

**EMBARGOED UNTIL TABLING IN THE
NEGOTIATING COUNCIL**

**TWENTY SEVENTH REPORT OF THE TECHNICAL
COMMITTEE ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
16 NOVEMBER 1993**

CHAPTER 13

Police and Defence

South African Police Service

Establishment

186. (1) There shall be a two tier South African Police Service which shall -
- (a) be established and regulated by Act of Parliament;
 - (b) have jurisdiction in respect of the laws of South Africa;
 - (c) function under the direction of both national and provincial government, in accordance with the provisions of this chapter.
- (2) The Act of Parliament referred to in sub-section 1 shall -
- (a) provide for the appointment of a Commissioner of the Service and a Commissioner for each Province;

- (b) provide for the establishment and maintenance of uniform standards of policing at all levels regarding:
- (i) the exercise of police powers;
 - (ii) the recruitment, appointment, promotion and transfer of members of the Service;
 - (iii) suspension, dismissal, disciplinary and grievance procedures;
 - (iv) training, conduct, and conditions of service of members of the Service;
 - (v) the general management [government], control, maintenance and provisioning of the Service;
 - (vi) returns, registers, records, documents, forms and correspondence;
 - (vii) generally, all matters which are necessary or expedient for the achievement of the purposes of this Constitution.

Powers and functions

187. The powers and functions of the Service shall be:

- (a) the preservation of the internal security of the Republic;
- (b) the maintenance of law and order;
- (c) the investigation of any offence or alleged offence, and
- (d) the prevention of crime.

Minister and Commissioner

188. (1) The State President shall, subject to the provisions of this Constitution, charge a Minister with responsibility for the Service.

(2) Without derogating from the provisions of section 185(2)¹ the President shall appoint a Commissioner of the SAPS, who shall exercise executive command of the Service subject to the directions of the Minister referred to in subsection (3).

(3) The State President may, if the Commissioner has lost the confidence of the Cabinet, institute appropriate proceedings against the Commissioner in accordance with law.

Powers of Province

189. (1) The Provincial Premier shall charge a Minister with responsibility for the performance by the Service of the functions set out in section 192(2).

(2) The Minister referred to in subsection (1):

(a) shall approve or veto the appointment of the Provincial Commissioner in terms of section 191(1)(b);

(b) may, if the Provincial Commissioner has lost the confidence of the provincial executive, institute appropriate proceedings against the said Commissioner according to law.

(3) The provincial legislature may pass laws not inconsistent with national legislation regarding the functions of the Service set out in section 192 (2).

(4) No provincial law may permit lower standards of performance of the functions of the Service than those provided for by Act of Parliament or detract from the rights which citizens have under Act of Parliament.

National Commissioner

190. (1) Subject to the provisions of section 186, and under the direction of the relevant Minister, the Commissioner of the South African Police Service shall be responsible for -

1. This phrase is subject to final agreement.

- (a) the maintenance of an impartial, accountable, transparent and efficient police service;
- (b) the appointment of provincial commissioners, subject to the provisions of section 189 (2)(a);
- (c) the preservation of the internal security in the Republic;
- (d) the investigation and prevention of organised crime or crime which requires national investigation and prevention or specialised skills: provided that the Act referred to in section 186(1) shall set out the circumstances which shall be regarded as organised crime and the circumstances which require national investigation and prevention or specialised skills;
- (e) international police liaison;
- (f) the keeping and provision of crime intelligence data, criminal records and statistics;
- (g) the training members of the Service, including any municipal or metropolitan police services to be established;
- (h) the recruitment, appointment, promotion and transfer of all members of the Service;
- (i) the provision of forensic laboratory services;
- (j) such functions relating to border control and the import and export of goods as may be allocated to the Service by law;
- (k) the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner: provided that the Act referred to in section 186 shall provide that the President, in consultation with the Cabinet, may direct the National Commissioner to deploy the said unit in circumstances where the

Provincial Commissioner is unable to maintain public order and the deployment of the said unit is necessary to restore public order;

- (l) national protection services;
- (m) establishment of a special task force for high risk operations which require specialised skills;
- (n) such other functions not referred to in section 19 which:
 - (i) are necessary to achieve the objectives set out in section 187; and
 - (ii) are appropriate for the National Commissioner to take responsibility for.

(2) The National Commissioner may **[and with the approval of the relevant SPR executive]** delegate responsibility for any function set out in this section to a Provincial commissioner.¹

Provincial commissioners

191. (1) Subject to the provisions of section 186 and section 190 and under the direction of the relevant member of the provincial executive, a Provincial Commissioner shall be responsible for:

- (a) the investigation and prevention of crime;
- (b) the development of community-policing services;
- (c) the maintenance of public order;
- (d) the provision in general of all other visible policing services, including
 - (i) the establishment and maintenance of police stations,
 - (ii) crime reaction units; and

1. This subsection has not yet been agreed to bilaterally.

- (iii) patrolling services;
 - (e) protection services in regard to provincial institutions and personnel;
 - (f) transfers within the province of members of the Service performing functions in terms of this section; and
 - (g) promotion of members of the Service performing functions set out in this section up to the rank of lieutenant-colonel.
- (2) Subject to the provisions of sections 186 and 191, and under the direction of the National Commissioner a provincial commissioner shall be responsible for -
- (a) the maintenance and discipline of the Service in the province;
 - (b) the recruitment, and, the promotion to the rank of colonel and above of all members of the Service responsible for functions set out in this subsection;
 - (c) such other functions as may be delegated to him or her by the National Commissioner; and
 - (d) subject to any procedures or mechanisms established by the Board of Commissioners referred to in section 19, the transfer of members of the Service under his or her command to positions outside his or her jurisdiction, or vice versa.

Co-ordination and co-operation

192. (1) A committee consisting of the Minister referred to in section 188 and the Ministers referred to in section 189(1) shall be established to ensure the effective co-ordination of the Service and effective co-operation between the various Commissioners.

(2) A Board of Commissioners consisting of the National Commissioner and the Provincial Commissioners presided over by the National Commissioner, or his or her nominee, shall be established to the Act referred to in section 186(1) to promote co-operation and co-ordination in the Service.

Local Policing

193. (1) The Act of Parliament referred to in section 186(1) shall provide for the establishment of community-police forums at police station level.

(2) The functions of community-police forums referred to in sub-section (1) may include -

- (a) the promotion of local accountability of the Service to communities and cooperation of communities with the Service;
- (b) the monitoring of the effectiveness and efficiency of the Service;
- (c) advising the Service regarding local policing priorities;
- (d) the evaluation of the provision of visible police services, including -
 - (i) the provision, siting and staffing of police stations;
 - (ii) the reception and processing of complaints and charges;
 - (iii) the provision of protective services at gatherings;
 - (iv) the patrolling of residential and business areas; and
 - (v) the prosecution of offenders;
- (e) requesting enquiries into policing matters in the locality.

(3) The Act referred to in section 186(1) shall make provision for the establishment by a local authority of a municipal or metropolitan police service: provided that :

- (a) such police service may only be established with the agreement of the consent of the relevant member of the provincial executive;

- (b) said member of the provincial executive shall, subject to the provisions the act determine the powers, duties and functions of such police service which may have powers relating only to crime prevention and municipal and metropolitan by-laws; and
- (c) the provisions of the Act shall apply *mutatis mutandis* to any such police service.

Independent complaints mechanism

194. There shall be established and regulated by Act of Parliament an independent mechanism under civilian control to efficiently and effectively investigate complaints of offences and misconduct allegedly committed by members of the Service

Acts of members outside their territorial jurisdiction

195. (1) No act of a member of the Service shall be invalid solely by reason of the fact that it was committed outside the province in which that member is stationed.

(2) The National Commissioner shall by regulation determine the procedures and the powers of the members of the Service to enable them to perform their functions outside their area of provincial jurisdiction.

Transitional Provisions

196. (1) At the coming into operation of this Constitution the South African Police existing in terms of the Police Act, 7 of 1958, and all other police forces established by law within the Republic, shall be deemed to constitute the South African Police Service in terms of this Constitution and any reference to the South African Police in the said Act shall be deemed to be a reference to the said Service.

(2) Any reference in any Act to the South African Police shall, unless the context indicates otherwise, bear the meaning and be interpreted as the South African Police Service in terms of this Constitution.

(3) The national and provincial governments shall assume responsibility for the consolidation and rationalisation of all the police forces in accordance with section 119.

National Defence Force

Establishment of a National Defence Force

1. (1) A National Defence Force is hereby established as the only defence force for the Republic.

(2) The National Defence Force, shall consist of -

(a) all members of -

(i) the South African Defence Force; and

(ii) the defence forces of the Republics of Transkei, Bophuthatswana, Venda and Ciskei; and

(b) the members of any armed or military force not established by or under any law and which is under the authority and control of or associated with and promotes the objectives of a political organisation,

who are considered to be members of such respective defence, armed and military forces under the provisions of section 16(3) or (9), as the case may be, of the Transitional Executive Council Act, 1993 (Act No. 151 of 1993): provided that this section shall not apply to the members of any such defence or armed force if the political organisation under whose authority and control it stands or with whom it is associated and whose objectives it promotes does not take part in the elections contemplated in section 40.

(3) Save for the National Defence Force referred to in subsection (1) no other armed force or military force or armed organisation shall be established in or for the Republic other than -

- (a) as provided for in this Constitution;
- (b) a force established by or under Act of Parliament for the protection of public property or the environment; or
- (c) a service established by or under law for the protection of persons or property.

Chief of the National Defence Force

2. *Without derogating from the provisions of section 185(2)*³, the President shall appoint a Chief of the National Defence Force, who shall exercise military executive command of the National Defence Force subject to the directions of the Minister of Defence and, during a state of national defence [in time of war]⁴, of the President.

Members of the National Defence Force

3. (1) The National Defence Force shall comprise both a permanent force and a part-time reserve component.

(2) The establishment, organisation, training, conditions of service and other matters concerning the permanent force shall be provided for by Act of Parliament.

(3) The establishment, organisation, training, state of preparedness, calling up, obligations and conditions of service of the part-time reserve component shall be provided for by Act of Parliament.

3. The inclusion of this reference to the chapter on the Public Service does not seem to have been agreed upon.

4. The bilateral document proposes that the President exercises certain powers "in time of war". It is not certain in law when a state of war exists. Despite the definition thereof in the *Defence Act, 1957*, which reads "any time ... during which an actual state of war exists or may in the opinion of the State President be anticipated". Regarding our proposal, see footnote 5 below.

(4) The National Defence Force shall be established and trained in such a manner that will provide a balanced military force capable of exercising its functions in terms of this Constitution.

(5) The National Defence Force shall strive to be a technologically advanced military force which complies with international standards of competency.

(6) A member of the National Defence Force shall have all the rights of a citizen save for those inconsistent with military service, provided that no full-time member of the Force shall hold office in any political party or political organisation.

(7) A member of the National Defence Force shall be obliged to comply with all lawful orders, but shall be entitled to refuse to execute any order if the execution of such order would constitute an offence or would breach *international customary law and treaties / international law of armed conflict binding on the Republic*⁵.

(8) An Act of Parliament shall provide for adequate compensation to a member of the National Defence Force who suffers loss due to physical or mental disability in the execution of his or her duties.⁶

(9) Provision shall also be made for the adequate compensation to the immediate dependants of a member of the National Defence Force who suffer loss due to the death of or physical or mental disability of the member referred to in subsection (1).

Functions of the National Defence Force

4. (1) The National Defence Force may be employed -
- (a) for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity;
 - (b) for service in compliance with the international obligations of the Republic with regard to international bodies and other states;

5. These alternative formulations have not been agreed upon bilaterally. We propose the addition of the underlined words.

6. The bilateral document suggested a limitation of compensation for loss due to duties performed on "in time of war, martial law or civil unrest".

- (c) for service in the preservation of life, health or property;
- (d) for service in the provision or maintenance of essential services;
- (e) subject to the provisions of section 5, for service in the upholding of law and order in the Republic in co-operation with the South African Police Service under circumstances set out in law where the said Police Service is unable to maintain law and order on its own; and
- (f) for service in support of any department of state for the purpose of socio-economic upliftment.

(2) The National Defence Force shall -

- (a) perform its functions and duties and exercise its powers solely in the national interest by -
 - (i) upholding the Constitution;
 - (ii) providing for the defence of the Republic; and
 - (iii) ensuring the protection of the **[peoples]** *inhabitants* of the Republic,

in accordance with the provisions of this Constitution and any law.

- (b) perform its functions, exercise its powers and comply with its duties under the directions of the government of the Republic;
- (c) refrain from furthering or prejudicing party political interests;
- (d) not breach international customary law binding on the Republic relating to aggression;
- (e) in armed conflict comply with its obligations under international customary law and treaties binding on the Republic; and

(f) be primarily defensive in the performance of its powers, duties and functions.

(3) The employment, training, organisation and deployment of the Defence Force shall be in accordance with the requirements of subsection (2).

Accountability

5. (1) The Minister of Defence shall be accountable to Parliament for the employment of the National Defence Force.

(2) Parliament shall annually approve a budget for the defence of the Republic.

(3) A joint standing committee of Parliament on defence shall

(a) be established consisting of members of all political parties holding more than 20 seats in the National Assembly;

(b) be constituted in proportion to the number of seats held by each participating party in the National Assembly.

(c) be competent to investigate and make recommendations regarding the functioning, organisation, armaments, policy, morale and state of preparedness of the National Defence Force and to exercise such other functions relating to parliamentary supervision of the Force as may be prescribed by law.

(4) The President shall, whenever he exercises any of his powers referred to in section 76(4)(b)(i), forthwith communicate the reasons for such action to Parliament: provided that if Parliament is not then sitting, the President shall summon the joint standing committee referred to in subsection (3) to meet expeditiously, but not later than 14 days after having taken such action to communicate to it the reason for taking the action.

(5) The President shall, if Parliament is in session at the time of his employing the National Defence Force for service as contemplated in section 4(1)(e), forthwith communicate the reason for such action to Parliament and if Parliament is not then sitting, the President shall do so not later than 14 days after the commencement of the next sitting of Parliament, and Parliament may by motion terminate such employment: provided that any act or omission committed prior to such termination, shall be deemed to have been committed in terms of section 4(1)(d).

Transitional provisions

6. (1) The provisions of section 183(1), (2), (3), (4), (5), (6) and (7) shall apply *mutatis mutandis* to members of the National Defence Force.

(2) The provisions of section 185 (1), (2), (4) and (6) shall apply *mutatis mutandis* to all members of forces referred to in section 1 (2).

(3) The provisions of section 152 shall apply to all members referred to in section 1 (2)(b).

(4) If the number of the members of the National Defence Force in terms of subsection (1) exceeds the personnel strength determined in the force design and structure for that Force, any member of that Force who, due to the integration, consolidation and rationalisation of the National Defence Force is not included in such force design and structure, shall be dealt with in accordance with law.

(5) Continuance of membership of members referred to in section 1(2)(b) shall be subject to such members entering into agreement for temporary or permanent appointment with the National Defence Force within a reasonable time: Provided that such contracts shall be in accordance with normal employment policies and terms and conditions of service.

(6) Any reference in any law to the South African Defence Force shall, unless the context indicates otherwise, bear the meaning and be interpreted as the National Defence Force.

(7) The National Defence Force shall, subject to this Constitution and any Act of Parliament, be governed by the Defence Act, 44 of 1957.

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We propose that the following subsection be inserted in section 76 (Chapter 4) dealing with the powers and functions of the President:

- (4) (a) The President shall be the Commander-in-Chief of the National Defense Force.
- (b) The President may -
- (i) declare, with the approval of Parliament, a national state of defence;⁷
 - (ii) with the approval of Parliament, employ the National Defence Force in accordance with the provisions of sections 4 and 5 (of Chapter 13); and
 - (iii) confer permanent commissions on members of the national Defence Force and cancel commissions in accordance with law.

7. We would strongly advise against the inclusion of any mention of the declaration of war or martial law in this Constitution:

War has become outlawed in international law. In terms of international law the declaration of war is therefore unlawful. The declaration of a state of national defence to combat aggression or any aggressive act against the territorial integrity of the state will however be compatible with international law.

Martial law, being a state of complete suspension of not only the Constitution, but also of all other law, is a notion wholly inconsistent with the constitutional state. South Africa's history, especially during colonial times, is notorious for abuses perpetuated by military and civil authorities under martial law.

CHAPTER 14

GENERAL AND TRANSITIONAL PROVISIONS

Repeal of laws

190. (1) The laws mentioned in Schedule ... are hereby repealed to the extent set out in the third column of that Schedule.

(2) Notwithstanding the repeal of section 13 and 101(2) of the previous Constitution, any pension which but for such repeal would have been payable shall continue to be payable as if such repeal has not been effected.

Continuation of existing laws and conventions

191. (1) Subject to the provisions of this Constitution, all laws which immediately prior to the commencement of this Constitution were in force in any part of the national territory shall continue in force until repealed or amended by a competent authority.

(2) The constitutional and parliamentary conventions which existed immediately before the commencement of this Constitution shall continue to exist, except to the extent that they are inconsistent with the provisions of this Constitution.

Continuation of international rights and obligations

192. All rights and obligations under international agreements which were vested in or binding on the Republic immediately before the commencement of this Constitution, shall after such commencement continue to be vested in or binding on the Republic.

Status of International Law

192A. (1) Parliament shall subject to the provisions of this Constitution have the power and function subject to this Constitution to agree to the ratification of or accession to international agreements negotiated and signed in terms of section 76 (1)(i).

(2) International agreements approved by Parliament in terms of subsection (1) shall, unless inconsistent with the provisions of this Constitution or excluded by express provision in an Act of Parliament, be binding and shall form part of the law of the Republic.

(3) Rules of customary international law binding on the Republic, unless inconsistent with the provisions of this Constitution or an Act of Parliament, shall form part of the law of the Republic.

Construction of certain references

193. Unless the context otherwise indicates, a reference in a law referred to in section 191 -

(a) State President ...

(b) Republic ...

(c) Parliament ...

(d) Administrator ...

(e) Province ...

Transition: Legislatures

194. (1) A person who immediately before the commencement of this Constitution was a member of Parliament or of any other legislative assembly which exercised legislative powers in respect of any part of the national territory, shall at such commencement cease to be such a member, but shall for the purpose of any law relating to the payment of pension benefits to such members not be disqualified solely by reason of this section.

(2) A person who immediately before the commencement of this Constitution was an officer or employee in the service of Parliament shall after such commencement and notwithstanding section 190 continue in such service subject to the laws regulating such service.

(3) The provisions of section 196(3), (4) and (5) shall apply *mutatis mutandis* in respect of a person referred to in subsection (2).

(4) A person who immediately before the commencement of this Constitution was an officer or employee in the service of a legislature referred to in subsection (1) other than Parliament, shall be deemed to be an officer or an employee in the service of the administration of that part of the national territory in which such legislature exercised legislative powers, and sections 196 and 197 shall apply *mutatis mutandis* in respect of such person.

(5) Any matter before Parliament or any such other legislative assembly which immediately before the commencement of this Constitution has not yet been disposed of by Parliament or such legislative assembly, as the case may be, shall lapse upon such commencement.

(6) The rules and orders of Parliament in force immediately before the commencement of this Constitution, shall, to the extent that they can *mutatis mutandis* be applied in respect of the affairs of Parliament under this Constitution, continue in force until amended or replaced in terms of this Constitution.

Transitional arrangements: The Executive

195. (1) A person who immediately before the commencement of this Constitution was -

- (a) the State President or a Minister or Deputy Minister of the Republic within the meaning of the previous Constitution;
- (b) the Administrator or a member of the Executive Council of a province; or
- (c) the President, Chief Minister or other chief executive or a Minister, Deputy Minister or other political functionary in the government of

any part of the national territory in terms of a constitution or other constitutional arrangement in force in such part of the said territory,

shall after such commencement and notwithstanding section 190 continue in office until the President under this Constitution has been elected and has assume office.

(2) Any vacancy which may occur in an office referred to in subsection (1)(a), (b) or (c) shall, if necessary, be filled by a person designated by the persons continuing in office in terms of subsection (1)(a), acting in consultation with the Transitional Executive Council.

(3) Executive authority vested in a person or persons referred to in subsection (1)(a), (b) or (c) in terms of a constitution or constitutional arrangement in force immediately before the commencement of this Constitution, shall during the period in which the said person or persons remain in office in terms of subsection (1), be exercised in accordance with such constitution or constitutional arrangement as if it had not been repealed or superseded by this Constitution, and any such person or persons shall continue to be competent to administer any department of state, administration or other institution which was entrusted to, and to exercise and perform any power or function which vested in, him or her or them immediately before the commencement of this Constitution.⁸

(4) Upon the assumption of office by the President in terms of this Constitution -

(a) the executive authority of the Republic as contemplated in section 70 shall vest in the President acting in accordance with that section; and

(b) the executive authority of a province as contemplated in section 113 shall vest in the Premier of that province acting in accordance with that section, or if the Premier of a province has not yet assumed office, in the President acting in accordance with section 70 until the Premier assumes office.

(5) The power to exercise executive authority in terms of laws which immediately prior to the commencement of this Constitution were in force in any part of the national territory and which in terms of section 191 continue in force after such commencement, shall be allocated in accordance with the following rules:

8. Subsections (1), (2) and (3) do not take into account the situation wherein elections, either nationally or in one or more provinces, are not declared to be free and fair. We require instructions to enable us to make provision for the necessary bridging mechanism.

(a) All laws with regard to matters which -

(i) do not fall within the functional areas specified in Schedule 9; or

[(ii) do fall within such functional areas but which are matters in respect of which Parliament has overriding legislative competence in terms of section 118,]⁹

shall be administered by a competent authority within the jurisdiction of the national government referred to in subsection (4)(a).

(b) All laws with regard to matters which fall within the functional areas specified in Schedule 9 and which are matters in respect of which a provincial legislature has legislative competence in terms of section 118 shall -

(i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (6) to an appropriate authority within the jurisdiction of the government of such province referred to in subsection (4)(b); or

(ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies.

(c) In this subsection "competent authority" shall mean -

(i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and

9. The provisions of subparagraph (ii) are inconsistent with those of subparagraph (i) and should be deleted.

- (ii) in relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province.
- (6) (a) The President may, and shall if requested to do so by the Premier of a province, by proclamation in the *Gazette* assign, within the framework of section 118, the administration of a law referred to in subsection (5)(b)(i) to an appropriate authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.
- (b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may -
- (i) amend or adapt such law in order to regulate its application or interpretation;
 - (ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and
 - (iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including the transfer or admission of persons to or in the service of the State or any other person, subject to conditions not less favourable than those under which they serve, and the transfer of assets, liabilities, rights and obligations, including moneys, to or from the national or a provincial government or any other person or body established by law.
- (c) Any reference in a law so assigned in terms of paragraph (a) to the authority administering such law, shall upon the assignment be deemed to

be a reference *mutatis mutandis* to the appropriate authority of the province concerned.

- (7) (a) If for any reason the government of a province is unable to assume responsibility within 14 days of its appointment for the administration of any law referred to in subsection (5)(b)(ii), the President shall by proclamation in the *Gazette* assign the administration of such law to a special administrator or other appropriate authority within the jurisdiction of the national government, either generally or to the extent specified in the proclamation, until the government of such province is able to assume such responsibility.

(b) Subsection (6)(b) and (c) shall *mutatis mutandis* apply in respect of an assignment under paragraph (a) of this subsection.

(8) A proclamations contemplated in subsections (6) and (7) shall be tabled before Parliament in session and if not approved, within 14 days of such tabling, the proclamation shall lapse.

(9) If Parliament disapproves of any such proclamation or any provision thereof, such proclamation or such provision shall thereafter cease to be of force and effect to the extent to which it is so disapproved but without prejudice to the validity of anything done in terms of such proclamation up to the date upon which it so ceased to be of force and effect, or to any right, privilege, obligation or liability acquired or accrued or incurred as at the said date under and by virtue of such proclamation.

Transitional arrangements: Public administration

196. (1) A public service, department of state, administration or other institution which immediately before the commencement of this Constitution performed governmental functions under the control of an authority referred to in section 195(1)(a), (b) or (c), shall after such commencement and notwithstanding section 190 continue as such and to perform the said functions in accordance with the laws applicable to it until it is abolished, consolidated with any other public service, department of state, administration or institution or otherwise rationalized as contemplated in section 197.

(2) Any person immediately before the commencement of this Constitution was an officer or employee in the service of any institution referred to in subsection (1) shall after such commencement and notwithstanding section 190 continue in such service subject to this Constitution and the laws regulated such service.

(3) Subject to subsection (4), the terms and conditions of service applicable to a person referred to in subsection (2) immediately before the commencement of this Constitution, shall continue to apply to him or her until amended by or under a law.

(4) Subject to any law relating to unfitness or incapacity to carry out duties efficiently, the pensionable salary or pensionable salary scale of a person referred to in subsection (2) shall not be reduced below that applicable to such person as at the commencement of this Constitution.

(5) Notwithstanding the provisions of this section, the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred or may occur between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2), or class of such persons, may, at the instance of a Minister or a member of a provincial executive, within one year of the commencement of this Constitution, be reviewed by a tribunal appointed by such Minister or member of a provincial executive and presided over by a judge, and if not proper or justifiable in the circumstances of the case, the tribunal may reverse or alter the contract, appointment, promotion or award.

(6) Subsection (1) shall apply *mutatis mutandis* to a public service commission established for a public service referred to in subsection (1) and subsections (2), (3), (4) and (5) shall apply *mutatis mutandis* to a person who immediately before the commencement of this Constitution occupied the position of chairperson or member of such a public service commission: provided that -

(a) the Commission for Administration, established by the Commission for Administration Act, 1984 (Act No. 65 of 1984), shall cease to exist upon the appointment of the chairperson and members of the Public Service Commission referred to in section 180; and

(b) any other public service commission existing immediately before the commencement of this Constitution, shall cease to exist upon the

establishment under section 184 of a provincial service commission for a province in the area of which such public service commission continued as such in terms of subsection (1).

Rationalization of public administration

197. (1) All public services, departments of state, administrations and other institutions referred to in section 196(1), and all public service commissions established for such public services, shall as soon as is possible after the commencement of this Constitution be rationalized with a view to establishing -

- (a) a public administration at the national level of government to deal with matters within the jurisdiction of the national government referred to in section 195(4)(a); and
 - (b) a public administration for each province to deal with matters within the jurisdiction of each provincial government referred to in section 195(4)(b).
- (2) (a) The responsibility for the rationalization of public services, departments, administrations and other institutions, and public service commissions, shall primarily but not exclusively rest with the national government which shall exercise such responsibility in co-operation with the provincial governments and the Commission on Provincial Government referred to in section 127.
- (b) The responsibility for the internal rationalization of an administration referred to in subsection (1)(b) shall rest with the relevant provincial government.
- (3) (a) The President may, subject to subsection (2)(a), by proclamation in the *Gazette* take such steps as he or she considers necessary in order to achieve the aim mentioned in subsection (1).
- (b) Without derogating from the generality of paragraph (a) the steps referred to in that paragraph may include -

- (i) the amendment, repeal or replacement of any law regulating the establishment, functions and other matters relating to any public service, department, administration, institution or public service commission referred to in section 196(1), or of any law referred to in section 196(2), or of any law which deals with any of the foregoing matters in a consequential way: Provided that if a law referred to in section 196(2) is repealed, provision shall be made for the application of any general law regulating the employment of persons, or any class of persons, in the service of the state to the persons, or class of persons, affected by such repeal; and
- (ii) measures prescribing the transfer or secondment of personnel, or the allocation of assets and liabilities, rights and obligations (including moneys), and administrative records, in order to establish the administrations referred to in subsection (1)(a) and (b).
- (c) A proclamation under paragraph (a) shall be submitted to Parliament in session within 14 days after the publication thereof.
- (d) If Parliament disapproves of any such proclamation or any provision thereof, such proclamation or such provision shall thereafter cease to be of force and effect to the extent to which it is so disapproved, but without prejudice to the validity of anything done in terms of such proclamation up to the date upon which it so ceased to be of force and effect, or to any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such proclamation.
- (5) (a) A special tribunal consisting of a judge and two assessors shall in accordance with an Act of Parliament determine all claims and disputes of rights in terms of laws regulating as at 1 November 1993 employment in a public service referred to in section 196(1) and arising out of the implementation of this section and section 196.
- (b) The Act of Parliament referred to in paragraph (a) shall prescribe expeditious procedures for the adjudication of claims and disputes including the granting of interim and final relief.

(c) Notwithstanding the provisions of any law the procedures contemplated in paragraph (b) shall be the only procedures to be followed by such tribunal.

(d) The decisions of the tribunal on any such claim or dispute shall be final and binding.

(e) The provisions of this subsection shall lapse one year from the commencement of this Constitution.

Transitional arrangements: Assets and liabilities

198. (1) All assets, including administrative records, which immediately before the commencement of this Constitution vested in an authority referred to in section 195(1)(a), (b) or (c), or in a government or administration under the control of such an authority, shall be allocated in accordance with the following rules:

(a) Where any asset is applied or intended to be applied for or in connection with a matter which -

(i) does not fall within a functional area specified in Schedule 9; or

[(ii) does fall within such a functional area but is a matter in respect of which Parliament has overriding legislative competence in terms of section 118,]¹⁰

such asset shall vest in the national government.

(b) Where any asset is applied or intended to be applied for or in connection with a matter which falls within a functional area specified in Schedule 9 and is a matter in respect of which a provincial legislature has legislative competence, such asset shall, subject to paragraph (c), vest in the appropriate provincial government.

10.

This paragraph is contradictory to (i) and should be deleted.

- (c) Where any asset referred to in paragraph (b) is applied or intended to be applied for or in connection with the administration of a particular law or the performance of a particular function in a particular area, such asset shall vest in the government to which the administration of that law is assigned, or is assigned in that particular area, in terms of section 195(5), (6) or (7) or to which the performance of that function is entrusted, or entrusted in the particular area, in terms of section 197.
- (d) Where any asset cannot in terms of the foregoing rules be classified with reference to a particular matter, law or function, or where there is disagreement between two or more governments, the advice of the Commission on Provincial Government referred to in section 127 shall be obtained, and any dispute shall be resolved with due regard to such advice.
- (e) Parliament shall be competent to enact a law to facilitate the application of this section and to prescribe guide-lines for the resolution of disputes arising from such application.
- (2) (a) A registrar of deeds shall upon the production of a certificate by a competent authority that immovable property described in the certificate is vested in a particular government in terms of subsection (1), make such entries or endorsements in or on any relevant register, title deed or other document to register such immovable property in the name of such government.
- (b) No duty, fee or other charge shall be payable in respect of a registration in terms of paragraph (a).
- (3) (a) Subject to paragraph (b) all debts and liabilities -
- (i) directly linked to an asset vesting in terms of subsection (1) in a provincial government, shall be assumed by such provincial government; and
- (ii) other than those referred to in subparagraph (i) shall be assumed by the national government.

(b) Parliament shall be competent to enact a law regulating the re-allocation of debts and liabilities to the national and respective provincial governments, but no such law shall be enacted unless a report and recommendations of the Financial and Fiscal Commission referred to in section 170 has been tabled in and considered by Parliament.

(4) Anything done in terms of this section shall be subject to audit by the Auditor-General.

Transitional arrangements: Judiciary

199. (1) A superior or lower court of law which immediately before the commencement of this Constitution exercised judicial functions in any part of the national territory, shall after such commencement and notwithstanding section 190 continue as such and to perform judicial functions in accordance with the laws applicable to it until it is abolished, consolidated with any other court or otherwise rationalized as contemplated in section 200.

(2) A person who immediately before the commencement of this Constitution was -

- (a) the Chief Justice or a judge of appeal of the Appellate Division or a judge president of a provincial division or a judge of a provincial or local division of the Supreme Court of South Africa, or a magistrate or other judicial office-bearer of any lower court under the jurisdiction of the said Supreme Court;
- (b) a chief justice, judge of appeal or judge of any superior court in any part of the national territory, other than the Supreme Court of South Africa, or a magistrate or other judicial officer in any lower court under the jurisdiction of any such superior court; or
- (c) an attorney-general in the jurisdictional area of any superior court referred to in paragraph (a) or (b), shall after such commencement and notwithstanding section 190 continue in office subject to this Constitution and the laws relating to such office.

(3) The provisions of section 196(3), (4) and (5) shall apply *mutatis mutandis* in respect of a person referred to in subsection (2).

(4) A person referred to in subsection (2) shall within 30 days of the commencement of this Constitution make and subscribe to an oath or solemn affirmation in the terms set out in Schedule 6 before the Chief Justice, or a judge of the Supreme Court designated by the Chief Justice for this purpose, or, in the case of the person continuing in office as Chief Justice in terms of subsection (2)(a), before any judge of appeal.

(5) All proceedings which immediately before the commencement of this Constitution were pending before any court exercising jurisdiction in accordance with the law in force then, shall be continued and concluded as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted after such commencement the appeal proceedings shall be subject to the law as altered by this Constitution.

Rationalization of court structures

200. (1) All courts of law referred to in section 199(1) shall as soon as is possible after the commencement of this Constitution be rationalized with a view to establishing the court structures contemplated in Chapter 7.

(2) The provisions of section 197(2) (a) and (3) shall apply *mutatis mutandis* in respect of any rationalization under this section.

Transitional and other arrangements: Educational Institutions¹¹

201. (1) The National and provincial governments shall not alter the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community-managed or state-aided primary or secondary schools under existing laws, unless agreement, resulting from *bona fide* negotiations has been reached with such bodies and reasonable notice of implementation has been given:

11. The provisions contained hereunder emanate from bilateral discussions between the South African Government and the African National Congress. We have made certain editorial changes to the agreement.

(2) The National and provincial governments shall not alter the rights, powers and functions of the controlling bodies of universities and technikons under existing laws, unless agreement, resulting from *bona fide* negotiations, has been reached with such bodies.

(3) Should agreement not be reached in terms of Subsections (1) and (2), the competence of the national and provincial governments to alter the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community-managed or state-aided primary or secondary schools as well as the controlling bodies of universities and technikons will not be constrained, provided that interested persons and bodies shall have recourse to challenge the exercise of the competence of the said governments under the provisions of this Constitution.

Continuation of electoral system

202. (1) (a) The President may, subject to the provisions of this Constitution, by proclamation in the *Gazette* call a general election of members of the National Assembly in pursuance of its dissolution, to be held on a date to be determined by the President: Provided that such and any election shall take place in accordance with the provisions of the Electoral Act, 1993.

(b) The Premier of a provincial government may, subject to the provisions of this Constitution, call a general election of members of the legislature of the province concerned, to be held on a date to be determined by the Premier in which event the provisions of subsection (1)(a) shall apply *mutatis mutandis*.

(2) The provisions of this Constitution and of the Electoral Act, 1993, relating to the holding of elections, shall subject to the provisions of this Constitution, remain in force until a further Parliament is elected in accordance with the provisions of Chapter 5 or in accordance with the new constitutional text adopted in terms of chapter 5.

(3) A referendum shall take place in accordance with the provisions of this Constitution and of the Electoral Act, 1993, relating to the holding of elections, provided that:

- (a) Such referendum shall be limited to ascertaining the opinion of the electorate on a question formulated by the President;
- (b) A referendum may take place in respect of any part of the Republic or any section of the electorate; and
- (c) The Premier of a provincial government may call a referendum in respect of the territory or electorate of the province concerned, in which event the provisions of this subsection (3)(a) shall apply *mutatis mutandis*.

Prescription of penalties

203. Subject to the provisions of this Constitution a competent legislature may prescribe penalties in respect of a contravention of any provision of law which falls within the competence of such legislature.

Definitions

204. (1) In this Constitution;

- (a) **"a decision in consultation with"** a person or body means a decision taken jointly by the persons or bodies concerned, in which each person or body concurs;
- (b) **"a decision after consultation with"** a person or body means a decision taken in good faith by the person or body vested with that power, after consulting and giving serious consideration to the views of the person or body concerned.

(2) In this Constitution, unless the context otherwise indicates -

"Administrator"

"Administration"

"Chief Justice", means the Chief Justice of the Supreme Court of South Africa;

"**Constitutional Principles**" means the principles set out in Schedule 7;

"**Constitutional Assembly**" means the National Assembly and the Senate sitting in joint session for the purposes of Chapters 5 and 9 of this Constitution;

"**Parliament**" means the legislative authority of South Africa consisting of the National Assembly and the Senate;

"**Party**" means a party registered in terms of the *Electoral Act, 1993*;

"**Premier**" means

"**President**" means the President of the Republic of South Africa;

"**Republic**" means the Republic of South Africa as defined in section 1.

"**State President**" means the State President under the *Republic of South Africa Constitution Act, 1983*.

Short title and commencement

205. (1) This Constitution shall be called the Republic of South Africa Constitution Act, 1993, and shall, save to the extent as may be otherwise required in order that affect may be given to any provision thereof, come into operation on a date fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be so fixed in respect of different provisions of this Constitution.

(3) A reference in a provision of this Constitution to the commencement of this Constitution shall, unless the context otherwise indicates, be construed as a reference to the commencement of such provision.

**Nkosi sikelel' iAfrika. God seën Suid-Afrika.
Morena boloka sechaba sa heso. May God bless our country.**

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.

27THRPT.DOC
16 Nov 1993

NUMBER AND YEAR OF LAW	TITLE	EXTENT OF REPEAL
Act No. 46 of 1959	Representation between the Republic of South Africa and Self-governing Territories Act, 1959	The whole
Act No. 32 of 1961	Provincial Government Act, 1961	The whole
Act No. 22 of 1963	Provincial Councils and Executive Committees Act, 1963	The whole
Act No. 26 of 1969	South Africa Act Amendment Act, 1969	The whole
Act No. 26 of 1970	National States Citizenship Act, 1970	The whole
Act No. 21 of 1971	Self-governing Territories Constitution Act, 1971	The whole
Act No. 65 of 1976	Financial Relations Act, 1976	The whole, except sections 27 and 28
Act No. 100 of 1976	Status of Transkei Act, 1976	The whole
Act No. 30 of 1977	Constitution Amendment Act, 1977	The whole
Act No. 31 of 1977	Financial Relations Amendment Act, 1977	The whole
Act No. 89 of 1977	Status of Bophuthatswana Act, 1977	The whole
Act No. 8 of 1978	Bophuthatswana Border Extension Act, 1978	The whole

NUMBER AND YEAR OF LAW	TITLE	EXTENT OF REPEAL
Act No. 13 of 1978	National States Citizenship Amendment Act, 1978	The whole
Act No. 36 of 1978	Alteration of Provincial Boundaries Act, 1978	The whole
Act No. 107 of 1979	Status of Venda Act, 1979	The whole
Act No. 2 of 1980	Borders of Particular States Extension Act, 1980	The whole
Act No. 101 of 1980	Republic of South Africa Constitution Fifth Amendment Act, 1980	The whole
Act No. 77 of 1981	Borders of Particular States Extension Amendment Act, 1981	The whole
Act No. 101 of 1981	Republic of South Africa Constitution Second Amendment Act, 1981	The whole
Act No. 102 of 1981	Financial Relations Amendment Act, 1981	The whole
Act No. 110 of 1981	Status of Ciskei Act, 1981	The whole
Act No. 34 of 1982	Financial Relations Amendment, 1982	The whole
Act No. 25 of 1983	Borders of Particular States Extension Amendment Act, 1983	The whole
Act No. 88 of 1983	Provincial Affairs Act, 1983	The whole except section 5.

Act No. 109 of 1983	Borders of Particular States Extension Second Amendment Act, 1983	The whole
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NUMBER AND YEAR OF LAW	TITLE	EXTENT OF REPEAL
Act No. 110 of 1983.	Republic of South Africa Constitution Act, 1983	The whole
Act No. 105 of 1984	Constitution Amendment Act, 1984	The whole
Act No. 114 of 1984	Financial Relations Amendment Act, 1984	The whole
Act No. 26 of 1985	Alteration of Provincial Boundaries Act, 1985	The whole
Act No. 104 of 1985	Constitutional Affairs Amendment Act, 1985	The whole
Act No. 69 of 1986	Provincial Government Act, 1986	The whole
Act No. 80 of 1986	Joint Executive Authority for KwaZulu and Natal Act, 1986	The whole
Act No. 112 of 1986.	Borders of Particular States Extension Amendment Act, 1986	The whole
Act No. 32 of 1987	Constitutional Laws Amendment Act, 1987	The whole, except sections 1, 21, 22, 24, 25, 30, 33, 34, 35, and 36
Act No. 43 of 1988	Constitutional Laws Amendment Act, 1988	Sections 10 to 13