

conformity with such policy, and may, if the Member fails to do so and after consultation with him or her and the leader of his or her party, remove such Member from office.

(4) If a vote of no confidence is passed by the Provincial Legislature in the Premier and the Executive Council, the Premier shall dissolve the Provincial Legislature and call an election.

(5) If a vote of no confidence is passed by the Provincial Legislature in the Premier, but not the Executive Council, the Premier shall resign, and the vacancy shall be filled in accordance with the provisions of section 114(1).

(6) If a vote of no confidence is passed by the Provincial Legislature in the Members of the Executive Council, but not the Premier, the Premier shall either -

(a) reconstitute the Executive Council in accordance with the provisions of section 115; or

(b) dissolve the Provincial Legislature and call an election.

(7) Should the Provincial Legislature be dissolved in accordance with the provisions of this section, the Premier shall continue to hold office until a Premier is elected in terms of section 114, and the Members of the Executive Council shall continue to hold office until a new Executive Council is appointed in terms of section 115.

Remuneration of Premiers, Members of the Executive Council and Members of Provincial Legislatures

117A. The Premier, Members of an Executive Council and Members of the Provincial Legislature shall be paid out of and as a charge on the Provincial Revenue Fund such salary and allowances and pensions, as may be determined from time to time by resolutions of the Provincial Legislature.

Legislative competences of provinces

118. (1) A provincial legislature shall, subject to the provisions of subsections (3) and (4), have concurrent competence with Parliament to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 9.

(2) The legislative competence referred to in subsection (1) shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

(3) An Act of Parliament which deals with a matter referred to in subsections (1) and (2) shall prevail over a provincial law inconsistent therewith only to the extent that -

- (a) it deals with a matter that cannot be regulated effectively by provincial legislation; or
- (b) it deals with a matter that requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic; or
- (c) it is necessary to set minimum standards across the nation for rendering of public services;
- (d) it is necessary for the determination of national economic policies, the maintenance of economic unity, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour or the maintenance of national security; or
- (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that they are, expressly or by necessary implication, inconsistent.

SCHEDULE 9

Agriculture

Casinos, racing, gambling and wagering

Cultural affairs

Education at primary and secondary level (the matter of tertiary education stands over)

Health services

Housing

Language policy and language/s as languages of record for use in provincial administrations

Local government subject to the Provision of Chapter 10

Nature conservation, excluding national parks and national botanical gardens and marine resources

Police subject to the provisions of the appropriate chapter

Provincial public media

Public Transport

Regional planning and development

Road traffic regulation

Roads

Tourism

Trade and industrial promotion

Traditional authorities

Urban and rural development

Welfare services

The following reformulation of section 61 is submitted for consideration:

61. (1) Save for the provisions of subsections (2) and (3) and of Chapter 5, an amendment to this Constitution shall be passed by a two thirds majority of the total number of members of the National Assembly and the Senate sitting in joint session.

(2) No amendment of this Constitution shall be permissible in so far as it is designed to detract, directly or indirectly, from the essence of the Constitutional Principles contained in Schedule 7.

(3) An amendment of section 118 shall be passed by a two thirds majority of the total number of members of the National Assembly and of the total number of members of the Senate: provided that the legislative and executive competences of a province shall not be amended without the consent of its legislature.

Continuation, transfer and consolidation of existing administrative responsibility

REFERRED TO PC/BILATERALS

119. (1) The National Government and provincial governments shall co-operate with each other, and shall, each within their respective areas of competence, rationalise the administrations and institutions referred to in subsection (3) (a), and establish administrations and employ the personnel needed for the performance of their functions.

(2) The National Government and provincial governments in rationalising the administrations and institutions as contemplated in subsection (1) shall, in the event of any disagreement between them, have regard to the advice and recommendations of the Commission on Provincial Government established in terms of section 127 of this Constitution.

(3) Until changes are made as a result of the rationalisation or consolidation of administrations and institutions as contemplated in subsection (1) -

- (a) Administrations and institutions of Provincial Governments, selfgoverning territories, and Transkei, Bophuthatswana, Venda and Ciskei, if reincorporated, which immediately before the coming into force of this Constitution were established within the boundaries of a province, and performed functions within such boundaries, shall continue to perform such functions;
- (b) The Government of the province concerned shall be responsible for and shall exercise control over the performance of those functions referred to in subparagraph (a) and which fall within the scope of the functional areas referred to in sections 118(1) and 118(4), and the National Government shall be responsible for and exercise control over the performance of all other functions;
- (c) A department of state of the Republic of South Africa referred to in section 24(1) of the *Republic of South Africa Constitution Act, 1983*, and which was immediately before the coming into force of this Constitution responsible for the performance of functions within the boundaries of a province, shall continue to be responsible for the performance of such functions;
- (d) The National Government shall be responsible for the performance of and shall exercise control over the functions referred to in subparagraph (c);

- (e) Personnel of all administrations and institutions referred to in this section shall continue in the posts they occupied immediately before the coming into operation of this Constitution, and shall continue to perform the functions which they previously performed;
- (f) The personnel referred to in subparagraph (e), who perform functions in terms of that subparagraph and subparagraph (b) on the instructions of a provincial government, shall be deemed to be in the employ of, and shall be entitled to be remunerated by it on the same basis as they were previously being remunerated, for as long as they continue to perform such functions on the instructions of that provincial government;
- (g) The personnel referred to in subparagraph (e) who perform functions in terms of that subparagraph and subparagraphs (b) and (d) on the instructions of the National Government, shall be deemed to be in the employ of and shall be entitled to be remunerated by the National Government, on the same basis as they were previously being remunerated, for as long as they continue to perform such functions on the instructions of the National Government.

Administration of existing laws

[Finalisation of this provision is subject to the final wording of section 119.]

120. (1) Existing laws applicable in a province governing the operation of the institutions for which the provincial government assumes responsibility and control in terms of section 119, shall continue to govern those matters until they are amended or repealed by the competent legislature, and references in such laws to any government or organ of government shall be deemed to be references *mutatis mutandis* to the government or relevant organ of government of the province.

(2) The powers, functions and obligations arising from the provisions of the laws referred to in subsection (1), shall vest *mutatis mutandis* in the relevant organ of the province.

(3) Parliament and the legislatures of the provinces shall, each within their respective areas of competence, undertake the consolidation and unification of the laws referred to in subsection (1) as expeditiously as possible.

Provincial finance and fiscal affairs

121. (1) A province shall be entitled to an equitable share of revenue collected nationally to assist it to provide services and to execute its powers and functions.

(2) The equitable share of revenue referred to in subsection (1) shall consist of

(a) a percentage, fixed by Act of Parliament, of income tax on individuals which is collected within its boundaries; and

(b) a percentage, fixed by Act of Parliament, of value added tax which is collected within its boundaries; and

(c) other conditional or unconditional allocations of national revenue made in terms of this section.

(3) The percentages referred to in subsection (2)(a) and (b) shall be of general application to all provincial governments, and shall be fixed reasonably after taking into account the national interest and recommendations of the Financial and Fiscal Commission.

(4) Allocations made in terms of subsection 2(c) shall be determined by Act of Parliament, with due regard to the national interest and after taking into account -

(a) the provision that has to be made for interest and other payments in respect of the national debt; and

(b) the different fiscal capacities, fiscal performances, needs and economic disparities within and between provinces, as well as the developmental needs, administrative responsibilities and other legitimate interests of the provinces, and any other objective criteria identified by the Financial and Fiscal Commission; and

(c) the legitimate needs and interests of the national government; and

(d) the recommendations of the Financial and Fiscal Commission.

(5) Provincial legislatures may raise other taxes, surcharges or levies, provided that:

- (a) they are authorised to do so by Act of Parliament, passed after taking into account the recommendations of the Financial and Fiscal Commission; and
 - (b) they do not discriminate against non-residents of that province who are South African citizens.
- (6) Provincial legislatures shall be competent to enact legislation authorising the imposition of user charges: provided that -
- (a) the criteria to be taken into account in raising such charges may be regulated by Act of Parliament in accordance with recommendations made by the Financial and Fiscal Commission; and
 - (b) they do not discriminate against non-residents of that province who are South African citizens.
- (7) A provincial government -
- (a) shall not be competent to raise loans for current expenditure: provided that loans may be raised for bridging finance, subject to such conditions as may be prescribed by Act of Parliament passed after taking into consideration recommendations of the Financial and Fiscal Commission;
 - (b) shall be competent to raise loans for capital expenditure: provided that it does so within the framework of norms and conditions prescribed by Act of Parliament passed after taking into consideration recommendations of the Financial and Fiscal Commission.
- (8) A provincial government may not guarantee loans, unless:
- (a) the Financial and Fiscal Commission has verified the need for a guarantee and recommended that it be given; and
 - (b) the giving of the guarantee has been approved by a resolution of Parliament.
- (9) Revenue allocations made by the national government to local authorities shall ordinarily be made via the provincial government within whose jurisdiction the local government falls.

(10) Allocations from national revenue to provincial governments and local authorities shall be made through appropriation acts passed in accordance with the provisions of this section.

(11) There shall be established in each province a Provincial Revenue Fund into which shall be paid all revenue raised by or accruing to the provincial government.

(12) No money may be withdrawn from a Provincial Revenue Fund otherwise than by an appropriation made in accordance with the provisions of law.

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The following provisions should be inserted in Chapter 11 (Finance):

- x. The national government may not guarantee any loans, unless -
- (a) the guarantee is an explicit requirement demanded by an international financial institution; and
 - (b) the Financial and Fiscal Commission has verified the need for the guarantee and has recommended that it be given.

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Effect of laws of provincial legislature

122. *Deleted in view of the reformulation of section 118.*

Recommendations to Parliament

123. A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws.

Provincial Constitutions

REFERRED TO PC/BILATERALS

[To be revisited together with the deadlock-breaking mechanisms (section 68).]

124. (1) A provincial legislature may, subject to the provisions of this Constitution, adopt a constitution for the province by a two thirds majority of all its members.

(2) A provincial legislature may make such arrangements as it deems appropriate for the negotiation and drafting of a provincial constitution.

(3) A provincial constitution adopted by a provincial legislature shall not be inconsistent with the Constitutional Principles enumerated in Schedule 7 or the provisions of the new constitutional text adopted in terms of Chapter 5.

(4) A provincial constitution shall be developed in consultation with the Commission on Provincial Government established in terms of section 127.

(5) A provincial constitution adopted prior to the adoption of a new constitutional text in terms of Chapter 5 shall be approved and come into operation in terms of a resolution of the Constitutional Assembly passed by two thirds of its members.

(6) A provincial constitution adopted by a provincial legislature may be referred to the Constitutional Court by the chairperson of the Constitutional Assembly after being petitioned by one third of the members of the Constitutional Assembly in order to obtain an opinion from the Court as to whether such constitution, if adopted, would conform with the Constitutional Principles.

(7) A provincial constitution which is not in force prior to the new constitutional text intended in Chapter 5, shall be approved and come into operation in terms of such new constitutional text.

Development of constitutional provisions regarding provincial Government

REFERRED TO PC/BILATERALS

125. (1) The development of a system of provincial government shall receive the priority attention of the Constitutional Assembly and in this regard it shall take into consideration the recommendations of the Commission on Provincial Government referred to in section 127 and the views expressed thereon by the executives of the various provinces.

(2) The Commission's recommendations to the Constitutional Assembly regarding any matter that falls within the ambit of its objects in terms of section 128 shall include draft provisions for the national Constitution.

(3) The Constitutional Assembly shall deal with such draft provisions in the same manner as it is required to deal with other constitutional provisions.

(4) Draft provisions recommended by the Commission which are not adopted by the Constitutional Assembly, shall lapse, except if a majority of the members of the Constitutional Assembly present and voting resolve that the recommended provisions be referred back to the Commission for further consideration.

(5) Draft provisions referred back to the Commission may again be presented to the Constitutional Assembly, provided that if amended in one or more substantive respects, the provisions of this section regarding the acceptance, rejection or referral of the recommendations of the Commission shall apply *mutatis mutandis*.

Election of new provincial Governments

REFERRED TO PC/BILATERALS

126. A provincial government may at any time after the coming into force of a provincial constitution contemplated in section 124 or of the constitutional dispensation contemplated in section 125, petition the Constitutional Assembly to determine by resolution that an election for the establishment of a new provincial legislature and executive in that province, or in a province incorporating that province in whole or in part, shall be held.

Commission on Provincial Government

Establishment of Commission on Provincial Government

127. A Commission on Provincial Government shall be appointed by the President in terms of this Constitution within 30 days of its coming into operation.

Objects and functions of the Commission

128. (1) The objects and functions of the Commission regarding the establishment of provincial government in terms of this Chapter are to -

- (a) advise the National Government and provincial governments on the establishment and consolidation of administrative institutions and structures

in the provinces and on any matter arising out of the provisions of section 118; and

- (b) make recommendations to the National Government and provincial governments on the rationalisation of statutory enactments and public sector resources directed at facilitating the introduction and maintenance of a system of provincial government.

(2) The objects and functions of the Commission regarding the constitution making process provided for in Chapter 5 are to submit recommendations to the Constitutional Assembly in the form of draft constitutional provisions regarding -

- (a) the finalisation of the number and the boundaries of the provinces of the Republic;
- (b) the constitutional dispensations of such provinces, including the constitutional structures within such provinces as well as the method of their election and their authority, functions and procedures;
- (c) measures, including transitional measures, that provide for the phasing in of new provincial constitutional dispensations;
- (d) the final delimitation of powers and functions between national and provincial institutions of government with due regard to the criteria that are set out in subsection (3);
- (e) fiscal arrangements between the institutions of national government and those of provincial government;
- (f) the powers and functions of local governments; and
- (g) any matter which the Commission considers to be relevant or ancillary to its functions.

(3) In carrying out its functions the Commission shall, *inter alia*, take into consideration -

- (a) The provisions of this Constitution;
- (b) The Constitutional Principles enumerated in Schedule 7;

- (c) Historical boundaries, including those set out in Schedule 1, former provincial boundaries, magisterial and district boundaries and infrastructures;
- (d) Administrative considerations, including the availability or non-availability of infrastructures and nodal points for services;
- (e) The need to rationalise existing structures;
- (f) Cost-effectiveness of government, administration and the delivery of services;
- (g) The need to minimise inconvenience;
- (h) Demographic considerations;
- (i) Economic viability;
- (j) Developmental potential;
- (k) Cultural and language realities.

Constitution and impartiality of the Commission

129. (1) The Commission shall be appointed by the President for the period during which this Constitution is in force, and shall consist of not less than 10, nor more than 15 full-time members, as the President may determine.

(2) At least one member of the Commission shall be appointed from each province with the approval of the Premier of the province.

(3) Members of the Commission shall perform their duties fairly, impartially and independently.

(4) Members shall not perform or commit themselves to perform remunerative work outside their official duties.

(5) A member of the Commission shall not hold office in any political party or political organisation.

(6) It shall be an offence to influence or attempt to influence a member to act otherwise than in accordance with the provisions of subsection (3).

Chairperson and deputy chairperson

130. (1) The President shall designate one of the members of the Commission as chairperson and another as deputy chairperson.

(2) (a) When the chairperson is absent or not able to perform his or her functions as chairperson, or where there is a vacancy in the office of chairperson, the deputy chairperson shall act as chairperson, and if the chairperson as well as the deputy chairperson are absent or not able to perform the functions of the chairperson, the Commission shall elect another member to act as chairperson.

(b) Such member shall while acting as chairperson have all the powers and perform all the duties of the chairperson.

Vacation of office and filling of vacancies

131. (1) Members of the Commission shall vacate their offices if they resign or if they become disqualified to hold office for the same considerations and in the same fashion as would apply to a judge of the Supreme Court.

(2) If a member of the Commission ceases to hold office, the President may, subject to section 129 appoint a person to fill the vacancy.

Meetings of the Commission

132. (1) The first meeting of the Commission shall be held within 30 days of its appointment at a time and place to be determined by the Chairperson, and subsequent meetings will be held at a time and place determined by the Commission or, if authorised thereto by the Commission, by the Chairperson.

(2) A quorum for a meeting of the Commission shall not be less than one half of all its members.

(3) A decision of a majority of the members of the Commission shall constitute a decision of the Commission and in the event of an equality of votes the chairperson shall have a casting vote in addition to his or her deliberative vote.

(4) All the decisions of the Commission shall be recorded.

Committees

133. (1) The Commission may establish committees from among its number.

(2) Any such committee shall consist of such number of members as the Commission may determine.

(3) The Commission shall designate one of the members of the committee as chairperson thereof, and if any such chairperson is absent from a meeting of the committee the members present shall elect one from among their number to act as chairperson.

(4) (a) The Commission may, subject to such directions as it may issue from time to time-

(i) delegate any power granted to it by or under section 128 to such a committee; and

(ii) grant authority that a duty assigned to it by or in terms of section 128 may be performed by such a committee.

(b) The Commission shall not be divested of a power so delegated and the performance of a duty so authorised, and may amend or set aside any decision of a committee.

Co-option of persons to serve on or advise committees

134. (1) A committee may co-opt any person to serve on a committee or to attend a particular meeting thereof in connection with a particular matter dealt with by the committee.

(2) Such a person may take part in the proceedings of the committee in connection with the matter or at the meeting in respect of which he or she has been co-opted, but shall not be entitled to vote.

Remuneration and allowances of members of the Commission and other persons

135. Members of the Commission and persons referred in section 134 who are not in the employment of the State, shall be paid, from moneys appropriated by Parliament for that purpose, such remuneration and allowances as the Minister of Finance may determine.

Appointment of Staff

136. The Commission may appoint such staff as it may deem necessary for the efficient performance of its functions and administration, and may, in consultation with the Commission for Administration, determine the remuneration and conditions of service of such staff.

Regulations

137. The President may make regulations regarding -

- (a) procedures in connection with any function of the Commission; and
- (b) any other matter in connection with the achievement of the objects of the Commission.

**EMBARGOED UNTIL TABLING IN THE
NEGOTIATING COUNCIL**

**NINETEENTH REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
1 NOVEMBER 1993**

CHAPTER 6

(As reformulated in terms of the instructions of the Negotiating Council)

The Executive Power

Executive power

70. The executive power of the Republic regarding all matters falling within the legislative power of Parliament shall vest in the President who shall exercise his or her powers and functions subject to the provisions of this Constitution.

Head of State

71. The President shall be the Head of State.

Election of the President

72. (1) The first President under this Constitution shall be elected by the National Assembly at its first sitting.

(2) The election of a President other than the first President referred to in subsection (1) shall be held within 30 days after the vacation of the office of President, within 7 days after a vote of no confidence as contemplated in section 83, or in the event of a general election held in terms of this Constitution, within 30 days after the commencement of the first sitting of the Senate after such general election.

(3) The election referred to in subsection (2) shall take place at a joint sitting of the National Assembly and the Senate.

(4) The Chief Justice or a Judge of the Appellate Division designated by him or her for this purpose shall preside over the elections referred to in subsections (1) and (2).

(5) The election of the President in terms of this section shall be conducted in the manner provided for in Schedule 8.

(6) No person may be elected as President unless he or she has been elected to the National Assembly.

(7) On being elected the President shall vacate his or her seat in the National Assembly, and the political party to which he or she belongs shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on such party's election list compiled for the general election, or if there is no such person, by nominating any member of such party.

Oath or affirmation

73. The President-elect shall, before formally assuming office, make an affirmation or take an oath in the form contained in Schedule 6, which shall be administered by the Chief Justice or a judge designated by the Chief Justice for this purpose.

Tenure of office

74. The President shall hold office until he or she is removed from office in terms of this Constitution, or until he or she is replaced in terms of the provisions of the new constitutional text contemplated in Chapter 5 of this Constitution.

Responsibility of the President

75. (1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall as head of state defend the Constitution as the supreme law of the land.

(2) The President shall with dignity provide executive leadership in the interests of national unity in accordance with the provisions of this Constitution and all the laws of the Republic.

Powers and functions of the President

76. (1) The President shall be competent to exercise the following powers and functions -
- (a) to assent to, sign and promulgate bills duly passed by Parliament;
 - (b) in the event of a procedural shortcoming in the legislative process, to refer a bill passed by Parliament back for further consideration by Parliament;
 - (c) to convene meetings of the Cabinet, including extraordinary meetings for the resolution of disputes among the members of the Cabinet;
 - (d) to refer disputes of a constitutional nature between political parties represented in Parliament or between organs of the State at any level of government to the Constitutional Court or other appropriate institution, commission or body for resolution, whether such institution, commission or body was appointed by himself or herself or constituted under this Constitution or other law;
 - (e) to confer honours;
 - (f) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
 - (g) to appoint commissions of enquiry;
 - (h) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any law;
 - (i) to negotiate and sign international agreements;
 - (j) to proclaim referenda and plebiscites in terms of this Constitution or an Act of Parliament; and
 - (k) to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit and to remit any fines, penalties or forfeitures.

- (2) The President shall consult the Executive Deputy Presidents -
- (a) in the development and execution of the policies of the government;
 - (b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;
 - (c) in the assignment and allocation of the functions contemplated in section 79(4) to an Executive Deputy President;
 - (d) regarding appointments made under subsection (1)(f); and
 - (e) before exercising any of the competences referred to in subsection (1)(g)-(k).
- (3) The President shall exercise all other powers and perform all other functions as may be conferred upon or assigned to him or her in terms of this Constitution or any other law in consultation with the Cabinet.

Executive Deputy Presidents

77. (1) Every party holding at least 80 seats in the National Assembly shall be entitled to designate an Executive Deputy President from among the members of the National Assembly.

(2) Should no party or only one party hold 80 or more seats in the National Assembly, the party holding the largest number of seats, and the party holding the second largest number of seats, shall each be entitled to designate one Executive Deputy President.

(3) On being designated as such, an Executive Deputy President may vacate his or her seat in the National Assembly, and the party to which he or she belongs shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on such party's election list compiled for the general election, or if there is no such person, by nominating any member of such party.

(4) An Executive Deputy President shall perform such functions as may be assigned to him or her by the President.

(5) The provisions of section 75 shall apply *mutatis mutandis* to an Executive Deputy President.

(6) The President shall appoint on a rotational basis one of the Executive Deputy Presidents to act as President during his or her absence or temporary incapacity: provided that if the President is unable to do so, the Cabinet shall make such appointment.

Salaries of the President and Executive Deputy Presidents

78. (1) There shall be paid to the President and the Executive Deputy Presidents out of and as a charge on the National Revenue Fund and apart from any privilege which they may enjoy, such salaries and allowances as may be determined from time to time by resolution of Parliament.

(2) The President and Executive Deputy Presidents shall not hold any other public offices and shall not perform remunerative work outside the duties of their offices.

Removal from office of the President and filling of the vacancy

79. (1) The President or an Executive Deputy President shall be removed from office if two thirds of all the members of the National Assembly and the Senate, at a joint sitting adopt a resolution impeaching the President or the Executive Deputy President on the grounds of a serious violation of the laws of the land, of misconduct or inability rendering him or her unfit to perform his or her functions in accordance with the provisions of section 75.

(2) If the President resigns, or is removed from or ceases to hold office for any reason, the vacant office of President shall be filled in accordance with the provisions of section 72.

(3) If the office of President becomes vacant an Executive Deputy President, designated by a majority of the members of the Cabinet, shall act as President pending the election in terms of subsection (2).

(4) If the office of an Executive Deputy President becomes vacant, the vacancy shall be filled in accordance with the provisions of section 77.

The Cabinet

80. (1) The Cabinet shall consist of the President, the Executive Deputy Presidents and not more than 27 Ministers appointed by the President in accordance with the provisions hereof to administer one or more of the Departments of State established by the President.

(2) A party holding at least 20 seats in the National Assembly shall be entitled to be allocated a number of Cabinet portfolios in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other parties represented in the Cabinet.

(3) The President shall allocate portfolios to the parties represented in the Cabinet after consultation with the Executive Deputy Presidents and the leaders of the parties represented in the Cabinet.

(4) The President shall appoint Ministers from among the members of Parliament to the portfolios referred to in subsection (3) on the advice of the leaders of the parties to which the relevant portfolios have been allocated.

(5) The President shall terminate the appointment of any Minister if requested to do so by the leader of the party by which such Minister was designated.

(6) In the event of a vacancy in the Cabinet, occurring for any reason, the President shall appoint another person from the ranks of the party entitled to the portfolio on the advice of the party leader concerned.

(7) No member of the Cabinet may take up any other paid employment, engage in activities inconsistent with membership of the Cabinet, or expose himself or herself to any situation which carries with it the risk of a conflict developing between his or her responsibilities as a member of the Cabinet and his or her private interests.

(8) No member of the Cabinet shall use his or her position as such, or use information entrusted confidentially to him or her in such capacity, directly or indirectly to enrich himself or herself or any other person.

Procedure in the Cabinet

81. (1) Meetings of the Cabinet shall be presided over by the President, or in his or her absence, by an Executive Deputy President: provided that the Executive Deputy

(2) If any party entitled to Cabinet portfolios declines to be represented in the Cabinet, portfolios shall be allocated to the other parties entitled to such representation, in proportion to the number of seats each such party holds in the National Assembly.

(3) If all parties entitled to Cabinet portfolios, other than the party of the President, decline to be represented in the Cabinet, appointments to the Cabinet shall be made at the discretion of the President.

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

TWENTIETH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 4 NOVEMBER 1993

CHAPTER 10

Local Government

(As reformulated in accordance with the original draft of Chapter 10 and the instructions of the Negotiating Council.)

Establishment and status of local government.

140. (1) Local government shall be established for the residents of areas demarcated in terms of law and the powers, functions and structures of local government shall be regulated by law.

(2) A local government shall be autonomous and shall be entitled to regulate its affairs within the limits prescribed by law.

(3) A provincial law providing for or relating to local government may make provision for categories of metropolitan, urban and rural governments with the differentiated powers, functions and structures according to considerations of demography, revenue, physical and environmental conditions and other factors which justify or necessitate such categories.

(4) The status of a local government shall not be changed without prior consultation with the local government concerned.

(5) A bill of a provincial legislature or Parliament which materially affects the boundaries, powers and functions of local government shall be published for comment in the *Government Gazette* or the *Provincial Gazette* as the case may be, and a local

government, interested persons or groups of persons affected thereby shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

(6) A local government shall have powers and functions to provide such services as may be necessary to maintain and promote the wellbeing of the residents of the area of the local government: provided that, subject to the provisions of this Constitution, the said powers and functions shall not be less than those powers and functions of local government that exist at the date immediately prior to the commencement of this Constitution.

(7) The local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the inhabitants within its area of jurisdiction and effective administration of its affairs.

(8) An enforceable code of conduct for members and officials of local government shall be provided for by law.

(9) Actions affecting the physical environment of a local government area shall be undertaken only after consultation with the local government concerned and shall not be carried out against the wishes of such local government unless such actions are reasonably required in the national interest.

(10) A local government shall have the power to make bylaws not inconsistent with national and provincial laws and executive powers which shall allow it to function effectively.

(11) A local government shall be elected democratically and such elections shall take place in terms of provincial legislation and at intervals of not less than 3 nor more than 5 years: provided that, within any province, the first local government elections after the coming into force of this Constitution shall take place on the same day.

(12) No person shall be elected a member of a local government if he or she -

(a) is an elected member of any other legislature; or

(b) does not qualify to be elected as a member of the National Assembly under this Constitution; or

(c) his or her spouse is an employee of a local government unless, with due regard to the public interest, exemption of this qualification is given by the Executive Council of the province and proof of such exemption accompanies the nomination of such person; or

(d) is disqualified in terms of any other law.

(13) A voter for the election of a local government shall be -

(a) a natural person who -

(i) is a South African citizen or has been a lawful resident of the Republic for a continuous period of at least five years immediately prior to the date of the election; and

(ii) is at least 18 years of age ; and

(iii) is not subject to any disqualifications mentioned in section 42 or in any other law; and

(iv) is ordinarily resident within the area of jurisdiction of the local government for which such election is held, or under law is liable for the payment of assessment rates, service charges or levies to the local government concerned.

(b) a juristic person which is -

(i) the owner of immovable property within the area of jurisdiction of the local government concerned;

(ii) liable for the payment of assessment rates, service charges or levies, and

(iii) registered on the voters' roll of the local government concerned.

(14) A voter shall not have more than one vote per local government.

(15) The electoral system for a local government shall include both proportional and ward representation and shall be regulated in provincial legislation.

(16) A local government shall have the right of recourse to the Constitutional Court in any matter relating to the encroachment or threatened encroachment upon its autonomy under this Constitution or any other law.

(17) A local government shall make provision for access by all South African citizens residing within its jurisdiction to water, sanitation, transportation facilities, electricity, primary health, education, housing and security: provided that such services are rendered in an environmentally sustainable manner and are financially and physically practicable.

Local government finance

141. (1) A local government shall, subject to conditions prescribed by law passed by a competent legislature after taking into consideration recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its duties and functions: provided that such rates, levies, fees, taxes and tariffs shall be levied uniformly.

(2) A local government shall be entitled to an equitable allocation by the provincial government of funds and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations taking into account the different categories of local government referred to in section 140(3).

Continuation of local governments

NOTE: The document produced bilaterally between the South African Government and the ANC that was submitted to us, proposed the following wording for this provision:

The Local Government Transition Act, 1993, shall regulate restructuring at local government level until after elections at local level have taken place as provided in section 10 of the Local Government Transition Act, 1993, whereupon the function of restructuring local government shall, subject to the provisions of this Act (the Constitution), vest in the national and SPR legislatures which may amend or repeal the Local Government Transition Act, 1993: Provided that the national and SPR legislatures shall maintain the principles embodied in this Chapter and this Act as a whole (the Constitution).

We have not drawn up a corresponding provision, because it is not completely clear to us what the intention of the parties involved is. We would however like to make the following comments:

- (a) Mention of the "Local Government Transition Act, 1993" in the Constitution may have the effect of entrenching its provisions until elections are held at local government level.
- (b) We do not know to what extent it is certain that a Local Government Transition Act will be adopted before the coming into force of the Constitution or what it will provide for.
- (c) The entrenchment of a Local Government Transition Act in the proposed manner will postpone the assumption by the national and provincial governments of full competence over local government in terms of the Constitution (section 118 and Schedule 9) until elections are held at local government level.
- (d) It is not clear to us what the last proviso is intended to mean.

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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

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 substance and the remaining paragraphs have been renumbered accordingly.

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

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.

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.

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.

**TWENTY SECOND REPORT
OF THE
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES
TO THE
NEGOTIATING COUNCIL**

9 NOVEMBER

1. REVISION OF CHAPTER 11

We have considered the bilateral document dealing with Chapter 11, and, as instructed by the Negotiating Council, have revised the Chapter in the light of this document and the debates in the Council. The revised provisions are set out in the addendum to this report. Material changes to the original draft are indicated by footnotes.

2. EXISTING ASSETS AND LIABILITIES

We have had difficulty in formulating appropriate provisions dealing with the assumption of assets and liabilities on the basis of the bilateral document. In particular:

- 2.1 The suggested process of referring the allocation of assets and liabilities to the Financial and Fiscal Commission will give rise to uncertainty, lack of control