OUR FUTURE TOGETHER

DISCUSSION DOCUMENT: THE NATIONAL PARTY PROPOSALS FOR THE FINAL CONSTITUTION

OCTOBER 1995

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INTRODUCTION

The transitional constitution was the result of the multi-party negotiations that took place at Kempton Park and was approved overwhelmingly in the elections of April 1994. The transitional constitution led to the most profound constitutional and political transition in the history of South Africa. It brought about a new, democratically elected government, entrenched the principles of a constitutional state and firmly placed us on the way to a new South Africa and national unity.

It is, however, a transitional constitution which will be replaced by a **final** constitution adopted by the elected representatives of all South Africans. The constitution accordingly provides that Parliament in its capacity as a Constitutional Assembly must adopt a final constitution for South Africa. It prescribes the procedures to be followed and sets out the framework of principles with which the final constitution must comply - the Constitutional Principles which will be discussed below.

The constitution-making process has been underway for some months and this document provides an overview and summary of the most important proposals which the National Party has submitted to the Theme Committees of the Constitutional Assembly working on the different aspects of the constitution.

The National Party believes that the final constitution must promote unity, prosperity and peace. It must promote justice, freedom and stability. It must recognise the aspirations and ideals of all South Africans, it must accommodate the rich diversity of the South African society and it must provide effective protection to all

our communities. The National Party has a vision of a final constitution which provides for **our future together**.

PRINCIPLES AND OBJECTIVES

All proposals by the National Party on the final constitution are aimed at the realisation of our policy principles and objectives and are, of course, subject to the Constitutional Principles prescribed in the transitional constitution - see below.

The National Party bases its proposals on the following points of departure:

- recognition of the sovereignty and guidance of Almighty God;
- recognition of South Africa as a sovereign state;
- constitutionalism, power-sharing, devolution of power and the other constitutional principles set out below;
- the need for national unity;
- recognition and protection of fundamental human rights, including the protection of minorities;
- free enterprise and a market-based economy.

On this basis the National Party commits itself to

* the creation and continued development of a true and sustainable **democracy**, which will ensure freedom, fairness and justice for all and bring peace, progress, prosperity and effective political participation to all;

* a **constitutional state** based on the supremacy of an entrenched constitution, the principle of legality, and the fundamental elements of a democratic state;

* a **participatory democracy** based on a common citizenship, universal suffrage and proportional representation in legislatures and executives at all levels, which shall ensure effective representation and participation for all and meaningful power-sharing among political parties;

* **responsible and accountable government** at all levels and, accordingly, the entrenchment of sufficient constitutional checks and balances, the separation of powers, freedom of information, effective judicial processes, transparency, and the distribution of powers among different levels of government;

* the protection of **fundamental rights** in terms of a justiciable and enforceable bill of rights;

* the recognition and entrenchment of **three levels of government**;

* the development of **strong provincial government** on the basis of the federal constitutional distribution and devolution of powers and functions;

* the development of **healthy and viable local government** and local responsibility as the cornerstone of a democratic system;

* the recognition of diversity and the **accommodation and protection of minorities** through effective participation in all decision-making, protection of fundamental rights, and empowerment.

THE TRANSITIONAL CONSTITUTION

The National Party accepts the **transitional constitution as the proper point of departure** for the drafting of the final constitution. It is the primary objective of the NP to **retain** the fundamentals contained in that constitution and to **improve and extend** its present provisions where possible and necessary in accordance with NP policy.

The transitional constitution has already brought about a fundamental transition constitutionally, politically, economically and emotionally. It established a democratic constitutional state, supremacy of the constitution, responsible and accountable government, responsible and appropriate distribution of powers, and, *inter alia* through the bill of rights, goes a long way towards the protection of the people against exploitation and oppression. The process of achieving freedom, justice and equality and the optimum development of all our people has already commenced under the transitional constitution. In drafting the final constitution, it is not a question of establishing a new order. The new order has already arrived. Therefore, the purpose of the final constitution should only be to conclude, confirm and strengthen this transition and, where necessary, further extend and entrench the democratic protection of all South Africans.

THE CONSTITUTIONAL PRINCIPLES

The transitional constitution provides that the final constitution must comply with the **Constitutional Principles** contained in Schedule 4 to the transitional constitution and that it shall not come into operation unless the Constitutional Court certifies the text of the final constitution as being in accordance with those Principles.

These principles form the framework within which the final constitution must be drawn up and include a commitment to a democratic constitutional system based on equal franchise, regular, multi-party elections, one citizenship, an entrenched constitution, protection of fundamental rights, an independent judiciary, equality before the law, separation of powers and three levels of government. A number of principles deal with the distribution of powers among the different levels of government and prescribe that the distribution must be entrenched, that all levels of government must enjoy sufficient powers to function effectively and that the national government may not encroach on the integrity of the provinces. The provinces and local governments are entitled to an equitable share of the national income.

The National Party believes that these principles form, in the words of the Preamble to the transitional constitution, a "solemn pact" to which all parties must adhere and which we must ensure are contained and reflected in the final constitution. It is our firm commitment to measure our own and all other inputs, as well as the next phase in the constitution-making process, against these principles. In our proposals we refer to these Principles where appropriate.

CHARACTER OF THE STATE

1. GENERAL

In view of the policy objectives and framework of principles explained above, the NP takes a strong stand on the fundamental principles on which the final constitution must be based and which will determine the **character** of the state. These include the relevant democratic principles, regular, multi-party elections, supremacy and entrenchment of the constitution, representative and accountable government, separation of powers, all the necessary checks and balances, citizenship and suffrage, a justiciable bill of rights, an independent and impartial judiciary and, in general, all aspects relating to the concept of a constitutional state. Our views on these matters correspond in almost all material respects with the content of the transitional constitution and the relevant Constitutional Principles. These matters have a determining influence on the nature of the state and the most salient are dealt with below in some detail.

2. SUPREMACY AND ENTRENCHMENT

2.1 The National Party strongly supports the principle that the state and all its organs shall be subject to a constitution in which their structures and powers, as well as the relationship between the state and its citizens, are defined. **The supremacy of the constitution will be the most important feature of the final constitution.** (See *Constitutional Principle IV*) The consequences of this for the position of Parliament as the highest legislature, the

executive as the authority that executes those laws, and the judiciary as the authority responsible for the application of the constitution to the actions of those other branches are indeed far-reaching.

In particular, the notion of an entrenched, justiciable constitution is closely related to **a justiciable bill of rights**. (*Constitutional Principle II*) A bill of rights that is enforced by the courts can only be an effective instrument of law if it forms a part of the supreme law of the land. In other words, it needs to be a part of an entrenched supreme constitution which cannot be amended or abolished easily. As a matter of fact, a bill of rights will and should form an integral and prominent part of the constitution.

In a very direct sense, supremacy of the constitution will not be effective if the courts do not have the authority to review the actions of other branches of government. This presupposes at least a measure of **separation between the different branches of government** which will enable the judiciary effectively to exercise its review function. (*Constitutional Principle VI*) In a broader, more indirect sense, the idea of the separation of powers, its underlying premise of preventing an over-concentration of power and effecting meaningful checks and balances is, of course, an essential feature of a constitutional state. Again, the separation of powers can be provided for effectively only in a written, entrenched constitution that has higher status than the government bodies the powers of which it seeks to control.

A supreme constitution, which includes a bill of rights, can be an effective instrument of law only if there is an effective way of enforcing it. An **impartial and independent judiciary** is the most suitable instrument for this purpose. (*Constitutional Principle VII*) As a matter of fact, an independent judiciary goes hand in hand with the idea of a supreme constitution.

2.2 Finally, **it is imperative that the constitution be entrenched.** (*Constitutional Principles II, IV and XV*) Supremacy of the constitution and entrenchment goes hand in hand. A supreme constitution that is not entrenched, and can simply be amended or repealed according to the normal procedures prescribed for ordinary laws, cannot be an effective instrument to control state action. In actual fact, entrenchment is one of the ways in which a constitution is afforded higher status or, put another way, in which the supremacy of a constitution is given real and practical meaning. To explain: if the constitution provides that it is supreme, but that particular section can be amended by an ordinary majority, ie a majority of a quorum, that supremacy can be abolished almost by the stroke of a pen and means very little. Without entrenchment, constitutional supremacy becomes a fiction without substance.

Accordingly, the NP proposes as follows in this regard: **The formula adopted in the transitional constitution should be retained in principle.** The constitution will undoubtedly contain critically important principles and guarantees which should not be susceptible to easy amendment. Our diverse society requires a constitution that is strongly entrenched. The following detail proposals are submitted:

- It should be possible either to identify those fundamental principles which should not be subject to amendment at all, or, at least, to formulate a commitment to a democratic form of state and democratic mechanisms which should be **entrenched absolutely**. Analogous to the French and Italian constitutions, an example of the latter could be an amended section 1(1) which reads: "No amendment of this Constitution which affects the democratic form of state shall be admissible."

- The rest of the constitution should, in principle, be amended only in **a joint sitting by a two-thirds majority of all members**. From an international perspective, a two-thirds majority is clearly the norm and from a domestic point of view, it is the very least which will give the various communities in our diverse society the sense of security that they need in regard to the entrenchment of the constitution.

- The present provision with regard to amendments affecting the **provinces** in general or a particular province, should be retained unamended. This means that the houses must approve an amendment to the powers of the provinces by a two-thirds majority sitting separately and, in the case of a particular province being affected, the provincial legislature of that province must concur. (*Constitutional Principle XVIII(4)*) This provision is one of the most important that gives recognition to the constitutional status of the provinces and to the Senate as the representative of the provinces in the national legislative process.

- A list of the most basic fundamentals of a democratic state should be included in a **Schedule** to the constitution, with the directive that the Constitutional Court must certify as being in accordance with the Schedule any amendment to the constitution that affects these fundamentals. The Schedule should contain matters such as regular multi-party elections, the supremacy of an entrenched constitution, representative and accountable government, the separation of powers, the protection of fundamental rights,

an independent judiciary, the existence of three levels of government, etc.

2.3 By way of summary, the following concepts are inextricably bound to one another and should all be provided for in the final constitution:

* constitutional supremacy (*Constitutional Principle IV*);
* justiciability of the constitution (*Constitutional Principle VII*);
* entrenchment of the constitution *(Constitutional Principles II, IV and XV*);
* the separation of powers (*Constitutional Principle VI*); and
* effective protection and justiciability of fundamental rights and freedoms (*Constitutional Principle II*).

3. REPRESENTATIVE AND ACCOUNTABLE GOVERNMENT

3.1 **Representative government is one of the most fundamental characteristics of a democratic system** and one of the most basic principles with which the final constitution must comply. (*Constitutional Principle VIII*) Representative government means that government authority shall not be exercised arbitrarily, but on behalf of the people. That, in turn, requires that the people shall be involved in the designation of the government so that the government shall be representative of the people. It took centuries to develop, until today representative government is ensured through direct elections by the people of their representatives in government.

Representative government, therefore, assumes the entrenchment of principles such as **universal adult franchise, a common voters' roll, freedom of political choice and activity, free, fair and regular elections, a multi-party system and a fair**

and suitable electoral system. (*Constitutional Principle VIII* contains all these aspects.)

Traditionally, representative government was associated with the legislature only, on the assumption that the **executive** shall be appointed from the legislature (specifically from the majority party) and, thus, indirectly, still be representative of the people. This led to the attitude that as long as the legislature is representative of the people, the position of the executive and its relationship with the electorate is not that important. The twentieth century has shown that this is an oversimplified view in modern societies.

Firstly, there has been a manifest transfer of authority from the legislature to the executive. The executive is nowadays the most powerful and prominent branch of government. With the vast bureaucracy at its disposal, the executive has the expertise, information and infrastructure effectively to cope with the demands made on modern governments. For this reason, the position and role of the executive has become as important as that of the legislature to the concept of representative government.

Secondly, the phenomenon in Western European democracies that, more often than not, no party obtains an absolute majority, has led to the emergence of coalition governments in which more than one party serve in the executive. Contrary to tradition, therefore, representative government for these countries came to mean government by more than one party.

Thirdly, the establishment of the modern concept of the state in much less homogeneous societies than ever before, especially in the less developed part of the world, has led to the formation of governments on the simple majority basis which too often were not representative enough of those diverse societies. In view of these facts, the principle of representative government should apply both to the legislature and the executive. See the discussion on the Executive.

Although the principles underlying representative government are stated generally in the Constitutional Principles and they obviously allow for flexibility in respect of their detailed implementation, the Constitutional Principles do not allow any departure from the *essence* of those principles. For example, it would be possible to determine the term of Parliament, in other words, how often elections must take place, but not to abolish the principle of regular elections. It would be possible to determine the voting age, but not to abolish the principle of universal adult suffrage. In similar vein the *type* of proportional electoral system could be determined, but it would be in breach of the Constitutional Principles to adopt a constituency system.

With regard to the issue of **participatory democracy**, three aspects need to be mentioned.

(a) *Involvement in the parliamentary process*

Representative government does not stop at regular elections for decision-making bodies and extends to the continuous involvement of the electorate in the decision-making process. For this reason, it is necessary to provide sufficient mechanisms and opportunities for the people to participate in the parliamentary process. This applies to the lawmaking function of Parliament, as well as its function to reflect and articulate the views of the public on all matters of interest to it. With reference to *Constitutional Principle X*, the legislative procedures of Parliament should be formulated to provide for all this. Much has been done already, for example, in the case of prior publication of bills, but more can still be achieved. Extensive provision for public participation and for the presentation of petitions, should, for example, be made.

(b) *Right of free access to information*

The principle of free access to information (*Constitutional Principle IX* and section 23 of the transitional constitution) is of particular relevance to the practical implementation of the idea of optimum public participation. In order for the public to enjoy an informed involvement, its needs information. All decision-making processes, at legislative as well as executive levels, should be aimed at efficiency, but also at providing the public with as much information as possible.

(c) *Referenda*

Although the National Party is in favour of optimum public participation, it does not believe that regular referenda as a standing constitutional feature of our decision-making system would be feasible. Switzerland is the only country where referenda are used on a regular basis and there it can be justified on account of the small size of the country and population, as well as the sophistication of the electorate and the efficiency of the administration and infrastructure. In contrast, referenda on a regular basis would be too costly and difficult in South African geographical, demographic and other circumstances.

3.2 Apart from the principle of representative government, a democratic system is also based on **accountable or responsible** government, which means that the elected government must be responsible to the representatives of the people and to the people themselves and may govern only with their continuous support. (*Constitutional Principle VI*)

For this reason, there should, *firstly*, be an express commitment in the constitution (for example, in the Preamble), to the principle of responsible government.

Of course, the principle of responsible or accountable government will be given effect only through specific arrangements and, therefore, *secondly*, the constitution should provide for all the various mechanisms and instruments without which a mere commitment to responsible government will have no substance. Categories of mechanisms to be provided for, include (i) judicial review (mainly on the basis of the bill of rights), (ii) the separation of powers and concomitant checks and balances, including an express provision on executive responsibility to the legislature (the present sections 92 and 153), (iii) access to information and transparency, and (iv) various offices and commissions.

To complete the list, the following should be added:

(a) **free, fair and regular elections**, which is probably the most important mechanism to ensure responsibility, because it enables the voters to express themselves on the government's performance, either to demonstrate rejection or continuous support;

(b) the full range of **parliamentary control mechanisms**, such as motions of no-confidence, approval of the budget, questions, interpellations and hearings, and reports by the Auditor-General. Parliament remains the primary arena for enforcing government responsibility and these mechanisms must be provided and protected in full. In this regard, the role of opposition parties is crucially important and nothing should be allowed that encroach on their ability to act; (*Constitutional Principle XIV*)

(c) distribution of powers among different **levels of government**, because it brings government closer to the people and facilitates accountability. (*Constitutional Principle XVI*)

4. SEPARATION OF POWERS

One of the most important methods to distribute power and to prevent the concentration of power, is by the application of the doctrine of the separation of powers. (*Constitutional Principle VI*) In terms of the doctrine, government authority is divided into **legislative, executive and judicial authority**, and exercised by different bodies. In theory, the purpose is that the body responsible for the enactment of laws shall not also be responsible for their execution or for adjudication on them. Likewise, the executive is not supposed to enact laws or to administer justice, and the judiciary should not make or execute laws. In practice, a larger or smaller degree of **overlap** may and does exist among the different branches of government. No system exists in which a total or absolute separation of powers can be found, or in which government bodies act in total isolation.

An integral aspect of the doctrine of separation of powers is that the different branches of government shall **control** one another. In this narrower sense of the word, reference is also sometimes made to *the system of checks and balances*, the idea being that no single branch of government may exercise too much authority on its own and that for important decisions, they need one another's co-operation. Checks and balances in this sense probably function strongest in the American system, where the legislature and the executive are to a large extent in a power equilibrium, although a measure of overlap does exist.

As in many other countries, a **relative separation of powers** exists in South Africa. Legislative authority is vested in Parliament, but the State President is involved in its exercise through his or her power to confirm bills. In addition, the executive has the delegated

power to make subordinate legislation. Executive authority is vested in the State President, but he or she is elected by Parliament, his or her ministers must be members of Parliament, and the State President and Cabinet is dependent on the support of Parliament for staying in power. Justices are appointed by the executive, a matter in which Parliament is also involved.

A separation of powers is prescribed by *Constitutional Principle VI* and must be adhered to.

5. CONSTITUTIONAL CHECKS AND BALANCES

In the narrow sense of the word, constitutional checks and balances refer to the way in which the different branches of government, viz the legislative, executive and judicial branches, control one another. In a wider sense, the purpose of constitutional checks and balances is to prevent excessive concentration of government power, which may lead to abuse, and to ensure control over the exercise of power without crippling effective government. In this latter sense, constitutional checks and balances may refer to all those democratic techniques which promote and ensure responsible constitutional government. The following checks and balances can be mentioned: an entrenched constitution, the separation of powers, different levels of government, a bill of rights, public control (through regular, multi-party elections and a free press), Parliamentary control (through committee activities, debates, questions, approval of the budget, motions of no-confidence, etc.), judicial control, bicameralism, the system of proportional representation, a multi-party executive, requirements for Parliamentary decision-making, mandatory consultation by different office holders, the offices of Public Protector and Auditor-

General, and institutions such as the Human Rights Commission. (See *Constitutional Principle VI.*)

6. THE ECONOMY

The constitution should give a clear indication of the *macro-economic philosophy* that governs the functioning of the markets for goods, services, labour and capital, the policies to manage the economy, the conducting of business by the private sector, and the institutional framework within which organised labour operates.

South Africa faces tremendous economic challenges to increase, on a sustainable basis, economic growth, improve the competitiveness of the economy domestically and internationally, create sufficient job opportunities, and address existing socio-economic backlogs. These challenges can be met only through a *market-orientated* or *market-based* economic system, founded on the principles of *free enterprise, private ownership* and the *right of the individual to sell his or her labour and the products thereof.* It is the responsibility of the government to provide a policy framework conducive to sustainable economic growth and the effective pursuance of these objectives. In addition, the private sector should be encouraged to play its pivotal role in the transformation of the economy from its current low growth equilibrium trap to a higher sustainable level. The reconstruction and development programme forms an integral part of the government's economic growth strategy, but our ability to achieve our objectives depends to a large extent on the growth generated by the private sector.

For these reasons, the National Party believes that it will boost confidence if the basic principles underlying our economic system are enshrined in the constitution, for example in the Preamble, as follows: *"The South African economic system shall be*

market-based and founded on the principles of free enterprise and private ownership."

INTRODUCTORY PROVISIONS

1. PREAMBLE, NAME, SYMBOLS AND TERRITORY

1.1 The National Party is of the opinion that the **Preamble** to the constitution can be properly drafted only after the constitution has been finalised. However, the NP strongly believes that the Preamble should at least include a reference to our humble submission to Almighty God. Although South Africa should maintain a proper separation of state and religion and no particular religion should be favoured in the constitution, we believe that a declaration such as this would reflect the sentiments of the vast majority of South Africans. It would also form the proper point of departure for the recognition of the freedom of religion in the bill of rights.

1.2 The **name** of the state, "Republic of South Africa", should be retained.

1.3 With regard to **national symbols**, the present flag has quickly become a truly unifying symbol and, together with the coat of arms, should be retained. The national anthems, "Nkosi Sikelel iAfrika" and "Die Stem", should also be retained with the proviso that the combined shortened multilingual version be used where appropriate.

1.4 The description of the **national territory** should be retained in principle, except that more pertinent reference can now be made to the provinces. Section 1(2) can then read: "The national territory of the Republic shall comprise the [**areas**] provinces defined in Part 1 of Schedule 1."

2. OFFICIAL LANGUAGES

It is the considered opinion of the National Party that the present section 3 should, in principle, be retained in the final constitution. Section 3 is based on a number of extremely important principles:

(a) The **right of the individual** to use the language of his or her choice as guaranteed in the transitional constitution, is the cornerstone of the language provisions in the transitional constitution. It recognises the importance of language in a multilingual society, recognises the multilingual character of the state, and quite rightly puts the focus on the individual.

(b) By providing for **eleven official languages**, the multilingual nature of our society is recognised constitutionally. The purpose is to elevate all languages to the same status and not to favour one or more languages over others. Section 3 actually places the responsibility on governments and all public bodies to participate actively in the development of all our languages.

(c) The protection of **existing** rights relating to and the present status of languages is a necessary concomitant to the ideal to elevate all languages to the same status. This protection extends to all languages that in the past enjoyed official status in various parts of the country, including the former independent and selfgoverning homelands.

(d) Section 3 provides for **flexibility** in its application by allowing each province to choose its own official language(s), and by allowing for the use of an official language(s) for

government purposes. While the status of languages is protected vigorously, this creates room for a practical approach to their use by the authorities.

(e) The principles enunciated in section 3(9) aims to further equality, respect and opportunity for all languages and to prevent exploitation, domination and division in language matters.

For these reasons, section 3 acknowledges the dignity of all South Africans and should be retained in spirit and in substance.

3. CITIZENSHIP AND SUFFRAGE

Citizenship denotes the permanent inhabitants of a state, the people who, in terms of certain rights and duties, have a particular relationship with that state. *Constitutional Principle I* as well as section 5 of the transitional constitution provides for a **common South African citizenship**. This principle should be retained in the final constitution, whereas the detail with regard to the acquisition, loss and restoration of citizenship should be dealt with in a separate law.

Citizenship confers certain rights on a person. One is the right to vote. The principle of **universal adult suffrage** is referred to in *Constitutional Principle VIII* and section 6 of the transitional constitution. This should be retained for persons 18 years of age and older and it should be made clear that, in principle, it only applies to citizens. Exceptions may exist in the case of local government.

STRUCTURE OF THE STATE

The structure of the state provided in the transitional constitution should be accepted as the proper point of departure. Provision should therefore be made for three levels of government (*Constitutional Principle XVI*), relative separation of powers (*Constitutional Principle VI*), a directly elected Parliament (*Constitutional Principles VIII and XVII*) consisting of two houses, an executive State President, an executive based on the principle of multi-party participation and power-sharing and which shall be responsible to Parliament, constitutional distribution of powers (*Constitutional Principle XVIII(1)*), a strong, constitutionally entrenched provincial system the legislative and executive structures of which correspond with those provided in the transitional constitution, a constitutional framework for local government (*Constitutional Principle XXIV*), and an independent and impartial judiciary (*Constitutional Principle VII*). Particulars in this regard are explained below.

THE LEGISLATURE

1. VOTING SYSTEM AND ELECTIONS

The NP favours the retention of the present system of representation, with a number of qualifications. Our present party list system of **proportional representation** is easy to understand and apply and fulfils the most basic requirement of any electoral system: it accurately reflects the support each party enjoys among the voters. (*Constitutional Principle VIII*) By definition, this gives all interest groups an opportunity to be represented and ensures a legitimate electoral system.

However, the system also carries with it two distinct disadvantages:

- The system leads to insufficient contact between the electorate and their representatives and, eventually, separation and even alienation between voters and representatives.
- In the election of 1994, the system was applied without voters' lists. Elections without the registration of voters are bound to cause disorderliness, electoral malpractices, voting by disqualified persons and, eventually, an increase in voter dissatisfaction and alienation.

The National Party accordingly proposes as follows:

1. In principle, the system of **proportional representation** has proven to be the most suitable electoral system for South Africa and it should be retained.

2. It is imperative that future elections be conducted on the basis of proper **voters' lists**. In addition to the reasons mentioned above, voters' lists force parties and candidates to get down to grassroots level to register voters. This encourages the development of an informal identification of voters with parties and candidates at this early stage in the electoral process, thus countering the separation between voters and representatives caused by proportional representation. It should also be emphasised that voters' lists should be prepared on a *provincial* basis. A voter should be registered in the province where he or she resides.

3. For proper linkage between voters and representatives, it is proposed that the constitution provides formally that after the election, and after the results have been published and Parliament has been constituted, the parties must **formally designate their MP's and Senators as representatives of the various magisterial districts** in South Africa. The public must be informed of this in various ways, *inter alia* by publication in the *Gazette*. The objective is to link members of Parliament constitutionally to geographical areas of the Republic, providing them with the formal clout and status to act on behalf of the voters in a particular district. All parties are involved and it may happen that a particular magisterial district is represented by more than one representative, creating, as it were, multi-member constituencies. Obviously, larger parties will be able to designate each of their members to fewer districts than smaller parties. For this reason, parties should be able either to cover as many districts as possible, which means that every member may be made responsible for a number of districts, or may choose to concentrate on

particular districts and leave the others to other parties. Senators should be designated only in their respective provinces, whereas parties should, in any case, preferably designate their members according to their place of ordinary residence.

The primary objective of any election is to arrive by legal means at an accurate, reliable and legitimate reflection of the will of the voters with regard to their representatives. Impartiality and efficiency are therefore the two most important criteria for the administration of elections. For these reasons, the National Party believes that an **independent electoral commission** should be in charge of elections. The basic principles governing the composition, powers and functioning of the commission should be entrenched in the constitution. The commission must be appointed in a representative way and it is proposed that nominations be submitted by a joint committee of Parliament and approved at a joint sitting of both Houses by a majority of 75% of all members. In putting up its administrative infrastructure, the commission should draw on existing expertise and experience. Adjudication of electoral disputes should be referred to the courts.

2. THE NATIONAL ASSEMBLY

It is the function of a representative Parliament to articulate voters' interests, participate in law-making and control the actions of the executive. The composition, powers and procedures of Parliament should be directed at the achievement of these purposes. The National Party believes that the composition, powers and functioning of the National Assembly as provided in the transitional constitution should be retained in principle (*Constitutional*

Principles VIII, X and XIV), except in so far as it is affected by the proposals with regard to the Senate discussed below. A reduction in the size of the National Assembly should also be considered.

Constitutional recognition should be given to the role of **parties**, especially minority parties, in the parliamentary process as a logical consequence of a multiparty system. They should be empowered through sufficient information and resources to fulfil their functions effectively.

A free mandate in terms of which representatives need not vacate their seats if they change their party affiliation should be reintroduced, and section 43(b) of the present constitution should be deleted accordingly.

Parliamentary **committees** are potentially the most effective instruments for control over the executive. The existence of a strong and effective committee system should be entrenched in the constitution, along with the principle that they must be composed on a proportional basis, that their chairpersons must be appointed from among all parties, that they shall have the power to consider and initiate bills, that they shall have the power of executive and administrative scrutiny, and that they shall take decisions on a consensus-seeking basis.

Parliament should be able to arrive at an informed decision on every bill in an effective way, and the **legislative process** must be directed at the achievement of this goal. In particular, all bills should, as a rule, be published before introduction, extensive information should be made available on every bill, all bills should be considered by committees, all parties should be allowed full participation in all proceedings, and evidence should be obtained from the public where necessary. Without jeopardising effective decision-making, the public should also be encouraged to make known their views through petitions to Parliament.

3. THE SENATE

3.1 **Purpose**

It is the considered opinion of the National Party that the constitution should provide for a **second chamber of Parliament,** called the Senate. The reasons are as follows:

(a) **The main purpose of a second chamber is to represent particular interests in society not adequately represented in the popularly elected house.** A second chamber to represent the constitutionally entrenched, but still fledgling, South African provinces in decision-making at national level is strongly called for, both for symbolic reasons and for the real influence it can exercise in the governing process. This is particularly important in view of the powers of the national Parliament to legislate on matters affecting the provinces, for example in the case of provincial finances and in those cases where national legislation overrides provincial legislation.

(b) A second chamber can, by providing a **second opportunity to consider legislation,** enhance the quality of Parliamentary decision-making and serve as an effective control mechanism in a democratic society. In this regard, a second chamber is often referred to as a house of revision, that promotes thorough consideration of matters before Parliament, strengthens control over the executive and alleviates Parliament's workload in the process. A second chamber can serve a useful purpose in this regard in South Africa.

It could be considered to include in the constitution an **express reference** to the purpose for which a second chamber is established.

3.2 **Composition**

3.2.1 The Senate should be composed of an **equal number of members** for each province. By this arrangement, the equal status formally enjoyed by the provinces is recognised and the purpose of the Senate to represent the provinces at national level is confirmed. The present number of **ten Senators per province** should be retained. The size of the country and of the population warrant a second chamber of at least the present size. A reduction in the number of Senators would impede the ability of the Senate to function effectively and, in any case, make it even more difficult for smaller parties to obtain seats in the Senate.

3.2.2 If it is accepted that the main purpose of the Senate is to represent the provinces in national decision-making, Senators should be elected in a way that serves and promotes that purpose. In this regard, the present method of nomination by the political parties holding seats in the various provincial legislatures has been criticised for not providing enough linkage between a province and its Senators. Accordingly, it is proposed that Senators be elected **indirectly by the respective provincial legislatures on a proportional basis**. This will establish a formal constitutional link, largely absent at present, between Senators and their respective provinces.

In addition, the present proportional formula according to which the parties nominate Senators should be reconsidered as it tends to favour the bigger to the disadvantage of the smaller parties. Normally, in composing a Parliamentary committee, for

example, the smaller parties are being favoured to some extent. The present formula should be adapted accordingly and applied in such a way that when the provincial legislatures elect their Senators, all but the very small parties represented in such a legislature will be able to nominate at least one Senator.

3.2.3 The **qualifications for Senators** should be the same as for members of the National Assembly, with the addition of the requirement that all Senators must be ordinarily resident in their respective provinces. This is a necessary concomitant to the main purpose of the Senate and the attempt to strengthen the ties between Senators and their provinces.

3.3 **Powers**

Powers should be assigned to the Senate in accordance with its purpose (i) to represent the provinces in national decision-making and (ii) to provide an opportunity for reconsideration during the legislative process in Parliament. On this basis, the following existing and additional powers should be assigned to the Senate:

- As second chamber of the national Parliament, the Senate, like the National Assembly, shall **consider all bills** introduced in Parliament.

- With regard to disagreements on **ordinary bills**, the present arrangement in terms of which a joint committee is established to submit proposals to a joint sitting where the bill must be adopted by a majority of all members of Parliament (section 59 of the transitional constitution), is unsatisfactory. The purpose of a joint committee always is to submit proposals that will be acceptable to both houses

sitting separately (*cf* the conference committees of the United States Congress and the Mediation Committee of the German Parliament). Our joint committee should fulfil the same function, namely to submit proposals to the Houses sitting *separately* and only if agreement is still not reached, should a joint sitting be held.

- Section 61 of the transitional constitution provides that bills affecting the **boundaries or powers and functions of the provinces**, must be adopted by both Houses sitting separately. Furthermore, such a bill, if it affects a particular province or provinces only, must also be approved by a majority of the Senators from that province or provinces. In the absence of agreement between the Houses, no law is made. For the effective representation of the provinces in matters affecting them, this arrangement should be retained.

- The present section 60 in terms of which the Senate can only delay and not veto **money bills**, emphasises the Senate's subordinate position with regard to this crucial category of bills. Actually, there is no convincing reason why the same arrangement as in the case of ordinary bills should not apply here. In other words, if the Senate and the National Assembly disagrees on a money bill, a joint committee (*eg* the joint standing finance committee) could be asked to submit proposals to the Houses sitting separately, and if agreement is still not reached, the bill is disposed of at a joint sitting. The NP proposes accordingly.

- **Other financial bills affecting the provinces** should be dealt with as provided in sections 155-157 of the tran-

sitional constitution. Such bills should be adopted by both Houses sitting separately and in the case of disagreement, the normal provisions for resolving disputes (section 59) shall not apply. This means that no law is made if the Houses cannot agree.

- The provision for **constitutional amendments** (section 62) should also be retained. In other words. amendments should be adopted by a two-thirds majority at a joint sitting, but (i) amendments affecting the legislative and executive powers of the provinces must be adopted by a two-thirds majority in both Houses sitting separately, and (ii) amendments affecting a particular province or provinces should only be adopted with the consent of the affected province or provinces.

- It could further emphasise the function of the Senate as the representative of the provinces, if it is required that **any bill directly affecting the provinces or a particular province shall be introduced in the Senate first**. For such bills, Senate committees could be required to hold public hearings where the provinces could state their views.

- The Senate's role as the legislative body that has the "advise and consent" function, *ie* **to assent to, or make recommendations for, certain top executive and judicial appointments, should be extended**. The Senate is already involved in nominations for justices, the Public Protector, and the Auditor-General and in the election and impeachment of the State President and the establishment of a Pan South African Language Board. In addition, the

Senate should also be involved in the appointment of constitutional bodies such as the *Human Rights Commission*, the *Commission on Gender Equality*, the *Commission on Provincial Government*, the *Financial and Fiscal Commission*, the *Public Service Commission* and the *Independent Electoral Commission*. The Senate should also have the function to assent to appointments to bodies such as the *Land Claims Court*.

- The Senate should be **represented in the Commission on Provincial Government and the Financial and Fiscal Commission**.

- The Senate's role as **watchdog** over the constitutionality of bills (section 98(9)) should be confirmed.

THE EXECUTIVE

For the reasons explained below, the National Party is strongly in favour of the retention of a multi-party executive and of the present powers and functioning of the executive. The particulars are as follows:

1. THE STATE PRESIDENT

1.1 The powers of head of state and of government should be combined in the office of the **executive State President** as at present. A developing democracy needs strong government and leadership and, except for important checks and balances to prevent the abuse of power, the office of the head of state and of government should be structured to provide that. **A ceremonial head of state** is not recommended. In theory, such an office serves as a unifying symbol, but an executive head of state has the duty to represent the whole nation and in that sense should be a symbol to everybody.

1.2 The State President should be **indirectly elected** by Parliament as at present. A directly elected head of state may enhance strong leadership. However, a directly elected head of state can lead to a measure of separation between the legislature and the executive that may, at this stage in the development of our fledgling democracy, cause an undesirable degree of tension between those branches of government. Of course, sufficient

separation is needed for Parliament to control the executive effectively.

1.3 The **term of office** of the State President is linked to that of Parliament and after every election for Parliament, a presidential election takes place. The State President and his or her Cabinet are subject to motions of no-confidence by Parliament - see below. **Succession** to the office of State President depends on the proposal for two Deputy State Presidents. If adopted, one of the Deputy State Presidents nominated by the Cabinet could, in the event of a vacancy, act as State President until a new State President has been elected by Parliament.

1.4 In principle, the State President should have the **powers** provided for in the transitional constitution, the most salient of which include the following:

(a) The State President *chairs* the Cabinet. (Provision can be made for a deputy State President to chair meetings in his or her absence - see below.)

(b) The State President has a number of important *executive powers*, which he or she exercises mainly in consultation with the Cabinet.

(c) The State President is responsible for the *observance of the constitution*, and to uphold and defend the constitution. The State President shall with dignity provide executive leadership in the interests of national unity.

(d) The State President *appoints* ministers, deputy ministers and other office holders according to procedures laid down in the constitution.

(e) The State President *confirms bills* adopted by Parliament, but has no substantial veto. [In order for the State President effectively to ensure observance of the constitution, his or her power to refer a bill back to Parliament in the event of a procedural shortcoming, could be extended to bills violating the constitution or, at least, he or she could be empowered to refer such bills to the Constitutional Court. This would supplement the existing provision for prior control by the Court - see section 98(2).]

2. THE DEPUTY STATE PRESIDENT(S)

2.1 Provision should be made for **two or, at least, one Deputy State Presidents**. There are two reasons for this proposal:

- Experience has told us that an executive head of state cannot possibly do justice to all his or her executive powers, responsibilities and duties **and** perform all the ceremonial functions of the office as well. The State President simply needs assistance in respect of both his or her executive and ceremonial functions.

- Provision for one or two Deputy State Presidents creates the opportunity for the accommodation of a minority party and thus for much needed coalition politics in a diverse society.

Examples that may be considered in this regard are, *firstly*, of course, the present constitution and, *secondly*, a country like the Netherlands where the office of deputy premier is held by the leader of the second largest party in the coalition.

2.2 The Deputy State President(s) should have substantial **powers**. The State President must assign certain powers to them, and they may act on behalf of the State President in his or her absence, including as chairpersons of the Cabinet. They must also be consulted on important policy decisions, ministerial appointments, etc., as provided in the present constitution.

3. THE CABINET

3.1 It remains the National Party's view that it would be in the best interests of the country if the executive were constituted on a **multiparty** basis. This can be motivated very briefly.

(a) In modern states, the executive is by far the most powerful and prominent branch of government. With the vast bureaucracy at its disposal, the executive is the only branch that has the expertise, information and infra-structure effectively to cope with the demands made on modern governments. The executive is furthermore better equipped to act on short notice **and** to plan ahead. For these and other reasons, governmental initiative has long since shifted to the executive and, to a considerable degree, the function of the legislature has been reduced to the legitimisation of executive initiatives. When the accommodation in government of different interests in society is considered, it would be, at the very least, extremely shortsighted not to take cognisance of this simple fact. Mere representation in the

legislature suddenly appears much less effective against this background. **Therefore, if the purpose of the system of proportional representation in the legislature is to afford minority and other interests effective representation in the decision-making process** (*Constitutional Principle XIV*), **it would be logical to extend their representation to the executive.**

(b) The purpose of government is not only to govern, but to provide peace, order and stability to subjects. In diverse societies, where differences may be strong and permanent, or at least long term in nature, it is particularly imperative upon government to ensure that all views are accommodated. In a diverse society, this is as strong an incentive for the accommodation of different parties in the executive as for the formation of a coalition government in a more homogenous country where no party commands an absolute majority: In both cases this is the only sound way to ensure stable and responsible government. Put another way, it should be as necessary in a diverse society to form a multi-party executive as in countries like Germany, Switzerland, Belgium and the Netherlands.

3.2 Although the NP is convinced of its merits, it understands that the idea of a multi-party executive is novel and contentious. It is therefore proposed that consideration be given to the following **mechanisms** to facilitate the smooth functioning of the executive. Their purpose is to ensure effective government in the interests of the nation, while allowing minority involvement and influence for the sake of stability and harmony.

- The basis of any multi-party executive arrangement should be an **extensive policy accord**. The more contentious issues can be agreed upon and decided beforehand, the less

conflict will arise in the executive. This is standard procedure in all Western European coalition governments, and the fact that, in South Africa, a multi-party executive is prescribed by the constitution, does not in any way detract from this basic point of departure. In practice, this would imply that the parties constitutionally entitled to Cabinet membership would sit down before assuming office to thrash out as complete a policy accord as possible.

- An extensive general policy accord could be supplemented by an **annual accord** on the priorities for that year. This will allow for some flexibility in respect of the application of the general accord, as well as for the inclusion of new priorities. This is the procedure followed in Germany.
- Matters not included in the general and annual accords are simply **not allowed on the Cabinet agenda**. This may sound inflexible, but is very strictly adhered to in Germany. It forces the parties to include beforehand every conceivable detail in the accords and, more often than not, prevents hasty and emotional action on *ad hoc* issues.
- An alternative to the previous course of action could be the appointment of a **special Cabinet committee** to consider all matters not contained in any policy accord before it is allowed on the Cabinet agenda. This is the practice followed in Denmark and also serves to defuse contentious issues and allow for some measure of give and take before hard decisions are to be taken.
- **Classification of issues** into different categories with the purpose of distinguishing between routine or non-contentious matters (over which consensus is less important), and contentious issues or matters of principle (over which consensus may be imperative), can relieve the pressure on

consensus decision-making on every issue and thus on the multi-party executive.

- With regard to **Cabinet responsibility**, a directive could apply that on matters covered by the policy accord(s), full joint Cabinet responsibility will apply and all members of the executive shall defend decisions publicly, but that in the case of other matters, every party shall be free to maintain and express its own views. Of course, in the case of an extensive policy accord, as explained above, these matters could be reduced to an absolute minimum.
- It is, of course, much too early to pronounce on the success of the present multi-party executive. The NP believes that it will yet prove to be one of the outstanding innovations of the constitutional transformation and that it will be at least shortsighted, if not irresponsible, to reject it out of hand and, in any case, this early in the life of the transitional constitution. Various **conventions** that will facilitate the functioning of the executive, and will provide us with valuable guidance for the future, should be allowed to develop.

3.3 With regard to **Cabinet procedure** it was proposed that consensus decision-making be the norm as at present (see section 89), but that it be qualified by the classification of decisions into different categories in order to allow for majority decisions on non-contentious issues (see above). Cabinet responsibility should also be applied on a qualified basis as explained above.

4. A PARLIAMENTARY EXECUTIVE

4.1 It is evident from the above that a Parliamentary executive is preferred. The formal link between the executive and the legislature should be retained. As argued above, it may be undesirable in a developing democracy to provide for a more pronounced separation of powers between the executive and the legislature. In this respect, the NP therefore argues in favour of a qualified application of *Constitutional Principle VI*, which deals with the separation of powers. The executive should thus be dependent on the support of and should also be responsible to Parliament. This implies that, although the State President will not be a member of Parliament, his or her **ministers and deputy ministers should, as a rule, remain members of Parliament**. Provision should be made for some members of the executive to be non-political party experts.

Another implication is that the executive will be unable to govern without the support of Parliament and that it should resign or call an election if Parliament adopts a **motion of no-confidence** in the executive. (The present section 93 seems to be in order.) Parliament should also be able to impeach members of the executive for misconduct or inability to perform their functions.

4.2 Sufficient constitutional checks and balances effectively to control the executive and prevent excessive concentration and possible abuse of power, should also be provided in the constitution. (*Constitutional Principle VI*) Such mechanisms include, *inter alia*,

* *public control* through a free press and regular, multi-party elections,
* *parliamentary control* through various parliamentary forums and instruments, and
* *judicial control* by the courts over all government actions.

THE JUDICIARY

1.1 An independent and impartial judiciary with the function to adjudicate on all actions by the government in terms of the supreme constitution, is a prerequisite for a stable democratic constitutional state which is able to protect its citizens effectively. (*Constitutional Principle VII*) The nature, composition and jurisdiction of the judiciary are therefore of crucial importance. The National Party aims to propose ways and means to secure and enhance the independence, impartiality and legitimacy of the judiciary, a properly qualified and broadly representative Bench and procedures that will facilitate access to the courts.

The present court system provided in the transitional constitution should be retained in principle. This includes a separate Constitutional Court and its jurisdiction over constitutional disputes, the provincial and local divisions of the Supreme (or High) Court and its Appellate Division, the magistrates' courts and other specialised courts.

Especially in order to strengthen the representative nature and the eventual acceptance and legitimacy of the judiciary, the National Party has particular views on a number of aspects.

1. **It is imperative that justices of the Constitutional Court shall be appointed on a multi-party basis.** Our proposal is that they must be appointed by the President on the advice of the Judicial Services Commission *in consultation with party leaders involved.* In the case of a deadlock, the appointments must be approved at a joint sitting of the two Houses by a 75% majority of all members.

2. The present composition of the **Judicial Service Commission** should be adapted to include more members of the legislative branch. Our proposal is that instead of Senators only, as at present, each House should nominate four members by a two-thirds majority of all its members, provided that no party shall have more than half the total number of members nominated by Parliament.
3. With regard to the **term of office** of justices of the Constitutional Court, we believe that the present nonrenewable seven year term should be retained, but that a process should develop in terms of which a number of justices (*e.g.* half) retire every three and a half years. This will allow more regular changes in the composition of the Court without endangering continuity.
4. The present arrangement in terms of which one third of the members of any legislature may request that a **bill** under consideration must be referred to the Constitutional Court, should be adapted in order to accommodate smaller parties. Our proposal is that the requirement should be reduced to one fifth of the members, or all the members of two parties which make up 10% of the total number of members, or all opposition members. One must bear in mind the very small numbers of the opposition in some provincial legislatures.

1.2 The National Party believes that the office of **Attorney-General** has a key function in the administration of justice in general and in the fight against crime in particular. It is imperative that the independence, impartiality and powers of every Attorney-General be protected in the constitution. *Firstly*, an office of "super" Attorney-General to whom all Attorneys-General will be responsible and who will be able to override decisions by a particular Attorney-General, may well compromise their independence and impartiality

and should not be created. Consideration could however be given to the establishment of a national functionary who shall be responsible for the promotion of the prosecuting profession, the coordination of prosecutions and, in consultation with all the Attorneys-General, the determination of guidelines and policy with regard to prosecutions. *Secondly*, the appointment of Attorneys-General should ensure their independence and impartiality. Each Attorney-General should be appointed by the State President on the advice of the Judicial Service Commission, for which purpose the Commission should include at least two Attorneys-General. Procedures for their removal from office similar to those for judges should apply. In general, the provisions in the transitional constitution pertaining to the independence and impartiality of the Public Protector and the Auditor-General should apply to Attorneys-General as well as public prosecutors.

THE BILL OF RIGHTS

God created man after His own image and as such every person is entitled to the protection of a number of **fundamental human rights** as against other human beings. The main thrust of those rights is the protection of the dignity of every human being. In particular, the individual should be protected against the state which has the power to compel us to act against our will. The purpose of a bill of rights is to entrench the fundamental rights of individuals and juristic persons, where applicable, to set out the rules on how and when the state may limit those rights and, in so doing, to regulate the relationship between the people and their government.

However, **people have rights as well as obligations**. The most basic obligation is to respect and uphold the rights of others. The state will be unable effectively to protect our rights if we ourselves have no inclination to respect the rights of others. The National Party believes that this aspect needs much attention in educational and other programs to promote the development of a human rights culture.

The National Party is therefore committed to **the effective protection of human rights in terms of a justiciable and enforceable bill of rights**. (*Constitutional Principles II, III, V and VII*) In addition, it wishes to emphasise our obligations towards one another. The following detail matters are, *inter alia*, proposed:

- The basic structure and functioning of the present bill of rights and the particular rights enshrined in the bill of rights should be retained in principle.

- Some of those rights, such as certain socio-economic rights and the rights of children, need to be extended and strengthened.
- It must be ensured that the language, culture, religion and educational rights of members of minorities are effectively protected and that they enjoy adequate protection against any form of discrimination. (*Constitutional Principles XI and XII*)
- In section 8(2) "affiliation" should be added as another ground on which discrimination is prohibited, in order to ensure that nobody is discriminated against on the basis of his or her membership of any group.
- Affirmative action should not be allowed to infringe constitutional rights and should be made subject to the provisions of the bill of rights.
- The right to life should be qualified so as to allow for the retention of the death penalty as an optional sentence.
- Freedom of religion must be retained unamended and religious observances in state or state-aided institutions, including schools, must be protected as at present (section 14(2)).
- The provision dealing with rights in property should be retained in principle, but the present subsection 28(3) should be redrafted to make it unequivocally clear that expropriation is allowed only if (i) it is for public purposes; (ii) provision is made for full compensation which is just and equitable; (iii) in the absence of agreement, compensation is determined by a court of law; and (iv) such determination and payment of compensation is made expeditiously.
- Academic freedom at present provided for in two separate sections, should be addressed in a single provision and it should be made clear that it includes the autonomy of institutions of higher learning.

- The right to use the language and participate in the cultural life of one's choice as guaranteed at present in section 31, should be retained.
- The educational rights protected in section 32 should be retained, but it should be made clear that educational institutions established on the basis of a common language, culture or religion are entitled to state aid. Accordingly, it is proposed that paragraph 32(c) be amended as follows: "Every person shall have the right - (c) to educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race and, provided further, that the state shall not, in granting aid to educational institutions, discriminate against any institution on the ground that it has been established on the basis of a common language, culture or religion."
- With regard to the extension of the existing socio-economic rights, we propose that the following be added:

  (a) the right to a minimum standard of living including basic nutrition and shelter; and

  (b) the right to the enjoyment of the highest attainable standard of physical and mental health.
- With regard to the rights of accused persons, we propose that the present section 25 be retained, but that it should be amended so as to render inadmissible unconstitutionally obtained evidence.
- In the case of administrative justice, slight amendments that will clarify the present section 24 are recommended. The same is proposed in the case of section 34 which deals with states of emergencies.
- We propose the extension of the existing children's rights (section 30) *inter alia* to include rights to basic medical services, protection against maltreatment, sexual exploitation and drug

abuse and not to be compelled to perform certain work or render certain services.

- With regard to reproductive rights, the NP believes that it is a matter better dealt with by ordinary legislation.
- In the general limitations clause (section 33), the phrase "shall not negate the essential content of the right" should be clarified.
- On the interpretation of the bill of rights, the NP acknowledges the fact that it shall have a limited horizontal application. The bill of rights is first and foremost an instrument for the regulation of the relationship between the individual and the state, but we recognise the fact that the norms and principles laid down in the bill of rights should permeate throughout our entire legal system and that, consequently, the bill of rights will apply indirectly to private relationships.

MINORITY PROTECTION

1. DEMOCRACY

Peace, security and stability for all South Africans are possible only if the constitution recognises the diversity of our society, promotes the ideal of **unity in diversity** and provides for the meaningful participation by minorities in decision-making and the effective protection of minority interests. The transitional constitution accommodates the diversity of South Africa in various ways. Examples are the recognition of eleven official languages, the system of proportional representation, the principle that the executive shall be composed on a multi-party basis, the entrenchment of the provinces, the establishment of bodies such as the houses and council of traditional leaders and the "volkstaat" council, the recognition of local government, the protection of fundamental rights, and the creation of offices such as the Public Protector and commissions such as the Human Rights Commission and the Commission on Gender Equality. In addition, *Constitutional Principles XI, XII, XIII, XXXIV* contain express references to our diversity.

In this regard, it is important to note that the provision and entrenchment of a **democratic constitutional state** is a critical mechanism for the protection of minority interests, as so many other mechanisms in this respect depend on the very existence of a democratic order. Representation of minorities in decision-making bodies, the protection of the rights of members of minorities in a bill of rights and special bodies looking after minority interests, can only exist and function effectively in terms of a democratic constitution. An entrenched constitution which provides for

universal adult suffrage, regular, multiparty elections, separation of powers, representative and responsible government, an independent and impartial judiciary, effective checks and balances and three entrenched levels of government are therefore equally important to minorities than proportional representation, effective participation in decision-making and an enforceable bill of rights.

However, in the South African circumstances, the existing democratic mechanisms for minority participation and protection should be extended and strengthened. Various proposals in this regard have already been referred to. The following additional mechanisms should be considered:

2. PARLIAMENT

Note: *It must be emphasised that, where possible, the proposals that follow should also be applied to the provincial legislatures.*

As mentioned in the discussion on Parliament, the role of **minority parties** in the parliamentary decision-making process should be recognised constitutionally as a logical consequence of a multiparty system. In addition, the standing rules of Parliament should provide optimum opportunities for them to participate, promote the interests of their respective communities and serve as essential watchdogs in a democracy. The information and resources needed to fulfil these functions should be provided.

In particular, the existence and role of **parliamentary committees** should be entrenched in the constitution. Committees are potentially the most effective instruments for control over the executive, and the constitution should contain provisions which will afford minority parties full participation, in particular with regard to their establishment, proportional composition, allocation of chairs to the different parties, powers and procedures.

The NP further proposes that a **special standing committee** of Parliament be established in terms of the constitution to consider bills affecting minority interests. The committee should have the power to recommend the reconsideration of a bill by the executive, or to refer a bill to the Constitutional Court, the Cultural Commission (paragraph 6), or any Cultural Council (paragraph 3).

Particular proposals have also been made with regard to the **legislative process**. In addition, the constitution should provide that a certain number of members (e.g. one fifth or all members of minority parties) should be able to request that a bill be referred back to Cabinet for reconsideration on the grounds that it detrimentally affects minorities or a particular minority. Opportunities for public participation should also be extended through meaningful utilisation of petitions.

3. CULTURAL COUNCILS

Minorities that feel strongly about their cultures and need a collective voice on matters dear to them, should be able to establish statutory cultural councils that can speak on their behalf, exercise decision-making powers over certain matters and take responsibility for the cultural development of their members. These councils should function on a national, non-geographic basis and should be financially supported by the state. They should be established on a voluntary, non-racial and non-discriminatory basis and should be open to any *bona fide* member of the minority in question.

Cultural councils should preferably be directly elected bodies, but different methods to establish and compose them should for practical reasons be considered. A cultural council should, *firstly*, have an advisory function similar to that of the

traditional authorities in terms of chapter 11 of the transitional constitution. It should, in other words, be competent to advise and make recommendations to any government body at any level with regard to any matter pertaining to the language, cultural, religious and other interests of that minority. In particular, a cultural Council should be able to liaise with the executive, with Parliament or any Parliamentary committee, and with the Cultural Commission. It should also be able to bring an action before the Constitutional Court. *Secondly*, particular decision-making powers could be allocated to a cultural council, for example mother tongue education, the promotion of culture, art and literature, museums and monuments, old age homes, mother tongue media, and particular aspects of social welfare services.

In order to exercise these functions effectively, a cultural council should be entitled to an equitable share of national revenue and, if necessary, it should be empowered to raise additional income from the members of that minority. Should the need arise, cultural councils could form the basis of the additional representation of minorities in national structures.

4. THE BILL OF RIGHTS

In addition to the existing provision for the protection of language, cultural, religious and educational rights, the bill of rights should, as far as possible and necessary, be amended to extend and strengthen the protection of minorities. As pointed out in the discussion on the bill of rights, a number of proposals are made in this regard, for example, the addition of "affiliation" in the provision that prohibits discrimination, the qualification of affirmative action in order to subject it to the constitution, and the amendment of section 32(c) in order to put it beyond doubt that educational

institutions established on the basis of a common language, culture or religion are entitled to state aid.

As mentioned previously, the composition of the Constitutional Court should be adapted to provide for effective minority representation.

5. INTERNATIONAL DECLARATION

It would be tremendously significant to minorities if the South African government becomes a party to the *International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (18 December 1992). The Declaration *inter alia* commits states to the protection of minorities and the creation of opportunities for their development. The rights of members of minorities to their own culture, religion and language are also guaranteed, as well as their participation in decision-making. The NP proposes that the Declaration should be signed urgently and that reference should be made to it in the constitution.

6. THE COMMISSION ON CULTURAL AFFAIRS

On the same basis as the Human Rights Commission and the special Commissions on Gender Equality and the Restitution of Land Rights, a special Commission on Cultural Affairs should be established to look after the protection of minorities in terms of the constitution and the International Declaration referred to above. Minorities should be strongly represented in the Commission and it should have the power to promote respect for minorities and an awareness of minority interests, monitor compliance with those rights of particular interest to minorities, make recommendations

to any public body on the promotion of minority interests, investigate any injury to and complaints by minorities and, whenever necessary, refer a matter to the Constitutional Court or an applicable international body.

THE PROVINCES

1. LEGISLATIVE AND EXECUTIVE STRUCTURES

The provisions of the transitional constitution dealing with provincial legislative and executive structures should be retained in principle. (*Constitutional Principle XX*) However, a reduction in their size should be considered where appropriate. Changes proposed to the electoral system applicable to Parliament should, of course, apply to the provinces as well. The same applies to the proposals mentioned above in respect of the role of minority parties, legislative committees and the legislative process. Of course, the present provision in terms of which provinces may adopt constitutions which provide for legislative and executive structures and procedures different from those in the national constitution should be retained.

2. DISTRIBUTION OF POWERS

The distribution of powers between levels of government entails some of the most crucial issues to be resolved in the constitution-making process. Not only the status, powers and functions of both the provinces and the national government are involved; the relationship between these levels of government and, eventually, the form of the future South African state itself, is at stake. For this reason, the National Party wishes to make a responsible, fair and constructive contribution to the deliberations on this aspect of the constitution in the best interests of the whole country and all its regions and people.

In this regard, the Constitutional Principles obviously call for extensive arrangements covering in detail all aspects of the relationship between the different levels of government, but they also presuppose a strong, viable and entrenched provincial system as an integral part of a stable and democratic dispensation. (*Constitutional Principles XVIII, XIX, XX, XXI, XXII and XXIII*) Accordingly, it is incumbent upon us to protect and strengthen the autonomy and position of the provinces.

We are further mindful of the fact that, due to the complex and dynamic nature of modern government and of the relationships between different levels of government, the formal distribution of powers often do not fully and accurately reflect the true relationship between those levels and that we should allow for continuous growth and development in this respect. For the same reason, we should not focus too narrowly on a particular theoretical model, but should work towards the development of a system unique to our own circumstances and needs.

Against this background, and with the transitional constitution again the proper point of departure, the NP submits the following proposals:

1. We believe in strong and viable provincial government for South Africa based on federal principles and our proposals are directed at protecting and strengthening the position and autonomy of the provinces.

2. In South African circumstances, the powers of the provinces should be listed as at present in a Schedule to the constitution and residual powers should vest in the national government. In addition, the following should be provided for:

- In terms of the criteria for the allocation of functions to the provinces set out in *Constitutional Principle XXI*, we propose that Agency and Delegated Functions, Forestry, Land Affairs, Publication Control, Public Works and Water Affairs be added to the present list. However, we believe that a proper allocation can be accomplished only if all relevant information is available. We propose, therefore, that accurate information should be obtained from the state administration on the progress made with the implementation of the present list of provincial functions before a list of provincial functions is finalised.

- Due to the complexities of modern government, a strict separation between the levels of government is impossible and undesirable. Therefore, we propose that Parliament should have **concurrent powers** with the provinces over its list of functions.

- Provincial laws in respect of these matters should, however, prevail over national laws except insofar as national laws comply with certain prescribed criteria. These **overrides** should be restricted *inter alia* by narrower definition, the principle of subsidiarity and the Constitutional Principle that the national level may not encroach on the geographical, functional and institutional integrity of the provinces. A provision in this regard could read as follows:

> "(1) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter allocated to the provinces, except insofar as -
>
> (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
>
> (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards for the management or administration of that matter that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
(e) the provincial law materially prejudices the economic, health or security interests of another province or the Republic.

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic.
(3) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.
(4) An Act of Parliament shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.
(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of any province.
(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively."

3. The principle of **subsidiarity** in terms of which functions should be allocated to the lowest level of government where it can be exercised and performed effectively, should apply to the allocation of functions and the application of the overrides - see subclause (6) of the above draft clause.

4. A *second list of matters* should be identified over which Parliament may only adopt **framework legislation**, containing mere general principles and/or guidelines, norms and standards, in order to allow the provinces to make detail legislation on those matters not subject to any other overriding powers of the national level. The national government should not be able to prescribe detail on these matters on the grounds, for instance, of effectiveness, maintenance of economic unity, promotion of interprovincial commerce, etc. This will allow the

provinces the opportunity to provide detail peculiar to their different circumstances and needs, thus giving expression to provincial diversity, without sacrificing national control over norms, standards, etc. We believe there are a number of matters even now in the list of provincial functions, as well as other matters presently under exclusive national jurisdiction, which the national government need not deal with in detail. Those matters may, therefore, extend to both the residual and concurrent powers. Moreover, some matters in the existing list of provincial functions do not readily present themselves as matters over which national legislation will ever be required for the sake of, for example, the maintenance of economic unity, the protection of the common market, the security of the country, or the implementation of national economic policies. They may, however, require uniform norms and standards. Such matters should then rather form part of a separate list not subject to the whole range of "overrides". We further propose that in order not to impede or even prevent the freedom of the provinces to act, they should be able to proceed in respect of these matters in the absence of national framework legislation. Of course, as soon as such framework legislation is promulgated, their own arrangements will be subject to the principles or guidelines enunciated in such framework legislation. A further submission on matters to be included in such a list again depends on expert advice, *inter alia* from the state administration, on which matters qualify for such a list. The following draft provision on framework legislation is submitted for consideration:

"(1) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule Y.
(2) The national Parliament shall be competent to enact only framework legislation which sets out principles and/or guidelines, and which shall

be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule Y."

5. Regional differences are part of the South African reality and the principle of **asymmetry** in terms of which differences may exist among the provinces in respect of their structures, powers and functions, should be allowed to develop. Asymmetry can be promoted as follows: (i) Provinces must be able to adopt their own constitutions. (ii) Provinces must be able to take up functions according to their different needs and capabilities. In this regard, the transfer of functions to the provinces should be the responsibility of an independent body and not the executive. (iii) Provision should be made for the performance of functions on an agency or delegated basis in order to allow provinces to request other governments to perform particular functions on their behalf. (iv) Asymmetry will finally be furthered by the concept of framework legislation which will enable provinces to make detailed legislation on those matters peculiar to their own circumstances and needs.

3. INTERGOVERNMENTAL RELATIONS

In any modern state in which powers and functions are distributed constitutionally among different levels of government, formal and informal structures, mechanisms and procedures regarding intergovernmental relations are imperative. Various *Constitutional Principles* also envisage extensive provision in this regard. However, the objective of mechanisms for intergovernmental relations should never be to subject the provinces to national control, supervision or domination. Unless the different levels of government always liaise and co-operate on the basis of equality, and respect each other's constitutional status and domain, the *practice* of intergovernmental

relations will be in conflict with the constitutional entrenchment of different levels of government and their status and powers, and the *idea* of constructive intergovernmental relations will be lost. This basic point of departure should be followed throughout.

The transitional constitution makes limited provision for intergovernmental relations. Various *informal* mechanisms for intergovernmental relations have nevertheless been established. Accordingly, it is proposed, *firstly,* that the necessity for structures, mechanisms and procedures for intergovernmental relations which, at the same time, respect the constitutional status and domain of each level of government, be **acknowledged in the constitution**. The constitution should only lay down the principle that intergovernmental relations must be provided for in parliamentary legislation and should not provide all detail itself.

Secondly, consideration should be given to the inclusion in such legislation of the structures and mechanisms such as those already established informally. We refer to (i) the **Intergovernmental Forum**, jointly chaired by the Ministers of Provincial Affairs and Constitutional Development and of Public Service and Administration, and attended by the Premiers of all nine provinces; (ii) the **Technical Committee to the Intergovernmental Forum**, which is responsible for its preparatory work; (iii) **Ministerial Forums** established *ad hoc* on a line-function basis between ministers at national level and members of provincial executive councils; (iv) **Technical Committees** consisting of officials which assist the Ministerial Forums; (v) a **Senate Secretariat** which promotes communication between the Senate and the provinces.

The following additional mechanisms could be considered:

(a) A single structure for the co-ordination of intergovernmental relations, called the **Advisory Committee on Intergovernmental Relations**, and consisting of representatives of the

national government, the provinces and other bodies concerned, such as the Commission on Provincial Government, could be established.

(b) Provision should be made for the representation of the **Senate** on certain bodies such as the Financial and Fiscal Commission and the Commission on Provincial Government.

(c) Senate liaison with the provinces, *inter alia* through the **Senate Secretariat**, should be extended.

(d) Express scope for further formal and informal developments could be built into the legislation. The legislation should, in other words, provide for a compulsory minimum of mechanisms, with room for additional optional structures and procedures.

4. FINANCIAL AND FISCAL RELATIONS

The South African economic and other realities dictate the continuation of the pragmatic approach to intergovernmental financial and fiscal relations outlined in the transitional constitution. (See also *Constitutional Principle XXVI.*) In terms of that approach a **revenue-sharing model** is followed.

The National Party proposes that the following taxes and incomes should consequently be collected **nationally** and deposited in the National Revenue Fund for revenue sharing purposes:

- Direct taxes: personal and corporate as well as mining taxation
- VAT or any other sales tax
- Fuel levies

- Customs and excise duties and any levies imposed thereon
- Estate duties

The servicing of national debt should have first claim on these incomes. The balance should then be shared between the national government and the provinces on the basis of formulae recommended by the Financial and Fiscal Commission (section 155(4)), but subject to the condition that the fiscal competencies of and taxes raised by the provinces, in view of the limited extent of the sources of revenue in this regard, shall not be taken into account to determine the share of each province. It should also not be possible for the national government to use these financial relations as a political weapon and to withhold a province's share for any other reason than financial maladministration. A provision to this effect should be included in the constitution.

Provinces (see *Constitutional Principle XXV*) should have exclusive competence over the following taxes:

- Stamp duties
- Transfer duties
- Vehicle licences
- Toll taxes
- Taxes, levies and duties imposed on casino's, gambling, wagering, betting and lottery tickets

It should be possible to add to the list on the recommendation of the Financial and Fiscal Commission. Provinces should also be able to impose user charges and should be competent to impose levies on taxes raised nationally (section 156(1)).

The principle that no government body may borrow money to finance current expenditure, should be adhered to very strictly and it is proposed that the constitution should provide for the esta-

blishment of a **Loans Authority** to co-ordinate the issue of loan stock and to determine policy for the management of government debt and guarantees in this regard at all three levels. Detail in this regard should be provided in separate legislation.

With regard to **expenditure**, the servicing of provincial debt should have first claim on the revenues accruing to the provinces, as in the case of the national government. Otherwise, the provinces should enjoy greater autonomy to determine spending priorities in respect of their functions and the standard of services provided by them. The present provisions should be amended as far as may be necessary to achieve this. Provinces should maintain financial records and follow effective auditing procedures to the satisfaction of the Auditor-General. The national government should, however, be competent to take over the financial management of a province, or aspects thereof, should a province, in the view of Parliament after consideration of a report to that effect by the Auditor-General, be regarded as incompetent to perform this function.

LOCAL GOVERNMENT

The National Party believes that viable local government is the cornerstone of a democratic system. Local government brings decision-making closer to the people and affords them better opportunities to become involved in government processes affecting their daily lives. Strong local government that performs effectively and enjoys the support of the people can in many ways achieve more than other levels of government in the fight against crime, poverty and other social problems and in creating stable, peaceful and prosperous local communities.

For this reason, local government should be recognised constitutionally as a fully-fledged level of government. With the present chapter 10 as the proper point of departure, the constitution should provide a framework for local government. (*Constitutional Principle XXIV*) Although local government is subject to national and provincial legislation, local government should not be completely subservient to any higher level. Any action by other levels with regard to local government must be in terms of and subject to the constitutional framework for local government. Local government should be autonomous within the limits of the law and it should be competent to exercise any function not withheld by higher authorities. A minimum list of functions should be provided only to entrust a local government with the responsibility to provide access for its community to a minimum of basic services.

Chapter 10 should be retained in principle and be amended only to reflect these points of departure. In addition, the following proposals are made:

- The **formula** according to which 60% of the members of an urban local government shall be elected on a ward basis, and 40% on the basis of proportional representation, which applies in the forthcoming elections, should be continued in the final constitution. Other formulae may apply for rural areas.
- It should be provided in pursuance of *Constitutional Principle XXVI* that local governments shall be entitled to an equitable share of **revenue** collected nationally.
- The transitional constitution enables the establishment of **submunicipal** bodies within the area of jurisdiction of a local government. As the establishment, composition, powers and functioning of such bodies are determined by the relevant local government, local communities are not empowered by the existing arrangement. The constitution should instead provide that such a body, which we prefer to call a **ward council**, *shall* be established if a special majority (e.g. two-thirds) of the paying residents of a particular ward so requests. The composition and powers of the ward council should be determined in consultation with the residents.
- The representation of local government on the **Financial and Fiscal Commission** should be strengthened by providing that the State President shall appoint three persons designated by organised local government.
- A **Local Government Commission** should be appointed to act as guardian of local government and to facilitate the establishment, development, maintenance and recognition of local government. The Commission should be able to advise the national government with regard to all legislation affecting local government and in respect of policies

regarding local government systems, institutions, powers and functions.

- **Intergovernmental forums** should be established in each province to facilitate adequate consultation between local and provincial governments.
- **Administrative supervision** of local governments should take place in terms of and subject to guidelines set out in the constitution.
- Local governments should be empowered expressly to **co-operate and form joint bodies** for the pursuance of mutual objectives.

TRADITIONAL LEADERS AND INDIGENOUS LAW

1. TRADITIONAL LEADERS

The National Party recognises the importance of the traditional leaders and structures and of indiginous law. In principle, we therefore support chapter 11 of the transitional constitution (and *Constitutional Principle XIII*) as the point of departure for their accommodation at the various levels of government. Their accommodation in the final constitution must, however, be determined in consultation with them and in accordance with the democratic principles entrenched in the transitional constitution.

On this basis, the following proposals are made:

- The **houses** and **council of traditional leaders** should be utilised for the necessary consultation and involvement in the constitution-making process.
- In view of the particular different ways in which traditional leaders are identified, a body of experts should be appointed to advise and support the government in identifying these leaders for the purposes of their constitutional accommodation.
- A distinction should be made between the traditional functions of traditional leaders and those allocated to them by the government, so that the latter can be allocated to other suitable authorities.
- At national level, traditional leaders should be accommodated via the council of traditional leaders envisaged in the transitional constitution, as amended in a process of consultation.

- At provincial level, the houses of traditional leaders envisaged in the transitional constitution should be the vehicle for their accommodation.
- At local level, traditional or rural local authorities should be accommodated in the same way as rural councils. The traditional leaders in the area in question should nominate half the members of the rural local authority and the other half should be elected democratically. Voluntary advisory forums should assist the rural local authorities.

2. INDIGENOUS LAW

Full legal recognition should be given to indigenous law, provided (a) that indigenous law shall not be inconsistent with the consitution and specific provisions of national or provincial legislation, and (b) that indigenous law shall not be in conflict with the principles of public policy or natural justice (provided that the *lobola* or *bogadi* custom shall not be regarded to be in conflict). Courts of law should have judicial discretion to decide which system of law shall apply in a particular case, taking into account the cause of action, the intention of the parties and the implications. Legislation should be considered to remove gender discrimination from indigenous law. Any legislation affecting indigenous law should be referred to the council and, where appropriate, the houses of traditional leaders as contemplated in the transitional constitution.

The National Party believes that the present section 181(1) and (2) should be retained with these provisos.

PUBLIC ADMINISTRATION

Public administration has a decisive role to play to ensure confidence, stability and growth, and in upholding the constitution and promoting the democratic rights and freedoms of all people. Accordingly, South Africa should have a professional, competent and impartial public administration which is broadly representative of all segments of the community, responsive to the will and needs of the people and enjoys the support and confidence of all South Africans. (*Constitutional Principles XXIX and XXX*)

The constitution should lay the foundation for our public administration and should provide for issues such as the nature and value system of public administration and the various institutions and mechanisms with regard to personnel matters and the implementation of policy and evaluation and control in this regard.

In particular, the constitution should provide for public administration which is professional, economic, efficient and effective, stable, non-partisan and a-political, broadly representative, fair, loyal, responsive and accountable, development orientated and sensitive to the fundamental rights and freedoms of all people.

With regard to policy advice, the constitution should provide for the establishment of an independent and legitimate **Public Administration Commission**, which must advise the government on personnel and management matters and on policy frameworks for personnel administration and management in individual departments. The qualifications, appointment and terms of office of members of the commission must further the objectives of professionalism, independence and impartiality. Individual members of the commission should be nominated by the provinces

and should be competent to perform the powers and functions of the commission in the various provinces.

The actual implementation of personnel policies should be entrusted to a national personnel department (supplemented by similar provincial components), and should be responsible for managerial efficiency and training, labour relations, promotions, transfers, etc. This department should also be responsible for evaluation and control of personnel matters.

All bodies mentioned here should report annually to Parliament or a committee of Parliament.

FINANCE

1. NATIONAL REVENUE FUND, ANNUAL BUDGET AND PROCUREMENT

The provisions of the transitional constitution dealing with the National Revenue Fund, the annual budget and procurement administration should be retained. All income of the national government should be paid into the National Revenue Fund and no money should be drawn from the Fund except under appropriation made by a law of Parliament. Revenue to which the provinces are entitled should, however, form a direct charge against the Fund. We also believe that the provisions regarding the National Revenue Fund should be finalised in conjunction with those dealing with the Financial and Fiscal Commission.

The Minister of Finance must lay before Parliament an annual budget reflecting the estimates of revenue and expenditure of the government.

With regard to procurement administration, the constitution should, as at present, prescribe independent and impartial tender boards, and a fair, public and competitive tender system.

2. THE AUDITOR-GENERAL

Independent external auditing of all government bodies is required by *Constitutional Principle XXIX* and therefore the provisions of the transitional constitution in respect of the Auditor-General should be retained in principle.

The fundamental principle of audit is the **independence and impartiality** of those responsible for it. This enables unhindered and independent auditing and public reporting on the collection and utilisation of public funds as one of the key checks and balances in any democracy. Of course, a special close relationship should exist between the Auditor-General and Parliament as the elected representatives of the people.

Although minor improvements may be effected, the following aspects should be retained in the constitution to ensure the performance of the auditing function on this basis:

(a) the establishment of the office of Auditor-General and the protection of its independence, impartiality, dignity and effectiveness;

(b) the appointment, qualifications, tenure and dismissal of the Auditor-General. This should include the provision that the Auditor-General shall be nominated by a joint committee of Parliament consisting of one member of each party and approved by a majority of two-thirds in a joint meeting;

(c) the powers and functions of the Auditor-General and the obligation of state bodies to co-operate;

(d) public reports by the Auditor-General;

(e) the appointment of staff and the provision of funds.

3. THE RESERVE BANK

The NP believes that the provisions in the transitional constitution on the South African Reserve Bank should be retained in principle, but that it should be stated unequivocally that the Bank shall be independent and impartial and subject only to the constitution and the law. (*Constitutional Principle XXIX*) The powers and functions of the Bank shall be prescribed by law, but shall be at least similar to those customarily discharged by central banks. The primary objective of the Bank to protect the value of the currency in the interest of balanced and sustainable economic growth, should also be entrenched in the constitution.

It is imperative that nothing more than an arms-length relationship should be maintained between the Bank and the government to ensure that the Bank is not politicised or manipulated and that its national and international credibility is protected. As at present, the constitution should therefore only provide for regular consultation between the Bank and the Minister of Finance with regard to the Bank's exercise of its powers and functions.

4. THE FINANCIAL AND FISCAL COMMISSION

The constitution should provide for a Financial and Fiscal Commission which should make recommendations in respect of equitable fiscal and financial allocations to provincial and local governments. (*Constitutional Principle XXVII*) For this purpose, the present provisions regarding the establishment, composition, objects and functions, impartiality and functioning of the Financial and Fiscal Commission should be retained in principle. In view of the key function of the Commission in respect of provincial and

local finance, it is proposed, however, that the composition of the Commission be extended to include representatives from the Senate and from organised local government.

SPECIAL BODIES

1. THE PUBLIC PROTECTOR

Most modern societies provide specialised bodies to investigate complaints from the public against the government. The establishment of the office of Public Protector was a step forward in the fight against maladministration, corruption, abuse of power and other improper acts by the government and its various agencies. The provisions of the transitional constitution in this regard should therefore be retained in principle, whereas the detail regarding the office can be provided in a separate law. (*Constitutional Principle XXIX*)

2. THE HUMAN RIGHTS COMMISSION

The National Party fully supports the institution of a Human Rights Commission as envisaged in the transitional constitution and provided for in the relevant legislation (Act 54 of 1994). Such a body is necessary to promote the development of a human rights culture and to assist in the protection of the fundamental rights guaranteed in the constitution.

The structure and composition of the Commission as envisaged in the transitional constitution should be retained. In principle, its powers and functions should also remain the same, but the following specific proposals are made in this regard:

- It should be spelled out in the constitution that, in addition to its function to promote an awareness of human rights,

the Commission also has an **educational function** in this regard.

- Particularly the lobbying, monitoring, research and advisory functions of the Commission should be fleshed out in the constitution. The mediation function of the Commission which receives attention in the Act, should be specifically mentioned in the constitution.
- The present section 116(3), which provides for financial assistance by the Commission only "to enable proceedings to be taken to a competent court", should be brought in line with the Act, which provides that the Commission may itself bring proceedings in a court of law.
- The reference to staffing of the Commission could be deleted from the constitution (section 117(1)), but the provisions dealing with the Commission's accountability to Parliament (sections 117(2)) and 118), should be retained.

3. THE COMMISSION ON GENDER EQUALITY

The National Party supports the establishment of a commission to promote gender equality, particularly in relation to the development of our disadvantaged communities, for a number of reasons.

Although much has already been done to promote equality between men and women, history has caused backlogs that has resulted in women in particular being a disadvantaged group, especially in less developed communities. Discrimination against women is not peculiar to South Africa, but is recognised internationally as a problem that deserves special attention. Consequently, a number of international documents and covenants call for the establishment of national mechanisms to monitor and improve the status of women. It is important for South Africa to

participate fully in this international endeavour to eliminate discrimination against women. The attention given in the transitional constitution to gender equality has been well received internationally, and it would be inappropriate not to make the same provision in the final constitution. Finally, there is general consensus among representative women's groups on the need for a special commission in this regard.

Although not too much detail should be included in the constitution so as not to impede the flexibility of the commission, the constitution must provide that the commission shall be an independent and autonomous body with mainly advisory functions, but which also has powers to monitor, investigate, educate, lobby and conduct research. The focus of the commission should, in the first place, be the creation of an environment in which women and, ultimately, all disadvantaged people, will be able to realise their full potential.

It must be a small, streamlined body, subject to the requirement that it shall be broadly representative of the South African population. The commission should, therefore, consist of 6-10 members of whom at least two should serve full time. The appointment procedure followed in the case of bodies such as the Public Protector and the Human Rights Commission should apply. An appropriate name for the commission should be considered pursuant to its perceived gender equality activities as well as its attention to the development of all disadvantaged communities.

Detail matters pertaining to the commission should be provided in separate legislation.

4. RESTITUTION OF LAND RIGHTS

It is the considered view of the National Party that the provision for a commission on the restitution of land rights in the transitional constitution (section 121), was directed at the establishment of an interim instrument that must conclude its task before the commencement of the final constitution. As a matter of fact, the provisions of the Restitution of Land Rights Act 22 of 1994, which has been adopted to give effect to the relevant provisions of the transitional constitution, are very much consistent with this view. It is the express aim to address the position of persons previously dispossessed of rights in land in terms of laws inconsistent with the prohibition of racial discrimination by the constitution. Consequently, provision for a similar body need not be made in the final constitution.

5. THE COMMISSION ON CULTURAL AFFAIRS

The establishment of a Commission on Cultural Affairs to look after the interests of minorities has been dealt with under the discussion on minority protection.

DEFENCE, POLICE AND INTELLIGENCE

1. GENERAL

It is the opinion of the National Party that the inclusion in the final constitution of certain detail provisions regarding the Security Forces will be beneficial to reconciliation and nation-building. (See *Constitutional Principle XXXI.*) In general, provision should be made for the declaration under strict conditions of a **state of war or national defence** distinct from the state of emergency referred to in the present section 34. A **Security Forces Commission** should be established to perform for all members of the Security Forces, including the Correctional Services, the same functions as the Public Administration Commission. All **fundamental rights** and, in particular, the basic values of freedom and equality, should apply to all members of the Security Forces, but justifiable differentiation should apply where applicable. Members of the Security Forces should also not have the right to strike and demonstrate and no party-political activities should be allowed on premises of the Security Forces.

2. THE NATIONAL DEFENCE FORCE

The provisions of the transitional constitution should apply in principle. The National Defence Force should be employed for service in defence of the Republic, for the protection of its sovereignty and territorial integrity, in compliance with international obligations of the Republic, in the preservation of life, health and property, and in the provision or maintenance of essential services,

for example, the upholding of law and order where the Police Service is unable to do it on its own, and in support of socio-economic upliftment. (See also *Constitutional Principle XXXI.*)

The State President should be the Commander-in-Chief of the National Defence Force and should appoint the Chief of the Force. The Chief exercises military executive command of the Force subject to the directions of the Minister of Defence and, in the case of a state of war/national defence, the State President. Whenever the State President employs the Force in accordance with its functions, the State President must inform Parliament forthwith of the reasons for it.

The constitution should provide for the establishment by the National Assembly of a multi-party Standing Committee on Defence, with the power to deal with any matter pertaining to defence. Membership of the Committee should be as inclusive as possible.

The provisions of the transitional constitution with regard to the conditions that apply to the exercise of the functions of the National Defence Force should be retained. We do not support the establishment of a separate office of military ombudsman. The constitution should allow for conscription if Parliament so decides.

3. THE SOUTH AFRICAN POLICE SERVICE

The South African Police Service should be responsible for the prevention of crime, the maintenance of law and order, the preservation of the internal security of the Republic, and the investigation of any offence or alleged offence. (*Constitutional Principle XXXI*) The State President must charge a Minister and appoint a National Commissioner to take responsibility for the Service. The Service

must be structured at both national and provincial levels, and the present provision for Provincial Commissioners should be retained.

Other detail aspects with regard to the Service should appear in other legislation.

4. INTELLIGENCE

Specific provisions in this regard should be included in the final constitution. In particular, the constitution should provide that intelligence structures shall be non-partisan, that no intelligence agency may carry out operations or activities that undermine, promote or influence any legal South African political party or organisation (*Constitutional Principle XXXI*), and that Parliament must establish a multi-party joint Standing Committee on Intelligence, which could meet in camera and oversee all intelligence activities.

provinces the opportunity to provide detail peculiar to their different circumstances and needs, thus giving expression to provincial diversity, without sacrificing national control over norms, standards, etc. We believe there are a number of matters even now in the list of provincial functions, as well as other matters presently under exclusive national jurisdiction, which the national government need not deal with in detail. Those matters may, therefore, extend to both the residual and concurrent powers. Moreover, some matters in the existing list of provincial functions do not readily present themselves as matters over which national legislation will ever be required for the sake of, for example, the maintenance of economic unity, the protection of the common market, the security of the country, or the implementation of national economic policies. They may, however, require uniform norms and standards. Such matters should then rather form part of a separate list not subject to the whole range of "overrides". We further propose that in order not to impede or even prevent the freedom of the provinces to act, they should be able to proceed in respect of these matters in the absence of national framework legislation. Of course, as soon as such framework legislation is promulgated, their own arrangements will be subject to the principles or guidelines enunciated in such framework legislation. A further submission on matters to be included in such a list again depends on expert advice, *inter alia* from the state administration, on which matters qualify for such a list. The following draft provision on framework legislation is submitted for consideration:

"(1) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule Y.
(2) The national Parliament shall be competent to enact only framework legislation which sets out principles and/or guidelines, and which shall

be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule Y."

5. Regional differences are part of the South African reality and the principle of **asymmetry** in terms of which differences may exist among the provinces in respect of their structures, powers and functions, should be allowed to develop. Asymmetry can be promoted as follows: (i) Provinces must be able to adopt their own constitutions. (ii) Provinces must be able to take up functions according to their different needs and capabilities. In this regard, the transfer of functions to the provinces should be the responsibility of an independent body and not the executive. (iii) Provision should be made for the performance of functions on an agency or delegated basis in order to allow provinces to request other governments to perform particular functions on their behalf. (iv) Asymmetry will finally be furthered by the concept of framework legislation which will enable provinces to make detailed legislation on those matters peculiar to their own circumstances and needs.

3. INTERGOVERNMENTAL RELATIONS

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See draft

(c) the Act of Parliament is necessary to set minimum standards not provided by provincial legislation for the rendering of public services;
(d) the Act of Parliament is necessary for the maintenance of national economic unity or policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
(e) the provincial law materially prejudices the economic, health or security interests of another province or the Republic.

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic.
(3) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other.
(4) An Act of Parliament shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.
(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of any province.
(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively."

3. The principle of **subsidiarity** in terms of which functions should be allocated to the lowest level of government where it can be exercised and performed effectively, should apply to the allocation of functions and the application of the overrides - see subclause (6) of the above draft clause.

4. A *second list of matters* should be identified over which Parliament may only adopt **framework legislation**, containing mere general principles and/or guidelines, norms and standards, in order to allow the provinces to make detail legislation on those matters not subject to any other overriding powers of the national level. The national government should not be able to prescribe detail on these matters on the grounds, for instance, of effectiveness, maintenance of economic unity, promotion of interprovincial commerce, etc. This will allow the