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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

SUBMISSIONS

**RECEIVED AS AT
20TH FEBRUARY 1996**

VOLUME 20 (ADDENDUM)

PART 1

***POLITICAL PARTIES
ORGANISATIONS***

CONSTITUTIONAL ASSEMBLY

SUBMISSION RECEIVED FROM POLITICAL PARTIES AS AT 20TH FEBRUARY 1996

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19th February 1996

The Executive Director
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P O Box 15
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*Received on 19/2/96
@ 12h30 in Sub Com
meeting.*

ATTENTION: MR HASSEN EBRAHIM

Dear Sir

Due to other urgent commitments, both myself and Rev. K. Meshoe are unable to attend today's CC Sub Committee meeting.

For this reason, we have prepared some notes on an important aspect, namely the Central Bank.

Kindly share these with the members and please note that if these changes are to be debated, that we request this matter to stand over until either myself or Rev. Meshoe are available to debate our point of view.

If this is not acceptable, we reserve our position and will debate the matter in the Constitutional Committee.

Yours faithfully

L. M. GREEN (MP)
African Christian Democratic Party

Submission on the Central Bank

Introduction

Karl Marx knew that the family (the core building block of society), property and liberty were bound together. In *The Communist Manifesto*, Marx advocated compulsory education in tax supported schools. He called for centralised banking, a graduated income tax and inheritance taxes.

Marx knew that putting enough economic squeeze on the family would ultimately destroy it. Destroying the family is again vital for the breaking down of social barriers that would stifle the classless society from developing.

His purpose in advocating a central banking system was to attain a method for the manipulation of money by the state. The effect of this manipulative exercise is called inflation.

Inflation is caused by the increase in the purchasing medium - what we would call money today.

At issue is thus private property. The Christian approach to economics is based on private property. Money is used as a medium of exchange so individuals can exchange one property for another or for labour or something else of value. Money thus serves as a store of value.

A government that tampers with the money supply tampers with our wealth, our property. With a Biblical approach, anything of value would be used as money although certain things will be more efficient as a medium of exchange than others - gold, for example, has a historic value as a medium of exchange and store of value.

The prophet Isaiah long ago warned about inflation. "Thy silver has become dross", he cried out to God's people. Base metals were being used with the silver so that it lost most of its value. By using a cheap metal that looks like silver, the supply could be increased. This is inflation.

Modern inflating is done mostly through the central banking system. The money supply is steadily increased. This money is called "fiat" money with "fiat" being

the Latin word which means "let there be". Just as God said "Let there be light," so the money creators say "let there be money."

The individual cannot create wealth by fiat. Increasing the money supply results in a corresponding decrease in the value of all money. This is why the Rand has been steadily losing its value. Inflation is a silent burglar. Stealing from those, especially who are earning fixed incomes. Its victims, often as not, are the poor and needy.

Section 199(2)

While there is scope for the independence of the Central Bank, there is an equal need for transparency in its functions. All the structures of government and finance that have survived from the previous dispensations have been substantially adapted to ensure openness and transparency.

It is thus lamentable that the only institution that would seem to be as opaque and intransparent in its dealings as previously is the Central Bank - especially since its functions touch the pockets of all South Africans to an even greater extent than any other.

Oversight of this powerful body must thus lie with national and provincial Parliaments and not one member of cabinet. It must not merely consult, but its dealings must be audited from time to time and if errors in judgement and the like becomes apparent, those responsible must answer for it.

Section 199(1)

The primary object of the Central Bank should be adapted to make reference to the land. If the currency has to be changed, for whatever reason, this has to go through Parliament as the elected representatives of the people.

Re-drafted Text

Primary Object

- 199. (1)** The primary object of the South African Reserve Bank is to protect the value of the Rand of the Republic in the interests of balanced and sustainable economic growth in the Republic.
- (2)** The South African Reserve Bank, in the pursuit of its primary object, shall perform its functions, subject to acts of the respecting

Parliaments and in such a way that transparency, accountability and effective financial management of the economy, debt and all aspects with which the primary object of the Bank is concerned, is promoted. Regular consultation will take place between these Parliaments and the Bank to assist in the attainment of having a transparent, accountable and effective central bank.

Powers and functions

200. The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, subject to the need for transparency and accountability. Such powers and functions are to be determined by national and regional legislation.

19th February 1996



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19 February 1996

**TO : THE EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

FAX NO : 021 X 4614339

FROM : MR W J SCHOEMAN

NUMBER OF PAGES (including this one) : 49

WORKING DRAFT - NEW CONSTITUTION CHAPTER 10 - LOCAL GOVERNMENT

Attached herewith the text of the draft of Chapter 10 of the Constitution
available on request, without any charge.

The submission is made by the Association of Regional Local Government in South Africa on behalf of its members.

Our members include every existing Regional Local Government Body in the Republic of South Africa.

Yours sincerely

**WILLIE SCHOEMAN
CONVENER
REGLOGOV'S CONSTITUTIONAL WORKING GROUP**

**REGIONAL LOCAL GOVERNMENT
ASSOCIATION OF
SOUTH AFRICA**

**COMMENTS ON CHAPTER 10 OF THE
FIRST WORKING DRAFT OF THE CONSTITUTION
DATED 22 NOVEMBER 1995
FOR SUBMISSION TO THE
CONSTITUTIONAL ASSEMBLY**

Prepared by:
REGLOGOV CONSTITUTIONAL WORKING GROUP
3 February 1996

3 February 1996

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(18 February 1996)

3 February 1996

1. **INTRODUCTION**

This submission is made by the Association of Regional Local Government in South Africa on behalf of its members being the Non-Metropolitan Regional Local Government Institutions in the various provinces. Every existing Regional Local Government Body is a member of this Association.

Our members include all the Regional Services Councils, Joint Services Boards established in terms of the Regional Services Council Act, (Act No. 109 of 1985) and the KwaZulu and Natal Joint Services Act, (Act No. 84 of 1990) respectively as well as District Councils, Services Councils and Subregional Councils known as Regional Councils established in terms of the Local Government Transition Act, (Act No. 209 of 1993).

This Association was the first South African Local Government Association admitted to the International Union of Local Authorities as a member.

This Association was restructured as far as possible in terms of existing legislation pending elections in the Western Cape and KwaZulu-Natal.

2. **COMPARISON BETWEEN CHAPTER 10 OF THE INTERIM CONSTITUTION AND THE WORKING DRAFT OF THE NEW CONSTITUTION DATED 22 NOVEMBER 1995**

<u>INTERIM CONSTITUTION</u>	<u>DRAFT CONSTITUTION</u>
<p>S174 <u>Establishment and Status</u></p> <p>(1) Local government shall be established for the residents of areas demarcated by law of a competent authority.</p> <p>(2) A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.</p> <p>(3) A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.</p> <p>(4) Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.</p> <p>(5) Proposed legislation which materially affects the status, powers or functions of local governments or the boundaries of their jurisdictional areas, shall not be introduced in Parliament or a provincial legislature unless it has been published for comment in the Gazette or Provincial Gazette, as the case may be, and local governments and interested persons, including organised local government, have been given a reasonable opportunity to make written representations in regard thereto.</p>	<p>S164 <u>Establishment of Local Government</u></p> <p>The Draft Chapter 10 provides that government at local level must be established as a distinct tier of government to</p> <p>(1) The structures, powers and functions of government at the local level must be provided for in national or provincial legislation, or in both, in accordance with the framework provided by this Chapter.</p> <p>(2) Local government structures must be established for the whole territory of the Republic and the legislation referred to in subsection (1) must provide for the demarcation of the areas of jurisdiction of local government.</p> <p>(3) A law referred to in subsection (1) may provide for different categories of local government with different powers, functions and structures.</p> <p>S163 <u>Government at Local Level</u></p> <p>(a) Enhance democracy and development;</p> <p>(b) empower civil society to participate in local self-governance;</p> <p>(c) Improve service delivery to all communities;</p> <p>(d) enhance social and economic development, economic viability; sustainability and self supportiveness;</p> <p>(e) enhance partnership among the different tiers of government, and among the different categories of local government, civil society and international local government institutions; and</p> <p>(f) ensure accountability, responsiveness and openness.</p>

INTERIM CONSTITUTION

S175 Powers and Functions of Local Government

- (1) The powers, functions and structures of local government shall be determined by law of a competent authority.
- (2) A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.
- (3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.
- (4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.
- (5) A local government shall have such executive powers as to allow it to function effectively.
- (6) A local government may, in its discretion, by means of a resolution of its council provide for the assignment of specified functions to local bodies or sub-municipal entities within its area of jurisdiction as prescribed and regulated by or under law where, in the opinion of the council, such assignment of functions will facilitate or enhance the provision or administration of services, the adherence to municipal by-laws or, more generally, good governance in the public interest: Provided that such assignment of functions -
 - (a) shall not be inconsistent with an Act of Parliament or an applicable provincial law, and

DRAFT CONSTITUTION

S166 General Powers and Functions of Local Government

- (1) A local government must have legislative and executive powers.
- (2) A local government may make by-laws provided that they are not inconsistent with national or provincial legislation.
- (3) A local government has executive authority over all matters in respect of which it has exercised its legislative competence, and matters assigned or delegated to it by national or provincial legislation to allow it to function effectively.
- (4) A local government must provide services for the maintenance and promotion of the well-being and good government of all persons within its area of jurisdiction, provided that the services can be rendered in a sustainable manner and are financially and physically practicable. It must also promote local economic development within a safe and healthy environment.
- (5) A local government's competence to form and belong to associations for the protection and promotion of mutual interest and to co-operate with other local governments in this regard, is recognised.

S168 Legislative Competencies, Powers and Functions

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

- Cleansing
- Community Services
- Economic Development
- Environmental Protection
- Elections
- Electricity
- Health
- Housing

<p align="center">INTERIM CONSTITUTION</p>	<p align="center">DRAFT CONSTITUTION</p>
<p>(b) shall not diminish the accountability of such local government.</p> <p>S178 Administration and Finance</p> <p>(1) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.</p> <p>(2) A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction.</p> <p>(3) A local government shall be entitled to an equitable allocation by the provincial government of funds, and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations, taking into account the different categories of local government referred to in section 174(2).</p>	<ul style="list-style-type: none"> ● Library Services ● Licensing ● Parks and recreation ● Planning ● Produce Markets ● Protection ● Rates, Tariffs and Taxes ● Roads ● Sewage ● Storm water ● Traffic ● Transport ● Water <p>S166 Administration and Finance</p> <p>(1) Legislation referred to in section 164 must contain provisions aimed at ensuring that local government administration is based on sound principles of public administration, good governance, transparency and public accountability.</p> <p>(3) Subject to conditions prescribed by legislation after taking into consideration any recommendations of the Financial and Fiscal Commission, a local government may levy and recover rates, levies, fees, taxes and tariffs, as may be necessary to exercise its powers and perform its functions.</p> <p>(4) A local government may be entitled by legislation to a specifically allocated portion of national and provincial revenue, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement and allocations, taking into account the different categories of local government.</p> <p>(5) Any transfer of responsibilities to local government by another level of government, must be accompanied by an allocation of the financial and other resources required for their fulfilment.</p> <p>(6) All financial arrangements within a local government must be conducted by way of publicised budgets which must be constructed in accordance with the relevant legislation of a competent legislature.</p>

INTERIM CONSTITUTION

- (b) is a member of the National Assembly of the Senate;
- (c) is not qualified to become a member of the National Assembly;
- (d) is an employee of a local government (unless, with due regard to the public interest, exemption of this disqualification is given by the Executive Council of the province in whom the local government is situated and proof of such exemption accompanies the nomination of such person); or
- (e) is disqualified in terms of any other law.

DRAFT CONSTITUTION

- (7) No one is qualified to be a member of a local government if that person is -
 - (a) not entitled to vote in terms of subsection (5);
 - (b) a member of any legislature at the national, provincial or local level, except for representing the local government in another legislature in terms of any legislation;
 - (c) not qualified to become a member of the national or a provincial legislature;
 - (d) an employee of a local government unless exempted by legislation; and
 - (e) disqualified in terms of any legislation on any other ground.

S177 Executive Committees

A council of a local government shall elect according to a system of proportional representation as may be prescribed by a law, from among its members, an executive committee to exercise such powers and perform such functions as may be determined by such council: Provided that:

- (a) the council shall determine the number of members of and the quorum for the executive committee;
- (b) the executive committee shall endeavour to exercise its powers and perform its functions on the basis of consensus among its members; and
- (c) if consensus on any matter cannot be achieved, such matter may be decided by the committee by resolution of a majority of at least two-thirds of all its members, or the committee may, if a majority of the committee so decides, submit a report and recommendation (if any) on the matter to the council for a decision.

INTERIM CONSTITUTION

DRAFT CONSTITUTION

S178 Council Resolutions

Matters before the council of a local government pertaining to -

- (a) the budget of the local government, shall be decided by a resolution of the council adopted by a majority of at least two-thirds of all its members; and

- (b) town planning, shall be decided by a resolution of the council adopted by at least a majority of all its members: Provided that a council may delegate the power to make decisions on matters pertaining to town planning to the executive committee or to a committee appointed for this purpose: Provided further that section 177 shall apply mutatis mutandis to the appointment and functioning of a committee appointed for this purpose.

3. THE CONSTITUTIONAL PRINCIPLES

3.1 POINTS OF DEPARTURE

The significance and importance of specifically Schedule 4 of the Interim Constitution, which contains the so called "Constitutional Principles" has been questioned, but stands to be measured against the fact that the Constitutional Assembly itself is constitutionally [Section 71(11)] obliged to "... comply with the constitutional principles in Schedule 4".

The validity of the constitutional principles are more-over protected against any gerrymandering by the provision of Section 74 of the Interim Constitution, which precludes:

"any amendment or repeal of the principles themselves or of any provisions of the relevant chapter of the constitution relating to either the principles or to any requirement that the constitutional text shall comply with the principles or that the text shall be certified by the Constitutional Court as being in compliance therewith".

The final safeguard of the validity of the principles is that the new constitutional text passed by the Constitutional Assembly shall according to Section 71(2) "..... not be of any force or effect, unless the Constitutional Court has certified that all the provisions of such text complies with the Constitutional Principles". Significant is that this places an obligation on that court to positively satisfy itself that there is compliance with the principles. Any person may challenge compliance of the proposed text with the principles in litigation.

3.2 IDENTIFICATION AND INTERPRETATION

It is accepted that all the principles contained in Schedule 4 are in some way relevant to Local Government. The following principles, however are identified as those principles most relevant in determining the new text of the Constitution regarding Local Government. Principles number XVI, XX and XXIV together must however form the nucleus of the new Constitution, regarding Local Government.

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PRINCIPLE

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.

COMMENT

1. This principle read with principle IV and XVI requires the Constitution as the supreme law of the land to provide for a democratic system of government (structured at national, provincial and local levels).
2. It requires the Constitution to create this democratic system of government.
3. It does not provide for government itself (Provincial or National Government) to create a democratic system of government (Local Government).

PRINCIPLE 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.

COMMENT

1. The Constitution being the only supreme law of the land is the only suitable mechanism to effectively regulate the relationship between the different levels of government.
2. It is therefore totally inappropriate to allow subordinate legislation (including Provincial Constitutions) to regulate the relationship between the different levels of government. If this principle is read in conjunction with principle XX it is apparent that the Constitution itself shall regulate the relationship between the different levels of government.

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3. The Constitution shall provide for the creation of representative government (Local Government) complying, with the requirements of multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, in general, proportional representation. It should be noted that proportional representation is not the absolute and only possible form of representation.

PRINCIPLE VIII

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

COMMENT

The Constitution must guarantee representative government at all levels, embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and in general proportional representation.

PRINCIPLE IX

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

COMMENT

This principle requires the Constitution to make provision for freedom of information so that wherever a government administration exists such administration shall be open and accountable.

PRINCIPLE X

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

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COMMENT

This principle read with principle XXIV requires the Constitution to provide for a framework with regard to the legislative process of Local Government. The process of higher levels of government, legislating over other levels of government where such level is competent to do so, must be provided for in the Constitution, in order to afford each level of government a measure of protection. When this principle is compared with the requirements of principle XX, it seems that each level of government is entitled to protection of its appropriate and adequate legislative and executive powers and functions, to enable it to function effectively.

PRINCIPLE XIII

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 fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

[Constitutional Principle XIII substituted by s. 2 of Act 3 of 1994].

COMMENT

1. The institution, status and role of traditional leadership (also with regard to their role in Local Government) shall be recognised and protected in the Constitution.
2. This principle, read with principle XVII specifically excludes the requirements of democratic representation in the realm of traditional leadership, where it does not affect fundamental rights.

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3. Because of the difficult Constitutional relationship between democratically elected government and the hereditary tribal system (which could also in some aspects be considered a form of local government) it is essential for the Constitution to adequately regulate its concept.

PRINCIPLE XVI

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

COMMENT

1. The Constitution must provide for the structuring of government at National, Provincial and Local levels. It would be therefore inappropriate to allow any of these levels to solely control the structuring of government on any of the other levels. The framework referred to in principle XXIV must therefore be sufficiently defined to actually structure Local Government.
2. Local Government shall be a form of government and may not be reduced to merely an administration. It shall therefore possess all essential elements of a government and shall be autonomous with regard to its functions.

PRINCIPLE XVII

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

COMMENT

It requires the Constitution to create the opportunity for democratic representation also at Local Government level which implies Local Government for all areas. The exception to this principle also acknowledges the role and status of traditional leadership in the sphere of Local Government.

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PRINCIPLE 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.

COMMENT

1. National and provincial levels of government shall have the power to perform functions for other levels of government on an agency or delegation basis. This principle specifically does not allow other levels of government to usurp the functions of Local Government. It specifically provides that Local Government shall, even when other levels of government perform its functions, still remain the principle responsible for its function. The Constitution must therefore guarantee that Local Government remains the principal responsible for its functions and must allow it to determine the mandamus in terms of which such agency or delegation shall operate.
2. This principle implies a massive autonomy for each level of government in relation to its functions.

PRINCIPLE 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.

COMMENT

1. Specifically referring to "each level of government" the application of this principle to local government as well, is accentuated.
2. It guarantees each level of government appropriate and adequate legislative and executive powers and functions to enable each level (including local government) to function effectively.
3. It requires the Constitution to protect these powers and functions of each level of government vis-à-vis any other level of government.
4. Such constitutional protection must guarantee each level of government a measure of autonomy regarding those legislative and executive powers necessary for its effective functioning.
5. This principle entrenches the rights of each level of government when it functions effectively and when it renders its public administration effectively.
6. The Constitution is further required to provide a basic mechanism in terms whereof powers can be allocated to different levels of government (including Local Government).
7. This mechanism is based on a test regarding the financial viability at each level of government, regarding the performance of the function and the effective public administration of such function. This test pertaining to the allocation of powers and functions must be entrenched in the Constitution to which all levels of government are subject.
8. This principle effectively qualifies the autonomy of each level of government vis-à-vis any other.

PRINCIPLE XXIV

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

COMMENT

1. This principle must not be read in isolation and is further expanded upon in principle XX and other relevant principles.
2. This principle empowers both Central and Provincial Government to provide for the comprehensive powers, functions and other features of local government. It does, however not provide a free hand to national and provincial government to legislate for local government. Their legislation shall comply with the framework to be established for Local Government and with the rights reserved to them and in principle XX.
3. The framework must provide for Local Government's powers, functions and structures and, when read with principle XXV, the framework shall also provide for Local Government's appropriate fiscal powers and functions.
4. This framework will have to be sufficiently comprehensive to comply with the requirements of the other constitutional principles discussed in this document.
5. This framework will have to be sufficient to effectively entrench the position of local government vis-à-vis other levels of government.

PRINCIPLE XXV

The National Government and Provincial Governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for

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Local Government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of Local Government.

COMMENT

1. The framework for the fiscal powers and functions for different categories of Local Government must be entrenched in the Constitution.
2. The framework must be sufficiently clear to ensure appropriate fiscal powers and functions for the different categories of Local Government including the power to raise appropriate levies and taxes.
3. The principle of different categories of Local Government must therefore be entrenched also with specific reference to their different fiscal powers and functions.

PRINCIPLE XXVI

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

COMMENT

1. The Constitution must entrench the right of each level of government, including Local Government, to an equitable share of revenue collected nationally, so as to ensure that local governments will be able to provide basic services and execute the functions allocated to them.
2. This constitutional right must be sufficiently clear to allow the financial and fiscal commission to define the quantum of the share for Local Government.

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3. This constitutional right prohibits the allocation of functions to Local Government where it is not also provided with funding to execute such functions.
4. This principle entrenches local government's obligation to provide for basic services even where such local government is not able from own resources to perform these basic services.
5. This principle obliges the Fiscus to assist Local Government financially in its provision of basic services.
6. This principle does not allow any other level of government to share in revenue collected at Local Government level.

PRINCIPLE XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

COMMENT

This principle affords each Province (not each provincial government) the constitutional right of representation on the financial and fiscal commission. Local governments, being essential components of each province, should therefore be included in the representation of such province. This is especially so as local governments are specific beneficiaries of revenue collected nationally.

3.3 CONFLICTS AND OMISSIONS

This section deals with conflicts and omissions with regard to the Draft Chapter 10 and the Constitutional Principles. It does not purport to be an exhaustive list.

Section 163

GOVERNMENT AT LOCAL LEVEL

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

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

COMMENT

As a matter of consistency the word "tier" should be substituted by the word "level" as used in the constitutional principles (XVI, XIX, XX, XXVI).

Section 164

ESTABLISHMENT OF LOCAL GOVERNMENT

- (1) The structures, powers and functions of government at the local level must be provided for in national or provincial legislation, or in both, in accordance with the framework provided by this Chapter.

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- (2) Local Government structures must be established for the whole territory of the Republic and the legislation referred to in subsection (1) must provide for the demarcation of the areas of jurisdiction of local government.
- (3) A law referred to in subsection (1) may provide for different categories of local government with different powers, functions and structures.

CONFLICT

Section 164(3)

A law referred to in subsection (1) may provide for different categories of local government with different powers, functions and structures.

1. Section 164(3) - Constitutional Principle XXV requires that the "framework" enjoined by Constitutional Principle XXIV must "... make provision for appropriate fiscal powers and functions for different categories of local government" therefore the framework must settle the question of categories. This it presently does not do.
2. In any event the word "may" as used in the inadequate draft must be replaced by "must".

OMISSION

Constitutional Principle XXIV distinguishes between:

1. a framework of powers and functions and structures for Local Government which is to be provided for in the Constitution; and
2. the comprehensive powers and functions of Local Government, which is to be provided for in national or provincial legislation. Section 168 of the Draft Chapter 10 fails to provide for 1. above by totally abrogating this duty to the "national or provincial legislature".

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Similarly Section 164 does not provide any framework for local government structures as per 1. above. It again leaves it to national or provincial legislation. Only lipservice is paid for compliance with this principle.

Section 165

GENERAL POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

- (1) A local government must have legislative and executive powers.
- (2) A local government may take by-laws provided that they are not inconsistent with national or provincial legislation.
- (3) A local government has executive authority over all matters in respect of which it has exercised its legislative competence, and matters assigned or delegated to it by national or provincial legislation to allow it to function effectively.
- (4) A local government must provide services for the maintenance and promotion of the well-being and good government of all persons within its area of jurisdiction, provided that the services can be rendered in a sustainable manner and are financially and physically practicable. It must also promote local economic development within a safe and healthy environment.
- (5) A local government's competence to form and belong to associations for the protection and promotion of mutual interest and to co-operate with other local governments in this regard, is recognised.

CONSTITUTIONAL PRINCIPLE 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

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public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

OMISSION

1. The Draft Chapter 10 by no means provides for "adequate and appropriate" legislative powers for Local Government. For example, the Draft Chapter 10 only gives a discretionary power to make subordinate legislation (i.e. legislation which can be vetoed at Provincial or National level). A situation can thus arise in which the Constitution obliges Local Government to perform a certain function. Yet, because of the limited subordinate legislative powers granted, Local Government may be inhibited from delivering effectively on its constitutional obligations.
2. The granting of the limited subordinate legislative power and the omission of "adequate and appropriate" legislative powers can be viewed as being unconstitutional.
3. The granting of legislative powers to Local Government by means of a National/Provincial legislation will also not comply with Constitutional Principle XX, as such national and provincial legislation cannot secure the "adequate and appropriate" status, which local government would need to have to ensure compliance with Constitutional Principle XX.
4. Constitutional Principle XX furthermore requires provision to be made in the Constitution to provide for a "sound basis" upon which the allocation of powers between the different levels of government should take place. An attempt at providing such a "sound basis" in the form of a list of possible functions is made in Section 168 of the Draft, which except for metropolitan councils, (which generally all have similar capacity in relation to financial viability and public administration) cannot be viewed as a "sound basis" since it does not take account of the varying capacities of the other categories of local governments individually, or the varying needs of different communities.

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5. This principle furthermore requires the acknowledgement of cultural diversity in the allocation of powers and functions. Such acknowledgement is absent in the Draft Chapter 10, Section 168 on powers and functions.

CONFLICT

Section 165(3)

A local government has executive authority over all matters in respect of which it has exercised its legislative competence, and matters assigned or delegated to it by national or provincial legislation to allow it to function effectively.

To limit local government's executive competence, to matters in respect of which it has exercised its legislative competence is in conflict with Constitutional Principle XX. This is inappropriate as there are cases in which Constitutional Principle XX Local Government may perform functions without requiring legislation to do so.

OMISSION

Constitutional Principle X prescribes formal legislative procedures at National and Provincial level. It should similarly provide formal procedures for Local Government legislation.

For the Draft Chapter 10 to comply with this principle it should at least set minimum requirements with regard to legislative procedures for the promulgation of Local Government legislation.

Section 166

ADMINISTRATION AND FINANCE

- (1) Legislation referred to in section 164 must contain provisions aimed at ensuring that local government administration is based on sound principles of public administration, good governance, transparency and public accountability.

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

CONSTITUTIONAL PRINCIPLE XXIV

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

CONFLICT

Section 166(3)

Subject to conditions prescribed by legislation after taking into consideration any recommendations of the Financial and Fiscal Commission, a local government may levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions.

1. Following the line of reasoning as employed in respect of Section 164(3) supra the provisions of this is unconstitutional to the extent that it purports to make local government rights to levy and recover rates and tariffs "subject to conditions prescribed by (subsidiary) legislation".
2. Local government is constitutionally entitled to appropriate fiscal powers and functions for different categories of local government.

CONSTITUTIONAL PRINCIPLE XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

OMISSION

Section 166(4)

A local government may be entitled by legislation to a specifically allocated portion of national and provincial revenue, and the Financial and Fiscal Commission must make recommendations regarding criteria for such entitlement and allocations, taking into

account the different categories of local government.

3. The phrase "a local government may be entitled by legislation to a specifically allocated portion of national and provincial revenue" contradicts Constitutional Principle XXVI, and is to that extent unconstitutional in the following respects:
- (a) the word "may" is inappropriate since the constitutional right (Constitutional Principle XXVI) is unconditional and should be replaced by the word "is";
 - (b) local government is constitutionally entitled to its share of nationally collected revenue and this right cannot be delegated to subsidiary legislation;
 - (c) that it refers to "a specifically allocated portion ..." instead of "and equitable share of ..."; and
 - (d) it refers to "national and provincial" revenue instead of revenue "collected nationally".

OMISSION

Constitutional Principle XXVI gives local government an unequivocal right to "an equitable share of revenue collected nationally to ensure that local government" is able to provide "basic services and execute the functions allocated" to it.

Section 166(4) however only provides that local government "may" be entitled to a specifically allocated portion of national and provincial revenue and such entitlement arises only by means of specific legislation in this regard.

Section 166(4) thus completely omits to provide for the automatic entitlement provided for in Principle XXVI.

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A similar omission occurs once again in Section 168 as this section omits to provide the allocation for the delivery of basic services to local government. Principle XXVI clearly envisages constitutional duty upon local government to provide basic services in addition to any other functions allocated to it.

CONSTITUTIONAL PRINCIPLE XXV

The National Government and Provincial Governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for Local Government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of Local Government.

OMISSION

Constitutional Principle XXV requires a framework in the Constitution to differentiate between the fiscal powers and functions of the different categories of local government. The Draft Chapter 10 in Section 168(4) does draw this distinction with regard to local governments share of funds collected at a national level. Yet Section 168(3) fails to draw this distinction in relation the more important aspect of local government finances, namely its fiscal powers and functions with regard to its own taxes.

Section 167

ELECTIONS

- (1) A local government must be elected democratically, and elections must take place in terms of applicable legislation.
- (2) Elections for local government must take place at intervals of not more than five years.

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- (3) Members of a local government must be elected in accordance with a system of proportional representation, or ward representation, or both proportional and ward representation.
- (4) Where a system of ward representation applies, independent candidates must not be discriminated against.
- (5) Every natural person is entitled to vote in an election of a local government if that person -
 - (a) is qualified to vote in an election for the National Assembly;
 - (b) ordinarily resides in the area of that local government, or is liable for the payment of property rates, rent, service charges or levies to that local government in terms of applicable legislation; and
 - (c) is registered as a voter on the voters roll of that local government.
- (6) Subsection (5)(b) does not entitle a voter to more than one vote per local government.
- (7) No one is qualified to be a member of a local government if that person is -
 - (a) not entitled to vote in terms of subsection (5);
 - (b) a member of any legislature at the national, provincial or local level, except for representing the local government in another legislature in terms of any legislation;
 - (c) not qualified to become a member of the national or a provincial legislature;
 - (d) an employee of a local government unless exempted by legislation; and

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(e) disqualified in terms of any legislation on any other ground.

CONSTITUTIONAL PRINCIPLE VIII

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

CONFLICT

CPVIII specifically provides that representative government may "in general (be on the basis of) proportional representation". To the extent that the constitutional proposal as presently drafted would allow representation that may be "in general" on a ward basis, it is unconstitutional.

OMISSION

Constitutional Principle VIII

The principle of a common voters' roll is not addressed in the Working Draft.

It will amount to an artificial construction to limit the interpretation of this principle to only national and provincial levels of government.

A proper application of this principle requires that the constitution must provide that every local government must have a common voters' role. For example this implies that for metropolitan or regional councils (district councils) to have a common voters' role, the obligation in relation to this voters' role lies on the relevant metropolitan/regional (district) council only.

The principle of a common voters' role at local government level should thus be enshrined in Chapter 10 of the Constitution.

Section 168

LEGISLATIVE COMPETENCIES, POWERS AND FUNCTIONS

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

- Cleansing
- Community services
- Economic development
- Environmental protection
- Elections
- Electricity
- Health
- Housing
- Library services
- Licensing
- Parks and recreation
- Planning
- Produce markets
- Protection
- Rates, tariffs and taxes
- Roads
- Sewage
- Storm water
- Traffic
- Transport
- Water

CONSTITUTIONAL PRINCIPLE 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.

CONSTITUTIONAL PRINCIPLE XXVI

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

COMMENT

The powers and functions of Local Government is of crucial importance. The currently drafted, vague and contradictory, one sentence formulation does not do justice to the purpose of a constitution in this regard. Constitutional Principles XX and XXVI should be imported into the text of Chapter 10 to establish the requisite justiciable norm against the allocation of powers and functions in any other legislation is to be tested.

OMISSION

Constitutional Principle XX

The Draft Chapter 10 by no means provides for adequate and appropriate legislative powers for local government. For example the Draft Chapter 10 only gives a discretionary power to make subordinate legislation (i.e. legislation which can be vetoed at provincial or national level). Thus a situation can arise in which the constitution obliges local government to perform a certain function. Yet, because of the limited subordinate legislative powers granted local government may be inhibited from delivering effectively on its constitutional obligation.

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The grant of the limited subordinate legislative power and the omission of adequate and appropriate legislative powers can be viewed as being unconstitutional.

The granting of legislative powers to local government by means only of National/Provincial legislation will also not comply with Constitutional Principle XX as such national and provincial legislation cannot secure the adequate and appropriate status which local government would need to have to ensure compliance with Constitutional Principle XX.

Constitutional Principle XX furthermore requires provision to be made in the constitution to provide for a sound basis upon which the allocation of powers between the different levels of government should take place. An attempt at providing such a "sound basis" is made in Section 168 of the draft barring metropolitan/regional councils which are generally all similarly developed, the list in Section 168 cannot be viewed as a "sound basis" since it does not take account of the varying capacities of the other categories of local government individually and as categories.

The list in Section 168 further does not accommodate cultural diversity as no diversity can be accommodated in a uniformly applicable list.

4. **THE COMPARISON BETWEEN REGLOGOV'S POSITION AND THE DRAFT CHAPTER 10 ON LOCAL GOVERNMENT**

Reglogov's position on the Chapter on Local Government in a future Constitution is reflected in Papers 1, 2 and 3 circulated separately.

4.1 **ESTABLISHMENT OF LOCAL GOVERNMENT**

Introduction

It is trite law that two of the main purposes of a Constitution is the regulation of the relationship between:

- (1) the different components of the State and
- (2) the relationship between the State and its citizens.

1. The relationship between the different components of the State

A Constitutional democracy is premised on the notion that the Constitution is supreme. Therefore it is the supreme regulator of the relationships referred to above. The notion of Constitutional supremacy emanates from the need to protect the institutions of the State from one another.

If the notion of Constitutional democracy is accepted, the adoption of a Constitution which does not give effect to this need amounts to a contradiction in terms.

The proposed text of the Constitution only pays lipservice to the regularization of the relationship between Local Government and the rest of government. In reality it does not even set a minimal framework for the regulation of this relationship.

Government is established not only for the sake of governing but is also established to address specific needs. Establishing a level of government without having a clear objective on the role of such government in addressing the specific needs does no more than to create an expensive talkshop.

As stated earlier a Constitution is required to regulate the relationships within government and its institutions. The regulation of these relationships is mainly informed by the specific needs which need to be addressed.

Similarly the relationship between Local Government and any other level of government can only be successfully regulated by a Constitution which assigns a specific role to Local Government.

The role of Local Government is in no way defined in the proposed text. Attempts are made at defining the role of Local Governments in Section 168 (to some extent) and Section 169 (to no extent).

2. The relationship between the State and its citizens

For a Constitution to effectively and fairly regulate the above relationship, it must be accessible (in a wide sense) to the citizens of the State.

This requires that the text of the Constitution be drafted in an easily understandable and apparent manner.

The Draft Chapter 10 does however fall short of the above. For example in order to assign a meaning to Section 168 and Section 165(3) (read with Schedule 5), extensive research is required.

4.2 THE ROLE OF LOCAL GOVERNMENT IN GOVERNMENT

It is suggested account should be taken of the rationalities introduced in Constitutional Principles XVI, XX and XXVI.

A local government shall provide for the basic needs of its community necessary for the maintenance and promotion of the well-being and good government of the community in its area of jurisdiction and local economic development within a safe and healthy environment.

In addition to this, and in no way less important, it should be noted that Local Government is best suited to develop the communities it serves in every possible way.

The supplementary vision of Local Government is provided for in Section 163(a) - (f) which includes:

- (a) Enhance democracy and development;
- (b) empower civil society to participate in local self-governance;
- (c) improve service delivery to all communities;
- (d) enhance social and economic development, economic viability, sustainability and self-supportiveness;

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- (e) enhance partnership among the different levels of government, and among the different categories of local government, civil society and international local government institutions; and
- (f) ensure accountability, responsiveness and openness.

Vision can never be equated to the role (mission). The role of Local Government should thus be clearly spelt out as being the role of Local Government and not as defining the way in which Local Government is to be established.

4.3 FRAMEWORK FOR LOCAL GOVERNMENT

The purpose of a framework is to provide a blueprint and give policy direction. It is not only a mechanism enabling the creation of some unknown creature. To refer to a framework which does not exist, does not in itself create the framework.

It is therefore suggested that such a blueprint should contain directions with regard to:

1. Local Government's position viz-à-viz that of the rest of government;
2. the role of Local Government within society;
3. the structuring of Local Government (including the relationship between Local Governments);
4. the minimum powers and functions required to fulfill its identified role; and
5. administrative and financial capacities Local Government may utilize to fulfill its role and achieve its objectives.

(Subsidiary to the above are the issues listed in the Draft Chapter 10).

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A constitution cannot provide a blueprint on the above issues, by simply delegating the obligation for the formulation of such blueprint. It should be noted that this blueprint can be achieved without stifling the developments with regard to Local Government currently taking place.

It is thus suggested that the following other issues also be included in the establishment part of the blueprint:

1. the territorial aspects of Local Government such as the "wall-to-wall" principle;
2. the categories of Local Government with their respective roles;
3. issues related to demarcation.

4.4 POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

In relation to the powers and functions of Local Government, the following needs reiteration:

1. The principle contained in schedule 4 require the Constitution to provide a blueprint for the rational distribution of powers and functions in government and sets the parameters and the criteria to be complied with for the distribution of powers and functions.
2. The allocation of any function without the concomitant allocation of all relevant powers amounts to an illogical contradiction. The attainment of executive authority (powers) after the utilisation of legislative authority is not always feasible as executive authority may be needed before legislative authority can be exercised. (Powers refer here to all powers necessary for the performance of the function i.e. legislative and executive powers. Executive authority should be widely construed here).

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3. Only once a rational basis for the allocation for powers and functions is fully provided for, will the debate on the finances and administration of Local Government become meaningful.
4. If it is indeed accepted that the Constitution must provide a blueprint with specific regard to the functions of Local Government and that the blueprint must be based on rational criteria, the following questions arises:

Whether providing for a list of functions which allows other levels of government to select from this list, functions Local Government is obliged to perform, without providing any criteria to which this selection process must comply, is consistent with the requirements set down in the constitutional principles?

5. The provision of a rigid list of functions for Local Government may generally be questioned bearing in mind:
 - (a) the huge differences in the various needs of the communities;
 - (b) the differences in available capacity of Local Government in its broadest sense; and
 - (c) the changes in Local Government taking place.
6. It is generally accepted that the blueprint for Local Government must also map out Local Government's role in the development of its community in the broadest sense. The development of the community has many facets (e.g. physical, humanitarian, socio-economic and cultural) and is presently perhaps not even fully understood. A rigid list could not possibly provide the flexibility for Local Government to properly grow in this regard.

Because of the above Reglogov support the following:

1. The distribution of powers and functions in non-metropolitan areas, between the levels of government and categories of Local Government, require well-defined criteria. Should a list of the allocation of powers and functions be

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decided upon, the necessary flexibility can be obtained by setting well-defined objective and obligatory criteria to effectively inform the distribution of these functions within the categories of Local Government. This list should make allowance for the performance of unidentified developmental functions.

4.5 ADMINISTRATION AND FINANCE

Section 166(1) gives no guidance with regard to the definitions of the concepts of sound public administration, good governance, transparency and public accountability. At the very least clarification of these concepts should be linked to similar sections in the Constitution.

Section 166(3) is the only section that deals with any competence of Local Government to levy any form of tax. This subsection, however, does not recognise any exclusive taxing competence on the part of Local Government whether in respect of property based tax, which has historically been the province of Local Government or any form of taxation. Given the requirement that each level of government should have appropriate powers, the new Constitution should recognise in some manner an exclusive form of taxation.

The only section dealing with Local Government's right to an equitable share of revenue collected nationally, is embodied in Section 166(4). This subsection, however, fails to recognise and constitutionalize this right which is crucial to Local Government's ability to effectively deliver basic services.

4.6 ELECTIONS

4.6.1 Holding of elections

It is proposed that Local Government elections should as a matter of course, be held on the same day nationally. This proposal is based on the inadequacy of localised campaign infra structures within many political groupings, necessitating a one-off campaign nationally. A supporting

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consideration is that the publicity generated by elections nationally on the same day will increase the status of Local Government elections in the eyes of the electorate and promote higher voter participation.

4.6.2 Electoral systems

While maintaining support for the recognition of representation also on a ward basis on Local Government level, it is pointed out that in order to avoid the provision being tested successfully in a Constitutional Court, it needs to be reworked to ensure that representation will "in general" be proportional as required by CPVIII and XIV.

4.6.3 Qualification/Disqualification

- (a) The provision of Section 167(7)(d) disqualifying employees of Local Government from membership of local councils, on the one hand unfairly discriminates against them as compared to other civil servants while on the other hand failing to address adequately the real problem which is to avoid individuals being both an employee and a member of the council (employer) of the same council.

To avoid the conflict of interest in the later situation the provision should be redrafted appropriately.

- (b) Given that representation at local level is structured to allow the electorate to in fact cast 2 votes, (one on the proportional list and one for a ward councillor) both in the same Local Government, the provision of 167(6) of the Draft limiting a voter to one vote only leads to confusion, which is best avoided given the status of the Constitution.

It is once more suggested that a simpler way of accomplishing the intention of this subsection is by limiting individual voter enrolment to once per local authority.

4.7 CODE OF CONDUCT

In the context of maintaining high levels of integrity, efficiency and effectiveness it is considered important that the need for the establishment by a law of competent authority, of an enforceable code of conduct for elected members and officials should be constitutionally enshrined.

4.8 CHAPTER 14

Financial and Fiscal Commission

The view that the role of the Financial and Fiscal Commission should be extended to take over the function of reviewing the imposition of Local Government taxes and charges currently fulfilled by the Provinces, is reiterated and motivated as follows:

- (i) The Financial and Fiscal Commission is the more functionally appropriate and better equipped by virtue its composition to handle these issues.
- (ii) The Financial and Fiscal Commission is in a better position to ensure a uniform approach in respect of the criteria to be applied in the imposition of taxes and charges.

5. CONCLUSION : PROPOSALS FOR THE NEW CONSTITUTIONAL TEXT : LOCAL GOVERNMENT (18 FEBRUARY 1996)

SECTION 1 : ESTABLISHMENT AND STATUS OF LOCAL GOVERNMENT

- (1) Local government comprising of primary local government and a regional local government shall be established for every metropolitan and non-metropolitan area.
- (2) Local Government, as a level of Government shall be autonomous with regard to those entrusted powers and functions it can perform utilising its own resources and it shall be entitled to regulate its affairs. Local Government shall have such legislative and executive powers to allow it to function effectively.
- (3) Parliament or a provincial legislator shall, subject to the provisions of Section 2, paragraph 11 (Section 175(1) of the interim constitution) not encroach on the powers and functions for which a Local Government is autonomous.
- (4) The only competent body of appeal for a decision taken by a Local Government or an act made by a Local Government in connection with any power or function for which it is autonomous, shall be a competent court of law.
- (5) Proposed legislation which establishes, changes or disestablishes a Local Government which has not been entrusted with any autonomous powers or functions shall not be introduced in parliament or a provincial legislator unless it has been published for comment in the gazette, or the provincial gazette as the case may be, and local government and interested persons, have been given a reasonable opportunity to make written representations in regard thereto.

- (6) Proposed legislation which establishes, changes or disestablishes any local government entrusted with autonomous powers and functions shall not be introduced in a competent legislator without the consent of such a local government.
- (7) Every local government shall have an elected council with legislative and executive powers.

SECTION 2 : POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

- (1) The powers and functions of Local Government shall be entrusted by law of a competent authority in accordance with the provisions of this constitution.
- (2) Local Government shall be entrusted with such powers and functions as may be necessary to provide municipal services and to perform developmental functions for the maintenance and the promotion of the well-being of all persons within its area of jurisdiction provided that such services and functions can be rendered in a sustainable manner and are financially and physically practisable.
- (3) Local Government shall ensure access to all persons residing within its area of jurisdiction to basic municipal services.
- (4) Local Government functions shall be entrusted by a law of a competent authority to either primary or regional local government. The allocation of local government functions between such local governments, shall be made on the basis which is conducive to the financial viability of the execution of such powers and functions and the effective public administration thereof.

- (5) Primary local government shall mainly be responsible for the provision of basic municipal services.
- (6) Regional local government shall mainly be responsible for functions of a developmental nature and ensuring access to municipal services.
- (7) A local government may perform powers and functions on behalf of another local government or another level of government without affecting the responsibility of that government.
- (8) A local government shall be autonomous in respect of those powers and functions which it can perform utilising its own resources.
- (9) A local government shall have the power to make acts not inconsistent with this constitution in order to regulate its affairs and perform its powers and functions for which it is autonomous.
- (10) A local government shall have the power to make regulations not inconsistent with this constitution, an act of parliament or a provincial law in order to regulate its affairs and to perform its powers and functions for which it is not autonomous.
- (11) An act passed by a local government in terms of this constitution shall prevail over an act of parliament or a law passed by a provincial legislator except in so far as:
 - (a) the act of parliament or the law of the provincial legislator deals with a matter that cannot be regulated effectively by the local government,

- (b) the act of parliament or the law of the provincial legislator 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 or in such Province,
- (c) it is necessary to set minimum standards across the nation or the province for the rendering of public services,
- (d) it is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial and local governmental economy, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national or provincial security; or
- (e) the act of local government material prejudice economic, health or security interests of another local government, the province or the country as whole, or impedes the implementation of national economic policies.

SECTION 3 : ADMINISTRATION AND FINANCE

- (1) A Local Government shall ensure that its administration is based on sound principles of public administration, good government, and public accountability.
- (2) A Local Government shall, after taking into consideration any recommendation of the financial and fiscal commission be competent to levy and recover such rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and performs its functions.

- (3) There shall be different taxation for primary Local Government and Regional Local Government provided that within each Local Government all property rates, levies, fees, taxes and tariffs shall be based on uniform structure.
- (4) Other levels of government shall not levy or acquire property rates, levies, fees, taxes and tariffs appropriate to local government.
- (5) Local Government shall on recommendation of the financial and fiscal commission be entitled to an equitable allocation of funds collected nationally in order to render municipal services and those other functions entrusted to local government.
- (6) Local Government shall be entitled to representation on the financial and fiscal commission.
- (7) The decisions pertaining to the adoption of a budget of Local Government shall be taken by a two-thirds majority of the members of such Local Government.

SECTION 4 : ELECTIONS

- (1) The council of a Local Government shall be democratically elected at intervals of not less than 3 and not more than 5 years as determined by such local government.
- (2) (a) The electoral system for Primary Local Government include proportional and may include ward representation.

(b) The electoral system for Regional Local Government shall include both proportional and indirect representation.

- (3) Subject to section 6 (of the Interim constitution) every natural person shall be entitled to vote in an election of a local government if he or she -
- (a) is ordinarily resident within the area of jurisdiction of that local government or is under law liable for the payment of property rates, rent, service charges or levies to that local government; and
 - (b) is registered as a voter on the voters' role of that local government.
- (4) Where a representation on a local government takes place on a proportional and ward system each voter shall have at least two votes for that local government.
- (5) A voter qualifying to vote in more than one local government may vote in every such local government.
- (6) No person shall qualify to become or remain a member of a local government if he or she -
- (a) is not eligible to vote in terms of subsection (3);
 - (b) is a member of the National Assembly or the Senate or a provincial legislator;
 - (c) is not qualified to become a member of the national Assembly;
 - (d) is an employee of a local government (unless, with due regard to the public interest, exemption of this disqualification is given by the Executive Council

of the Province in which the local government is situated and proof of such exemption accompanies the nomination of such person); or

- (e) is disqualified in terms of any other law.

SECTION 5 : CODE OF CONDUCT

- (1) An enforceable code of conduct for members and officials of local government shall be provided for by law.

REVISION DATED 18 FEBRUARY 1996

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SECTION 4 : ELECTIONS

- (2)(a) The electoral system for Primary Local Government shall include [both] proportional and may include ward representation.
- (5) A voter qualifying to vote in more than one [ward] local government may vote in every such [ward] local government.



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FREE STATE FREEDOM FRONT PROPOSALS:

AFRIKANER SELF DETERMINATION

At a meeting of the Freedom Front Free State Provincial Party Council on 3rd of Februarie 1996, the following unanimous decision was taken:

The Freedom Front of the Free State requests the Constitutional Assembly to consider in all earnest, the acceptance in the new Constitution, of the following Declaration of intent:

"Recognition of the right of self-determination of the South African people as a whole in this constitution, shall not be construed as precluding, within the framework of the said right, constitutional provision for the Afrikaner people to freely exercise their right of self-determination, whether in a territorial context within the republic (as being negotiated between the government of the RSA and representatives of the Afrikaner people) or in any other recognised way.

The state accepts responsibility for enabling and assisting Afrikaners to pursue their development in the cultural, social and political spheres of life

in accordance with international law and the conventions, declarations and decisions of the United Nations with respect to the principle of the self-determination of peoples, and

provided that other rights and the rights and political status of other peoples, minorities or communities of the Republic are not prejudiced in any way."

In order to persue the self-determination of the Afrikaner people in an orderly way and in line with the Constitution, the Party Council proposes the institution by Parliament an Afrikaner Council to implement the founding of a Volkstaat and to assist Afrikaner people who want to resettle as a result of affirmative action.

This Afrikaner Council should have fiscal and monetary powers to help with the development of potential growth point and the raising of funds to assist therewith.

CHAIRPERSON
FF FREE STATE

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PARLEMENT
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Demokratiese Party
Democratic Party

16 February 1996

Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
11th Floor
REGIS HOUSE

Attn: Margie Keegan

Dear Mr Ebrahim

I have pleasure in enclosing the following updated submissions from the Democratic Party on:

Council of Provinces/Senate - Chapter -

Provincial and National Legislative and Executive Competences - Chapter 9

In view of the fact that the position of the Democratic Party is not fully reflected in the "Working Draft", I'd be grateful if you would have the above submissions distributed - hopefully in time for the meeting of the Sub Committee scheduled for 10h00 on Monday 19 February 1996.

Yours sincerely

Colin Eglin MP
for Democratic Party

Encs.



16 February 1996

THE SENATE

1. The prime function of the Senate will be to represent the interests of the Provinces at national legislative level.

To achieve this prime function, the DP proposes the following structures and procedures:

- 1.1 The Senate will consist of 7 members from each Province elected directly by the members of each Provincial Legislature on the basis of proportional representation of parties in that legislature.
- 1.2 The term of office of members of the Senate will be the same as for the Provincial Legislature that elected them i.o.w., members of the Senate will be elected following upon the election of their respective Provincial Legislature.
- 1.3 The members of the Senate may attend and participate but not vote in the proceedings of their respective Provincial Legislatures and their Portfolio Committees, and they will attend when requested by the Provincial Legislature to do so.
- 1.4 Provincial Premiers and members of the Provincial Executive Councils responsible for the relevant portfolios may address the Senate when legislation relating to the Provinces is being discussed.
- 1.5 National legislation falling within the areas of competences of the Provinces must be introduced in the Senate prior to being introduced in the National Assembly.
- 1.6 Such legislation requires the approval of the Senate as well as that of the National Assembly.
- 1.7 When, on the principle of having such legislation, each Province, through its delegation of Senators, will have one vote which vote will be in accordance with any resolution taken by the Provincial Legislature.
- 1.8 In the event of a deadlock between the Senate and the National Assembly, the draft legislation will be referred to a Mediation Committee of the Senate and the N.A.

- 1.9 Should the Mediation Committee fail to reach agreement acceptable to the Senate, the draft legislation will lapse.
 - 1.10 The Senate may set up Portfolio Committees on which each Province through its members of the Senate will be represented to deal with draft legislation falling within the areas of competence of the Provinces, which committees may confer with similar committees of the N.A.
 - 1.11 A similar Portfolio Committee, which may confer with the N.A.P.C on Finance, will consider the budget in so far as it affects the financial allocations and the budget in relation to the Provinces.
2. The secondary function of the Senate is to receive draft legislation that has been introduced in the N.A. - and which does not fall within the areas of competence of the Provinces.
 - 2.1 In respect of such legislation, the Senate may refer it back to the N.A. for further consideration, but will not have power to block such legislation if again passed by the N.A.
 3. Amendments to the constitution which alter the powers, boundaries, functions or institutions of provinces will require:
 - 3.1 Procedures for obtaining the views of the Provincial Legislatures on such legislative proposals;
 - 3.2 the approval of two thirds of the Senate;
 - 3.3 and if the amendment concerns specific provinces only, the approval of two thirds of the members of the legislatures of such provinces will also be needed.
 4. The Senate will be empowered to set up such committees as it considers necessary to achieve interaction and cooperation on legislative matters as between the Provincial Legislatures and between the Provincial Legislatures and the National Government.
 5. The Senate will be able to hold members of the Cabinet to account by way of questions, interpellations and motions.

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Demokratiese Party
Democratic Party

16 February 1996

NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCIES

Legislative authority of the Republic

1. (1) The legislative authority of the Republic vests in Parliament, which shall be competent to make laws in terms of this Constitution.
- (2) Parliament will be competent to make laws on matters which fall within the functional area of Schedule 1 (concurrent) to the extent that such laws apply uniformly in all parts of the country, and are necessary for:
 - the establishment of essential national or minimum standards required for a service to be rendered; or
 - the prevention of unreasonable action taken by a province which is materially and unjustifiably prejudicial to economic unity, or the health, environmental or security interests of another province or the country as a whole.
- (3) Subject to the conditions laid down in the above Sub-section 1 (2), Parliament will be competent to enact framework legislation for legislation of the Provinces on matters which fall within the functional area of Schedule (2) (framework).
 - Framework legislation may not contain detailed or directly applicable provisions.
 - Where Parliament enacts framework legislation, the Provincial legislatures will be obliged to introduce the necessary provincial legislation within a reasonable period of time as prescribed by national law.

Legislative authority of Provinces

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

- (2) A provincial legislature shall be competent to legislate any matter which falls within a functional area specified in Schedule 1 (concurrent) and Schedule 2 (framework) as long as and to the extent that Parliament has not exercised its legislative powers.
- (3) A provincial legislature shall be competent to legislate on any matter which falls within a functional area specified in Schedule 3 (exclusive).

Necessary ancillary powers

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

Conflict of laws

4. In the event of a conflict between an Act of Parliament and a law of a provincial legislature with regard to any matter which falls within a functional area specified in Schedule 1, the Act of Parliament shall prevail over the provincial law only to the extent such Act was made in terms of section 1(2).

Legislative procedures

5. (1) A Bill designed to become an Act of Parliament intended in section 1(2) shall be introduced in the Senate and shall require the approval of both the Senate and the National Assembly.
- (2) The Constitutional Court shall, upon application by at least one fifth of the members of the Senate, and prior to the promulgation of a Bill intended in section 1(2), expeditiously determine whether the Bill conforms with the requirements of section 1(2).

Integrity of provinces

6. (1) An Act of Parliament shall not empower an organ of state to encroach upon the geographical, functional or institutional integrity of a province.
- (2) The National Government shall not exercise its powers so as to encroach on the geographical, functional or institutional integrity of a province.

Executive Authority of the Republic

7. The Executive Authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President and the Cabinet who shall perform his or her powers and functions subject to and in accordance with this Constitution.

Executive Authority of Provinces

8. (1) The Executive Authority of a Province shall vest in the Premier of the Province who shall execute and perform his or her powers and functions subject to and in accordance with this Constitution.
- (2) A province shall have executive authority over all functional areas in respect of which it has legislative competence, matters assigned to it under section (x) or any law, and matters delegated to it by or under any law.

Transitional period

9. (1) A provincial government may assume its executive and legislative powers in each of the functional areas assigned to it in Schedule 1, 2 and 3 when it has the capacity to exercise the powers effectively.
- (2) In the event of the national government disputing the capacity of a province to exercise one or more powers effectively, the Commission on Provincial and Local Government will adjudicate on the dispute.
- (3) Should a province be found not to have the capacity to exercise the relevant legislative or executive powers effectively, the national government may exercise such powers.
- (4) Ten years after the adoption of this Constitution, all the powers in the functional areas listed in Schedule 1, 2 and 3 will automatically be assumed by all the provinces except in the case of a province which has made an alternative arrangement with the national government.

Date sent: Tue, 20 Feb 96 22:36:49 PST
From: "Joao Lourenco N. Azevedo" <joao@icon.co.za>
To: Constitutional Assembly <conassem@iaccess.za>

Name: Joao Lourenco N. Azevedo
E-mail: Joao Lourenco N. Azevedo<joao@icon.co.za>
Date: 02/20/96
Time: 22:36:49

This message was sent by Chameleon

THE DEMOCRATIC PARTY YOUTH
OF THE
REPUBLIC OF SOUTH AFRICA



RESPONSE TO THE CONSTITUTIONAL ASSEMBLIES INVITATION
TO COMMENT ON THE
WORKING DRAFT OF THE NEW CONSTITUTION

WORKING DRAFT OF THE NEW CONSTITUTION

Contents

- Preamble.
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THE DEMOCRATIC PARTY YOUTH
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RESPONSE TO THE CONSTITUTIONAL ASSEMBLIES INVITATION
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The fundamental aim of the final constitution, is to initiate and maintain a tradition amongst all South African citizens, whereby, promotion of their democratic rights, may take place whilst exercising their respective fundamental rights and freedom, under the symbolic colours of the proud South African nation.

The Democratic Party Youth submits its comments expressed by the individuals that have worked to compile this document, in order to participate constructively in the construction of a constitution that will be representative of our multi-cultural society.

The expressions have been highlighted and underlined, in order to facilitate its interpretation. Please contact the writer if any queries arise.

Yours Constructively,

Joao Azevedo
for the Democratic Party Youth



THE DEMOCRATIC PARTY YOUTH
OF THE
REPUBLIC OF SOUTH AFRICA



RESPONSE TO THE CONSTITUTIONAL ASSEMBLIES INVITATION
TO COMMENT ON THE
WORKING DRAFT OF THE NEW CONSTITUTION

PREAMBLE

(Please note that no comment was submitted as the text was not part of the working draft.)

CHAPTER 1
FOUNDING PROVISIONS

• National symbols

5. The national flag is black, gold, green, white, red and blue as sketched and described in Schedule 2.

(We hereby support the existing flag of the Republic of South Africa as described in Schedule 2.)

(The National Anthem is still under discussion)

(We hereby support the bid for "Nkosi Sikelel iAfrika" to become the South African National Anthem.)

• Languages

(We hereby agree with Option 2)

The same as section 3 of the interim Constitution.



CHAPTER 2 BILL OF RIGHTS

- Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2)

(We hereby agree with Option 2)

Option 2

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

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

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

- Life

10.

(We hereby agree with Option 1)

Option 1

Everyone has the right to life.

- Freedom and security of the person

11. (2) Everyone has the right to security of the person, *bodily and psychological integrity* including the right -

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

- Privacy

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

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



(d) the privacy of their communications *intercepted* violated.

• **Freedom of religion, belief and opinion**

14. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that -

- (a) those observances follow rules made by an appropriate authority;
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.

(3) The Constitution does not prevent legislation recognising the validity of marriages concluded under a system of religious law *or other recognised traditions*, or a system of personal and family law adhered to by persons professing a particular religion to the extent that the system is consistent with the Bill of Rights

• **Freedom of expression**

15. (1) Everyone has the right to freedom of expression, including -

- (a) freedom of the press and other media; and
- (b) freedom to receive and impart information and ideas.

(2) The protection in subsection (1) does not extend to -

- (a) propaganda for war;
- (b) the incitement of imminent violence; or
- (c) *advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement To discrimination.*

(We hereby agree with Option 1 or 2, as long as the highlighted words are inserted at there respective points in the clauses)

(3) Option 1

The state must *not* regulate any media *irrespective* that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

Option 2

The state must *not* regulate any newspapers and electronic media *irrespective* that it finances or controls to ensure that they are impartial and represent broadly the views of society.

• **Political rights**

18. (1) Every citizen is free to make political choices, which includes the right -

- (a) to form a political party;
- (b) to participate in the activities of, or to recruit members for, a political party; and



(c) to campaign for a political party or cause.

(2) Every **(delete - adult & insert) South African** citizen **over the age of 18 years of age** has the right to free, fair and regular elections for any legislative body established in terms of the Constitution, to vote in those elections and to do so in secret.

(3) Every citizen has the right to stand for election to public office and, if elected, to hold office.

- Economic activity

21.

(We hereby agree with Option 2 and changing to read :)

Option 2

(1) Everyone has the right to pursue a livelihood **of their choice** and engage in economic activity anywhere in the Republic **of South Africa, including the right to choose freely their occupation or profession.**

(2) Subsection (1) does not preclude measures that are designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices, or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality, **thereby eliminating Affirmative Action from the workplace.**

- Labour relations

22. (1) Everyone has the right to fair labour practices.

(2) Workers have the right -

(a) to form and join trade unions;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike

(3) Employers have the right -

(a) to form and join employers' organisations;

(b) to participate in the activities and programmes of an employers' organisation; and

(c) to lock-out.

(4) Every trade union and every employers' organisation has the right :

(a) to determine its own administration, programmes and activities;

(b) to organise;

(c) to bargain collectively; and

(d) to form and join a federation.

provided that it does not infringe on the rights of others.

- Property

6



24.

(We hereby agree with Option 3, provided subsections (5) & (6) are excluded)

Option 3

(1) Property, including the right to acquire, hold and dispose of property, is guaranteed.

(2) No one may be arbitrarily deprived of property.

(3) Property may be expropriated only in accordance with a law of general application -

(a) for public purposes or in the public interest which includes land reform;

(b) subject to the payment of just and equitable compensation, the amount, the timing and manner of payment of which have been either agreed or decided by a court.

(4) When a court decides the amount, the timing and manner of payment of compensation it must equitably balance the public interest and the interests of those affected, considering all relevant factors including -

(a) the current use of the property;

(b) the history of its acquisition;

(c) its market value; and

(d) any beneficial improvements after acquisition.

- Housing and land

25. (1) Everyone has the right to have access to adequate housing. The state must take reasonable and progressive legislative and other measures to secure this right.

(2) No one may be evicted from their home arbitrarily and without an order of court made after considering the relevant circumstances.

(We hereby agree with this section, provided subsection (3) is excluded)

- Education

28.

(We hereby agree with Option 2, provided subsection (1)(c) includes the word "official" before the word "language" & that subsection (2)(b) is excluded)

Option 2

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

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

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OFFICE OF THE EXTERNAL DEPUTY PRESIDENT OF THE DEMOCRATIC PARTY YOUTH



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- **Academic freedom**

(We hereby agree with Option 1)

29. Option 1

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

- **Access to information**

31. (1) Everyone has the right of access to -

- (a) any information held by the state; and
 (b) any information that is held by another natural or juristic person and that is required for the exercise or protection of any rights.

- (2) This right must *not* be regulated by national legislation.

- **Just Administrative Action**

(We hereby agree with Option 1)

Option 1

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

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

- **Arrested, detained and accused persons**

34. (1) Everyone who is arrested for allegedly committing an offence has the right -

- (a) to remain silent;
 (b) to be informed, promptly and in a language that the arrested person understands -

- (i) of the right to remain silent; and
 (ii) of the consequences of not remaining silent;

- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;

- (d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention; and



(We hereby agree with Option 1)

Option 1

to be released with or without bail, unless the interests of justice requires that person to be detained ... **if the interests of justice permit that person to be released.**

- Limitation of rights

35. (1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation of a right is -

(a) reasonable and justifiable.

(b) compatible with the nature of the right that it limits; and

(c) consistent with the Republic's obligations under international law

(2) **(Delete this clause)**

(3) **(Delete this clause)**

- Application

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

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

(3)

(We hereby agree with Option 1)

Option 1

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

CHAPTER 3 PARLIAMENT

(We hereby fully agree with Chapter 3, provided that the additions be included in the final text)

- Legislative authority of Republic

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

(2) Parliament consists of the National Assembly and *a second house*.

THE NATIONAL ASSEMBLY

• Composition and election of National Assembly

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

• Membership

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

(a) anyone who is appointed by or is in the service of the state and receives remuneration, other than the President, Deputy President, Ministers and Deputy Ministers and any other office-bearers whose functions have been declared by national legislation to be compatible with the functions of a member of Parliament;

(b) members of *the second House*, a provincial legislature or a local government;

(c) unrehabilitated insolvents;

(d) anyone declared to be of unsound mind by a court of the Republic; or

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

(2) A person loses membership of the National Assembly if that person -

(a) ceases to be eligible; or

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.

(3) Vacancies must be filled in terms of national legislation.

• Sittings and recess periods

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

(2) The *State* President may summon the National Assembly to an extraordinary sitting at any time to conduct urgent business.



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

- **Speaker and Deputy Speaker**

47. (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.

(2) The President of the Constitutional Court must preside over the election of the Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

(3) The procedure set out in Schedule 4 applies to the election of the Speaker and the Deputy Speaker.

(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. At least one half of the members of the Assembly must be present when the resolution is adopted.

- **Decisions**

48. (1) At least one half of the members of the National Assembly must be present before a vote may be taken on a Bill, and one third of the members must be present before a vote may be taken on any other matter, except where the Constitution provides otherwise.

(2) All questions before the National Assembly must be decided by a majority of the votes cast, except where the Constitution provides otherwise.

(3) The presiding member of the National Assembly has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

- **Bills**

52. (No submissions have been provided for this sections as no text was available at the time of analysis)

- **Constitutional amendments**

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

CHAPTER 4 SENATE

(We hereby agree with Option 2 of Chapter 4, provided that the amendments pointed out are considered)

OPTION 2



SENATE

- **Sittings**

70. (1) The President of the Senate, or when the President is not available, the Deputy President of the Senate, after consultation with the Speaker of the National Assembly and the chief whips of all political parties represented in the Senate and in accordance with the rules and orders of the Senate, must determine the time and duration of sittings of the Senate.

(2) When a majority of Senators representing at least two provinces or one fifth of Senators representing at least five provinces requests it, the President or Deputy President must convene a sitting of the Senate.

(3) The President of the Republic may request the President of the Senate to summon members of the Senate to an extraordinary sitting in accordance with its rules and orders to conduct urgent business.

(4) The seat of the Senate is at the Houses of Parliament in Cape Town. Sittings at other places are permitted only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Senate.

CHAPTER 5 THE NATIONAL EXECUTIVE

- **Cabinet**

85.

(We hereby agree with the following proposal)

(1) The Cabinet consists of the President, a Prime Minister and Ministers.

(2) The President appoints the Prime Minister and Ministers from among the members of the National Assembly, in terms of the proportional representation as prescribed in the election of the cabinet used for the Government of National Unity, and may dismiss them.

(3) The Prime Minister and Ministers are responsible for the functions of the executive assigned to them by the President.

(4) The Prime Minister -

(a) must assist the President in the execution of the functions of government;

(b) is the leader of government business in Parliament;

(c) must co-ordinate the work of the Cabinet; and

(d) in the absence of the President, must preside at meetings of the Cabinet.

- **Votes of no confidence**

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93.

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

CHAPTER 6 COURTS AND ADMINISTRATION OF JUSTICE

• Appointment of judicial officers

100.

(We hereby agree with Option 2)

Option 2

- (1) Any appropriately qualified woman or man who is a citizen and a fit and proper person may be appointed as a judicial officer.
- (2) A person appointed as the President, the Deputy President or a judge of the Constitutional Court must be -
 - (a) a judge; or
 - (b) qualified to be admitted as an advocate or attorney and, after qualifying, must have practised as an advocate or an attorney or lectured in law at a university for at least 10 years; or
 - (c) a person who, by reason of training or experience, has expertise in the field of constitutional law relevant to the application of the Constitution and the law of the Republic.
- (3) A person appointed as the Chief Justice, the Deputy Chief Justice or a judge must be qualified to be admitted as an advocate or attorney and, after qualifying, must have practised as an advocate or an attorney or lectured in law at a university for at least 10 years.
- (4) The President of the Constitutional Court and the Chief Justice must be appointed by the President on the advice of the Judicial Service Commission.
- (5) The Deputy President of the Constitutional Court and the other judges of the Constitutional Court must be appointed after advice by the Judicial Service Commission and in consultation with the leaders of all political parties in Parliament who wish to participate.
- (6) In the event of no consensus having been reached in terms of subsection (5), the judges must be appointed together by a majority of at least 75% of the members of the National Assembly and the second House in a joint sitting.

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OFFICE OF THE EXTERNAL DEPUTY PRESIDENT OF THE DEMOCRATIC PARTY YOUTH



(7) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed and no more than three should have qualified for the Court in terms of subsection (2) (c) .

(8) The President must appoint the Deputy Chief Justice and all other judges on the advice of the Judicial Service Commission.

(9) The appointment of other judicial offices must be made by an independent body established by an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against such judicial officers, take place without favour or prejudice, and that the applicable legislation and administrative directives are applied uniformly and properly, and that no victimisation or improper influencing of these judicial officers occurs.

(10) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 3, that they will uphold and protect the Constitution.

- **Acting judges**

101. (1) The President may appoint an acting judge to the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting in consultation with the President of the Constitutional Court and the Chief Justice.

(2) The appointment of an acting Constitutional Court judge may be for any period until the vacancy is filled or until the absent judge returns to the Court. A person may be appointed as an acting judge more than once but may not serve for a period of more than six months. A person continues as an acting judge to complete any unfinished case after the expiry of the period of appointment.

(3) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts on the advice of and after consultation with the senior judge of the court on which the acting judge will serve.

- **Removal**

103. (1) A judge may be removed from office only if -

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

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection(1) .

- **Judicial Service Commission**



104. (1) There is a Judicial Service Commission, consisting of -

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

(2) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

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

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

CHAPTER 7 STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

(We hereby fully agree with Chapter 7)

CHAPTER 8 PROVINCES

• Application of this Chapter

118.

(We hereby agree with Option 1)

Option 1

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



PROVINCIAL EXECUTIVES

• Powers and functions of Premiers

134. (1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.

(2) The Premier must exercise the powers and perform the functions entrusted to that office in consultation with the other members of the Executive Council, except where -

- (a) the Executive Council has determined that the Premier may act in consultation with a member or a committee of members; or
- (b) the Constitution states or implies that the Premier may act alone.

(3) The Premier may act alone when -

- (a) appointing and dismissing Executive Council members and assigning powers and functions to them;
- (b) convening Executive Council meetings;
- (c) assenting to and signing Bills;
- (d) referring a Bill to the legislature for reconsideration of the Bill's constitutionality;
- (e) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
- (f) summoning the provincial legislature to an extraordinary sitting to conduct urgent business; and
- (g) dissolving the provincial legislature and calling an election after a vote of no confidence in the Executive Council has been passed by the legislature.**

(4) Decisions of the Premier in consultation with the other members or a member or committee of the Executive Council, must be in writing, signed by the Premier, and countersigned by another member.

• PROVINCIAL CONSTITUTIONS

Adoption and Certification

(We hereby fully agree with Subsection 154)

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

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

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

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

CHAPTER 9



PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCES

(We hereby fully agree with Chapter 9)

CHAPTER 10 LOCAL GOVERNMENT

(We hereby fully agree with Chapter 10, provided that the following additions are included)

We believe that the greater the power devolved to the Metropolitan Substructures, the greater the representation

167. (1) A local government must be elected democratically, and elections must take place in terms of applicable legislation.

(2) Elections for local government must take place at intervals of not more than five years.

(3) Members of a local government must be elected with a system of proportional representation, that is, ward councillors should be elected from the wards while TMC councillors should be elected from the proportional representation system.

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

- Cleansing
- Community services
- Economic development
- Environmental protection
- Elections
- Electricity
- Health
- Housing
- Library services
- Licensing
- Parks and recreation
- Planning
- Produce markets
- Protection
- Rates, tariffs and taxes
- Roads
- Sewage

"South African Police Services : and other forms of policing at all levels, from the National Police Services, Provincial to Metropolitan and other Community policing services."



Storm water
Traffic
Transport
Water

**CHAPTER 11
TRADITIONAL AUTHORITIES**

(We hereby fully agree with Chapter 11)

**CHAPTER 12
PUBLIC ADMINISTRATION**

(We hereby fully agree with Chapter 12)

**CHAPTER 13
SECURITY SERVICES**

(We hereby fully agree with Chapter 13)

**CHAPTER 14
FINANCE
GENERAL FINANCIAL MATTERS**

(We hereby fully agree with Chapter 14)

**CHAPTER 15
GENERAL PROVISIONS**

(We hereby fully agree with Chapter 15 & all its Schedules below)

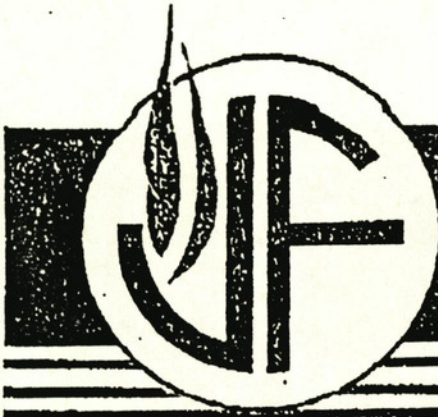
SCHEDULES :

**SCHEDULE 1 - NATIONAL TERRITORY AND PROVINCIAL BOUNDARIES
SCHEDULE 2 DESCRIPTION OF THE NATIONAL FLAG
SCHEDULE 3 - OATHS AND AFFIRMATIONS
SCHEDULE 4 - ELECTIONS PROCEDURES**



SCHEDULE 5 - PROVINCIAL FUNCTIONAL AREAS
SCHEDULE 6 - FRAMEWORK LEGISLATION





VRYHEIDSFRONT FREEDOM FRONT

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1996-02-19

Mr C Ramaphoza
Chairperson
CONSTITUTIONAL ASSEMBLY
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Dear Sir

AFRIKANER SELF-DETERMINATION

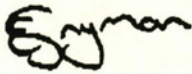
It is a fact that a substantial part of the Afrikaner people is committed to the concept of a Volkstaat in order to protect their identity. Self-determination of both a cultural and a territorial nature must be established to ensure that the Afrikaner people can control their own destiny. Only then will the Afrikaner community be able to make a significant contribution in the achievement of development, peace and progress for all the people of Southern and Central Africa.

Cultural self-determination is necessary to ensure the protection and promotion of cultural matters such as language (including mother tongue education at all levels), basic health care, social welfare services, libraries, museums, monuments, the arts (performing and visual) own language media and community policing.

Although a sovereign Volkstaat cannot be achieved at this stage, the creation of a Volkstaat should be seen as a process and this process must be incorporated into the new Constitution.

The new Constitution must make provision for the self-determination of the Afrikaner people and their commitment to a Volkstaat. It is therefore an absolute necessity that the new Constitution should provide for a constitutional principle make provision for self-determination and to replace Constitutional Principle XXXIV by acceptance of the concept of territorial self-determination.

Yours sincerely



E Snyman
Secretary

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NATIONAL ASSEMBLY
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Ref No.

12 February 1996

PRELIMINARY SUBMISSION OF THE PAC ON THE SECOND HOUSE

Preliminary Observations

Current proposals on the second house mainly see it as a house of review or as a house of provinces.

The PAC is convinced that we neither need a senate to carry out these tasks nor can it be said that the senate is the only institution that can effectively do such work.

Our experience with the present senate is that it is a mirror image of the National Assembly. The strong party system ensures that, in most instances, the same positions taken at the lower house will be maintained at the upper house.

Provinces are an artificial creation of the Interim Constitution and still need to be nurtured and developed. As of now therefore, it is not correct to say that our Senators are representatives of provinces. They are representatives of political parties.

We humbly submit that the present Senate cannot be said to be doing a better job in reviewing legislation than the National Assembly and its standing committees. We need to strengthen the standing committees of the National Assembly and enhance the participation of the public in the law making process.

In addition, the PAC would support the Constitutionalisation of the Inter-governmental forum. This would create a far cheaper and more useful constitutional forum where MECS and National Ministers could meet to discuss policy formulation, legislation and matters of common concern.

Equally, the PAC has already indicated in an earlier submission that it is in favour of the retention of the Fiscal and Financial Commission. This commission can advise national government about the financial needs of provinces and the allocation of resources to them.

The PAC therefore, submits that looking at the current proposals and on the strength of the performance of the present Senate, a case for the establishment of the second house has not been made or proved.

Alternative Proposal of a Second House

If it is felt that there is a need for a second house, probably consideration should be given to the viability of the establishment of an unelected second house.

This house could be drawn from persons who have made outstanding contributions in various fields, such as, business, sports, religion, academic, gender, labour and could have a significant representation from traditional leaders. It should consist of about 90 senators.

This house could be called the National Council as it will be representative of various sectors of society.

One of its functions should be to make evaluative comments on all bills passed by the National Assembly. In this regard, it could raise reasoned objections to any legislation and the National Assembly can either, accommodate those objections or pass the bill as it is. This does not imply a power to veto the decisions of the National Assembly.

However, it may be necessary in certain matters, to provide for a possibility of allowing, where a significant number of Senators are opposed to a measure, a cooling off period of a month or two before the National Assembly passes such a measure. An example, could be a case where a significant number of traditional leaders are opposed to a bill affecting traditional land, law and institutions or where

a significant number of all the Senators are opposed to a measure. This of course, should not apply to money bills.

Equally, the National Council should be given a meaningful role in nation building which could include mediating in certain disputes which may undermine national unity and stability.

Senators should be appointed for a period of five years. Some could be appointed by the President either, on the recommendation of an independent commission or, on the recommendation of that particular group or body.

It may be necessary in dealing with eligibility to place an age restriction of 35 years and above.

Conclusion

One of the merits of this proposal is that such an unelected house will not be subject to political party loyalties or fear of electoral retribution. It can discuss and reflect on all national issues and give a valuable and an objective second opinion without fear or favour. This National Council could therefore be a house of "truth" or a true conscience of the nation and government.

In addition, the accommodation of traditional leaders in an essentially Western liberal institution, may result in the creation of a truly hybrid African institution. This in our opinion, will give traditional leaders a more meaningful role than being isolated and marginalised in a toothless Council of Traditional Leaders.

It must also be said that this proposal does not cover all the aspects of this issue. However, should it merit consideration, which we think it should, we are prepared to work with others in developing it.

R K Sizani - MP

Public Opinion On Aspects of the New Constitution

A Submission To the Constitutional Assembly

From

***The Institute for Democracy In
South Africa
(Idasa)***

Public Opinion Service (POS)

February 1996

Public Opinion On Aspects of the New Constitution

Why should public opinion be considered by constitution-makers? After all, constitutions are intended to remove certain fundamental human rights and basic matters of structure of the government and state, from the "to and fro" of day-to-day politics and majority vote. At the same time, if they are to last and be accepted as legitimate by the public, democratic constitutions must resonate with the basic values and preferences of the governed.

This report offers evidence about South Africans' values and opinions on the Bill of Rights in general, as well as on a series of more specific constitutional matters including federalism, traditional leadership, land reclamation, abortion, the location of parliament, and voter registration. This data come from a survey of a scientifically-selected, nationally representative sample of 2400 South Africans conducted late in 1995.

Rights

On the subject of the Bill of Rights, we tested what can be called people's "rights consciousness" by examining their own unaided conceptions of, and preferences for various rights. We asked:

"The Constitution will include a number of rights. Which ones, in your opinion, are the most important?"

The most important conclusion South Africa's constitution-makers should draw from the results is the strikingly high number of people who seem to be unfamiliar with the elite political debate over specific rights which rages in the Constitutional Assembly.

First of all, 27% of the sample could not list one thing that they thought should be included in the constitution as a "right." In fact, "don't know" was the most frequent response of all. Second, the most frequently cited substantive response—"human rights/equal rights"—is a fairly general concept, rather than a specific definable right. 16% mentioned this as the most important thing that should be included, and a total of 27% mentioned it as one of their three preferences.

Put together, this means that 43% of those sampled did not or could not spontaneously cite any specific constitutional right as their *most* important preference.

The most frequently cited specific substantive rights were education (15%), speech (13%), safety (12%), housing (12%), employment (9%) and women's rights (8%) [see Table 1].

Significantly, people's emphases across the range of specific rights do not vary greatly according to race. Only on the right to speech, safety, and shelter/housing, and women's rights do we see significant differences [see Table 2].

Another important finding concerns the differing emphases people give to different *types* of rights. One of the main dimensions of the political debate about the Bill of

Rights concerns the relative balance between political and civil rights (often called "first generation rights"), economic and social rights (so-called "second generation" rights) and environmental and cultural rights ("third generation"). Table 3 offers a breakdown of the same rights recategorized by these categories.

Abortion

Abortion threatens to be one of the most controversial and divisive political issues in the democratic South Africa. We asked people:

"There has been some discussion about abortion during recent years. Under which circumstances should abortion be permitted? Never? Only in cases of rape, incest or when the women's life is in danger? For reasons other than rape, incest or danger to the woman's life, but only after the need for the abortion has been clearly established? Always as a matter of personal choice?"

The responses reveal a strong element of socially conservative opinion on this issue. 35% said that abortion should "never" be permitted. Another 37% would permit it "only in case of rape, incest or when the women's life is in danger." matter of personal choice"). 4% do not know. 9% said it could be permitted for other reasons, but "only after the need" had "been clearly established." Only 15% adopted the fullest pro-choice position ("always as a matter of choice").

Opinion results, especially when a number of options are provided, can be read in divergent ways. Seen one way, these results mean that 61% condone abortion under some circumstances, and 35% want to ban it outright. Seen another way, 72% favour a total ban or at least very strict controls on abortion, while 24% would support more liberal abortion laws. For every woman who would support a total ban, 10% would support more liberal laws, and 18% would support at least some restrictions.

Attitudes on abortion differ greatly according to race. African and coloured opinion is very conservative on this issue. 41% of Africans (as well as 38% of coloured citizens) say abortion should *never* be permitted compared to only 15% of whites and 8% of Indians. In contrast, 26% of whites and 33% of Indians adopt the most liberal position of *personal choice* compared to only 12% of Africans and 9% of coloureds [see Table 4].

In Western Europe and North America, abortion is one of a key set of issues where there exists a significant "gender gap" in terms of opinion. Importantly, South Africans' attitudes on abortion do not differ by gender, among the entire sample or within each race group (except among Indians where 46% of women say always, compared to only 20% of men). Neither does gender make any difference among rural or urban South Africans.

Then we asked all those people who would permit abortion under at least some circumstances, or who did not offer an opinion (65% of the total sample):

"When should a women be able to obtain an abortion?"

Of those people, the majority (55%) said "only in the first three months." 4% chose the first six months, and 16% chose any point in the pregnancy. A surprisingly high 27% of those who would permit an abortion under some circumstances did not have an opinion regarding the timing [see Table 5].

Restated as percentages of the entire public, 35% would never allow an abortion, 36% would allow one in the first three months of pregnancy, 3% in the first six months, 10% would allow it anytime and 16% do not have an opinion on this issue of timing.

Traditional Leadership

The role of traditional leaders in a democracy is one of the most vexing questions facing South Africa's constitution-makers. What do people think about this matter?

"Now that South Africa has a democracy, would you say that tribal or traditional leaders have no role, have some role, or have an important role to play in this country?"

A large majority (61%) feel that traditional leaders still have a role to play in South Africa (17% said they had an "important role," 44% said "some role"). Only 24% said that they had "no role" (15% had not heard enough about the issue to have an opinion) [see Table 6].

"Do you think that there is a conflict between the idea of traditional authority and the idea of democratically elected representatives or do you think that the two ideas can go together?"

Four out of ten (41%) see a conflict between democracy and traditional leadership; 27% feel that the two ideas can co-exist (17% were unsure and another 15% did not have an opinion) [see Table 7].

"When it comes to local or community government, do you think that tribal or traditional leaders should or should not be represented in local government?"

Half the public (50%) feel that tribal leaders should be represented in local government, while 32% say they should not (19% had no opinion). Interestingly, this is a much larger number of people than of those who feel that traditional leaders are legitimate democratic actors, which may indicate that acceptance of traditional leadership may be comprised more of pragmatism than a principled commitment to tradition [see Table 8].

"If traditional leaders are represented in local government, how should they be represented? Should they be automatically awarded a seat on the council or should they have to stand for election and win people's votes?"

While the balance of opinion is that traditional leaders should be represented, at the same time most people feel (47%) that they should earn democratic legitimacy by running for office; 30% said they should be automatically given seats (23% are unsure) [see Table 9].

"Do you think that traditional leaders should or should not be aligned with any political party?"

An even larger proportion of people (58%) felt that traditional leaders should not be aligned with any political parties; 21% said they should (21% did not know) [see Table 10].

"Do you think that traditional leaders should or should not take public stances on political issues?"

Just under half the total public (48%) said they should not take any public stances on political issues; 32% felt they should (21% did not know) [see Table 11].

With regard to the effect of race, we see surprisingly little differences in attitudes about whether traditional leaders still had any role to play, or whether the institution was in conflict with democracy. There were larger differences, however, on other questions. Africans were significantly more willing to say they should be represented in local government, coloured and Indian respondents significantly less willing [see Tables 6 and 7].

Importantly, Africans were much *less likely* than other South Africans to want to subject traditional leaders to democratic pressures. At the same time, Africans were much *more likely* than other citizens to want them to remain independent of political parties, to want them to avoid taking stances on political issues [see Tables 9-11].

Also of interest, the largely patriarchal nature of this institution seems to have had no effect on attitudes. We see no politically significant differences in opinion by gender, and few statistically significant ones. The absence of a "gender gap" was true for the entire public, as well as among each race group, and perhaps most surprisingly so among rural people.

Federalism

The raging debate about the appropriate distribution of political power between central and provincial government has been the most divisive issue of South Africa's transition. First of all, we asked a question designed to assess people's opinions about the appropriate balance of national and provincial power in the new constitution.

"Do you think that provincial government's power and authority should be increased, reduced, or kept about the way it is at present?"

A plurality of South Africans (39%) want to have provincial powers and authorities increased. 32% favour keeping them the balance of power the way it presently is. Only 8% said they should be decreased. An unusually high 21% said they had not yet had a chance to hear enough in order to have an opinion [see Table 12].

Put another way, 71% of South Africans would favour at least maintaining the present distribution of national and provincial power as contained in the Interim Constitution, and only 8% think the situation should be reversed in favour of the central government.

Surprisingly, Africans (41%) show stronger support for increasing provincial powers than whites (33%) [see Table 13].

An examination of opinion by province provides yet another round of surprises. While 38% of the entire sample wanted increased provincial powers, support for greater federalism is *much higher* among respondents living in five of the seven provinces governed by the African National Congress, a party traditionally in favour of greater centralisation: Mpumalanga (62%), Northwest (61%), Free State (60%), Eastern Cape (47%) and Northern Cape (43%). Ironically, support for greater provincial powers is *slightly lower* than the national average among respondents living in the provinces governed by parties strongly in favour of federalism, the National Party and Inkatha Freedom Party: Western Cape (34%) and kwaZulu/Natal (33%). Support for greater provincial powers was also a bit lower than the average in Gauteng (34%) and much lower in the Northern Province (23%) [see Table 13].

Then we asked an open-ended question designed to assess the degree to which people felt provinces should have any *exclusive* powers.

"There is a good deal of debate about whether the national government or the provincial government should have final authority [in making rules and policies in a number of areas]. What things, if any, do you think that your provincial government should have final authority over, instead of national government?"

Like our open-ended question about rights, the most frequent response (38%) was "don't know."

28% of the sample said provinces should have exclusive control over the provision and regulation of services and rates, 25% cited housing, and 25% each for education and schools. Police and security were cited by 20%, health care (19) and unemployment (16%). [See Table 14 for other responses].

Moving away from the concept of *exclusive* powers, we wanted to assess support for the idea of *asymmetrical* provincial powers.

"Do you think that provinces can have differing power and authority, or should they be given the same powers and authority?"

While the balance of opinion favours maintaining or increasing the present provincial share of political power, there is little support for *asymmetrical* forms of federalism. Only 18% said that provinces can have differing power. A massive 71% said that provinces should have the same powers (11% did not have an opinion).

Opposition ran across people of all races and, more importantly, all provinces. In kwaZulu/Natal, whose provincial government has been most interested in the idea of *asymmetrical* powers, only 16% support the idea.

Moving from the abstract question of *asymmetrical* provincial power, we focused people's attention specifically on the situation in kwaZulu/Natal.

"Are things in kwaZulu/Natal so different from the rest of the country that its provincial government should be given special powers and authority which are different from the rest of the provinces, or should they have the same powers and authority as any other province?"

Only 16% favoured allowing that province special powers. An equally large 72% said that they should have the same powers and authority as any other province (12% did not offer an opinion).

Again, opposition to a special dispensation for this province ran across people of all ages and, importantly, all provinces. Only 17% of those respondents living in kwaZulu/Natal want special powers for their own provincial government.

Land Restitution

Land restitution is another area where the public exhibits, perhaps surprisingly, overwhelmingly conservative sentiments.

First of all, it should be remembered that in the open-ended question listed above, only 7% of South Africans mentioned access to land as one of the three most important rights to be included in the constitution. At the same time, only 3% mentioned the right to private property. In this sense, it can be said that—at least at present—land reform and property rights are not issues of great importance to the vast majority of South Africans (an image at odds with the amount of elite attention devoted to the issue in parliament and in the news media).

Our first question dealt with the circumstances under which the state can legitimately take possession of someone's land.

"There is a great deal of controversy about land. When do you think that government can take possession of someone's land? Never? Only in order to use it to build something for the public (e.g. a road or a school)? Only in order to give it back to those people who formerly owned the land? Only in order to give it to people without land? Or whenever it wants to?"

The most frequent single response (38%) was that it was *never* permissible for the state to take someone's land.

However, another 56% of the public would allow the state to take land, though these people are divided over the appropriate reasons. 27% say that government can do so only "in order to build something for the public" (what constitutional lawyers often call the "public use" function of land reclamation).

29% selected options that could be fit into what legal scholars call the "public purpose" function of land reclamation (that is reclaiming land in order to achieve some larger social good). Comprising this segment were 21% who said government could take land "in order to give it back to those people who formerly owned the land" and 10% who said land could be reclaimed "in order to give it to people without land" [see Table 15]

Of all the issues examined in this report, land restitution exhibits the starkest racial differences of opinion. While 38% of the total public say the state can *never* take possession of land, 70% of whites and 57% of Indians hold this opinion, compared to only 31% of coloured citizens and 29% of Africans. 35% of Africans and 31% of coloureds favour land reclamation for "*public purposes*" compared to only 6% of whites [see Table 15].

An interesting finding is that urban-rural differences are not very great, even within each race category. 33% of rural Africans say the state can "*never*" take land compared to 21% of urban, 32% of rural coloureds compared to 29% of urban, 73% of rural whites 73% compared to 68% of urban.

Then we turned to the controversial question of compensation.

"Now let's assume that government does take possession of someone's land. How much should they pay the owners? The current market value? What the owner originally paid for the land? Government does not have to pay?"

These results were also surprising. Fully 73% of the South African public said government has to pay the *current market value*.

14% said government should pay what the owner *originally paid*, and another 3% said that the government does not have to pay and compensation (10% did not offer an opinion) [see Table 16].

Opinions about compensation vary greatly by race. 93% of whites and 94% of Indians want the state to pay the current market value, compared to two-thirds of Africans (68%) and coloureds (66%). However, the important point here is that strong support for land compensation at current market value runs across people of all races [see Table 16].

There are no differences between rural and urban respondents on the question of compensation value.

Location of Parliament

The Constitutional Assembly has thus far remained deadlocked over a solution to the permanent location of South Africa's parliament.

"Over the past year, a controversy has arisen over the site of parliament. Do you think that parliament should remain in Cape Town where it presently is, or do you think that it should be moved some place else, such as Pretoria, Midrand or Bloemfontein?"

Two-thirds (66%) of the entire public feel that parliament should remain where it is in Cape Town. 14% chose Pretoria, 5% Bloemfontein, 1% Midrand and another 4% named an assortment of other locations. (11% had not thought about the issue enough to have an opinion) [see Table 19].

Support for Cape Town is broad and cuts across all the usual demographic divisions. It enjoys majority support from South Africans of all races. It is the clear preference among all language groups and the winner in eight of nine provinces (Bloemfontein is on top among those from the Free State).

Moreover, support for keeping Parliament in Cape Town has jumped by fifteen points (from 51% to 66%) since Idasa's last national survey in September 1994. Since that time, support for Cape Town has surged among South Africans of all races, in seven of nine provinces and of all but one language group.

Significantly, in Pretoria's home province, Gauteng, support for Pretoria has declined drastically from a close margin in 1994 of 38% to 30% in favour of Cape Town, to a marked advantage in 1995 of 68% to 14% in favour of Cape Town.

[for more information see "The Location of Parliament," *POS Reports 2* (February 1996).]

Voter Registration

Voter registration is the final constitutionally-related issue we will discuss. Attitudes on this issue were tapped in conjunction with our examination of local government elections last year.

"Do you think that people should have to register to vote, or do you think that people should just automatically be able to vote?"

In contrast to focus groups conducted in early 1995 which seemed to show a great deal of opposition to and suspicion of a voter registration process, especially among blacks, our survey found that by the time of last year's elections, a vast majority (76%) had the opinion that people should have to register to vote. 17% still favoured automatic eligibility to vote (4% were unsure and 3% did not know) [see Table 18].

Acceptance of registration ran across all race groups, though it was significantly higher among whites (88%), and coloureds (81%) and a bit lower among Africans (73%) and Indians (65%) in our sample [see Table 18].

Survey and Sample

The questionnaire and survey were designed by Idasa's Public Opinion Service. Fieldwork was done for Idasa by Market and Opinion Surveys of Durbanville who conducted personal interviews with a nationally representative sample of 2674 South Africans between late September and early November 1995. The results were then weighted to reflect an electorate estimated at 24.3 million voters. Results based on the total sample have a margin of error of plus or minus three percentage points. Results based on smaller sub-samples will obviously have greater margins of error depending upon the number of interviews in that group.

Idasa's Public Opinion Service

The Public Opinion Service, at Idasa's Public Information Centre, regularly conducts, analyses and publishes regular surveys of South African public opinion in order to support the consolidation of democracy.

For more information about POS, our survey results or other publications, or to make comments and suggestions about our work, contact Program Manager Robert Mattes at the Public Information Centre (021-418-3464 or rbmat@pic.iaccess.za).

The report was compiled by Cherrel Africa, Jennifer Christie and Robert Mattes.

Appendix

Table 1: Most Important Rights to be Included in the Constitution

	Most Important	Second Most Important	Third Most Important	Total Mentions
Don't Know	27	1	—	28
Equal Rights/ Human Rights	16	7	4	27
Freedom of Speech	6	4	3	13
Right to Safety/ Protection From Crime	5	4	3	12
Right to Education	5	6	4	15
Right to Housing/ Affordable Housing	4	4	3	11
Women's Rights	4	2	2	8

Other rights mentioned (either first, second or third) include the right to employment (9%), access to land (7%), freedom of movement (6%), children's rights (6%), health care (5%), right to vote (4%), equal treatment by employers (4%), freedom of association (4%), right to vote (4%), right to guaranteed income (3%), private property (3%), freedom of religion (3%), right to strike (2%), equal treatment before the law (1%), freedom to criticize government (1%), water (1%), legal defence (1%) and cultural and linguistic rights (1%).

Table 2: Most Important Rights to be Included in the Constitution by Race

	African	White	Coloured	Indian
Don't Know	36	24	39	49
Equal Rights/ Human Rights	24	30	23	10
Freedom of Speech	11	10	17	11
Right to Safety/ Protection From Crime	10	8	23	4
Right to Education	15	17	13	22
Right to Housing/ Affordable Housing	4	12	15	18
Women's Rights	1	11	1	—

Columns do not total to 100% because only those most frequently mentioned were included

Table 3: Categorization of Different Types of Rights

Political/ Civil Rights	Economic/ Welfare Rights	Social/ Educational Rights	Environmental/ Cultural/ Linguistic Rights	Other
Freedom of Speech (13%)	Right to Housing/ Affordable Housing (12%)	Right to Education (15%)	Cultural and Linguistic Rights (4%)	Equal Rights/ Human Rights (27%)
Right to Safety/ Protection From Crime (11%)				
Freedom of Movement (6%) Right to vote (4%)	Right to Employment (9%) Access to Land (7%)	Women's Rights (8%) Children's Rights (6%)		Other (13%)
Freedom of Association (4%) Private Property (3%)	Equal Treatment by Employers (4%) Right to Guaranteed Income (3%) Right to Strike (2%)			
Freedom of Religion (3%) Equal Treatment Before the Law (1%)	Water (1%)			
Freedom to Criticize Government (1%) Legal Defence (1%)				

Table 4: Circumstances under which Abortion should be Allowed by Race and Gender

	Total	African	White	Coloured	Indian	Female	Male
Never	35	41	15	38	8	34	35
Only in case of rape, incest or when the woman's life is in danger	37	33	48	41	43	38	36
For reasons other than rape, incest, or danger to the woman's life, but only after the need for the abortion has been clearly established	9	9	10	8	6	10	8
Always as a matter of personal choice	15	12	26	9	33	16	14
Don't Know	4	5	2	5	10	3	6

Table 5: Stage of pregnancy at which Abortion is allowable

	Total	African	White	Coloured	Indian	Male	Female
At any point of her pregnancy	16	14	18	11	27	23	14
Only in the first six months	4	3	7	1	2	8	6
Only in the first three months	55	49	64	59	56	56	71
Don't Know	27	34	11	29	15	13	10

This question was only asked of those who responded that abortion should be allowed

Table 6 : Role of Tribal Leader In New South Africa

	Total	African	White	Coloured	Indian
No role to play	24	24	26	24	31
Some role to play	44	46	44	27	47
Important role to play	17	19	16	10	8
Don't know	15	12	14	40	14

Table 7 : Conflict between Traditional Leaders and Democracy?

	Total	African	White	Coloured	Indian
Will be a conflict	41	39	49	37	35
Can work together	27	31	21	17	17
Uncertain/Don't know	32	31	31	47	48

Table 8 : Should Traditional Leaders be Included in Local Government?

	Total	African	White	Coloured	Indian
Should be part of local govt	51	55	45	27	37
Should not be included in local govt	32	30	35	33	37
Don't Know	19	15	20	40	27

Table 9 : How Traditional Leaders should be Represented in Government

	Total	African	White	Coloured	Indian
Awarded a seat	30	38	12	8.1	2
Run for election	47	40	70	48	69
Don't Know	23	22	18	44	29

Table 10 : Should Traditional Leaders be Aligned with a Political Party?

	Total	African	White	Coloured	Indian
Should be aligned with a political party	21	19	28	18	18
Should not be aligned	58	63	50	39	49
Don't Know	21	17	22	43	33

Table 11 : Should Traditional Leaders take Stances on Public Issues?

	Total	African	White	Coloured	Indian
Should take a stance	32	28	48	25	24
Should not take a stance	48	54	33	31	43
Don't Know	21	18	19	44	33

Table 12: Provincial Government Powers

	Total	African	White	Coloured	Indian
Should be increased	39	41	33	37	32
Kept the way they are	32	34	30	18	33
Should be reduced	8	7	11	8	6
Don't know	21	17	26	37	29

Table 13: Provincial Government Powers by Province

	West Cape	East Cape	North Cape	Free State	Natal	North-West	Gaut-eng	North ern	Mpum-langa
Increased	34	47	43	60	33	61	34	23	62
Kept the way they are	21	19	43	26	43	16	34	40	29
Reduced	11	12	3	6	9	13	8	3	2
Don't know	34	23	11	9	16	10	24	33	7

Table 14: Exclusive Powers of Provincial Government

	Most Important	Second Most Important	Third Most Important	Fourth Most Important	Total
Don't Know	36	1	—	1	38
Housing	10	8	6	1	25
Services/Local Infrastructure	9	7	8	4	28
Education	8	7	7	3	25
Police/Security	6	5	5	4	20
Health Care	5	7	4	3	19
Employment	4	6	4	2	16

Other areas mentioned by less than 5% include justice (4%), protection of aged (4%), care for homeless (4%), economic development (4%), parks/dams (4%), land (3%), traditional affairs (3%), tax collection (3%), and water (3%).. 4% said that provinces should have no powers at all.

Table 15: When Can Government Possess Land?

	Total	African	White	Coloured	Indian
Never	38	29	70	31	57
To Build Something for Public Use	27	29	20	22	21
To Give It Back to the Former Owners	21	26	5	26	10
To Give It to People Without Land	8	10	1	5	8
Whenever It Wants To	1	2	0	0	0
Don't Know	5	4	4	16	4

Table 16: How Much Does Government Have To Pay If It Possesses Land

	Total	African	White	Coloured	Indian
Current Market Value	73	68	93	66	94
What Owner Originally Paid	14	18	4	13	0
Government Does Not Have To Pay	3	4	0	1	2
Don't Know	10	10	3	20	4

Table 17: Should Parliament Stay In Cape Town Or Be Moved?

	Total	African	White	Coloured	Indian
Cape Town	66	57	94	88	73
Pretoria	14	18	7	3	0
Midrand	1	1	1	0	2
Bloemfontein	5	7	2	2	2
Elsewhere	4	5	1	2	0
Don't Know	11	13	5	1	23

Table 18: Should People Have To Register In Order To Vote?

	Total	African	White	Coloured	Indian
Should Have To Register	76	73	88	81	65
Should Automatically Be Able To Vote	17	19	10	14	31
Unsure	4	5	2	2	2
Don't Know	2	3	1	3	2

