

**EMBARGOED UNTIL TABLING IN THE
NEGOTIATING COUNCIL**

**TWENTY FIRST REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
8 NOVEMBER 1993**

SCHEDULE 7

Constitutional Principles

(As presented to the Negotiating Council in the Draft Outline of the Constitution on 20 August 1993)

See page 7 for the proposed revised text.

I¹

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

III

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

IV

The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

1. See par 2.1 of our Fourth Supplementary Report on Constitutional Principles.

V

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

VI

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

VII

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

VIII

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

IX

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

X

All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the Constitution.

XI

The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

XII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

XIII

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XIV

Amendments to the Constitution shall require special procedures involving specified majorities.

XV

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

XVI

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

XVII

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate SPR autonomy and cultural diversity.

XVIII²

The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPRs shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPRs, alternatively, if there is such a chamber, a specified majority of a chamber of Parliament composed of SPR representatives, and if the amendment concerns specific SPRs only, the approval of the legislatures of such SPRs will also be needed.

XIX

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

2. See pages 2-3 of our Fourth Supplementary Report on Constitutional Principles.

XX

The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XXI

National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XIX shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXII

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

XXIII

A Financial and Fiscal Commission, representing inter alia each of the SPRs, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, economic disparities between the SPRs as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPRs.

XXIV

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

1. The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.³
2. The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPRs.
3. Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the

3. See page 4 of our Fourth Supplementary Report on Constitutional Principles.

prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

4. The essential principles of the Constitution, including the fundamental rights contained therein, shall apply to all organs of the state at all levels of government.
5. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.
6. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
7. Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.
8. The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
9. SPR governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -
 - 9.1 for the purposes of SPR planning and development and the delivery of services; and
 - 9.2 in respect of aspects of government dealing with the specific socio-economic and cultural needs and the general well being of the inhabitants of the SPR.⁴
10. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

4. See pages 4-5 of our Fourth Supplementary Report on Constitutional Principles.

11. In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.
12. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to an SPR government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or SPR governments.

XXV

Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.

XXVI

The independence and impartiality of a Commission for Administration, a Reserve Bank, and Auditor-General and Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

XXVII

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their duties and functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.⁵

5. See page 5 of our Fourth Supplementary Report on Constitutional Principles.

SCHEDULE 7
Constitutional Principles
(Proposed revised text)

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.⁶

III

All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution.⁷

IV

The Constitution shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.⁸

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.⁹

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6. Compare the original Principle II and XXIV 4. The prohibition of all forms of discrimination is dealt with in Principle IV below.
 7. Compare the original Principle X. The words "which shall be provided for" have been inserted.
 8. Taken from the original Principle II.
 9. Compare the original Principle XI. The words "The principle of" have been deleted in the second sentence. It should be noted that the equivalent draft provision of the draft constitutional text, clause 8(3), as developed by the Technical Committee on Fundamental Rights during the Transition and adopted by the Negotiating Council, reads as follows:

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

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.¹⁰

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.¹¹

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and in general, proportional representation.¹²

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.¹³

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.¹⁴

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.¹⁵

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.¹⁶

10. The original Principle III.

11. "Appropriately qualified" has been substituted for "competent" in the original Principle IV.

12. The original Principle V.

13. The original Principle VI.

14. The original Principle VII.

15. The original Principle VIII.

16. The original Principle IX.

XIII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.¹⁷

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.¹⁸

XV

Amendments to the Constitution shall require special procedures involving special majorities.¹⁹

XVI

Government shall be structured at national, provincial²⁰ and local levels.²¹

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.²²

XVIII²³

The powers, boundaries²⁴ and functions of national and provincial governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority²⁵ of the legislatures of the provinces, alternatively, if there is such a chamber, a special²⁶ majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

17. The original Principle XII.

18. The original Principle XIV.

19. The word "special" is substituted for "specified" in the original Principle XIV.

20. We have, as in our Eighteenth Report, replaced "SPR" with "province(s)" and "provincial" throughout this revised text of Schedule 7.

21. The original Principle XV.

22. The original Principle XVI.

23. Compare the original Principle XVIII.

24. The word "boundaries" is added in line with the second sentence of the Principle.

25. Consideration should be given to specify the majority in order to clarify the meaning of this Principle.

26. The word "special" is substituted for "specified" in the original Principle XVIII.

XIX²⁷

The powers and functions of the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes²⁸ national unity, legitimate provincial autonomy and cultural diversity.

XXI²⁹

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

1. The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.³⁰
2. Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.
3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

27. The original Principle XX.

28. Consideration should be given to the question whether it is desirable to "promote" cultural diversity rather than "permit" it.

29. Compare the original Principle XXIV. Paragraphs 2, 4 and 11 have been inserted in substantive principles and the remaining paragraphs have been renumbered accordingly.

30. See page 4 of our Fourth Supplementary Report on Constitutional Principles.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
5. Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.
6. The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.
7. provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia -
 - 7.1 for the purposes of provincial planning and development and the delivery of services; and
 - 7.2 in respect of aspects of government dealing with the specific socio-economic and cultural needs and the general well being of the inhabitants of the province.³¹
8. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.
9. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.³²

31. See pages 4-5 of our Fourth Supplementary Report on Constitutional Principles.

32. Taken from the original Principle XXIV 2.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.³³

XXVI

A framework for local government powers, duties, functions and structures shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and in provincial legislation or in both.³⁴

XXII

National and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XVIII shall make provision for appropriate fiscal powers and functions for different categories of local government.³⁵

XXIII

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.³⁶

XXIV

A Financial and Fiscal Commission, representing inter alia each of the provinces, shall recommend equitable fiscal and financial allocations to the provincial governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.³⁷ The determination of national economic policies, and the power to promote inter-provincial commerce and protect the common market in respect of the mobility of goods, services, capital and labour, shall be entrusted to the national government.³⁸

33. Taken from the original Principle XXIV 11.

34. The original Principle XIX. The words "and/or SPR legislation" have been replaced with "or in provincial legislation or in both" to improve the language.

35. The original Principle XXI.

36. Compare the original Principle XXII.

37. Compare the original Principle XXIII.

38. Compare the original Principle XXIV 8.

XXV

Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.

XXVI³⁹

The independence and impartiality of a Commission for Administration, a Reserve Bank, and Auditor-General and Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

XXVII⁴⁰

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their duties and functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXVIII⁴¹

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

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39. Compare the original Principle XXVI.

40. Compare the original Principle XXVII and our Fourth Supplementary Report.

41. Taken from the Addendum to our 19th report.