

2/21/1/2/42

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**MONDAY
18 MARCH 1996
OLD ASSEMBLY CHAMBER
(10h00)**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Monday, 18 March 1996

TIME: 10h00 - 18h00

VENUE: Old Assembly Chamber

DRAFT AGENDA

1. Opening
 2. Bill of Rights
 3. Provinces
 4. Competencies
 5. National Council of Provinces
 6. AOB
 7. Closure
-

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries: Ms M M Sparg, Tel 245-031

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 14 March 1996
SUBJECT: Draft Formulations on "*Chapter 2 - Bill of Rights*"

We enclose for your consideration draft formulations produced by the Technical Refinement Team on "*Chapter 2 - Bill of Rights.*"

H EBRAHIM
EXECUTIVE DIRECTOR

DRAFT -12 MARCH 1996

Status: For discussion by Constitutional Committee Sub-committee in preparation for report-back to Constitutional Committee.

**CHAPTER 2
BILL OF RIGHTS**

State's duties

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

Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures that are designed for the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination may be taken.
- (3) Neither the state [nor any person] may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth [and affiliation or any other grounds].¹
- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.²

Human dignity

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

¹ Words in brackets are still in contention. Panel and Technical Committee to provide alternative formulations and to move section 35(4) into this section.

² Agreed. May need to be revisited if "unfair" and "unfairly" fall out.

Life
10.

Option 1

Everyone has the right to life.

Option 2

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

Option 3

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

Freedom and security of the person

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

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

(2) Everyone has the right to security of the person, including the right -

- (a) to be free from all forms of violence;
- (b) to [bodily / physical] and psychological integrity; and
- (c) to make decisions concerning [reproduction / their body] free from coercion, discrimination and violence.

(3) No one may be -

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

Slavery, servitude and forced labour

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

Privacy

13. Everyone has the right to privacy, including the right not to have³ -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; and
- (d) the privacy of their communications infringed.

³ Panel/TC4 to write memo on inclusion of 'reasonable' in (a), (b) and (c).

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 public authority;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising -
- (i) marriages concluded under any tradition or a system of religious, personal or family law; and
 - (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
- (b) The legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution.

Freedom of expression

15. (1) Everyone has the right to freedom of expression, including -
- (a) freedom of the press and other media;
 - (b) freedom to receive and impart information and ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.⁴
- (2) The right 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 cause harm.]⁵
- (3) **Option 1**
The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

⁴ NP wants to be sure provision applies to juristic persons.

⁵ Section 15(2)(c) still under discussion.

Option 2

The state must regulate any newspapers and electronic media that it finances or controls to ensure that they are impartial and represent broadly the views of society.⁶

Assembly, demonstration and petition

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

Freedom of association

17. Everyone has the right to freedom of association.

Political rights

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

Citizenship

19. No citizen may be deprived of citizenship.

Freedom of movement and residence

20. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.⁷
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter and to remain in the Republic.
- (4) Every citizen has the right to a passport.

⁶ Possible formulations for this provision and similar provision in Chapter 7 are being prepared by the TRT.

⁷ ANC is reconsidering the use of the word 'everyone'.

Freedom of occupation

21. Every citizen has the right to choose freely their [trade,] occupation or profession, their place of work and their place of training.⁸ [The practice of an occupation may be regulated by law.]

Labour relations⁹

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.

⁸ DP considering reference to "citizen".

⁹ Section 22 still under discussion.

Environment¹⁰

23. Everyone has the right -

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

Property

24. (1) The state must guarantee property [and it must foster conditions which enable people to gain access to property on an equitable basis].

- (2) [The nature, content and limits of property may be determined by law.] No one may be deprived of property except in accordance with a law of general application [but no one may be arbitrarily deprived of property].
- (3) Property may be expropriated only in terms of a law of general application -
 - (a) for public purposes or in the public interest which includes land reform to address the results of past racial discrimination; and
 - (b) subject to the payment of [just and equitable] compensation within a time period and in a manner as agreed or decided by a court.
- (4) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine a fair balance between all relevant interests having regard to all the relevant factors, including -

¹⁰ NP proposes the following clause:

"Everyone has the right -

- (1) *to an environment that is not harmful to their health, well-being and quality of life, and*
- (2) *to have their environment protected through reasonable legislative and other measures for the benefit of present and future generations -*
 - (a) *preventing pollution and ecological degradation;*
 - (b) *promoting conservation;*
 - (c) *securing the ecologically sustainable use of natural resources;*
 - (d) *safeguarding the environment while promoting justifiable economic development; and*
 - (e) *securing the ecological integrity of the environment."*

- (a) the current [and intended] use;
- (b) the history of its acquisition;
- (c) its market value;
- (d) [the ability of the state to pay];
- (e) the purpose of expropriation;
- (f) the level and extent of state investment and subsidy;
- (g) [the value of the investment in the property]; and
- (h) [the need for effective land reform].

[(5) This section does not invalidate reasonable legislative and other measures that are designed to bring about land reform to redress the results of past racial discrimination.]

Access to land

24A [Everyone has the right to have equitable access to land. The state must take reasonable legislative and other measures, within the state's available resources, to facilitate this access.]¹¹

Housing

25. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home or have their home demolished [arbitrarily] without an order of court made after considering the relevant circumstances.¹²

Health, food, water, and social security

26. (1) Everyone has the right to have access to -

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within the state's available resources, to achieve the progressive realisation of each of these rights.

¹¹ Agreed to deal with land in separate clause. Full clause still to be developed. ANC and NP submitted drafts for discussion.

¹² Panel/TC4 to prepare memo on the inclusion of the word "arbitrary". NP proposes that the clause should refer to a "lawfully occupied" home.

- (3) No one may be refused emergency medical treatment.

Children

27. (1) Every child has the right -

- (a) to a name and a nationality from birth;
- (b) to family care, [parental care], or appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services, and social services;
- (d) to be protected from maltreatment, neglect, abuse, or degradation;
- (e) to be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and
- (f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest period of time and has the right to be -
 - (i) kept separately from other detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.

- (2) The child's best interest is of paramount importance in every matter concerning the child.
- (3) In this section, "child" means a person under the age of 18 years.

Education

28. *Option 1*

- (1) Everyone has the right -

- (a) to a basic education, including adult basic education, in a state or state-aided institution;¹³
- (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
- (c) to choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.

- (2) Everyone has the right to establish and maintain, at their own

¹³ The wording in the preamble. See TC4 memo.

expense, private educational institutions that -

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Option 2

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

- (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.

29. ...¹⁴

Language and culture

- 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.¹⁵

Access to information¹⁶

31. *Option 1*

- (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 be regulated by national legislation.]¹⁷

Option 2

- (1) The State must take legislative measures to provide reasonable access to any information that is -

¹⁴ Agreed that Section 29 on academic freedom would be incorporated under Section 15.

¹⁵ TRT has considered the formulation and believes it is appropriate. NP is considering this provision.

¹⁶ Panel/TC4 to provide new wording.

¹⁷ Section 31 to be reconsidered when horizontality and juristic persons discussed.

- (a) required for the exercise and protection of any rights; and
[(b) held by the State or a natural or juristic person.]¹⁸

Just administrative action¹⁹

32. Option 1

- (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.

Option 2

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

Access to courts

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

¹⁸ The words in brackets seem unnecessary.

¹⁹ ANC proposes the following formulation:

- "(1) *The State must provide by way of relevant legislation access to just administrative action.*
(2) *The legislation referred to in subsection (1) must -*
(a) *Provide for the review of administrative action by a court of law or an independent and impartial tribunal;*
(b) *impose a duty on the state and the organs of state to take lawful, reasonable and procedurally fair administrative action;*
(c) *be justifiable in an open and democratic society based on freedom and equality;*
and
(d) *promote an efficient administration."*

Panel/TC4 to provide new wording.

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 -
 - (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
 - (e) to be released from detention subject to reasonable conditions if the interest of justice permit.²⁰
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
- (a) to be informed promptly of the reason for being detained;
 - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned by the state if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and
 - (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused has a right to a fair trial, which includes the right -
- (a) to be informed of the charge with sufficient details to answer

²⁰ DP and PAC do not support this wording

- the charge;
- (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial that begins and concludes without unreasonable delay in an ordinary court of law;
 - (d) to be present when being tried;
 - (e) to choose and be represented by a legal practitioner and to be informed of this right;
 - (f) to have a legal practitioner assigned to the accused person at state expense if substantial injustice would otherwise result,²¹ and to be informed of this right;
 - (g) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
 - (h) to adduce and challenge evidence;
 - (i) not to be compelled to give self-incriminating evidence;
 - (j) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (k) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (l) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - (m) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (n) of appeal to, or review by, a higher court.
- (4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.²²
- (5) Where this section requires information to be given to a person, that information must be given in a language that the person understands.²³

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 is

²¹ DP reserves position on wording.

²² See Panel/TC4 memo of 11 March 1996 with proposed wording.

²³ Inserted to avoid repetition several times.

[demonstrably] justifiable in an open and democratic society based on human dignity, equality and freedom and limits the right as little as is reasonably possible.²⁴

- (2) Any limitation in terms of subsection (1) must take into account the nature of the right and -
- (a) the importance of the purpose of the limitation;
 - (b) the nature and extent of the limitation; and
 - (c) whether the limitation can achieve its purpose.
- [(3) The provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit [unfair] discrimination.]²⁵
- (4) Except as provided in subsections (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency²⁶

36. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -
- (a) the life of the nation is threatened by war, invasion, [general] insurrection, disorder, [national] disaster, or other public emergency; and
 - (b) the declaration is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two thirds of its members, may resolve to extend a declaration of a state of emergency for a period of up to three months, or for consecutive periods of up to three months each [for no more than 14 days ... up to 60 days, or for consecutive periods

²⁴ Panel/TC4 to prepare memo on this provision.

²⁵ Agreed to move this section to section 8. Panel/TC4 will propose formulation.

²⁶ TRT to draft reformulation.

of up to 60 days each].

- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) (it) is strictly required by the emergency;
 - (b) it is consistent with the Republic's obligations under international law;
 - (c) it conforms to subsection (4); and
 - (d) it is published in the national Government Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
- (a) the creation of retrospective crimes or the imposition of retrospective penalties except for an act or omission that, at the time it was committed, was criminal in terms of international law;
 - (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
 - (c) any derogation from this section or any of the sections listed below.

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

| | |
|-----------------------|--|
| Section 34(2) (d) | Right to challenge detention and be released |
| Section 34(3) and (4) | Fair trial |
| Section 35 | Rights contained in limitation section |
| Section 38 | Application of the Bill |

(5)...

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

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

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

- (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
- (b) a notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and referring to the emergency measures under which that person has been detained;
- (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
- (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
- (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless the detention is necessary to restore peace and order;
- (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
- (g) the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
- (h) the state must present written reasons to the court to justify the detention or continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

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

Enforcement of rights

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

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

Application

38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state.
- (2) The Bill of Rights binds all natural and juristic persons if applicable.
- (3) 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.
- (4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.²⁷

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, every court -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) ...²⁸
- (3) When interpreting any legislation, and when developing the common

²⁷ NP to consider wording.

²⁸ Moved to Judiciary chapter (S99(b)).

law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.



CONSTITUTIONAL ASSEMBLY

ANC PROPOSAL ON PROPERTY

MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE SUB-COMMITTEE
FROM: EXECUTIVE DIRECTOR
DATE: 14 MARCH 1996
RE: ANC PROPOSAL ON PROPERTY

We enclose a document from the ANC entitled, "*Further ANC Proposals on Property Clause (28 February 1996)*," for consideration in relation to the new section 24A.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

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You've made your mark



Now have your say

THE NEW CONSTITUTION

FURTHER ANC PROPOSALS ON PROPERTY CLAUSE (28 FEB 1996)

- (1) Everyone has the right to have equitable access to land. The state must take reasonable and progressive legislative and other measures to secure this access.
- (2) The institution of property shall be respected. Its nature, use, content and limits shall be determined by law.
- (3) No one may be deprived of property except in accordance with a law of general application.
- (4) Property may be expropriated only in terms of a law of general application -
 - (a) for public purposes or in the public interest;
 - (b) subject to the payment of compensation within a time period and in a manner as agreed or decided by a court.
- (5) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine an equitable balance between the public interest, which includes land reform, and the interests of those affected, having regard to all relevant factors, including -
 - (a) the current use of the property;
 - (b) the nature of the property;
 - (c) the history of its acquisition, occupancy and use;
 - (d) its market value;
 - (e) the ability of the state to pay;
 - (f) the extent of state investment and subsidy;
 - (g) purpose of expropriation;
 - (h) the nation's commitment to land reform and measures to bring about equitable access to water.
- (6) This section shall not invalidate reasonable legislative and other measures that are designed to redress the results of past racial discrimination in respect of access to land, water and other natural resources.
- (7) Every person and community dispossessed of land after 19 June 1913 as a result of any law or practice which would have been inconsistent with the provisions of section 8 of this Constitution had that section been in operation at the time of the dispossession, shall be entitled to restitution of that land or alternatively, an equitable redress in the manner described by legislation.*
- (8) Every person and community whose existing rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to legally secure rights to that land or comparable redress as prescribed by legislation.

* Should provision for the restitution of mineral rights be included in this clause?



CONSTITUTIONAL ASSEMBLY

NP PROPOSAL ON LAND

MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE SUB-COMMITTEE
FROM: EXECUTIVE DIRECTOR
DATE: 14 MARCH 1996
RE: NP PROPOSAL ON LAND

We enclose a document from the NP entitled, "*Land*," for your consideration in relation to the new section 24A.

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

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22

THE NEW CONSTITUTION

LAND

1. To achieve land reform in order to redress the results of past racial discrimination the state must take reasonable and progressive legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.
2. Every person and community dispossessed of land after 19 June 1913 as a result of past racially discriminatory laws or practises has the right to claim restitution of the land or equitable redress consistent with section 24, in terms of national legislation.
3. Every person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices has the right to claim legally enforceable security of tenure or, where appropriate, equitable redress consistent with section 24, in terms of national legislation.



CONSTITUTIONAL ASSEMBLY
MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 14 March 1996
SUBJECT: Draft Formulations on "*Chapter 8 - Provinces*"

We enclose for consideration at the 18 March 1996 meeting of the Constitutional Committee Subcommittee draft formulations on "*Chapter 8 - Provinces*" produced by the Technical Refinement Team.

H EBRAHIM
EXECUTIVE DIRECTOR

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18 March 1996
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THE NEW CONSTITUTION

DRAFT -12 MARCH 1996

Status: For discussion by Constitutional Committee Sub-committee in preparation for report-back to Constitutional Committee.

**CHAPTER 8
PROVINCES**

Provinces

117. (1) The Republic has the following provinces:
- (a) Eastern Cape
 - (b) Free State
 - (c) Gauteng
 - (d) KwaZulu-Natal
 - (e) Mpumalanga
 - (f) Northern Cape
 - (g) Northern Province
 - (h) North-West Province
 - (i) Western Cape.

- (2) The boundaries of the provinces are those existing when the Constitution took effect.

[Status and duties of provinces

- 117A (1) Provinces are integral parts of the Republic and inseparable from the Republic which is one sovereign state.
- (2) Provincial governments must promote national unity and must pursue peace in their provinces. They must commit themselves to the well-being of all the people of the province, and co-operate in a spirit of ubuntu to reconstruct and develop their provinces.
 - (3) Provinces are founded on respect for and the observation of human rights. They must promote the achievement of equality between men and women and people of all races.
 - (4) Provinces must comply with the principles of constitutional democracy and the rule of law within the meaning of the Constitution to preserve homogeneity among the provinces.

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

Application of this Chapter

118. 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 LEGISLATURES

Legislative authority of provinces

119...¹

Composition and election of provincial legislatures

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

Membership

121. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except -
- (a) anyone who is appointed by or is in the service of the state and receives remuneration, other than -

¹ See clause 2 in Chapter 9 which will be moved to this section when finalised.

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

122...

Oath or affirmation by members

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

Sittings and recess periods

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

(2) The Premier of a province may summon the provincial legislature to

an extraordinary sitting at any time to conduct urgent business.

- (3) A provincial legislature may determine where it ordinarily will sit.

Elections and duration of Provincial Legislatures

125. (1) A provincial legislature is elected for a term of five years.

- (2) If a provincial legislature is dissolved in terms of section 125A or when its term expires, the President/Premier, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved, or its term expired.
- (3) If the results of an election of a provincial legislature are not declared within the period referred to in section 113(1) or if an election is set aside by a court, the President/Premier, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
- (4) A provincial legislature remains competent to function from the time it is dissolved or its term expires until the day before the first day of polling for the next legislature; but, if the election results are not declared within the period referred to in section 113(1) or an election is set aside by a court, the legislature as constituted previously again becomes competent to function until the day before the first day of polling in the next election.

Dissolution of provincial legislatures before expiry of term

125A. (1) The Premier may dissolve a provincial legislature with the approval of the legislature by a vote of the majority of its members.

- (2) An Acting Premier must dissolve a provincial legislature if -
- (a) the Premier has resigned after a vote of no confidence in terms of section 147; and
- (b) the legislature fails to elect a new Premier within 21 days of the vote of no confidence.

Speakers and Deputy Speakers

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

- (2) A judge designated by the President of the Constitutional Court must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.

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

Decisions

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

Internal autonomy

128. (1) A provincial legislature may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.
- (2) The rules and orders must provide for the participation of minority parties in the legislative process in a manner consistent with democracy.
 - (3) A committee of a provincial legislature may summon anyone to appear before it to give evidence under oath or affirmation or to produce documents.

Privileges and immunities of members

129. (1) Members of a provincial legislature have freedom of speech and debate in the provincial legislature and in its committees, subject to its rules and orders.
- (2) Members of provincial legislatures are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
 - (a) anything they have said in, produced before, or submitted to their provincial legislature or any of its committees; or
 - (b) anything revealed as a result of anything that they have said,

produced or submitted.

- (3) Other privileges and immunities of members of the provincial legislatures may be prescribed by legislation.

Assent to Bills

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

Application by members to Constitutional Court

- 130A. (1) At least one third of the members of a provincial legislature may apply to the Constitutional Court for an order declaring that a Bill passed by the legislature or part of the Bill, or if the Bill has been promulgated, the Act, or part of the Act, is unconstitutional.
- (2) An application -
- (a) may not be made before the Premier has assented to and signed the Bill; and
 - (b) must be made within 30 days after the Bill has been signed by the Premier.
- (3) When an application is made, the Constitutional Court may order that the Bill may not be promulgated or that the Act or part of it has no force until the Court has decided the application if -
- (a) the interest of justice requires this; and
 - (b) the application has reasonable prospects of success.
- (4) If the application is unsuccessful the Constitutional Court must order

the applicants to pay the costs unless the application had reasonable prospects of success.

Promulgation

131. (1) A Bill assented to and signed by the Premier of a province must be promulgated and becomes an Act of the province upon its promulgation.

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

Safekeeping of Provincial Acts

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

PROVINCIAL EXECUTIVES

Executive authority of provinces

133...²

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

² See clause 10 in Chapter 9 which will be moved to this section when finalised.

passed by the legislature.]

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

Election of Premiers

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

Assumption of office by Premiers

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

Term of office of Premiers

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

Vacancies

138...

Acting Premiers

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

- (2) An acting Premier has the responsibilities, powers and functions of the Premier.

Executive Council

140. The Executive Council of a province consists of the Premier and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

Continuation of Executive Councils after elections

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

Oath or solemn affirmation

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

Accountability of Members of Executive Councils

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

Conduct of members of Executive Councils

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

Temporary assignment of powers and functions

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

Transfer of powers and functions

146. The Premier by proclamation may transfer to a member of the Executive Council - (a) the administration of any legislation entrusted to another member; or
(b) any power or function entrusted by legislation to another member.

Votes of no confidence

147. (1) If a provincial legislature by a vote of the majority of its members passes a vote of no confidence in the province's Executive Council, excluding the Premier, the Premier must reconstitute the Council.
- (2) If a provincial legislature by a vote of the majority of its members passes a vote of no confidence in the province's Premier, the Premier and the other members of the Council must resign.

PROVINCIAL FINANCIAL AND FISCAL MATTERS³

PROVINCIAL CONSTITUTIONS

Adoption and Certification

154. (1) A provincial legislature may adopt a constitution by resolution of at least two thirds of its members.
- (2) A provincial constitution must be consistent with the Constitution; but, provided that it does not deviate from the principles embodied in the Constitution, it may -
- (a) establish different legislative and executive structures and procedures; and
- (b) provide for the institution, role, authority and status of a traditional monarch in the province.
- (3) No provincial constitution and no amendment to a provincial constitution has force or effect unless the Constitutional Court has certified that all the provisions of the provincial constitution or of the amendment are consistent with this Constitution.
- [(4) Any provision in a provincial constitution which requires resources additional to those envisaged in this Constitution must be provided for by the province itself.]

³ Sections 148-153 moved to Chapter 14 (Finance).



CONSTITUTIONAL ASSEMBLY
MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 14 March 1996
SUBJECT: Draft Formulations on "*Chapter 9 - Competencies*"

We enclose for consideration at the 18 March 1996 meeting of the Constitutional Committee Subcommittee draft formulations on "*Chapter 9 - Competencies*," produced by the Technical Refinement Team.

H EBRAHIM
EXECUTIVE DIRECTOR

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35

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18 March 1996
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THE NEW CONSTITUTION

DRAFT - 13 MARCH 1996

Status: Draft discussed at CC subcommittee meeting of 12/3/96, and as adjusted after that meeting.

NATIONAL AND PROVINCIAL LEGISLATIVE AUTHORITY

Legislative authority of Republic

1.¹ (1) The legislative authority of the Republic is vested in [Parliament]² and confers on [Parliament] the power-

- (a) to amend the Constitution; or
- (b) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 5³ but excluding any exclusive provincial matter.⁴

(2) When exercising its legislative authority Parliament is bound only by the Constitution, and must act in accordance with and within the limits of the Constitution.

¹ This section as drafted is broadly supported by the parties, except the DP which reserved its position.

² No decision as yet whether the National Chamber of Provinces should be part of Parliament.

³ As the words "any matter" may be misinterpreted to relate only to matters within the exclusive competence of Parliament plus those within the parliamentary overrides in clause 3 of this draft, it is necessary to state categorically that Parliament is competent to legislate fully on the matters within the functional areas in Schedule 5 (and not only the parliamentary override part of those functional areas).

⁴ See clause 2(3) and foot note 10 below.

Legislative authority of provinces

- 2.⁵ (1) The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power -
- (a) to pass a constitution for its province or to amend any constitution passed by it;⁶ or
 - (b) to pass legislation in and for its province with regard to -
 - (i) any matter within the functional areas listed in Schedule 5;⁷ or
 - (ii) any matter outside these functional areas explicitly delegated to it by national legislation.⁸

⁵ Clause as drafted broadly supported by the parties, except the DP which reserved its position.

⁶ The above section must be read with section 154 of the Working Draft which prescribes the procedure for the adoption of a provincial constitution and the conditions to which a provincial constitution must conform.

⁷ NP and DP want concept of framework legislation to be introduced in this section. No agreement on framework legislation.

⁸ Matters of state at the different levels are so interrelated that it may be useful to allow Parliament to delegate further legislative powers to the provinces, for instance where there is a need for provincial legislation to complement specific national legislation in the provinces. This is in line with article 71 of the German Basic Law. It must be pointed out that this kind of provincial legislation will be mere subordinate legislation and completely dependent for its validity on the enabling national legislation. Parliamentary overrides do not come into play here as provincial legislation inconsistent with the enabling national legislation will obviously be *ultra vires*.

This provision may also be a useful instrument to give certain provinces more legislative powers than others (asymmetry). See also foot note 26.

- (2) When exercising its legislative authority a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with and within the limits of the Constitution and that provincial constitution.⁹
- (3) The passing of a provincial constitution and of any amendments to it is an exclusive provincial [matter].¹⁰
- (4) Legislation passed by a provincial legislature which is reasonably necessary for or incidental to the effective exercise of its power to legislate with regard to a matter within the functional areas listed in Schedule 5, is deemed to fall within those functional areas.¹¹

⁹ Section 156 of the Working Draft is incomplete in that it does not deal with the passing of laws by a provincial legislature under the regime of a provincial constitution. It is suggested that both the Constitution and the provincial constitution should bind the provincial legislature and that this principle should be stated in the Constitution.

The section also makes it clear that a provincial legislature, when exercising its legislative competence which includes the adoption of a constitution, must act in accordance with and subject to the limits of the Constitution (as prescribed elsewhere, e.g. sec. 154).

¹⁰ This clause contemplates vesting the power to pass and amend provincial constitutions exclusively in the provinces. It is suggested that this would satisfy CPXIX which requires both concurrent and exclusive powers for the provinces. This clause must be read with section 154 of the Working Draft which lays down the parameters for provincial constitutions, and also with clause 4 below which regulates the overrides where a provincial constitution and national legislation is in conflict with each other. Such conflicts may arise where a province includes in its constitution provisions dealing with matters that fall inside the concurrent area (Schedule 5 matters).

ANC considering whether "matter" used here and in other relevant sections should not be replaced by "legislative competence".

¹¹ A concern was raised that this provision should also specifically empower Parliament to legislate on "incidental matters". This has been considered but in context of the other provisions, especially clause 1(1)(b), there would appear to be no need for this.

Conflicts between national and provincial legislation¹²

3. (1) In the event of a conflict between national legislation and provincial legislation which falls within the functional areas listed in Schedule 5 -
- (a) the national legislation prevails over the provincial legislation if the national legislation -
 - (i) is aimed at achieving an [essential] national objective;
 - (ii) is necessary for the achievement of that objective; and
 - (iii) applies uniformly in or with regard to the country as a whole;¹³
 - (b) the provincial legislation prevails over the national legislation where paragraph (a) does not apply.
- (2) National legislation must be regarded as necessary for the achievement of an [essential] national objective if it -
- (a) deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;¹⁴
 - (b) establishes -
 - (i) norms and standards;¹⁵
 - (ii) structural, regulatory or other frameworks; or

¹² This clause is based on the different models in section 159 of the Working Draft. Subclause (1) attempts to lay down the general principle that national legislation which is necessary for the achievement of an essential national objective and applies uniformly with regard to the country as a whole, overrides provincial legislation and that, where this does not apply, provincial legislation overrides national legislation. Subclauses (2) and (3) sets out the specifics of the application of the general principle.

The DP does not support the concept of conflict resolution in this clause and proposes a formulation similar to section 72 of the German Basic Law which would limit Parliament to legislate on Schedule 5 matters to the extent of the Parliamentary overrides. However, the DP subsequently tabled on 12 March 1996 a new proposed formulation for Section 3 based on concurrent powers and national and provincial overrides.

¹³ The word "essential" is in contention. Paragraph (a) redrafted as per agreement between ANC and NP.

¹⁴ Paragraph (a) adjusted on the insistence of the NP to bring it into line with section 126(3) of the Interim Constitution.

¹⁵ The previous reference to "minimum norms and standards" has been deleted as per agreement between ANC and NP.

- (iii) a national policy,
aimed at achieving uniformity across the nation with regard to a matter which in the interest of the country as a whole requires uniformity;
 - (c) provides for -¹⁶
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - (iv) the promotion of economic activities across provincial boundaries;¹⁷
 - (v) the promotion of equality or equal opportunities; or
 - (vi) the protection of the environment; or
 - (d) is aimed at preventing unreasonable action by a province which is prejudicial to another province or the country as a whole.¹⁸
- (3) Unless the contrary is proved, national legislation aimed at achieving an [essential] national objective other than those listed in subsection (2), must be regarded as necessary for the achievement of that objective if it has been supported by the National Council of Provinces

¹⁶ The ANC and NP agreed that the words "the implementation of a national policy which is in the interest of the country as a whole, which includes", be deleted.

¹⁷ The term "interprovincial commerce" has been replaced with the agreement of the parties by "economic activities across provincial boundaries" which is more descriptive.

¹⁸ There is uncertainty whether this paragraph should not be dealt with separately in order to comply with certain interpretations of CP21.2. As presently positioned the parliamentary override will only set in if the relevant national legislation applies uniformly in the country as a whole. (See section 126(5) of the Interim Constitution).

[or agreed to in the Mediation Committee] with six provinces having voted in favour of the legislation.¹⁹

Conflicts between national legislation and provincial constitutions²⁰

4. In the event of a conflict between national legislation and a provision of a provincial constitution with regard to -

- (a) a matter where this Constitution specifically requires or contemplates the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; or²¹
- (b) a matter within the functional areas listed in Schedule 5, section 3²² applies as if the affected provision of the provincial constitution were provincial legislation contemplated in that section.²³

Conflicts that cannot be resolved

5. If a dispute concerning a conflict between national legislation and provincial legislation falling within Schedule 5 or between national legislation and a

¹⁹ This subclause replaces the previous subsection (2)(e) and the previous options for subsection (3) and provides for a rebuttable presumption in favour of a parliamentary override where the relevant national legislation has been approved by the National Council of Provinces or agreed to in the Mediation Committee. However, its ambit has been narrowed down to national legislation

- which is aimed at achieving a national objective, and
- which falls outside the categories listed in subsection (2).

By de-linking subsection (2) from decisions of the Council of Provinces the adjustment ensures that the subsection (2) categories will be fully justiciable by the courts. Consequently the presumption will only apply to **residual** national legislation and then only to the **test of necessity** as required in section 3(1)(a)(ii). The question whether the legislation is aimed at achieving a national objective must be proved in the normal way.

The NP suggests the deletion of the words in brackets. ANC will consider this. NP also favours the inclusion of the underlined words. ANC prefers an ordinary majority of the provinces.

- ²⁰ Conflicts between provincial constitutions and national legislation is a different matter that cannot be resolved by the same rules as applicable to conflicts between national and provincial legislation. It is consequently dealt with separately.
- ²¹ This paragraph only applies to national legislation specifically required by the Constitution, for instance in sections 172, 180 (1) and 187 of the Working Draft.
- ²² Of this Draft.
- ²³ This provision is necessary to prevent provinces from attempting to use their constitutions as a means to circumvent parliamentary overrides where these overrides would normally apply.

provincial constitution cannot be resolved by the Constitutional Court in terms of sections 3 and 4, respectively, the national legislation prevails over the provincial legislation or constitution.²⁴

6. Subsidiarity²⁵
7. Asymmetry²⁶
8. Justiciability²⁷

²⁴ See CP 23. Consideration was also given to CP 22 insofar as that Principle stipulates that the national government may not exercise its powers in such a way so as to encroach on the geographical, functional or institutional integrity of the provinces. It would appear that this Principle does not require the inclusion in the Constitution of a provision following its exact wording, and that the Principle would be complied with if the Constitution, read as a whole, disallows such encroachment.

²⁵ The view is that CP 21.1 is a matter which concerns the allocation of functional areas, e.g. Schedule 5, especially when it comes to the allocation of **executive** competences. It cannot be understood to intend excluding Parliament from legislating in those areas.

Matter of subsidiarity still unresolved.

²⁶ The current framework as envisaged for the new Constitution provides for asymmetry in the following respects:

- (a) Section 154 provides for institutional and procedural asymmetry in the sense that the provinces can establish and develop their own executive and legislative structures and procedures.
- (b) The draft on the transitional provisions (section 12) allows for an asymmetrical assignment of statutory powers and functions to the provinces in accordance with their administrative capacities. This principle is also contained in section 235 of the Interim Constitution.
- (c) Clause 2(1)(b)(ii) of this Draft provides for the delegation of additional legislative powers to the provinces, which does not exclude the allocation of more powers to some of the provinces.

²⁷ NP wants a provision stating clearly that disputes concerning overrides will be determined by the courts.

SCHEDULE 5

CONCURRENT FUNCTIONAL AREAS

PART A²⁸

Agriculture
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pool
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health Services
Housing
Indigenous Law and customary law
Language policy and the regulation of official languages within a province subject to section 6
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism
Trade and industrial promotion

²⁸ No real consideration has been given to this list up to this stage. Police has been removed as it appears to be dealt with explicitly outside this framework in Chapter 13 of the Working draft.
NP wants to add

Forestry
Land affairs
Public works
Water affairs
Publication control.

ANC wants local government to be removed.

Words underlined added. NP will consider.

Traditional authorities
Urban and rural development
Welfare services

PART B

Any matter where a provision of the Constitution specifically requires the enactment of provincial legislation.

DRAFT - 5 MARCH 1996

Status: For consideration by CC Subcommittee.

NATIONAL AND PROVINCIAL EXECUTIVE AUTHORITY

National executive authority

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

Executive authority of provinces²

2. (1) The executive authority of a province is vested in the provincial executive and confers on the provincial executive the power -
 - (a) to administer all matters within the functional areas listed in Schedule 5 except where provided otherwise in the Constitution or an Act of Parliament;
 - (b) to administer provincial legislation in the province;³
 - (c) to administer national legislation in the province where the administration of that national legislation has been assigned to it in terms of an Act of Parliament;⁴ and
 - (d) to perform any other function assigned to it in terms of the Constitution or an Act of Parliament.

¹ This wording comes from section 76 of the Working Draft.

² See section 133 of the Working Draft.

³ The concept of "provincial legislation" will have to be defined as embracing both new legislation enacted by the province and existing legislation assigned to the province.

⁴ A provision as proposed here may come in very useful where Parliament legislates within the parliamentary overrides on, for instance, uniform norms and standards and assigns the enforcement of the legislation to the provinces.

- (2) The administration of provincial legislation in a province is an exclusive provincial matter;⁵ but, this subsection may not be read as limiting sections 3 and 4.⁶
- (3) The provincial executive consists of the Premier and the other members of the Executive Council who must act in accordance with and within the limits of the Constitution and, if a provincial constitution has been passed for the province, also that constitution.⁷

Executive co-operation

3. An executive organ of state, by agreement with another executive organ of state at the same or any other level of government, may -
 - (a) delegate any of its powers, other than its constitutional powers, to that other organ of state; or
 - (b) authorise that other organ of state to perform any act on its behalf.⁸

**National executive intervention
in provinces⁹**

4. The national executive may assume the administration of any legislation or the performance of any executive function vested in the executive of a province when it is necessary for -
 - (a) the maintenance of national standards or the establishment of minimum standards required for the rendering of services;
 - (b) the maintenance of economic unity;
 - (c) the maintenance of national security; or

⁵ In line with CP XIX which requires exclusive powers for the provinces.

⁶ The proviso is necessary to prevent this provision trumping sections 3 and 4.

⁷ Section 162 of the Working Draft is incomplete in that it does not deal with the exercise of provincial executive power under the regime of a provincial constitution. This is now added.

⁸ Reformulation of sections 161 and 162(2) of the Working Draft. This section may need further development in line with the philosophy behind intergovernmental co-operation.

⁹ This clause is necessary because of section 2 above which confers, inter alia, certain exclusive executive powers to the provinces within the Schedule 5 areas. Where exclusive powers are given CP XXI.2 requires constitutional provision for intervention by the national executive in the circumstances listed in paragraphs (a) to (d) above.

Draft: 5 March 1996

- (d) the prevention of unreasonable action taken by that province which is prejudicial to the interest of another province or the country as a whole.



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Subcommittee
FROM: Executive Director
DATE: 14 March 1996
RE: CONSTITUTIONAL PRINCIPLES APPLICABLE TO THE ALLOCATION OF NATIONAL AND PROVINCIAL COMPETENCIES

At the meeting of the Sub-committee of the Constitutional Committee on 12 March 1996 the Technical Advisers, Panel of Experts, and Law Advisers were instructed to provide members with an opinion on the application of the constitutional principles to the proposed formulation contained in Section 3 of the draft dated 12 March 1996 dealing with Legislative Competence.

All the experts concerned met immediately after the Sub-committee meeting and mandated me to produce this report.

It is the unanimous view of all experts concerned that it is not possible for the experts to provide an opinion on the compliance of constitutional principles solely with regard to the one provision. Any opinion on the compliance of the constitutional principles would have to take into consideration all the provisions of the relevant text of the new Constitution as a whole.

To assist members, I was further requested to provide a further copy of the opinion of the technical advisers to Theme Committee 3 on *Constitutional Principles Applicable to the Allocation of National and Provincial Competencies*, which was contained in the Constitutional Committee Sub-committee pack of 21 August 1995 and discussed at that meeting.

H EBRAHIM
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THE NEW CONSTITUTION

CONSTITUTIONAL PRINCIPLES APPLICABLE TO THE ALLOCATION OF NATIONAL AND PROVINCIAL COMPETENCIES

by
THE TECHNICAL ADVISORS OF THEME COMMITTEE 3

1. INTRODUCTION

The Sub-Committee of the Constitutional Committee instructed us on 10 August 1995 to draft a report on the interpretation of the Constitutional Principles contained in Schedule 4 of the present Constitution regarding key issues concerning the allocation of legislative and executive competencies to the national and provincial governments respectively.

For the purposes of this report we have identified the following questions at this stage to be of fundamental importance:

- Should the Constitution contain one or two lists of functions or functional areas?
- How should the matter of "overrides" be determined?
- What guidance is to be found regarding "residual powers"?
- What does "framework legislation" entail?

In our discussion of the various Constitutional Principles, reference will be made to these problem areas.

The debate on national and provincial competencies should in our view take place against the background of the following considerations.

1.1 THE NATURE OF THE CONSTITUTIONAL PRINCIPLES

Section 71(1) of the Constitution provides, inter alia, that a new constitutional text shall comply with the Constitutional Principles contained in Schedule 4.

Section 71(2) provides that the new constitutional text must be certified by the Constitutional Court as complying with the Constitutional Principles.

Whilst this report is not an attempt to "second guess" the Constitutional Court, it is important to understand the jurisprudential nature of the Constitutional Principles, i.e. the manner in which they are likely to be applied.

It is significant that the word "principles" is employed to describe the constitutional statements in Schedule 4. Principles have a particular meaning in the legal literature and this has been recognised by our courts. Principles differ from rules of law. They do not apply on an "all-or-nothing" basis like rules of law. They perform the role of a value framework pointing in a particular direction rather than prescribing one narrowly defined result.

Accordingly the Constitutional Principles in Schedule 4 should not be read in an inflexible, literal manner, but rather as creating a framework for the drafting of the Constitution, although some of the Constitutional Principles (e.g. IV, XXXII and XXXIII) are phrased in a more direct manner and in more concrete constitutional language.

It is submitted that a holistic approach should be followed. In short, the Constitutional Principles should be read together as the new constitutional text must conform to all the Constitutional Principles.

1.2 THE NOTION OF "RESIDUAL POWERS"

The expression "residual powers" finds its meaning in the notion that certain powers are allocated from a specific reservoir of powers, leaving a "residue" of unallocated powers in the reservoir, which then remains with the original bearer(s) of those powers. The typical application of the concept is where a federation is composed of a number of independent states, each with its own sovereign authority. The component states sacrifice their sovereignty and surrender some of their powers to the federation. Such a process of federation can entail that either the federal authorities are endowed with a specified list of powers, leaving the "residual powers" with the component states, or the powers of the component states may be listed, and whatever is not listed, is entrusted to the federation.

The Constitutional Principles do not deal with the matter of residual powers. This is explained by the fact that the South African constitutional process is not one comparable to a process of federation as described above. The Republic was endowed, prior to 27 April 1994, through the mechanism of parliamentary sovereignty, with the full reservoir of governmental authority, and from that date onwards continued to hold those powers, subject though to the Constitution (sections 37 and 75). The Constitution replaced parliamentary sovereignty with its own supremacy (section 4) and in section 124 established new entities known as provinces, which were endowed (sections 126 and 144) with competence in the field of a list of functional areas (Schedule 6), taken from, as it were, the reservoir of national competence.

From this it is clear that the provincial competencies are derived from the Constitution and therefore that a construction of residual power vesting in them is untenable.

1.3 THE NOTION OF "FRAMEWORK LEGISLATION"

In view of the fact that various parties have expressed the view that the new Constitution should employ the mechanism of "framework legislation", it may be useful also to consider its nature.

1.3.1 ORIGINS

The prime (and, as far as could be established, only specific) constitutional example of framework legislation is to be found in the *Grundgesetz (Basic Law)* of Germany.

Section 75 of the *Basic Law* empowers the federal parliament to make "framework regulations" (which is considered in German law to be synonymous to "framework legislation") with regard to a list of specified matters.¹ Framework legislation of the federal parliament is subject to the same limitations applicable to concurrent legislation (section 72 of the *Basic Law*). The limitations are comparable to those provided for in section 126(3) of our present Constitution.

Whether framework legislation should be considered to be a legislative category distinct from concurrent legislation, or if it must be understood to be a form of concurrent legislation, has not been settled in German legal theory. What is however generally accepted, within the context of the German Constitution is that the competency to adopt framework legislation is more limited than that regarding concurrent legislation. A federal framework law may not regulate the subject matter exhaustively. Framework laws are intended to provide guidelines within which the legislatures of each of the *Länder* will then make, according to the specific and often different requirements of each, detailed legislative provisions. The framework law is in all respects federal legislation, while the detailed provisions are laws of each *Land*. A law is only considered to conform to the description of a framework law if it *requires substantial* "filling in" and if it is indeed *capable* of being filled in by *Länder* legislation.

The purpose of a framework law is to define the boundaries within which the *Länder* are enabled to complete the legislative regulation of the matter. This however does not mean that the framework law must be limited merely to fundamental principles. Apart from prescribing guidelines to the *Länder* legislatures, framework laws sometimes contain substantive provisions directly applicable in all the *Länder*.

Framework legislation must be distinguished from *empowering* legislation in which an organ of the executive is empowered to make detailed provisions by means of subordinate regulations. Framework legislation does not merely empower the adoption of subordinate legislation, because the laws of the *Länder* made in pursuance of a federal framework law are original *Länder* laws applying independently from (though necessarily in conformity with) the framework law.

1.3.2 IMPLICATIONS FOR THE NEW CONSTITUTIONAL TEXT

If the concept of framework legislation is to be used in the new constitutional text, it is advisable to provide clearly what it means, because there is no indisputable universal meaning that can be attached to the concept, and even in Germany differences in expert opinion in regard thereto are prevalent.

Considerable care should therefore be taken before the concept of framework legislation is employed in the Constitution as a synonym for the terms "exclusive"

¹. The listed matters are the legal status of persons in the public service of the *Länder*, of local governments and of other public corporate bodies, general principles of the higher education system, the press and films, hunting, nature conservation and protection, land distribution, regional planning, water affairs, registration of inhabitants and personal documentation (identification and passports).

and/or "concurrent" powers as they appear in the Constitutional Principles.

The balance of this opinion deals with the various principles identified as relevant to the allocation and relationship between national and provincial competencies.

2. CONSTITUTIONAL PRINCIPLE XVI

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

Apart from requiring three levels of government, this CP does not take the debate as to residual powers, the listing of powers or the overrides any further.

3. CONSTITUTIONAL PRINCIPLE XVIII

- "1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.
2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less or substantially inferior to those provided for in this Constitution.
3."

CP XVIII para 1 : The operative words are "shall be defined". In our view, "defined" would cover the description of the seat of the residual power, that is, if the Constitution states, for instance, that Parliament shall have the competence or power to make laws for the country as a whole this "defines" the power of Parliament as national lawmaker. To list the powers for instance, of the national lawmaker would likewise "define" these powers. However, this does not mean that this CP requires a listing of powers and that other ways of "defining" are ruled out.

CP XVIII para 2 : The operative words are "not substantially less or substantially inferior to". In our view, the word "substantially" means that the powers and functions of the province CAN be less or inferior to those provided for in the 1993 Constitution but should not be substantially so. In other words, it is a question of degree : it is impossible to devise a definitive test which would authoritatively decide the question of when powers and functions are less or inferior but not substantially so.

What would amount to a *substantial* reduction of the quantity or quality of those competencies, can hardly be determined in the abstract. It is submitted that, in the context, the word "substantial" means that the provincial competencies of the new Constitution need not be exactly the same as those of the present Constitution, but that the provinces should be

left in at least the same position of relative competence in relation to the national government as they can be at present. Thus a provision requiring provincial laws to be submitted for approval to the President (instead of the Premier), would, it is suggested, amount to a substantial qualitative reduction, whereas dealing with "animal control and diseases" as a component of the functional area of "agriculture" would hardly qualify as a reduction of the quantity of provincial competencies. In short, the determination is one of weight of powers rather than the quantity thereof.

4. CONSTITUTIONAL 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".

The constitutional empowerment of one level of government (be it the executive or legislative arm of government) to perform functions for another level of government on an agency or delegation basis would be an example of "defining" the powers and functions of a level of government (see the discussion on "defining" above). The concept of framework legislation can also be applied when empowering one level of government on an agency or delegation basis to perform functions for another level of government. That is, the framework legislation empowers another level of government to do the filling in of the framework legislation on either an agency or delegation basis.

Delegation of functions is normally conceived of as "downward" empowerment. Although Principle XIX seems to be cast in broad enough language to allow for the delegation of functions by a provincial government to the national government, perhaps regarding a matter in the exclusive domain of the province, it is submitted that such "upward" delegation would be a novel form of delegation. Delegation should preferably also be the subject of clear constitutional regulation, since the Principle would appear to go beyond the scope of the usual forms of administrative delegation.

It is clear that both the national and provincial levels of government must have exclusive as well as concurrent powers. A possible argument is that this CP does not require both legislative and executive powers to be exclusive and that, for instance, granting merely exclusive executive powers to provinces would satisfy the requirements of this CP. There is precedent for this approach in, for example, Germany.

Another argument that may pass the test of the requirements of this CP is that this CP does not require legislative exclusivity with regard to certain defined functional areas. In other words, if provincial legislatures may pass legislation in certain defined (listed) functional areas concurrently with the national Parliament the provincial legislatures do not have exclusive jurisdiction with regard to these functional areas but these provincial legislatures DO have exclusive legislative powers where, for example, the national overrides do not apply or even where

provincial overrides apply, as the case may be. The question arises as to whether provinces may be granted exclusive legislative powers by means of framework legislation, that is, whether provincial legislatures have exclusive legislative powers with regard to the filling in within the parameters described by the framework Act of the national Parliament when the framework Act requires that the provincial legislatures make laws with regard to the detail within the norms or principles set out in such Act. (See paragraphs 1.3.1 and 1.3.2 above).

5. 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".

In our opinion the parameters of "appropriate and adequate" powers that will enable government to function "effectively" are very wide and do not take the debate on exclusive or concurrent powers; on overrides; on the listing of powers and the seat of residual power any further. This submission is equally applicable to powers which must be conducive to "financial viability" and to "effective" public administration. The framework is wide : there must be provision for both "national unity" and "legitimate provincial autonomy" as well as "cultural diversity".

6. CONSTITUTIONAL PRINCIPLE XXI

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

1. The level at which decision can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.
2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards for the rendering of services, the maintenance of economic unity, the maintenance of social security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.
3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
5. The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
6. Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia -
 - (a) for the purposes of provincial planning and development and the rendering of services; and
 - (b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.
7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.
8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments".

CP XXI is of crucial importance with regard to the criteria which apply in the allocation of powers to the national government and the provincial governments.

CP XXI para 1 enjoins the Constitution to empower the level of government at which decisions can be taken "most effectively" in respect of the "quality and rendering of services". There is no indication that the lowest level of government should always be the level so empowered. It may be that one may in suitable circumstances come to the conclusion that the lowest level of government (in these circumstances) may be the level at which decisions can be taken most effectively with regard to the quality and rendering of services. In our view, this is a general principle with regard to the allocation of powers which does not require a listing of all the functions (although it certainly does not rule out the listing of functional areas). This CP can play a role in deciding the overrides in that a certain level of government must be empowered because decisions can be taken most effectively in respect of the quality and rendering of services at such level.

CP XXI para 2 states that the Constitution shall empower the national government to intervene in certain circumstances : it is accordingly clear that this CP deals with the important questions of overrides. It is submitted that overrides would take place

primarily "through legislation" - the only other procedure for overriding would be through the executive arm of national government. Accordingly, this CP does not deal with the issue of the seat of the residual power or the listing of powers as such but it awards an override in certain prescribed circumstances. In our view, this CP requires that the Constitution must empower the national government to intervene in the prescribed circumstances; in other words, the Constitution must make provision for a national override in the following circumstances : when it is necessary for the maintenance of essential national standards; for the establishment of minimum standards required for the rendering of services; the maintenance of economic unity; the maintenance of national security; or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole. We submit that para 2 constitutes a formulation for an override not only in respect of concurrent but also of exclusive provincial powers. Unlike other paragraphs of CP XXI which specifically refer to exclusivity or concurrency (para 6), there is no qualification contained herein and furthermore the CP mandates national government intervention by employing the word "shall". Similarly, this paragraph does not employ the word "allocation" which supports our submission that this subparagraph deals not with allocation of power directly but with the override.

Depending on the definition given to framework legislation, such overrides could also take the form of national framework legislation. For example, the national Parliament can be empowered to pass framework Acts which lay down essential national standards or required minimum standards for the rendering of services and the provincial legislatures then acquire the power to pass detail legislation to fill in such frameworks enacted by Parliament.

CP XXI para 3 in essence, requires, that foreign affairs should be allocated to the national level. This can, of course, be achieved in different ways :

- foreign affairs could be part of the "residual" powers of national government;
- foreign affairs can be listed as one of the functional areas of national government (on the assumption that these powers are specifically listed); or
- foreign affairs could be taken care of by means of an override on the legislative terrain.

This CP does not appear to favour any one of these alternatives over the other.

CP XXI para 4 In circumstances where uniformity across the nation is required for a particular function, the Constitution must allocate the relevant legislative competencies predominantly or wholly to the national legislature (Parliament). This could be done by way of :

- an outright override (where national legislation prevails wholly);
- by way of framework Acts of Parliament (where national legislation prevails predominantly by laying down the parameters of uniformity within which the provincial legislatures may pass detail (filling in) legislation); or
- a guideline for the defining of powers in a list (if such system is employed).

Whichever of these options are employed the Constitutional Assembly will have to apply its mind to the question of which functions will have to be exercised at the national level in order to attain uniformity across the nation.

CP XXI para 5 requires that the functional areas of national economic policies; the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour must be allocated to the national government. As is the case with foreign affairs (CP XXI para 3 discussed above) this can be achieved in different ways :

- these functional areas can be part of the "residual" power of national government;
- they can be listed as functional areas of national government; or
- they can be taken care of by means of an override on the legislative terrain.

This CP does not favour any one of these options. However, the term inter-provincial commerce has been widely used by the courts in the USA to strengthen the position of the national (federal) power over that of the composite states. It is submitted that this CP is couched in terms which are often employed for the purposes of an override.

CP XXI para 6 requires that the Constitution "shall" allocate to provincial governments inter alia the following powers either exclusively or concurrently with the national government : powers for the purposes of provincial planning and development and the rendering of services; and powers in respect of aspects of government dealing with specific socio-economic needs and the general well-being of the inhabitants of the province. If such powers are allocated concurrently this need not only be done by way of listing the functional areas (subject to national or provincial prevalence, as the case may be) but it is also clear that this CP allows for framework legislation in these concurrent areas of jurisdiction : for instance, the national Parliament can lay down parameters or standards or principles within which provincial planning and development as well as the rendering of services must take place. On the whole, it would appear as if this CP deals, in general, with matters which are province-specific, that is, that issues such as provincial planning or development, the rendering of (provincial) services; and the specific socio-economic or cultural needs and general well-being of provincial inhabitants "shall" be allocated either exclusively or concurrently to the provincial governments. This paragraph will also lend weight to the conclusion that where the matters specified therein are not specific to provinces, eg. socio-economic and cultural needs of national importance, these should be allocated to the national government (in terms of CP XXI para 2). In our view this CP merely states this as a general requirement and does not require that all matters which are either province-specific or, on the other hand, national-specific should be listed. This CP is also valuable in the override-debate. For example, the Constitution may state that provincial laws which deal specifically with the socio-economic or cultural needs of the provincial inhabitants, must prevail over an Act of Parliament in this area of legislation.

CP XXI para 7 contains a general principle which operates in allocating powers to the national and provincial governments. Where mutual co-operation is essential or

desirable or where it is required to guarantee equality of opportunity or access to a government service, the Constitution should allocate such powers concurrently to the national and provincial governments. Concurrent powers can be allocated either by way of listing of the functional areas concerned or by way of framework legislation in terms of which both the national and provincial governments exercise power but where the national government lays down the standards or principles and the provincial governments provide the filling in (detail) in those areas where, for instance, as a general rule mutual co-operation is essential or desirable.

CP XXI para 8 requires the Constitution to specify "how" powers which are not specifically allocated to the national government or to the provincial government "shall" be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments. Section 126(2) of the 1993 Constitution provides an illustration of such a provision: "The legislative competence referred to in Subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence". It is submitted that this Principle does not deal with residual powers, but, as section 126(2) of the present Constitution, with powers *ancillary* to such powers as are specifically allocated. The Principle is not concerned with the mechanism of allocation, but seeks to ensure that the constitutional provisions dealing with the allocation of powers will also be understood to allocate the authority to do whatever is peripherally necessary to exercise those competencies effectively.

7. CONSTITUTIONAL PRINCIPLE XXII

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

In our view, this CP does not address the problem area of residual powers; the listing of powers; or overrides in a meaningful manner. This CP merely introduces a test to curb national powers in general : it shall not overstep the mark and encroach upon the geographical, functional or institutional integrity of the provinces. In our view this CP provides an objective test which could be introduced in the Constitution and thereby allow the courts to determine the limits of the national government power.

8. CONSTITUTIONAL PRINCIPLE XXIII

"In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the national government".

This could be an important principle because it creates a presumption in favour of national legislation whenever there is a dispute between the national government

and the provincial governments with regard to concurrent legislative powers and the court is unable to decide the matter on an interpretation of the Constitution. This CP would accordingly rule out a provision in the Constitution which purports to create a general presumption in favour of provincial legislation.

9. CONSTITUTIONAL 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".

This CP does not have any direct implication for the debate on national and provincial competencies. It also adds nothing to the debate whether local government should be a function of the national or of provincial governments or of both.

10. CONSTITUTIONAL PRINCIPLE XXV

"The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution"

This CP deals with fiscal and financial issues and does not relate directly to the debate on national and provincial competencies.



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Subcommittee
FROM: Executive Director
DATE: 14 March 1996
RE: DRAFT ON NATIONAL COUNCIL OF PROVINCES

We enclose for consideration at the 18 March meeting of the Constitutional Committee Sub-committee proposals on the National Council of Provinces.

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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THE NEW CONSTITUTION

DRAFT -12 MARCH 1996

Status: For discussion by Constitutional Committee Sub-committee in preparation for report-back to Constitutional Committee.

**CHAPTER 4
THE NATIONAL COUNCIL OF PROVINCES¹**

Composition

1. (1) There shall be a National Council of Provinces through which the provinces participate in the national legislative process.
- (2) The National Council shall comprise of 9 provincial delegations made up as follows:
 - (a) five (Option: seven) members elected directly by each provincial legislature in proportion to the support enjoyed by the political parties represented in such provincial legislature. (Option: the members so elected shall cease to be members if the provincial legislature loses confidence in its representatives.)
 - (b) five (Option: three) representatives appointed by each provincial legislature (Option: Executive) in proportion to the support enjoyed by the political parties to attend specific council meetings from time to time.

Participation in National Legislative Process

2. (a) The National Council shall have the power to consider legislation dealing with matters which fall within the exclusive competence of national government.
- (b) The National Council may consent or to object to such legislation and may propose amendments thereto.
- (c) Where the National Council has proposed amendments or has

¹ This entire Chapter still under discussion.

objected to such a Bill, the National Assembly must reconsider such a Bill and amendments if any and may pass the Bill with or without such amendments by a simple majority.

- (d) The National Council and the National Assembly may establish any joint committee in accordance with their respective rules to consider such a Bill and any amendments proposed thereto, provided that no more than 30 days shall be allowed for such joint consideration after the Bill has been referred to the National Council.

2.(2) All Bills which effect the exercise or performance of the powers and functions of the provinces as provided in schedule 5, excluding appropriation bills and amendments to the Constitution shall be dealt with by the National Council as follows:

- (a) if the Council supports the Bill, it must be submitted to the President for assent;
- (b) if the Council proposes amendments or opposes the Bill, the Bill together with any proposed amendments must be referred to the Mediation Committee;
- (c) if the Mediation Committee agrees on the version of the Bill as passed by the National Assembly, the Bill must be submitted to the President for assent;
- (d) if the Mediation Committee agrees on a different version of the Bill to that approved by the National Assembly it shall be submitted to the Assembly for approval, and if approved, the Bill shall be submitted to the President for assent.

(Option. If the mediation Committee agrees on a different version of the Bill, to that approved by the National Assembly, such amended Bill must be referred to both the Council and the Assembly for approval before it is submitted to the President for assent.); and

- (e) if the Mediation Committee fails to agree on the Bill or amendments thereto, the Bill shall lapse unless the Assembly approves such Bill by a majority of at least $\frac{2}{3}$ of its members present.

(Option. If the Mediation Committee fails to agree on the Bill, or amendments thereto, the Bill shall lapse.)

Financial Bills

- 3.
- 3.1 All appropriation Bills shall be dealt with in terms of procedures set out in section 2(1).
 - 3.2 Other Bills having financial implications for provincial government with regard to the functional areas listed in schedule 5, shall be dealt with in terms of the procedures set out in section 2(2).

Constitutional Amendments

- 4.
- 4.1 The approval of $\frac{2}{3}$ of the total number of members of the National Council shall be required for any constitutional amendment which amends any provisions of the Constitution dealing with provinces.
 - 4.2 In the event that a constitutional amendment amends the powers and functions of a specific province or provinces, the approval of the legislature of such province or provinces shall be required.

Mediation Committee

- 5.
- 5.1 The Mediation Committee shall consist of
 - (a) one delegate from each province designated by members of the province in the National Council and
 - (b) 9 members of the National Assembly elected by the Assembly in proportion to the representation of the parties represented in the Assembly.
 - 5.2 Support by the majority of the members of the National Assembly and by the majority of the delegates of the National Council on any issue placed before the Mediation Committee shall constitute an agreement by the Committee.

Voting in the Council

- 6.
- 6.1 Each Province shall be entitled to one vote to be cast by its representatives in accordance with the mandate given by the provincial legislature.
 - 6.2 With regard to all decisions other than those which affect the exercise of performance of the powers and functions of the provinces as provided in Schedule 5, each member of the Council shall exercise a vote and the Council shall take its decisions by a majority of such votes cast.

Powers to summon Ministers

- 7.
- 7.1 The Council shall have the power to summon national Ministers and officials of the Executive to the Council and its committees.
 - 7.2 Members of the Cabinet shall have the right to address the National Council or its committees in respect of any deliberations regarding legislation affecting their portfolio.

Appointments

- 8.
- 8.1 The National Council may confirm the appointments set out in Schedule X. (Option. The National Council shall confirm the appointment of Constitutional Court judges.)

Chairpersons

- 9.
- 9.1 The Chairperson of the national Council shall be a member of the National Council elected by the Council.
 - 9.2 Upon election, a Chairperson shall have no vote and his or her delegation may fill the vacancy caused by such an election.
 - 9.3 The term of office of such a Chairperson shall be for one year and he or she shall be succeeded by a person chosen from another province. Provision shall be made for Deputy Chairpersons.

Option

- 10.1 There shall be a President of the Council who shall be appointed by the President.
- 10.2 The President of the Council shall have no vote and shall be responsible for the Secretariat.
- 10.3 There shall be two vice-presidents who shall be elected annually at a meeting of the council of Premiers from amongst their numbers.
- 10.4 At least one of the vice Presidents shall be elected from one of the minority parties if such a minority party is a majority party in a province.

General

- 11.
- 11.1 The members of the National Council of Provinces shall be entitled to participate in the deliberations of the Provincial Legislatures from which they have been elected and in the committees of such

legislatures but shall have no vote therein.

- 11.2 Property mandated representatives (delegates) of local government may attend and participate in the National Council and their committees but may not vote.
- 11.3 The Council shall have the right to express itself by passing resolutions on any matter of concern including the performance of the national or provincial executives and their members.

