should draft the national constitution:



- 5.4.3 Simultaneously, or in interaction with the drafting of the national constitution, "people at ground level" must negotiate and determine SPR constitutions in accordance with the constitutional principles set at national level.
  - 5.4.4. The constitutions of regions or states shall be drawn up and adopted by regional, multi party fora, or referenda, or regional constituent assemblies.
  - 5.4.5. Legislative organs of the respective SPR shall pass their national and SPR constitution.
  - 5.4.6. Elections shall take place on a national as well as SPR levels in terms of the new national and respective regional constitutions.
- 5.5 One of the participants appears to propose that the present negotiating forum draft and adopt a transitional constitution:
- 5.5.1 Which will be drafted in accordance with and amended or replaced by and only within the framework of agreed, justiciable and specially entrenched constitutional principles;
  - 5.5.2 Which shall be a fully fledged constitution;
  - 5.5.3 Which shall not be amended or repealed in any other manner or by any other procedure than that prescribed by its own provisions;
- 5.6 Whilst subscribing to the views of the general category described in 5.4 hereabove, one of the parties holds a distinct view that:
- 5.6.1 The demarcation, powers and functions governing at least two States - "an Afrikaner state and the new South Africa there might be more" should be negotiated beforehand by all interested parties, presumably within the multi-party negotiation process.
  - 5.6.2 Such constitutions of the confederal states or states within a commonwealth should be legislated into power by the existing South African parliament. It is argued that only the present parliament can lawfully transfer its powers to the new states.

## 5.7 Transitional/interim process

Two broad approaches emerge from the submissions of the parties in respect of constitutional transitional arrangements:

- 5.7.1 The group that favours constitution-making in the MPNP:
  - 5.7.1.1 Rejects the notion of a two-phased transition to a final national constitution;



- 5.7.1.2 Consequently, they oppose the establishment of a transitional executive council, elections leading to a CA, the CA itself, an interim government of national unity, or any form of transitional authority, and a transitional constitution:
- 5.7.1.3. They seek prior determination of the form of state and, obviously of SPR boundaries, functions and power:
- 5.7.1.4. They all support the principle of asymmetrical SPR powers and of the principle of a "bottom up" constitution making process in terms whereof the regions draft and adopt separate, distinct and autonomous constitutions, on the one hand, and the MPNP adopts the national constitution which will not override the autonomous constitutions of the SPR.
- 5.7.1.5. They resist the holding of elections at a national or regional level at any stage before the SPR constitutions have been predetermined by the SPR themselves.
- 5.7.1.6. They all oppose the termination or amendment of the present constitutional dispensation including the TBVC states prior to the final adoption of the constitutions for the SPR and the national constitution.
- 5.7.1.7 All but one which advances a confederal model, propose a "federal" constitutional order within one country.

#### 5.7.2 The two-phased model generally speaking is characterised by:

- 5.7.2.1 The determination of the constitutional principle by the MPNP:
- 5.7.2.2 The demarcation of regions by the MPNP for purposes of elections:
- 5.7.2.3 Installation of a transitional executive council. [Some parties hold that the TEC should function in terms of the transitional constitution whilst others hold that it should function in terms of agreements by the MPNP]
- 5.7.2.4 The adoption of a transitional constitution
- 5.7.2.5 A firm election date should be proclaimed and a formal election process should commence.
- 5.7.2.6 Once elections have been held:
  - 5.7.2.6.1 The new parliament will be installed [some parties advocate for legislative as well as constitution making functions by the new parliament].
  - 5.7.2.6.2 A new multi-party executive government will be structured, and



5.7.2.6.3 Newly structured regional, [including TBVC states] and local government levels will be phased in. and

5.7.2.7 The constituent assembly/parliament adopts [on some versions amend. the transitional constitution] a new constitution replacing the transitional one.

## 6. PROPOSALS OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.

6.1 No significant progress can be made by the parties without a significant resolution of what appears to be mutually exclusive approaches to the constitution making process. Historically two predictable modes of constitution making have come to be:

6.1.1 *Pouvoir Constituant* - has been utilised to create a new constitution following upon a new and distinct historical moment such as a total collapse of a regime or a revolution. In this case the new constitution would not owe its existence to the old.

6.1.2. *Pouvoir Constitué* - existing constitutional order is amended and thus the new order derives its legitimacy and continuity from the old.

6.2 The present constitutional impasse exhibits features of both of the aforementioned approaches. Here it may be said that the new constitution cannot derive its legitimacy, popular acceptability and democratic character from the existing constitutional dispensation. A mere amendment of the existing constitutional order would not suffice. The major source of legitimacy would be a democratic process signifying an irreversible and "cleansing" break from an undemocratic constitutional order. On the other hand it may be argued that a new constitution may not and cannot come into being without the explicit co-operation of the existing constitutional order.

6.3 Can the differences that exist in regard to the process be resolved? A possible solution which may be worth exploring in the Negotiating Council is the careful and sensitive formulation of a mutually acceptable principle of regional government, adequate constitutional principles and provision for the democratic creation and adoption of a final constitution.

6.4 Each of the following constitutional processes could be examined in that context and given effect to as instruments of reconciling the competing concerns of the parties:



6.5 Adequate principle of regional government including:

- 6.5.1 The idea of a special role for regions in the formal amendment procedure of the constitution, especially on matters affecting regions;
- 6.5.2 The concept of regional representation in the central legislature;
- 6.5.3 A list of justiciable criteria limiting the exercise of the override to prevent the party at the centre from exercising such powers for the purpose of penalising regional opponents;
- 6.5.4 Agreed criteria for the determination of regional boundaries, and powers.

6.6 Justiciable and binding constitutional principles.

6.7 Special majorities.

6.8 Entrenched and justiciable rights.



**CONFIDENTIAL**  
**THIS REPORT IS EMBARGOED UNTIL 12H00**  
**ON FRIDAY 28 MAY 1993**

**THIRD REPORT TO THE NEGOTIATING COUNCIL ON CONSTITUTIONAL  
PRINCIPLES BY THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL MATTERS**

27 May 1993

**1. Introduction**

- 1.1 We were requested by the Planning Committee to develop our Second Report on Constitutional Issues (19 May 1993) so as to formulate a comprehensive set of constitutional principles, and in particular principles on the powers and functions of regions to serve the purpose suggested by us in paragraph 6.3 of our Second Report.
- 1.2 We do not think that any good purpose will be served by attempting to analyse each of the submissions made to us in order to indicate the type of constitution that is contemplated by the various participants, or how they differ from one another. We have considered all the proposals put to us, and have decided that we can best give effect to the request from the Planning Committee by formulating a set of constitutional principles for debate in the Negotiating Council. In formulating these principles, we have drawn on the Codesa documents, and on our own knowledge and experience as well as the submissions of the participants.
- 1.3 The principles that we offer for debate do not accord wholly with the submissions of any of the parties, and we appreciate that they are likely to meet some resistance from all of the participants. It seems to us, however, that areas of agreement, disagreement and possible compromise will emerge from the debate on our report, and that in the process, the participants may be able to find a solution along the lines suggested by us in paragraph 6.3 our



Second Report (19 May 1993). For the sake of clarity we deal with general constitutional principles and principles on SPR's in separate paragraphs. Together they constitute one body of constitutional principles.

- 1.4 We have not yet had a response to paragraph 3.6 of our Second Report. In the circumstances we do not intend dealing in this report with the question of confederation. How, if at all, a confederation can be accommodated within one set of constitutional principles may depend on that response.

## **2. General Constitutional Principles**

- 2.1 The constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government and a common South African citizenship.
- 2.2 The constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial and all other forms of discrimination and promote racial and gender equality and national unity.
- 2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- 2.4 The judiciary shall be competent, independent, legitimate and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.
- 2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.



- 2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.
- 2.7 Formal legislative procedures shall be adhered to by legislative organs at all levels of government.
- 2.8 The diversity of languages, cultures and religions shall be acknowledged, promoted and protected.
- 2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.
- 2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.
- 2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
- 2.12 The status of traditional leaders shall be acknowledged and recognised in an appropriate manner in the constitution. Unless provided otherwise by legislation, indigenous law shall be applied to the extent that it is compatible with the provisions of the fundamental rights contained in the constitution.
- 2.13 Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.



- 2.14 Amendments to the constitution shall require special procedures involving specified majorities.

3. **Principles dealing with the allocation of powers to different levels of government**

- 3.1 Government shall be structured at national, SPR and local levels.
- 3.2 At each level of government there shall be democratic representation.
- 3.3 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.
- 3.4 The powers and functions of each level of government shall be defined in the constitution. Amendments to the constitution which alter the powers, boundaries, functions or institutions of regions shall in addition to any other procedures specified in the constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.
- 3.5 The powers and functions of each level of government may include exclusive and concurrent powers, as well as the power to perform functions for other levels of government on an agency or delegation basis.
- 3.6 Each level of government shall have fiscal powers which will be defined in the constitution.
- 3.7 A Financial and Fiscal Commission, including representatives of each of the SPR's, shall be constituted to advise the national government on the distribution of financial and fiscal resources.



3.8 Fiscal and financial allocations by the national government to SPR governments shall be made on an equitable basis after taking into account the national interest, disparities within SPR's, the advice of the Financial and Fiscal Commission, the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

3.9 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

3.9.1 General<sup>1</sup>

3.9.1.1 The level at which there is most control over the quality and delivery of services, should be the level responsible for the execution of the programme or the delivery of the services.

3.9.1.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the territorial, functional or institutional integrity of the SPR's.

3.9.1.3 In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.

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<sup>1</sup> In dealing with this issue we have made extensive use of the report on Constitutional Options and their Implications for Good Government and a Sound Economy prepared by a group of experts which consisted largely of South Africans of different political persuasions, published in March 1993 by the Consultative Business Movement.



3.9.1.4 Where it is necessary for the maintenance of national standards, the maintenance of economic unity, the maintenance of national security or the prevention of action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.

3.9.1.5 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

### 3.9.2 National Government

3.9.2.1 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

3.9.2.2 Where uniformity across the nation is regarded as important with regard to a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.

3.9.2.3 Where minimum standards across the nation are regarded as important for the delivery of public services, the power to set such standards should be allocated to the national government.



3.9.2.4 The power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

### 3.9.3 SPR Government

SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

### 3.9.4 Concurrent Powers

Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

### 3.9.5 Residual Powers

Powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall vest in the national government, alternatively in the SPR governments. (This is a fundamental issue which calls for a political decision).



#### 4. Asymmetry

Certain parties have made submissions to our committee that the constitution should make provision for SPR asymmetry. Regional asymmetry may manifest itself in the following ways:

##### 4.1 Geographical and demographic asymmetry

It stands to reason that a measure of geographical and demographic asymmetry will exist amongst SPR's. If such asymmetry becomes disproportionate and creates possibilities of economic decline or disruption of inter-regional relationships, constitutional mechanisms could be applied to rectify the position (eg adjustment of SPR borders on a basis of consent by the people concerned and approval by the respective SPR's as well as the national legislature).

##### 4.2 Asymmetry in respect of functions and powers

There can be asymmetry in the allocation of powers and functions. In the submissions to our Committee it has been suggested that SPR's may require different powers and functions depending on their location, the nature and extent of the development that has taken place in a particular SPR, and even the composition of the population. It has been suggested that asymmetry could be extended not only to powers and functions, but also to matters such as SPR citizenship, and the recognition and use of languages.

##### 4.3 Institutional asymmetry

There can be asymmetry in the institutions of government, ie different types of legislatures, different electoral systems etc. There can also be asymmetrical institutions, ie different institutions for the accommodation and recognition of traditional leaders, and linguistic, cultural and religious groups etc.



#### 4.4 Temporal Asymmetry

SPR governments, institutions, functions and powers may be phased in at different times.

We have not dealt with asymmetry as a principle because it is not clear to us what the views of all the parties are on this issue. The principles that we have formulated are of general application and ought not to hamper a debate on asymmetry.

### 5. **Matters requiring the consideration of the Negotiating Council:**

5.1 Matters such as the powers, functions and boundaries of the SPR's and local governments in the interim depend on decisions to be taken by the Negotiating Council in regard to the process of transition and can only be dealt with after such decisions have been taken.

5.2 The process of decision making with regard to the allocation of exclusive, concurrent or residual powers specifically to different levels of government, is a matter requiring political negotiation in the light of this report. The final model should be one which, inter alia, is financially viable and conducive to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.



# THE FOURTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

3 JUNE 1993.

## 1. Introduction

1.1 The process of transition contemplated by the Resolution submitted by the Planning Committee to the Negotiating Council on 1 June 1993 requires agreement to be reached by the Multi-Party Negotiating Forum on:

1.1.1 General Constitutional Principles

1.1.2 A constitutional principle on the allocation of powers to different levels of government

1.1.3 A constitutional framework which makes provision:

1.1.3.1 For the election of a Constitution Making Body which will adopt a constitution;

1.1.3.2 For government at national, regional and local levels during the period between the election for a constitution making body, and the adoption of a new constitution by that body - the transitional period;

1.1.3.3 For the establishment of structures for national, regional and local government, the powers that each level of government will have, the way each will function and take decisions during the transitional period, and the manner in which the different levels of government will relate to one another.



- 1.2 The Resolution requires us to make recommendations to the Negotiating Council on:
- 1.2.1 The powers, functions and structures of the SPR during the transitional period;
  - 1.2.2 The constitution making process to be followed, including the structures that need to be established for that purpose;
  - 1.2.3 The procedures to be followed in the drafting and adoption by the Multi-Party Negotiating Forum of a constitution for the transitional period;
  - 1.2.4 The procedure to be followed thereafter in the drafting and adoption of a constitution by an elected constitution making body.
- 1.3 The issues which we have to address are once again inter-related and the tension which we have previously identified between decisions to be taken by the MPNP, and decisions to be taken by the Constitution Making Body is likely to arise at each stage of the process.
- 1.4 In this report we will address the powers, functions and structures of the SPR during the transitional period. We will do this in the context of our previous reports and in the knowledge that decisions taken in relation to the SPR during this period, have a bearing on the constitution making process as a whole, and on the functioning of the elected Constitution Making Body.
- 1.5 The need to make provision for a legal framework to regulate SPR government between the adoption of a constitutional framework by the MPNP, and the adoption of a new constitution by the elected Constitution Making Body cannot be questioned. The nature of that framework depends, however, to some extent upon the way in which the transitional framework is conceptualised. We deal with this later in our report.



## **2. Assumptions regarding the constitution-making process and the establishment of regional government**

To enable us to formulate concise suggestions regarding the powers, functions and structures of SPR's during the transitional period, we have to make certain assumptions relating to the constitution making process:

- 2.1 Due to the variety of structures at present in existence (in particular the Provincial Governments, the TBVC states and the Self-governing Territories), various scenarios are possible depending upon the continuation or not of those, or some of those structures when a transitional constitution comes into effect.

**For the purposes of this Report we therefore assume that:**

- (a) Transkei, Bophuthatswana, Venda and Ciskei will have been reincorporated into South Africa at the time of the coming into operation of the transitional constitution;
- (b) The operation of the constitutional legislation underlying the institutions of the Self-governing Territories (Act 21 of 1971) and related measures will have ceased at the time of the coming into operation of the transitional constitution.

- 2.2 The variety of existing regional and second-tier administrations will not be capable of instant rationalisation, whatever geographical or structural form the transitional regional dispensation may take. Personnel and infrastructures of each of the existing administrations will have to be taken into consideration in the process of inevitable rationalisation.

We therefore assume that the transitional constitution will make provision for the consolidation of the *political* authority over all the existing administrations and the infrastructure within each SPR established for the period of transition, and that the greatest measure of continuity of



employment and services will be ensured during the process of rationalisation.

### 3. The different approaches to SPR's in the transitional period

#### 3.1 Broadly, two models of interim SPR's have been proposed:

3.1.1 The first envisages the establishment of interim regional administrations within existing provincial boundaries for the purpose of phasing out apartheid based structures, rationalising existing administrations and ensuring the provision of services in the transitional period.

3.1.2 The second contemplates the establishment of fully fledged transitional regional governments within boundaries demarcated for the purposes of the elections, and with elected legislative and executive structures.

3.2 These models have implications for the divisions of powers between national government and SPR's in the transitional period, the structures and composition of those SPR's and the effective powers of an elected CMB.

3.3 The two models overlap to the extent that they both envisage the reconstruction and rationalisation of existing second tier structures of government, an agreed distribution of the function of government between the national and regional levels in the transitional period, and the adoption of a final constitution by an elected Constitution Making Body.

3.4 No matter how the transition is conceptualised, three matters are clear:

- \* First, that the framework will have to make provision for effective regional administration during the transitional period.



\* Secondly, that this will have to be done in way which has regard to the regional authorities (including the TBVC states), which may be in existence when the new arrangements are implemented.

\* And finally, that this must all be done in way which is compatible with the powers and functions of the elected Constitution Making Body.

#### 4. The allocation of powers to SPR's during the transition

4.1 The process of the allocation of powers and functions between different levels of government is always a complex task. It is particularly difficult to undertake this task for a transitional period, when the nature of the final constitutional order has not been settled.

4.2 It would be more appropriate in these circumstances to have a flexible allocation of powers, which at SPR level could be exercised subject to the supervision of the Constitution Making Body and a broad based government of national unity. If this were to be done, the distinction in the emphasis in the two models to which we have referred between administration on the one hand and government on the other could be bridged.

4.3 As long as the demarcated boundaries are broadly acceptable, a way forward could be the acceptance of a model in which:

4.3.1 Provisional regions are established in accordance with the demarcated boundaries;

4.3.2 Provisional regional authorities are established on the basis of the electoral results within such regions;

4.3.3 Powers consistent with criteria such as those contained in our Third Report are vested in the Provisional Regional Authority;

4.3.4 Such powers are stated in general terms and are made subject to the supervision of the Constitution Making Body.



4.4.4 This would enable the foundations for SPR governments to be established and the necessary rationalisation to be undertaken, without finalising the precise boundaries of the SPR's and the precise areas of competence of the different levels of government. Those tasks would be left to the Constitution Making Body to accomplish within the framework of the constitutional principles and the detailed principle dealing with the allocation of powers to different levels of government.

## **5. Suggested allocation of powers and functions of SPR's during the transition**

With reference to the criteria to be applied in the allocation of powers between national and SPR governments set out in paragraph in 3.9 of our Third Report, it is our view that during the transition SPR Governments could be entrusted with powers pertaining to the following functional areas, within the framework described in paragraph 4:

- 5.1 The imposition of SPR taxes
- 5.2 Appropriation of revenue
- 5.3 Health services
- 5.4 Welfare
- 5.5 Education
- 5.6 The environment
- 5.7 Local government
- 5.8 Town planning
- 5.9 Tourism and recreation
- 5.10 Agriculture
- 5.11 Public media
- 5.12 Public works and roads
- 5.13 Traffic control
- 5.14 Local policing and law enforcement
- 5.15 Casinos, racing and gambling



- 5.16 Transport
- 5.17 Cultural affairs
- 5.18 Traditional authorities
- 5.19 Protection services
- 5.20 Markets and pounds
- 5.21 Fish and game preservation

The allocation of specific elements of these functional areas to SPR's and other levels of government requires expertise in the field of public administration. Such detailed allocation should be done at the time of the drafting of the transitional constitution.

## 6. Structures of the SPR's during the transitional period

The exact structures of the SPR's are matters to be negotiated and agreed upon. However, these structures, including the form of regional government, should be democratic and in accordance with the Constitutional Principles as developed in our previous Reports.

## 7. Outstanding matters

We will deal with the other matters set out in paragraph 1.2 in subsequent reports.



**EMBARGOED (PAGES 1-13)  
UNTIL DELIVERY/TABLING IN  
NEGOTIATING COUNCIL MEETING**

**THE FIFTH REPORT OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES  
TO THE NEGOTIATING COUNCIL  
15 JUNE 1993**

**1 Background**

1.1 The *Draft Resolution on Constitutional Issues* presented to the Negotiating Council by the Planning Committee on 1 June 1993, contains the following paragraph:

2. *There is a need for the adoption of a Constitution for the transitional period, the text of which is agreed to at the Multi-Party Negotiating Process:*

2.1 *Which shall be drafted in accordance with the constitutional principles agreed upon in so far as they may be applicable;*

2.2 *Which will provide, inter alia, for justiciable fundamental rights, the structure of national and regional governments and their respective powers, functions and authority; and*



2.3 *As well as which will provide for the procedures relating to the drafting and adoption of a Constitution by the elected constitution-making body.*

1.2 Despite reservations made by some of the participants in regard to paragraph 2 of the draft resolution, there was general agreement that we should proceed in terms of paragraph 3. Paragraphs 3.3 and 3.4 require us to make recommendations to the Negotiating Council on:

3.3 *The procedures to be followed in the drafting and adoption by the Multi-Party Negotiating Forum of a Constitution for the transitional period.*

3.4 *The procedure to be followed thereafter in the drafting and adoption of a constitution by an elected constitution making body.*

1.3 Our understanding of this instruction and the debate in the Negotiating Council is that we were to proceed on the premise that despite the reservations concerning paragraph 2 of the draft resolution (quoted above), consensus might be reached once the details of the transitional process and structures contemplated in paragraph 2 have been developed and debated.

1.4 A few participants have suggested in submissions to us that we have misunderstood our instructions as set out in paragraph 3 of the Draft Resolution. We have considered these submissions, but are of the opinion that the manner in which we are proceeding is clearly in accordance with our instructions, and our Fifth Report has been prepared on that basis.

## 2 Outline of the process

2.1 The process whereby an elected constitution making body will formulate and adopt a new constitution in accordance with agreed constitutional principles is discussed in paragraph 5 of our Second Report.

2.2 The legislative framework that has been advocated for the entire process makes provision for:

2.2.1 A Transitional Executive Council.

2.2.2 An Independent Electoral Commission.

2.2.3 An Independent Media Commission.

2.2.4 A constitution for the transitional period which will make provision for the holding of elections for the government of the country during the constitution making phase, and the functioning of the elected constitution making body.

2.3 Whether or not it is desirable to establish a Transitional Executive Council, an Independent Election Commission and an Independent Media Commission, and if it is, the legislation necessary for such purposes, is being dealt with by other technical committees, and we are not required to make any recommendations thereon. We are required in terms of our instructions to deal with a constitution for the transitional period, and it is that issue that we address in this report.

## 3 The development and formalisation of a Constitution for the transitional period

3.1 The Constitution for the transitional period should emerge cumulatively from the development of a political consensus within the MPNP. The exact formulation of different parts of the text of this Constitution should be developed in the light of the reports of the relevant Technical Committees appointed by the Negotiating Council, and the debates thereon in the Council.



The work of other institutions such as the Commission on the Demarcation/Delimitation of Regions will also be material.

- 3.2 Since the MPNP does not have legislative powers, the Constitution for the transitional period will have to be adopted formally by Parliament. This means that the final text agreed upon, should conform to all the technical requirements of a draft Bill.

#### 4 Elements of a constitution for the transitional period

- 4.1 The constitutional principles will bind the constitution making body established by the Constitution for the transitional period, and should also be taken into account in the drafting of the transitional Constitution itself.

- 4.2 We propose to develop draft texts dealing with the elements of the Constitution for the transitional period in sequence. In developing the text, agreement should in our view be sought systematically. For this purpose we recommend that the elements of the Constitution for the transitional period be considered in the order set out below.

##### 4.2.1 *The composition and functioning of the elected body*

Components of this element of the Constitution will include:

- 4.2.1.1 If it is to function as a national legislature, its composition for such purpose, its election and the way in which it will take its decisions.

- 4.2.1.2 Its composition as a constitution making body, its election and the way in which it will take its decisions.

- 4.2.1.3 How disputes in regard to decisions will be resolved and deadlocks broken.

4.2.2 *The composition and functioning of the national executive*

Considerations under this heading include:

- 4.2.2.1 Participation in the executive.
- 4.2.2.2 The location and nature of the powers and functions of the Head of State and executive government.
- 4.2.2.3 The constitutional relationship between the executive and the legislature.

4.2.3 *The location of the judicial power, the composition of the judiciary and the nature of the judicial function*

Matters to be addressed in this respect will include:

- 4.2.3.1 Adjudication of the provisions of the Constitution, including the protection of fundamental rights and adherence by the constitution making body to the constitutional principles.
- 4.2.3.2 The appointment and jurisdiction of judicial officers.
- 4.2.3.3 Continuity of the judicial function.

4.2.4 *Fundamental Rights*

This element is being dealt with by the Technical Committee on Fundamental Rights during the Transition.

4.2.5 *Powers, functions and structures of SPR's during the transitional period*

The powers and functions of SPR's during the transition are dealt with in our Fourth Report. In addition to the matters



addressed in our Fourth Report, the following will have to receive consideration:

- 4.2.5.1 Legislative and executive structures within the SPR's during the transition.
- 4.2.5.2 The formulation of the powers and functions of the national and SPR governments during the transition.
- 4.2.5.3 Representation of SPR interests in national institutions.
- 4.2.5.4 The process of rationalisation of existing administrations within the SPR boundaries.

4.2.6 *Other matters, structures, procedures and arrangements*

These will include:

- 4.2.6.1 A preamble.
- 4.2.6.2 National symbols and official languages.
- 4.2.6.3 Possibly a special procedure for the establishment of the final SPR structures, powers and functions by the Constitution making body.
- 4.2.6.4 Finance.
- 4.2.6.5 Other institutions.
- 4.2.6.6 General and transitional provisions.

4.2.7 We deal below with aspects of the preceding matters which will have a bearing on the structure of the constitution, and for that reason, should be given priority by the Negotiating Council when the constitution for the transitional period is debated. The structures can then be developed in accordance with the debates and decisions of the Council. In each instance, before

formulating the specific issues that call for decision, we discuss the context in which the issues have arisen.

## 5 Matters affecting the structure of the constitution for the transitional period

### 5.1 *Composition and functioning of the elected body*

5.1.1 In the debates in the Negotiating Council and in their submissions to us, some of the participants make the point that a constitution can always be amended or replaced by parliament in accordance with procedures prescribed for that purpose. On that basis it is argued that it is fallacious to refer to a "transitional constitution" and contend that a complete and comprehensive constitution should be drawn up by the MPNP at this stage. It is correct that constitutions can be amended. There is, however, a difference between drawing up a constitution for the indefinite future, and drawing up a constitution for a transitional period of limited duration, in the knowledge that during that period a body elected for that purpose will be given the specific task of drawing up a new constitution for the indefinite future. It is the difference between creating a structure which is intended to endure, and creating a structure which is intended to be changed. The fact that the first might not endure, or that the second might not be changed, does not alter the distinction. The difference between the participants in their approach to this issue, is a difference of substance and not of terminology. It is the difference to which we have consistently referred in our reports, between those who believe that the new South African Constitution should be drawn up and adopted by the MPNP, and those who believe that it should be drawn up and adopted by an elected constitution making body. A two phased process, with built in checks and balances referred to in our previous reports, is a



possible solution to this difference which is one of the most fundamental of all the differences between the parties.

5.1.2 In dealing with the composition and functioning of the body that will be elected to draw up the constitution, the first question is whether it should be vested only with constitution making powers, or whether it should be vested with legislative powers as well. Although this issue has been raised in submissions made to us and it has been argued that the elected body should function only as a constituent assembly and not as a legislature, it seems to be implicit in the instruction to us to address the issue of the drafting by the MPNP of a constitution for the transitional period, that provision should be made for the elected body to have both legislative and constitution making powers.

5.1.3. The second question concerns the composition of the elected body. In the detailed submissions that have been made to us some parties favour a bicameral, others a unicameral structure. The bicameral structure generally makes provision for a National Assembly of 400 members, and a smaller senate to be elected on a regional basis. The unicameral structure seeks to accommodate regional interests through an electoral system, which makes provision for half the members to be elected on regional lists. A decision needs to be taken on this issue, both in regard to the constitution making process and the legislative process. As far as the legislative process is concerned, it has been suggested that special procedures may be necessary for legislation dealing with the budget, appropriations, and regional affairs.

5.1.4 As far as the constitution making process is concerned, there is support for the proposition that decisions should be taken by a two thirds majority (though 70% has also been suggested) subject to time limits, and the application of dispute resolution or deadlock breaking mechanisms if the time limits are not met. A decision needs to be taken on these issues. Dispute resolution and deadlock breaking procedures which have been suggested include the reference of disputes to the leaders of political parties for possible resolution by them, the references of disputes to technical experts for reports, new elections, referenda, and a combination of such procedures.

5.1.5 We therefore suggest that consideration be given in the first instance to the following issues:

5.1.5.1 Should the elected body have legislative as well as constitution making powers?

5.1.5.2 Should the elected body be constituted as a unicameral or a bicameral structure?

5.1.5.3 If a unicameral structure is favoured, how many members should it have, should provision be made for regional interests to be represented in the structure through the electoral system, and how should decisions be taken -

- \* in the constitution making process; and
- \* in the legislative process?



5.1.5.4

If a bicameral structure is favoured, how should each of the houses be elected, how many members should each have, what role should each perform, and how should decisions be taken -

- \* in the constitution making process; and
- \* in the legislative process?

5.1.5.5

Should the process of adopting the constitution make provision for dispute resolution procedures, and deadlock breaking mechanisms, with set time frames?

5.1.6

If it is possible to achieve consensus on most or all of these issues, we will be able to develop a more detailed framework dealing with the composition and functioning of the elected body.

5.2 *The composition and functioning of the national executive*

5.2.1 *Participation in the executive during the transitional period*

5.2.1.1

In the interests of inclusivity and acceptability of government and administration in the period following the elections, there may be reasons for the establishment of an executive composed of representatives of the political parties emerging from the elections with significant support.

- 5.2.1.2 One approach to achieve a multi-party executive would be to allow the ordinary political process to run its course, which may possibly lead to the formation of a coalition government.
- 5.2.1.3 Another approach (which is being advocated by some of the participating parties), would be to provide for a procedure in the constitution whereby a multi-party executive may be composed, while simultaneously affording the parties with significant support a choice to participate in such executive or not.
- 5.2.1.4 A decision needs to be taken on this issue by the Negotiating Council to enable us to formulate a draft on the relevant constitutional provisions.
- 5.2.2 Regarding the location and nature of the functions of the head of state and executive government, the following matters call for consideration:
- 5.2.2.1 How will the head of state be elected for the transitional period?
- The only suggestions so far made to us have been that the head of state should be a President elected by the legislature. This seems to be the most practical method in the circumstances.
- 5.2.2.2 What powers and functions should be vested in the head of state?
- Apart from the usual ceremonial functions, the head of state may be vested by a constitution with executive and legislative functions.



5.2.2.3 The relationship between the head of state and the legislature and the executive

This relationship depends upon the powers and functions vested in the head of state and the checks and balances imposed on the exercise of such powers and functions by the constitution. One participant has suggested that certain presidential powers should be exercised together with the executive, or together with the leaders of political parties participating in the executive.

5.2.2.4 How the head of state can be removed from office?

Provisions are usually made for a method whereby a President can be impeached by the legislature and removed from office.

5.2.3 *The executive during the transitional period*

A decision needs to be taken as to how the cabinet will be appointed and composed and how it will function.

5.2.4 *The constitutional relationship between the executive and the legislature during the transitional period*

The measure of separation of powers relating to the legislative and executive functions will determine questions regarding, inter alia, assent to legislation, the accountability of the executive to the legislature, whether ministers may be appointed only from the elected ranks of the legislature or otherwise, the question whether draft legislation may be initiated by ordinary members of the legislature or only by ministers, and the right of the head of state and ministers to address the legislature on their own initiative or only on

request/demand by the legislature. Debate and agreement on these matters in the Negotiating Council is called for.

### 5.3 The judicial function under the Constitution for the transitional period

In order to enable a beginning to be made in the framing of constitutional provisions regarding the judiciary, clarity on the following crisp issues is necessary:

5.3.1 How should the judiciary be appointed?

5.3.2 Should the judiciary be given the jurisdiction to decide issues emanating from the provisions of the Constitution, including conformity of constitutional legislation to the binding constitutional principles and the protection of fundamental rights?

5.3.3 Should judicial structures other than the ordinary courts be established for the adjudication of constitutional matters?

5.3.4 Should a special Constitutional Court be established, and if so, how should it be appointed, should it be an integral part of the existing judicial structures or should it have a separate and independent existence?

## 6. **Outstanding matters**

6.1 The issues concerning the SPR's during the transitional period raised in paragraph 4.2.5 above will be addressed by us in the light of the debate and the decisions taken in response to our Third and Fourth Reports.

6.2 We propose to deal with the issues raised in paragraph 4.2.6 after the framework of the constitution has been developed.



**EMBARGOED (PAGES 1-7) UNTIL DELIVERY/TABLING IN  
NEGOTIATING COUNCIL MEETING**

**FIRST SUPPLEMENTARY REPORT ON CONSTITUTIONAL PRINCIPLES  
BY THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES  
TO THE NEGOTIATING COUNCIL  
15 JUNE 1993**

**1. Introduction**

In response to the debate in the Negotiating Council on 3 June 1993 regarding the draft constitutional principles contained in paragraph 2 of our Third Report, and subsequent submissions to us, we have given further consideration to paragraphs 2.2, 2.4, 2.8 and 2.12, which were referred back to us by the Council for reformulation.

**2. Paragraph 2.2: Gender**

It was agreed that at the meeting of the Council that paragraph 2.2 should be amended to include "gender" in line two. As amended it will read:

**2.2 The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.**

### 3. Paragraph 2.4: Judiciary

It was agreed at the meeting of the Council that Paragraph 2.4 should be amended to delete "legitimate" in line one. As amended it will read:

**2.4 The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**

### 4. Paragraph 2.8: Diversity of language and culture

4.1 We were asked to reconsider the formulation of paragraph 2.8 in the light of the debate in the Negotiating Council. In our view the question of religious freedom does not require specific mention in paragraph 2.8. It is a universally accepted freedom and is covered by paragraph 2.10. We have had regard to the debate and to the International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the United Nations General Assembly on 18 December 1992. Consistently with the way in which language and culture is dealt with in that Declaration, we suggest that Paragraph 2.8 should be amended and reformulated as follows:

**2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

4.2 In one of the submissions to us it was suggested that paragraph 2.8 should also acknowledge the "diversity of peoples". We are of the opinion that such diversity in all its relevant aspects is covered by the general constitutional principles, which on the one hand recognises and protects cultural and linguistic diversity, and on the other prohibits discrimination.



5. **Paragraph 2.12 : Traditional leaders and indigenous law:**

5.1 Indigenous or customary law is an established system of immemorial rules which have evolved from the way of life and national events of the people, the general context of which was and is a matter of common knowledge and adherence, coupled with precedents applying to specific cases. It is a system of law of ancient origin and is largely still unwritten outside Natal and KwaZulu. Even though the greater part of indigenous law is unwritten and therefore sometimes looked at with uncertainty as to the precision thereof, sight must not be lost of the fact that historically it has successfully provided indigenous communities with rules necessary for their orderly existence.

Notwithstanding deep social and economic changes in our society, indigenous law continues to play an important role in the daily lives of a great many South Africans.

5.2 Indigenous law could find a favourable reception in the democratic political environment that is being planned, if it is allowed to develop spontaneously in a given jural community. It may require reform, particularly as far as the position of women, children and the right of individual ownership are concerned, and in our view the constitution ought not to inhibit the reform that may be desirable.

5.3 With regard to the compatibility of fundamental rights with indigenous law it should be noted that most of the instruments concerned with human rights mention the protection of cultural rights on a basis consistent with equality. Paragraph 4 of the preamble of the 1981 African Charter on Human and People's Rights urges states to take into consideration "the virtues of their historical tradition and the values of African civilization"; article 18(2) gives definition to this ideal by obliging states "to assist the family which is the custodian of moral and traditional values recognised by the community".



Neither of these provisions is remarkable in itself, but when viewed in the overall context of the Charter (which makes no reference to individual rights in marriage) they suggest a strong commitment to preservation of the foundation of African culture: the family.

The Draft Declaration of the Rights of Indigenous Peoples adopted on 14 August 1992 (of the Working Group on Indigenous Populations which is a sub-committee of the UN Commission on Prevention of Discrimination and Protection of Minorities), prepared for adoption by the UN General Assembly during 1993 (the UN Year of Indigenous People) recognises in the seventh preambular paragraph "the urgent need to respect and promote the rights and characteristics of indigenous people, especially their right to their laws, territories and resources, which stem from their history, philosophy, cultures, spiritual and other traditions as well as from their political, economic and social structures". The operative paragraph 8 of the Draft Declaration specifically provides for the right of indigenous peoples "to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures", whereas the operative paragraph 16 recognises the "right to the full recognition of their own laws and customs, land-tenure systems and institutions..."

- 5.4 It should be kept in mind that international declarations and conventions universalising human rights were the product of modern jurisprudence, and for many historical, political and other reasons, to a large extent neglected the indigenous doctrines of rights. Unfortunately to some degree this is still the prevailing situation in South Africa. Where a society is in fact culturally plural, as South Africa is, the recognition of indigenous law gives effect to the accepted constitutional principle acknowledging cultural diversity. The infrastructure for the legal enforcement of indigenous law already exists.



Chiefs' and headmens' courts have jurisdiction to apply indigenous law, and even magistrates' courts and the Supreme Court may now take judicial notice of customary law.

5.5 It is suggested that a symbiotic approach between indigenous law and fundamental rights may be developed (ultimately growing into a hybrid system). This should not prove a threat to important aspects of indigenous law such as the payment of lobola or bogadi. The diversity of the systems of indigenous law could justify the allocation of powers in respect thereof to the SPRs.

5.6 A submission has been made to us that:

...ordinary legislation cannot modify indigenous law. However, both legislation and indigenous law are to be subject and conditioned to all constitutional sources of law, including federal and state constitutions.

It is further contended in the same submission that:

...indigenous law is recognised and protected only to the extent that it conforms with democratic requirements and with the overall blueprint of society.

There seems to be general acceptance that in the event of conflict, fundamental rights should prevail over indigenous law. It was however clear from the debate in the Negotiating Council on paragraph 2.12 of our Third Report that certain participants took the view that indigenous law should be made subject to legislation. This raises a question for decision by the Negotiating Council, namely:

Should the legislature have the power to amend or repeal provisions of indigenous law?

5.7 It was agreed that the status of traditional leaders should receive appropriate recognition in the constitution. In one of the submissions to us it is said that acknowledgement of the status of traditional leaders is not sufficient and that the constitution should specifically recognise "the institution of traditional leaders, including the traditional councils as established by customary law and usages". As long as the constitution recognises the status of traditional leaders as well as indigenous law (which acknowledges the institution of traditional leaders), it is our opinion that this concern will be met.

5.8 We suggest that paragraph 2.12 of our Third Report be reformulated as follows:

**The status of traditional leaders shall be recognised in the constitution. The constitution shall provide for the recognition of indigenous law and its application by the courts. Indigenous law shall be applied subject to the provisions of the fundamental rights contained in the constitution.**

Depending on the outcome of the debate on paragraph 4.6.2, the following words may have to be added at the end of the final sentence:

**"and to legislation dealing specifically therewith".**

## **6. Response to further submissions**

6.1 We have received comments and questions from certain participants on matters raised by us in our Third and Fourth Reports. Some request us to undertake research, and provide them with advice. We consider that this is the responsibility of the participants themselves and not our responsibility. Some seek to reopen issues which we understood to have been resolved at the meeting of the Negotiating Council on 3 June 1993. We consider that we can only do this if instructed to do so by the Negotiating Council. Some raise



issues relevant to the debates which are still to take place on our Third and Fourth Reports which will presumably be raised by the participants concerned when these Reports are debated in the Council.

- 6.2 We are concerned that if we are expected to reply in detail to all the issues and question raised with us by participants, we will be diverted from the tasks assigned to us by the Negotiating Council and will be unable to address them efficiently and expeditiously. We have considered all the submissions made to us, and are of the opinion that there is no need to add to this Report, which in our view is complete, and sufficient to facilitate the debate in the Council on all relevant issues.

## 1. Introduction

During the debate in the Negotiating Council a number of issues were raised in regard to paragraphs 2 and 3 of our Third Report. We respond to these issues below, indicating what decisions are necessary to enable us to prepare a final schedule of constitutional principles in a consolidated form. Where there has been no comment, we set out the Constitutional Principles without amendment or comment. Where issues have been raised, we identify them, and point to what is necessary for the progress of the finalisation of the principle. We treat the general Constitutional Principles and the Principles dealing with the allocation of powers to the different levels of government, together, showing where appropriate, the numbering in our Third Report where this differs from the present numbering.

**EMBARGOED (PAGES 1-12)**  
**UNTIL DELIVERY/TABLING IN**  
**NEGOTIATING COUNCIL MEETING**

**SECOND SUPPLEMENTARY REPORT ON CONSTITUTIONAL  
PRINCIPLES FROM THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL**  
**23 JUNE 1993**

**1. Introduction**

During the debate in the Negotiating Council a number of issues were raised in regard to paragraphs 2 and 3 of our Third Report. We respond to those issues below, indicating what decisions are necessary to enable us to prepare a final schedule of constitutional principles in a consolidated form. Where there has been no comment, we set out the Constitutional Principles without amendment or comment. When issues have been raised, we identify them, and point to what is necessary for the purposes of the finalisation of the principle. We treat the general Constitutional Principles and the Principles dealing with the allocation of powers to the different levels of government, together, showing where appropriate, the numbering in our Third Report where this differs from the present numbering.



## **2. The Constitutional Principles**

- 2.1 The Constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government and a common South African citizenship.**

The question was raised whether the words "non-sexist" and "non-racial" should be added before the words "sovereign state" in line two. We were instructed to reconsider the matter. We confirm our view that this is covered by paragraphs 2.2, 2.10 and 2.11 and that there is no constitutional need to include these words. We can take the matter no further. The Negotiating Council must decide.

- 2.2 The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.**
- 2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**
- 2.4 The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**
- 2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.**
- 2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.**

2.7 **Formal legislative procedures shall be adhered to by legislative organs at all levels of government.**

2.8 **The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

(This principle was reformulated in the First Supplementary Report)

The question was raised whether it should be made clear in the language of paragraph 2.8 itself, that as far as culture is concerned, the protection, and encouragement for its promotion should be subject to the provisions of the fundamental rights contained in the constitution. We expressed the view that paragraphs 2.2 and 2.10 met this concern. We are still of this view. If specific reference to the fundamental rights is required in paragraph 2.8 the following words can be added: **"provided that this is done subject to the provisions of the fundamental rights contained in the constitution."**

2.9 **Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.**

The debate has to be finalised and a decision taken.

2.10 **All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.**



2.11 **The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.**

2.12 **The status according to indigenous law of traditional leadership shall be recognised in the Constitution. Indigenous law shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution (and to legislation dealing specifically therewith).**

A number of issues in regard to the wording of this provision were raised during the debate in the Council, and we have also received additional written submissions in regard to this principle. The distinction between constitutional principles and constitutional provisions needs to be kept in mind in dealing with this matter. We have had regard to all the submissions we have received and concerns expressed and have reformulated paragraph 2.12. A final decision needs to be taken as a matter of principle in regard to inclusion or exclusion of the words in brackets. (See paragraph 5.6 of our First Supplementary Report.)

2.13 **Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.**

2.14 **Amendments to the constitution shall require special procedures involving specified majorities.**

2.15 **Government shall be structured at national, SPR and local levels.**  
(3.1 of Third Report)

2.16 At each level of government there shall be democratic representation.

(3.2 of Third Report)

2.17 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

(3.3 of Third Report)

This principle has been reformulated in response to a suggestion that the last sentence of paragraph 5.2 of our Third Report should be incorporated as a principle.

2.18 The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPR's shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.

(3.4 of Third Report)

A proposal was made to insert the underlined words, and no objection was raised to this.



- 2.19 A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

(3.5 of Third Report)

An amendment dealing with local government powers was proposed during the debate. No objection was raised during the debate to the proposed amendment. The wording we have adopted is our edited version of the proposal.

- 2.20 The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

Shall has been substituted for "may" in line 2 in accordance with the debate in the Council.

- 2.21 National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.

(3.6 of Third Report. This has been reformulated. See comments under paragraph 2.23)

- 2.22 Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

(This is a new formulation. See comments under paragraph 2.23).

- 2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR's, shall recommend equitable fiscal and financial allocations to the SPR governments after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

Comment on paragraphs 2.21, 2.22 and 2.23

During the debate on paragraphs 3.3, 3.6, 3.7 and 3.8 of our Third Report, a number of issues were raised concerning the fiscal powers and functions of different levels of government and the method of allocating fiscal and financial resources so as to ensure that this is done on an equitable basis. We have had regard to the debate and to written submissions made to us. In particular we have noted the concern that SPR and local governments should have access to funds needed to enable them to carry out their responsibilities and provide necessary services. We have also noted that local government is in a special position because of the different categories that will exist and that this will have to be accommodated in the Constitution. Taking these matters into consideration, we have reformulated paragraphs 3.6, 3.7 and 3.8 of our Third Report. The reformulated provisions are paragraphs 2.21, 2.22 and 2.23.

- 2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

General:

- 2.24.1 The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.

(3.9.1.1 of Third Report)



The words "and accountable" have been added as proposed during the debate.

2.24.2

**The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPR's.**

(3.9.1.2 of Third Report)

The word "geographical" has been substituted for "territorial" as proposed during the debate.

(Note: The position of paragraph 3.9.1.3 of the Third Report has been changed. See Paragraph 2.28 below).

2.24.3

**Where it is necessary for the maintenance of national standards, the maintenance of economic unity, the maintenance of national security or the prevention of action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.**

(3.9.1.4 of Third Report)

It has been contended that overriding powers of the national government should be confined to conflicts arising in the field of concurrent powers, and that paragraph 3.9.1.4 of our Third Report went further than is necessary for that purpose. In this context attention has been drawn to the reference in our report to the report of the independent experts published by the

Consultative Business Movement on which we have placed reliance, and it is said that this report wrongly relies on the German constitution which in effect deals only with overriding powers in the context of concurrent powers. It is correct that the German constitution deals with the override in the context of concurrent powers. The passage that is referred to in the comment we received is from page 36 of the CBM Report which deals with co-ordination of the exercising of powers which prima facie is concerned with concurrent powers. This is confirmed by the following passage from page 38 of that Report:

So far, the powers of the centre to override the regions has been discussed solely in relation to concurrency. It also has a wider application. The centre would necessarily have to possess the power to take action to uphold the fundamental norms specified in the National Constitution vis-a-vis the regions, when judicial mechanisms were either inappropriate or inadequate.

We agree, and are of the opinion that there is a need to make clear that where national priorities such as those specified in paragraph 2.24.3 conflict with SPR competencies, the national priorities should prevail. Paragraph 2.24.3 specifies the high objective criteria, "necessary", and the particular priorities to which it refers, are of crucial national importance.

2.24.4 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

(3.9.1.5 of Third Report)



## National Government

2.25.1 **Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.**

(3.9.2.1 of Third Report)

2.25.2 **Where uniformity across the nation is required for a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.**

(3.9.2.2 of Third Report)

In the light of the debate we have substituted the words "required for" for the words "regarded as important with regard to". This is a more objective criterion.

2.25.3 **Where minimum standards across the nation are important for the delivery of public services, the power to set such standards should be allocated to the national government.**

(3.9.2.3 of Third Report)

The words "regarded as" have been deleted in line 1.

2.25.4 **The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.**

(3.9.2.4 of Third Report)

The words "The determination of national economic policies, and," have been introduced.

2.26 SPR Government

**SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.**

(3.9.3 of Third Report)

2.27 Concurrent Powers

**Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.**

(3.9.4 of Third Report)

2.28 **In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.**

(3.9.1.3 of Third Report)

A number of issues were raised in regard to this paragraph. It was suggested that a way should be found of resolving conflicts without providing that the legislation of the national government should take precedence. Paragraph 2.28 addresses the possibility of conflicting legislation in the field of concurrent powers. *This will happen only when there is both conflicting legislation and overlap of legislative competence which cannot be resolved by the court*



*through a construction of the provisions of the constitution.* In such circumstances the need for legislative certainty requires the court to prefer one legislative enactment over the other. The national government will only have the competence if the legislation is relevant to a national interest, and, it is for that reason that we formulated the clause so as to give preference to the national legislation. That seems to us to be consistent with constitutional practice.

## 2.29 Residual Powers

**The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with.**

(3.9.5 of Third Report)

A comprehensive allocation of powers in the constitution (as contemplated by these principles) makes the question of residuality of less importance. In practice residuality would amount to no more than establishing the allocation of ancillary powers to those powers and functions attributed to national and SPR governments.

**EMBARGOED (PAGES 1-15 UNTIL DELIVERY/TABLING IN THE  
NEGOTIATING COUNCIL MEETING**

**SIXTH REPORT OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL**

**23 JUNE 1993**

**1. Introduction**

1.1 In view of the submissions received, the Negotiating Council adopted a resolution at its meeting on 17 June 1993, requesting the Technical Committee on Constitutional Issues to consider and report on:

*1.1.1 alternative ways of drafting and adopting a new constitution, including the bottom-up and top-down approaches, and*

*1.1.2 alternative views regarding the need for SPR-constitutions and different options for such constitutions.*

1.2 We annexe to this report a schedule in which the different approaches to the bottom-up constitution making process are analysed. From our analysis of all relevant submissions, and points raised in the debates of the Negotiating Council a bottom-up constitution making process emanates. In particular, it appears to us that the parties favouring a bottom-up process are largely motivated by the following considerations:



- \* There is no guarantee that a proportionately elected constitution making body will favour or tolerate the establishment of autonomous SPR's, especially if the majority of the members of such a constitution making body are members of a party or parties which favour a centralized form of state and government.
- \* Existing regional institutions which are presently functioning as autonomous governments, and in certain instances form the political bases of some of these parties, will be abolished.
- \* SPR interests, and indeed the whole rationale for SPR's as is currently debated in the MPNP, may be side-lined or even be discarded in a national constitution drafted by an elected constitution making body.

In our opinion, there is every reason to be sensitive and aware of the concerns of these parties.

## 2. The Bottom-up and Top-down Approaches

- 2.1 We used the terms "bottom-up" and "top down" in this report because they have been colloquially used in the Negotiating Council. The terminology could, however, be misleading. In the schedule to this report we set out in detail the various proposals which have been made concerning the "bottom-up" process. It appears from this analysis, and from our previous reports, that the distinction between the "bottom-up" and the "top-down" process is a distinction on the one hand between a regional constitution making process and on the other, a national process. The "bottom-up" process seeks to accommodate regional interests in



various ways, including in the case of some submissions regional elections, and national interests through the MPNP. The "top-down" process seeks to accommodate national and regional interests through the national election of the constitution making body in which regional interests are also represented.

2.2 The two stage process as it has developed through CODESA and the MPNP seeks to find a compromise between the two approaches. We have pointed to this in previous Reports, and have suggested that a detailed set of constitutional principles could be a bridge between the two extremes, which if pursued and strengthened could provide a solution to the conflict concerning process. It is in this context and at the specific instance of the Negotiating Council that we have explored the possibilities of bridge building.

2.3 Both approaches relate to the processes of constitution-making and in particular, the ways in which SPR autonomy must be established. Whereas the top-down approach, foresees a national constitution-making process to map out and establish such SPR autonomy or autonomies, the bottom-up approach foresees various mechanisms and procedures whereby SPR autonomy is in the first instance acknowledged as federalism and established either beforehand or simultaneously with the national constitution-making process.

2.4 Parties favouring the bottom-up approach, although they differ as regards their views on the establishment of SPR autonomy and the participation of SPR representatives in the overall, national constitution-making process, share the common view that SPR autonomy must not entirely be left in the hands of a constitution making body established by a national election. Two parties advanced what in our view is a constitutionally controversial proposal that their SPR should be acknowledged as a "sovereign member state of the Federal Republic of South Africa" which would then devolve some of its powers and functions upwards to the



national government. Furthermore, in conformity with the bottom-up approach, parties favouring such an approach, generally insist on having entrenched SPR constitutions.

2.5 Seen pragmatically, the bottom-up approach as propagated by these parties presents certain difficulties:

\* As evidenced by the submissions referred to in the schedule to this report, different bottom-up approaches reflect variations as regards the entire constitution-making process. Whereas some parties suggest that SPR-constitutions should be negotiated and endorsed solely on SPR level, others are of the opinion that SPR constitution-making bodies should be elected not only to draw up SPR-constitutions but also to contribute to the process of national constitution-making.

\* Generally, some parties favouring a bottom-up approach, proceed from an existing state of affairs which cannot be sustained, or they assume a state of affairs which constitutionally does not presently exist. Thus, a party representing a TBVC government supports a bottom-up approach without indicating how the TBVC state will be accommodated in a future SPR or SPR's. Also, it is found that parties representing the interests of an existing self-governing territory which under present constitutional law, is in the position of a subordinate entity, assume that such self-governing territory will accede to a constitutional status which would enable it, as part of a newly demarcated region, to lay claim to exclusive powers and functions in the constitution making process.

- \* From a practical point of view, the bottom-up approach could take up more time and increase the risks of deadlock in that the current negotiating process would have to be suspended until such time as SPR constitutions have been drafted.

### 3. **SPR Constitutions**

- 3.1 Intrinsically bound up with the bottom-up approach as advocated by some parties and explained above, is the insistence on having SPR constitutions either before or together with the adoption of a national constitution. However, it is difficult to conceive of a process in which SPR constitutions could be adopted and implemented independently from a national constitution.
- 3.2 Opposition to the adoption of separate SPR constitutions has been raised in a submission to us, principally on the basis that they would be divisive, and a threat to national unity and would diminish the role of the elected constitution making body.

### 4. **An Equilibrium**

A balance between top-down and bottom-up approaches could possibly be achieved. Such an equilibrium, which may assuage concerns and apprehensions and put the matter of SPR constitutions in another perspective, could be attained in the following way if agreement is reached on the drafting of a constitution for a transitional period.

- 4.1 The deliberation and adoption of general constitutional principles pertaining to SPR autonomy which is presently being undertaken by the Negotiating Council.



- 4.2 If these constitutional principles are adopted, the Negotiating Council will have to decide how the principles pertaining to SPR autonomy will be incorporated and applied in the constitution for the transitional period. In this respect, special regard will have to be given to existing boundaries and institutions, the recommendations of the Commission on the Demarcation/Delimitation of Regions, and the role and functions of SPR representatives in the national legislature in the transitional period. It may very well be that the constitution for the transitional period could create mechanisms for consolidating SPR administrations and the election of SPR representatives both on national and SPR level.
- 4.3 If SPR government is instituted for the transitional period, the constitution making body could call on these SPR governments or representatives, to propose their separate SPR constitutions (or one standard SPR constitution) in conformity with the constitutional principles adopted by the MPNP, to be authorised by or incorporated in the "final" constitution.
- 4.4 It might be possible for the constitution making body to approve the coming into operation of SPR constitutions before the adoption of a final constitution.

## SCHEDULE TO THE SIXTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

### Analysis and interpretation of submissions and proposals.

1. In previous reports we have drawn the participants attention to the two broad approaches to the constitution making process, which emerges from the parties' respective proposals. In particular, in our Second Report we examined the proposals of all the parties and concluded that, barring the confederal option, there are two broad categories or proposals. In the first category, one finds the proponents of a single phased transition who also contend for the Multi Party Negotiating Process ["MPNP"] being the constitution making body for the national constitution. On the other hand, a further category of proposals supports a two-phased transition and the adoption of the final constitution by an elected constituent assembly. As we stated in our Fourth Report, [para. 5.1] this divergence of views amongst the participants, is "a difference of substance and not of terminology". In our Second Report we further pointed out that "no significant progress can be made by the parties without a significant resolution of what appears to be mutually exclusive approaches to the constitution making process".
2. In this report we examine more closely the approach which favours final constitution making by the MPNP and the one stage constitutional transition. Of course, this classification and name-tags may be expedient to describe this approach but are less than accurate. The actual proposals of the parties are complex and entail several steps or stages.
  - 2.1 The parties who filed submissions in support of this mode of constitution making process and content are:
    - 2.1.1 Kwa-Zulu Government;
    - 2.1.2 Inkatha Freedom Party;



2.1.3 Bophuthatswana Government;

2.1.4 Ciskei Government, and

2.1.5 The Afrikaner Volksunie "AVU"

3. Whilst in broad outline the proposals from these parties have a certain commonness, significant variation of detail of the proposals which are described hereunder would therefore reflect the broader picture. We will however make reference to divergences where relevant or necessary. Hereunder we deal with the features of the proposals under various headings.

4. **Form of State:**

4.1 It is argued that the issue of the form of state must be resolved and disposed preliminarily to any determination affecting both the modalities of the process of transformation as well as the constitutional principles to be embodied in any future constitution. A predetermined type of state, that is a federal, confederal, regional or unitary state would condition the process of transformation. Put otherwise, the process of transformation needs to be shaped in order to produce a predetermined type of state. It is consequently argued that a unified centralised process of transformation, centred around the notion of a constituent assembly is not likely to produce the breakdown of the present unitary state into member states organised on the basis of the federal principle. It is further argued that the MPNP should not focus on a constitution making body and transitional constitution until the form of state has been considered. To do otherwise "would be to put the process before substance, to permit the fundamental determination on the substance to be conditioned by the procedural decisions".

4.2 The proponents of the preliminary determination of form of state in the negotiating process, advance various reasons for their viewpoint. Such reasons relate, amongst other things, to political expediency, constitutional dogmatics, the determinative

relationship between the form of state and the constitution making process and the component structures of the constitution.

4.3 The form of state contended for is described in the following broad terms:

4.3.1 A federal system in which "all powers should be reserved to the region/state while only those powers which cannot be adequately exercised at region/state level should be devolved upwards to the federal government".

4.3.2 Such a form of state should be informed by the principles of subsidiarity, residuality and asymmetry. The notion of subsidiarity requires the taking of decisions at the lowest possible level. So to speak, all services and governmental functions and powers should be handled or exercised by the lowest level of government capable of handling such function, powers or services. On the other hand, residuality is a qualification of the notion of subsidiarity. According to the concept of residuality only those powers which cannot be exercised adequately and properly at local level should be devolved upwards to the federal level.

4.3.3 On this proposal of form of state, autonomous [sometimes referred to as "independent"] federal states would come into being as part of the "Federal Republic of South Africa". Such a federal system is "intended as a system of splits of sovereignty between the member states and the federal government".

4.4 It is also argued that a federal system should be established on an asymmetric basis. Some of the parties hold that it is conceivable that a portion of South Africa could be organised as a unitary state and that such a portion would entertain a



federal relation with one or more regions of the territory organised as a federal system.

## 5. Constitutional transition to a federal state:

The constitutional transition envisaged entails two matters. The first of these is the constitution making process and the second would be the transitional process from the existing constitutional dispensation to the envisaged new constitution or constitutions for South Africa. The parties who support the prior determination of the form of state, also support a specified method of constitution making and transitional process. Hereunder, we set out some of the broad features envisaged in the constitution making process and transition.

- 5.1 The MPNP should determine preliminarily the form of state. No decisions on the constitutional principles, component structures and of the constitution or the transitional process should be made until the form of state has been determined.
- 5.2 The MPNP should, in the light of the form of state agree upon constitutional principles which should include entrenched regional borders, and entrenched powers and functions of SPR's.
- 5.3. The MPNP must agree on the demarcation of SPR boundaries. None of the parties deal with what appears to be the inevitable consequence of such geographic demarcation being the integrity of the existing borders and constitutional authority of the TBVC states.
- 5.4 The agreed form of state, and constitutional principles would be referred by MPNP to a panel of experts who would be instructed to prepare a draft national constitution.

5.5 People "at ground level negotiate and determine" SPR constitutions' within each newly demarcated SPR. The method of determination of SPR constitutions vary from proposal to proposal:

#### 5.5.1 The IFP and KwaZulu government proposal

- The Inkatha Freedom Party ["IFP"] and Kwa-Zulu Government ["KZG"] propose that at this stage elections be held in every SPR.
- Such elections could be held by April 1994 after which constituent assemblies in each SPR could be brought in to being with a specific mandate to formulate constitutional proposals and to choose representatives to a Federal Council of the MPNP. Armed with a democratic mandate, the SPR representatives, elected from the respective constituent assemblies would form a distinct structure of the MPNP being the Federal Council. In this way the MPNP would become a bicameral structure made up of elected representatives in the Federal Council and of the present unelected delegates in the MPNP. The Federal Council would deliberate in all matters which affect SPR's in the constitution making process directed at the national constitution.
- The bicameral national negotiating forum will debate constitutional proposals and also appoint a constitution making body from its ranks.
- A panel of experts will be requested to prepare a draft national constitution. The experts and the constitution making body will interface to produce a final national constitution.
- No specific reference is made in the proposal to the actual adoption of the SPR constitutions. It can, however, be inferred that the SPR



constitutions will be adopted by the SPR constituent assemblies before or simultaneously with the national constitution.

5.5.2. Bophuthatswana proposal:

The Bophuthatswana proposal in this regard is that people at ground level must negotiate and determine the SPR constitution, simultaneously with the drafting of the national constitution by a panel of experts. It is, however, unclear how the people at ground level would negotiate and determine SPR constitutions. Once the SPR and national constitutions have been drafted these would be submitted to the MPNP for consideration, co-ordination and approval.

5.5.3. Ciskei proposal:

The Ciskei too proposes that the SPR's should write their own constitutions. Their proposal provides no specification of how these constitutions would have to be written. The approval and adoption of the constitutions would occur through referenda within the SPR or in regional multi-party conferences. Presumably, the approved SPR constitution would be forwarded to MPNP where the national constitutions would be prepared and would give "recognition to regional initiatives and delegation of powers.....".

5.5.4. AVU proposal:

The AVU also submits that the regional states write their own constitutions. No particulars have been furnished about the processes envisaged for the drafting and adoption of such SPR constitutions.

Once the SPR constitutions have been adopted as proposed hereabove these would be submitted to the MPNP for coordination and synchronisation with the national constitution.

7. When the MPNP has approved the national and SPR constitutions a national referendum will be held to endorse the national and SPR constitutions.
7. Thereafter legislative processes would be set in motion to adopt national and SPR constitutions. This proposal implies that the South African parliament as well as the TBVC legislatures would take all such legislative measures as are necessary to give legislative effect to the national and SPR constitutions.
8. Finally, elections at national and SPR levels would take place in terms of new constitutions. In this regard, the IFP/KZG proposal national elections would be for the "lower house" whereas the already elected SPR representatives could serve as members of the national senate. In terms of this proposal it would still be necessary to have elections for SPR legislatures under their own new SPR constitutions.
9. For the sake of completeness it may be useful to point out that the foregoing approach to constitution making and transition:
  - 9.1 rejects the notion of a two-phased transition to a final national constitution;
  - 9.2 rejects the establishment of an elected constituent assembly or constitution making body;
  - 9.3 opposes the establishment of any transitional arrangements such as a transitional executive council, elections leading to a constituent assembly, an interim government or the drawing of any transitional constitution;



9.4 resists the holding of any election at national level at any stage before the SPR constitutions have been predetermined by the SPR's themselves;

9.5 would be against the termination or amendment of the present constitutional dispensation including that of the TBVC states prior to the final adoption of a final constitution for the SPR's and the national constitution.

10 It is contended by these parties that in this way the constitution making process and transition would be "bottom-up". The process of institution building and transition would commence at SPR level and would culminate in a national referendum and ultimately national elections. This process is seen as being premised on "grass roots democracy" or "bottom-up democracy" as it engages a large number of people at local level to participate in the SPR constitution making process. It may be added that in the IFP/KZG proposal, it is said that final national elections could be held during or before September 1994. It is, however, noteworthy that none of the other proposals dealt with hereabove propose an electoral process preceding SPR constitution making.

**EMBARGOED (PAGES 1-9)  
UNTIL DELIVERY/TABLING IN THE  
NEGOTIATING COUNCIL MEETING**

**SPECIAL REPORT ON CONFEDERALISM FROM THE  
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES  
TO THE NEGOTIATING COUNCIL  
22 JUNE 1993**

1. We have received submissions from the Conservative Party of South Africa and the Government of Bophuthatswana dealing with confederalism and related matters. We deal with these submissions in this special report.
2. **SUBMISSION OF THE CONSERVATIVE PARTY OF SOUTH AFRICA**
  - 2.1 In a detailed written submission dated 7 June 1993 and entitled: THE CONSERVATIVE PARTY OF SOUTH AFRICA'S ANALYSIS OF THE PRESENT SOUTH AFRICAN SITUATION AND ITS PROPOSALS FOR A PEACEFUL RESOLUTION TO THIS QUESTION, (the Analysis), the Conservative Party sets out its views on the history of the Afrikaners, the course of democracies in Africa, political and constitutional realities in South Africa as well as their legal interpretation of concepts such as self-determination, confederation, etc. It is not for this Technical Committee to cross swords with the Conservative Party on its political views and opinions; in a very real sense they are the expressions of a political party's rights to which we alluded in our First Report (paragraph 3.4.2). Our role is to



analyse the legal opinions expressed in their submissions on a technical basis and to identify the issues that need to be addressed by the Negotiating Council.

2.2 In our Second Report we said:

It would be helpful if participants in the Negotiating Council in favour of confederation as an option would provide us with more clarity on their proposals and in particular the territory and population of the envisaged separate state, and how it will meet the international law requirements of secession and self-determination.

In our view these are the crucial issues that need to be addressed in order to determine the feasibility of the Conservative Party's proposals and a South African confederation of states.

- 2.3 The argument of the Conservative Party in the Analysis is developed on the basis that the principle of self-determination is an internationally recognised right of peoples. We dealt with this issue in our First Report and pointed to the limitations on this right and to the fact that international law does not permit self-determination where it infringes upon the rights of others. It is clearly feasible to allow collective rights of self-determination to Afrikaners in a single South African state, protected in the manner explained in paragraph 3.5 of our First Report (inter alia by watchdog bodies, regional and local institutions, and specially accredited bodies of a representative nature and freely associated). What is problematic, however, is the feasibility of affording pre-established and exclusive constitutional and political rights to Afrikaners in a separate state, as contended for by the Conservative Party.

- 2.4 In paragraph 8.6.4 of the Analysis the Conservative Party says that it is fundamental that "the external features of the form of state must be determined first." In our view a determination of the external features of the



form of state does not involve a theoretical discussion of forms of state, but rather a practical discussion of all those concrete elements which constitute statehood and determine the nature of the state.

These concrete elements are:

- the territory and boundaries of the state
- the creation and establishment of the state, whether through partition or secession;
- the population of the state, which implies a clear and legal definition of citizenship and the legal status of non-citizens;
- the governance and legal system of the state.

2.5 The Conservative Party indicates that it intends to submit concrete proposals on the first element (ie the territory and boundaries of the proposed Afrikaner state) to the Commission on the Demarcation/Delimitation of Regions. There is, however, no information on this vital issue in the Analysis or any of its other submissions to us, nor has such information as yet been given during the debate on self-determination in the Negotiating Council.

2.6 In the Analysis the Conservative Party deals with the question of citizenship. It says that citizens in its contemplated state will be Afrikaners, whom it defines as "afstammelinge van die Afrikanervolk en daardie anderstalige patriotte wat met die Afrikanervolk lotsverbonde is op die basis van wedersydse aanvaarding en gemeenskaplike vryheidstrewe." In our view this definition lacks legal certainty. We will, however, use the word "Afrikaner" in this report as used by the Conservative Party. It seems clear, however, that it would not include, and is not intended to include, all South Africans living in the partitioned portion at the time of the partition.



- 2.7 It seems to have been accepted during the debate in the Negotiating Council that the present population of the state contemplated by the Conservative Party would not contain a majority of Afrikaners. If this is so, an implication of the Conservative Party's proposal is that the state contemplated by them will either be based on minority rule, or will call for large scale population removals or shifts in order to establish an Afrikaner majority within its boundaries. It will also involve the denial of citizenship to the majority of the people within the state at the time of its establishment, and the conferring on them of citizenship in a state in which they do not live and may not have any direct interest. On this basis, political self-determination for Afrikaners in their own independent sovereign state according to the proposals of the Conservative Party, would involve a denial of self-determination to the majority of people who would be living in that state when it is established. These implications, which are not sanctioned by international law on which the Conservative Party relies, have not been addressed by it.
- 2.8 The Conservative Party indicated in the debate in the Negotiating Council that its preference would be for voluntary partition rather than unilateral secession. The examples of partition and secession that it gives in the Analysis, and which it mentioned during the debate are, with the exception of Yugoslavia, all examples of states in which the people seeking political self-determination constituted a clear majority in the partitioned segment. As far as we are aware no example can be cited of a successful voluntary partition, or of a unilateral secession recognised by international law, in which the territory of a nation state has been partitioned on the basis that a minority within one of the portions, has been given exclusive political rights in such portion. The implications of such a partition are pointed out in paragraph 2.7 hereof. They are in conflict with international law and it is for this reason that we expressed the view in our First Report that an Afrikaner state established on such a basis, and against the will of the majority of the people living in such a state, would be unlikely to secure international recognition.



2.9 The Conservative Party has provided no details of the governance and legal system of the state that it contemplates. During an earlier debate in the Negotiating Council on the general constitutional principles a spokesperson for the Conservative Party indicated that his Party had no objection to these principles as such: its objection was to the principle of a single state which is contrary to the Conservative Party's vision of two or more states of which one will be an Afrikaner state. The framework for the governance and legal system of the contemplated Afrikaner state will be identified if the Conservative Party addresses the issues raised in this report and also indicates:

2.9.1 which of the general constitutional principles set out in paragraph 2 of our Third Report it accepts for the Afrikaner state;

2.9.2 which of the principles dealing with the allocation of powers to different levels of government set out in paragraph 3 of our Third Report it accepts for the Afrikaner state;

2.9.3 the structures of government that are contemplated for the Afrikaner state, including the powers and functions of the Head of State, how the Head of State will be appointed, how the legislature will be constituted, what electoral system will be adopted, who will be entitled to vote, how the legislature will take its decisions, how the executive will be constituted and take its decisions, and how the judiciary will be appointed and function.

If this information is provided by the Conservative Party to the Negotiating Council it will enable the Council to determine the external features of the form of state advocated by the Conservative Party.



### 3. SUBMISSION OF THE GOVERNMENT OF BOPHUTHATSWANA

- 3.1 In a submission dated 31 May 1993, the Government of Bophuthatswana, while not contesting our broad exposition on confederations, states:

The classic definitions and examples of confederations are well known and do not call for further elaboration. It may even be better to disregard all of it for the time being, in order to approach this whole matter with an open mind in designing a constitutional model *sui generis* perhaps even including new terminology to describe it.

As "relevant and applicable aspects of such a model", the examples of Berlin until German unification, the Commonwealth of Puerto Rico and the former French Community are briefly alluded to. In conclusion it is said: "These are some examples of a 'non-classical' approach to this issue (ie confederalism), which indicates a need, in certain exceptional cases, for an original, innovative and flexible approach".

- 3.2 In response to this submission of the Government of Bophuthatswana, it must be pointed out immediately that confederations, being a voluntary association of separate, independent states, do differ according to the manner in which they come about, their histories and their respective confederal pacts. The classic example of a confederation in the form of the German Bund (1815-1866) differs in many respects from modern confederations such as the (former British) Commonwealth and the European Community. At least two examples cited in the submission, ie those of Berlin and Puerto Rico, do not constitute confederations in any real sense of the word. They are what is sometimes called hegemonic state systems which are often transient in nature, are the result of a particular course of history and are characterised by the fact that the particular state or geographical entities possess a certain kind of



autonomy *vis-à-vis* the dominant or mother-state which is less than that enjoyed by an independent state. Examples of such hegemonic state systems abound and mostly exist under the following circumstances:

- 3.2.1 Very often *islands*, entirely detached from the mainland of the dominant mother-state are drawn into such a system by way of international accord, constitutional arrangement or a combination of the two (eg, the Aaland Islands, Puerto Rico, the New Hebrides, the Canton and Enderbury Islands, as well as the Channel Islands and the Isle of Man); in some instances, these islands acquire the status of protectorates or semi-protectorates for some time before they become fully independent; in other cases they are incorporated into the constitutional body of the mother-state (eg Réunion).
  - 3.2.2 Sometimes an enclave or city is given a particular status as a result of an international and internal (national) arrangement which usually follows a period of colonisation, war or conflict, eg the free city of Danzig, Hong Kong, Berlin and Trieste (in the case of Trieste the arrangement was, however, not implemented). As a rule these enclaves and cities lose their special status after the expiry of a certain time or the occurrence of certain events.
  - 3.2.3 In some cases, territories have, via an international agreement, been given *sui generis* status which is neither that of a component state in a federation nor that of an independent state in a confederation. The well known example which is close to our experience, is the status of the erstwhile mandated territory of South West Africa.
- 3.3 All the above examples of so-called hegemonic state systems point to the fact, which is argued in the submission of the Government of Bophuthatswana, that the constitutional relations between states and other territories need not and simply cannot be explained in simple confederal terms. However, what is of overall importance, is that all the abovementioned state relations are the direct products of given historical and other realities. Similarly, in considering the



position of Bophuthatswana the following objective factors, which are relevant to it and the other TBVC states, must not be lost sight of:

3.3.1 There is no element of statehood in the TBVC states' existence which is presently supported, underwritten, sanctioned or recognised by the international community or international organisations and which could form the basis for the particular sui generis status advocated by the Government of Bophuthatswana.

3.3.2 The demographics, economic systems, financial viability and politics of the TBVC states are intrinsically linked to those of the RSA. Transport (two of the states are landlocked and the other two possess no harbours), infra-structures, etc are almost totally dependent on systems and networks of the RSA. Objectively and without any intention to denigrate them, the extent of vassalage of the TBVC states to the RSA cannot be denied.

3.3.3 None of the TBVC states is in the nature of islands detached from the territory of the RSA. The territories of these states are interspersed between the existing regions and provinces of the RSA and they are inexorably a part of the South African geography and its accompanying geo-politics. According to international law the TBVC states are treated as being part of South Africa.

3.3.4 The majority of the inhabitants and citizens of the TBVC states were South Africans by birth before these states became independent and there are strong indications that they and their descendants may wish to regain this status.

3.4 If we are to consider semi-confederal or hegemonic state systems for the RSA and the TBVC we would require instructions from the Negotiating Council to do so, and more detailed proposals than are contained in the submissions to us from the Bophuthatswana government. It would appear from the foregoing, however, that the possibility that Bophuthatswana or any other of the TBVC states will continue in a semi-confederal relationship or hegemonic

state system with the RSA is rather slight. Furthermore, such a relationship or system cannot be brought about unilaterally and it has very little chance of being successful if not supported by the international community.

#### 4. CONCLUSION

We cannot take the issue of confederation further without instructions from the Negotiating Council. The issues raised by the Conservative Party and the Government of Bophuthatswana raise crisply the question whether partition, secession or the continued independence of any of the TBVC States is an acceptable option. We require instructions on these matters.

At the meeting of the Negotiating Council on Thursday 24 June 1993, the chairman summarised the debate by indicating that we are required to -

1.1 Synthesise proposals on the table into a systematic form and present a model/scenario in respect of the "bottom up" approach.

1.2 ...explore further the "confederation" outlined in paragraph 4 of (our) Sixth Report creating common ground and bridging the differences among participants.

1.3 Look into the establishing of SPR Governments and Legislatures at the time of the national election (and) how these will be linked with the national structures.

From this it would appear that we are required essentially to develop two scenarios, one describing a constitution making process in which preference is given to the drafting of SPR constitutions, the other describing a possible scenario that may meet the preferences of the different schools of thought represented in the MPMF.

We deal with the first scenario in paragraph 4 below, and with the second in paragraph 5.



**THE SEVENTH REPORT OF THE TECHNICAL  
COMMITTEE ON CONSTITUTIONAL ISSUES  
TO THE NEGOTIATING COUNCIL  
29 JUNE 1993**

**1. Introduction**

At the end of the meeting of the Negotiating Council on Thursday 24 June 1993, the chairman summarised the debate by indicating that we are required to -

- 1.1 Synthesize proposals on the table into a systematic form and present a model/scenario in respect of the "bottom up" approach.
- 1.2 ...explore further the "equilibrium" offered in paragraph 4 of (our) Sixth Report creating common ground and bridging the differences among participants.
- 1.3 Look into the establishing of SPR Governments and Legislatures at the time of the national election (and) how these will be linked with the national structures.

From this it would appear that we are required essentially to develop two scenarios, one describing a constitution making process in which preference is given to the drafting of SPR constitutions, the other describing a possible *via media* that may meet the preferences of the different schools of thought represented in the MPNP.

We deal with the first scenario in paragraph 4 below, and with the second in paragraph 6.

## **2. Avoiding terminological traps**

In the political debates in the Negotiating Council, in some of our instructions, and consequently in some of our Reports, terminology is employed that in our view is not legally accurate and does not promote clarity of the issues.

Firstly, as we have indicated in our Sixth Report, it is less than accurate to refer to a "bottom-up" as opposed to a "top-down" process: both schools of thought contain elements of national and sub-national negotiations, decision making and implementation.

Secondly, it appears that a distinction between a one- and two-phased process produces more confusion than clarity: the "bottom-up" approach has been associated with a one phased constitution making process, but, as appears from paragraph 4 below, that scenario also requires more than one phase, although it does not call for a constitution for a transitional period.

## **3. Analyses and suggestions regarding process and submissions reviewed in previous reports**

3.1 In our Sixth Report we describe the principal features of the "bottom up" constitution making process and draw attention to the fact that the proposals that support this process differ as to detail. In this report we address the main differences and make suggestions as to how they could be brought together so as to constitute a single scenario.

3.2 There is broad agreement amongst those who favour this process that federalism should be agreed upon as a constitutional principle, and that the federal states should be established on the basis of residuality and asymmetry. We give a brief description of residuality in paragraph 4.3 of the schedule to our Sixth Report, and of asymmetry in paragraph 4 of our Third Report.



- 3.3 There is also broad agreement that constitutional principles should be developed as a framework for the formulation of SPR powers and functions, and that the boundaries of the SPRs that will constitute the federal units will have to be agreed upon by the MPNP.
- 3.4 The IFP proposes that a commission be appointed to assist "political formations" to develop the boundaries of the federal units and the constitutional principles according to which the powers and functions of the SPRs will be determined. The KwaZulu government proposes that a technical committee "in consultation with regional representatives (as they presently stand) and relevant experts" should delineate the relevant boundaries. There are no other specific suggestions from those favouring the bottom up process as to how the SPR boundaries should be established.
- 3.5 When a decision has been taken on the constitutional principles and the boundaries of the SPRs, the SPRs will become involved in the process. Suggestions as to how this should be achieved include the establishment of an MPNP at SPR level; decision making by "elective representatives"; and the establishment of SPR constituent assemblies.
- 3.6 The IFP contends in its submissions to us that because of "the unique characteristics of the region of KwaZulu/Natal" it should be assumed to be a region and treated differently to other SPRs. According to its contention the organisation by the South African government of a referendum for the final ratification of the Constitution of the State of KwaZulu/Natal which was approved by the KwaZulu Legislative Assembly on December 1 1992 is mandatory.
- 3.7 The government of KwaZulu does not advance such a contention in its written submissions to us. According to its proposals regional constituent assemblies should be elected to formulate constitutional proposals for their SPRs and



these proposals should be the basis of negotiations in a reconstituted MPNP which "will be the main arena for the contestation of the various constitutional proposals put forward..."

- 3.8 The next stage of such a process will be for the SPRs to formulate their proposals for their own constitutions and for a national constitution. The question as to how such decisions will be taken within the SPRs is not addressed in any of the proposals submitted to us. If the "bottom-up" process is adopted this question will have to be addressed.
- 3.9 When each of the SPRs has finalised its proposals for its own constitution and for the national constitution, the focus of the negotiations will return to the national MPNP. At this stage the concern will be to co-ordinate the different proposals and to establish whether they can be accommodated in the national constitution. If there are differences between the proposals, those favouring the "bottom up" process support the view that the accommodation can be made on an asymmetrical basis.
- 3.10 To facilitate the process it has been suggested that a committee or committees of experts or a commission be appointed to participate in the process at all levels. Technical assistance could facilitate the work of the SPR constituent assemblies and a commission could have a useful role to play in co-ordinating the submissions coming from the SPR's.
- 3.11 Most of the proposals call for a referendum at SPR level to approve the SPR constitutions as well as a referendum at national level to approve the national constitution. One of these proposals suggests that the SPR referenda and the national referendum be held at the same time, but the others favour the SPR referenda being held before the national constitution is drawn up.
- 3.12 The proposals envisage a constitution making process which does not require any change in the present constitutional order until a new national constitution



is adopted. This means that existing structures will remain in place until the new constitutions have been approved and enacted into law.

- 3.13 When the constitutions have been adopted, elections will be held under them for the national parliament and the SPR parliaments.

#### 4. Developing the Process

##### 4.1 Synthesis

- 4.1.1 The Negotiating Council has already established a Commission on the Demarcation/Delimitation of Regions and has asked us to formulate constitutional principles for debate and discussion by the Council, and to consider and report on the structures, powers and functions of SPR's. On the basis of debates and discussions, including those that have already taken place, it should be possible for the Negotiating Council to take a decision on the constitutional principles, and when the Commission's report is received, to take a decision on the boundaries of the SPR units.
- 4.1.2 In dealing with the way in which SPRs will take decisions, and the suggestion that KwaZulu/Natal should be treated as a special case, it must be appreciated that the SPRs will not come into existence unless and until existing legislation is amended to make provision for the creation of new SPRs in accordance with decisions that may be taken by the MPNP. None of the boundaries of the TBVC states, the Self-governing Territories, or the Provinces, is likely to coincide with the boundaries of the SPRs.
- 4.1.3 Neither the boundaries nor the electorates of future SPR's are likely to coincide with those of existing bodies. In the circumstances, and although other possibilities may exist, it seems to us that the election

of SPR constituent assemblies would be an appropriate way in which to determine the views of the electorate of the SPRs for the purposes of the "bottom up" process.

4.1.4 The question of levelling the playing fields for the purposes of the elections is addressed in only one of the submissions. According to that submission steps will have to be taken in order to enact a new electoral law, an independent broadcasting authority, a media watchdog, joint control of the security forces, the disbandment of private armies, etc. This issue is not within our terms of reference but would have to be addressed if the bottom up process were to be followed.

4.1.5 Some of the proposals seem to contemplate that the MPNP will be obliged to accept decisions taken at SPR level as long as they are in accordance with the constitutional principles. Others accept that the MPNP will have the final say, and will not be bound by the SPR proposals which "would be nothing more than powerful popular petitions to the constitution-drafting process at central level." This question will have to be resolved if the bottom-up process is adopted.

4.1.6 Since SPR constitutions have to be co-ordinated with the national constitution it seems appropriate that the SPR referenda be held before the national constitution is finalised. The national constitution can then be put to a national referendum. If the national referendum fails to approve the constitution, the MPNP can continue the process, until the necessary approval by referendum is secured.

4.1.7 Responsibility for supervising the referenda would depend on decisions taken in regard to how the "playing fields should be levelled". One proposal is that a special commission be appointed to assume



responsibility for such purposes, which would presumably include the supervision of the elections for regional constituent assemblies as well. This question is outside our terms of reference but as pointed out in paragraph 4.1.4 will have to be addressed if this process is adopted.

4.1.8 Provision needs to be made for the possibility that the referenda at SPR level do not produce positive results in all SPRs. One proposal is that if an SPR constitution cannot be adopted within an established time frame, the solution must be found through negotiations as central level. This issue needs to be resolved.

4.1.9 In one of the proposals it is suggested that the SPR proposals be debated within the MPNP, enlarged to include as a second chamber consisting of representatives from each of the SPR constituent assemblies, and that the approval of both chambers be required for decisions. Other proposals contemplate that the MPNP will continue in its present form.

## 4.2 Scenario

On the basis of the synthesis in paragraph 4.1 the following could be a scenario for a "bottom up" process.

4.2.1 MPNP resolves that there shall be a federal state.

4.2.2 MPNP decides upon constitutional principles for the federal state.

4.2.3 MPNP decides upon SPR boundaries after considering the report on the Commission on Delimitation/Demarcation of Boundaries.

4.2.4 The establishment of institutions for the levelling of the playing fields.

4.2.5 Each SPR elects a constituent assembly to formulate proposals for its constitution and a national constitution.

4.2.6 Referenda are conducted at SPR level to secure approval of the proposals for the SPR constitutions.

4.2.7 MPNP coordinates proposals for SPR constitutions and the national constitution, and finalises the national and SPR constitutions with the assistance of a committee/commission.

4.2.8 The national constitution is submitted to a national referendum for approval.

4.2.9 Elections are held for national and regional legislatures in accordance with the provisions of the approved constitutions, which mark the termination of the present constitutional dispensation.

#### 4.3 Questions to be resolved

To complete this scenario the following questions would have to be addressed by the MPNP:

4.3.1 How will SPR constituent assemblies be elected and how will they take their decisions?

4.3.2 What majority will be required for approval of the constitutions at the SPR level and at national level?

4.3.3 What will the position be if the specified majorities are not obtained at SPR level?



4.3.4 How will the playing fields be levelled for the purposes of elections and the referenda?

4.3.5 Should the MPNP remain as presently constituted or should it be converted into a bi-cameral body with representatives of the SPR constituent assemblies constituting a federal council within the MPNP?

4.3.6 Will the MPNP be bound by decisions taken at SPR level or will the MPNP have the final say?

4.3.7 Should a special commission be appointed to oversee the process of constitution making, elections and referenda?

## 5. Making a choice

5.1 In our view two of the issues which have given rise to the differences as to process, concern on the one hand the boundaries, powers, and functions of SPRs, and on the other, the question whether there should be SPR constitutions, and if there are, how their provisions should be determined. The matters raised in paragraphs 1.2 and 1.3 of the our instructions are relevant to these issues. In paragraph 6 below we explore further the equilibrium tentatively advanced in our Sixth Report, which could help to bridge the gap which still exists between the two processes.

5.2 We have indicated in our previous reports that a choice has to be made as to the constitution making process to be followed. In the light of this report and our previous reports the Negotiating Council should be in a position to address this crucial issue.

## 6. Possible equilibrium regarding the process of constitution making

### 6.1 Introduction

6.1.1 In our Sixth report we suggest a possible equilibrium between the conflicting approaches regarding constitution making on a basis which assumes the adoption by the MPNP of a constitution for the transitional period. We have been instructed to explore this possibility further. The greater clarity now offered of the establishment of SPR's and the participation of SPR representatives in the process could possibly provide an acceptable equilibrium.

6.1.2 In paragraph 4.1 of our Sixth Report, it is suggested that, as a point of departure in finding an equilibrium between the two approaches, the constitutional principles pertaining to SPR autonomy currently under debate in the Council should be finalised. These constitutional principles indicate essential features of both the nature and form of a future South Africa. Not only is such a future state defined as a constitutional state in which the constitution shall have the character of the supreme law, but the form of state also emerges clearly as a decentralised one with regional autonomy. In fact, there is nothing in these principles which stands in the way of federalist aspirations. This coincides with the view previously expressed in paragraph 3.4 of our Second Report:

There is no universally accepted definition of federalism, and we are not convinced that in a discussion on the form of state, it would be useful or indeed possible to use as a point of departure preconceived concepts such as unitary or federal states. We should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a bearing on the form of state.



## 6.2 The importance of the Constitutional Principles

The question has been raised during the debates of the Negotiating Council whether these principles would be sufficiently binding on the processes of constitution making to ensure their application and actual implementation. It speaks for itself that were these principles simply to be regarded as useful guidelines during the different phases of constitution making, the relevant concerns would not be allayed. In this regard two interrelated matters must be considered, namely, first the binding force of the constitutional principles as a matter of law once they have been adopted by the MPNP; and second, their actual implementation.

### 6.2.1 The legal force of the constitutional principles adopted by the MPNP

It will be necessary to imbue the constitutional principles with a legal force which will be binding on the constitution making body. (See also paragraph 4.1 of our Fifth Report). In other words, once adopted, these constitutional principles will not simply be directives or guidelines, but will form a justiciable basis of the mandate of the constitution making body.

### 6.2.2 The practical application and implementation of the constitutional principles

In their present form the constitutional principles are stated as principles for a future democratic South Africa. Being stated as principles, they are not prescriptive in so far as their actual implementation is concerned. They bind the constitution making body, but leave it free within the limitations they impose to develop the precise terms and mechanisms of the constitution.

### 6.3. Making provision for SPR constitutions

In view of the need for constitutional arrangements for SPR government and administration immediately after the election of a constitution making body, and the concern expressed that there should be SPR constitutions, a possible equilibrium could be to include in the text of a constitution for the transitional period, provisions for the following scenario:

- 6.3.1 At the time of the election of the constitution making body, legislatures can be elected simultaneously within each demarcated SPR. These legislatures could elect SPR executives for the period of the transition. The administrative structures existing within the SPR's at the time of the election would continue to function under the political direction of the newly elected structures. Rationalisation and co-ordination of these structures where necessary, will be undertaken by the SPR governments in cooperation with the national government in terms of the Constitution for the transitional period.
- 6.3.2 Provision could be made in the Constitution for the transitional period for the representation of SPRs in the constitution making body: this may be achieved in various ways, for instance, additional party lists in the demarcated SPRs, the direct election of a second chamber or the designation of members of the SPR legislatures to a second chamber.
- 6.3.3 The Constitution for the transitional period could provide for the establishment of a commission to interact with the constitution making body in a prescribed manner regarding the finalisation of the boundaries, authority, powers and functions of SPRs, including either uniform or asymmetrical SPR constitutions.



6.3.4 Should an approach of this nature be agreed upon, the implementation of constitutional arrangements for a specific SPR during the transitional period may become practicable. It is conceivable that the elected legislatures of some or all of the SPRs would be capable of developing SPR constitutional arrangements before the constitution making body would be able to produce a new national constitution. These constitutional arrangements should be consistent with the constitutional principles and the Constitution for the period of transition and be in conformity with the new Constitution as it evolves in and is authorised by the constitution making body.

#### 6.4

#### Conclusion

A process of SPR constitution making along these lines could establish an equilibrium between the different approaches to constitution making. SPR constitutional dispensations are not left entirely in the hands of the national constitution making body. Further, SPR dispensations and their implementation may not necessarily be postponed until a final national constitution has been adopted and implemented. The adoption of such a procedure for finding an equilibrium between the two approaches, would require a somewhat detailed regulation in the constitution for the transitional period of the procedures to be followed by the constitution making body for the establishment, approval, ratification and implementation for SPR dispensations.

**THIRD SUPPLEMENTARY REPORT ON CONSTITUTIONAL  
PRINCIPLES OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO  
THE NEGOTIATING COUNCIL  
30 JUNE 1993**

**1. Introduction**

When the Constitutional Principles were revisited during the debate in the Negotiating Council a number of issues were raised. As we did in our Second Supplementary Report, we now indicate where the debate has not yet been concluded. Where there has been no comment we have set out the Constitutional Principles as they appeared in our previous reports. Where issues have been raised we identify those issues. Amendments or additions are identified by underlining the relevant words, and deletions are indicated by square brackets.

**2. Constitutional Principles**

- 2.1 The Constitution of South Africa shall provide for the establishment of a single sovereign state with [a democratic system of government] a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.



2.1 This principle was reformulated to incorporate the underlined words in accordance with a proposal accepted during the debate. The wording we have adopted is our edited version of this proposal.

A suggestion was made that the word single before "sovereign state" be deleted. It is our opinion that the word single does not have a specific meaning in this regard. A decision needs to be taken.

- 2.2 **The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.**
- 2.3 **There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**
- 2.4 **The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**
- 2.5 **There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.**
- 2.6 **Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.**
- 2.7 **Formal legislative procedures shall be adhered to by legislative organs at all levels of government.**

**2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

A decision is still required as to whether the following specific reference to fundamental rights should be added to this principle: **"provided that this is done subject to [the provisions of] fundamental rights contained in the constitution."**

Another approach suggested during the debates is an addition to 2.10 or to another principle, which would make the application of all or specific principles subject to the fundamental rights regime. We suggest that this matter be revisited during the debate on paragraph 2.12.

**2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.**

The debate on this principle has not yet been concluded. The following submission was received:

"The right of self-determination of peoples is acknowledged. The right is exercised through cultural and linguistic groups/minorities and formations in:

- \* Practising their own cultures;
- \* Using own languages;
- \* Forming organs of civil society;
- \* Determining their own political status through legislative and executive powers in the form of territorial autonomy;
- \* participating effectively in decisions on the national and regional level.

These rights shall, on the basis of non-discrimination and free association, be recognised and protected."



"Collective rights of self-determination in forming, joining and maintaining organs of civil society" as in the current wording of this principle, is a different notion from "the right of self-determination of peoples" as in the proposed alternative.

The notional difference lies in the fact that the bearers of the first mentioned rights (a collection of individuals, "including linguistic, cultural and religious associations") could be distinguished from the bearers of the second ("peoples").

The proposed amendment will also have an impact on political rights. A decision needs to be taken on the formulation of this principle.

**2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.**

**2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.**

It was suggested that this principle be reformulated to accommodate the amendment to 2.1. As the principle in 2.1 is now phrased in positive terms and not as a prohibition, no amendment to the present principle should be necessary.

- 2.12 **The status according to indigenous law of traditional leadership shall be recognised in the Constitution. Indigenous law shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution (and to legislation dealing specifically therewith).**

The following suggestion was submitted to the Negotiating Council :

"The institution, status and role of Traditional Leaders shall be acknowledged in the Constitution. Indigenous law shall be applied to the extent that is compatible with the provisions of fundamental human rights contained in the Constitution."

It was agreed to leave the matter in abeyance to allow for further informal discussions in this regard. This matter still has to be finalised.

We reiterate the fact that the word "status" in this context is a legal term indicating the standing or position in law, particularly in terms of indigenous law, of traditional leaders. "Status" in this context can therefore not be interpreted as reflecting on example social and financial esteem.

- 2.13 **Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.**
- 2.14 **Amendments to the constitution shall require special procedures involving specified majorities.**
- 2.15 **Government shall be structured at national, SPR and local levels.**



**2.16 At each level of government there shall be democratic representation.**

The question was raised in the debate whether this principle would affect traditional institutions. It is suggested that traditional structures generally cannot be described as a "level of government" in this context. There is however a potential area of conflict between democratic representation and traditional institutions, which may affect the manner in which some traditional communities function. Should traditional structures however also perform the task of government (eg at SPR or local level), the principle as formulated will allow communities to decide democratically whether the traditional institutions must be retained for that purpose.

**2.17 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.**

It has been suggested by a participant that the words "including fiscal powers" be introduced after the word "powers" in line two. Fiscal powers are dealt with in paragraph 2.21, 2.22 and 2.23. It is suggested that the proposed addition be debated in the context of paragraphs 2.21, 2.22 and 2.23.

**2.18 The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPR's shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional**



representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.

2.19 A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

2.20 The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

2.21 The following criteria shall be applied in the allocation of powers to the

2.21 National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.

2.22 Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

The principle contained in the paragraph needs to be amended.

(See comment below in paragraph 2.23)

2.23 The following criteria shall be applied in the allocation of powers to the

2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR's, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.



One of the participants suggested that the words "from revenue collected nationally" should be added in line three after the words "SPR governments".

The use of these words in paragraph 2.22 and 2.23 raises the question whether the SPR's should have a right to fiscal and financial resources other than revenue collected nationally.

It was also suggested by a participant that the word **determine** should be substituted for the word **recommend** in line two.

This also requires further debate.

- 2.24 **The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:**

General:

Subject to the other provisions of paragraph 2.24 whenever it is practical to do so, powers, functions and the delivery of services should be allocated to the level of government closest to the people concerned.

The addition of this paragraph has been suggested by one of the participants. The formulation is somewhat ambiguous and may be in conflict with 2.24.1. The principle contained in the paragraph needs to be debated.

- 2.24.1 **The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.**

2.24.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPR's.

2.24.3 Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.

One of the participants suggested the insertion of the underlined words. The suggestion was that "unreasonable" be inserted before "prejudicial" in line four. We however suggest that it would be more appropriately placed as indicated.

2.24.4 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

National Government

2.24.5 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.



2.24.6 Where uniformity across the nation is required for a particular function, then legislative power over that function should be allocated predominantly, if not wholly, to the national government.

One of the participants suggested the insertion of the word "legislative" in the second line. We think it would be appropriate.

2.24.7 Where minimum standards across the nation are [important] required for the delivery of public services, the power to set such standards should be allocated to the national government.

One of the participants suggested the insertion in the second line. We think it would be appropriate.

2.24.8 The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

2.24.9 SPR Government

SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

There are two proposals in the alternative to the amendment in paragraph 2.24.9. The first option proposes that the words after "as" (in the second line) be deleted and be replaced by "defined in the constitution". The motivation for this amendment is that there is no point in identifying areas of a few examples only. The list of examples should either be extended or eliminated.

The second option, which applies only if the preceding proposed amendment is defeated, proposes:

- \* In the third line the deletion of "for the purpose of" and substitute this with "in respect of local government" and

- \* In the fourth line, the deletion of "aspects of health, welfare and education" and the substitution of "major aspects of health, housing, police, welfare, education and culture"

We acknowledge the shortcomings of the original wording. Debate on this matter will assist us in drafting another formulation.

#### Concurrent Powers

2.24.10 Where mutual co-operation is essential or desirable or where it is required [important] to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.



It was suggested during the debate that the word "important" be replaced with the word "required" to provide for a more objective criterion. We support this suggestion.

- 2.24.11 **In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.**

#### Residual Powers

- 2.24.12 **The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with.**

### **3. Proposed additions**

The following additional principles have been proposed by participants:

- \* Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.
- \* The independence and impartiality of a Commission for Administration, a Reserve Bank, an Auditor general and an Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

- \* Every member of the security forces (police, military and intelligence) shall be required to perform his or her duties and functions and exercise his or her powers in the national interest and shall be prohibited to intentionally further or prejudice party political interest.

The inclusion of these suggested principles have not yet been debated fully.

SECOND SPECIAL REPORT ON CONFEDERALISM FROM THE  
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO  
THE NEGOTIATION COUNCIL

26 JULY 1993

L. Introduction

Since our (1991) Special Report on Confederation was tabled and debated in the Negotiation Council we have received a written response by the Conservative Party to that report, dated 23 June 1993. The Conservative Party's 'First Draft Constitution' for the proposed partitioned or seceded state (entitled 'KONSEPGRONDWET VIR DIE STAAT VAN AFRIKANEERVOLK'), being a guideline presently under discussion by the Conservative Party, was also submitted to us.

- 1.1 It is not our function to get involved in a political argument with the Conservative Party. We reiterate our view, however, that the Conservative Party is entitled to express its political views and opinions. In this report we present a brief outline of the Conservative Party's constitutional approach and our response to the cardinal issues raised in it.



## EMBARGOED UNTIL TABLED IN THE NEGOTIATING COUNCIL

### SECOND SPECIAL REPORT ON CONFEDERALISM FROM THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATION COUNCIL

26 JULY 1993

#### 1. Introduction

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- 1.1 It is not our function to get involved in a political argument with the Conservative Party. We reiterate our view, however, that the Conservative Party is entitled to express its political views and opinions. In this report we present a brief outline of the Conservative Party's constitutional approach and our response to the cardinal issues raised in it.

## 2. Outline of the Conservative Party's Approach

The basic elements of the Conservative Party's constitution for a "Volkstaat" can be summarised as follows:

- 2.1 The "Volkstaat", described as a Republic, is a sovereign independent and democratic 'regstaat', based on the separation of powers, representing the 'volk' through elected representatives.
- 2.2 The territory of the Republic is indivisible and the Republic may cooperate with the other states in Southern Africa on the basis of a voluntary confederation.
- 2.3 The Republic will have its own security forces of which a State President is the ex officio head.
- 2.4 Citizenship is granted to all Afrikaners residing in the Republic on the date of independence (see below) and citizens over the age of 18 will have the franchise, the right to be elected and to form political parties.
- 2.5 Part 2 of the draft constitution contains the fundamental rights regulating the state-individual relationship. Fundamental rights such as freedom of assembly, association, employment, and military service are limited to citizens.
- 2.6 The legislature consists of the State President and a Parliament having two houses: the members of the 'Volksraad' or lower house are elected on a constituency basis, whilst the members of the Senate are indirectly elected by the members of the 'Volksraad', in proportion to the strength of the relevant political parties.



2.7 The Executive consists of the State President and cabinet ministers appointed by the State President.

2.8 The State President is directly elected by universal franchise of citizens for a period of five years (re-electable only once) and he cannot serve in that capacity if he is over the age of 75 years.

2.9 Provision is made for a specially constituted Constitutional Court.

2.10 The Constitution is a rigid one providing for specified majorities for its amendment.

### 3. Specific Issues

#### 3.1 General:

In paragraph 2.4 of our previous Special Report referred to above, we stated that a determination of the external features of the form of state does not involve a theoretical discussion of form of state, but rather a practical discussion of all those concrete elements which constitute statehood and determine the nature of the state. These concrete elements are:

- \* the territory and boundaries of the state;
- \* the creation and establishment of the state, whether through partition or secession;
- \* the population of the state which implies a clear and legal definition of citizenship and the legal status of non-citizens; and
- \* the governance and legal system of the state.

### 3.2 Territory and Boundaries

The determination of the territory and boundaries of the proposed Afrikaner state falls outside our mandate, and although we take cognisance of the fact that such proposals will be submitted to the Commission on the Demarcation/Delimitation of SPRs, we are of the view that no state can ever exist *in vacuo*. Unless the proposed features of the draft constitution obtain concrete and physical expression and manifestation in relation to a defined territory they are in our view constitutionally without any legal effect. The furnishing of the territorial features of the proposed state would have enabled constitutional lawyers to identify the nature of the state's population and the constitutional viability of an *agreed* partition or dismemberment of the present RSA.

### 3.3 The Creation and Establishment of the State

We do not contest the right of self-determination of a people like the Afrikaners: as an identifiable people or minority they could be protected in the political and legal sense in a composite South African state within the ambit of the constitutional principles adopted and in the process of being debated in the Negotiating Council. In so far as this collective right of self-determination implies the right of a people, however defined, to determine its political future, it may justify a secessionary action in respect of that territory in which they reside *only* if they are suppressed, or denied fundamental human rights, or if secession is voluntarily agreed upon with the government. The Conservative Party's submissions, in our view, do not contain any evidence that could form the basis for such a secession.

A voluntary partition is not foreseen as a viable constitutional alternative if the effect of such a proposed partition would be that a substantial part or the majority of the population of the partitioned state are disenfranchised in respect of the *territory* in which they live and in respect of the *government* that controls their lives in that territory. It can undoubtedly be expected that



in such an event the sanction of the international community for such a dispensation would be withheld. A confederal option with these unanswered lacunae can therefore not be recommended.

### 3.4 Citizenship and the Legal Status of Non-citizens

According to clause 6 of the Conservative Party's draft constitution, citizens of the proposed state would be Afrikaners residing in the territory as well as those persons born or resident elsewhere and who apply for citizenship. Citizenship may also be acquired by persons born in the territory of parents who are both citizens: this last-mentioned category applies only in respect of the acquisition of citizenship after independence. Although it is constitutionally permissible to define citizenship in terms of ius sanguinis (by descent), the initial cut-off point to ascertain who exactly would be the first Afrikaners in the proposed state, is still vague.

The second category of initial citizens comprises those born or resident outside the territory and who apply for citizenship. This means that all non-Afrikaners born in or residing in the state are not citizens of the proposed state, and indeed would be constitutionally disenfranchised in the state. To them it is no solatium or consolation to state that they will remain citizens of the 'New South Africa'. ( See para 5.8 of the Conservative Party's said Response.) This indeed will amount to the formal denial of the very right of self-determination (on which the Conservative Party relies) to those others, be they a majority or a minority, who would be living in that state.

To merely treat them, as enunciated in clause 8 of the Conservative Party's draft constitution, as aliens, only emphasises the constitutional unacceptability of the proposed dispensation, rather than clarifying it.

#### 4. Conclusion

Although the Conservative Party's submissions provide particulars on the governance and legal system of the proposed state, the question in regard to the other concrete elements referred to in paragraph 3.1 above which constitute statehood, have as yet not been resolved.

#### 1. Introduction

Subsequent to our previous reports on Constitutional Principles and the debate in the Negotiating Council, the Negotiating Forum on 2 July 1993 adopted a set of Constitutional Principles. The Negotiating Forum agreed that the Constitutional Principles shall be binding on the constitution-making body and that the justifiability thereof shall be ensured by a constitutional court of appeal. These Constitutional Principles will be set out fully in our Eighth Report.

In this report we deal only with outstanding matters and with certain typographical and grammatical errors in the Constitutional Principles adopted by the Forum (see Volume 1 of the "Reports and Recommendations" from the Council to the Forum on 2 July 1993, pages 11-17). Deletions are indicated by square brackets and additions by underlining. Principles not yet agreed on are printed in italics. In this report we identify the relevant Principles by the same numbering as was used in our Third Report and the "Reports and Recommendations" before the Negotiating Forum.



**EMBARGOED UNTIL TABLING IN THE  
NEGOTIATING COUNCIL**

**FOURTH SUPPLEMENTARY REPORT ON CONSTITUTIONAL  
PRINCIPLES OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO  
THE NEGOTIATING COUNCIL**

**26 JULY 1993**

**1. Introduction**

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## 2. Constitutional Principles

- 2.1 The Constitution of South Africa shall provide for the establishment of one sovereign state, [with a democratic system of government] a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

Corrected text: The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

- 2.18 *The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPR's shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.*

It was suggested that the first sentence should be amended to read

"The powers, functions and institutions of national and SPR governments shall be defined in the Constitution."

In view of the unresolved debate concerning SPR constitutions, it may be better to leave this open, so that the constitution making body can authorise SPR's to adopt their own constitutions in which SPR institutions will be defined. Having regard to the recommendation contained in our Eighth



Report concerning the development of SPR constitutions, the proposed inclusion will unduly curtail the development of SPR structures in terms of such constitutions.

It was also suggested that the word "alternatively" be replaced with "and". In regard to the amendment of those parts of the Constitution relating to SPR's, there are two possibilities. Firstly the constitution could be changed by a specified majority of all the legislatures of the SPR's, alternatively by a specified majority of a chamber of parliament (senate) composed of regional representatives. The first method of amendment involves the representatives of people of the regions more directly. However it results in a more rigid constitution which is more difficult to change. By means of the second method amendments could be effected more expeditiously and the members representing the different regions can engage in a wider and more inclusive debate within a single forum.

It should further be noted that the second method could, depending on the composition of and voting procedure in the second chamber, produce a different result than would emerge from the first method. This difference could be diminished by requiring the representatives of each SPR in the second chamber to vote en bloc on amendments of this nature.

Prescribing both methods will render the procedure more cumbersome without thereby necessarily achieving the presumed goal of effectively entrenching SPR interests better. It also creates the possibility of conflict occurring between the SPR's and the second chamber.

These considerations require further debate, before the Negotiating Council can come to an informed agreement.

**2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:**

*2.24.1 The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.*

Suggested corrected version:

**The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.**

The amendments are suggested in order to clarify the meaning of the Principle.

*2.24.9 SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.*

It was suggested that the reference to "aspects of health, welfare and education" in the concluding words of the principle was inappropriate and that the reference should have been to criteria rather than to specific functions.



In the light thereof we propose that the Principle be formulated as follows:

**2.24.9** SPR governments shall have powers, either exclusively or concurrently with the national government, inter alia:

**2.24.9.1** for the purposes of regional planning and development and the delivery of services; and

**2.24.9.2** in respect of aspects of government dealing with the specific socio-economic and cultural needs and the general well being of the inhabitants of the SPR.

In view of the previous discussions in the Negotiating Council, we are of the opinion that consideration should be given to the addition of the following sentence to principle 2.8:

**Culture shall not be promoted in a manner which would prejudice persons who do not adhere to such culture.**

**2.27** [Every] Members of the security forces (police, military and intelligence) and the security forces as a whole shall be required to perform [his, her] their duties and functions and exercise [his, her] their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

The changes are proposed for obvious grammatical reasons.

### 3. Principles on self-determination

The following submissions on self-determination of peoples was put forward to the Council:

- 3.1 *The right of self-determination of peoples, which allows them to determine their own political status through legislative and executive powers in the form of territorial independence and autonomy, is acknowledged.*

This is a principle of international law which is subject to the limitations referred to in our previous reports on confederalism. For the reasons set out in particular in paragraph 3.3 of our Second Special Report on Confederalism, we cannot recommend the introduction of this principle. The inclusion of a single principle of international law concerning self-determination of peoples, in the context of a set of constitutional principles for the constitution of South Africa, will obfuscate matters and contribute nothing to the constitution making process that is envisaged by the MPNP. Stated differently, we fail to see why the international law principle of self-determination of peoples should influence or bind a constitution making body in its tasks of giving content and effect to the constitutional principles for South Africa to be agreed upon by the MPNP.

- 3.2 *The right of self-determination of peoples is acknowledged. The right is exercised through cultural and linguistic groups\minorities and formations in:*

- \* *Practising their own culture;*
- \* *Using own languages;*
- \* *Forming organs of civil society;*



- \* *Participating politically effectively on the national and regional level in order to determine their political aspirations in legislature and executive in a particular region.*

*These rights shall, on a basis of non-discrimination and free association, be recognised and protected.*

#### PREAMBLE

The proposed principle as formulated, corresponds in general terms to our views on the collective right of self-determination set out in paragraph 3.4.2 of our First Report. In the context of municipal law, however, an unqualified reference to the right of self-determination of peoples is open to misinterpretation. Furthermore, we are of the opinion that the right of self-determination within the context of municipal law has been adequately addressed in the following Constitutional Principles discussed and adopted by the Negotiating Council: Principle 2.2 on non-discrimination; Principle 2.5 on Multi-Party Democracy; Principle 2.8 on the acceptance of linguistic and cultural diversity; Principle 2.9 on collective rights of self-determination; Principle 2.10 on the enjoyment of universally accepted fundamental rights; and Principle 2.13 on the participation of minority political parties.

For these reasons, we do not recommend the inclusion of this principle.

#### CHAPTER 2

##### Citizenship

- \* *South African citizenship at the time of the coming into operation of this Constitution.*
- \* *The acquisition and loss of South African citizenship after the coming into operation of this Constitution.*
- \* *The protection of South African citizenship after the coming into operation of this Constitution.*

# **CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**

## **1993**

*(Draft Outline: 21 July 1993)*

### **PREAMBLE**

### **CHAPTER 1**

#### **Formal and Constituent Provisions**

Including:

- The name, sovereignty and territorial definition of the state.
- The supremacy of the Constitution.
- National symbols.
- Languages.

### **CHAPTER 2**

#### **Citizenship**

- South African citizenship at the time of the coming into operation of this Constitution.
- The acquisition and loss of South African citizenship after the coming into operation of this Constitution.
- The protection of South African citizenship after the coming into operation of this Constitution.



### CHAPTER 3 Fundamental Rights

Wording provided by the Technical Committee on Fundamental Rights during the Transition

### CHAPTER 4 The Legislature

#### Legislative authority

1. (1) The legislative authority of the Republic shall be vested in the Parliament of the Republic which shall consist of the National Assembly and the Senate and shall, subject to the provisions of this Constitution, have the power to make laws applying equally in all SPRs of the Republic.

(2) Parliament shall be competent to delegate by law any matter within its powers to the legislature of a region or of a local authority.

#### Duration of Parliament

2. Parliament shall continue until the entering into force of a new and totally revised constitutional text, or until it is dissolved under Chapter 5.

#### Franchise

3. *[To be formulated in light of the Negotiating Council's discussion of the reports of the Technical Committee on the Independent Electoral Commission.]*

#### Composition of the National Assembly

4. The National Assembly shall consist of four hundred members elected according to the system of proportional representation on national and regional party lists as provided for in Schedule 3.

### **Speaker of the National Assembly**

5. (1) The Speaker shall be elected by the members of the National Assembly.

(2) The Speaker shall preside at meetings of the National Assembly.

(3) The Speaker shall be vested with all powers, duties and functions assigned to him or her by the rules and orders approved by the National Assembly.

### **Composition of the Senate**

6. (1) The Senate shall be composed of ten members from each SPR, elected by the SPR legislature of each SPR at the first session after its election from among its number according to the principle of proportional representation, each voter having one transferable vote.

(2) The members of an SPR legislature elected in terms of subsection (1) to the Senate, shall vacate their seats in the SPR legislature.

(3) The vacancies in the SPR legislature occurring in terms of subsection (2) shall be filled by persons whose names appear on the party lists on which the names of the persons elected to the Senate appeared.

### **President of the Senate**

7. (1) The President of the Senate shall be elected by the Senators.

(2) The President of the Senate shall preside at meetings of the Senate and at joint sessions of the National Assembly and the Senate.

(3) The President of the Senate shall be vested with all powers, duties and functions assigned to him or her by the rules and orders approved by the Senate.



## **Immunities and privileges**

8. The immunities and privileges of Parliament and its members shall be regulated by law.

## ***Parliamentary procedure***

### **Rules and orders**

9. (1) The National Assembly and the Senate may separately make rules and orders concerning the order and conduct of their various proceedings.

(2) The National Assembly and the Senate may make rules and orders concerning the order and conduct of their joint proceedings.

(3) Parliament may institute representative standing committees of the National Assembly and the Senate, in order to resolve possible disagreements and to make joint reports.

### **Ordinary legislation**

10. (1) All laws, except laws relating to finance, specified SPR matters, and the amendment of this Constitution, shall be considered to be ordinary legislation.

(2) Ordinary legislation may be introduced in either the National Assembly or the Senate and shall be passed by a majority of the total number of the members in both Houses.

(3) A bill passed by one House and rejected by the other shall be referred to a joint committee consisting of members of all parties represented in Parliament to report on proposed amendments to the bill, whereafter the bill shall be referred to a joint sitting of both houses for decision by a majority of the total number of members of Parliament.

### **Finance Bills**

11. (1) Bills appropriating revenue or moneys or imposing taxation shall be introduced only in the National Assembly after they have been considered and



reported on by a joint committee of both Houses and, in so far as it may be required in terms of this Constitution, by the Financial and Fiscal Commission.

(2) A bill shall not be deemed to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(3) The Senate may not amend any bills in so far as they impose taxation or appropriate revenue or moneys.

(4) If the National Assembly in any session passes a bill imposing taxation only or dealing with the appropriation of revenue or moneys, and the Senate in the same session rejects or fails to pass it within thirty days after it had been passed by the National Assembly, the bill shall be reconsidered by the National Assembly and may thereafter be presented to the State President for his or her assent and shall as soon as it has been assented to by the State President become an Act of Parliament as if it had been approved by the Senate.

#### **Bills concerning specified SPR matters**

12. (1) Bills concerning the exercise of powers and functions allocated to SPR governments in section 6(1) of Chapter 9, shall be approved by the National Assembly and the Senate.

(2) A bill which affects the exercise of powers or functions allocated in terms of section 6(1) of Chapter 9 to a particular SPR only, shall also be approved by a majority of the Senators of that particular SPR.

#### **Amendment of the Constitution**

13. (1) Save for the provisions of subsection (2) of this section and of Chapter 5, an amendment to this Constitution shall be passed by a two thirds majority of the total number of members of the National Assembly and the Senate sitting in joint session.

(2) No amendment of this Constitution shall be permissible in so far as it is designed to detract, directly or indirectly, from the essence of the Constitutional Principles contained in Schedule 1.



*Provision should further be made for the following matters:*

- *Assent to Bills by the State President*
- *Signature and enrolment of Acts of Parliament*
- *Resolution of conflicts between texts in different official languages*
- *Seat of the legislative power*
- *Sessions of Parliament*
- *Qualifications and disqualifications of members of Parliament*
- *Penalty for sitting or voting when disqualified*
- *Oath or affirmation of members of Parliament*
- *Quorum in Houses of Parliament*
- *Casting vote of President of the Senate and Speaker in the event of an equality of votes*
- *Rights and obligations of State President and Ministers regarding speaking, sitting and voting in the Houses of Parliament.*

## **CHAPTER 5**

### **Total Revision of the Constitution and the Adoption of the new Constitutional Text**

#### **The Constitution-making Body**

1. (1) The National Assembly and the Senate, sitting in joint session, shall be the CMB.

(2) The CMB shall undertake a total revision of this Constitution and adopt a new constitutional text in accordance with the provisions and procedures of this Chapter.

(3) The CMB shall be presided over by the President of the Senate, and in his or her absence, by the Speaker, and in the absence of both, by a person elected by the CMB for such purpose.

## **Constitutional Principles**

2. (1) In undertaking its task of total revision of the present Constitution and the drafting of a new constitutional text, the CMB shall adhere and give effect to the Constitutional Principles contained in Schedule 1.

(2) During the course of undertaking the total revision and the drafting of the new constitutional text, any constitutional proposal pertaining to such revision and drafting may be referred to the Constitutional Court by the Chairperson after being petitioned by one third of the members of the CMB to do so, in order to obtain an opinion from the Court as to whether such proposal, if adopted, would conform with the Constitutional Principles.

(3) A new constitutional text, or any separate part thereof, shall not come into operation unless the Constitutional Court certifies that all its provisions conform to and adequately give effect to the principles contained in Schedule 1.

(4) A decision of the Constitutional Court in terms of subsections (2) and (3) shall be final and binding and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of any constitutional provision which has been certified by the Constitutional Court in terms of subsection (3).

## **Appointment of commissions, committees and advisory bodies**

3. (1) The CMB shall have the power to appoint its own commissions, technical and parliamentary committees and other advisory bodies to assist it in its task.

(2) The CMB shall, with the concurrence of at least two thirds of all its members, appoint an independent panel of five persons being recognised constitutional experts not holding office in any political party, to advise it and the Chairperson on constitutional matters and to perform such other tasks as are provided for in this Constitution.



### **Adoption of a new constitutional text**

4. (1) A total revision of this Constitution shall be undertaken by the CMB, and a new constitutional text shall be adopted within two years from the commencement of the first session of Parliament.

(2) A new constitutional text shall be approved by two thirds of all the members of the CMB.

(3) Should the CMB fail to adopt a new constitutional text by a two thirds majority, but a draft of the new constitutional text is supported by a majority of its members, such draft shall be referred to the panel of constitutional experts by the Chairperson for their advice, to be given within 30 days of such referral, on amendments within the framework of the Constitutional Principles which might secure a majority necessary for the approval of the constitutional text.

(4) Should a draft prepared in accordance with the unanimous advice of the panel of constitutional experts in terms of subsection (3) not be submitted to the CMB within 30 days, or, should such draft, after being so submitted, not be supported by the necessary majority in the CMB, a constitutional text may be accepted by a majority of the members of the CMB.

(5) The State President shall refer a constitutional text accepted in terms of subsection (4), after it has been certified by the Constitutional Court to be in conformity with the Constitutional Principles enumerated in Schedule 1, to a national referendum.

(6) The question put before the electorate in the referendum shall be the acceptance or rejection of such draft constitutional text.

(7) The constitutional text presented to the electorate in the referendum shall, if approved by a majority of sixty per cent of the votes in the referendum, become the Constitution of South Africa.

(8) If the new constitutional text is not approved in the referendum contemplated in subsection (7), or if a new constitutional text is not otherwise approved, Parliament shall be dissolved by the State President and a general election shall be held.

(9) The CMB, composed of the newly elected National Assembly and Senate, shall within a period of one year after its first session, approve and pass the new constitutional text by ordinary majority.

#### **Amendment of this Chapter**

5. (1) No amendments to the provisions of this Chapter shall be permitted in so far as they relate to -

- (a) the Constitutional Principles set out in Schedule 1;
- (b) the requirement that the new constitutional text or texts shall comply with the Constitutional Principles, and that such text or texts shall be certified by the Constitutional Court as being in compliance therewith.

(2) All other provisions of Chapter 5 shall be capable of being amended by a two thirds majority of the CMB.

### **CHAPTER 6**

#### **The Executive Power**

- An Executive representative of political parties occupying a specified percentage of the seats in the National Assembly.

### **CHAPTER 7**

#### **The Judicial Power**

- Provisions for the continuation of existing courts and the establishment of a Constitutional Court.



## CHAPTER 8

**The Ombudsman and the Human Rights Commission**

- Provisions for the establishment of an impartial and independent Ombudsman and Human Rights Commission.

## CHAPTER 9

**SPRs****Establishment of SPRs**

1. The SPRs of South Africa shall be ... LISTED BY NAME ..., the boundaries of which are defined in Schedule 2.

**SPR legislatures**

2. (1) There shall be a legislature for each SPR.
- (2) The legislature of each SPR shall consist of the members elected at the time of the election of the National Legislature according to a system of proportional representation on SPR party lists as provided for in Schedule 3.
- (3) The number of seats in an SPR legislature shall be determined by dividing the total number of votes cast in the SPR in the election held in terms of subsection (2) by 50 000, approximated to the nearest complement.

*Provision should further be made for the following matters:*

- *Convening, venue and holding of sessions of SPR legislatures*
- *Qualifications for election to SPR legislatures*
- *Vacation of seats by members of SPR legislatures*
- *Filling of vacancies*
- *Quorum of meetings of SPR legislatures*
- *Rules of procedure for the conduct of the business of SPR legislatures*
- *Duties, privileges and immunities of members of SPR legislatures*

- *The requisite majority for decisions by SPR legislatures*
- *Public access to sittings of SPR legislatures*
- *Assent to bills passed by SPR legislatures*
- *Publication and enrolment of SPR legislation*
- *Duration of the SPR legislature.*

### **SPR executives**

3. (1) The executive of an SPR shall be elected by the SPR legislature according to the principle of proportional representation, each voter having one transferable vote, and shall consist of ten members.

(2) The executive of an SPR shall from among its own number elect a Premier.

(3) Each member of the executive shall be responsible for the administration of one or more of the departments of the SPR to be established by the Premier.

(4) The Premier shall determine how responsibility for the administration of departments shall be allocated to members of the executive.

*Provision should further be made for the following matters:*

- *Oath or affirmation of office by Premier, members of SPR executives and legislatures*
- *Remuneration of members of SPR legislatures, members of SPR executives and Premiers*
- *Appointment of secretary and other officers for SPRs*
- *Vacation and removal from office of SPR Premiers and members of SPR executives.*

### **Transfer and consolidation of existing administrative responsibility**

4. (1) Subject to the relevant transitional provisions contained in Chapter 12 and immediately following the determination of the extent of the legislative and executive competence of an SPR in terms of section 6, an SPR shall *mutatis*



*mutandis* assume responsibility for all the administrative and executive institutions existing within the SPR which were previously charged with the administration and execution of the matters falling within the competence of the SPR.

(2) The government of an SPR shall, on the advice of the Commission on SPR Government instituted in terms of this Constitution, establish a single, consolidated SPR administration as expeditiously as possible.

(3) In those instances where the administrative institutions of an SPR are charged by the National Executive with the administration of matters falling within the competence of the national government, the SPR executive shall administer those structures for and on behalf of the National Executive.

#### **Administration of existing laws**

5. (1) Subject to the relevant transitional provisions contained in Chapter 12 and immediately following the determination of the extent of the legislative and executive competence of an SPR in terms of section 6, existing laws applicable in the SPR governing matters falling within the competence of the SPR, shall *mutatis mutandis* be deemed to be laws of the SPR legislature.

(2) The powers, functions and obligations relating to the legislative and executive competence of the SPR arising from the provisions of the laws referred to in subsection (1), shall vest *mutatis mutandis* in the legislature and executive of the SPR.

(3) The legislatures of the SPRs shall undertake the consolidation and unification of the laws referred to in subsection (1) as expeditiously as possible.

#### **Powers and Functions of SPR Governments**

6. (1) The National Executive shall, after consultation with each SPR executive and receipt of the recommendation of the Commission on SPR Government established in terms of this Constitution, determine the extent of the legislative and executive competence of each SPR regarding the functional areas referred to in subsection (2), and such determination of competence shall, if approved by the CMB, be promulgated by the State President in a proclamation published in the *Government Gazette*.

(2) An SPR shall be entitled to the allocation of legislative and executive competences in each of the following functional areas -

- (a) Taxation within the SPR in order to raise revenue for SPR purposes
- (b) The appropriation of revenue and moneys for financing the government and services of the SPR
- (c) Local government
- (d) Town planning
- (e) Markets and pounds
- (f) Traffic control
- (g) Protection services
- (h) Local policing and law enforcement
- (i) Housing
- (j) Education
- (k) Cultural affairs
- (l) Traditional authorities and indigenous law
- (m) Health services
- (n) Welfare services
- (o) Agriculture
- (p) Fish and game preservation
- (q) Environmental affairs



- (r) Tourism and recreation
- (s) Public media
- (t) Public works
- (u) Roads
- (v) Transport
- (w) Casinos, racing and gambling
- (x) Language policy and language(s) for official use in the SPR.

(3) The competence of an SPR shall be determined as provided for in subsection (1) after due consideration of the SPRs' financial, administrative and infrastructural capability, and such determination shall have regard to the principles enumerated in Schedule 1.

(4) An SPR executive may decline specific powers and functions in any of the functional areas at the time of the initial allocation and may from time to time request the National Executive to expand its competence.

(5) The determination of the extent of the legislative and executive competence of an SPR made in terms of subsection (1) shall not be amended during the period of the operation of this Constitution without the consent of the SPR legislature.

#### **SPR finance and fiscal affairs**

7. (1) An SPR shall be entitled to an equitable share of revenue collected nationally in order to enable it and the local governments within its boundaries to provide basic services and to execute their functions and powers.

(2) The Financial and Fiscal Commission established in terms of Chapter 11 shall make recommendations to the National Assembly regarding equitable fiscal

and financial allocations to the SPRs from revenue collected nationally, taking into account the national interest, the provisions of subsection (1), economic disparities between the SPRs, as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each SPR.

(3) An SPR Revenue Fund shall be established in every SPR, into which shall be paid all revenues raised by or accruing to the SPR.

(4) An SPR government shall not be competent to raise loans for current expenditure.

(5) An SPR government shall be competent to raise loans for capital expenditure with the consent of the national executive given on the advice of the Financial and Fiscal Commission.

(6) An SPR government shall be competent to levy such taxes and surcharges as may be recommended by the Financial and Fiscal Commission and approved by the National Assembly, which approval shall not unreasonably be withheld.

(7) An SPR government shall not be entitled to raise taxes detrimentally affecting national economic policies, inter-SPR commerce, or the national mobility of goods, services, capital and labour.

(8) Allocations by the national government to local governments shall ordinarily be made only via an SPR government.

#### **Effect of laws of SPR legislature**

8. (1) A law made by an SPR legislature shall have effect in and for the SPR as long and as far only as it is not repugnant to any Act of Parliament duly passed within the competence of Parliament in terms of this Constitution.

(2) The provisions of a law made by an SPR legislature shall not be deemed to be repugnant to an Act of Parliament unless such provisions are expressly or by necessary implication inconsistent with an Act of Parliament.



## Recommendations to Parliament

9. An SPR legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws.

## SPR Constitutions

10. (1) An SPR legislature may, subject to the provisions of this Constitution, adopt a constitution for the SPR by a two thirds majority of all its members.

(2) An SPR legislature may make such arrangements as it deems appropriate for the negotiation and drafting of an SPR constitution.

(3) An SPR constitution adopted by an SPR legislature shall not be inconsistent with the principles enumerated in Schedule 1 or the provisions of the new constitutional text adopted in terms of Chapter 5.

(4) An SPR constitution shall be developed in consultation with the Commission on SPR Government established in terms of section 13.

(5) An SPR constitution adopted prior to the adoption of a new constitutional text in terms of Chapter 5 shall be approved and come into operation in terms of a resolution of the CMB passed by two thirds of its members.

(6) An SPR constitution adopted by an SPR legislature may be referred to the Constitutional Court by the chairperson of the CMB after being petitioned by one third of the members of the CMB in order to obtain an opinion from the Court as to whether such constitution, if adopted, would conform with the Constitutional Principles.

(7) An SPR constitution which is not in force prior to the new constitutional text intended in Chapter 5, shall be approved and come into operation in terms of such new constitutional text.

13. A Commission on SPR Government shall be appointed by the State President in terms of this Constitution within 30 days of its coming into operation.



## **Development of constitutional provisions regarding SPR Government**

11. (1) The development of a system of SPR government shall receive the priority attention of the CMB and in this regard it shall take into consideration the recommendations of the Commission on SPR Government referred to in section 13 and the views expressed thereon by the executives of the various SPRs.

(2) The Commission's recommendations to the CMB regarding any matter that falls within the ambit of its objects in terms of section 14 shall include draft provisions for the national Constitution.

(3) The CMB shall deal with such draft provisions in the same manner as it is required to deal with other constitutional provisions.

(4) Draft provisions recommended by the Commission which are not adopted by the CMB, shall lapse, except if a majority of the members of the CMB present and voting resolve that the recommended provisions be referred back to the Commission for further consideration.

(5) Draft provisions referred back to the Commission may again be presented to the CMB, provided that if amended in one or more substantive respects, the provisions of this section regarding the acceptance, rejection or referral of the recommendations of the Commission shall apply *mutatis mutandis*.

## **Election of new SPR Governments**

12. An SPR government may at any time after the coming into force of an SPR constitution contemplated in section 10 or of the constitutional dispensation contemplated in section 11, petition the CMB to determine by resolution that an election for the establishment of a new SPR legislature and executive in that SPR, or in an SPR incorporating that SPR in whole or in part, shall be held.

## ***Commission on SPR Government***

### **Establishment of Commission on SPR Government**

13. A Commission on SPR Government shall be appointed by the State President in terms of this Constitution within 30 days of its coming into operation.



### **Objects and functions of the Commission**

14. (1) The objects and functions of the Commission regarding the establishment of SPR government in terms of this Chapter are to -

- (a) advise the national government and SPR governments on the establishment and consolidation of administrative institutions and structures in the SPRs; and
- (b) make recommendations to the national government regarding the extent of the legislative and executive competence of SPRs during the period of operation of this Constitution.

(2) The objects and functions of the Commission regarding the constitution making process provided for in Chapter 5 are to submit recommendations to the CMB in the form of draft constitutional provisions regarding -

- (a) the finalisation of the number and the boundaries of the constituent SPR's of the Republic of South Africa;
- (b) the constitutional dispensations of such SPRs, including the constitutional structures within such SPRs as well as the method of their election and their authority, functions and procedures;
- (c) measures, including transitional measures, that provide for the phasing in of new SPR constitutional dispensations;
- (d) the rationalisation of statutory enactments and public sector resources directed at facilitating the introduction and maintenance of a system of SPR government;
- (e) the final delimitation of powers and functions between national and SPR institutions of government with due regard to the criteria that are set out in subsection (3);

- (f) fiscal arrangements between the institutions of national government and those of SPR government;
- (g) the powers and functions of local governments; and
- (h) any matter which the Commission considers to be relevant or ancillary to its functions.

(3) In carrying out its functions the Commission shall, *inter alia*, take into consideration -

- (a) The provisions of this Constitution;
- (b) The principles enumerated in Schedule 1;
- (c) Historical boundaries, including those set out in Schedule 2, former provincial boundaries, magisterial and district boundaries and infrastructures;
- (d) Administrative considerations, including the availability or non-availability of infrastructures and nodal points for services;
- (e) The need to rationalise existing structures;
- (f) Cost-effectiveness of government, administration and the delivery of services;
- (g) The need to minimise inconvenience;
- (h) Demographic considerations;
- (i) Economic viability;
- (j) Developmental potential;
- (k) Cultural and language realities.



### **Constitution and impartiality of the Commission**

15. (1) The Commission shall consist of not less than ten full-time members appointed for such period, not exceeding five years, as the State President may determine.

(2) At least one member of the Commission shall be appointed from each SPR after consultation with the Premier of the SPR.

(3) Members of the Commission shall perform their duties fairly, impartially and independently.

(4) Members shall not perform or commit themselves to perform remunerative work outside their official duties.

(5) A member of the Commission may not hold office in any political party or political organisation.

(6) It shall be an offence subject to penalties prescribed by law to attempt to influence a member to act otherwise than in accordance with the provisions of subsection (3).

### **Chairperson and deputy chairperson**

16. (1) The State President shall designate one of the members of the Commission as chairperson and another as deputy chairperson.

(2) (a) When the chairperson is absent or not able to perform his or her functions as chairperson, or where there is a vacancy in the office of chairperson, the deputy chairperson shall act as chairperson, and if the chairperson as well as the deputy chairperson are absent or not able to perform the functions of the chairperson, the Commission shall elect another member to act as chairperson.

(b) Such member shall while acting as chairperson have all the powers and perform all the duties of the chairperson.

### **Vacation of office and filling of vacancies**

17. (1) Members of the Commission shall vacate their offices if they resign or if they become disqualified to hold office for the same considerations and in the same fashion as would apply to a judge of the Supreme Court.

(2) Any person who has ceased to be a member of the Commission by reason of the effluxion of time may be reappointed.

(3) If a member of the Commission ceases to hold office, the State President may, subject to section 15 appoint somebody to fill the vacancy.

### **Meetings of the Commission**

18. (1) Meetings of the Commission shall be held at a time and place to be determined by the Commission or, if authorised thereto by the Commission, by the Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of a majority of the members of the Commission shall constitute a decision of the Commission and in the event of an equality of votes the chairperson shall have a casting vote in addition to his or her deliberative vote.

(4) All the decisions of the Commission shall be recorded.

### **Committees**

19. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a



meeting of the committee the members present shall elect one from among their number to act as chairperson.

- (4) (a) The Commission may, subject to such directions as it may issue from time to time-
  - (i) delegate any power granted to it by or under section 14 to such a committee; and
  - (ii) grant authority that a duty assigned to it by or in terms of section 14 may be performed by such a committee.
- (b) The Commission shall not be divested of a power so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.

#### **Co-option of persons to serve on or advise committees**

20. (1) A committee may co-opt any person to serve on a committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect which he or she has been co-opted, but shall not be entitled to vote.

#### **Remuneration and allowances of members of the Commission and other persons**

21. Members of the Commission and persons referred in sections 16 and 20 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

#### **Regulations**

22. The State President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

## CHAPTER 10

### Local Government

- General provisions regarding the powers, functions and structures of local government;
- The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

## CHAPTER 11

### Finance

- Provisions relating to existing debts and liabilities of the state (note position regarding TBVC and the self-governing territories;
- the national and SPR revenue funds, taxation, appropriation and financial procedures and legislation;
- the Auditor-General;
- the Reserve Bank;
- the Financial and Fiscal Commission representative of the SPRs.



## CHAPTER 12

### General and transitional provisions

Provisions relating to:

- The legal system (continuation of statutory and common law subject to the Constitution, unification of provincial ordinances, TBVC laws and laws of the self-governing territories with national and SPR law, recognition of indigenous law);
- the status of international law;
- the independence and impartiality of the Commission for Administration and the security forces;
- civil society;
- method of publication of notices, etc.;
- affirmation in lieu of oath;
- construction of certain references;
- definitions and terminology;
- short title, commencement and duration of the Constitution.

## SCHEDULE 1

### Constitutional Principles

#### I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

#### II

The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

#### III

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

#### IV

The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

#### V

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

#### VI

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

#### VII

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.



## VIII

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

## IX

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

## X

All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the Constitution.

## XI

The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

## XII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

## XIII

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

## XIV

Amendments to the Constitution shall require special procedures involving specified majorities.

## XV

Government shall be structured at national, SPR and local levels.



## XVI

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XII.

## XVII

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

## XVIII

The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPRs shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPRs, alternatively, if there is such a chamber, a specified majority of a chamber of Parliament composed of regional representatives, and if the amendment concerns specific SPRs only, the approval of the legislatures of such SPRs will also be needed.

## XIX

A framework for local government powers, duties, functions and structures shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

## XX

The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

## XXI

National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XIX shall make provision for appropriate fiscal powers and functions for different categories of local government.



## XXII

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPRs and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

## XXIII

A Financial and Fiscal Commission, representing inter alia each of the SPRs, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, economic disparities between the SPRs as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPRs.

## XXIV

The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

1. The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.
2. The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPRs.
3. Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.
4. The essential principles of the Constitution, including the fundamental rights contained therein, shall apply to all organs of the state at all levels of government.



5. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.
6. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
7. Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.
8. The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
9. SPR governments shall have powers, either exclusively or concurrently with the national government, inter alia -
  - 9.1 for the purposes of regional planning and development and the delivery of services; and
  - 9.2 in respect of aspects of government dealing with the specific socio-economic and cultural needs and the general well being of the inhabitants of the SPR.
10. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.
11. In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.
12. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to an SPR



government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or SPR governments.

#### XV

Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.

#### XVI

The independence and impartiality of a Commission for Administration, a Reserve Bank, and Auditor-General and Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

#### XVII

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their duties and functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

### SCHEDULE 2

#### Boundaries and Designation of SPRs

[Report of the Commission on Delimitation/Demarcation of SPRs]

### SCHEDULE 3

#### System for the Election of the National Assembly and SPR Legislatures

**EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL**

**EIGHTH REPORT OF THE TECHNICAL COMMITTEE  
ON CONSTITUTIONAL ISSUES TO THE  
NEGOTIATING COUNCIL**

**26 JULY 1993**

**1. INTRODUCTION**

1.1 In terms of the Resolution on Steps to be Taken for the Purposes of Establishing a New Constitutional Order, we were instructed by the Negotiating Council to draft a Constitution for the transition which shall make provision for:

1.1.1 the election according to a system of proportional representation of a constitution making body, legislature and national government for the transitional phase which will include a national and regional component. With regard to constitution making, this Constitution shall provide for deadlock breaking and special majorities by which decisions will be taken;

1.1.2 the election of regional legislatures and the establishment of regional governments in the transition;



- 1.1.3 the powers, functions and structures of regions for the transitional period;
  - 1.1.4 fundamental human rights on a justiciable basis during the transitional period;
  - 1.1.5 a constitutional court/tribunal to ensure the justiciability of the constitutional principles, of the fundamental rights and of the Constitution itself.
- 1.2 This Resolution requires us to proceed along the lines of the "two stage process", and to formulate the provisions of a constitution for a transitional period during which an elected body will function both as a legislature and a constitution making body charged with the responsibility of drafting a new constitution in accordance with Constitutional Principles agreed upon by the MPNP. Some of the submissions to us continue to urge us to follow a "one stage process" according to which a rigid constitution will be adopted by the MPNP. In the light of our instruction we cannot proceed along these lines: we are required to follow the "two stage process" and have done so. We have, however, paid particular regard to the status of SPRs and have made provisions in our draft to ensure that they will have both autonomy and original powers - factors which are stressed as being of importance in some submissions dealing with the "one stage process".
- 1.3 In our Fifth Report we drew attention to a number of issues relevant to the drafting of a constitution for the transitional period on which decisions still have to be taken by the Negotiating Council. Participants were asked by the Negotiating Council to submit their proposals concerning such matters to us by 12 July. We have received responses to our Fifth Report from various



participants. In preparing this report we have had regard to these responses, as well as to the previous submissions made to us. The previous submissions include both submissions of a general nature and drafts of proposed constitutional legislation.

1.4 We have prepared a Draft Outline of a constitution for the transition which we attach to this report. This draft provides an indication of the subject matter of a possible constitution, and includes preliminary texts of two chapters of the Constitution: these preliminary texts are intended to provide an indication of how the legislative and constitution making process would be conducted, and how SPRs would be established and developed, if the outline is approved. *The preliminary texts will be edited and refined and developed in the light of the debates in the Negotiating Council.*

1.5 *This report provides an overview of the Draft Outline, but it is essential that the Draft Outline (including the texts) be studied by all the participants.*

The technical interpretation of the Draft Outline will be further elaborated to the Negotiating Council when we present this Report.

1.6 Certain issues relevant to the constitution for the transition, concern matters of principle on which political decisions are required from the Negotiating Council. We deal with some of these matters below.

## 2. CONFEDERATION

The national territory should be defined in the Constitution. The territorial boundaries are relevant to the holding of elections and also to the definition of the SPR boundaries. The question of confederalism needs therefore to be addressed expeditiously to enable the constitution to be finalised.



### 3. THE TBVC STATES

We have received a recent submission from the government of Bophuthatswana which proposes "associate membership of the Republic of South Africa" for Bophuthatswana. What it has in mind is a retention of its present identity, representation in the South African parliament on a non-voting basis save in regard to issues directly affecting the constitution, and submission to South African laws only if they are specifically adopted by its own Parliament. We cannot, however, explore the possibilities of this proposal unless we are assured by the Negotiating Council that instead of reincorporation, Bophuthatswana will be accorded the status of an "associate member of the RSA."

The question of the reincorporation of the TBVC states is relevant to the definition of the national territory, the boundaries of the SPRs, and the holding of elections. Whether reincorporation should take place, and if it does, when and on what terms this should be done has not yet been resolved.

Apart from the issue of boundaries and elections, there are a number of technical issues that will have to be addressed if there is to be reincorporation. These include the legal forms according to which it will be effected, arrangements to be made in respect of existing contractual liabilities, and the creation of a single legal order in the SPRs into which the TBVC states will fall.

If there is to be reincorporation it would be easier from a practical point of view to address these issues before the elections are held. This would not only facilitate the conducting of the elections, but would also allow more time for the process of rationalisation and integration of the existing administrations, and make it easier to establish SPR government and administration during the transitional period. For the purpose of drafting a constitution for the transitional period it is essential to reach finality on the question whether, and if so, when and on what terms the TBVC states will be reincorporated. Similarly, we are not in a position to assess the constitutional implications of those submissions in which the retention of sovereign status for SPRs



is proposed. Such "inalienable and untransferable sovereignty" which according to these submissions, gives preference to the provisions of SPR constitutions over and above those of the National Constitution, is essentially confederalist in nature and does not correspond with the approach consistently adopted in the Negotiating Council and in our previous Reports. Again, as stated in paragraph 2, we urge the Negotiating Council to take a decision on the matter of confederalism.

#### 4. NATIONAL SYMBOLS AND LANGUAGES

The question of languages during the transition both at national and SPR level needs to be addressed in the constitution for the transitional period. This, and the question of symbols, such as the anthem, the flag and the coat of arms, are political rather than technical constitutional issues. The MPNP must decide how these issues are to be dealt with. Possibly a special committee of the MPNP could be appointed to address such issues which call for political decisions, and to make recommendations thereon to the MPNP.

#### 5. COMING INTO FORCE OF THE CONSTITUTION FOR THE TRANSITIONAL PERIOD

The Constitution for the transitional period will have to make provision for the holding of the elections and the governing of the country after the elections have been held. We have assumed that in the period between the enactment of the constitution, and the holding of elections, existing administrations either on their own or in consultation with the TEC will remain responsible in terms of existing constitutional legislation for the governing of the country. If this is so, the constitution could stipulate that the provisions relevant to the holding of elections and the making of preparations for the establishment of SPR government and administration in the newly created SPRs, shall come into force at an appropriate time before the elections are



held, and that the other provisions shall come into force immediately after the elections have been held. Appropriate transitional provisions will be necessary to ensure that there is constitutional continuity and that there is at no stage a political vacuum.

## 6. CITIZENSHIP IN THE TRANSITION

The constitution should make provision for all existing South African citizens and all citizens of reincorporated TBVC states to be citizens of the new Republic of South Africa. There should also be provisions authorising the acquisition of citizenship in terms of the prevailing citizenship legislation which should be amended in so far as the MPNP may consider this to be necessary, for the purpose of the elections. Because of a possible link between citizenship and voting, and the need for existing citizenship legislation to be rationalised, this would have to be addressed during the pre-election period. We will deal further with this issue after the Negotiating Council has responded to the report of the Technical Committee on the Independent Electoral Commission and after we have had an opportunity of consulting with such Committee on these matters.

## 7. COMPOSITION AND FUNCTIONING OF THE ELECTED BODY

### 7.1 The elected body functioning as legislature

This is dealt with in **Chapter 4** of the Draft Outline.

#### 7.1.1 *Composition of the legislature*

During the time of the transitional period, the elected body will constitute parliament. Parliaments may be unicameral or bicameral. A unicameral parliament during the period of transition could accommodate SPR interests through an electoral system which makes provision for a proportion of the



members to be elected on regional lists. However, in the light of the constitutional principles adopted by the MPNP which imply a dispensation with safeguarded and entrenched SPR autonomy, as well as regional participation by SPR representatives in the constitution making process, and the need to address the matters referred to in paragraph 8 below, we consider that a bicameral system may be more appropriate: a second house elected on an SPR basis would provide an important link between the SPRs and the National Assembly during this period.

In the draft constitution we therefore make provision for a bicameral system with a National Assembly of 400 members and a Senate to be elected on an SPR basis. The election for the National Assembly will be according to a system of proportional representation in which there will be both regional and national lists. The Draft Outline refers to a schedule in which the voting system is described. We have not yet finalised the schedule, but will do so in our subsequent reports.

In order to establish the equality of SPR dispensations during the transitional period, the Senate will be composed of an equal number of representatives for each SPR. With SPR representation on an equal footing and SPR representatives in the National Assembly, the Senate does not need to be a large body, and provision has been made for 10 senators per SPR. Senators could be elected directly or indirectly by SPR legislatures or by the SPR representatives in the National Assembly. We favour a system of indirect election for the Senate for the transitional period. This will provide the necessary link between SPR interests and the constitution making process, and will do so in a way which ensures that the



first general election is not unduly complicated. This will not preclude the adoption of a system of direct election of a Senate if the constitution making body decides that a bicameral system should be adopted for the future.

#### 7.1.2

#### *Powers of the legislature*

Parliament for the period of transition, will have full legislative powers, which means that all laws must be adopted by it subject to the provisions of the Constitution. Immunities and privileges of Parliament and its members should be regulated by law.

#### 7.1.3

#### *Procedures*

During the transitional period Parliament will have to pass ordinary laws, laws dealing with the budget and appropriations and may even have to amend the constitution for the period of transition. Different procedures and deadlock breaking mechanisms must be devised for these different kinds of legislation. In the draft constitution we have dealt with these issues as follows:

##### 7.1.3.1

We consider that it is important that the Senate be involved in legislation during this period, which will involve the phasing in of the new SPRs, and will also be a time when close co-operation will be required between the national legislature and SPR legislatures. We have therefore provided that ordinary legislation should generally be passed with a majority in both the National Assembly and the Senate. If

the Senate rejects a bill, a joint meeting of both houses will be held so that they can attempt to resolve their differences. The legislation could then be passed by a majority at such a joint sitting. To facilitate co-operation and where possible, to avoid disagreements arising between the two houses, provision is made for a system of standing joint committees of the National Assembly and the Senate. The requirement that there be both SPR and national lists for the election of the National Assembly ensures that SPR interests will be adequately represented in the National Assembly and in the joint sitting.

#### 7.1.3.2

**Money bills** (namely budgetary measures and appropriation bills) must also be approved by both the National Assembly and the Senate, but in the case of rejection by the Senate, such bills could be adopted by the National Assembly with an ordinary majority.

#### 7.1.3.3

**Bills concerning specific SPR matters** must also be approved by the National Assembly and the Senate. However, should the Senate reject such a bill, it cannot be overruled by the National Assembly. A bill which affects a particular region or regions only, must be approved by a majority of the Senate representatives of that particular region or regions.



#### 7.1.3.4

It may be necessary for technical reasons to amend the Constitution for the transitional period in order to address situations which have not been contemplated or difficulties which are encountered in the application of the Constitution. A distinction must be drawn between fundamental provisions such as the Constitutional Principles, and key aspects of the constitution making process, which should not be amended, and other provisions of the Constitution which may be capable of being amended.

We have provided that these core provisions cannot be amended by the legislature during the period of transition. We have also made special provision for the protection of SPR boundaries and SPR interests. Other amendments to the constitution for the period of transition, which are not designed to subvert the essence of the Constitutional Principles, can be passed by a two-thirds majority of both the National Assembly and the Senate, sitting together in joint session.

The reason why Constitutional Principles, and the key aspects of the constitution making process should not be amended by the legislature during the time of transition, is that these provisions are contained in a **solemn pact** agreed upon by the parties in the MPNP, and constitute the basis of the future constitutional

state and constitution making process. Constitutionally, once the MPNP is dissolved, there will be no other body which can change this solemn pact, which must remain binding until the new constitution has been adopted in accordance with its requirements.

## 7.2 The Elected Body as Constitution Making Body

This is dealt with in **Chapter 5** of the Draft Outline. The process which is contemplated by the Draft Outline of the Constitution for the transitional period, can be described as follows:

7.2.1 The MPNP, through the adoption of a solemn pact of Constitutional Principles, has laid the foundations of the future constitutional state. The elected body acting as a constitution making body, will have the legitimacy to perform the task of giving precise form and content to the constitutional state. In doing so, the elected body (whether it acts as legislature or constitution making body) must act in terms of the constitution for the period of transition drawn up and approved by the MPNP.

7.2.2 In strict constitutional terms, the nature and task as well as the functions of the elected body acting as a constitution making body could be described in the following way:

The elected body, acting in accordance with the precepts of the Constitutional Principles, concluded as a solemn pact by the MPNP, is specifically charged under the constitution for the transitional period, to undertake a *total revision* of that constitution.



Constitutionally, total revision of a constitution means the writing of a new constitution. There are various precedents for this elsewhere in the world.

An understanding of the process in this way, namely that an elected body, authorized and charged to do so by the MPNP, will undertake a total revision of the Constitution, within prescribed forms, and will adopt a new constitution according to prescribed specified majorities within prescribed time frames will, we believe, put the contemplated processes in their proper context.

- 7.2.3 The elected body acting as constitution making body, should be seen as separate from the elected body acting as legislature or Parliament. It has therefore been provided in the draft that we have prepared, that for the purposes of totally revising the constitution, the elected bodies will sit together. The National Assembly and Senate sitting jointly will be the constitution making body. The constitution making body should be given an appropriate name - those suggested so far are: **Constitutional Conference; Constitutional Assembly; Parliament in Constitutional Conference or Constituent Assembly**. In the draft text we refer to the CMB, but an appropriate name must be chosen, and used in the text of the constitution. To indicate its constitution making task, the CMB will have its own chairperson, and provision is also made for the CMB to appoint its own commissions, technical and parliamentary committees and advisory bodies to assist it in its task.

7.2.4 The general constitutional principles which are agreed to by the MPNP in the form of a solemn pact are fundamental to the total revision to be undertaken by the CMB. As stated above, these principles cannot be amended. On completion of the total revision in accordance with the provisions of the constitution for the transitional period, the CMB must submit its draft of the new constitution to the Constitutional Court for endorsement.

7.2.5 The CMB, by the specified majority, and with the endorsement by the Constitutional Court, could if it so decides adopt certain separate parts of the constitution before the total revision has been completed. It may be possible for instance for SPR constitutions to be adopted in this way if a decision is taken that there should be such constitutions. This will, of course, only be possible if the SPR constitutions are designed in ways which ensure that they will be compatible with the new national constitution when it is ultimately adopted.

7.2.6 The total revision of the Constitution has to be completed within a period of two years. If this is not done a draft Constitution adopted by a simple majority of the CMB, and endorsed by the Constitutional Court, may be submitted to a popular referendum. If the draft is ratified by a specified majority in the referendum it shall become the new Constitution. If it is not adopted, or if a referendum is not held, then Parliament shall be dissolved, new elections shall be held, and the total revision shall be undertaken by the new Parliament and be completed within a period of one year.



## 8. SPR GOVERNMENT IN THE TRANSITION

8.1 In formulating the powers and functions of the SPRs in Chapter 9 of the attached Draft Outline we have made provision for the establishment and implementation of elected SPR government during the transitional period on a flexible basis under the supervision and co-ordination of the national government and the constitution making body as well as a Financial and Fiscal Commission and a Commission on SPR government, on both of which SPRs will be represented.

8.2 This flexibility seems to us to be necessary for various reasons.

8.2.1 First, the details of the allocation of powers and functions by the constitution-making body to SPRs, within the framework of the Constitutional Principles, may prove to be different to any allocation of such powers and functions to them under the constitution for the transitional period. Until the final allocation has been made, it seems to us to be appropriate that the SPRs should have concurrent rather than exclusive powers, and that there should be consultation and co-operation between the National Government and the various SPR governments in the exercise and implementation of such powers.

8.2.2 There will inevitably have to be a rationalisation and reallocation of posts from existing administrations to new administrations. The TBVC states, the Self-governing Territories, and the Provinces will no longer exist, and the former employees of these administrations will, where possible, have to be accommodated in administrations to be established by the new SPRs.

If material changes are made in the functions and responsibilities of the National Government, this will also have an impact on the structure and functions of existing government departments. How the various former administrations can best be incorporated into the administrations to be created under the constitutional arrangement for the transitional period, will depend not only on the number, boundaries and administrative capitals of the new SPRs, and their relationship to the number, boundaries and administrative capitals of the former administrations, but also on the allocation of powers and functions to the National Government and the SPR governments in the transition.

The Constitution for the transitional period will have to make provision for the transfer of responsibilities from existing structures, to structures to be created under the new constitution, and for this to be done in a way which least disrupts the functioning of the civil service in all its aspects and delivery of services throughout the country.

#### 8.2.3

Another factor favouring the phased introduction of SPR government is the need to establish a uniform system of law nationally, as well as uniformity within the different SPRs. The legal order existing immediately after the elections will include pre-existing legislation of the Tricameral Parliament, Provincial Ordinances, TBVC legislation, and legislation of the Self-governing Territories. In some SPRs all these forms of legislation will have to be accommodated. The constitution can provide a framework for the rationalisation, but there will be a need for close co-operation between the national government and the SPR governments in sorting out the problems that will arise.



There will also be a need to co-ordinate and rationalise existing structures for the administration of justice including possibly the establishment of new courts and the maintenance of law and order. Here too the national government will have a crucial role to play in the process of co-ordination and restructuring.

#### 8.2.4

It may be possible for certain preparatory work and planning to be undertaken by the TEC in the period between the enactment of the Constitution for the transitional period and its coming into force. We suggest that consideration be given to appointing a Secretariat for each SPR (we assume that this would be done by the TEC), and for these Secretariats to be charged with the task of making preparations for the changes which will occur when the Constitution for the transitional period comes into force. Their work would include the identification of all administrations and providers of services within the boundaries of the new SPRs, the differences in the statutory regimes under which portions of the new SPRs may previously have been governed, and what may be needed to establish a uniform legal order and effective administration. The Secretariats could report to the TEC and carry out all other duties allocated to them by the TEC. They could also be made responsible for convening the first meetings of the SPR legislatures, and conducting elections within the SPR legislatures for the appointment of the various elected positions.

But even allowing for this, it seems to us to be likely that much of the restructuring will have to take place after the Constitution for the transitional period has come into force, and political decisions have been taken by the newly elected SPR

legislatures in regard to the establishing and staffing of departments for the implementation of the responsibilities entrusted to them.

There will have to be close co-operation between the National Government and the SPR governments during this period to ensure that there is no breakdown in services, and the National Government will clearly have a crucial role to play in the supervision and implementation of the restructuring.

8.2.5 In our view the best way of ensuring continuity of services and of rationalising and co-ordinating the existing administrations is to require the rationalisation and co-ordination to be done by the National Government and the SPR governments in co-operation with each other. When necessary, the National Government will be able to take responsibility for the continuity of services while the new SPR administrations are being set up, and to transfer appropriate functions to the SPR administrations as soon as they are in a position to assume responsibility for them. Some SPRs may have the infrastructure to take on administrative responsibilities sooner than other SPRs. We propose the establishment of a Commission on SPRs which will have the task, inter alia, of facilitating the process of establishment of SPR governments during the period of the transition as well as the development of the final SPR dispensation.

8.2.6 The need for flexibility and co-operation between the National Government and SPR governments during the transitional period, are factors which favour proportional representation in the executive, and a bicameral legislature in which one chamber will consist of SPR representatives. The Draft



Outline of the constitution that we have formulated makes provision for these structures, as well as for proportional representation in the SPR executives.

8.3 In line with the equilibrium suggested in our Sixth and Seventh Reports we have made provision in the preliminary texts for a process according to which SPR constitutions would be formulated and adopted, possibly even prior to the adoption of a new national constitution and subject to the approval of the CMB.

8.4 We have continued to use the expression SPR in our Reports and in the Draft Outline. A decision, must however, be taken in regard to the term which will be used to describe these entities in the text of the Constitution.

9. We are continuing our work and will complete drafts of the other sections of the Constitution as soon as we are able to do so. Our work will be facilitated if the Negotiating Council would consider as soon as possible the matters raised by us in this Report, and indicate whether or not the basis on which we are proceeding is acceptable to it.

# **EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL**

## **NINTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 10TH AUGUST 1993**

1. We have continued working on the draft outline of the Constitution for the transitional period. We are in the process of preparing detailed texts for the entire Constitution. We have ready for consideration by the Negotiating Council detailed texts of chapters 1, 2, 4, 5, and 9. These texts are now at a more advanced stage than the texts which were attached to our Eighth Report. Although a final edit has not yet been completed, the texts are in a form in which they can be made the subject of a detailed debate both in regard to the principles which they contain and the terminology used. Chapters 4, 5 and 9 have been developed in the light of the debate which took place in the Negotiating Council on our Eighth Report. Changes of detail have been made in chapters 4 and 5, formal provisions which were not included in the first draft outline have been introduced into these chapters, and certain of the formulations have been refined. Chapter 9 has been restructured, with a new formulation dealing with the distribution of the powers and functions of the SPRs, and a proposal concerning a legal framework to ensure administrative and legal continuity during the complicated process which will have to take place when the



administrations of the provinces, the self-governing territories and those TBVC states that are reincorporated, are restructured into the new government structures at national and SPR levels established in terms of the Constitution.

2. We have also developed preliminary texts for chapters 6, 7, 8 and 10 of the Constitution. We have not annexed these preliminary texts to this report because they are still under discussion in our committee and need to go through a further discussion and editing process before they are in a form in which they can be made the subject of detailed debate. We hope to have these chapters in a suitable form for debate when we next report to the Negotiating Council.
3. We plan from now onwards to refine the texts of the completed chapters in the light of the debates which take place in the Negotiating Council, and in this way to build up a core document which will contain detailed provisions covering all aspects of the framework identified in the draft outline attached to our Eighth Report. As changes are made in the detailed texts in the light of the debate, these will be reflected in the core document, and marked up for easy identification in the same way as is being done in the development of the core document dealing with constitutional principles.
4. A number of matters were raised during the debate in the Negotiating Council on our Eighth Report on which different views were expressed. We need greater clarification from the Council in regard to these issues than we could derive from that debate. These include, in particular:
  - 4.1 the deadlock breaking mechanism set out in chapter 5.
  - 4.2 SPR constitutions
  - 4.3 Whether the CMB will have the power to alter the number, boundaries and powers of SPRs as set out in the Constitution for the transitional period.



5. There was also discussion concerning the role of traditional leaders. We made no provision in the draft outline, for traditional leaders to have any specific role in the national legislature, constitution making body, or SPR legislatures. The draft outline reflects Constitutional Principles XVI and XVII which require legislative structures at all levels to be democratic. The saving made in Principle XVI is relevant to the role of traditional leaders in local government, and we plan to make provision for that in our chapter dealing with local government. That decision was, however, questioned during the course of the debate, and was left over for discussion between the participants. It was not made the subject of detailed debate.
6. A number of other issues of detail were raised during the debate. Some concerned terminology and formulation, others suggested changes which would result in a change of meaning of the draft provisions. None were the subject of detailed debate or decisions. In the circumstances we are not able without greater clarification than we presently have from the Negotiating Council to deal further with these matters at this stage. We have accordingly made no changes to the provisional texts dealing with these issues or with the issues raised in paragraph 4 and 5 and request clarification from the Negotiating Council as to how these matters, which call essentially for political decisions, should be dealt with.
7. During the course of the debate in the Negotiating Council on the powers and functions of SPRs terms such as "original powers", "exclusive powers", "concurrent powers" and "constitutional continuity" were used. There did not appear to us to be a common understanding of the meaning of these terms. To achieve greater clarity in the debate we give our understanding of the meaning of these terms in the context of the Constitutional principles which will be binding on the CMB.
8. Original powers are powers derived directly from the Constitution. They differ from delegated powers which are derived from a higher legislative authority, and as such can be altered or withdrawn by that authority. Moreover, the exercise of delegated powers is subject to much stricter scrutiny by a court. Under a system of



constitutional supremacy the exercise of both original and delegated powers are subject to review by the court if they are exercised in a manner that is inconsistent with the requirements of the Constitution. Delegated powers are, however, open to challenge on additional grounds in which, inter alia, the motive, procedure and to some extent the reasoning of the authority that has exercised the power can be challenged. These additional grounds cannot be invoked in respect of the exercise of original powers. Put simply, original powers vested in SPRs which are derived from the Constitution cannot be withdrawn by the national government, nor can they be changed without amending the Constitution itself. They are stronger and less open to challenge than delegated powers.

9. "Exclusive powers" refer to those powers which are essentially within the primary legislative competence of the authority in whom they are vested. Ordinarily an authority with "exclusive powers" is the only authority with the competence to enact legislation in the field of such powers. It can do so itself, or it can delegate its authority to a lower level of Government. That power is, however, subject to limitations imposed by the Constitution itself. First, there is the limitation applicable to all forms of legislation, imposed by the "bill of rights" and procedural provisions contained in the Constitution. Secondly, they are subject to limitations arising out of overlapping competencies. The national government has competence in matters of overriding national interest such as national security etc. This overriding national interest, when it exists, is a cross-cutting competence, relevant to all fields of government, which permits the National Government to intervene in all fields affected by it. The constitutional principles address the circumstances in which the National Government would be entitled to make such interventions, and these provisions have been incorporated into our draft of the Constitution for the transitional period. Put simply, the National Government may not legislate in the field of "exclusive powers" reserved for the SPRs save in the special circumstances identified in the Constitution, and then only to the extent that the Constitution permits such intervention.



10. Concurrent powers are those in which two or more legislative authorities have legislative competence. Either may enact legislation in these fields, and in accordance with Constitutional Principle XXIV (11) where there is a clear conflict between the legislation of the National authority, and the SPR authority, the legislation of the National authority prevails. We have however, made this subject to the limitation recognised in the Constitutional Principles, namely, that the National Government may not use its powers so as to encroach upon the geographic, functional or institutional integrity of the SPRs or in a manner which would deprive an SPR substantially of any of its concurrent competencies. Put simply, the National Government may not use its powers so as to negate the powers given to the SPRs in the Constitution. It cannot occupy the whole field itself and must leave legitimate scope for the exercise of power by the SPRs in such matters. Should there be a dispute between the National government and SPR governments in regard to the exercise of concurrent powers, a court will decide whether or not the National Government has gone too far and encroached upon the integrity of the SPR.
11. "Constitutional continuity" implies that there should at all times be a legal framework within which Government can be conducted and the powers of the different organs of the state ascertained. Under a system of separation of powers this means that the powers of the legislature, the executive and the judiciary must be certain, and changes in such powers must be made in a way which does not leave a void in which no authority has power or in which there is no effective administration. The Constitution for the transitional period which we are preparing will make provision for a transfer from existing legislative, executive (including administrative) and judicial authorities at all levels of Government, to the new legislative, executive and judicial authorities to be constituted under the Constitution. At no time will there be an hiatus in which no authority exists. It was precisely for this reason that we originally formulated chapter 9 of our draft outline of the Constitution in the way that we did. We saw this as a simple and possibly the easiest and most coherent way of transferring existing authorities, and establishing new authorities at SPR level without disrupting government and administration. In the light of the debate, however, we have made



it clear that SPR legislatures and governments will be vested with definite powers from the moment that the Constitution comes into force, whilst at the same time, making provision on a transitional basis, for the way in which administration will be handled and supervised until the necessary co-ordination and rationalisation has been completed.

12. We attach to this report detailed drafts of chapters 1, 2, 4, 5, and 9. We suggest that for the purposes of the debate in the Negotiating Council it might be convenient to deal with our report by allowing us to begin by presenting each of these component parts sequentially. We will draw attention during the oral presentation to the changes we have made in the draft outline attached to our Eighth Report, and to issues which call for decisions of principle to be taken. In this way we would be able to draw attention at the time of presentation to the aspects of our report which are relevant to the particular part of the Constitution which is under discussion. In the light of greater clarification secured as a result of the debate we would, where necessary, and as instructed by the Council, refine or amend the text and present it to the Council in an amended form in the further draft at the time of our next report.

# **CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1993**

**(Draft Outline: 6 August 1993)**

## **PREAMBLE**

## **CHAPTER 1**

### **Formal and Constituent Provisions**

#### **The New Republic of South Africa**

1. (1) The Republic of South Africa shall be one sovereign state.
- (2) The national territory shall consist of all the territory defined in Schedule 1.

#### **National symbols**

2. (1) The design of the national flag of South Africa shall be as set out in Schedule 2.
- (2) The national anthem of South Africa shall be .....
- (3) The national coat of arms of South Africa shall be in accordance with the description set out in Schedule 3.
- (4) The national seal of South Africa shall be in accordance with the description set out in Schedule 4.



## Languages

3. *[The text of this provision will be formulated after the committee of the MPNP has reported.]*

## The supremacy of the Constitution

4. (1) This Constitution shall be the supreme law of the land and any law inconsistent with its provisions shall, to the extent of its inconsistency, be of no force or effect.

- (2) The provisions of this Constitution binds all the legislative, executive and judicial organs of the state at all levels of government.

## CHAPTER 2

### Citizenship and the Franchise

#### Citizenship

5. (1) Every person who is a South African citizen in terms of legislation applicable on the date of the coming into operation of this Constitution, shall retain such citizenship.

- (2) The acquisition, loss and restoration of South African citizenship shall be regulated by Act of Parliament.

- (3) A South African citizen shall not be deprived of his or her citizenship other than as provided for by Act of Parliament.

#### The franchise

6. Every person who is -

- (a) a South African citizen;
- (b) of or over the age of 18 years; and

- (c) not subject to any of the disqualifications set out in the *Electoral Act*, 1993,

shall, subject to the provisions of the *Electoral Act*, 1993, be entitled to vote in any election for members of the National Assembly, the Legislatures of the SPRs and local governments.

### CHAPTER 3

#### Fundamental Rights

*[The wording has been taken from the Seventh Report of the Technical Committee on Fundamental Rights during the Transition, which is still under discussion in the Negotiating Council.]*

#### Application

7. (1) The provisions of this Chapter shall -

- (a) bind the legislative, executive and, where appropriate, the judicial branches of government at all levels as well as all statutory bodies and functionaries;
- (b) bind, where just and equitable, other bodies and persons; and
- (c) be enforced by the [designated authority].

(2) In the case of an infringement of any provision of this Chapter, the [designated authority] may, where appropriate, put any body or person referred to in subsection (1)(a) or (b) on terms as to how and within what period such infringement should be remedied.

(3) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken during the period of operation of this Chapter.



(4) All juristic persons shall be entitled to the rights contained in this Chapter to the extent that the nature of these rights permit.

(5) (a) Every person who alleges that his or her rights or every association which alleges that its members' rights entrenched in this Chapter, have been infringed or are threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.

(b) Nothing in this subsection shall prevent a person from applying for relief on behalf of a group or class of persons whose rights entrenched in this Chapter are alleged to have been infringed or are threatened.

## Equality

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular.

(3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.

(4) In any action in which unfair discrimination is alleged, prima facie proof of such discrimination shall be sufficient to bring it within the class of conduct contemplated in subsection (2), until the contrary is established.

## Life

9. Every person shall have the right to life.

## **Human Dignity**

10. Every person shall have the right to respect for and protection of his or her dignity.

## **Freedom and Security of the Person**

11. (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

## **Servitude and Forced Labour**

12. No person shall be subject to servitude or forced labour.

## **Privacy**

13. Every person shall have the right to his or her personal privacy and not to be subject to searches of his or her person, home or property, seizure of private possessions or the violation of private communications.

## **Religion and Belief**

14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by the appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance thereat is free and voluntary.



### **Freedom of Expression**

15. Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

### **Assembly, Demonstration and Petition**

16. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

### **Freedom of Association**

17. (1) Every person shall have the right to freedom of association.

(2) Without derogating from the generality of the provisions of section 2(2), nothing in this section shall permit discrimination on the ground of race.

### **Freedom of Movement**

18. Every person shall have the right to freedom of movement anywhere within South Africa.

### **Residence**

19. Every person shall have the right freely to choose his or her place of residence anywhere in South Africa.

### **Citizen's Rights**

20. Every citizen shall have the right to enter, remain in and leave South Africa, and no citizen shall be deprived of his or her citizenship.

### **Political Rights**

21. (1) Every person shall have the right -

- (a) to form, to participate in the activities of and to recruit members for a political party;
- (b) to campaign for a political party or cause; and
- (c) freely to make political choices.

(2) Every citizen of voting age shall have the right to vote in secret and to stand for election to public office.

#### **Access to Court**

22. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

#### **Access to Information**

23. Every person shall have the right of access to all information necessary for the protection or exercise of his or her rights.

#### **Administrative Decisions**

24. (1) Every person shall have the right to lawful and procedurally fair administrative decisions.

(2) Every person shall have the right to be furnished with reasons in writing for an administrative decision which affects his or her rights or interests.

#### **Detained, Arrested and Accused Persons**

25. (1) Every person who is detained, including every sentenced prisoner, shall have the right -

- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;



- (b) to be detained under conditions consonant with human dignity, including at least the provision of adequate nutrition, reading material and medical treatment at State expense;
- (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State; and
- (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse, next-of-kin, religious counsellor and a medical practitioner of his or her choice.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -

- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- (b) to be brought before an ordinary court of law as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released; and
- (c) to be released from detention with or without bail, unless the interests of justice require otherwise.

(3) Every accused person shall have the right to a fair trial, which shall include the right -

- (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;
- (b) to be informed with sufficient particularity of the charge;

- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- (d) to adduce and challenge evidence;
- (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so demand, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

### Eviction

26. No person shall be removed from his or her home, except by order of a court of law after taking into account all relevant factors, which may include the availability of appropriate alternative accommodation and the lawfulness of the occupation.

### Economic Activity

27. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.



(2) Nothing in this section shall preclude legislation aimed at the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such legislation is justifiable in a free, open and democratic society based on the principle of equality.

### **Labour Relations**

28. (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(2) Workers and employers shall have the right to organise and bargain collectively.

(3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

### **Property**

29. (1) Every person shall have the right to acquire, hold and dispose of rights in property.

(2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

(3) Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

## Environment

30. Every person shall have the right to an environment which is safe and not detrimental to his or her health or well-being.

## Children

31. Every child shall have the right to security, basic nutrition and basic health services and not to be subject to neglect, abuse or child labour.

## Language and Culture

32. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

## Education

33. Every person shall have the right -

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race or colour.

## Limitation

34. (1) The rights entrenched in this Chapter may be limited by a law applying generally and not solely to an individual case, provided that such limitation -

- (a) shall be permissible only to the extent that it is -
  - (i) reasonable; and



(ii) justifiable in a free, open and democratic society based on the principle of equality; and

(b) shall not negate the essential content of the right in question.

(2) Notwithstanding the provisions of this Chapter, a law in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by the legislature.

### Suspension

35. (1) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency proclaimed prospectively under an Act of Parliament and only to the extent demanded by the situation.

(2) Any such suspension shall comply with the following requirements:

(a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is necessary to restore peace or order.

(b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to be valid in law unless the declaration is ratified by a majority of the total number of the directly elected members of Parliament within fourteen days of the declaration.

(c) No state of emergency shall endure for longer than six months provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in paragraph (b).

- (d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and any action, whether a regulation or otherwise, taken under such declaration.

(3) Neither the enabling legislation which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -

- (a) the creation of retrospective crimes;
- (b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency; or
- (c) the suspension of this section.

(4) Any person detained under a state of emergency shall have at least the following rights:

- (a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
- (b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Government Gazette within five days of their detention;
- (c) the detention of a detainee shall, as soon as is reasonably possible but not later than ten days after his or her detention, be reviewed by a court of law, which may order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review;
- (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;



- (e) a detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
- (f) a detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
- (g) if detained for longer than ten days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of a period of ten days from the date of determination of the review procedure provided for in paragraph (c).

(5) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such re-detention.

### **Interpretation**

36. (1) In interpreting the provisions of this Chapter the [designated authority] shall promote the values which underlie a free, open and democratic society based on the principle of equality.

(2) Save as provided for in this Chapter, no rule of the common law, custom or legislation shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights included in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised and conferred by common law, custom or legislation.

(4) A law limiting a right entrenched in this Chapter shall be presumed constitutionally valid until the contrary is proved: Provided that a law limiting -

- (a) a right entrenched in section 21; or

- (b) a right entrenched in sections 15, 16, 17, 18, 23 or 24, insofar as such right relates to the expression of free and fair political activity,

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shall be strictly construed for constitutional validity.

- (5) No law existing at the commencement of this Chapter which limits any of rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of fact that the wording used prima facie exceeds the permissible limits imposed in this Chapter, provided such a law is capable of a more restricted interpretation which does not exceed such limits, in which event such a law shall be construed as having the said more restricted meaning.

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This Chapter shall be of full force and effect until a Bill of Rights duly enacted by the elected constitution-making body has come into effect.

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#### CHAPTER 4 The Legislature

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legislative authority

- (1) The legislative authority of the Republic shall, subject to the provisions of the Constitution, be vested in the Parliament of the Republic, which shall consist of the National Assembly and the Senate and shall have the power to make laws for the Republic.

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- (2) Parliament shall be competent to delegate by law any matter within its powers to the legislature of an SPR or of a local government.

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- (1) Parliament shall continue until it is dissolved under Chapter 5 or until a new Parliament is constituted in terms of the new constitutional text adopted in accordance with the provisions of Chapter 5.



(3) The Speaker, or in his or her absence the Deputy Speaker, shall preside over meetings of the National Assembly.

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

(5) If the office of Speaker or Deputy Speaker becomes vacant, the National Assembly shall in like manner elect a member to fill the vacancy.

(6) Where neither the Speaker nor the Deputy Speaker is available, the National Assembly, with the Secretary of Parliament acting as Chairperson, shall elect a member to act as Speaker during such absence.

(7) The Speaker or the Deputy Speaker or the acting Speaker presiding at a meeting of the National Assembly shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

### **Qualification of Members of the National Assembly**

42. (1) No persons may be nominated or become members of the National Assembly if -

- (a) at the date of such nomination or election they are serving a sentence of imprisonment of more than twelve months without the option of a fine; or
- (b) at any time after the adoption of this Constitution, they are convicted of an offence in South Africa or outside of South Africa if such conduct would have constituted an offence within South Africa, and for which they have been sentenced to imprisonment of more than 12 months without the option of a fine, unless he or she has received a pardon; or
- (c) they are unrehabilitated insolvents; or

- (d) they are of unsound mind and have been so declared by a competent court; or
- (e) they are remunerated employees of any public service within the Republic.

(2) For the purposes of subsection (1) no person shall be considered as having been convicted by any Court until any appeal which might have been noted against the conviction or sentence has been determined, or the time for noting an appeal against such conviction or sentence has expired.

### **Vacation of Seats**

43. (1) Members of the National Assembly shall vacate their seats if they:

- (a) cease to be eligible for membership of the National Assembly; or
- (b) cease to be members of the political party which nominated them to sit in the National Assembly; or
- (c) resign their seats in writing addressed to the Speaker; or
- (d) absent themselves voluntarily from the National Assembly for 30 consecutive sitting days, without having obtained leave in the manner and on grounds specified in the rules and standing orders of the National Assembly; or
- (e) become members of the Senate, an SPR Legislature or of a local government.

(2) If a seat of a member of the National Assembly is vacated in terms of subsection (1), the party which nominated such member to sit in the National Assembly shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on the party's election list compiled for the previous general election, or if there is no such person, by nominating any member of the party.



(3) If the vacancy occurs in respect of a person who was elected from a national list, it shall be filled from the national list, and if the vacancy occurs in respect of a person who was elected from an SPR list, it shall be filled from the SPR list, by a person ordinarily resident in such SPR.

### Quorum

44. The presence of at least one third of the members of the National Assembly, other than the Speaker or the presiding member, shall be necessary to constitute a meeting of the National Assembly for the exercise of its powers and for the performance of its functions.

### Oath or Affirmation by Members of the National Assembly

45. Every member of the National Assembly shall, before taking his or her seat, make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge designated by the Chief Justice for this purpose.

### Sessions of the National Assembly

46. (1) The National Assembly shall sit:

- (a) at the Houses of Parliament in Cape Town, unless the Speaker directs otherwise on the grounds of public interest, security or convenience;
- (b) in a session convened by the Chief Justice to be held as soon as reasonably possible after the election of the National Assembly and not later than 10 days after such election, and such session shall terminate on such date as the National Assembly may determine by resolution;
- (c) in ordinary session on such dates as the National Assembly may determine by resolution, and such session shall terminate on such date as the National Assembly may determine by resolution;
- (d) in such special sessions as may be directed by proclamation in the *Government Gazette* by the President from time to time.

(2) During such sessions the National Assembly shall sit on such days and during such times of the day or night as its rules and standing orders may provide.

(3) The President may alter the date of commencement of any session directed in terms of subsections (1)(c) or (1)(d) if he or she is requested to do so by the Speaker on the grounds of public interest or convenience.

(4) There shall be a session of the National Assembly at least once in every year, so that a period of 13 months shall not intervene between the commencement of the one session and the commencement of the next session.

### **Composition of the Senate**

47. (1) The Senate shall be composed of ten members from each SPR, elected by the SPR legislature of each SPR within 10 days of the commencement of the first session after its election.

(2) Candidates for the election of the Senate shall be nominated by a party represented in the SPR legislature and the election shall be conducted according to the principle of proportional representation, as set out in Schedule 5.

(3) Any member of an SPR legislature elected in terms of subsection (2) to the Senate, shall vacate his or her seat in the SPR legislature.

### **President of the Senate**

48. (1) At its first sitting, and before proceeding to despatch any other business, the newly elected Senate, with the Chief Justice or a judge designated by him or her acting as Chairperson, shall elect one of its members to be the President of the Senate, who shall be vested with all powers, duties and functions assigned to him or her in terms of this Constitution and by the rules and orders of the Senate.

(2) The President of the Senate shall preside at meetings of the Senate and at joint sessions of the National Assembly and the Senate.



(3) In the absence of the President of the Senate, a person shall be elected by Senators from amongst their number to preside at their meetings during such absence.

(4) The President of the Senate shall vacate his or her office if he or she ceases to be a member of the Senate, may be removed from office by a resolution of the Senate, and may resign by lodging his or her resignation in writing with the Secretary of Parliament.

(5) If the office of the President of the Senate becomes vacant, the Senate shall in like manner fill the vacancy.

(6) The President of the Senate or the person presiding at a meeting of the Senate shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

### **Qualification of members of the Senate**

50. Persons shall be qualified to be Senators under this Constitution if they are qualified to stand for election as members of the SPR legislature by whom they are elected.

### **Quorum**

51. The presence of at least one third of the number of senators other than the President of the Senate or the presiding senator shall be necessary to constitute a meeting of the Senate for the exercise of its powers and for the performance of its functions.

### **Oath or affirmation by Senators**

52. Every Senator, before taking his or her seat, shall make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge designated by the Chief Justice for this purpose.

### **Vacation of Seats by Senators**

53. (1) Senators shall vacate their seats if they:

- (a) cease to be eligible for membership of the Senate; or
- (b) resign their seats in writing addressed to the President of the Senate; or
- (c) absent themselves voluntarily from the Senate for 30 consecutive sitting days, without having obtained the leave of the Senate on grounds specified in its rules and standing orders; or
- (d) become members of the National Assembly, an SPR legislature or a local government.

(2) If a seat of a member of the Senate is vacated in terms of subsection (1), the political party which nominated that Senator shall nominate a person to fill the vacancy.

### Sessions of the Senate

54. (1) The Senate shall sit:

- (a) at the Houses of Parliament in Cape Town, unless the President of the Senate directs otherwise on the grounds of public interest, security or convenience;
- (b) in a session convened by the Chief Justice to be held as soon as reasonably possible after the election of the Senate and not later than 10 days after such election, and such session shall terminate on such date as the Senate may determine by resolution;
- (c) in ordinary session on such dates as the Senate may determine by resolution, and such session shall terminate on such date as the Senate may determine by resolution;
- (d) in such special sessions as may be directed by proclamation in the *Government Gazette* by the President from time to time.



(2) During such sessions the Senate shall sit on such days and during such times of the day or night as its rules and standing orders may provide.

(3) The President may alter the date of commencement of any session directed in terms of subsections (1)(c) or (1)(d) if he or she is requested to do so by the President of the Senate on the grounds of public interest or convenience.

(4) There shall be a session of the Senate at least once in every year, so that a period of 13 months shall not intervene between the commencement of the one session and the commencement of the next session.

### **Privileges and immunities of members of Parliament**

55. (1) Notwithstanding the provisions of any other law, no member of Parliament shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of any matter or thing which he or she has brought by petition, bill, motion or otherwise or may have said before or in any meeting of Parliament or any committee thereof.

(2) Provision for other privileges and immunities of members of Parliament may be made by Act of Parliament.

### **Public access to Parliament**

56. All sessions of the National Assembly and the Senate shall be held in public and members of the public and the media shall have access to such meetings: provided that reasonable measures may be instituted to regulate such access, and to search, and where appropriate, to refuse entry to persons.

### ***Parliamentary procedure***

#### **Rules and orders and committees**

57. (1) The National Assembly and the Senate may each make rules of procedure for the conduct of its business and proceedings and may also make rules for the



establishing, functioning and procedures of committees, and formulate standing orders, including restrictions on access to such committees.

(2) For the purposes of exercising their powers and performing their functions any committee of the National Assembly or Senate established in terms of subsection (1) shall have the power to *subpoena* persons to appear before it to give evidence on oath and to produce any documents required by it, and to receive representations from interested parties.

(3) The National Assembly and the Senate may jointly make rules and orders concerning the order and conduct of their joint proceedings, including all matters referred to in subsections (1) and (2).

(4) Parliament may institute standing committees representative of all parties in the National Assembly and the Senate, in order to resolve possible disagreements between the Houses and to make joint reports.

### Ordinary legislation

58. (1) All laws, except laws relating to finance, specified SPR matters, and the amendment of this Constitution, shall be considered to be ordinary legislation.

(2) Ordinary legislation may be introduced in either the National Assembly or the Senate and shall be passed by each House.

(3) Ordinary legislation passed by one House and rejected by the other shall be referred to a joint committee consisting of members of all parties represented in Parliament to report on proposed amendments to the bill, whereafter the bill shall be referred to a joint sitting of both Houses at which it may be adopted with or without amendment by a majority of the total number of members of both Houses of Parliament.

### Finance Bills

59. (1) Bills appropriating revenue or moneys or imposing taxation shall be introduced only in the National Assembly and after they have been considered and



reported on by a joint committee of both Houses and, in so far as it may be required in terms of this Constitution, by the Financial and Fiscal Commission.

(2) A bill shall not be deemed to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(3) The Senate may not amend any bills in so far as they impose taxation or appropriate revenue or moneys.

(4) If the National Assembly in any session passes a bill imposing taxation only or dealing with the appropriation of revenue or moneys, and the Senate in the same session rejects or fails to pass it within 30 days after it has been passed by the National Assembly, the bill shall be reconsidered by the National Assembly.

(5) The National Assembly may adopt a bill referred to in terms of subsection (4), with or without amendment, and if adopted it may thereafter be presented to the President for his or her assent, and shall as soon as it has been assented to by the President become an Act of Parliament as if it had been approved by the Senate.

#### **Bills concerning specified SPR matters**

60. (1) Bills affecting the exercise of powers and functions allocated to SPR governments under Chapter 9 of this Constitution shall be approved by the National Assembly and the Senate.

(2) A bill which affects the exercise of powers or functions of a particular SPR only, shall also be approved by a majority of the Senators of that particular SPR.

#### **Amendment of the Constitution**

61. (1) Save for the provisions of subsection (2) and of Chapter 5, an amendment to this Constitution shall be passed by a two thirds majority of the total number of members of the National Assembly and the Senate sitting in joint session.

(2) No amendment of this Constitution shall be permissible in so far as it is designed to detract, directly or indirectly, from the essence of the Constitutional Principles contained in Schedule 7.

### **Requisite Majorities**

62. Save as provided in this Constitution, a majority of votes cast shall be sufficient for the passing of any Bill, or the taking of any decision or resolution by the National Assembly or the Senate.

### **Assent to Bills**

63. A Bill duly passed by the National Assembly, and where required by this Constitution, by the Senate, shall require the assent of the President, to be signified by the signing of the Bill, and the publication of the Act in the *Government Gazette*, in order to acquire the status of a valid Act of Parliament.

### **Signature and Enrolments Acts**

64. (1) Any valid Act of Parliament which has been duly passed by Parliament, signed by the President, and published in the *Government Gazette* shall be lodged in the office of the Registrar of the Appellate Division of the Supreme Court and such copy shall be conclusive evidence of the provisions of the Act.

(2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

*Provision should further be made for the following matters:*

- *Resolution of conflicts between texts in different official languages*
- *Rights and obligations of President and Ministers regarding speaking, sitting and voting in the Houses of Parliament.*



## CHAPTER 5

### The Adoption of the new Constitution

#### The Constitution-making Body

65. (1) The National Assembly and the Senate, sitting in joint session, shall be the CMB.

(2) The CMB shall adopt a new constitutional text in accordance with the provisions and procedures of this Chapter.

(3) The first meeting of the CMB shall be convened by the President of the Senate not later than seven days after the first sittings of the National Assembly and the Senate have been held.

(4) At its first sitting, and before proceeding to dispatch any other business, the CMB shall elect one of its members to preside at its meetings and a deputy to preside in his or her absence.

(5) In the absence of the President of the CMB or his or her deputy, a person elected by the CMB for such purpose shall preside for as long as such absence continues.

(6) The CMB may make rules of procedure for the conduct of its business and proceedings, and also make rules for the establishing, functioning and procedures of committees and formulate such standing orders, including restrictions on access to such committees as may appear to it to be expedient or necessary, having regard to the business of such committees.

#### Constitutional Principles

66. (1) In undertaking its task of drafting a new constitutional text, the CMB shall comply with the Constitutional Principles contained in Schedule 7.

(2) During the course of the drafting of the new constitutional text, any constitutional proposal pertaining to such drafting shall be referred to the Constitutional Court by the Chairperson after being petitioned by one third of the members of the CMB



to do so, in order to obtain an opinion from the Court as to whether such proposal, if adopted, would comply with the Constitutional Principles.

(3) A new constitutional text, or any separate part thereof, shall not come into operation unless the Constitutional Court certifies that all its provisions comply with the Constitutional Principles.

(4) A decision of the Constitutional Court in terms of subsections (2) and (3) shall be final and binding and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of any constitutional provision which has been certified by the Constitutional Court in terms of subsection (3).

### **Appointment of commissions, committees and advisory bodies**

67. (1) The CMB shall have the power to appoint its own commissions, technical and parliamentary committees and other advisory bodies to assist it in its task.

(2) The CMB shall, with the concurrence of at least two thirds of all its members, appoint an independent panel of five persons being recognised constitutional experts not holding office in any political party, to advise it and the Chairperson on constitutional matters and to perform such other tasks as are provided for in this Constitution.

### **Adoption of a new constitutional text**

68. (1) A new constitutional text shall be adopted by the CMB within two years from the commencement of the first session of Parliament.

(2) A new constitutional text shall be approved by two thirds of all the members of the CMB.

(3) Should the CMB fail to adopt a new constitutional text by the required two thirds majority, but a draft of the new constitutional text is supported by a majority of its members, such draft shall be referred to the panel of constitutional experts by the Chairperson for their advice, to be given within 30 days of such referral, on amendments



within the framework of the Constitutional Principles which might secure a majority necessary for the approval of the constitutional text.

(4) Should a draft prepared in accordance with the unanimous advice of the panel of constitutional experts in terms of subsection (3) not be submitted to the CMB within 30 days, or, should such draft, after being so submitted, not be supported by the required two-thirds majority in the CMB, a constitutional text may be accepted by a majority of the members of the CMB.

(5) The President shall refer a constitutional text accepted in terms of subsection (4) after it has been certified by the Constitutional Court to be in compliance with the Constitutional Principles set out in Schedule 7, to a national referendum.

(6) The question put before the electorate in the referendum shall be the acceptance or rejection of such draft constitutional text.

(7) The constitutional text presented to the electorate in the referendum shall, if approved by a majority of sixty per cent of the votes cast in the referendum, become the Constitution of South Africa.

(8) If the new constitutional text is not approved in the referendum contemplated in subsection (7), or if a new constitutional text is not adopted in terms of this Constitution within two years, Parliament shall be dissolved by the President and a general election shall be held for a new Parliament in accordance with the provisions of this Constitution.

(9) A CMB, composed of the newly elected National Assembly, and the Senate, shall within a period of one year after its first session, approve and pass the new constitutional text by an ordinary majority.

(10) The newly elected Parliament shall be convened in accordance with the provisions of sections 46(1) and 54(1), and shall conduct its proceedings in accordance with the provisions of this Constitution other than the provisions of subsections (1) to (8) hereof.

## **Amendment of this Chapter**

69. (1) No amendments to the provisions of this Chapter shall be permitted in so far as they relate to -

- (a) the Constitutional Principles set out in Schedule 7;
- (b) the requirement that the new constitutional text or texts shall comply with the Constitutional Principles, and that such text or texts shall be certified by the Constitutional Court as being in compliance therewith.

(2) All other provisions of Chapter 5 shall be capable of being amended by a two thirds majority of the total number of members of the CMB.

## **CHAPTER 6 The Executive Power**

[Sections 70 - 85]

## **CHAPTER 7 The Judicial Power**

[Sections 86 - 91]

## **CHAPTER 8 The Ombudsman and the Human Rights Commission**

[Sections 92 - 99]



## CHAPTER 9

## SPRs

**Establishment of SPRs**

100. The SPRs of South Africa shall be ... LISTED BY NAME ..., the boundaries of which are defined in Schedule 1.

**SPR legislatures**

101. (1) There shall be a legislature for each SPR.

(2) The legislature of each SPR shall consist of the members elected at the time of the election of Parliament according to a system of proportional representation on SPR party lists as provided for in Schedule 5.

(3) The number of seats in an SPR legislature shall be determined by dividing the total number of votes cast in the SPR in the election held in terms of subsection (2) by 50 000, approximated to the nearest complement: provided that no SPR legislature shall have less than 30 nor more than 100 seats.

**Sessions of SPR Legislatures**

102. (1) An SPR legislature shall sit:

- (a) At a place fixed by the Provisional Secretary of such SPR appointed by the Transitional Executive Council under the provisions of the *Transitional Executive Council Act*, 1993, unless and until the legislature of the SPR directs that the sessions shall be held at a different place;
- (b) In a session convened and presided over by the Provisional Secretary referred to in subparagraph (a) and commencing as soon as reasonably possible after the election of the SPR legislature, but not later than 7 days after such election, and such session shall terminate on such date as the SPR legislature may determine;

- (c) In such special sessions as may be directed by proclamation by the Premier from time to time.

(2) During such sessions the SPR legislature shall sit on such days and during such times of the day or night as it by its rules and standing orders may provide.

(3) The Premier may alter the date of commencement of any session directed in terms of subsection (1)(c) if he or she considers it desirable to do so on the grounds of public interest or convenience.

### **Qualifications for Election to SPR Legislatures**

103. No person shall be qualified to be a member of an SPR legislature unless he or she:

- (a) is ordinarily resident within the boundaries of the SPR; and
- (b) is qualified to stand for election as a member of the National Assembly.

### **Vacation of Seats by Members of SPR Legislatures**

104. (1) Members of SPR legislatures shall vacate their seats if they -

- (a) cease to be eligible to be members of the SPR legislature; or
- (b) cease to be members of the party which nominated them for election to the SPR legislature; or
- (c) resign their seats in writing addressed to the Premier of the SPR; or
- (d) absent themselves voluntarily from the SPR legislature for 30 consecutive sitting days, without having obtained the leave of the SPR legislature on grounds specified in its rules and standing orders.

(2) If a seat of a member of an SPR legislature is vacated in terms of subsection (1), the party which nominated such member to sit in the SPR legislature shall



be entitled to fill the vacancy by nominating, according to the order of preference, a person on the party's election list compiled for the previous SPR election, or if there is no such person, by nominating any member of the party.

### **Quorum of meetings of SPR legislature**

105. The presence of at least one third of the number of members of the SPR legislature other than the Chairperson or the presiding member thereof shall be necessary to constitute a meeting of the SPR legislature for the exercise of its powers and for the performance of its functions.

### **Requisite Majorities**

106. (1) Save as provided in this Constitution, a majority of votes cast shall be sufficient for the passing of any Bill, or the taking of any decision or resolution by an SPR legislature.

(2) The Chairperson of the SPR legislature or the person presiding at a meeting of the SPR legislature shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

### **Rules and orders and committees**

107. (1) An SPR legislature may make rules of procedure for the conduct of its business and proceedings and may also make rules for the establishing, functioning and procedures of committees, and formulate standing orders, including restrictions on access to such committees.

(2) For the purposes of exercising their powers and performing their functions any committee of an SPR legislature established in terms of subsection (1) shall have the power to *subpoena* persons to appear before it to give evidence on oath and to produce any documents required by it, and to receive representations from interested parties.

### **Privileges and immunities of SPR legislatures**

108. (1) Notwithstanding the provisions of any other law, no member of an SPR legislature shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of any matter or thing which he or she has brought by petition, bill, motion or otherwise or may have said before or in any meeting of the SPR legislature or any committee thereof.

(2) Provision for other privileges and immunities of members of SPR legislatures may be made by Act of Parliament.

### **Signature and Enrolment of SPR Legislation**

109. (1) Any valid Act of an SPR legislature which has been duly passed by such legislature, signed by the Premier, and published in the *SPR Gazette* shall be lodged in the office of the Registrar of the Appellate Division of the Supreme Court and such copy shall be conclusive evidence of the provisions of the Act.

(2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

### **Public access to SPR legislature**

110. All sessions of an SPR legislature shall be held in public and members of the public and the media shall have access to such meetings: provided that reasonable measures may be instituted to regulate such access, and to search, and where appropriate, to refuse entry to persons.

### **Assent to Bills passed by the SPR legislatures**

111. A Bill passed by an SPR legislature in terms of this Constitution shall require the assent of the Premier and a member of the SPR executive to be signified by the signing of the bill, and the publication of the Act in the *SPR Gazette* in order to acquire the status of a valid SPR Act.



## **Duration of the SPR legislature**

112. The SPR legislature shall continue until Parliament is dissolved under Chapter 5.

## **SPR executives**

113. (1) The executive of an SPR shall be elected by the SPR legislature according to the principle of proportional representation, each voter having one transferable vote, and shall consist of ten members.

(2) The executive of an SPR shall from among its own number elect a Premier.

(3) Each member of the executive shall be responsible for the administration of one or more of the departments of the SPR to be established by the Premier.

(4) The Premier shall determine how responsibility for the administration of departments shall be allocated to members of the executive.

(5) Every member of an SPR executive shall make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge designated by the Chief Justice for this purpose.

(6) There shall be paid to the Premiers, members of an SPR executive and legislature out of and as a charge on the SPR Revenue Fund such salary and allowances and pensions, as may be determined from time to time by resolutions of the SPR legislature.

(7) After consultation with the Commission on SPR Government an SPR executive shall appoint a Secretary of the SPR legislature and other officers of the SPR Legislature.

## **Functioning of SPR executives**

114 to 117. *[The details of the functioning of SPR executives will be dealt with in conjunction with Chapter 6.]*

### Areas of competence of SPR Governments

118. (1) Subject to the provisions of subsection (2) an SPR government shall have exclusive legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

- (a) The appropriation of SPR revenue and moneys for financing the government and services of the SPR
- (b) SPR planning and development
- (c) Town planning
- (d) Firefighting, ambulance services and other civil protection services
- (e) Language policy and language(s) for official use in the SPR
- (f) SPR cultural affairs
- (g) Traditional authorities and indigenous law.
- (h) Markets and pounds
- (i) Road traffic
- (j) Delivery of water, electricity and other essential services
- (k) SPR tourism and recreation
- (l) SPR public media
- (m) SPR roads
- (n) SPR public transport



(o) Casinos, racing and gambling

(2) An SPR legislature may by resolution decline to accept any of the exclusive competences referred to in subsection (1) if it is unable to exercise such competences by reason of lack of administrative, infrastructural or related capacities, but may at any time thereafter require Parliament to transfer any such competence to it.

(3) Parliament shall not legislate on matters falling within the functional areas specified in subsection (1) unless -

- (a) it is necessary for the setting of minimum standards or effective exercise of control over the quality and delivery of services; or
- (b) it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole; or
- (c) uniformity of minimum standards across the nation is required regarding a matter falling within such functional area; or
- (d) it may be necessary for the determination of national economic policies, the promotion of inter-SPR commerce and the protection of the common market in respect of the mobility of goods, services, capital and labour.

(4) An SPR government shall, subject to the provisions of subsection (5), have full legislative competence for SPR purposes, and Parliament shall, subject to the provisions of subsection (7), have concurrent legislative competence in the following functional areas:

- (a) Subject to the provisions of section 121, taxation for SPR purposes
- (b) Local government
- (c) Housing

(d) Education

(e) Health services

(f) Welfare services

(g) Agriculture

(h) Fish and game preservation

(i) The environment

(j) Public works

(k) SPR and local policing

(l) SPR correctional services.

(5) If Parliament exercises its concurrent legislative competence in terms of subsection (4), the legislative competence of an SPR government shall be constrained only to the extent that the relevant parliamentary legislation deals with such matters and expressly or by necessary implication limits the legislative competence of SPR governments.

(6) Whilst this Constitution remains in force, and subject to its provisions, the legislative competences of an SPR referred to in subsections (1) and (4) shall not be amended or diminished without the consent of such SPR legislature.

(7) Parliament shall not exercise its powers under subsection (3) or subsection (4) so as to encroach upon the geographical, functional or institutional integrity of an SPR or in a manner which would deprive an SPR government substantially of any of its competences in terms of subsection (4).

(8) Executive power relating to all functional areas in which an SPR government has legislative competence, shall vest in the SPR executive.



### Continuation, transfer and consolidation of existing administrative responsibility

119. Until the rationalisation and consolidation of administrative institutions and structures has taken place as contemplated in subparagraph (h) or until changes are otherwise made in terms of this constitution or any other law -

- (a) Administrative institutions and structures of Provincial Governments, selfgoverning territories, and Transkei, Bophuthatswana, Venda and Ciskei, if reincorporated, which immediately before the coming into force of this Constitution were established within the boundaries of an SPR, and performed functions within such boundaries, shall continue to perform such functions;
- (b) Personnel of the administrative institutions and structures referred to in subparagraph (a) shall continue in the posts they occupied immediately before the coming into operation of this Constitution, and shall continue to perform the functions which they previously performed;
- (c) The Government of the SPR concerned shall be responsible for and shall exercise control over the performance of those functions which fall within the scope of the functional areas referred to in sections 118(1) and 118(4), and the National Government shall be responsible for and exercise control over the performance of all other functions referred to in subparagraph (b);
- (d) Administrative structures and institutions which immediately before the coming into force of this Constitution formed part of a department of state of the Republic of South Africa referred to in section 24(1) of the *Republic of South Africa Constitution Act*, 1983, and which were at such time responsible for the performance of functions within the boundaries of an SPR, shall continue to be responsible for the performance of such functions;
- (e) The National Government shall be responsible for the performance of and shall exercise control over the functions referred to in subparagraph (d);



- (f) The personnel referred to in subparagraph (b), who perform functions in terms of that paragraph on the instructions of an SPR government, shall be deemed to be in the employ of, and shall be entitled to be remunerated by it on the same basis as they were previously being remunerated, for as long as they continue to perform such functions on the instructions of that SPR government;
- (g) The personnel referred to in subparagraph (b) who perform functions in terms of that subparagraph on the instructions of the National Government, shall be deemed to be in the employ of and shall be entitled to be remunerated by the National Government, on the same basis as they were previously being remunerated, for as long as they continue to perform such functions on the instructions of the National Government;
- (h) The National Government and SPR governments shall co-operate with each other, and shall, each within their respective areas of competence, rationalise the administrations and institutions referred to in subparagraph (b), and establish administrative structures and institutions, and employ the personnel needed for the performance of functions undertaken by them, within their areas of competence;
- (i) The National Government and SPR governments in rationalising and/or consolidating administrations and institutions as contemplated in subparagraph (h) shall, in the event of any disagreement between them, have regard to the advice and recommendations of the Commission on SPR Government established in terms of section 127 of this Constitution.

#### **Administration of existing laws**

120. (1) Existing laws applicable in an SPR governing the operation of the institutions for which the SPR government assumes responsibility and control in terms of section 119, shall continue to govern those matters until they are amended or repealed by the competent legislature, and references in such laws to any government or organ of government shall be deemed to be references *mutatis mutandis* to the government or relevant organ of government of the SPR.



(2) The powers, functions and obligations relating to the legislative and executive competence of the SPR arising from the provisions of the laws referred to in subsection (1), shall vest *mutatis mutandis* in the legislature and executive of the SPR.

(3) Parliament and the legislatures of the SPRs shall, each within their respective areas of competence, undertake the consolidation and unification of the laws referred to in subsection (1) as expeditiously as possible.

### **SPR finance and fiscal affairs**

121. (1) An SPR shall be entitled to an equitable share of revenue collected nationally in order to enable it and the local governments within its boundaries to provide basic services and to execute their functions and powers.

(2) The Financial and Fiscal Commission established in terms of Chapter 11 shall make recommendations to the National Assembly regarding equitable fiscal and financial allocations to the SPRs from revenue collected nationally, taking into account the national interest, the provisions of subsection (1), economic disparities between the SPRs, as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each SPR.

(3) An SPR Revenue Fund shall be established in every SPR, into which shall be paid all revenues raised by or accruing to the SPR.

(4) An SPR government shall not be competent to raise loans for current expenditure.

(5) An SPR government shall be competent to raise loans for capital expenditure with the consent of the national executive given on the advice of the Financial and Fiscal Commission.

(6) An SPR government shall be competent to levy such taxes and surcharges as may be recommended by the Financial and Fiscal Commission and approved by the National Assembly, which approval shall not unreasonably be withheld.



(7) An SPR government shall not be entitled to raise taxes detrimentally affecting national economic policies, inter-SPR commerce, or the national mobility of goods, services, capital and labour.

(8) Allocations by the national government to local governments shall ordinarily be made only via an SPR government.

### **Effect of laws of SPR legislature**

122. (1) A law made by an SPR legislature shall have effect in and for the SPR as long and as far only as it is not repugnant to any Act of Parliament duly passed within the competence of Parliament in terms of this Constitution.

(2) The provisions of a law made by an SPR legislature shall be construed as being repugnant to an Act of Parliament only if such provisions are expressly or by necessary implication inconsistent with an Act of Parliament.

### **Recommendations to Parliament**

123. An SPR legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws.

### **SPR Constitutions**

124. (1) An SPR legislature may, subject to the provisions of this Constitution, adopt a constitution for the SPR by a two thirds majority of all its members.

(2) An SPR legislature may make such arrangements as it deems appropriate for the negotiation and drafting of an SPR constitution.

(3) An SPR constitution adopted by an SPR legislature shall not be inconsistent with the Constitutional Principles enumerated in Schedule 7 or the provisions of the new constitutional text adopted in terms of Chapter 5.

(4) An SPR constitution shall be developed in consultation with the Commission on SPR Government established in terms of section 127.



(5) An SPR constitution adopted prior to the adoption of a new constitutional text in terms of Chapter 5 shall be approved and come into operation in terms of a resolution of the CMB passed by two thirds of its members.

(6) An SPR constitution adopted by an SPR legislature may be referred to the Constitutional Court by the chairperson of the CMB after being petitioned by one third of the members of the CMB in order to obtain an opinion from the Court as to whether such constitution, if adopted, would conform with the Constitutional Principles.

(7) An SPR constitution which is not in force prior to the new constitutional text intended in Chapter 5, shall be approved and come into operation in terms of such new constitutional text.

#### **Development of constitutional provisions regarding SPR Government**

125. (1) The development of a system of SPR government shall receive the priority attention of the CMB and in this regard it shall take into consideration the recommendations of the Commission on SPR Government referred to in section 127 and the views expressed thereon by the executives of the various SPRs.

(2) The Commission's recommendations to the CMB regarding any matter that falls within the ambit of its objects in terms of section 128 shall include draft provisions for the national Constitution.

(3) The CMB shall deal with such draft provisions in the same manner as it is required to deal with other constitutional provisions.

(4) Draft provisions recommended by the Commission which are not adopted by the CMB, shall lapse, except if a majority of the members of the CMB present and voting resolve that the recommended provisions be referred back to the Commission for further consideration.

(5) Draft provisions referred back to the Commission may again be presented to the CMB, provided that if amended in one or more substantive respects, the provisions



of this section regarding the acceptance, rejection or referral of the recommendations of the Commission shall apply *mutatis mutandis*.

### **Election of new SPR Governments**

126. An SPR government may at any time after the coming into force of an SPR constitution contemplated in section 124 or of the constitutional dispensation contemplated in section 125, petition the CMB to determine by resolution that an election for the establishment of a new SPR legislature and executive in that SPR, or in an SPR incorporating that SPR in whole or in part, shall be held.

### ***Commission on SPR Government***

#### **Establishment of Commission on SPR Government**

127. A Commission on SPR Government shall be appointed by the President in terms of this Constitution within 30 days of its coming into operation.

#### **Objects and functions of the Commission**

128. (1) The objects and functions of the Commission regarding the establishment of SPR government in terms of this Chapter are to -

- (a) advise the National Government and SPR governments on the establishment and consolidation of administrative institutions and structures in the SPRs and on any matter arising out of the provisions of section 118; and
- (b) make recommendations to the National Government and SPR governments on the rationalisation of statutory enactments and public sector resources directed at facilitating the introduction and maintenance of a system of SPR government.

(2) The objects and functions of the Commission regarding the constitution making process provided for in Chapter 5 are to submit recommendations to the CMB in the form of draft constitutional provisions regarding -



- (a) the finalisation of the number and the boundaries of the SPR's of the Republic of South Africa;
- (b) the constitutional dispensations of such SPRs, including the constitutional structures within such SPRs as well as the method of their election and their authority, functions and procedures;
- (c) measures, including transitional measures, that provide for the phasing in of new SPR constitutional dispensations;
- (d) the final delimitation of powers and functions between national and SPR institutions of government with due regard to the criteria that are set out in subsection (3);
- (e) fiscal arrangements between the institutions of national government and those of SPR government;
- (f) the powers and functions of local governments; and
- (g) any matter which the Commission considers to be relevant or ancillary to its functions.

(3) In carrying out its functions the Commission shall, *inter alia*, take into consideration -

- (a) The provisions of this Constitution;
- (b) The Constitutional Principles enumerated in Schedule 7;
- (c) Historical boundaries, including those set out in Schedule 1, former provincial boundaries, magisterial and district boundaries and infrastructures;
- (d) Administrative considerations, including the availability or non-availability of infrastructures and nodal points for services;

- (e) The need to rationalise existing structures;
- (f) Cost-effectiveness of government, administration and the delivery of services;
- (g) The need to minimise inconvenience;
- (h) Demographic considerations;
- (i) Economic viability;
- (j) Developmental potential;
- (k) Cultural and language realities.

### **Constitution and impartiality of the Commission**

129. (1) The Commission shall consist of not less than 10, nor more than 15 full-time members, as the President may determine, appointed for the period during which this Constitution is in force.

(2) At least one member of the Commission shall be appointed from each SPR with the approval of the Premier of the SPR.

(3) Members of the Commission shall perform their duties fairly, impartially and independently.

(4) Members shall not perform or commit themselves to perform remunerative work outside their official duties.

(5) A member of the Commission shall not hold office in any political party or political organisation.



(6) It shall be an offence subject to penalties prescribed by law to attempt to influence a member to act otherwise than in accordance with the provisions of subsection (3).

### **Chairperson and deputy chairperson**

130. (1) The President shall designate one of the members of the Commission as chairperson and another as deputy chairperson.

(2) (a) When the chairperson is absent or not able to perform his or her functions as chairperson, or where there is a vacancy in the office of chairperson, the deputy chairperson shall act as chairperson, and if the chairperson as well as the deputy chairperson are absent or not able to perform the functions of the chairperson, the Commission shall elect another member to act as chairperson.

(b) Such member shall while acting as chairperson have all the powers and perform all the duties of the chairperson.

### **Vacation of office and filling of vacancies**

131. (1) Members of the Commission shall vacate their offices if they resign or if they become disqualified to hold office for the same considerations and in the same fashion as would apply to a judge of the Supreme Court.

(2) Any person who has ceased to be a member of the Commission by reason of the effluxion of time may be reappointed.

(3) If a member of the Commission ceases to hold office, the President may, subject to section 129 appoint a person to fill the vacancy.

### **Meetings of the Commission**

132. (1) The first meeting of the Commission shall be held within 30 days of its appointment at a time and place to be determined by the Chairperson, and subsequent

meetings will be held at a time and place determined by the Commission or, if authorised thereto by the Commission, by the Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of a majority of the members of the Commission shall constitute a decision of the Commission and in the event of an equality of votes the chairperson shall have a casting vote in addition to his or her deliberative vote.

(4) All the decisions of the Commission shall be recorded.

### Committees

133. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a meeting of the committee the members present shall elect one from among their number to act as chairperson.

(4) (a) The Commission may, subject to such directions as it may issue from time to time-

(i) delegate any power granted to it by or under section 128 to such a committee; and

(ii) grant authority that a duty assigned to it by or in terms of section 128 may be performed by such a committee.

(b) The Commission shall not be divested of a power so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.



### **Co-option of persons to serve on or advise committees**

134. (1) A committee may co-opt any person to serve on a committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

### **Remuneration and allowances of members of the Commission and other persons**

135. Members of the Commission and persons referred in section 134 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

### **Appointment of Staff**

136. The Commission may appoint such staff as it may deem necessary for the efficient performance of its functions and administration, and may, in consultation with the Commission for Administration, determine the remuneration and conditions of service of such staff.

### **Regulations**

137. The President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

## CHAPTER 10

### Local Government

- General provisions regarding the powers, functions and structures of local government;
- The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

## CHAPTER 11

### Finance

- Provisions relating to existing debts and liabilities of the state;
- the national and SPR revenue funds, taxation, appropriation and financial procedures and legislation;
- the Auditor-General;
- the Reserve Bank;
- the Financial and Fiscal Commission representative of the SPRs.



## CHAPTER 12

### General and transitional provisions

Provisions relating to:

- The legal system (continuation of statutory and common law subject to the Constitution, unification of provincial ordinances, TBVC laws and laws of the self-governing territories with national and SPR law, recognition of indigenous law);
- the status of international law;
- the independence and impartiality of the Commission for Administration and the security forces;
- civil society;
- method of publication of notices, etc.;
- affirmation in lieu of oath;
- construction of certain references;
- definitions and terminology;
- short title, commencement and duration of the Constitution.

**SCHEDULE 1****The National Territory and Boundaries and Designation of SPRs**



**SCHEDULE 2**  
**Design of the National Flag**

**SCHEDULE 3**  
**The National Coat of Arms**



**SCHEDULE 4**

System for the Election of The National Seal

**SCHEDULE 5**

**System for the Election of the National Assembly and SPR Legislatures**



## SCHEDULE 6

### Oaths and Affirmations of Office

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

## SCHEDULE 7

### Constitutional Principles

#### I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

#### II

The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

#### III

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

#### IV

The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

#### V

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

#### VI

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

#### VII

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.



## VIII

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

## IX

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

## X

All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the Constitution.

## XI

The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

## XII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

## XIII

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

## XIV

Amendments to the Constitution shall require special procedures involving specified majorities.

## XV

Government shall be structured at national, SPR and local levels.

## XVI

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XII.

## XVII

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate SPR autonomy and cultural diversity.

## XVIII

The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPRs shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPRs, alternatively, if there is such a chamber, a specified majority of a chamber of Parliament composed of SPR representatives, and if the amendment concerns specific SPRs only, the approval of the legislatures of such SPRs will also be needed.

## XIX

A framework for local government powers, duties, functions and structures shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

## XX

The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

## XXI

National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle



XIX shall make provision for appropriate fiscal powers and functions for different categories of local government.

## XXII

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPRs and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

## XXIII

A Financial and Fiscal Commission, representing inter alia each of the SPRs, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, economic disparities between the SPRs as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPRs.

## XXIV

The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

1. The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.
2. The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPRs.
3. Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

4. The essential principles of the Constitution, including the fundamental rights contained therein, shall apply to all organs of the state at all levels of government.
5. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.
6. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
7. Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.
8. The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
9. SPR governments shall have powers, either exclusively or concurrently with the national government, inter alia -
  - 9.1 for the purposes of SPR planning and development and the delivery of services; and
  - 9.2 in respect of aspects of government dealing with the specific socio-economic and cultural needs and the general well being of the inhabitants of the SPR.
10. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.
11. In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments which cannot be



resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

12. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to an SPR government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or SPR governments.

## XXV

Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.

## XXVI

The independence and impartiality of a Commission for Administration, a Reserve Bank, and Auditor-General and Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

## XXVII

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their duties and functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

# **EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL**

## **TENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 20TH AUGUST 1993**

1. Following upon the debate in the Negotiating Council on our Eighth Report we evaluated each part of the text which came under discussion and where necessary took such steps as we thought were appropriate. Such steps include:
  - 1.1 additions and omissions to the text and each of these are indicated appropriately on the face of the text,
  - 1.2 reformulation of certain provisions to achieve clarity, eradicate inconsistencies or to bring the text in line with consensus which may have emerged during the course of the debate in the Council.



We suggest that the debate be concentrated on these changes. Consequently, we have attached hereto detailed and refined texts of Chapters 1, 2, 4, 5 and 9. The final edit has not been completed, however, the texts are in a form which, if found in order, may be approved by the Council. We have refrained from dealing with matters in which a participant has suggested changes of substance on which no decisions were taken by the Negotiating Council.

2. We have added to the existing text a preamble and schedules 5 and 6. The Negotiating Council has already referred the settling of a preamble to the Planning Committee. Consequently we have produced a preamble which may serve as a basis for further discussion. Schedule 5 describes a possible system for the election of a National Assembly and SPR Legislatures. Schedule 6 contains proposed formulations for oaths and affirmations for the President, Ministers and members of Parliament and SPR legislature. We draw the attention of the Council to the fact that there is no reference to any Deity in the body of the Oath.
3. As we intimated in paragraph 2 of our Eighth Report, preliminary texts for Chapter 6 (the Executive Power), Chapter 7 (the Judicial Power), Chapter 8 (the Ombudsman and Human Rights Commission), and Chapter 10 (Local Government) have been developed. In certain instances more than one text per chapter has been

developed by us. None of these preliminary texts have been attached to this report. This is so, firstly because the development of these sections has taken considerably more time than was originally anticipated. Secondly, the refinement and reworking of the text on Chapters 1, 2, 4, 5 and 9, on the basis of the discussions in the Council used up a substantial portion of the time at our disposal.

4. We have, however, in our Eleventh Report, produced a provisional outline of a text on the Executive Power, as well as a report which, again, identifies policy issues that call for determination by the Negotiating Council and instructions to our Technical Committee.

5. During the debate on our Eighth and Ninth Reports in the Negotiating Council certain matters which need greater clarification have remained undetermined or unresolved. Some of these matters have been referred to the Planning Committee with a view to facilitating agreement between the parties. None of the following matters can be finalised by us until we receive clear instructions from the Negotiating Council:

5.1. Definition of the National Territory (section 1(2);

5.2. National symbols inclusive of National Flag, Anthem, Coat-of-Arms, and Seal, (section 2);



- 5.3 Languages, (section 3);
  - 5.4 The deadlock breaking mechanisms set out in Chapter 5;
  - 5.5 SPR Constitutions;
  - 5.6 Whether the Constitutional Assembly will have the power to alter the number, boundaries and powers of SPRs described in the Constitution for the transitional period, and
  - 5.7 All matters relating to areas of competence of SPR Governments set out in section 118.
6. In the detailed drafts of Chapters 1, 2, 4, 5 and 9 it is contemplated that certain legislation will have to be enacted before the coming into operation of the Constitution for the transitional period. Such enactment should be done sooner rather than later and in any event not after the coming into operation of this Constitution. Such legislation will include the following:
- 6.1. Electoral Act 1993 (section 6)
  - 6.2. Rationalisation of existing citizenship laws (section 5)
  - 6.3. Statutory provision in respect of the preparatory work on the continuation, transfer and consolidation of existing administrative responsibilities (section 102 rtw Sec 119).

We suggest that the instructions for the drafting of the legislation envisaged in 6.2 and 6.3 be given as soon as possible.

7. During the debate of this report before the Council we shall make an oral presentation of the refined texts placed before you. In doing so, we shall refer to all changes made to the text and direct the Council's attention to those issues which call for decisions on principle. However, for the convenience of the members of the Council we draw attention to the following matters :

7.1.        **Sec. 4:        Supremacy of the Constitution**

During the debate in the Negotiating Council the question was raised whether the draft Independent Electoral Commission Act is compatible with the Constitution. Section 4 (1) of the Constitution provides that the Constitution shall be the supreme law of the land. According to section 3.1 of the draft Act, the draft Act shall be binding on the State. Where a conflict may arise between the provisions of the draft Act and the inherent powers of the state or the provisions of any other statute, save for other transitional legislation, the draft Act shall override such powers and provisions insofar as they relate to the conduct and supervision of elections, referenda and other matters dealt with in



terms of the draft Act. 'Transitional legislation' is defined by the draft Act to include inter alia the 1993 Constitution. As the 1993 Constitution enjoys supremacy, which supremacy is reflected by the draft Act, no conflict arises between the two.

The provisions of the draft Act purport to apply in respect of the first and subsequent elections for Parliament and SPR legislatures.

7.2.      **Sec. 5(3):      Citizenship**

Section 20 prohibits the deprivation of South African citizenship. It is common that states provide by law for the loss of citizenship, if the citizenship of another country is acquired voluntarily (inter alia, to avoid multiple citizenship). We have therefore retained section 5(3) and we suggest that the Council reconsider section 20.

7.3.      **Chapter 3:      Fundamental Rights**

One participant sought the inclusion of rights of national, ethnic, religious and linguistic minorities under the Chapter on Fundamental Rights. Our response then, and now, still is that a debate in this regard relates to the brief of the Technical Committee on Fundamental Rights. International law recognition of the rights of national, ethnic, religious and linguistic minorities could properly be dealt with under

Chapter 12 when provisions on the status of international law is debated.

7.4. **Sec. 38(2): Legislative Authority**

This provision has been deleted. Parliament, in any case, is competent to delegate by law any matter within its competence.

7.5 **Section 40(2) and 43(3) and 103(a): "Ordinarily Resident"**

The question was raised whether "ordinarily resident", as opposed to "domicile", is an appropriate criterion to serve as a "link" between a candidate and a particular SPR. Whether a person resides at a particular place at any given time depends upon all the relevant circumstances, in particular:

- (a) A distinction should be drawn between domicile and residence
- (b) A person can have more than one residence at the same time;
- (c) A person cannot be said to reside at a place where he or she is temporarily visiting.



Ordinarily resident is somewhat narrower than "resident". A person is "ordinarily resident" where he or she has his or her usual or principal residence, ie. what may be described as the person's real home, although the person may be temporarily or occasionally absent. The question whether a person is ordinarily resident at a place is one of fact. For this reason, depending on the facts, it is possible that a hostel dweller could be ordinarily resident in a hostel.

One's domicile is one's "address prescribed by law" and for certain mainly private law purposes, depending also on one's subjective intention. In some cases, the common law ascribes a domicile regardless of a person's physical presence (such as a minor following his guardian's domicile, a wife her husband's.) Proof of domicile is often complicated. For the purposes of this Constitution for the transitional period the term ordinarily resident, therefore, seems to be the appropriate identification criterion for nomination as a candidate.

7.6      **Sec.43(1)(b): Anti-Defection Clause**

During the debate before Council one participant suggested that the "anti-defection clause" herein contained may have to be elaborated upon in line with the provisions to be found in the Constitution for India. We have studied the Indian Constitution and annex hereto the Tenth Schedule thereof containing anti-defection provisions. Another participant has made submissions to us to the effect that the "anti-

defection" provision of section 43 (1) (b) should be deleted. The Negotiating Council is requested to signify whether the provisions of section 43 (1) (b) should be retained and if so whether any provisions similar to those in the Indian Constitution should be incorporated.

7.7      **Sec.43(2):      Filling Vacancies in the National Assembly**

We have amended this provision in order to gain greater clarity. During the debate before Council the filling of vacated National Assembly seats in order of preference of the parties' election lists compiled for the previous general election, was questioned. Some of the parties in the Council sought greater flexibility and thus the right not to observe the order of preference as the parties' election lists, after elections. Research in this area has, thus far, yielded no example of a constitutional dispensation using a party list system in which the order of preference of party election lists is **not** observed for purposes of filling a vacancy in the electorate body. The only other method for the filling of such vacancies, which is used in a few exceptional cases, is the holding of by-elections.



7.8      **Sec.47(2):      Composition of the Senate**

This provision has been amended by deleting the reference to a single transferable vote. The Electoral Act, 1993 shall have to set out a rather detailed and complex voting system based on a single transferable vote or such other system of proportional representation as the Council may decide upon. We suggest that this issue be referred to the relevant Technical Committee.

7.9      **Sec.58(3):      Ordinary Legislation**

During the debate a question was raised regarding the procedure for the adoption for ordinary legislation where it is passed by one House and rejected by the other. Under the present section 58(3) such legislation will be referred to a joint committee consisting of members of all parties represented in Parliament to report on proposed amendments, whereafter the bill shall be referred to a joint sitting of both Houses which may adopt the bill by a majority of the total number of members. We were requested to investigate other possible ways to resolve such a deadlock.

7.9.1 Different methods to promote consensus between the two houses can be identified:

- \* Adoption by a joint sitting of both Houses by a special majority of the members of both Houses.
- \* If the two Houses cannot agree after a minimum period of eg 3 months, Parliament may be dissolved to hold an election.
- \* A process where bills are considered and amended by each House and then be submitted to the other until agreement is reached (la navette).
- \* Reference of the bill to an arbitration committee consisting of an equal number of members from both Houses.

7.10 **Sec.101(1) and (2): SPR Legislatures**

During the debate we were requested to spell out the power of the SPR to make laws. That we do in subsection (1). This subsection may have



to be reconsidered in the light of decisions taken in regard to SPR constitutions. We have also added subsection (2) to make it clear that SPR laws will normally be applicable only within their own territories.

7.11      **Sec 118 (4) (5) (6) and (7): Concurrent Powers of SPRs and Parliament**

We have been urged by one participant to introduce "objective criteria" as a justiciable basis for determining the relative powers of SPR Governments and the National Government in the field of concurrent legislative competence. We were referred to the provisions of section 72 of the German Constitution which provides:

"(Concurrent Legislation of the Federation, definition)

(1) In matters within concurrent legislative powers the Laender shall have power to legislate as long as, and to the extent that, the Federation does not exercise its right to legislate.

(2) The Federation shall have the right to legislate in these matters to the extent that a need for regulation by Federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Laender ,or

2. the regulation of a matter by a Land law might prejudice the interests of other Laender or of the people as a whole, or
3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation."

The provisions of section 118 relating to the legislative competence of the SPR have been referred to the Planning Committee for further deliberation. As soon as clear directives are given to us in that regard we shall be in a position to re-draft the provisions of section 118, if so required.

7.12      **Subsection 113(6):    Remuneration of SPR Executives**

The question was raised whether the remuneration of SPR executives should be subject to limits and restrictions by the national government.

The provision as formulated reflects SPR autonomy.

Circumstances such as the financial ability of and workload in an SPR may differ between SPRs. Unreasonable expenditure should be accounted for at the polls.

We have however made editorial changes without altering the substance.



7.13      **Subsection 113(7): Appointment of SPR Secretary and other Officers**

This section gives the Commission only a consultative or advisory role. The SPR executive will still be entitled to appoint the officers independently and autonomously. The Commission will only assist the SPRs in the process of rationalisation of administrations.

7.14      **Subsection 118(3)(a)(c) and (d): Areas of competence of SPR Government**

We have reformulated these two subsections in the light of the debate in the Council. This however may still be subject to further change depending on recommendations made by the Planning Committee relating to section 118.

7.15      **Sec.119: Transfer of Administrative Responsibilities**

When section 119 came up for discussion, the comments by participants in the Council were wide ranging and included matters such as the wording of the section, the absence of time-frames, an assertion that the formulation contains inconsistent logic and finally that the service of people skilled in public administration should be engaged to assist in the drafting of the relevant provisions.

At the end of the debate before the Council, it was decided that the Technical Committee re-visit the provisions of section 119 and work out a graphic representation or a flow-chart of the transitional processes envisaged in section 119. Graphic representations of the transitional processes regarding administrative structures envisaged in section 119, are attached.

We have studied the Eighth Draft Bill on the Transitional Executive Council with a view to provide for preparatory work in respect of the rationalisation, consolidation of administrative institutions and structures which would be in existence in various SPR's at the date of coming into operation of the Constitution for the transitional period. The only sub-council of the TEC which may have some relevance to the processes envisaged in section 119 is the one on regional and local government.

The powers and functions of the sub-council on regional and local government bear some resemblance to provisions of paragraph 8.2. of our 8th report in which we propose that certain preparatory work and planning be undertaken by the TEC in the period between the enactment of the Constitution for the transitional period and its coming



into force. We there proposed the appointment of a Secretariat for each SPR.

We now suggest further that consideration be given to the establishment of an independent and non-partisan statutory body consisting of nominees of the Multi Party Negotiating Process whose specific function shall be to undertake all such functions and duties as would constitute preparatory work that would facilitate the continuation, transfer, consolidation and rationalisation of existing administrative and financial responsibilities envisaged in section 119. Members of the statutory body would have to be available on a full-time basis. This body should continue to function at least until the Commission on SPR government contemplated in section 121 of the Constitution has been established. The body could also perform the function envisaged in section 102 (1).

We have reformulated section 119 in order to enhance its clarity. The reconstruction of existing administrations also has financial implications. The SPRs will start life with obligations but no financial resources. The Chapters of the Constitution dealing with finance and transitional provisions will have to make provision for the manner in

which assets and liabilities of the TBVC states and the selfgoverning territories and the Provinces will be dealt with, and how the initial funding of SPRs will be provided. They will also have to deal with what will happen to the various revenue funds of the governments and administrations which will cease to exist when the Constitution for the transitional period comes into force. This is not a matter that we can address without instructions. We suggest that the Planning Committee set up a special technical group with the necessary expertise to make recommendations to the negotiating council in regard to how these issues be addressed, and how revenue previously accruing to such governments and administrations shall be allocated in the period immediately following the coming into force of the Constitution. Also how such revenue will be handled and accounted for, including how assets and liabilities of former government and administrations shall be dealt with.

7.16      **Sec. 121(5):   SPR Loans and Taxes**

Having listened to the debate on these subsections we decided not to effect any changes thereto. It was suggested that the advice or approval of the Reserve Bank be sought as well. However, it is not necessary to make that addition since, in any event, an SPR



government would not be competent to raise a foreign loan without the approval of the national government.

7.17 **Sec 121 (6) and Sec 118 (4): SPR Competences**

It has been contended that section 121(6) read together with section 118(4)(a) undermines SPR's concurrent legislative competence in respect of taxation for SPR purposes insofar as 121(6) subjects the competence of the SPR Government to levy taxes to the approval of the National Assembly. We have not debated nor canvassed this matter any further as all matters relating to the competencies set out in section 118 have been referred to the Planning Committee for further deliberation.

7.18 **Sec. 124(4): SPR Constitutions**

During the course of the debate certain inconsistencies in the usage of the word "adopt" or "adopted" were raised. We are of the view that the provisions in section 124 can be improved substantially by re-drafting. However, these provisions are tied up with the entire debate around dead-lock breaking mechanisms and SPR Constitutions. As

soon as we have received a clear directive from the Planning Committee or Council we shall be in a position to re-draft this clause and also refine the wording thereof.

7.19

**Sec. 126: Election of new SPR Governments**

The question was raised as to why elections to be held in SPRs, whether in an existing SPR or newly reconstructed SPR, should have the approval of the Constitutional Assembly are twofold. There may be practical considerations for this. On the one hand, the possible recomposition of the Senate and time-schedules for the approval of the new constitutional text, and elections to be held hereunder, may urge the Constitutional Assembly to regulate and co-ordinate the times of elections for SPR legislatures and their Executives; on the other hand, deadlocks in the Constitutional Assembly which might lead to a referendum or national elections could necessitate the postponement of SPR elections or at least require some measure of co-ordination. In short, the provisions of section 126 were intended as practical measures to harmonize the process of national constitution-making and the implementation of SPR constitutional dispensations.



**Sec. 129: The Commission on SPR Government**

The function of the Commission is to advise and make recommendations to the National and SPR governments; in this respect, it is foreseen that the Commission's work will be technical and supportive. However, in order not to make the Commission a faceless bureaucratic institution divorced from political and constitutional realities thus neglecting the wishes of SPRs, its composition should be such that at least one member should be appointed from each SPR with the approval of the Premier of the SPR. In the main, the Commission will ensure that the establishment of SPR governments and the elaboration of SPR constitutions will be co-ordinated and administrative structuring of governments on SPR levels rationalised. In the latter respect, it can be foreseen that the Commission will play an important role in ensuring that available human resources are employed maximally, eg by recommending and advising SPR governments on the structuring of their administration. Furthermore, the Commission will serve as an advisory and co-ordinating body in the drawing up of SPR constitutional dispensations. In this regard, the work of the Commission will be technical and supportive, which explains why members of the Commission must perform their duties fairly, impartially and independently. Since it is

foreseen that the Commission will be a body of professionals, it is provided that it may establish work committees and co-opt persons to serve on or advise such committees. It is not foreseen, however, that the Commission will become a large bureaucratic institution. It should in terms of the Constitution be a highly specialised body, politically accountable to the National as well as SPR governments which performs its functions and duties openly and publicly. For this reason it may be a good idea to add a provision which obliges the Commission to have its reports tabled in the Constitutional Assembly.

7.21 **Sec. 134(1): Co-options by Commission**

A question raised during the debate was whether the approval of the President should be required for the co-option of a member to a committee of the SPR Commission. We do not consider this to be necessary. The co-opted member has no vote and is co-opted only to a committee and not the Commission itself.



**Schedule 5**

This is a proposal specifically designed to cater for a single ballot. To our knowledge there is no international precedent for this procedure, and the Negotiating Council should consider its implications, and whether or not separate ballot papers should be used for the elections of the National Assembly and the SPR legislatures.

(Tenth Schedule)

(b) a nominated member of a House shall,—

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(2) An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.

(3) A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a House (whether elected or nominated as such) shall,—

(i) where he was a member of a political party immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such House as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the House who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph or, as the case may be, be deemed to be a nominated member of the House for the purposes of sub-paragraph (3) of this paragraph.

3. Disqualification on ground of defection not to apply in case of split.—Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party,—

(a) he shall not be disqualified under sub-paragraph (1) of paragraph 2 on the ground—

(i) that he has voluntarily given up his membership of his original political party; or

TENTH SCHEDULE

[Articles 102(2) and 191(2)]

Provisions as to disqualification on ground of defection

1. Interpretation.—In this Schedule, unless the context otherwise requires,—

(a) "House" means either House of Parliament or the Legislative Assembly or, as the case may be, either House of the Legislature of a State;

(b) "legislature party", in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or, as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

(c) "original political party", in relation to a member of a House, means the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2;

(d) "paragraph" means a paragraph of this Schedule.

2. Disqualification on ground of defection.—(1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—

(a) if he has voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.

Explanation.—For the purposes of this sub-paragraph,—

(a) an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

Added by the Constitution (Fifty-second Amendment) Act, 1985, s. 6 (w.e.f. 1-3-1985).



(Tenth Schedule)

- (d) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and
- (b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

4. Disqualification on ground of defection not to apply in case of merger.—  
(1) A member of a House shall not be disqualified under sub-paragraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party—

- (a) have become members of such other political party or, as the case may be, of a new political party formed by such merger; or
- (b) have not accepted the merger and opted to function as a separate group,

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of sub-paragraph (1) of paragraph 2 and to be his original political party for the purposes of this sub-paragraph.

(2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger.

5. Exemption.—Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule.

(a) If he, by reason of his election to such office, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or

(Tenth Schedule)

- (b) if he, having given up by reason of his election to such office his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office.

6. Decision on questions as to disqualification on ground of defection.—  
(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of article 212.

7. Bar of jurisdiction of courts.—Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

8. Rules.—(1) Subject to the provisions of sub-paragraph (2) of this paragraph, the Chairman or the Speaker of a House may make rules for giving effect to the provisions of this Schedule, and in particular, and without prejudice to the generality of the foregoing, such rules may provide for—

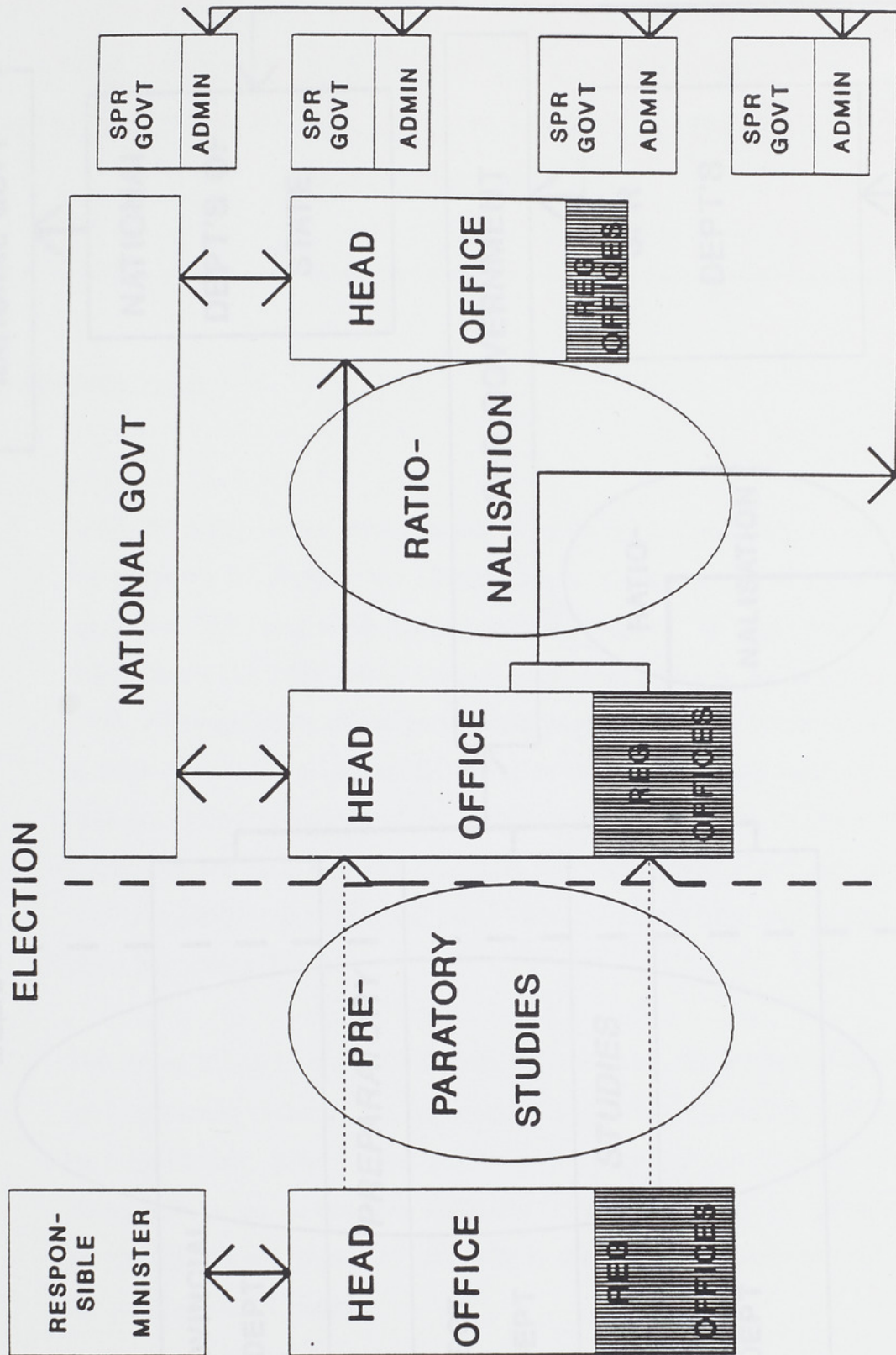
- (a) the maintenance of registers or other records as to the political parties, if any, to which different members of the House belong;
- (b) the report which the leader of a legislative party in relation to a member of a House shall furnish with regard to any condonation of the nature referred to in clause (b) of sub-paragraph (1) of paragraph 2 in respect of such member, the time within which and the authority to whom such report shall be furnished;

(c) the reports which a political party shall furnish with regard to admission to such political party of any members of the House and the officer of the House to whom such reports shall be furnished; and

(d) the procedure for deciding any question referred to in sub-paragraph (1) of paragraph 6 including the procedure for any inquiry which may be made for the purpose of deciding such question.

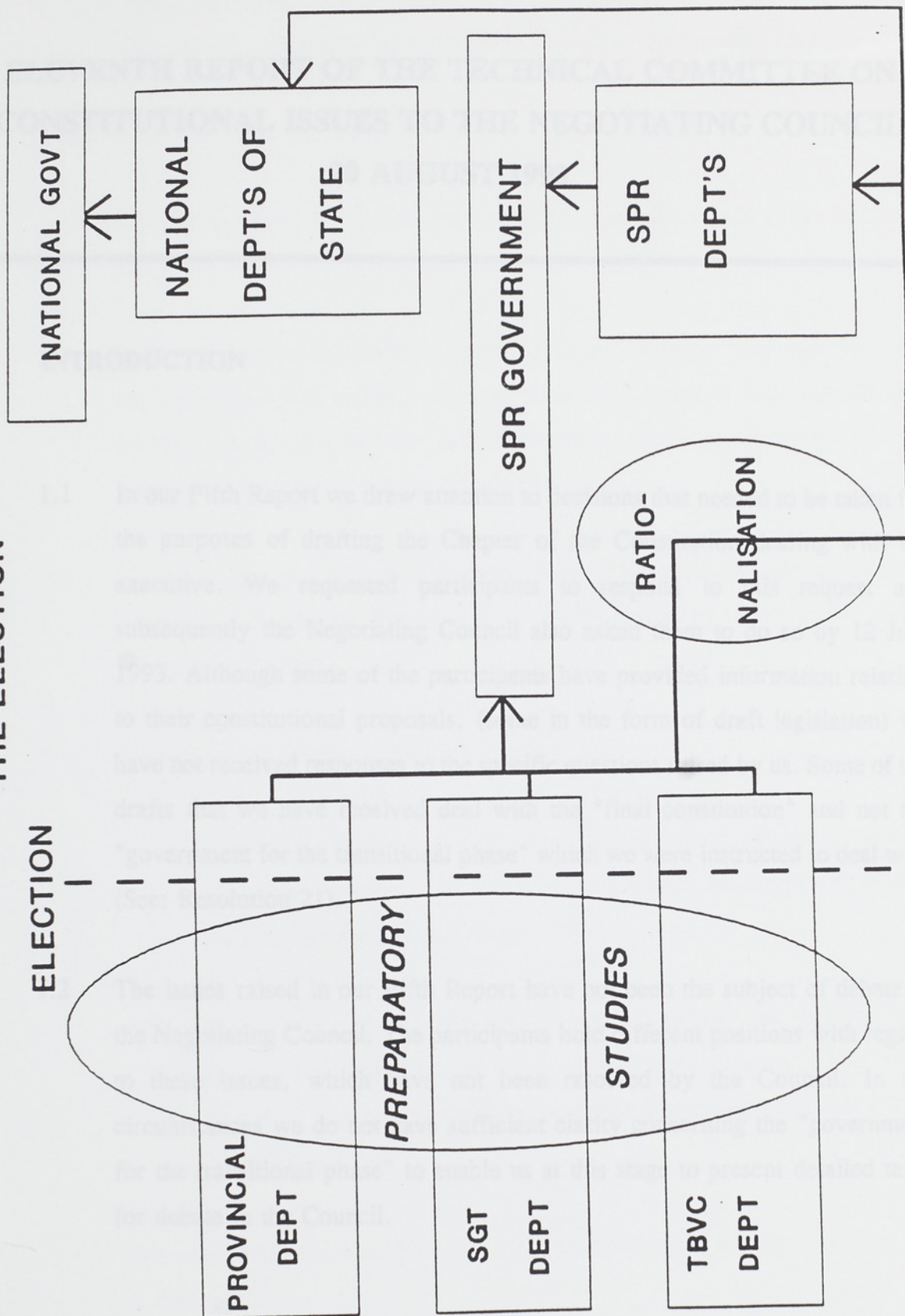


# DEPARTMENT OF STATE AT NATIONAL LEVEL (STRUCTURES)





# PROVINCIAL, SGT AND TBVC ADMINISTRATIONS OR INSTITUTIONS EXISTING IN AN SPR PRIOR TO AND IMMEDIATELY AFTER THE ELECTION



## **EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL**

### **ELEVENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 20 AUGUST 1993**

#### **1. INTRODUCTION**

1.1 In our Fifth Report we drew attention to decisions that needed to be taken for the purposes of drafting the Chapter of the Constitution dealing with the executive. We requested participants to respond to this request and subsequently the Negotiating Council also asked them to do so by 12 July 1993. Although some of the participants have provided information relating to their constitutional proposals, (some in the form of draft legislation) we have not received responses to the specific questions raised by us. Some of the drafts that we have received deal with the "final constitution" and not the "government for the transitional phase" which we were instructed to deal with (See: Resolution 21).

1.2 The issues raised in our Fifth Report have not been the subject of debate in the Negotiating Council. The participants hold different positions with regard to these issues, which have not been resolved by the Council. In the circumstances we do not have sufficient clarity concerning the "government for the transitional phase" to enable us at this stage to present detailed texts for debate in the Council.



- 1.3 As there are still important issues of principle that have to be resolved by the Negotiating Council, before a detailed text dealing with a "government for the transitional phase" can be presented to the Council, we identify these issues and make suggestions as to ways in which they could possibly be dealt with.

## 2. ELECTION OF THE HEAD OF STATE

- 2.1 It seems generally to be accepted that the head of state should be an executive president.
- 2.2 In proposals submitted to us by participants who favour a "one stage process" there is support for a directly elected president. None of these submissions address the question whether such a procedure would be appropriate for the election of a president for the transitional period.
- 2.3 The proposals that deal with a constitution for a transitional period favour a procedure whereby the President is indirectly elected by the members of the national legislature.
- 2.4 Factors which favour an indirect election, are:
- (a) A ballot for the election of the President in a direct election conducted at the same time as the election for the National Assembly would make the election more complicated.
  - (b) If there are several candidates in a direct election for the President, there is a risk that run-off elections might be necessary. This would be costly, and in the circumstances presently existing in South Africa, undesirable.
- 2.5 We require instructions from the Negotiating Council on the procedure that it favours.

### 3. APPOINTMENTS TO AND THE FUNCTIONING OF THE CABINET

- 3.1 The conventional way in which a cabinet is appointed by an executive president is for the President to determine the portfolios and to make the appointments at his or her discretion.
- 3.2 It has been suggested, however, by some participants that there should be a multiparty cabinet during the transition. This could be left to be dealt with by the political process in the ordinary way, or it could be catered for by a constitutional provision to the effect that parties holding more than a defined percentage of seats in the National Assembly are entitled, but not obliged, to be allocated seats in the cabinet.
- 3.3 The question of proportional representation in the executive during the transitional period is raised in our previous reports, and we made provision for this in the draft text dealing with SPR executives.
- 3.4 For the purpose of facilitating the debate in the Negotiating Council we make the same assumption, namely, that the Constitution for the transitional period should make provision for proportional representation in the cabinet.
- 3.5 This raises a number of issues concerning the way in which appointments should be made to the cabinet and the way in which it should function. The tension that exists is on the one hand between prescribing procedures conducive to achieving consensus, both in regard to the composition of the cabinet and the taking of decisions, and on the other hand in not prescribing procedures that could lead to the paralysis of executive government.
- 3.6 A number of different structures have been considered by us. We deal with these possible structures later in this report. But before doing so we consider it necessary to refer to other related issues.



#### **4. SHOULD THE PRESIDENT BE A MEMBER OF PARLIAMENT?**

4.1 A possible procedure for an indirect election of the President would be for the members of the National Assembly to elect one of their number as the President. Having been elected, the President would become both head of state and head of government. The President would then withdraw from the National Assembly, and be replaced by a member chosen from the relevant party list.

4.2 This would serve two purposes. First, it will enable the President to avoid the hurly burly of parliament, and to play a unifying role at a time when national reconciliation is likely to be a high priority. Secondly, it will free the President to attend to the executive affairs of state outside of parliament, and to perform the ceremonial functions that go with the office of president.

#### **5. SHOULD CABINET MINISTERS BE MEMBERS OF PARLIAMENT?**

5.1 It has been suggested that Cabinet Ministers need not be appointed from amongst the members of parliament, and that if members of parliament are appointed as Ministers they should resign their seats.

5.2 This would bring about a clear separation of powers between the legislation and the executive, but could make Ministers less accountable than they would be if they were to remain or become members of parliament answerable to it.

#### **6. SHOULD THERE BE A PRIME MINISTER?**

If the President withdraws from parliament a Prime Minister could provide the link between Parliament and the executive. The Prime Minister would be the principal representative of the government in ordinary parliamentary business and would be accountable to Parliament in that capacity.



## **7. SHOULD THERE BE A DEPUTY PRESIDENT/VICE PRESIDENT ?**

- 7.1 A deputy president/vice president could be elected on the basis of majority support or on the basis that he or she should come from a party other than the President's party.
- 7.2 A deputy president/vice president could alleviate the heavy responsibilities of the President. If chosen from a party other than the President's party, he or she may play a unifying role during the transitional period, provided that the respective powers and functions of the President and the Deputy President/Vice President are structured in such a way as to avoid conflict.
- 7.3 An objection to creating such an office is that it could have an impact on the question of succession should that ever arise as an issue. That difficulty could be addressed by a provision that the Deputy President / Vice President will act for the President during his or her absence, but will not necessarily succeed to the office of president if it should become vacant. The vacancy could be filled by a new election in the National Assembly.

## **8. APPOINTMENTS TO THE CABINET**

- 8.1 We have considered a number of different ways in which a Cabinet might be appointed. Common to all of them is that the Constitution provides that all parties with 5% or more of the seats in the National Assembly are entitled, but are not obliged to accept, positions in the cabinet in proportion to the seats held by them in the National Assembly. The threshold is, however, an issue that should be debated in the Negotiating Council.
- 8.2 The question as to how the cabinet should be composed and portfolios allocated is a political issue. For the purposes of facilitating debate in the Council on this issue, we have formulated examples of possible structures, which we set out below. These are merely examples and are not intended as



a complete list of all the possibilities. Different features of the various examples can also be combined to create different models.

### 8.3 **EXAMPLE 1**

The President appoints the members of the cabinet; allocating portfolios proportionally to the parties entitled to participate in the cabinet. The President is required to secure the agreement of the Deputy President/Vice President or the leaders of the participating parties in regard to the way in which the appointments are to be made and portfolios allocated.

#### **COMMENT:**

Implicit in this model is the risk of deadlocks when the President attempts to compose the cabinet. If agreement has to be reached on the allocation of portfolios with the Deputy President or the leaders of the parties entitled to seats in the cabinet, the President could be obliged to meet their requirements in order to avoid a deadlock and the possibility of paralysis of government. If this were to be a requirement, the President's position would be weakened, and the Deputy President, or leaders whose consent is necessary, could in effect dictate the way in which portfolios are allocated.

### 8.4 **EXAMPLE 2**

8.4.1. The President consults with the leaders of the parties entitled to seats in the cabinet in regard to the composition of the cabinet, and then appoints a Prime Minister and other members of the cabinet. The President allocates portfolios on the basis of proportionality to those parties that choose to participate in the cabinet, after taking into account the views expressed by the leaders with whom consultations have been held.

8.4.2. The appointment of persons to the portfolios allocated to the "minority parties" is made by the President in consultation with the leaders of such parties.

8.4.3. The President is required to terminate the appointment of a Minister from a minority party at the request of the leader of such party, or if there is a vote of no confidence in the Minister by parliament.

8.4.4 Vacancies are filled in accordance with the provision of paragraph 8.4.1.

#### **COMMENT:**

This model vests in the President effective power to compose the cabinet. The President is, however, obliged to accommodate all parties with more than 5% of the seats in the National Assembly who wish to join the cabinet, and to choose members acceptable to the parties to which they belong. Minority parties would be in a position to make demands for particular portfolios if their support is necessary to secure the majorities needed by the President's party to enable it to govern, or as a quid pro quo for the benefit the governing party would derive from having their support. It strengthens the hand of the President and lessens the risk of deadlocks arising over the allocation of portfolios.

#### **8.5 EXAMPLE 3**

This is the same as Example 2, save that the following additional requirements are laid down by the Constitution.

8.5.1 The President in consultation with the Prime Minister formulates the broad terms of the policy that the government will follow.



- 8.5.2 The Prime Minister consults with each of the Ministers in regard to the particular policy to be followed by his or her department, and with the approval of the President, formulates policies for such departments.
- 8.5.3 The approval of Parliament (possibly by a specified majority) to the government's policy must be secured within a prescribed time, failing which the cabinet is dissolved and a new cabinet appointed.
- 8.5.4 A Minister is obliged to comply with the approved policy and can be removed from office by the President if he or she fails to do so, or if a vote of no confidence in such Minister is passed by Parliament (possibly by a specified majority). Vacancies are filled from the same party.

#### COMMENT

This makes the cabinet and its policy directly accountable to Parliament and requires the government and individual Ministers to adopt and implement policies that have the approval of Parliament.

#### 8.6 EXAMPLE 4

- 8.6.1 The President consults with the leaders of the parties entitled to seats in the cabinet in regard to the policy to be pursued by the cabinet, the allocation of portfolios, and the appointments to be made.
- 8.6.2 The President must compose a cabinet committed to a known policy and do so in a way which will secure the participation of parties representing at least a specified majority of the members of the National Assembly.

Alternatively to 8.6.2:

- 8.6.3 The President is obliged to secure the approval of a specified majority of the National Assembly to the proposed policy and the composition of the cabinet. If the necessary support of the National Assembly is obtained, the cabinet is confirmed. If it is not, policy changes which may involve changes in the composition of the cabinet, will have to be made.
- 8.6.4 All parties entitled to seats who are willing to adhere to the proposed policy, and accept the allocation of portfolios made by the President, are entitled to a proportional allocation of portfolios.
- 8.6.5 If at any time the necessary support is lost, the cabinet will be dissolved and the President will have to form a new cabinet which is able to command the necessary support. If the President is unable to do this Parliament will be dissolved and new elections held.

**COMMENT:**

This model seeks to replicate the model of a voluntary coalition by setting a specified majority as a condition for governing. If the President's party is unable to command that majority on its own it has to find coalition partners. It can do this in any way it chooses, though places must always be offered to the parties entitled to cabinet seats for as long as they comply with the policy formulated by the President. This will lead to bargaining which will be reflected in the allocation of portfolios and the policy that the government adopts. Disagreements over policy at any time thereafter can lead to the collapse of the government and possibly to new elections. If the majority party has to secure outside support to enable it to obtain the prescribed majority, its position is weakened, but this does not necessarily lead to paralysis of government. It enables the cabinet to function as coalitions



ordinarily do, and to bargain for the support that is required, without necessarily having to meet the demands of any particular party or parties. It would facilitate decision making in the cabinet which could function in the normal way of coalition cabinets.

## 9. TAKING DECISIONS IN THE CABINET

9.1 Decisions in the cabinet could be taken in various ways depending upon political decisions to be made concerning the relationship between the participants in the cabinet. The possible mechanisms include:

- a) Decisions which have the support of a majority of the cabinet.
- b) Decisions which have the support of a specified majority of the cabinet.
- c) Decisions which are supported unanimously by the cabinet.
- d) Decisions which are supported by particular groups within the cabinet.
- e) A combination of some or all of the above procedures depending upon the nature of the decision that is taken.

9.2 The way in which decisions are to be taken could be prescribed in the Constitution, or could be left to be formulated as part of the policy guidelines accepted by cabinet members when they join the cabinet, or determined by them after the cabinet has been composed.

## 10. DESIGNING MULTI-PARTY GOVERNMENTS

Multi-party government calls for co-operation between parties who enter the government. Inherent in all multi-party governments is the risk, in varying degrees, of weak government, or of the collapse of government and the possibility of new elections. In extreme cases there is even the risk of paralysis of executive government. The securing of a balance which promotes co-operation and avoids a possible paralysis of government, ought to be kept in mind in the debates on the form

of government to be adopted. In this regard, the right, or the obligation to call elections if deadlock persists can not only serve to break deadlocks, but also to put pressure on the parties in the cabinet to reach the compromises needed for effective government.

## **11. A FRAMEWORK FOR EXECUTIVE GOVERNMENT**

We attach to this report a provisional outline of a framework for executive government. The outline is put forward for the purpose of facilitating debate and can be developed in the light of the debate in the Negotiating Council and instructions given to us.

## **12. DECISIONS TO BE TAKEN BY THE NEGOTIATING COUNCIL**

To enable us to finalise the preliminary text dealing with the executive we need instructions from the Negotiating Council on the issues raised in this report.



## ANNEXURE TO THE 11th REPORT (CONSTITUTIONAL ISSUES)

### Head of State

1. The President shall be the Head of State.

### Election of the President

2. (1) The President shall be elected within 15 days of the general election by the Electoral College consisting of all the members of the National Assembly (*and the Senate*) in the manner provided for in Schedule 8.

(2) The Electoral College shall be presided over by the Chief Justice or a judge of appeal designated by him.

(3) No person may be elected as President unless he or she has been elected to the National Assembly.

(4) On being elected, the President shall vacate his or her seat in the National Assembly and the political party to which he or she belongs, shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on such party's election list compiled for the general election, or if there is no such person, by nominating any member of such party.

### Oath or affirmation

3. The President-elect shall, before formally assuming office, make an affirmation or take an oath in the form contained in Schedule 6, which shall be administered by the Chief Justice or a judge designated by the Chief Justice for this purpose.

### Tenure of office

4. The President shall hold office until he or she is removed from office in terms of this Constitution, or until he or she is replaced in terms of the provisions of the new constitutional text contemplated in Chapter 5 of this Constitution.

## **Responsibility of the President**

5. The President shall uphold, protect and defend the Constitution as the supreme law of the land, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government of National Unity, subject to the terms of this Constitution and the laws of the Republic, which he or she is obliged to protect, to administer and to execute.

## **Executive power**

6. The executive power of the Republic regarding all matters falling within the legislative power of Parliament shall vest in the President who shall exercise his or her powers and functions subject to the provisions of this Constitution.

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

7. (1) The President shall be competent to exercise the following powers and functions in his discretion -

- (a) to assent to, sign and promulgate bills duly passed by Parliament;
- (b) in the event of a procedural shortcoming in the legislative process, to refer a bill passed by Parliament back for further consideration by Parliament;
- (c) to convene meetings of the Cabinet, including extraordinary meetings for the resolution of disputes among the members of the Cabinet;
- (d) to refer disputes of a constitutional nature between political parties represented in Parliament or between organs of the State at any level of government to the Constitutional Court or other appropriate institution or body for resolution;
- (e) to make such appointments as he or she may deem fit under powers conferred upon him or her by this Constitution or any law and to exercise such powers and perform such functions as may be conferred upon or assigned to him or her in terms of this Constitution or any other law; and



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

(2) The President shall be competent, after consultation with the Cabinet and subject to the provisions of this Constitution and any other law, to -

(a) confer honours on citizens, residents and friends of the Republic in consultation with interested and relevant persons and institutions;

(b) appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;

(c) negotiate and sign international conventions, treaties and agreements; and

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

#### **Removal from office of the President and filling of the vacancy**

8. (1) The President shall be removed from office if two thirds of all the members of the National Assembly and the Senate, at a joint sitting adopt a resolution impeaching the President on the grounds of a serious violation of the laws of the land or of such gross misconduct or ineptitude as to render him or her unfit to perform his or her functions in accordance with the provisions of section x5.

(2) If the President, resigns, or is removed or ceases to hold office for any reason, the vacant office of President shall be filled in the same manner as the first President was elected.

#### **Executive policy guidelines and directives**

9. (1) *(Provision could here be made for the manner in which the policy guidelines and directives are to be formulated in the light of the debate of the 11th Report.)*

(2) Ministers shall administer their departments in accordance with the policy determined in terms of this section.

(3) If a Minister fails to administer the department for which he or she is responsible in accordance with the policy determined in terms of this section, the President may either require the Minister concerned to bring the administration of such department into conformity with the agreed policy, or, after consultation with the Minister and the leader of his or her Party, dismiss the Minister.

(4) If Parliament is not satisfied with the way in which the government is functioning, or the way in which a Minister administers a department for which he or she is responsible, it may express its disapproval through a vote of no confidence in the government, or in the Minister, as the case may be.

(5) If a vote of no confidence is passed in a Minister the President shall dismiss the Minister.

### **The Cabinet**

10. (1) The Cabinet shall consist of the President (*the Deputy President, the Prime Minister*) and the Ministers appointed by the President in accordance with the provisions hereof.

*((2) The President shall appoint a Prime Minister who shall be responsible for the management of the Cabinet and, in the absence of the President, shall be accountable to Parliament for the policy of the government.)*

(3) A party holding at least 20 seats in the National Assembly shall, subject to *(the details of the model adopted)*, be entitled to be allocated Cabinet portfolios in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other parties represented in the Cabinet.



(4) The President shall consult with the leaders of the parties qualified to hold Cabinet portfolios in terms of subsection (3) regarding the portfolios to be allocated to each party.

(5) The leader of each of the parties qualified to hold Cabinet portfolios in terms of subsection (3), shall designate persons in consultation with the President to be appointed as Ministers.

(6) The President shall terminate the appointment of any Minister if requested to do so by the leader of the Party from which such Minister was chosen.

(7) In the event of a vacancy in the Cabinet, occurring in the manner described in subsection (5), or as a result of the death or resignation of a Minister, the President shall appoint another person from the ranks of the qualifying party on the recommendation of the party leader concerned.

#### **Appointment of Deputy Ministers**

11. The President may after consultation with the relevant Minister, appoint any person to hold office during the President's pleasure as Deputy Minister of any specified Department of State and to exercise or perform on behalf of the Minister any of the powers, functions and duties entrusted to such Minister in terms of any law or otherwise which may, subject to the directions of the President and Cabinet be assigned to him or her from time to time by such Minister.

#### **Ministerial accountability**

12. (1) All ministers shall be accountable individually for the administration of the departments allocated to them, and collectively for the administration of the work of the Cabinet both to the State President and to the National Assembly.

(2) During their tenure of office, Ministers may not take up any other paid employment, engage in activities inconsistent with their position as Ministers, or expose themselves to any situation which carries with it the risk of a conflict developing between their interest as Ministers and their private interests.

(3) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the Cabinet, directly or indirectly to enrich themselves or their families.

#### **Decision making process in the Cabinet**

13. (1) Meetings of the Cabinet shall be chaired by the President, or in his or her absence, by the Deputy President.

(2) Decisions of the Cabinet will, in so far as it is attainable, be taken by consensus, in the absence of which, and if any Minister requests a vote, by a (*specified*) majority of the Ministers present and voting.

(3) In the event of a (*the specified*) majority not being achieved in the Cabinet regarding the national budget, financial matters and national security, an absolute majority of the total number of Ministers shall be sufficient, provided that both the President and the Deputy President are in favour of such decision.

*(It may be necessary to develop further deadlock-breaking mechanisms.)*

#### **Rights and duties of President, the Deputy President and Ministers in Parliament**

14. (1) The President, Deputy President (*and a Minister*) shall be entitled to sit and to speak in the National Assembly and the Senate, and in a joint session of both Houses, but may not vote.

(2) The National Assembly and the Senate may by resolution summon the President, the Deputy President (*and any Minister*) to attend any session of such House and require him or her to reply to questions in the House.



# **CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1993**

*(Draft Outline: 20 August 1993)*

## **PREAMBLE**

**WHEREAS** there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races;

**AND WHEREAS** in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

**AND WHEREAS** it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;

**NOW THEREFORE** the following provisions are adopted as the Constitution of the Republic of South Africa:

## **CHAPTER 1**

### **Formal and Constituent Provisions**

#### **The New Republic of South Africa**

1. (1) The Republic of South Africa shall be one sovereign state.
- (2) The national territory shall consist of all the territory defined in Schedule 1.

[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

### **National symbols**

2. (1) The design of the national flag of South Africa shall be as set out in Schedule 2.
- (2) The national anthem of South Africa shall be .....
- (3) The national coat of arms of South Africa shall be in accordance with the description set out in Schedule 3.
- (4) The national seal of South Africa shall be in accordance with the description set out in Schedule 4.

### **Languages**

3. *[The text of this provision will be formulated after the committee of the MPNP has reported.]*

### **The supremacy of the Constitution**

4. (1) This Constitution shall be the supreme law of the land and any law inconsistent with its provisions shall, to the extent of its inconsistency, be of no force or effect.
- (2) The provisions of this Constitution binds all the legislative, executive and judicial organs of the state at all levels of government.

## **CHAPTER 2**

### **Citizenship and the Franchise**

#### **Citizenship**

5. (1) Every person who is a South African citizen in terms of legislation applicable on the date of the coming into operation of this Constitution, shall retain such citizenship.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

(2) The acquisition, loss and restoration of South African citizenship shall be regulated by Act of Parliament.

(3) A South African citizen shall not be deprived of his or her citizenship other than as provided for by Act of Parliament.

### **The franchise**

6. Every person who at the time of an election is -

- (a) a South African citizen;
- (b) of or over the age of 18 years; and
- (c) not subject to any of the disqualifications set out in the *Electoral Act*, 1993,

shall, subject to the provisions of the *Electoral Act*, 1993, be entitled to vote in an[y] election for members of the National Assembly, the Legislatures of the SPRs and local governments.

## **CHAPTER 3**

### **Fundamental Rights**

*[The wording has been taken from the Seventh Report of the Technical Committee on Fundamental Rights during the Transition, which is still under discussion in the Negotiating Council.]*

### **Application**

7. (1) The provisions of this Chapter shall -

- (a) bind the legislative, executive and, where appropriate, the judicial branches of government at all levels as well as all statutory bodies and functionaries;

[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

- (b) bind, where just and equitable, other bodies and persons; and
- (c) be enforced by the designated authority.

(2) In the case of an infringement of any provision of this Chapter, the designated authority may, where appropriate, put any body or person referred to in subsection (1)(a) or (b) on terms as to how and within what period such infringement should be remedied.

(3) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken during the period of operation of this Chapter.

(4) All juristic persons shall be entitled to the rights contained in this Chapter to the extent that the nature of these rights permit.

- (5) (a) Every person who alleges that his or her rights or every association which alleges that its members' rights entrenched in this Chapter, have been infringed or are threatened, shall be entitled to apply to a competent **[designated authority]** court for appropriate relief, which may include a declaration of rights.

- (b) Nothing in this subsection shall prevent a person from applying for relief on behalf of a group or class of persons whose rights entrenched in this Chapter are alleged to have been infringed or are threatened.

## Equality

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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(3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.

(4) In any action in which unfair discrimination is alleged, *prima facie* proof of such discrimination shall be sufficient to bring it within the class of conduct contemplated in subsection (2), until the contrary is established.

## **Life**

9. Every person shall have the right to life.

## **Human Dignity**

10. Every person shall have the right to respect for and protection of his or her dignity.

## **Freedom and Security of the Person**

11. (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

## **Servitude and Forced Labour**

12. No person shall be subject to servitude or forced labour.

## **Privacy**

13. Every person shall have the right to his or her personal privacy and not to be subject to searches of his or her person, home or property, seizure of private possessions or the violation of private communications.

[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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### **Religion and Belief**

14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by the appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance thereat is free and voluntary.

### **Freedom of Expression**

15. Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

### **Assembly, Demonstration and Petition**

16. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

### **Freedom of Association**

17. (1) Every person shall have the right to freedom of association.

(2) Without derogating from the generality of the provisions of section 8(2), nothing in this section shall permit discrimination on the ground of race.

### **Freedom of Movement**

18. Every person shall have the right to freedom of movement anywhere within South Africa.

### **Residence**

19. Every person shall have the right freely to choose his or her place of residence anywhere in South Africa.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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### **Citizen's Rights**

20. Every citizen shall have the right to enter, remain in and leave South Africa, and no citizen shall be deprived of his or her citizenship.

### **Political Rights**

21. (1) Every person shall have the right -

- (a) to form, to participate in the activities of and to recruit members for a political party;
- (b) to campaign for a political party or cause; and
- (c) freely to make political choices.

(2) Every citizen of voting age shall have the right to vote in secret and to stand for election to public office.

### **Access to Court**

22. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

### **Access to Information**

23. Every person shall have the right of access to all information necessary for the protection or exercise of his or her rights.

### **Administrative Decisions**

24. (1) Every person shall have the right to lawful and procedurally fair administrative decisions.

[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

(2) Every person shall have the right to be furnished with reasons in writing for an administrative decision which affects his or her rights or interests.

### **Detained, Arrested and Accused Persons**

25. (1) Every person who is detained, including every sentenced prisoner, shall have the right -

- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
- (b) to be detained under conditions consonant with human dignity, including at least the provision of adequate nutrition, reading material and medical treatment at State expense;
- (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State; and
- (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse, next-of-kin, religious counsellor and a medical practitioner of his or her choice.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -

- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- (b) to be brought before an ordinary court of law as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released; and



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

- (c) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
  - (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;
  - (b) to be informed with sufficient particularity of the charge;
  - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
  - (d) to adduce and challenge evidence;
  - (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so demand, to be provided with legal representation at State expense, and to be informed of these rights;
  - (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
  - (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
  - (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
  - (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
  - (j) to be sentenced within a reasonable time after conviction.

[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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## **Eviction**

26. No person shall be removed from his or her home, except by order of a court of law after taking into account all relevant factors, which may include the availability of appropriate alternative accommodation and the lawfulness of the occupation.

## **Economic Activity**

27. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.

(2) Nothing in this section shall preclude legislation aimed at the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such legislation is justifiable in a free, open and democratic society based on the principle of equality.

## **Labour Relations**

28. (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(2) Workers and employers shall have the right to organise and bargain collectively.

(3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

## **Property**

29. (1) Every person shall have the right to acquire, hold and dispose of rights in property.

(2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

(3) Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

### **Environment**

30. Every person shall have the right to an environment which is safe and not detrimental to his or her health or well-being.

### **Children**

31. Every child shall have the right to security, basic nutrition and basic health services and not to be subject to neglect, abuse or child labour.

### **Language and Culture**

32. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

### **Education**

33. Every person shall have the right -

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race or colour.

### Limitation

34. (1) The rights entrenched in this Chapter may be limited by a law applying generally and not solely to an individual case, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable; and

(ii) justifiable in a free, open and democratic society based on the principle of equality; and

(b) shall not negate the essential content of the right in question.

(2) Notwithstanding the provisions of this Chapter, a law in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by **[the legislature]** Parliament.

### Suspension

35. (1) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency proclaimed prospectively under an Act of **[the legislature]** Parliament and only to the extent demanded by the situation.

(2) Any such suspension shall comply with the following requirements:

(a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is necessary to restore peace or order.

(b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to be valid in law unless the declaration is ratified by a majority of



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the total number of the directly elected members of **[the legislature]** Parliament within fourteen days of the declaration.

(c) No state of emergency shall endure for longer than six months provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in paragraph (b).

(d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and any action, whether a regulation or otherwise, taken under such declaration.

(3) Neither the enabling legislation which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -

(a) the creation of retrospective crimes;

(b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency; or

(c) the suspension of this section.

(4) Any person detained under a state of emergency shall have at least the following rights:

(a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;

(b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the *Government Gazette* within five days of their detention;

(c) the detention of a detainee shall, as soon as is reasonably possible but not later than ten days after his or her detention, be reviewed by a court of law, which may order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review;

- (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
- (e) a detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
- (f) a detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
- (g) if detained for longer than ten days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of a period of ten days from the date of determination of the review procedure provided for in paragraph (c).

(5) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such re-detention.

## Interpretation

36. (1) In interpreting the provisions of this Chapter the designated authority shall promote the values which underlie a free, open and democratic society based on the principle of equality.

(2) Save as provided for in this Chapter, no rule of the common law, custom or legislation shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights included in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised and conferred by common law, custom or legislation.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

(4) A law limiting a right entrenched in this Chapter shall be presumed constitutionally valid until the contrary is proved: Provided that a law limiting -

(a) a right entrenched in section 21; or

(b) a right entrenched in sections 15, 16, 17, 18, 23 or 24, insofar as such right relates to the expression of free and fair political activity,

shall be strictly construed for constitutional validity.

(5) No law existing at the commencement of this Chapter which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the permissible limits imposed in this Chapter, provided such a law is capable of a more restricted interpretation which does not exceed such limits, in which event such a law shall be construed as having the said more restricted meaning.

#### Duration

37. This Chapter shall be of full force and effect until a Bill of Rights duly enacted by the [elected constitution-making body] Constitutional Assembly has come into effect.

### CHAPTER 4

#### The Legislature

#### Legislative authority

38. [(1)] The legislative authority of the Republic shall, subject to the provisions of this Constitution, be vested in the Parliament of the Republic, which shall consist of the National Assembly and the Senate and shall have the power to make laws for the Republic.

[(2) Parliament shall be competent to delegate by law any matter within its powers to the legislature of an SPR or of a local government.]



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

### **Duration of Parliament**

39. (1) Parliament shall continue until it is dissolved under Chapter 5 or until a new Parliament is constituted in terms of the new constitutional text adopted in accordance with the provisions of Chapter 5, or until it is dissolved as a result of a vote of no-confidence in the national executive.

(2) If Parliament is dissolved in terms of Chapter 5 or in terms of subsection (1), an election for a new Parliament shall be called by the President, and such election shall take place within 90 days from the date of such dissolution.

(3) Notwithstanding the dissolution of Parliament in terms of **[Chapter 5]** this Constitution, every person who at the date of the dissolution is a member of the National Assembly or the Senate shall remain a member thereof and the National Assembly and the Senate shall remain competent to perform their functions until a new National Assembly and a new Senate have been elected.

(4) The President shall have the power to summon the National Assembly and the Senate for the conduct of urgent and necessary business during the period following the dissolution under Chapter 5, until a new National Assembly and Senate have been elected.

### **Composition of the National Assembly**

40. (1) The National Assembly shall consist of 400 members elected according to a system of proportional representation, of whom 200 shall be elected on national and 200 on SPR party lists as provided for in Schedule 5.

(2) Persons who are nominated as candidates on SPR party lists shall be ordinarily resident in the SPR in respect of which the party list applies.

### **Speaker and Deputy Speaker of the National Assembly**

41. (1) At its first sitting, and before proceeding to despatch any other business, the newly elected National Assembly, with the Chief Justice or a judge designated by



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him or her acting as Chairperson, shall elect one of its members to be the Speaker, who shall be vested with all powers, duties and functions assigned to him or her in terms of this Constitution and by the rules and orders of the National Assembly.

(2) The National Assembly shall thereafter elect a Deputy Speaker from amongst its members, and the Deputy Speaker shall act as Speaker whenever the Speaker is not available, and for that purpose shall have all the powers vested in the Speaker.

(3) The Speaker, or in his or her absence the Deputy Speaker, shall preside over meetings of the National Assembly.

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

(5) If the office of Speaker or Deputy Speaker becomes vacant, the National Assembly shall in like manner elect a member to fill the vacancy.

(6) Where neither the Speaker nor the Deputy Speaker is available, the National Assembly, with the Secretary of Parliament acting as Chairperson, shall elect a member to act as Speaker during such absence.

(7) The Speaker or the Deputy Speaker or the acting Speaker presiding at a meeting of the National Assembly shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

### **Qualification of Members of the National Assembly**

42. (1) No person may **[be nominated or]** become a member of the National Assembly if he or she -

(a) at the date of such nomination or election is serving a sentence of imprisonment of more than twelve months without the option of a fine; or



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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- (b) at any time after the adoption of this Constitution, is convicted of an offence in South Africa or outside of South Africa if such conduct would have constituted an offence within South Africa, and for which he or she has been sentenced to imprisonment of more than 12 months without the option of a fine, unless he or she has received a pardon; or
- (c) is an unrehabilitated insolvent; or
- (d) is unsound mind and has been so declared by a competent court; or
- (e) **[is a remunerated employee of any public service within the Republic]** holds any office of profit under the Republic: provided that the following persons shall be deemed not to hold an office of profit for the purposes of this paragraph:
  - (i) a Minister or Deputy Minister;
  - (ii) a person in receipt of a pension paid from the national revenue fund or the revenue fund of an SPR;
  - (iii) a part-time or pensioned member of an existing or dissolved South African security force, or a member of such force;
  - (iv) a lawfully appointed justice of the peace or appraiser;
  - (v) a member of any council, board, committee, commission of enquiry or similar body established under law or a select committee of the National Assembly, who receives remuneration not in excess of an amount equal to his or her salary as a member of the National Assembly.

(2) For the purposes of subsection (1) no person shall be considered as having been convicted by any Court until any appeal which might have been noted against the conviction or sentence has been determined, or the time for noting an appeal against such conviction or sentence has expired.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

### Vacation of Seats

43. (1) A member of the National Assembly shall vacate his or her seat if he or she:

- (a) ceases to be eligible for membership of the National Assembly; or
- (b) ceases to be a member of the political party which nominated him or her to sit in the National Assembly; or
- (c) resigns his or her seat in writing addressed to the Speaker; or
- (d) absent himself or herself voluntarily from the National Assembly for 15 [30] consecutive sitting days, without having obtained leave in the manner and on grounds specified in the rules and standing orders of the National Assembly; or
- (e) becomes a member of the Senate, an SPR Legislature or of a local government.

(2) If a seat of a member of the National Assembly is vacated in terms of subsection (1), the party which nominated such member to sit in the National Assembly shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on the party's election list compiled for the previous general election who is eligible and available to become a member of the National Assembly, or if there is no such person, by nominating any member of the party.

(3) If the vacancy occurs in respect of a person who was elected from a national list, it shall be filled from the national list, and if the vacancy occurs in respect of a person who was elected from an SPR list, it shall be filled from the SPR list, by a person ordinarily resident in such SPR.

### Quorum

44. The presence of at least one third of the members of the National Assembly, other than the Speaker or the presiding member, shall be necessary to constitute a meeting of

[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

the National Assembly for the exercise of its powers and for the performance of its functions.

### **Oath or Affirmation by Members of the National Assembly**

45. Every member of the National Assembly shall, before taking his or her seat, make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge designated by the Chief Justice for this purpose.

### **Sessions of the National Assembly**

46. (1) The National Assembly shall sit:

- (a) at the Houses of Parliament in Cape Town, unless the Speaker, in accordance with the rules and orders of the National Assembly, directs otherwise on the grounds of public interest, security or convenience;
- (b) in a session convened by the Chief Justice to be held as soon as reasonably possible after the election of the National Assembly and not later than 10 days after such election, and such session shall terminate on such date as the National Assembly may determine by resolution;
- (c) in ordinary session on such dates as the National Assembly may determine by resolution, and such session shall terminate on such date as the National Assembly may determine by resolution;
- (d) in such special sessions as may be directed by proclamation in the *Government Gazette* by the President from time to time.

(2) During such sessions the National Assembly shall sit on such days and during such times of the day or night as its rules and standing orders may provide.

(3) The President may alter the date of commencement of any session directed in terms of subsections (1)(c) or (1)(d) if he or she is requested to do so by the Speaker on the grounds of public interest or convenience.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

(4) There shall be a session of the National Assembly at least once in every year, so that a period of 13 months shall not intervene between the commencement of the one session and the commencement of the next session.

### **Composition of the Senate**

47. (1) The Senate shall be composed of ten members from each SPR, elected by the members of the SPR legislature of each SPR within 10 days of the commencement of the first session after its election.

(2) Candidates for the election of the Senate shall be nominated by a party represented in the SPR legislature and the election shall be conducted according to the principle of proportional representation[, **each voter having a single transferable vote,**] as **[set out in Schedule 5]** provided for in the Electoral Act, 1993.

(3) Any member of an SPR legislature elected in terms of subsection (2) to the Senate, shall vacate his or her seat in the SPR legislature.

### **President and Deputy President of the Senate**

48. (1) At its first sitting, and before proceeding to despatch any other business, the newly elected Senate, with the Chief Justice or a judge designated by him or her acting as Chairperson, shall elect one of its members to be the President of the Senate, who shall be vested with all powers, duties and functions assigned to him or her in terms of this Constitution and by the rules and orders of the Senate.

(2) The Senate shall thereafter elect a Deputy President of the Senate from amongst its members, and the Deputy President of the Senate shall act as President of the Senate whenever the President of the Senate is not available, and for that purpose shall have all the powers vested in the President of the Senate.

(3) The President of the Senate, or in his or her absence the Deputy President of the Senate, shall preside **[at]** over meetings of the Senate and at joint sessions of the National Assembly and the Senate.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

[(3) In the absence of the President of the Senate, a person shall be elected by Senators from amongst their number to preside at their meetings during such absence.]

(4) The President of the Senate or Deputy President of the Senate shall vacate his or her office if he or she ceases to be a member of the Senate, may be removed from office by a resolution of the Senate, and may resign by lodging his or her resignation in writing with the Secretary of Parliament.

(5) If the office of President of the Senate or Deputy President of the Senate becomes vacant, the Senate shall in like manner elect a member to fill the vacancy.

(6) Where neither the President of the Senate nor the Deputy President of the Senate is available, the Senate, with the Secretary of Parliament acting as Chairperson, shall elect a member to act as President of the Senate during such absence.

[6](7) The President of the Senate or the Deputy President of the Senate [or the person] or the acting President of the Senate presiding at a meeting of the Senate shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

49. *[To be filled when the text is finally edited]*

### **Qualification of members of the Senate**

50. Persons shall be qualified to be Senators under this Constitution if they are qualified to stand for election as members of the SPR legislature by whom they are elected.

### **Quorum**

51. The presence of at least one third of the number of senators other than the President of the Senate or the presiding senator shall be necessary to constitute a meeting of the Senate for the exercise of its powers and for the performance of its functions.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

### Oath or affirmation by Senators

52. Every Senator, before taking his or her seat, shall make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge designated by the Chief Justice for this purpose.

### Vacation of Seats by Senators

53. (1) A senator shall vacate his or her seat if he or she:
- (a) ceases to qualify [**be eligible**] for membership of the Senate; or
  - (b) resigns his or her seat in writing addressed to the President of the Senate; or
  - (c) absent himself or herself voluntarily from the Senate for 30 consecutive sitting days, without having obtained the leave of the Senate on grounds specified in its rules and standing orders; or
  - (d) becomes a member of the National Assembly, an SPR legislature or a local government.
- (2) If a seat of a member of the Senate is vacated in terms of subsection (1), the political party which nominated that Senator shall nominate a person to fill the vacancy.

### Sessions of the Senate

54. (1) The Senate shall sit:
- (a) at the Houses of Parliament in Cape Town, unless the President of the Senate, in accordance with the rules and orders of the Senate, directs otherwise on the grounds of public interest, security or convenience;

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- (b) in a session convened by the Chief Justice to be held as soon as reasonably possible after the election of the Senate and not later than 10 days after such election, and such session shall terminate on such date as the Senate may determine by resolution;
  - (c) in ordinary session on such dates as the Senate may determine by resolution, and such session shall terminate on such date as the Senate may determine by resolution;
  - (d) in such special sessions as may be directed by proclamation in the *Government Gazette* by the President from time to time.
- (2) During such sessions the Senate shall sit on such days and during such times of the day or night as its rules and standing orders may provide.
- (3) The President may alter the date of commencement of any session directed in terms of subsections (1)(c) or (1)(d) if he or she is requested to do so by the President of the Senate on the grounds of public interest or convenience.
- (4) There shall be a session of the Senate at least once in every year, so that a period of 13 months shall not intervene between the commencement of the one session and the commencement of the next session.

### **Privileges and immunities of members of Parliament**

55. (1) Notwithstanding the provisions of any other law, no member of Parliament shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of any matter or thing which he or she has brought by petition, bill, motion or otherwise or may have said before or in any meeting of Parliament or any committee thereof.

(2) Provision for other privileges and immunities of members of Parliament may be made by Act of Parliament.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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## **Public access to Parliament**

56. All sessions of the National Assembly and the Senate shall be held in public and members of the public and the media shall have access to such meetings: provided that reasonable measures may be instituted to regulate such access, and to search, and where appropriate, to refuse entry to persons.

## ***Parliamentary procedure***

### **Rules and orders and committees**

57. (1) The National Assembly and the Senate may each make rules of procedure for the conduct of its business and proceedings and may also make rules for the establishing, functioning and procedures of committees, and formulate standing orders, including restrictions on access to such committees.

(2) For the purposes of exercising its powers and performing its functions any committee of the National Assembly or Senate established in terms of subsection (1) shall have the power to *subpoena* persons to appear before it to give evidence on oath and to produce any documents required by it, and to receive representations from interested parties.

(3) The National Assembly and the Senate may jointly make rules and orders concerning the order and conduct of their joint proceedings, including all matters referred to in subsections (1) and (2).

(4) Parliament may institute standing committees representative of all parties in the National Assembly and the Senate, in order to resolve possible disagreements between the Houses and to make joint reports.

### **Ordinary legislation**

58. (1) All laws, except laws relating to finance, specified SPR matters, and the amendment of this Constitution, shall be considered to be ordinary legislation.



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(2) Ordinary legislation may be introduced in either the National Assembly or the Senate and shall be passed by each House.

(3) Ordinary legislation passed by one House and rejected by the other shall be referred to a joint committee consisting of members of all parties represented in Parliament to report on proposed amendments to the bill, whereafter the bill shall be referred to a joint sitting of both Houses at which it may be adopted with or without amendment by a majority of the total number of members of both Houses of Parliament.

### Finance Bills

59. (1) Bills appropriating revenue or moneys or imposing taxation shall be introduced only in the National Assembly and after they have been considered and reported on by a joint committee of both Houses and, in so far as it may be required in terms of this Constitution, by the Financial and Fiscal Commission.

(2) A bill shall not be deemed to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(3) The Senate may not amend any bills in so far as they impose taxation or appropriate revenue or moneys.

(4) If the National Assembly in any session passes a bill imposing taxation only or dealing with the appropriation of revenue or moneys, and the Senate in the same session rejects or fails to pass it within 30 days after it has been passed by the National Assembly, the bill shall be reconsidered by the National Assembly.

(5) The National Assembly may adopt a bill referred to in terms of subsection (4), with or without amendment, and if adopted it may thereafter be presented to the President for his or her assent, and shall as soon as it has been assented to by the President become an Act of Parliament as if it had been approved by the Senate.



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### **Bills concerning specified SPR matters**

60. (1) Bills affecting SPR boundaries or the exercise of powers and functions allocated to SPR governments under Chapter 9 of this Constitution shall be approved both by the National Assembly and the Senate.

(2) A bill which affects the exercise of powers or functions of a particular SPR only, shall also be approved by a majority of the Senators of that particular SPR.

### **Amendment of the Constitution**

61. (1) Save for the provisions of subsection (2) and of Chapter 5, an amendment to this Constitution shall be passed by a two thirds majority of the total number of members of the National Assembly and the Senate sitting in joint session.

(2) No amendment of this Constitution shall be permissible in so far as it is designed to detract, directly or indirectly, from the essence of the Constitutional Principles contained in Schedule 7.

### **Requisite Majorities**

62. Save as provided in this Constitution, a majority of votes cast shall be sufficient for the passing of any Bill, or the taking of any decision or resolution by the National Assembly or the Senate.

### **Assent to Bills**

63. A Bill duly passed by the National Assembly, and where required by this Constitution, by the Senate, shall require the assent of the President, to be signified by the signing of the Bill, and the publication of the Act in the *Government Gazette*, in order to acquire the status of a valid Act of Parliament.

### **Signature and Enrolments Acts**

64. (1) Any valid Act of Parliament which has been duly passed by Parliament, signed by the President, and published in the *Government Gazette* shall be lodged in the

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office of the Registrar of the Appellate Division of the Supreme Court and such copy shall be conclusive evidence of the provisions of the Act.

(2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

*Provision should further be made for the resolution of conflicts between texts in different official languages*

## CHAPTER 5

### The Adoption of the new Constitution

#### The Constitution-making Body

65. (1) The National Assembly and the Senate, sitting in joint session, shall be the Constitutional Assembly.

(2) The Constitutional Assembly shall adopt a new constitutional text in accordance with the provisions and procedures of this Chapter.

(3) The first meeting of the Constitutional Assembly shall be convened by the President of the Senate not later than seven days after the first sittings of the National Assembly and the Senate have been held.

(4) At its first sitting, and before proceeding to dispatch any other business, the Constitutional Assembly shall elect one of its members to preside at its meetings and a deputy to preside in his or her absence.

(5) In the absence of the President of the Constitutional Assembly or his or her deputy, a person elected by the Constitutional Assembly for such purpose shall preside for as long as such absence continues.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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(6) The Constitutional Assembly may make rules of procedure for the conduct of its business and proceedings, and also make rules for the establishing, functioning and procedures of committees and formulate such standing orders, including restrictions on access to such committees as may appear to it to be expedient or necessary, having regard to the business of such committees.

### **Constitutional Principles**

66. (1) In undertaking its task of drafting a new constitutional text, the Constitutional Assembly shall comply with the Constitutional Principles contained in Schedule 7.

(2) During the course of the drafting of the new constitutional text, any constitutional proposal pertaining to such drafting shall be referred to the Constitutional Court by the Chairperson after being petitioned by one third of the members of the Constitutional Assembly to do so, in order to obtain an opinion from the Court as to whether such proposal, if adopted, would comply with the Constitutional Principles.

(3) A new constitutional text, or any separate part thereof, shall not come into operation unless the Constitutional Court certifies that all its provisions comply with the Constitutional Principles.

(4) A decision of the Constitutional Court in terms of subsections (2) and (3) shall be final and binding and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of any constitutional provision which has been certified by the Constitutional Court in terms of subsection (3).

### **Appointment of commissions, committees and advisory bodies**

67. (1) The Constitutional Assembly shall have the power to appoint its own commissions, technical and parliamentary committees and other advisory bodies to assist it in its task.

(2) The Constitutional Assembly shall, with the concurrence of at least two thirds of all its members, appoint an independent panel of five **[persons]** South African



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citizens being recognised constitutional experts not being members of any legislature and not holding office in any political party, to advise it and the Chairperson on constitutional matters and to perform such other tasks as are provided for in this Constitution.

(3) If the Constitutional Assembly fails to reach agreement upon the panel of constitutional experts in accordance with the requirements of subsection (2), a panel with the qualifications referred to in subsection (2) shall be appointed consisting of a nominee of each party holding at least 40 seats in the Constitutional Assembly.

### **Adoption of a new constitutional text**

68. (1) A new constitutional text shall be adopted by the Constitutional Assembly within two years from the commencement of the first session of Parliament.

(2) A new constitutional text shall be approved by two thirds of all the members of the Constitutional Assembly.

(3) Should the Constitutional Assembly fail to adopt a new constitutional text by the required two thirds majority, but a draft of the new constitutional text is supported by a majority of its members, such draft shall be referred to the panel of constitutional experts by the Chairperson for its advice, to be given within 30 days of such referral, on amendments within the framework of the Constitutional Principles which might secure a majority necessary for the approval of the constitutional text.

(4) Should a draft prepared in accordance with the unanimous advice of the panel of constitutional experts in terms of subsection (3) not be submitted to the Constitutional Assembly within 30 days, or, should such draft, after being so submitted, not be supported by the required two-thirds majority in the Constitutional Assembly, a constitutional text may be accepted by a majority of the members of the Constitutional Assembly.

(5) The President shall refer a constitutional text accepted in terms of subsection (4) after it has been certified by the Constitutional Court to be in compliance with the Constitutional Principles set out in Schedule 7, to a national referendum.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

(6) The question put before the electorate in the referendum shall be the acceptance or rejection of such draft constitutional text.

(7) The constitutional text presented to the electorate in the referendum shall, if approved by a majority of sixty per cent of the votes cast in the referendum, become the Constitution of South Africa.

(8) If the new constitutional text is not approved in the referendum contemplated in subsection (7), or if a new constitutional text is not adopted in terms of this Constitution within two years, Parliament shall be dissolved by the President and a general election shall be held for a new Parliament in accordance with the provisions of this Constitution.

(9) A Constitutional Assembly, composed of the newly elected National Assembly, and the Senate, shall within a period of one year after its first session, approve and pass the new constitutional text by an ordinary majority.

(10) The newly elected Parliament shall be convened in accordance with the provisions of sections 46(1) and 54(1), and shall conduct its proceedings in accordance with the provisions of this Constitution other than the provisions of subsections (1) to (8) hereof.

### **Amendment of this Chapter**

69. (1) No amendments to the provisions of this Chapter shall be permitted in so far as they relate to -

(a) the Constitutional Principles set out in Schedule 7;

(b) the requirement that the new constitutional text or texts shall comply with the Constitutional Principles, and that such text or texts shall be certified by the Constitutional Court as being in compliance therewith.

(2) All other provisions of Chapter 5 shall be capable of being amended by a two thirds majority of the total number of members of the Constitutional Assembly.

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## CHAPTER 6

### The Executive Power

[Sections 70 - 86]

## CHAPTER 7

### The Judicial Power

[Sections 86 - 91]

## CHAPTER 8

### The Ombudsman and the Human Rights Commission

[Sections 92 - 99]

## CHAPTER 9

### SPRs

#### Establishment of SPRs

100. The SPRs of South Africa shall be ... LISTED BY NAME ..., the boundaries of which are defined in Schedule 1.

#### SPR legislatures

101. (1) There shall be a legislature for each SPR with the power to make laws in accordance with and subject to the provisions of this Constitution.

(2) Laws made by an SPR legislature shall, subject to exceptions provided for by Act of Parliament, be applicable only within the territory of the SPR.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

~~[(2)]~~(3) The legislature of each SPR shall consist of the members elected at the time of the election of Parliament according to a system of proportional representation on SPR party lists as provided for in Schedule 5.

~~[(3)]~~(4) The number of seats in an SPR legislature shall be determined by dividing the total number of votes cast in the SPR in the election held in terms of subsection (2) by 50 000, approximated to the nearest complement: provided that no SPR legislature shall have less than 30 nor more than 100 seats.

### Sessions of SPR Legislatures

102. (1) An SPR legislature shall sit:

- (a) At a place fixed by the Provisional Secretary of such SPR appointed by the Transitional Executive Council under the provisions of the *Transitional Executive Council Act*, 1993, unless and until the legislature of the SPR directs that the sessions shall be held at a different place;
- (b) In a session convened and presided over by the Provisional Secretary referred to in subparagraph (a) and commencing as soon as reasonably possible after the election of the SPR legislature, but not later than 7 days after such election, and such session shall terminate on such date as the SPR legislature may determine;
- (c) In such special sessions as may be directed by proclamation by the Premier from time to time.

(2) During such sessions the SPR legislature shall sit on such days and during such times of the day or night as it by its rules and standing orders may provide.

(3) The Premier may alter the date of commencement of any session directed in terms of subsection (1)(c) if he or she considers it desirable to do so on the grounds of public interest or convenience.

### **Qualifications for Election to SPR Legislatures**

103. No person shall be qualified to be a member of an SPR legislature unless he or she:

- (a) is ordinarily resident within the boundaries of the SPR; and
- (b) is qualified to stand for election as a member of the National Assembly.

### **Vacation of Seats by Members of SPR Legislatures**

104. (1) A member of an SPR legislature shall vacate his or her seat if he or she -

- (a) ceases to be eligible to be a member of the SPR legislature; or
- (b) ceases to be a member of the party which nominated him or her for election to the SPR legislature; or
- (c) resigns his or her seat in writing addressed to the Premier of the SPR; or
- (d) absent himself or herself voluntarily from the SPR legislature for 30 consecutive sitting days, without having obtained the leave of the SPR legislature on grounds specified in its rules and standing orders.

(2) If a seat of a member of an SPR legislature is vacated in terms of subsection (1), the party which nominated such member to sit in the SPR legislature shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on the party's election list compiled for the previous SPR election, or if there is no such person, by nominating any member of the party.

### **Quorum of meetings of SPR legislature**

105. The presence of at least one third of the number of members of the SPR legislature other than the Chairperson or the presiding member thereof shall be necessary



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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to constitute a meeting of the SPR legislature for the exercise of its powers and for the performance of its functions.

### **Requisite Majorities**

106. (1) Save as provided in this Constitution, a majority of votes cast shall be sufficient for the passing of any Bill, or the taking of any decision or resolution by an SPR legislature.

(2) The Chairperson of the SPR legislature or the person presiding at a meeting of the SPR legislature shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

### **Rules and orders and committees**

107. (1) An SPR legislature may make rules of procedure for the conduct of its business and proceedings and may also make rules for the establishing, functioning and procedures of committees, and formulate standing orders, including restrictions on access to such committees.

(2) For the purposes of exercising its powers and performing its functions any committee of an SPR legislature established in terms of subsection (1) shall have the power to *subpoena* persons to appear before it to give evidence on oath and to produce any documents required by it, and to receive representations from interested parties.

### **Privileges and immunities of SPR legislatures**

108. (1) Notwithstanding the provisions of any other law, no member of an SPR legislature shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of any matter or thing which he or she has brought by petition, bill, motion or otherwise or may have said before or in any meeting of the SPR legislature or any committee thereof.

(2) Provision for other privileges and immunities of members of SPR legislatures may be made by Act of Parliament.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

### Signature and Enrolment of SPR Legislation

109. (1) Any valid Act of an SPR legislature which has been duly passed by such legislature, signed by the Premier, and published in the *SPR Gazette* shall be lodged in the office of the Registrar of the Appellate Division of the Supreme Court and such copy shall be conclusive evidence of the provisions of the Act.

(2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

### Public access to SPR legislature

110. All sessions of an SPR legislature shall be held in public and members of the public and the media shall have access to such meetings: provided that reasonable measures may be instituted to regulate such access, and to search, and where appropriate, to refuse entry to persons.

### Assent to Bills passed by the SPR legislatures

111. A Bill passed by an SPR legislature in terms of this Constitution shall require the assent of the Premier **[and a member of the SPR executive]** to be signified by his or her signature attached to [the signing of] the bill, and the publication of the Act in the *SPR Gazette* in order to acquire the status of a valid SPR Act.

### Duration of the SPR legislature

112. (1) The SPR legislature shall continue until Parliament is dissolved under Chapter 5.

(2) Notwithstanding the dissolution of an SPR legislature, every person who at the date of dissolution is a member of the SPR legislature shall remain a member thereof, the SPR legislature shall remain competent to perform its functions until a legislature replacing it is duly constituted, and the Premier shall be competent to summon it for the dispatch of business.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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### **SPR executives**

*[To be revisited when Chapter 6 has been completed.]*

113. (1) **[The executive of an SPR shall be elected by the SPR legislature according to the principle of proportional representation, each voter having one transferable vote, and shall consist of ten members.]**

(2) **[The executive of an SPR shall from among its own number elect a Premier.]**

(3) Each member of the executive shall be responsible for the administration of one or more of the departments of the SPR to be established by the Premier.

(4) **[The Premier shall determine how responsibility for the administration of departments shall be allocated to members of the executive.]**

(5) Every member of an SPR executive shall make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge designated by the Chief Justice for this purpose.

(6) T**[here shall be paid to t]he Premier[s]**, members of an SPR executive and legislature shall be paid out of and as a charge on the SPR Revenue Fund such salary and allowances and pensions, as may be determined from time to time by resolutions of the SPR legislature.

(7) After consultation with the Commission on SPR Government an SPR executive shall appoint a Secretary of the SPR legislature and other officers of the SPR Legislature.

### **Functioning of SPR executives**

114 to 117. *[The details of the functioning of SPR executives will be dealt with in conjunction with Chapter 6.]*

### Areas of competence of SPR Governments

118. (1) Subject to the provisions of subsection (2) an SPR government shall have exclusive legislative competences, including all necessary ancillary powers pertaining thereto, in the following functional areas:

- (a) The appropriation of SPR revenue and moneys for financing the government and services of the SPR
- (b) SPR planning and development
- (c) Town planning
- (d) Firefighting, ambulance services and other civil protection services
- (e) Language policy and language(s) for official use in the SPR
- (f) SPR cultural affairs
- (g) Traditional authorities and indigenous law.
- (h) Markets and pounds
- (i) Road traffic
- (j) Delivery of water, electricity and other essential services
- (k) SPR tourism and recreation
- (l) SPR public media
- (m) SPR roads
- (n) SPR public transport
- (o) Casinos, racing and gambling



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining]

(2) An SPR legislature may by resolution decline to accept any of the exclusive competences referred to in subsection (1) if it is unable to exercise such competences by reason of lack of administrative, infrastructural or related capacities, but may at any time thereafter require Parliament to transfer any such competence to it.

(3) Parliament shall not legislate on matters falling within the functional areas specified in subsection (1) unless -

- (a) it is necessary to set **[for the setting of]** minimum standards across the nation for the **[or effective exercise of control over the quality and]** delivery of public services; or
- (b) it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole; or
- (c) uniformity **[of minimum standards]** across the nation is required for a particular function **[regarding a matter falling within such functional area]**; or
- (d) it **[may be]** is necessary for the determination of national economic policies, the promotion of inter-SPR commerce and the protection of the common market in respect of the mobility of goods, services, capital and labour.

(4) An SPR government shall, subject to the provisions of subsection (5), have full legislative competence for SPR purposes, and Parliament shall, subject to the provisions of subsection (7), have concurrent legislative competence in the following functional areas:

- (a) Subject to the provisions of section 121, taxation for SPR purposes
- (b) Local government

- (c) Housing
- (d) Education
- (e) Health services
- (f) Welfare services
- (g) Agriculture
- (h) Fish and game preservation
- (i) The environment
- (j) Public works
- (k) SPR and local policing
- (l) SPR correctional services.

(5) If Parliament exercises its concurrent legislative competence in terms of subsection (4), the legislative competence of an SPR government shall be constrained only to the extent that the relevant parliamentary legislation deals with such matters and expressly or by necessary implication limits the legislative competence of SPR governments.

(6) Whilst this Constitution remains in force, and subject to its provisions, the legislative competences of an SPR referred to in subsections (1) and (4) shall not be amended or diminished without the consent of such SPR legislature.

(7) Parliament shall not exercise its powers under subsection (3) or subsection (4) so as to encroach upon the geographical, functional or institutional integrity of an SPR or in a manner which would deprive an SPR government substantially of any of its competences in terms of subsection (4).



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(8) Executive power relating to all functional areas in which an SPR government has legislative competence, shall vest in the SPR executive.

#### **Continuation, transfer and consolidation of existing administrative responsibility**

119. (1) The National Government and SPR governments shall co-operate with each other, and shall, each within their respective areas of competence, rationalise the administrations and institutions referred to in subsection (3) (a), and establish administrations and employ the personnel needed for the performance of their functions.

(2) The National Government and SPR governments in rationalising the administrations and institutions as contemplated in subsection (1) shall, in the event of any disagreement between them, have regard to the advice and recommendations of the Commission on SPR Government established in terms of section 127 of this Constitution.

(3) Until changes are made as a result of the rationalisation or consolidation of administrations and institutions as contemplated in subsection (1) -

(a) Administrations and institutions of Provincial Governments, selfgoverning territories, and Transkei, Bophuthatswana, Venda and Ciskei, if reincorporated, which immediately before the coming into force of this Constitution were established within the boundaries of an SPR, and performed functions within such boundaries, shall continue to perform such functions;

(b) The Government of the SPR concerned shall be responsible for and shall exercise control over the performance of those functions referred to in subparagraph (a) and which fall within the scope of the functional areas referred to in sections 118(1) and 118(4), and the National Government shall be responsible for and exercise control over the performance of all other functions;

(c) A department of state of the Republic of South Africa referred to in section 24(1) of the *Republic of South Africa Constitution Act*, 1983, and which was immediately before the coming into force of this Constitution responsible for the performance of functions within the boundaries of an



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SPR, shall continue to be responsible for the performance of such functions;

- (d) The National Government shall be responsible for the performance of and shall exercise control over the functions referred to in subparagraph (c);
- (e) Personnel of all administrations and institutions referred to in this section shall continue in the posts they occupied immediately before the coming into operation of this Constitution, and shall continue to perform the functions which they previously performed;
- (f) The personnel referred to in subparagraph (e), who perform functions in terms of that subparagraph and subparagraph (b) on the instructions of an SPR government, shall be deemed to be in the employ of, and shall be entitled to be remunerated by it on the same basis as they were previously being remunerated, for as long as they continue to perform such functions on the instructions of that SPR government;
- (g) The personnel referred to in subparagraph (e) who perform functions in terms of that subparagraph and subparagraphs (b) and (d) on the instructions of the National Government, shall be deemed to be in the employ of and shall be entitled to be remunerated by the National Government, on the same basis as they were previously being remunerated, for as long as they continue to perform such functions on the instructions of the National Government.

### **Administration of existing laws**

120. (1) Existing laws applicable in an SPR governing the operation of the institutions for which the SPR government assumes responsibility and control in terms of section 119, shall continue to govern those matters until they are amended or repealed by the competent legislature, and references in such laws to any government or organ of government shall be deemed to be references *mutatis mutandis* to the government or relevant organ of government of the SPR.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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(2) The powers, functions and obligations relating to the legislative and executive competence of the SPR arising from the provisions of the laws referred to in subsection (1), shall vest *mutatis mutandis* in the legislature and executive of the SPR.

(3) Parliament and the legislatures of the SPRs shall, each within their respective areas of competence, undertake the consolidation and unification of the laws referred to in subsection (1) as expeditiously as possible.

### **SPR finance and fiscal affairs**

121. (1) An SPR shall be entitled to an equitable share of revenue collected nationally in order to enable it and the local governments within its boundaries to provide basic services and to execute their functions and powers.

(2) The Financial and Fiscal Commission established in terms of Chapter 11 shall make recommendations to the National Assembly regarding equitable fiscal and financial allocations to the SPRs from revenue collected nationally, taking into account the national interest, the provisions of subsection (1), economic disparities between the SPRs, as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each SPR.

(3) An SPR Revenue Fund shall be established in every SPR, into which shall be paid all revenues raised by or accruing to the SPR.

(4) An SPR government shall not be competent to raise loans for current expenditure.

(5) An SPR government shall be competent to raise loans for capital expenditure with the consent of the national executive given on the advice of the Financial and Fiscal Commission.

(6) An SPR government shall be competent to levy such taxes and surcharges as may be recommended by the Financial and Fiscal Commission and approved by the National Assembly, which approval shall not unreasonably be withheld.



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(7) An SPR government shall not be entitled to raise taxes detrimentally affecting national economic policies, inter-SPR commerce, or the national mobility of goods, services, capital and labour.

(8) Allocations by the national government to local governments shall ordinarily be made only via an SPR government.

### **Effect of laws of SPR legislature**

122. (1) A law made by an SPR legislature shall have effect in and for the SPR as long and as far only as it is not repugnant to any Act of Parliament duly passed within the competence of Parliament in terms of this Constitution.

(2) The provisions of a law made by an SPR legislature shall be construed as being repugnant to an Act of Parliament only if such provisions are expressly or by necessary implication inconsistent with an Act of Parliament.

### **Recommendations to Parliament**

123. An SPR legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws.

### **SPR Constitutions**

124. (1) An SPR legislature may, subject to the provisions of this Constitution, adopt a constitution for the SPR by a two thirds majority of all its members.

(2) An SPR legislature may make such arrangements as it deems appropriate for the negotiation and drafting of an SPR constitution.

(3) An SPR constitution adopted by an SPR legislature shall not be inconsistent with the Constitutional Principles enumerated in Schedule 7 or the provisions of the new constitutional text adopted in terms of Chapter 5.

(4) An SPR constitution shall be developed in consultation with the Commission on SPR Government established in terms of section 127.



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(5) An SPR constitution adopted prior to the adoption of a new constitutional text in terms of Chapter 5 shall be approved and come into operation in terms of a resolution of the Constitutional Assembly passed by two thirds of its members.

(6) An SPR constitution adopted by an SPR legislature may be referred to the Constitutional Court by the chairperson of the Constitutional Assembly after being petitioned by one third of the members of the Constitutional Assembly in order to obtain an opinion from the Court as to whether such constitution, if adopted, would conform with the Constitutional Principles.

(7) An SPR constitution which is not in force prior to the new constitutional text intended in Chapter 5, shall be approved and come into operation in terms of such new constitutional text.

### **Development of constitutional provisions regarding SPR Government**

125. (1) The development of a system of SPR government shall receive the priority attention of the Constitutional Assembly and in this regard it shall take into consideration the recommendations of the Commission on SPR Government referred to in section 127 and the views expressed thereon by the executives of the various SPRs.

(2) The Commission's recommendations to the Constitutional Assembly regarding any matter that falls within the ambit of its objects in terms of section 128 shall include draft provisions for the national Constitution.

(3) The Constitutional Assembly shall deal with such draft provisions in the same manner as it is required to deal with other constitutional provisions.

(4) Draft provisions recommended by the Commission which are not adopted by the Constitutional Assembly, shall lapse, except if a majority of the members of the Constitutional Assembly present and voting resolve that the recommended provisions be referred back to the Commission for further consideration.

(5) Draft provisions referred back to the Commission may again be presented to the Constitutional Assembly, provided that if amended in one or more substantive



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respects, the provisions of this section regarding the acceptance, rejection or referral of the recommendations of the Commission shall apply *mutatis mutandis*.

### **Election of new SPR Governments**

126. An SPR government may at any time after the coming into force of an SPR constitution contemplated in section 124 or of the constitutional dispensation contemplated in section 125, petition the Constitutional Assembly to determine by resolution that an election for the establishment of a new SPR legislature and executive in that SPR, or in an SPR incorporating that SPR in whole or in part, shall be held.

### ***Commission on SPR Government***

#### **Establishment of Commission on SPR Government**

127. A Commission on SPR Government shall be appointed by the President in terms of this Constitution within 30 days of its coming into operation.

#### **Objects and functions of the Commission**

128. (1) The objects and functions of the Commission regarding the establishment of SPR government in terms of this Chapter are to -

- (a) advise the National Government and SPR governments on the establishment and consolidation of administrative institutions and structures in the SPRs and on any matter arising out of the provisions of section 118; and
- (b) make recommendations to the National Government and SPR governments on the rationalisation of statutory enactments and public sector resources directed at facilitating the introduction and maintenance of a system of SPR government.

(2) The objects and functions of the Commission regarding the constitution making process provided for in Chapter 5 are to submit recommendations to the Constitutional Assembly in the form of draft constitutional provisions regarding -



- (a) the finalisation of the number and the boundaries of the SPR's of the Republic of South Africa;
  - (b) the constitutional dispensations of such SPRs, including the constitutional structures within such SPRs as well as the method of their election and their authority, functions and procedures;
  - (c) measures, including transitional measures, that provide for the phasing in of new SPR constitutional dispensations;
  - (d) the final delimitation of powers and functions between national and SPR institutions of government with due regard to the criteria that are set out in subsection (3);
  - (e) fiscal arrangements between the institutions of national government and those of SPR government;
  - (f) the powers and functions of local governments; and
  - (g) any matter which the Commission considers to be relevant or ancillary to its functions.
- (3) In carrying out its functions the Commission shall, *inter alia*, take into consideration -
- (a) The provisions of this Constitution;
  - (b) The Constitutional Principles enumerated in Schedule 7;
  - (c) Historical boundaries, including those set out in Schedule 1, former provincial boundaries, magisterial and district boundaries and infrastructures;
  - (d) Administrative considerations, including the availability or non-availability of infrastructures and nodal points for services;

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- (e) The need to rationalise existing structures;
- (f) Cost-effectiveness of government, administration and the delivery of services;
- (g) The need to minimise inconvenience;
- (h) Demographic considerations;
- (i) Economic viability;
- (j) Developmental potential;
- (k) Cultural and language realities.

### **Constitution and impartiality of the Commission**

129. (1) The Commission shall be appointed by the President for the period during which this Constitution is in force, and shall consist of not less than 10, nor more than 15 full-time members, as the President may determine.

(2) At least one member of the Commission shall be appointed from each SPR with the approval of the Premier of the SPR.

(3) Members of the Commission shall perform their duties fairly, impartially and independently.

(4) Members shall not perform or commit themselves to perform remunerative work outside their official duties.

(5) A member of the Commission shall not hold office in any political party or political organisation.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

(6) It shall be an offence [subject to penalties prescribed by law to attempt] to influence or attempt to influence a member to act otherwise than in accordance with the provisions of subsection (3).

### **Chairperson and deputy chairperson**

130. (1) The President shall designate one of the members of the Commission as chairperson and another as deputy chairperson.

(2) (a) When the chairperson is absent or not able to perform his or her functions as chairperson, or where there is a vacancy in the office of chairperson, the deputy chairperson shall act as chairperson, and if the chairperson as well as the deputy chairperson are absent or not able to perform the functions of the chairperson, the Commission shall elect another member to act as chairperson.

(b) Such member shall while acting as chairperson have all the powers and perform all the duties of the chairperson.

### **Vacation of office and filling of vacancies**

131. (1) Members of the Commission shall vacate their offices if they resign or if they become disqualified to hold office for the same considerations and in the same fashion as would apply to a judge of the Supreme Court.

[(2) Any person who has ceased to be a member of the Commission by reason of the effluxion of time may be reappointed.]

(2) If a member of the Commission ceases to hold office, the President may, subject to section 129 appoint a person to fill the vacancy.

### **Meetings of the Commission**

132. (1) The first meeting of the Commission shall be held within 30 days of its appointment at a time and place to be determined by the Chairperson, and subsequent

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meetings will be held at a time and place determined by the Commission or, if authorised thereto by the Commission, by the Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of a majority of the members of the Commission shall constitute a decision of the Commission and in the event of an equality of votes the chairperson shall have a casting vote in addition to his or her deliberative vote.

(4) All the decisions of the Commission shall be recorded.

### **Committees**

133. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a meeting of the committee the members present shall elect one from among their number to act as chairperson.

(4) (a) The Commission may, subject to such directions as it may issue from time to time-

(i) delegate any power granted to it by or under section 128 to such a committee; and

(ii) grant authority that a duty assigned to it by or in terms of section 128 may be performed by such a committee.

(b) The Commission shall not be divested of a power so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.



### **Co-option of persons to serve on or advise committees**

134. (1) A committee may co-opt any person to serve on a committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

### **Remuneration and allowances of members of the Commission and other persons**

135. Members of the Commission and persons referred in section 134 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

### **Appointment of Staff**

136. The Commission may appoint such staff as it may deem necessary for the efficient performance of its functions and administration, and may, in consultation with the Commission for Administration, determine the remuneration and conditions of service of such staff.

### **Regulations**

137. The President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

## CHAPTER 10

### Local Government

- General provisions regarding the powers, functions and structures of local government;
- The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

## CHAPTER 11

### Finance

- Provisions relating to existing debts and liabilities of the state;
- the national and SPR revenue funds, taxation, appropriation and financial procedures and legislation;
- the Auditor-General;
- the Reserve Bank;
- the Financial and Fiscal Commission representative of the SPRs.



## CHAPTER 12

### General and transitional provisions

Provisions relating to:

- The legal system (continuation of statutory and common law subject to the Constitution, unification of provincial ordinances, TBVC laws and laws of the self-governing territories with national and SPR law, recognition of indigenous law);
- the status of international law;
- the independence and impartiality of the Commission for Administration and the security forces;
- civil society;
- method of publication of notices, etc.;
- affirmation in lieu of oath;
- construction of certain references;
- definitions and terminology;
- short title, commencement and duration of the Constitution;
- the prescription of penalties by Parliament.
- continuation of the electoral system used for the first election

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## **SCHEDULE 1**

### **The National Territory and Boundaries and Designation of SPRs**



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**SCHEDULE 2**  
**Design of the National Flag**

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**SCHEDULE 3**  
**The National Coat of Arms**



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## SCHEDULE 4

### The National Seal

*Provisions for the Election of the National Assembly and the Legislative Council*

*Registration of candidates and nomination of party lists*

1. Parties registered in accordance with the Electoral Act, 1995 shall nominate candidates for election to the National Assembly and the Legislative Council, and submit party lists in accordance with the provisions of the Electoral Act, 1995.

*Election of 200 members of the National Assembly on national party lists*

2. For the purpose of electing the members of the National Assembly on the national party lists contemplated in section 48, each registered party shall submit to the Electoral Commission a list of candidates for election by submitting to the chief electoral officer a list of candidates, the names of which shall be in such order as that party may determine.

3. For the purpose of filling the two hundred seats in the National Assembly contemplated in item 2, the total number of votes cast in a general election shall be divided by two hundred and the result shall be the quota of votes per seat.

4. The total number of votes cast in favour of a registered party, shall be divided by the quota of votes per seat and the result shall, subject to item 5, determine the number of seats allocated to that party. The allocation shall be made in terms of the provisions of the Electoral Act, 1995.

5. Where the formula set out in item 4 yields a surplus fraction of a seat, the number of seats allocated to the party concerned, such surplus shall be added to the number of seats allocated to any other party or parties, and any surplus fraction (in terms of the formula set out in item 4) shall be assigned to the party or parties concerned in sequence in descending order of the highest surplus.

*Election of 200 members of the National Assembly on regional party lists*

6. For the purpose of electing the members of the National Assembly on the regional party lists contemplated in section 48, such parties shall submit to the Electoral Commission

## SCHEDULE 5

### *System for the Election of the National Assembly and SPR Legislatures*

#### **Nomination of candidates and compilation of party lists**

1. Parties registered in terms of the *Electoral Act*, 1993 shall nominate candidates for election to the National Assembly and SPR legislatures, and compile party lists in accordance with the provisions of the *Electoral Act*, 1993.

#### **Election of 200 members of the National Assembly on national party lists**

2. For the purpose of electing the members of the National Assembly on the national party lists contemplated in section 40, such registered parties shall take part in the election by submitting to the chief electoral officer a list of candidates, not exceeding two hundred, in such order as that party may determine.

3. For the purpose of filling the two hundred seats in the National Assembly contemplated in item 2, the total number of votes cast in a general election shall be divided by two hundred and the result shall be the quota of votes per seat.

4. The total number of votes cast in favour of a registered party, shall be divided by the quota of voters per seat and the result shall, subject to item 5, determine the number of seats allocated to that party. The allocation shall be made in terms of the provisions of the *Electoral Act*, 1993.

5. Where the formula set out in item 4 yields a surplus fraction not absorbed by the number of seats allocated to the party concerned, such surplus shall compete with other similar surpluses accruing to any other party or parties, and any undistributed seat or seats (in terms of the formula set out in item 4) shall be awarded to the party or parties concerned in sequence of the highest surplus.

#### **Election of 200 members of the National Assembly on regional party lists**

6. For the purpose of electing the members of the National Assembly on the regional party lists contemplated in section 40, such parties shall take part in the election by



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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submitting to the chief electoral officer a list of candidates for each SPR in which it wishes so to take part, in such order as that party may determine.

7. For the purpose of determining the number of seats of the National Assembly to be filled from regional party lists from an SPR, the number of votes cast in the SPR shall be divided by the total number of votes cast nationally and be multiplied by 200. Fractions shall be approximated to the nearest complement.

8. For the purpose of filling the seats in the National Assembly contemplated in item 6, the total number of votes cast in a general election in an SPR shall be divided by the number of seats to be filled from such SPR in terms of item 7, and the result shall be the quota of votes per seat for such SPR.

9. The total number of votes cast in an SPR in favour of a party shall be divided by the quota of voters per seat for such SPR and the result shall, subject to item 10, determine the number of seats allocated to that party in respect of such SPR. The allocation shall be made in terms of the *Electoral Act*, 1993.

10. Where the formula set out in item 9 yields a surplus fraction not absorbed by the number of seats allocated to the party concerned, such surplus shall compete with other similar surpluses accruing to any other party or parties, and any undistributed seat or seats (in terms of the formula set out in item 9) shall be awarded to the party or parties concerned in sequence of the highest surplus.

### **Election of members of SPR legislatures**

11. The provisions of items 6, 9 and 10 shall apply *mutatis mutandis* to the election of the members of an SPR legislature contemplated in section 101 of this Constitution: Provided that the quota of votes per seat shall be 50 000.

### **Manner of casting and counting votes**

12. (1) The election of the National Assembly and the election of the SPR legislatures shall be conducted at the same time and in accordance with a single ballot.



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(2) Subject to the provisions of item 13, the name of a party that wishes to contest any of the elections referred to in subitem (1), shall appear on the ballot paper.

(3) Each voter shall be entitled to cast one vote only.

(4) The vote contemplated by subitem (3) shall be cast in favour of a party which has entered the election and, subject to the provisions of item 13, such vote shall be counted as a vote in favour of such party -

(a) in respect of the national list of candidates in the election of the National Assembly; and

(b) in respect of the regional list of candidates for the SPR in which the vote was cast in the election of the National Assembly; and

(c) in respect of the party's list of candidates in the election of the SPR legislature of the SPR in which the vote was cast.

#### **Declaration of support by one party of another party**

13. (1) If a party wishes to contest the election of one or more SPR legislatures, but does not wish to contest the election of the National Assembly, it may, within the time and in the manner prescribed by the *Electoral Act*, 1993, declare that it supports a party which has entered the election of the National Assembly, and if it makes such declaration, all votes cast in its favour shall, for the purpose of the election of the National Assembly, be deemed to be a vote in favour of such other party.

(2) If a party wishes to contest the election of the National Assembly, but does not wish to contest the election of one or more of the SPR legislatures, it may, within the time and in the manner prescribed by the *Electoral Act*, 1993, declare that it supports a party which has entered the election of an SPR legislature, and if it makes such declaration, all votes cast in its favour shall, for the purpose of the election of the relevant SPR legislature, be deemed to be a vote in favour of such other party.

(3) If a party wishes to contest the election of one or more SPR legislatures but does not wish to contest the election of all SPR legislatures, it may, within the time



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and in the manner prescribed by the *Electoral Act*, 1993, declare that it supports a party which has entered the election of the SPR legislatures that it is not contesting, and if it makes such a declaration, all votes cast in its favour shall, for the purposes of the elections of the SPR legislatures that it is not contesting, be deemed to be a vote in favour of such other party.

(4) For the purposes of subitems (2) and (3), a party may support different parties in the different SPRs.

(5) If a party does not make a declaration in terms of subitems (1), (2) or (3), it shall be deemed to have entered the election of the National Assembly and of all the SPR legislatures.

## SCHEDULE 6

### Oaths and Affirmations of Office

#### Oath or Affirmation of the President or Acting President

In the presence of those assembled here today and in full realisation of the high calling I assume office as President/ Acting President in the service of South Africa I, AB do swear/solemnly affirm to be faithful to the Republic of South Africa and do solemnly and sincerely promise at all times to promote that which will advance and to oppose all that may harm the Republic; to obey, observe, uphold, and maintain the Constitution and all other laws of South Africa; to discharge my duties with all my strengths and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice to all; and to devote myself to the well-being of South Africa and all its people.  
(In the case of an oath:) So help me God.

#### Oath or Affirmation of a Cabinet and SPR Minister

I, AB do swear/solemnly affirm to be faithful to the Republic of South Africa and to undertake before those assembled to hold my office as Minister with honour and dignity; to respect and uphold the Constitution and all other laws of South Africa; to be a true and faithful counsellor; not to divulge directly or indirectly any matters which are entrusted to me under secrecy; and to perform the duties of my office conscientiously and to the best of my ability.  
(In the case of an oath:) So help me God.

#### Oath of member of Parliament and SPR legislature

I, AB., do swear/solemnly affirm to be faithful to the Republic of South Africa and solemnly promise to perform my duties as a member of the National Assembly/Senate/SPR legislature to the best of my ability.  
(In the case of an oath:) So help me God.



## SCHEDULE 7

### Constitutional Principles

#### I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

#### II

The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

#### III

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

#### IV

The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

#### V

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

#### VI

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

#### VII

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

## VIII

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

## IX

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

## X

All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the Constitution.

## XI

The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

## XII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

## XIII

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

## XIV

Amendments to the Constitution shall require special procedures involving specified majorities.

## XV

Government shall be structured at national, SPR and local levels.



[omissions are indicated by bold lettering and square brackets]; insertions are indicated by underlining

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## XVI

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XII.

## XVII

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate SPR autonomy and cultural diversity.

## XVIII

The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPRs shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPRs, alternatively, if there is such a chamber, a specified majority of a chamber of Parliament composed of SPR representatives, and if the amendment concerns specific SPRs only, the approval of the legislatures of such SPRs will also be needed.

## XIX

A framework for local government powers, duties, functions and structures shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

## XX

The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

## XXI

National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle



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XIX shall make provision for appropriate fiscal powers and functions for different categories of local government.

## XXII

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPRs and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

## XXIII

A Financial and Fiscal Commission, representing inter alia each of the SPRs, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, economic disparities between the SPRs as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPRs.

## XXIV

The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

1. The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.
2. The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPRs.
3. Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.



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4. The essential principles of the Constitution, including the fundamental rights contained therein, shall apply to all organs of the state at all levels of government.
5. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.
6. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
7. Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.
8. The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
9. SPR governments shall have powers, either exclusively or concurrently with the national government, inter alia -
  - 9.1 for the purposes of SPR planning and development and the delivery of services; and
  - 9.2 in respect of aspects of government dealing with the specific socio-economic and cultural needs and the general well being of the inhabitants of the SPR.
10. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.
11. In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments which cannot be

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resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

12. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to an SPR government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or SPR governments.

#### XXV

Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.

#### XXVI

The independence and impartiality of a Commission for Administration, a Reserve Bank, and Auditor-General and Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

#### XXVII

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their duties and functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.



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## SCHEDULE 8

### Procedure for the Election of President and Deputy President







