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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

SUBMISSIONS

RECEIVED AS AT 24 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

VOLUME 10

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COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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1995-03-24

The Executive Director
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8000

Dear Mr Ebrahim

PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

1. Preliminary recommendations in regard to provincial constitutions

2. Preliminary recommendations in regard to provincial legislative competence

3. Preliminary recommendations in regard to provincial legislatures

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully

CHAIRPERSON

23/3/95

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON PROVINCIAL CONSTITUTIONS
RECOMMENDATIONS - DOCUMENT 1

1. **INTRODUCTION**

See introductory notes under recommendations on provincial legislative powers (Recommendation 3).

2. **CONSTITUTIONAL PRINCIPLES AND PROVISIONS**

2.1 Section 160 of the interim Constitution as amended provides as follows:

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

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

(3) A provincial constitution shall not be inconsistent with a provision of this Constitution, including the Constitutional Principles set out in Schedule 4: Provided that a provincial constitution may-

(a) provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and

(b) where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal.

(4) The text of a provincial constitution passed by a provincial legislature, or any provision thereof, shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is inconsistent with a provision referred to in subsection 3, subject to the proviso to that subsection.

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

2.2 Constitutional Principle XVIII stipulates that -

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

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2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

2.3 The following Constitutional Principles inter alia must be taken into account in adopting provincial constitutions:

I, II, III, IV, V, VI, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, IXX, XX, XXI.

3. **DISCUSSION**

3.1 The questions to be answered regarding provincial constitutions are how much autonomy a provincial legislature should have to adopt such a constitution if it desires to do so; what binding provisions or guidelines, if any, the national Constitution should provide for such constitutions; and whether the national Constitution should contain provisions relating to provincial government structures and procedures in the event of any of the provinces not having devised its constitution.

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3.2 Dr Bertus de Villiers (Federalism in South Africa: The Debate Unfolds, 1994, unpublished) makes the observation that "on the international level the right of states/provinces/cantons to draw up their own constitutions is generally associated with federations that come into being through aggregation or the integration of previously independent or autonomous territories. Federations that arise through decentralization, especially in the case of developing countries, normally have a standard provincial constitution that is contained in the national constitution. South Africa has to a certain extent followed the approach of Spain by providing for a uniform provincial constitution and simultaneously recognizing the right of the provinces to draw up their own constitutions." However, in Spain such provincial constitutions are subject to ratification by both chambers of the Cortes Generales (national parliament) before the King can sanction a provincial constitution and promulgate it as a law [Article 151(4)].

3.3 In South Africa, the right of provincial legislatures to adopt their own constitutions is guaranteed in the Constitutional Principles, subject to certification by the Constitutional Court. The issue is therefore not whether a province should have the right to adopt its own constitution, but whether changes to the provisions of section 160 can be justified, and what the scope of such changes might be. In view of CP XVIII, options for changing the provisions of section 160 of the interim Constitution are limited. Section 160 cannot be changed in any manner that will result in the new provisions being substantially less than or substantially inferior to those

provided for in the interim Constitution. As the terms "substantially less" and "substantially inferior" are imprecise, any proposal to reduce the present power to adopt a provincial constitution would need to be considered very carefully to ensure that it is not in conflict with the Constitutional Principles. The Commission itself is not aware of any cogent reason why a reduction in the constitution-making powers of provinces should be considered. However, it would be possible in terms of CP XVIII to increase the powers of provincial legislatures to adopt their own constitutions, if justified.

3.4 It should be noted that the constitution-making powers of provincial legislatures (including their powers to provide for legislative and executive structures and procedures different from those provided for in the national Constitution) are limited by the interim Constitution and the Constitutional Principles, and will continue to be so limited to the extent that these provisions and Principles are incorporated into the new Constitution.

3.5 The interim Constitution deals with the following aspects relating to provincial government -

3.5.1 Provincial Legislative Authority

(a) Provincial legislature (institution, legislative authority and applicability of its laws).

(b) Legislative competence of provinces

These provisions at (a) and (b) above do not appear to fall within the class of matters on which provincial constitutions may differ from the national constitution. In view of the Commission's considerations and recommendations in respect of provincial legislative competences, it follows that the CPG cannot support any change to the relevant provisions in the interim Constitution, which bind provincial constitutions to the national Constitution's provisions relating to these matters.

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However, items (c) to (s) below appear to be matters relating to legislative structures and procedures, and therefore fall within the competence of the provincial legislatures to provide for different provisions in their provincial constitutions. Such provisions will, however, have to comply with the Constitutional Principles, in whatever form these are incorporated into the new Constitution.

(c) Composition of provincial legislature

(d) Duration and dissolution of provincial legislatures

(e) Elections

(f) Sittings of provincial legislature

(g) Speaker and Deputy Speaker

(h) Qualification for membership of provincial legislature

(i) Vacation of seats and filling of vacancies

(j) Oath or affirmation by members

(k) Powers, privileges and immunities of provincial legislatures and benefits of members

(l) Penalty for sitting or voting when disqualified

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(m) Rules and orders

(n) Quorum

(o) Requisite majorities

(p) Assent to Bills

(q) Signature and enrolment of provincial laws

(r) Public access to provincial legislatures

(s) Administration of provincial legislatures

3.5.2 Provincial Executive Authority

All matters dealt with in sections 144 to 154 in the interim Constitution appear to be of a structural or procedural nature. On these matters it is therefore within the competence of provincial legislatures to provide for different provisions in their provincial constitutions. Such provisions will have to comply with the present Constitutional Principles in so far as these are incorporated into the new Constitution.

3.5.3 **Provincial Finance and Fiscal Affairs**

In terms of CP XXV the fiscal powers and functions of provincial governments will be defined in the Constitution. While provincial constitutions can therefore include provisions relating to provincial finance and fiscal matters, such provisions will have to be consistent with the relevant provisions in the Constitution, the latter being the supreme law of the land (CP IV).

3.5.4 **Traditional monarchs**

Section 160.4(b) provides that, where applicable, a provincial constitution may make provision for the institution, role, authority and status of a traditional monarch in the province. The CPG considers that this makes adequate provision for such matters as a general principle, and sees no compelling need for any specific provision relating to particular monarchs. It therefore recommends

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that the inclusion of any specific provision in the new constitution, as is the case with the present Section 160.4(b), should be reconsidered.

3.6 It therefore appears that provincial legislatures have been given wide powers to adopt provincial constitutions to suit the needs of their particular provinces. However, in some areas, such as provincial legislative competence and financial and fiscal affairs, they cannot be granted powers to adopt provisions contrary to those in the interim Constitution or which will be contained in the new national Constitution.

3.7 The questions raised in paragraph 3.1 above can therefore be answered as follows:

3.7.1 The interim Constitution has conferred on provincial legislatures the power to adopt their own provincial constitutions if they decide to do so, subject generally to the provisions of the national Constitution, but with the power to deviate from legislative and executive structures and procedures provided for in that Constitution, and to provide for a traditional monarch. This competence must be included in substantially undiminished form in the legislative powers of provincial legislatures in the new Constitution in compliance with CP XVIII. On the other hand, it does not appear to be possible or feasible to provide for even greater autonomy so as to include provisions which are contrary to the national Constitution.

3.7.2 The binding provision contained in CP IV that the national Constitution will be the supreme law of the land, appears to provide a sufficient guideline for the framing of provincial constitutions. The present provisions of section 160(3) allow sufficient autonomy for provincial legislatures to adopt their own provisions for legislative and executive structures, which, however, must not be inconsistent with the general spirit and provisions of the national Constitution.

3.7.3 The national Constitution should include provisions relating to provincial government structures and procedures, not only to provide the framework for provincial government in cases where provinces decide not to devise their own constitutions, but also to establish a broad general framework for government at all levels in South Africa.

4. CONCLUSION

The Commission is of the view that the provisions in section 160 of the interim Constitution provide adequately for the competence of provincial governments to

adopt unique provincial constitutions according to their needs, while ensuring that such constitutions will conform to national constitutional provisions and norms.

<u>The Commission recommends that provisions similar to those contained in section 160 be incorporated in the new Constitution, together with such amendments as will ensure conformity with the criteria established by the Constitutional Principles</u>.

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23 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON PROVINCIAL LEGISLATIVE POWERS RECOMMENDATIONS - DOCUMENT 2

1. **INTRODUCTION**

1.1 In terms of section 164 of the interim Constitution, the Commission on Provincial Government (CPG) is competent inter alia to advise the Constitutional Assembly (CA) on the development of a constitutional dispensation with regard to provincial systems of government. Such advice shall include recommendations in the form of draft constitutional provisions regarding inter alia the final delimitation of powers and functions between national and provincial institutions of government, with due regard to the criteria set out in section 164(3), i.e.

(a) the provisions of the Constitution;

(b) the Constitutional Principles set out in Schedule 4;

(c) historical boundaries, including those set out in Part 1 of Schedule 1, former provincial boundaries, magisterial district boundaries and infrastructures;

(d) administrative considerations, including the availability or non-availability of infrastructures and nodal points for service;

(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; and

(k) cultural and language realities.

1.2 Section 161(1) provides that the Constitutional Assembly shall give priority attention to the development of a system of provincial government and in this regard shall take into consideration any recommendations of the CPG and any comments thereon by the respective provincial governments.

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1.3 The CPG in practice consists of fourteen members appointed by the President, of whom nine are appointed from the provinces with the concurrence of the Premiers. Members are required by the Constitution to perform their functions fairly, impartially and independently.

1.4 The abovementioned provisions imply that the CPG should give careful attention to a large number of considerations relating to provincial governments and to come to fair, impartial, independent and informed decisions regarding the recommendations it makes to the CA. In this process, the provinces' views and experiences should command particular attention. To this end the Commission has invited submissions from the provinces, and has provided structured guidelines for the discussion of key issues. The Commission has also scheduled a series of workshops in which provinces would be involved, together with other interested parties (including members of the Constitutional Assembly). In addition, all draft recommendations by the CPG will be sent to the provinces for comment.

However, the CPG is also constrained in its investigations and deliberations by the time provisions for the adoption of a new constitution [Section 73(1)] and the constitutional process of the CA. Furthermore, the transition from the old systems of regional government to the new system created by the interim Constitution, has not yet been completed. It may be for this reason, amongst others, that the majority of provincial governments have not yet responded to requests to make submissions to the CPG regarding their requirements for a system or systems of provincial government. The CPG has, however, been intimately involved in the transitional arrangements for the establishment of the new provinces and is aware of the many problems which have been or are still being experienced in that process.

1.5 In addressing the question of the appropriate legislative competence of provinces, the CPG has not drawn on abstract constitutional theory. Its starting point is the interim Constitution, the agreed Constitutional Principles, and its own practical experience of circumstances in the provinces during the transitional period since April 1994.

1.6 Wherever problems are experienced or identified in the allocation and exercise of powers and functions, the CPG wishes to stress the importance of distinguishing between teething problems, which the passage of time should resolve, and others of a more profound or intractable kind. It is equally important to establish whether a problem's essential nature, root cause, and possible solution is to be found in administrative processes and structures, or in constitutional arrangements, or in the terrain of political contestation.

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1.7 In the new system of provincial government, some structures are in place while others are still being established. Provincial governments are functioning with varying degrees of effectiveness. The CPG has no reason to doubt that in time all the provinces will be able to carry out the functions allocated to them under the interim Constitution. However, at present not all provinces have developed to the point where they are able to handle all the powers and functions allocated to them in section 126, partly because of the complexities of the departmentalisation process.

1.8 The process of bringing provincial government to a fully operational point has been hampered inter alia by the need to rationalise the functions of former administrations; real or perceived delays in transferring functions from national to provincial level; personnel issues; budgeting processes; the establishment of sub-regions, and the provision of management infrastructure and support systems.

1.9 While the new system of provincial government is being implemented and consolidated, the provinces will need guidance in the performance of certain functions. This is so especially in the case of new functions (e.g. police) and expanded functional responsibilities (e.g. education, health, and housing). At this stage the provinces must draw on the expertise in national government departments in many instances. This is indeed one of the building blocks in an emerging system of intergovernmental cooperation.

1.10 The CPG considers intergovernmental cooperation to be in the best interests of South Africa. Indeed, the CPG believes that the emerging system of intergovernmental forums, functional committees and other vertical and horizontal intergovernmental mechanisms may need to be institutionalised even further. The new Constitution itself should perhaps make provision for additional structures intended to promote intergovernmental consultation and cooperation. This matter will be the subject of a memorandum to be submitted at a later stage.

1.11 In the meantime, however, the CPG wishes to draw attention to the need for sensitivity in the dealings between the national and provincial governments. For example, it is advisable to avoid creating perceptions that proceedings pertaining to provincial government and administration are dominated by the national government. Such perceptions could be remedied in part, for instance, by intergovernmental committees being chaired in rotation by national and provincial representatives. In developing a system of cooperative governance, attention to such details is perhaps as important as the larger structural and constitutional issues.

1.12 It is the CPG's view that the prudent approach would be to allow provinces to develop their present structures and capacities and to assist them to manage efficiently and effectively those functions already allocated to them.

1.13 If any province believes that there are additional functional areas not included in Schedule 6 for which it has the capacity and should be responsible, it is within the province's right to negotiate with the appropriate national government institutions to allow it to perform such function on an agency or delegation basis (See CP XIX and XXI.1). This could be the basis for an evolutionary process in which the formal transfer of such powers might be considered after the provinces have established the need and demonstrated the requisite capacity to deal with such matters.

2. GUIDELINES/CONSIDERATIONS

2.1 The freedom of the CPG to make recommendations in regard to provincial legislative powers is constrained by section 71(1)(a) which stipulates that a new constitutional text shall comply with the Constitutional Principles. Section 164(3)(a) furthermore requires it to take into consideration the provisions of the interim Constitution. The CPG consequently considers that the provisions of the interim Constitution should serve as the point of departure for its own deliberations in making its recommendations to the CA.

2.2 The allocation of powers between the different levels of government is required to be made on a basis which, inter alia, recognises the need for and promotes national unity and legitimate provincial autonomy (CP XX),

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and complies with the criteria stipulated in CP XXI (see paragraph 3.1 below).

2.3 The process of gradually extending provincial competence over the functional areas listed in Schedule 6 by means of legislative, executive and administrative action, is at a relatively early stage, and the establishment and implementation of structures required for constructive co-operation between levels of government is incomplete.

It is consequently difficult to judge whether the allocation of powers and functions as provided for under the interim Constitution is adequate to ensure effective and efficient governance. However, an assessment of the experiences thus far in implementing the new governmental competences should be taken into account in making constitutional proposals.

2.4 The character of a state is determined not only by the provisions which are written into a constitution at any particular time, but also by the gradual development over time of a set of national values, legal provisions and formal and informal arrangements to regulate the interactions among the levels of government.

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2.5 Constitutions can never be regarded as being final. Mechanisms for their amendment are necessary. The new Constitution should therefore also provide for such mechanisms. CP XVIII.4 indeed requires that provision be made for constitutional amendments inter alia in respect of the powers, boundaries, functions or institutions of provinces. The CPG intends to make recommendations in due course on ways in which the provinces should be involved in amendments to the Constitution affecting provinces.

2.6 <u>The CPG is of the view that the Constitution should not be unnecessarily detailed but rather should set out a broad framework (together with the requisite mechanisms) within which all levels of government should function and develop.</u>

3. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

3.1 <u>Constitutional Principles</u>:

The following Constitutional Principles have a bearing on the legislative powers of provinces -

XVIII, XIX, XX, XXI, XXII, XXIII

The text of these Constitutional Principles is given in an Appendix for easy reference.

3.2 <u>Legislative competence - Section 126</u>:

The interim Constitution provides as follows in relation to the legislative competence of provinces -

126.(1) A provincial legislature shall be competent, subject to subsections (3) and (4) to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

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

(2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as-

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
(b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
(e) the provincial law materially prejudices the economic health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(6) A provincial 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 or in respect of which an Act of Parliament prevails over a provincial law in terms of subsection (3).

3.3 <u>Functional areas - Schedule 6</u>:

The current legislative competences of provinces are set out in Schedule 6 as amended by Act No. 22 of 1994.

<u>Schedule 6: Legislative competence of Provinces</u>

Agriculture
Abattoirs
Airports, other than international and national airports

Animal control and diseases
Casinos, racing, gambling and wagering
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health services
Housing
Indigenous law and customary law
Language policy and the regulation of the use of official languages within a province, subject to section 3
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police, subject to the provisions of Chapter 14
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services

4. DISCUSSION

4.1 The Commission is bound to adhere to the Constitutional Principles (CP) and must take into consideration the provisions of the interim Constitution when formulating its recommendations and draft constitutional provisions. It is therefore necessary to consider whether section 126 provides adequately for the allocation of powers to the national and provincial levels of government and, if not, what changes should be effected.

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4.2 Section 126(1) empowers a provincial legislature to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.

Section 126(2A) empowers Parliament also to make laws in respect of all the functional areas included in Schedule 6. However, a provincial law in respect of any such area shall prevail over an Act of Parliament, except in the circumstances enumerated in paragraphs (a) to (e) of subsection 3. To prevail over a provincial law, such an Act of Parliament must furthermore apply uniformly in all parts of the Republic. The Constitutional Court has the jurisdiction to interpret, protect and enforce these provisions [section 98(2)].

Subsection (2) also provides for provincial legislative competence to include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

4.3 The effect of the provisions of section 126 is that the national Parliament is vested with the exclusive power to legislate in respect of all functional areas not specified in Schedule 6 or covered in subsection (2), as well as with concurrent powers in respect of the provincial competences, subject to certain conditions. These provisions enable, but do not compel any province to make laws on the subject matters (functional areas) allocated to provinces. This therefore allows for a measure of functional asymmetry

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to develop among provinces according to choices made by particular provinces.

4.4 The role that provinces can play in governing the country and protecting their interests could be enhanced by ensuring their effective representation in a second House (e.g. a Senate) capable of furthering the interests of provinces in the national legislature. This matter will be dealt with in a separate recommendation.

4..5 The Commission is of the view that in the new Constitution amendments to Schedule 6 may be necessary in the interests of good governance. It must be noted, however, that to date no provincial government has indicated to the Commission that the list of functional areas in Schedule 6 should be expanded; and also that reports from national departments on the division of activities in regard to Schedule 6 functions among the three levels of government have not all been completed. The Commission is nevertheless aware that amendments may be necessary, and intends to investigate and evaluate the need for further functional areas to be included in the Schedule. One such area which, in the Commission's view, appears to require inclusion in Schedule 6 is Finance, which is a provincial competence in terms of CP XXVI.

4.6 Criticism has been directed against the provisions of section 126 on three major points. These are given below, followed by the CPG's responses.

(i) *"Exclusive powers have on the face of it not been granted to provinces."*

Section 126(2A) empowers Parliament to make laws in regard to all matters within the legislative competence of provinces, subject to certain conditions. This section appears, in effect, to reduce the legislative power of provinces to the extent that they cannot be said to have exclusive powers in respect of any functional area. However, CP XIX stipulates that the powers and functions at the provincial level of government <u>shall</u> include <u>exclusive</u> and concurrent powers. It could therefore be argued that the present legislative powers of provinces are less than those which they are entitled to in terms of the Constitutional Principles.

A second argument is that provinces indeed have qualified exclusive competence to legislate on Schedule 6 functional areas in respect of matters in which Acts of Parliament will not prevail in terms of section 126(3). The possible legal uncertainty is not in the interest of good governance. The Commission therefore intends to investigate this matter further with a view to possible amendment of the relevant provisions of section 126.

(ii) *"The seat of residual powers has not been clarified."*

Section 126 empowers provincial legislatures to make laws for the province in regard to all matters which fall within the functional areas specified in Schedule 6, as well as in regard to matters which are reasonably necessary for or incidental to the effective exercise of such legislative competence. This power is subject to the power of Parliament to make laws on all such matters, which will, however, prevail over provincial laws only under specified circumstances. In terms of Section 37 the legislative power in respect of all other functional areas therefore is vested in Parliament. Thus all powers have been allocated in the Constitution.

(iii) *"The functional areas listed in Schedule 6 are not precise and therefore provincial legislatures cannot readily determine the borderlines of their legitimate field of legislative powers."*

It is correct that Schedule 6 does not give precise descriptions of the functions allocated to the provinces. To do so could be unnecessarily cumbersome, restrictive and inappropriate in a constitution if this is supposed to provide a framework within which governments can function, rather than spelling out the details.
It appears to be more appropriate in cases of doubt or contention for the two levels of government to negotiate agreements on which

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parts of the functional areas fall within the legislative and executive powers of the national and provincial governments, with due regard to the provisions of section 126(3). This has indeed already been done in respect of a number of functional areas on the basis of negotiation and consensus, e.g in the case of housing. This exemplifies the concept of intergovernmental cooperation. Cooperation and negotiation should be encouraged and required where appropriate by mechanisms provided for in the Constitution. For example, where the national government establishes policies, norms and standards in respect of Schedule 6 functions, it could be constitutionally required that such establishment should be in consultation with or after consultation with the provinces.

Structures, in addition to the Constitutional Court, for resolving disputes which may arise should also be provided for in the Constitution. This matter will be dealt with in a later memorandum.

In addition to the establishment of mechanisms for political negotiation and the resolution of disputes, Section 126(3) itself requires tighter formulation. The Constitutional Court rightly has final interpretative competence in constitutional matters, but the CPG considers it undesirable that the Court should be required to decide many matters which might more properly be resolved through

a political process, or else could be obviated by greater precision in the writing of the Constitution. The CPG therefore also intends to give attention to the possible reformulation of Section 126, which will be the subject of a later memorandum.

4.7 Subsections (5) and (6) of Section 126 do not appear to be contentious and the Commission can see no reason why the provisions should be changed in the new Constitution.

4.8 In view of CP XIX, a specific constitutional provision may be required to empower national and provincial governments to perform functions for other levels of government on an agency or delegation basis.

5. CONCLUSION

The provisions in Section 126 give the provinces the opportunity to exercise a measure of autonomy, and allow for functional asymmetry to develop. At the same time the present system allows for the provinces to have a say in policy-making and the determination of norms and standards at the national level through the evolving system of intergovernmental relations. Such arrangements could be formalised in the new Constitution. If a second House (a Senate) is provided for in the new Constitution, this could provide a further means of giving provinces an effective voice in the national legislature.

<u>The provisional conclusion of the Commission is that in general the allocation of powers and functions contained in Section 126 are at this stage appropriate to serve the interests of good government in South Africa.</u> However, further consideration needs to be given to the formulation of Section 126, as well as to the functional areas listed in Schedule 6, in order to ensure greater legal certainty and compliance with the applicable Constitutional Principles.

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APPENDIX: PROVINCIAL LEGISLATIVE POWERS: APPLICABLE CONSTITUTIONAL PRINCIPLES.

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed. 8

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial 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.

XX

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 recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

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

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. 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.

4. 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.

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

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia -

(a) for the purpose of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. 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 provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

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

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial 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.

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23 March 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON THE STRUCTURES AND PROCEDURES RELATING TO PROVINCIAL LEGISLATURES RECOMMENDATIONS - DOCUMENT 3

1. INTRODUCTION

1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 3).

1.2 Provinces have the right to adopt unique legislative structures and procedures for themselves. The Commission is nevertheless of the opinion that the new national Constitution should include provisions or generally provide for legislative structures and procedures which will enable provinces which do not adopt their own constitutions or which omit such matters from their constitutions, to function effectively. This will not affect the right of provinces to adopt their own legislative structures and procedures at any time if they wish to do so, different from those provided for in the national Constitution. The fact that provincial legislatures are entitled to adopt constitutional provisions dealing with their own structures and procedures, naturally limits the scope for the Commission to make recommendations about such matters for incorporation in the national Constitution.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 Section 160 of the interim Constitution confers on provincial legislatures the power to pass constitutions for their respective provinces which, in terms of subsection 3(a) may provide for legislative and executive structures and procedures different from those provided for in the Constitution. Apart from such differences, the provincial constitution shall not be inconsistent with the provisions of the Constitution.

2.2 Constitutional Principle XVIII.2 in effect entrenches the right of provincial legislatures to adopt constitutions for their provinces and to provide for legislative and executive structures and procedures different from those provided for in the national Constitution.

2.3 While provision in regard to legislative structures and procedures in provincial constitutions may differ from those provided for in the national Constitution, they will nevertheless have to comply with the relevant Constitutional Principles, in whatever form they are included in the new Constitution and other applicable constitutional provisions. The provisions relating to provincial legislative structures and procedures in the new Constitution must, of course, also comply with the Principles.

2.4 The relevant Constitutional Principles are IV, VI, VIII, X, XIV, XVI and XVII. The text of the Principles is appended for easy reference.

3. **DISCUSSION**

3.1 The views in this document are the collective views of members of the Commission, formulated with the assistance of a task group consisting of persons with various backgrounds and expertise.

3.2 The present constitutional provisions relating to provincial legislative authority formed the basis for the Commission's deliberations. (See section 164(3)(a) of the interim Constitution). Each section was considered to determine whether its subject matter should be included in the new Constitution in order to provide for efficient and effective legislatures in provinces which have not adopted their own constitutional provisions in this respect; whether the provisions are appropriate; what amendments should be recommended if the provisions are not appropriate; and which further provisions, if any, need be incorporated in the new Constitution.

3.3 The present constitutional text is attached and will be referred to in the discussion below. Section 126 and Schedule 6 will not be discussed in this document as these are dealt with in the recommendations relating to provincial legislative competence (Recommendation 1).

3.4 **Section 125 - Provincial Legislature**

3.4.1 Section 125 institutes a legislature for each province, vests it with legislative powers for the province in accordance with the Constitution and restricts the applicability of its laws to the territory of the province unless otherwise provided for in an Act of Parliament.

3.4.2 <u>The subject matter of section 125 needs to be included in the new Constitution</u> because it is a function of a national constitution to vest provinces with legislative powers and determine their jurisdictions. This is provided for in CP XVI, XVIII.1 and XX.

3.4.3 <u>It is the opinion of the Commission that the provisions in the interim Constitution are appropriate and do not require to be amended materially. No further provisions relating to the matter appear to be required.</u>

3.5 **Section 127 - Composition of provincial legislatures**

3.5.1 Section 127 stipulates that a provincial legislature shall consist of not fewer than 30 and not more than 100 members elected in accordance with a system of proportional representation of voters as provided for in the Electoral Act, 1993. The actual

number of seats is determined in accordance with Schedule 2 (also attached). The section also provides that members of a provincial legislature shall be elected from provincial lists of party candidates for the province in question.

3.5.2 The Commission is of the opinion that there is no absolute or infallible formula for determining the ideal number of members for any legislative body. The interim Constitution delegates the task of determining the number of seats for each province to the Independent Electoral Commission, but stipulates that data in respect of voters, representations by interested parties and a proposed determination in the Schedule should be taken into account. It appears to be justified for the Constitution to stipulate a minimum and maximum number of members in the Constitution in order to provide for adequate and appropriate representation. It also appears to be justified to prescribe a basis for the determination of the actual number of members between a minimum and maximum. For this purpose the number of voters in the province is obviously of great importance. Representations by "interested parties" appear to be so imprecise that it should not be included as a basis for such determination. What should be included, however, is a weighting of the number of members as determined on voter numbers, to provide for proper representation in provinces with large geographical areas but small populations. A generally accepted method to allow for this, is for an Act of Parliament to establish a national norm for the determination of the number of members for provincial legislatures and to provide for weighting by a certain percentage above or below the norm for sparsely populated and densely populated provinces respectively. <u>The Commission recommends that weighting on this basis be introduced to provide for more effective representation.</u>

3.5.3 The interim Constitution provides for the election of members from provincial lists of party candidates for the province in question. This provision complies with the stipulation in CP VIII which entrenches proportional representation as a general rule. However, it has come to the Commission's attention through the media and otherwise, that there is significant support for an electoral system which includes representation both from party lists and constituencies. Such a "mixed" system has been introduced at local government level. Although constituency based proportional representation alone would be preferable (see paragraph 3.11.3 below), <u>it is the Commission's opinion that a system which includes representation of constituencies in provincial legislatures will be more in accordance with the principles of democracy and accountability to voters than the</u>

<u>present system of election from party lists only. The Constitution should stipulate only that representation in provincial legislatures should be on such a basis. A system should be provided for in an Act of Parliament.</u>

3.6 Section 128 - Duration and dissolution of provincial legislatures

3.6.1 Section 128 provides for a five year term for provincial legislatures. However, if a legislature is dissolved in terms of other constitutional provisions before the expiry of that term, it shall continue for a period up to the day immediately preceding the commencement of polling for the election of a new legislature. Section 128 also provides for certain ancillary matters.

3.6.2 There is no absolute method by which the ideal duration of a legislature can be determined, nor have reasons to change the stipulations contained in section 128 come to the Commission's attention. <u>Consequently the Commission is of the view that the subject matter of Section 128 should be included in the new Constitution without any substantive amendments.</u>

3.6.3 The Commission also considered whether there should be constitutional provisions providing for general elections for provincial legislatures to be held on the same day in all provinces so as not to disrupt other national and provincial activities unnecessarily. However, the Commission is of the opinion this may be difficult to achieve in view of the powers already assigned to the Premiers of provinces by the interim Constitution.

3.7 Section 129 - Elections

3.7.1 Section 129 provides for the Premier of a province to call an election for a provincial legislature upon its dissolution in terms of the interim Constitution. Such an election shall take place within 90 days after the dissolution. The elections shall be conducted in accordance with the Electoral Act, 1993. In the opinion of the Commission these provisions presuppose that elections for provincial legislature need not be held on the same day(s) as elections for Parliament If provision is to be made for general elections as discussed in paragraph 3.6.3, section 129 would have to be amended by the addition of provisions in regard to the determination of the duration or dissolution of the newly elected legislature to make it possible to hold provincial elections on the same date.

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3.7.2 <u>The Commission is of the opinion that the provisions of section 129 are necessary and in accordance with generally accepted procedures for such elections and that the provisions should be incorporated into the new Constitution.</u>

3.8 Section 130 - Sitting of provincial legislature

3.8.1 Section 130 provides for the convening of a provincial legislature within seven days after an election of such legislature. The legislature may determine its own periods, days and hours for sittings. The Premier of a province may summon the provincial legislature to an extraordinary sitting for the despatch of urgent business.

3.8.2 <u>The Commission is of the opinion that the provisions of section 130 are necessary and in accordance with generally accepted procedures for sittings of legislatures.</u> There is also a need for Premiers to have the power to summon the legislature to extraordinary sittings in the interest of efficient government. <u>The provisions should be incorporated into the new Constitution without substantial amendments.</u>

3.9 Section 131 - Speaker and Deputy Speaker of provincial legislature

Section 131 provides procedures for the election of a Speaker and Deputy Speaker of a provincial legislature. The provisions are in accordance with the generally accepted practice for such elections. <u>The Commission is of the opinion that the provisions should be incorporated into the new Constitution without substantial amendment.</u>

3.10 Section 132 - Qualifications for membership of provincial legislatures

3.10.1 Section 132 provides for qualifications similar to those pertaining to members of the National Assembly. It also provides that a Premier shall not be disqualified from being a member of the legislature because of his holding that office.

3.10.2 Section 132(3) applies the provisions of section 40(2), (3), (4) and (5) pertaining to the National Assembly mutatis mutandis to a person nominated as a candidate for election to a provincial legislature. This section provides that candidates nominated for a provincial legislature shall at the time of nomination be ordinarily resident in the particular province, but allows for at least one candidate or not more than 10 per cent of the total number of candidates which a party is entitled to nominate to be nominated while they are nor ordinarily resident in the province concerned.

3.10.3 The Commission is of the opinion that only persons who are ordinarily resident in a particular province at the time of their nominations should be entitled to become members of the legislature for that province. The provisions of section 40(3) of the interim Constitution do not serve the interests of provincial voters and opens the way for political parties to make nominations for elections to provincial legislatures, which may not be in the interest of that particular province. No compelling reasons have come to the Commission's attention that would justify the continued existence of this provision

3.10.4 The Commission is of the opinion that the provisions of Section 132 should be incorporated into the new Constitution, but that the qualifications for membership of provincial legislatures should include the residential requirement for all members. Section 40(3) of the interim Constitution should therefore be deleted in so far as it relates to provincial legislatures.

3.11 Section 133 - Vacation of seats and filling of vacancies

3.11.1 Section 133(1) enumerates the circumstances under which a member of a provincial legislature shall vacate his or her seat. Paragraphs (a), (c), (d) and (e) which deal with eligibility, resignation, absenteeism and becoming a member of the National Assembly appear to be in accordance with generally accepted practice and the essence thereof could be incorporated in the new Constitution.

3.11.2 Paragraph (b) provides that a member shall vacate his or her seat if he or she ceases to be a member of the party which nominated that member. There appears to be some support for the deletion of this provision on the grounds that the clause could restrict freedom of speech, and desensitises members to significant shifts in public opinion. On the other hand it can be argued that a binding provision of this nature is the logical consequence of a system of proportional representation in which all members are elected from party lists. If some or all members are in future to be elected on a constituency basis, this may strengthen the call for the deletion of the provision on the grounds that members representing constituencies should be in a position to differ from their party's views if it is in the interest of their constituencies. It does seem unduly restrictive that, for the whole term of a legislature, members who are elected on a constituency basis should be obliged to follow their party's lead, even if they or a sector of the electorate no longer support that lead. The position of members who are elected

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from party lists is somewhat different in that they are elected only because of their party affiliations. There may therefore not be such compelling reasons to allow them to remain as members of the legislature if they resign from the party or lose their membership. The Commission is of the opinion that democratic principles would be better served if the provision which terminates the membership of a member of the provincial legislature if he or she ceases to be a member of the party which nominated him or her, is deleted in respect of members elected on a constituency basis.

3.11.3 In discussions with members of various provincial legislatures, the Commission was often aware of a reluctance on their part to express any views not cleared by their political parties' central organisations. It would appear that some provincial legislators fear that they might lose their party membership if they adopt standpoints which may not be favoured by the party at national level. If attitudes of this kind become prevalent, this would result in provincial legislators giving primary attention to the views of their party's national organisation rather than to their province's interests. To the extent that the party list system encourages such an ordering of priorities it must raise serious questions whether the system is conducive to democratic decision-making and accountability at the provincial level. The Commission is of the opinion that the continued use of the party list system of proportional representation at the level of provincial government should be reappraised, and consideration given to its replacement by a system of proportional representation on a constituency basis. The greater accountability of members to their constituents, rather than to central party structures, would be enhanced by such a system, which would therefore better serve the purposes of provincial governments.

3.11.4 Section 133(2) deals with the filling of vacancies in a provincial legislature under the existing party-list system of proportional representation. If this system should be changed to provide for constituency representation as well, it follows that the provisions of section 44(1) and (2) will also have to be changed.

Section 133(3) deals only with procedure for the submission of nominations and could be incorporated in the new Constitution unchanged.

3.12 **Section 134 - Oath or affirmation by members**

The section prescribes the oath or solemn affirmation which every member of a provincial legislature shall make before taking his or her seat. The Commission is of the opinion that the provision should be incorporated into the new Constitution.

3.13 **Section 135 - Powers, privileges and immunities of provincial legislatures and benefits of members**

3.13.1 Section 135(1) empowers a provincial legislature to control, regulate and dispose of its internal affairs and provides that it shall have all such other powers, privileges and immunities as may, subject to the national Constitution, be prescribed by a law of such legislature.

3.13.2 Section 135(2) provides for freedom of speech and debate in or before such legislature and any committee thereof, and that such freedom shall not be impeached or questioned in any court.

3.13.3 Section 135(3) protects a member from civil or criminal proceedings, arrest, imprisonment or damages for anything that he or she has said, produced or submitted in or before the legislature or a committee thereof or for anything that may have been revealed as a result thereof.

3.13.4 Section 135(4) deals with the payment of salaries and allowances and pension benefits to members and surviving spouses.

3.13.5 All the above provisions are necessary for the functioning of a provincial legislature and the Commission is of the opinion that similar provisions should be incorporated into the new Constitution.

3.14 **Sections 136 to 142**

Sections 136 to 142 provides for matters which are necessary for the orderly functioning of the legislature, viz:

- Penalty for sitting or voting when disqualified
- Rules and orders
- Quorum
- Requisite majorities
- Assent to Bills
- Signature and enrolment of provincial laws and
- Public access to provincial legislatures.

Similar provisions should be incorporated into the new Constitution.

3.15 **Section 143 - Administration of provincial legislatures**

3.15.1 Section 143(1) provides for the appointment of a provisional secretary for a legislature until a permanent secretary can be appointed. This provision will not be required in the new Constitution and can therefore be omitted.

3.15.2 Section 143(2) provides for the appointment by the Executive Council of a Secretary and other staff for the provincial legislature after consultation with the Commission on Provincial Government. In view of the status of a provincial legislature and the stipulation in CP VI that there shall be separation of powers between inter alia the legislature and executive, the Commission is of the opinion that the power to appoint a Secretary and staff of the legislature should be vested in the legislature itself, without being subject to an administrative action by the Executive Council.

3.15.3 However, CP VI also stipulates that appropriate checks and balances to ensure inter alia accountability shall accompany the separation of powers. The present section 143(2) requires the Executive Council to consult with the Commission on Provincial Government before appointing staff. While it is not considered appropriate that consultation with such a body should be obligatory in regard to the appointment of particular staff members, the Commission is of the opinion that consultation with an appropriate institution which has the required expertise to advise the legislature, should be obligatory in regard to the establishments, remuneration and other conditions of service of the staff of the legislatures. Significant disparities in salaries, grading and posts among the provincial legislatures themselves and between the provincial legislatures and Parliament and the Public Service (including provincial public servants) could lead to dissatisfaction and industrial action by staff who are all paid from the same source. It is considered necessary that national norms and standards should apply in respect of the abovementioned matters. The Public Service Commission is properly equipped to perform such a function. The Commission is consequently of the opinion that the provincial legislatures should determine their administrative establishments and staff salaries and other conditions of service after consultation with the Public Service Commission and that provision to this effect should be incorporated into the new Constitution.

3.15.4 The provisions of section 143(3) that the legislature's staff shall be remunerated out of the Provincial Revenue Fund of the province should be incorporated into the new Constitution.

3.16 Local Government

The interim Constitution does not provide for any formal arrangements in regard to consultation between provincial governments and local government representatives in relation to legislation affecting local governments (provision is made in respect of traditional authorities). There may be a need to provide for such consultation or representation and the Commission will consider the matter in a recommendation dealing with local government matters.

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APPENDIX: APPLICABLE CONSTITUTIONAL PRINCIPLES

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

VI

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

VIII

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

X

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

XIV

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

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.