AFRICAN NATIONAL CONGRESS

DEPARTMENT OF LEGAL AND CONSTITUTIONAL AFFAIRS
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POWER TO THE PEOPLE!

Our Ref:

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07/03/90

Dear Comrade,

Kindly find herewith enclosed a copy of the Revised Constitution ,adopted by the ANC.Annual Conference in December 1957. For amendments made to same kindly refer to the Kabwe Conference document a copy whereof can be obtained from comrade Gill Marcus.

Kindly work on both of them so that they can meet the conditions of the now unbanned ANC inside the country.We are planning to meet as the constitutional committee in London on the weekend of the 16th instant.

Comradely yours,
Zola Skweyiya

AFRICAN NATIONAL CONGRESS
(SOUTH AFRICA)
DEPT. OF LEGAL AND CONSTITUTIONAL AFFAIRS
P.O. BOX 31791, LUSAKA, ZAMBIA.

P/S Please ensure that Tony O'Dowd gets a copy and also NAT Masemola and Kader Asmal.

MCH91-117-1-10

REPORT ON THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (Draft Outline: 21 July 1993)

Prepared by Dr Sammy Adelman for the Legal and Constitutional Affairs Committee of the ANC

General Remarks

While it is appreciated, especially in light of the delicate situation prevailing in South Africa at present, that the draft Constitution should be as comprehensive a document as possible, there is a danger that too much is being included in it. The presence of a constitution, a bill of rights and a schedule of constitutional principles is likely to generate an extraordinary amount of constitutional litigation.

A second, and more fundamental, objection that might be raised is that the sheer comprehensiveness of the document is potentially undemocratic - something that is neither in South Africa's or the ANC's long-term interests. The process of constitution-making would appear to involve a choice between a maximalist position in which an attempt is made to cater for every conceivable constitutional and human rights situation that might arise and a minimalist approach which seeks to provide a framework within which the will of the majority can be implemented through the policies of a democratically elected government in terms of its manifesto. The maximalist approach has the advantages of certainty and constraint of arbitrary rule but courts the danger of encouraging litigation and excessive judicial decisionmaking because of the open-ended nature of constitutions and bills of rights. The choice, therefore, is between a constitutional dispensation in which the role of government is highly circumscribed at the outset and a constitutional dispensation in which the constitution, the bill of rights and the constitutional principles provide a minimalist but clear framework within which a democratically elected government can carry out the policies contained in its manifesto. I am concerned that an ANC government would find itself so constrained by constitutional provisions and litigation that it would effectively be unable to carry out the redistributive policies that are essential to overcome the legacy of apartheid. This would be undemocratic and would not be in the interests of the majority or the country as a whole.

Overall, the draft Constitution is overwhelmingly biased towards SPRs in that it delineates the power, functions, duties and structures of SPRs in great detail while omitting virtually any mention of national government (including the role of the State President). The (probably misleading) impression is created that the wishes of COSAG have been addressed at the expense of the majority. While the remainder of this report deals exclusively with legal, constitutional and, to a lesser extent, political issues, it is important to consider the economic and financial implications of the SPR powers contained in the draft Constitution: for example, the existence of approximately 10 or more SPR governments and civil services will be both highly bureaucratic and extremely costly.

The Draft Constitution

National Government and SPRs

The overall impression created by the draft Constitution is that the primary concern of the negotiators and the Technical Committee has been to address the thorny question of SPRs. As a result a disproportionate amount of attention is paid to SPRs at the expense of national government; indeed, there appears to be a politically expedient but constitutionally unjustifiable bias in favour of SPRs.

1. Nowhere in the draft are the powers of the national government defined. At the same time Chapter 9 deals exhaustively with SPRs. Since the two issues are inseparable, it would appear to be necessary to clearly define the powers and functions of the national government. Moreover, the powers and functions of the national government should be the point of departure rather than the other way around as appears to be the case in the draft. It is preferable that the powers of SPRs to be defined *negatively*, i.e. that according to the principle of subsidiarity contained in Principle XXIV (1) of the Constitutional Principles, the powers and

functions of SPRs and local government should be those which are *not* allocated to the national government. Put another way, in terms of the strongly federalist orientation of the draft, consideration should be given to precisely what powers the central government will have and then to devolve all other powers downwards.

The powers of central government will undoubtedly include defence and foreign affairs, two areas that are relatively unproblematic. Other areas in which the national government will need to play a central role but which raise important questions concerning its relationship with SPRs are national economic and fiscal policy, security and law enforcement. Because the potential for conflict and constitutional challenges in these matters is great careful consideration should be given to the precise delimitation of the powers of each level of government.

2. There is no provision in the draft Constitution for the powers and functions of the State President or the Executive. It is therefore unclear whether the presidency will operate under (1) an American style system in which the President is free to appoint the cabinet (subject to the approval of the Forum) and chairs cabinet meetings while retaining a substantial degree of personal control over foreign affairs, defence, and domestic and external security matters. (2) A French style system under which the president appoints a prime minister, with the latter having the power to appoint cabinet ministers. Under this system there is a division of powers between the president and the cabinet, with the former retaining control of defence and foreign affairs, for example, and the latter having jurisdication over all other matters. (3) A third option combines the roles of state president and prime minister so that the president would be tantamount to a prime minister under Westminster-style systems but would simultaneously act as head of state. (4) The fourth and final option is a purely symbolic state president acting as head of state. Under this system the president would have virtually no policy powers but would have significant and potentially important constitutional powers, particularly during the transition. An advantage of a symbolic presidency is that the head of state is seen to be above party politics and is therefore more easily able to represent the nation as a whole.

   The powers and functions of the cabinet can therefore only be delineated in relation to those of the state president. It is important that this be contained in the constitution, and that the means of appointing and dismissing cabinet ministers be clearly defined.

   Nothing is provided in the draft Constitution for the election of the State President: will the President be the leader of the largest party or will s/he be elected in a separate presidential election?

Specific Comments

[I will confine my comments to those Chapters which appear in full in the draft Constitution. I will not therefore respond in detail to Chapters 1, 2, 6, 7, 8, 10, 11 and 12. My comments on Chapter 3, *Fundamental Rights* will follow separately.]

Chapter 4: The Legislature

Section 4: Presumably the system of proportional representation for elections to the Legislature be the same as that envisaged under section 2 of Chapter 9 for the election of SPR legislatures in order to avoid confusion amongst the electorate. One question that presents itself is whether a system of proportional representation involves a two-stage election (as in France) or a one-off election (Britain and the USA)? Given the violence that might accompany the election it would seem to be desirable to to go for the latter option if at all possible.

Section 5: No provision is made for the election of a Deputy Speaker of the National Assembly, an omission that should be rectified.

Section 6 (1): In contrast to section 4 (Composition of the National Assembly) and section 2 (2) of Chapter 9 (SPR Legislatures), the method of proportional representation for election of the Senate is specified in this Section. For reasons of consistency consideration should be given to specifying the form of proportional representation for Senate elections in Schedule 3.

The composition of the Senate, i.e. exclusively composed of representatives from each SPR, appears to be a reasonable means of splitting power in a federal system. It does, however, have quite profound implications for democracy.

The core of the problem is to be found in sections 10 and 11 of this Chapter. Since the Senate is composed exclusively of SPR representatives who will not have been elected by the whole electorate it appears somewhat anomalous to enable ordinary legislation under section 10 (2) affecting the Republic as whole to be introduced in the Senate. Even more problematic is section 10 (3), because the Senate is empowered under this Section to reject legislation passed by a majority of the National Assembly. This goes too far in empowering SPRs and is essentially undemocratic on the basis that it is a fundamental principle of democracy that the most representative chamber should have the most extensive powers. A further problem with this system is that it undermines the conventional conception of an upper house in a bicameral system. Traditionally the upper house has the power to delay but not reject legislation; under the system envisaged in the draft constitution the two houses would appear to be co-equal even though the National Assembly is more representative than the Senate. The powers allocated to the Senate under section 12 (2) of this Chapter would seem to be an adequate safeguard of the interests of particular SPRs - any greater powers would privilege the SPRs at the expense of the Republic as a whole and appear to go down the road of confederation rather than federation.

Finally under this Section, could Senators not be elected by the electorate of each SPR at the same time as elections are held for the National Assembly?

Section 7: Provision should be made for the election of a Deputy President of the Senate.

Section 8: Consideration should be given to making this Section more specific by referral to the legislation that does or will regulate the immunities and privileges of Parliament and its members.

Section 9 (3): This section indirectly raises the issue referred to in relation to in relation to section 6 (1) above, namely that the National Assembly and the Senate are co-equal in their powers, which may be viewed as undemocratic.

Section 10 (2): Consideration should be given to permitting the introduction of ordinary legislation affecting the Republic as a whole in the National Assembly alone for the reasons discussed above. On this basis, the Senate should have a delaying power only, enabling it to refer legislation with which it disagrees back to the National Assembly for reconsideration. Should the National Assembly pass the bill after reconsideration it should become law otherwise the will of the majority can effectively be thwarted by the less representative Senate. In other words, the situation concerning ordinary legislation should be the same as that concerning Finance Bills under section 11 (4) of this Chapter.

Section 10 (3): This sub-section would become obsolete in the light of the recommendation concerning section 10 (2) above.

Section 11: While it is both conventional to do so and readily apparent why a distinction is made between ordinary legislation and finance bills, this section creates the somewhat anomalous position in which Finance Bills can be introduced only in the National Assembly, not least because it is precisely financial matters that SPRs are most likely to want to influence and to be concerned about. These comments are relevant also to Section 11 (3). This section should, however, be retained in its present form.

Section 12 (1): Since it is envisaged that the Senate will be composed exclusively of SPR representatives it would seem to be logical to give the Senate the power to reject bills concerning the exercise of the powers and functions allocated to SPRs under section 6 (1) of Chapter 9, not least as a *quid pro quo* for the changes suggested in the relative powers of the Senate and the National Assembly above. In other words, in matters concerning the exercise of the powers and functions of SPRs consideration should be given to providing the National Assembly with a delaying power (the Senate being unable to pass any legislation that contravenes the Constitution, the Fundamental Rights and/or the Constitutional Principles).

Section 12 (2): This is a particularly problematic section because, according to my calculations, no more than 5 senators from any particular SPR would effectively have a veto power over legislation applying to that SPR alone. The problem arises partially from the wording of this sub-section: does the word 'only' in line 2 refer, as it appears to, to a bill relating to a single SPR, or does it refer to a bill which relates to more than one SPR but which affects the powers and functions only of that SPR?

While it is apparent that a substantial safeguard of SPR interests is contemplated here it is inherently undemocratic that so few members of parliament could thwart the will of a majority of the Senate alone, never mind Parliament as a whole. This section indicates a deeper confusion, namely that between the powers of the national Legislature and SPR legislatures on the one hand, and between the powers and functions of national government (largely undefined at present) and SPR governments on the other. Assuming that the powers and functions of each level of government will be clearly defined, an alternative approach would be to preclude

Parliament from passing legislation affecting particular SPRs at all - this being the democratic prerogative of a particular SPR.

Put another way, if there exists a national interest causing such legislation to be introduced in the national Legislature it is difficult to comprehend why the Legislature should be deprived of its representative powers. If, on the other hand, there is no national dimension, such legislation would be better introduced in the SPR legislature.

Section 13: This section is satisfactory subject to the comments about the Constitutional Principles below.

Chapter 5

Section 1: A minor suggestion is that Constituent Assembly be used instead of CMB. This body will play a central role in the transitional period and the way in which it is referred will become common currency in the media, etc. The use of Constituent Assembly rather than CMB makes it clearer to the public at large what body is being referred to and what role it has.

Section 2: Please see the comments below on the Constitutional Principles.

Section 2 (4): There is a typographical error: 'of' in line 3 should read 'or'.

Section 3 (2): Consideration should be given to making clear that the panel of five independent constitutional experts will operate in a purely technical and advisory capacity as envisaged in section 4 (3). It is important that politics does not become subordinate to law or lawyers - in other words, that the will of the elected representatives of the people remains paramount.

Section 4 (8): This section potentially undermines the concept of a five-year transitional period. It is not clear from this section what will happen if a general election is held: will the timetable for the constitution making process envisaged in section 4 be adhered to, i.e. that the new parliament will have two years to adopt a new constitution, but that the overall length of the transition will still be five years? Or will the transitional period be extended for five years from the new general election? This should be clarified in this sub-section.

Section 5 (2): This section raises the possibility that the majorities in Chapter 5 (specifically those in sub-sections 4 (2) and 4 (7)) should be open to amendment by this process since this raises the possibility that the initial draft of the new constitutional text could be adopted by a simple majority of the CMB.

Chapter 8

In the absence of the detailed provisions in this Chapter it is of course impossible to comment. The existence of a Human Rights Commission and a Constitutional Court does, however, suggest the potential for conflicts between the powers and functions of the two bodies over the fundamental rights unless their respective roles are clearly defined.

Chapter 9

'SPRs' should appear in the title of this Chapter in full, *viz.* States, Provinces and Regions and, for sake of clarity, one of these terms should be adopted as soon as possible.

Section 2 (3): There is no obvious reason why the number of seats in each SPR legislature should be determined by dividing the total number of votes cast by a figure of 50,000. This may, in heavily populated SPRs, give rise to very large legislatures, which may be cumbersome and overly bureaucratic.

Section 3 (1): Is there any reason why the size of SPR executives should be confined to a maximum of ten members? Is this not something that might justifiably be left to each SPR legislature to determine? In light of the long list of powers and functions of SPR Governments contained in section 6 (2) it appears that a maximum of ten executive members may be too low.

Section 5 (3): This section is unclear because it assumes that existing laws referred to in sub-section 5 (1) are in need of consolidation and unification.

Section 6 (1): As argued above, the functions and powers of SPRs cannot logically be determined in the absence of the determination of the powers of the national government and the state president. There is a

potential contradiction between this sub-section and sub-section 6 (2): are the functional areas in the latter an exhaustive list or a mimimum list of functional areas over which SPRs are entitled to the allocation of powers, and which can be added to under this sub-section. Also problematic is the question of the extent to which the powers in sub-section 6 (2) are fully devolved or not; concurrent powers in a number of these areas would appear to provide a recipe for conflict and litigation. This section must presumably be read in the light of Constitutional Principle XXIV (1), which is also likely to generate litigation (see below).

In the case of a dispute between the National Executive and an SPR and/or the failure of the CMB to approve the determination of SPR legislative and executive competence should not recourse be provided to the Constitutional Court.

Section 6 (2): The comments on sub-section 6 (1) above notwithstanding, it is difficult to conceive how functional areas such as education will not fall under the jurisdiction of both central and SPR government.

Section 6 (4): In light of the thrust of this chapter and the draft constitution as a whole should not an SPR that initially declines specific powers and functions be able to demand (rather than request) the expansion of its competence at a later stage? If this is not the case disparities will arise between SPRs which may not necessarily be remedied. In addition, this sub-section as currently worded gives the National Executive the kind of powers over SPRs which the overall thrust of the draft constitution appears designed to avoid.

Section 6 (5): There is a potential conflict between this sub-section and sub-section 6 (4) unless it is made clear that the determination of the legislative and executive powers of an SPR under sub-section 6 (1) is theoretical and that the actual powers of an SPR will be governed by sub-section 6 (1) read in conjunction with sub-section 6 (4). If this is not the case a situation could conceivably arise in terms of which the expansion of SPR powers envisaged in sub-section 6 (4) could be construed as contrary to this sub-section.

Section 7 (1): The wording of this sub-section is problematic but may be unavoidably so. The problem lies in the word 'equitable', which is essentially vague and seems likely to give rise to litigation. It is envisaged under sub-section 7 (2) that the National Assembly shall decide what is equitable on the recommendation of the Financial and Fiscal Commission. This appears to give rise to a potential conflict with the provisions of sub-section 12 (2) of Chapter 4, which provides that 'any bill which *affects* the powers or functions allocated...to a particular SPR *only* [see above], shall be approved by the National Assembly *and* the Senate'. It is almost inconceivable that the amount of moneys allocated to an SPR would not be held to *affect* its powers and functions and it is therefore not difficult to envisage a challenge from any SPR that believes that the share granted to it is inequitable. The resolution of such a challenge by the Constitutional Court would be problematic because it would virtually give unelected judges a large measure of control over the disbursement of national resources, and this is potentially undemocratic.

Taxation/Fiscal Policy

Section 7 (6): The draft constitution envisages tax raising powers at three levels, *viz.* national, SPR and local levels. Careful consideration should be given to the overall levels of taxation that may emerge from such a system and the implications of this for the society as a whole and for democracy. Specifically, will/should the Parliament be able to set an overall limit for taxation which SPR and local government should not exceed? This is important because levels of taxation will affect national economic activity, something that is specifically envisaged in sub-section 7 (7). Secondly, should Parliament be allowed to set SPR and local government tax levels - is this not something that should be decided at those levels through the ballot box?

Whatever is decided, the wording of this sub-section is likely to give rise to litigation over the interpretation of the word 'unreasonably' in line 3. It is suggested that this sub-clause be amended or deleted.

Section 8 (1): Laws made by SPR legislatures shall be valid not only if they are not repugnant to any Act of Parliament but also - and this should be included in this sub-section - so long as they are not repugnant to the Constitution, the Fundamental Rights and the Constitutional Principles.

Section 9: The areas in which an SPR legislature is not competent to make laws is inherently vague in the absence of a definition of the powers and functions of the National Executive.

Section 10 (5): This sub-section raises an important problem, namely that the adoption by an SPR prior to the adoption of a new constitutional text potentially pre-empts the construction of the new constitutional dispensation and hence is potentially undemocratic. Consideration should be given to amending this sub-section to take consideration of the following points: (i) the number, status, boundaries and powers and functions of SPRs be capable of being finally decided in the new constitutional text (*cf.* sub-section 14 (2)); (ii) it should be

made clear that any SPR constitution adopted prior to the adoption of a new constitutional text is provisional, will not come into operation if it conflicts with the new constitutional text, and will require approval by a two thirds majority of both houses (jointly or separately, whichever is deemed to be most appropriate). The importance of this lies in the fact that 'facts' are far harder to undo than law and the very existence of SPR constitutions may, like the interim bill of rights, ultimately prove to be a *fait accompli*.

This section gives rise to the potentially anomalous situation in which three different types of SPR constitution are in existence: those currently in existence (e.g. for the TBVC states), those adopted and brought into force by SPR legislatures during the transitional period, and, under sub-section 10 (7), those adopted by SPR legislatures but not brought into force. It would be both more democratic and more efficient to treat all SPR constitutions as provisional prior to the adoption of a new constitutional text.

Section 14 (1)(b): It is difficult to foresee how the Commission on SPR Government will be able to make recommendations to the national government regarding the extent of the legislative and executive competence of SPRs in the absence of a definition of the powers of the national government, including those of the state president.

Section 14 (2)(e): The final delimitation of powers and functions between national and SPR governments is difficult in the absence of a definition of the powers and functions of the national government. These will presumably be made clear in the new constitutional text, but the potential problem that arises in the absence of such a set of definitions in this draft constitution is that the SPR tail will wag the national dog and that if SPR powers and functions are defined in the absence of those of the national government they are likely to be more difficult to remove.

Section 14 (2)(f): It will be politically dangerous for the ANC to enter an election under a constitution that contains a sub-section such as this. Since taxation and public expenditure are likely to be central issues in the election (witness the response to the idea of a wealth tax) and both the media and our political opponents are likely to attempt to portray the ANC as a high taxing, big spending party, it is to the ANC's advantage that the greatest possible clarity exists about the fiscal powers of the three levels of government.

Section 14 (2)(g): Just as the powers and functions of SPR government cannot be defined in isolation from those of national government, those of local government are equally dependent upon the prior definition of national and SPR government - particularly in terms of Constitutional Principle XXIV (1).

Section 14 (3): Consideration should be given to including the provisions of this sub-section in a Schedule rather than in the Constitution itself.

Section 14 (3)(g): This is inherently vague.

Section 15 (1): Consideration should be given to the inclusion after the words 'State President' (and depending upon the definition of the powers of the national government and the state president) of the following words 'on the advice of the National Assembly' or 'on the advice of the national executive'.

Section 15 (5): Does this phraseology imply that it would acceptable for members of polical parties who resign from those parties to be appointed as Commissioners? If so, this would dilute if not undermine the intention of this sub-section.

Section 16 (2)(b): Consideration should be given to merging this sub-section with sub-section 16 (2)(a) by adding it at the end.

Section 17 (1): Consideration should be given to replacing the reference to a judge of the Supreme Court with the title of the legislation under which a Commissioner might be required to vacate his/her post.

Section 17 (2): Consideration should be given to replacing 'by reason of the effluxion of time' with 'through the expiry of the term of his/her appointment by the State President under section 15 (2)' or words to similar, more explicit effect.

Section 22: Consideration should be given to inclusion, after 'The State President' of 'on the advice of the National Assembly' (or national executive, whichever is deemed most appropriate).

Schedule 1: Constitutional Principles

A lot of the phraseology in Schedule 1 is vague and thus potentially litigious. Such terminology should be eschewed wherever possible. Examples include 'responsiveness and openness' (Principle II), 'competent'

(Principle III), 'and in general' (Principle V). Since these terms have no established legal meaning they simply invite litigation.

There is a typographical error in the spelling of safeguard in line 2 of **Principle IV**.

Does 'and in general' in **Principle V** mean that some elections will be held under systems other than proportional representation? If so, which elections, under what system, and who will decide?

There is a grammatical error in **Principle VIII**, where 'their' should read 'its'.

Consideration should be given to replacing 'self-determination' with 'association' in **Principle IX**. Self-determination is a concept that carries a specific meaning. Since the Constitutional Principles are designed to guide the Constitutional Court in resolving challenges and disputes, and since judges the world over have a nasty habit of reading texts literally even when, as here, the context in which they appear indicates otherwise, it would be wise to remove the temptation for any SPR government to use the term as a pretext for secession. It is also simply more accurate to use 'association' when that is what is meant.

The presence of the word 'equitable' in **Principle XI** is an invitation to litigation because no legal system will ever be perceived to be fair by all citizens. Consideration should be given to the inclusion of a reference to the rule of law instead.

In **Principle XII** consideration should be given to clarifying which body of law should take precedence in the case of a clash between indigenous law and common law or statute.

In light of the presence of Principle V, **Principle XIII** appears to be redundant since multiparty democracy with regular elections presumably includes the participation of minority parties in the legislative process. At best, this Principle is vague.

Principle XV is poorly constructed. Does it mean that there shall be three levels of government? Or does it mean that the three levels of government should actually be coherently structured?!

Principle XVI is difficult to understand. Should it be taken to read that there shall be democratic representation at each level of government *unless* this conflicts with the traditional leadership protected under Principle XII? Since Principle XII contains two clauses, Principle XVI becomes vague to say the least.

Is it wise, under **Principle XVII**, to invite the Constitutional Court to decide what constitutes financial 'viability' and 'legitimate' regional autonomy? This would appear to be the almost inevitable outcome of the inclusion of such terms.

In **Principle XVIII** consideration should be given to placing a full stop after 'SPRs' and deleting the remainder of the wording in this Principle.

What, in **Principle XXI**, is meant by 'different categories of local government'? How many are envisaged and will this become clear in Chapter 10 of the transitional Constitution?

In **Principle XXII** the word 'equitable' is once again inherently contentious and hence potentially litigious. The same applies to **Principle XXIII**. Who will decide what is equitable and on what basis?

Principle XXIV (1) contains what, in the light of the notorious Maastricht Treaty on European union has become known as the concept of 'subsidiarity', namely that powers should be devolved to the level of government at which they can most effectively be exercised. Leaving aside the fact that what is meant to be understood by 'effectively' is open to dispute, it is virtually impossible to contemplate the operation of such a Principle in a constitution in which the powers, functions, duties and structures of national government are not defined. Unless it is clearly stated that defence, for example, is a function of national government it is not impossible to envisage an attempt by an SPR government to argue that control over defence can be most effectively exercised at SPR level. Secondly, but just as importantly, it is necessary to be very clear that this Principle constitutes an invitation to a Constitutional Court to decide that control over education, agriculture and environmental affairs, to cite but three examples from section 6 (2) of Chapter 9 which have national implications, is best exercised at SPR or local level. This would effectively rob the national government of control over all or part of these matters and would, for this reason be undemocratic. Urgent consideration should be given to either (i) deleting or amending this Principle or (ii) clearly defining the powers, functions and duties of national government.

In **Principle XXIV (2)**, an adequate definition of the 'functional or institutional integrity' of SPRs cannot be presumed in the absence of a clear definition of the powers, functions, duties and structures of national government.

In **Principle XXIV (3)**, what constitutes an 'essential national standard' and who will decide? While the general thrust of my argument so far has been that the draft Constitution contains an overwhelming bias in favour of SPRs at the expense of national government, it may well be argued by SPRs that what the remainder of the Constitution gives with one hand, this Principle takes back with the other. If the IFP returns to the MPNP on the basis of this draft Constitution it is not difficult to envisage a rejection of this Principle. Nonetheless, this Principle is one of the few parts of the Constitution that is consistent with democratic principles and should be retained.

Urgent consideration should be given to the inclusion of a principle concerning the powers, duties, functions and structures of national government (including those of the State President) along the lines of Principle XIX but going beyond the provisions contained in **Principle XXIV (5)**. In addition, the provisions of this Principle should be incorporated in a revised text of the draft Constitution as a precondition for its acceptance by the ANC.

In **Principle XXIV (6)** the words 'predominantly, if not wholly', which are vague, should be deleted. After the words 'national government' consideration should be given to adding the words ', which may delegate some of these powers to SPR and/or local government'.

Principle XXIV (9.2) is vague.

Principle XXIV (12) raises once again the persistent problem that in the absence of a clear definition of the powers of national government it is impossible to specify which powers are allocated specifically to the national government or to an SPR so that the draft Constitution is virtually incapable of meaningfully specifying the allocation of ancillary powers and functions under this Principle.

The provisions of **Principle XV** should be one of the Fundamental Rights in Chapter 3 rather than a Constitutional Principle.

Consideration should be given to the inclusion of the words 'impartially and' after 'their powers' in line 3 of **Principle XVII**.