

CHAPTER 12

Public Service Commission and Public Service

*Public Service Commission***Establishment**

180. There shall be a Public Service Commission for the Republic which shall have the powers, functions and duties provided for by this Constitution and by law, and it shall be accountable to Parliament.

Powers and functions

181. (1) The Commission shall be competent to -

- (a) make recommendations, give directions and conduct enquiries regarding -
 - (i) the organisation and administration of departments and the public service;
 - (ii) the conditions of service of members of the public service and matters related thereto;
 - (iii) personnel practices in the public service, appointments, promotions, transfers, discharge and other career incidents of members of the public service and matters connected with the employment of personnel;
 - (iv) the promotion of efficiency and effectiveness in departments and the public service; and
 - (v) a code of conduct applicable to members of the public service;
- (b) when so requested, advise the President, a Minister or a member of a provincial executive in regard to any matter relating to the public service or in relation to the employment, remuneration or other conditions of

service of functionaries employed by any institution or body which receives funds wholly or partly appropriated by the national or provincial legislature;

- (c) exercise such other powers, perform such other functions and carry out such other duties entrusted to it by any law; and
- (d) delegate any of its powers, functions and duties to any a member or official in the public service subject to any limitation imposed by law.

(2) Until amended by law, the powers of the Commission set out in subsection (1) shall be exercised in accordance with statutory provisions in force at the time of the coming into operation of this Constitution.

(3) A recommendation or direction of the Commission shall be implemented by the appropriate person or institution within 6 months unless:

- (a) such recommendation or direction involves expenditure from public funds and the approval of the treasury therefor is not obtained; or
- (b) the President rejects it and refers it back to the Commission before its implementation.

(4) The Commission may appoint, in a manner prescribed by law, such persons as may be necessary for the discharge of its work.

(5) Expenditure incurred during the performance of the functions of the Commission in terms of this Constitution or under any other law shall be defrayed from money appropriated by Parliament specifically for that purpose and from fees raised or money obtained in a manner authorised by Act of Parliament.

(6) On recommendation of the Commission the President may assign any power, function or duty of the Commission to a provincial service commission.

(7) The Commission shall annually frame and submit a report to Parliament on matters which have been dealt with by the Commission.

182. (1) (a) The Commission shall consist of no fewer than 3 members and no more than 5 members appointed by the President, one of whom shall be designated as chairperson by the President.
- (b) The Commission shall exercise its powers and perform its functions fairly, impartially and independently.
- (c) The remuneration and other conditions of service of a member of the Commission shall be determined in accordance with the provisions of an Act of Parliament, and such remuneration and the other conditions of service shall not be altered to his or her detriment during his or her term of office.
- (d) A member of the Commission shall not hold office in any political party or political organisation and shall be non-partisan in the performance of his or her functions.
- (e) A member of the Commission may be removed from office by the President on account of misconduct or unfitness for his or her duties or incapacity to carry them out efficiently or if, for reasons other than unfitness or incapacity, his or her removal from office will promote efficiency, and the removal and the reasons therefor shall be communicated by the President by message to Parliament within 14 days after such removal or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.
- (2) A person shall be qualified to be appointed to the Commission if he or she -
- (a) is a South African citizen; and
- (b) is a person who has sufficient knowledge of or experience in the administration, management or rendering of public services.
- (3) The composition, appointment, tenure, vacation of office, conditions of service and functioning of the Commission shall be as determined by Act of Parliament,

and shall ensure the independence and impartiality of the Commission and the efficient and effective exercise of its powers, performance of its functions and carrying out of its duties.

The Public Service

183. (1) There shall be a public service for the Republic, structured in terms of law to provide effective public administration.

(2) Such public service shall -

- (a) be non-partisan, career-orientated and function according to fair and equitable principles;
- (b) be obliged to promote an efficient public service broadly representative of the South African community;
- (c) serve all members of the public in an unbiased and impartial manner;
- (d) be regulated by laws dealing specifically with such service, and in particular with its structure, functioning, terms and conditions of service;
- (e) loyally execute the policies of the government of the day in the performance of its administrative functions; and
- (f) be organised in departments and other organizational components and the head of such department or organizational component shall be responsible for the efficient management and administration of his department or organizational component.

(3) Employment in the public service shall be accessible to all South African citizens who comply with the requirements determined or prescribed by or under any law for employment in such service.

(4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account.

(5) Subsection (4) shall not preclude measures to promote the objectives set out in subsection (2).

(6) Provision shall be made by law for a pension for a member of the public service by means of a pension fund or funds by law and members of the public service who are required by law to be members of a pension fund shall be entitled to fair representation on the body which manages the applicable fund.

(7) (a) In the event of changes to the law governing pension funds which prejudice persons referred to in subsection (6), the real value of the accrued benefits of a member of a fund, and his or her beneficiaries, as represented by the fund's actuarial liability towards the member or his or her beneficiaries, shall be maintained.

(b) The retirement age applicable to a public servant by law as at 1 October 1993, shall not be changed without his or her consent.

Provincial Service Commissions

184. (1) A provincial legislature may provide by law for a provincial service commission and, subject to the national norms and standards, such commission shall, in respect of public servants employed by the province, have -

- (a) the power to make recommendations, give directions and conduct inquiries -
 - (i) pertaining to the establishment and organisation of departments of the province;
 - (ii) relating to appointments, promotions, transfers, discharge and other career incidents of such public servants; and

- (iii) regarding the promotion of efficiency and effectiveness in departments of the province;
- (b) the power to -
 - (i) when so requested, advise the Premier or a member of the provincial executive in regard to any matter relating to the public service or in relation to the employment, remuneration or other conditions of service of functionaries employed by any institution or body which receives funds wholly or partly appropriated by the provincial legislature; and
 - (ii) delegate any of its powers, functions and duties to any a member or official in the public service subject to any limitation in law; and
- (c) such other powers, functions and duties of the public service commission assigned to it by the President with the approval of the Premier of the province.

(2) The measures contained in sections 181(2),(3) and (4), and 182(1), (2), and (3) pertaining to the public service commission, shall *mutatis mutandis* apply to the provincial service commissions established by provincial legislation, save that any reference to an act of Parliament, Parliament or to the President shall be deemed to be a reference to a provincial law, provincial legislature or the Premier of the province respectively.

Transitional arrangement

185. (1) The public service as regulated by legislation at the time of the commencement of this Constitution, shall continue to exist subject to changes made thereto by or in accordance with law.

- (2) (a) Any person employed in a public service immediately before the commencement of this Constitution shall remain in employment subject to the provisions of this Constitution and the laws governing employment in the public service.

- (b) Subject to the provisions of subsection (6), the terms and conditions of service of any person employed in a public service immediately before the commencement of this Constitution, shall continue to apply until amended by or under any law.

(3) The persons who immediately before the coming into operation of this Constitution occupied the positions of chairperson, member or members of the Commission for Administration shall, subject to the provisions of any law regulating their discharge or vacation of office or redetermination of their terms of office, continue to hold their respective positions under their current terms of employment.

(4) Notwithstanding the provisions of this section, the conclusion or amendment of contracts, the appointment, promotion, the award of terms and conditions of service and other benefits occurring between 27 April 1993 and 30 September 1994 in respect of any person or class of persons employed by a public service including a person employed as an educator or by a public service, may, at the instance of a Minister or a member of a provincial executive, within one year of the coming into operation of this Constitution, be reviewed by a commission presided over by a judge and if not proper or justifiable in the circumstances, the commission may reverse or alter the contract, appointment, promotion, terms and conditions of service and award of benefits.

(5) The persons who immediately before the coming into operation of this Constitution occupied the positions of chairperson, member or members of a public service commission of Transkei, Bophuthatswana, Venda, Ciskei or a Self-governing Territory, shall, subject to the provisions of any law regulating their discharge or vacation of office or redetermination of their terms of office, continue to be employed under their current terms of employment.

(6) Subject to subsection (4) and any law relating to unfitness or incapacity to carry out duties efficiently, the pensionable salary or pensionable salary scale of a member of any public service shall not be reduced below that applicable to such member as at the time of the coming into operation of this Constitution.

- (7) (a) Provision shall be made by Act of Parliament for a special tribunal consisting of a judge and two assessors to determine all claims and disputes of right in terms of laws regulating employment in the

relevant public service as at 1 November 1993 and arising out of the implementation of section 119.

- (b) The Act of Parliament referred to in subparagraph (a) shall prescribe expeditious procedures for the adjudication of claims and disputes including the granting of interim and final relief.
- (c) Notwithstanding the provisions of any law the procedures prescribed in terms of subparagraph (b) shall be the only procedures to be followed by the tribunal referred to in subparagraph (a).
- (d) The decisions of the tribunal on any such claim or dispute shall be final and binding.
- (e) The provisions of this subsection shall lapse one year after the date on which this Constitution comes into operation.

(8) For the purposes of this section "public service" shall include the administrations of the Republic, the Provinces, Transkei, Bophuthatswana, Venda, Ciskei and the Self-governing Territories.

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

12 NOVEMBER

Preliminary draft

CHAPTER "X"

(To be inserted as a new chapter after the Chapter on Local Government)

TRADITIONAL AUTHORITIES

Indigenous law

1. All matters pertaining to indigenous law or customary law shall be subject to regulation by law.

Traditional authority and local government

2. (1) All existing traditional authorities recognised by and instituted in accordance with indigenous law and legislation, shall continue to exist and exercise their powers and functions in terms of indigenous law as regulated by legislation. *

* Note: The following additional provision may be considered:

Traditional authorities may be established in accordance with indigenous law and in a manner prescribed by law.

- (2) There shall be an elected local government in the area of a traditional authority which shall be responsible for providing essential services in its area of jurisdiction.
- (3) The traditional leader of a traditional authority within the area of jurisdiction of an elected local government shall be an ex-officio member of that local government.
- (4) A chairperson of a local government shall be elected from amongst all members of such local government.
- (5) The procedures relating to the election of a local government referred to in subsection (2), the election of a chairperson and matters relating to the functioning of such local government shall be regulated by provincial legislation.

Provincial House of Traditional Leaders

3. (1) A House of Traditional Leaders shall be established in each province for representatives of traditional authorities within such province where such authorities exist.
- (2) A House shall consist of as many representatives elected or nominated by traditional authorities as shall be prescribed by provincial law.
- (3) (a) The House shall be entitled to advise the provincial legislature in respect of matters relating to indigenous law, tradition and custom.

- (b) All provincial bills pertaining to traditional authority, indigenous law, tradition and custom, and any other matter having a bearing thereon, shall be referred to the House by the Speaker of the provincial legislature for its comments before the passing of such bill.
- (c) The House shall indicate its support for or opposition to such bill within 30 days from the date of such referral.
- (d) If the House indicates that it is opposed to such bill, the provincial legislature shall not pass the bill before the lapse of a further period of 30 days from the date of receipt by the Speaker of such comment.
- (e) A provincial legislature shall enact laws to regulate the procedures applicable to the exercise of the powers and functions of the House in terms of this subsection.

4. Council of Traditional Leaders

- (1) A Council of Traditional Leaders shall be established, composed of representatives of traditional authorities and elected by an electoral college, constituted by the members of the Provincial Houses of Traditional Leaders referred to in section 3 (1) in accordance with the procedures prescribed by Act of Parliament.
- (2) The composition, terms of office, functions, procedures of the Council and all matters relating thereto shall be prescribed by Act of Parliament.
- (3) The Council shall advise the national government in respect of all matters relating to indigenous law, tradition and custom.

- (4) The President may seek the advice of the Council on any matter of national interest.
- (5) All parliamentary bills pertaining to traditional authorities, indigenous law, tradition and custom and related matters, shall be referred by the Speaker, simultaneously with the submission of such bill to the Senate, to the Council for its comments.
- (6) The comments of the House shall indicate its support for or opposition to such bill within 30 days from the date of such referral.
- (7) If the Council indicates its opposition to the bill such bill shall not be passed by the Senate or be finally adopted before the lapse of a further period of 30 days from the date of receipt of such comment by the Speaker.
- (8) If the Council fails to comment within the period of 30 days it shall be deemed to support such bill.
- (9) If a bill is introduced in the Senate and not in the National Assembly the procedures prescribed in subsections (5), (6), (7) and (8) shall mutatis mutandis apply.
- (10) Procedures relating to the exercise of its powers and functions by the Council referred to in subsections (2) to (8) shall be prescribed by Act of Parliament.

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

TWENTY FIFTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 15 NOVEMBER 1993

CHAPTER 7

The Judicial Power and the Administration of Justice

The changes indicated in this Chapter are based on the debate in the Negotiating Council of our 12th report, it reflects our editing as well as additional amendments based on the bilateral document of the SA Government and the ANC.

Judicial authority

86. (1) The judicial authority of the Republic shall vest in the courts established in terms of this Constitution and any other law.

(2) The judiciary shall be independent, impartial and subject only to the Constitution and the law.

(3) No person or organ of the state shall interfere with judicial officers in the execution of their duties.

Appointment of Chief Justice and President of the Constitutional Court¹

87. (1) There shall be a Chief Justice of the Supreme Court of South Africa who shall, subject to the provisions of section 94, be appointed by the President after consultation with the Judicial Service Commission and in consultation² with the Cabinet.

(2) There shall be a President of the Constitutional Court who shall, subject to the provisions of section 89, be appointed by the President after consultation with the Chief Justice [and in consultation with the Cabinet].³

The Constitutional Court and its jurisdiction

88. (1) There shall be a Constitutional Court consisting of a President and 10 other judges appointed in terms of section 89.

(2) The Constitutional Court shall have jurisdiction in all parts of the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of all the provisions of this Constitution, including -

- (a) the violation or anticipated violation of any fundamental right enshrined in Chapter 3 of this Constitution;
- (b) the constitutionality of executive and administrative conduct of all organs of the state;

1. This is a new provision based on the bilateral document.

2. The following definitions are suggested for inclusion in the Constitution:

"a decision in consultation with" a person or body means a decision taken jointly by the persons or bodies concerned, in which each person or body concurs;

"a decision after consultation with" a person or body means a decision taken in good faith by the person or body vested with that power, after consulting and giving serious consideration to the views of the person or body concerned.

Consultation with a multi-member body requires such body to express its concurrence in accordance with its decision-making procedures.

3. The inclusion or exclusion of the words in brackets is unresolved.

- (c) the constitutionality of any law, including an Act of Parliament, irrespective of whether such law came into operation or was adopted prior to or after the coming into operation of this Constitution;
 - (d) disputes of a constitutional nature between organs of the state at all levels of government;
 - (e) compliance in accordance with the provisions of Chapter 5 and Chapter 9 of this Constitution with the Constitutional Principles contained in Schedule 7;
 - (f) whether any matter falls within its jurisdiction;
 - (g) to consider and advise on the constitutionality of a bill or draft bill;⁴ and
 - (h) any other matter provided for in this Constitution or any other law.⁵
- (3) Save for the matters referred to in section 91(3) the Constitutional Court shall be the only court having jurisdiction over the matters referred to in subsection (2).
- (4) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of the state.
- (5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or the competent authority, within a period specified by the Court, to correct the defect in the law, which shall then remain in force pending correction or the expiry of the specified period.

4. The procedures according to which a bill may be referred to the Constitutional Court for an opinion are not dealt with in the bilateral document. They may be complex: see page 12 of our 12th report.

5. The referral of treaties and draft treaties before accession thereto or ratification thereof to a constitutional court for its opinion on their constitutionality, is not uncommon in constitutional states.

(6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or any provision thereof -

- (a) existing at the commencement of this Constitution, shall not invalidate anything done in terms thereof before the coming into effect of such declaration of invalidity; or
- (b) enacted after the commencement of this Constitution shall invalidate anything done in terms thereof.

(7) In the event of the Constitutional Court declaring executive or administrative conduct to be unconstitutional, it may order the relevant organ of the state to refrain from such conduct, or it may order it, subject to such conditions and within such time as may be specified by it, to correct its conduct, in order to conform with the Constitution.

(8) The Constitutional Court may in respect of the proceedings before it make such order as to costs as it may deem just and equitable in the circumstances.

Composition of the Constitutional Court and appointment of judges of the Constitutional Court

89. (1) The judges of the Constitutional Court shall be appointed by the President in accordance with the provisions of subsection (3) and (4).

(2) No person shall be qualified to be appointed President or Judge of the Constitutional Court unless he or she -

- (a) is a South African citizen; and
- (b) is a fit and proper person to be a Judge of the Constitutional Court; and

(c) is a judge of the Supreme Court of South Africa or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified:

(i) practised as an advocate or an attorney, or

(ii) lectured in law at a university; or

(d) is a person who, by reason of his or her training and experience, has expertise in the field of constitutional law relevant to the application of this Constitution and South African law.

(3) Four judges of the Constitutional Court shall be appointed from amongst the judges of the Supreme Court of South Africa by the President in consultation with the Chief Justice and the Cabinet.

(4) Six judges of the Constitutional Court shall be appointed by the President, after consultation with the President of the Constitutional Court and in consultation with the Cabinet: provided that not more than two persons shall be appointed from the category of persons referred to in subsection (2)(d).

(5) Vacancies in the Constitutional Court shall be filled as follows -

(a) a vacancy in respect of a judge appointed under subsection (3) shall be filled in accordance with the provisions of subsection (3); and

(b) a vacancy in respect of a judge appointed under subsection (4) shall be filled in accordance with the provisions of subsection (4).

Engaging the Constitutional Court

90. (1) The conditions upon which the Constitutional Court may be seized of any matter in terms of this Constitution or any other law, and all matters relating to the conduct of proceedings before the Court, shall be regulated by rules prescribed by the

President of the Constitutional Court after consultation with the Chief Justice, which rules shall be published in the *Government Gazette*.

(2) The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interests of justice to do so in respect of any matter over which it has jurisdiction.

The Supreme Court

91. (1) There shall be a Supreme Court of South Africa which, subject to section 97, shall consist of an Appellate Division and such provincial and local divisions as may be prescribed by law.

(2) Subject to the provisions of this Constitution, the Supreme Court shall have the jurisdiction, including the inherent jurisdiction, vested in it prior to the coming into operation of this Constitution and any further jurisdiction conferred upon it by this Constitution or by any law.

(3) A provincial or local division of the Supreme Court shall, subject to the provisions of this Constitution have jurisdiction in the following additional matters -

- (a) to inquire into and pronounce upon the validity of a law, other than an Act of Parliament, within its area of jurisdiction;
- (b) the violation or anticipated violation of the fundamental rights enshrined in Chapter 3 of this Constitution by provincial or local governments, their administrations or agents; and
- (c) subject to subparagraph (a), the constitutionality of executive and administrative actions of all organs of the state taken in terms of any legislation applicable within the area of its jurisdiction;
- (d) disputes of a constitutional nature between local governments as well as local and provincial governments; and

(e) any other matter provided for by law.

(4) In exercising its jurisdiction under subsection (3) a provincial or local division of the Supreme Court shall have the powers vested in the Constitutional Court in terms of sections 88, (5), (6) and (7) and (8).

(5) The Appellate Division shall have no jurisdiction to adjudicate on any issue within the jurisdiction of the Constitutional Court.

Procedural matters⁶

92. (1) If in any matter before a provincial or local division, there is an issue which may be decisive of the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 88(3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.

(2) If, in any matter there is any issue, other than the issue or issues referred to the Constitutional Court in terms of subsection (1), the provincial or local division concerned shall, if it refers an issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.

(3) If, in any matter before a provincial or local division there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction.

(4) An appeal shall lie to the Appellate Division against a decision of a provincial or local division given in terms of subsection (3).

6. This section is a reformulation of provisions relating to procedural matters based on our original draft and the bilateral document.

(5) If the Appellate Division is able to dispose of an appeal brought in terms of subsection (3), without dealing with the constitutional issue or issues that have been raised, it shall do so.

(6) If it is necessary for the purposes of disposing of the appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision.

(7) The Chief Justice and the President of the Constitutional Court shall jointly formulate rules to facilitate the procedure for dealing with appeals in which there are both constitutional and other issues, which may provide for the constitutional issues to be referred to the Constitutional Court before or after the appeal has been heard by the Appellate Division.

(8) If any division of the Supreme Court disposes of a matter in which constitutional issues have been raised and such court is of the opinion that the constitutional issues are of such public importance that a ruling should be given thereon, it may, notwithstanding the fact that the matter has been disposed of, refer such issues to the Constitutional Court for a ruling.

(9) When a constitutional issue has been referred to the Constitutional Court by a division of the Supreme Court in terms of subsection (8), the Minister of Justice shall, at the request of the President of the Constitutional Court, appoint counsel to argue such constitutional issues.

(10) If the validity of legislation is in dispute in any matter, and the relevant government is not a party to the proceedings, it shall be entitled to intervene as a party before the competent court, or shall be entitled to submit written argument to the said Court.

(11) Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such courts, which may provide that leave of the Court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal.

(13) Appeals arising from matters referred to in section 91(3) and which relate only to constitutional issues shall lie to the Constitutional Court.

(14) If a dispute arises between organs of the state regarding the question whether or not any conduct of one of those organs is consistent with this Constitution, the organ disputing the validity of the act may apply to a provincial or local division to refer the question of the validity of such conduct to the Constitutional Court for its decision.

(15) If the provincial or local division concerned is of the opinion that the conduct referred to in subsection (14) may be unconstitutional, it shall refer the matter to the Constitutional Court.

(16) If evidence is necessary for the purpose of a matter referred to in subsections (14) and (15) the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring such matter to the Constitutional Court.

(17) A decision not to refer a matter to the Constitutional court in terms of subsection (15), shall be appealable to the Constitutional Court.

(18) If in any matter before a provincial or local division of the Supreme Court the only issue raised is a constitutional issue within the exclusive jurisdiction of the Constitutional Court in terms of section 88(3), refusal to refer such issue to the Constitutional Court shall be appealable to the Constitutional Court.⁷

Other Courts

93. (1) The establishment, jurisdiction, composition and functioning of all other courts shall be regulated by legislation.

7. On pages 9-10 of the bilateral document, a proposal by the South African Government for the inclusion of a provision relating to procedures for constitutional complaints.

(2) If in any proceedings before a court referred to in subsection (1) it is alleged that any law or provision of such law is invalid on the ground of inconsistency with a provision of this Constitution, the court shall, subject to the other provisions of this section, decide the matter on the assumption that the law or provision is valid.

(3) If in any proceedings before a court referred to in subsection (1) the presiding officer is of the opinion that it is in the interests of justice so to do, he or she may postpone the proceedings to enable the party who has alleged that a law is invalid, to apply to the Supreme Court for relief in terms of subsection (4).

(4) If the Supreme Court to which the matter is referred in terms of subsection (3) is of the opinion that a decision regarding the validity of the law or provision is material to the adjudication of the matter and there is a reasonable prospect that the relevant law will be held to be invalid, the Court shall -

- (a) if the matters raised are within its jurisdiction, deal with such matters itself, and if they are in the exclusive jurisdiction of the Constitutional Court, refer them to the Constitutional Court for its decision after making findings on any evidence which may be relevant to such issue; and
- (b) suspend the proceedings before the court referred to in subsection (1) pending the decision of the Supreme Court or the Constitutional Court, as the case may be.

Appointment, removal, term of office and tenure of judges

94. (1) Judges of the Supreme Court shall be fit and proper persons appointed by the President under his hand and the seal of the Republic of South Africa acting on the advice of the Judicial Service Commission as constituted in terms of section 95.

(2) Judges appointed under subsection (1), sections 87 and 88 shall receive such remuneration as may be prescribed by law, and their remuneration shall not be reduced during their continuation in office.

(3) Any Judge shall, before commencing to exercise the functions of his or her office, take an oath or make an affirmation which shall be subscribed by him or her in the form set out in Schedule 6 of this Constitution.

(4) A Judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate in the same session praying for such removal.⁸

(5) A Judge who is the subject of investigations by the Judicial Service Commission in terms of subsection (4) may be suspended by the President pending such investigations.⁶

Judicial Service Commission

95. (1) There shall be a Judicial Service Commission which shall, subject to the provisions of subsection (3), consist of -

- (a) the Chief Justice, who shall preside at meetings of the Commission;
- (b) the President of the Constitutional Court;
- (c) one Judge President designated by the Judges President;
- (d) the Minister of Justice or his or her nominee;
- (e) one practising advocate designated by the General Council of the Bar of South Africa;
- (f) one practising attorney designated by the Association of Law Societies of the Republic of South Africa;

8. Agreement between the South African Government and the ANC on this formulation is outstanding.

- (g) one professor of law designated by the deans of all the law faculties at South African universities;
 - (h) 4 Senators designated by the Senate *en bloc* by a two thirds majority;
 - (i) 4 persons who are not members of any legislature and who are practising attorneys or practising advocates who shall be designated by the President in consultation with the Cabinet;
 - (j) on the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court, the Judge President of the relevant division and the Premier of the relevant province.
- (2) The functions of the Judicial Service Commission shall be -
- (a) to make recommendations regarding the appointment, dismissal, term of office and tenure of judges of the Supreme Court in terms of section 94; and
 - (b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice.
- (3) When the Commission performs its functions in terms of subsection (2)(b) it shall sit without the 4 senators referred to in subsection (1)(h).
- (4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decisions and resolutions.
- (5) The Commission may appoint committees from among its number and delegate any of its functions to such committee.

Seats of the Constitutional Court and the Appellate Division

96. (1) The seat of the Constitutional Court shall be Johannesburg.

(2) The seat of the Appellate Division of the Supreme Court shall be Bloemfontein.

Languages of the courts

97. (1) A party to litigation, an accused person and a witness may, during the proceedings of a court, use the South African language of his or her choice, and may require such proceedings of a court in which he or she is involved to be interpreted in a language understood by him or her.

(2) The record of the proceedings of a court shall be kept either in Afrikaans or in English.

Continuation of judiciary and legislation relating thereto⁹

98. (1) Every court existing within the Republic on the date of the coming into operation of this Constitution, and every judicial officer holding office on that date, shall continue to function and to hold office until such functioning and appointment may lawfully be changed by the competent authority.

(2) Subject to the provisions of this Constitution, all legislation in operation on the date of the coming into operation of this Constitution relating to the courts and their officers, and all rules of court shall remain in operation until amended or repealed by the competent legislature or authority.

Attorney-General¹⁰

99. (1) The authority to institute criminal prosecutions on behalf of the state shall vest in the attorneys-general of the Republic.

9. This provision which was in our 12th report has not been agreed to bilaterally between the South African Government and the ANC.

10. This provision which was in our 12th report has not been agreed to bilaterally between the South African Government and the ANC.

(2) The area of jurisdiction, powers, functions and duties of an attorney-general shall be prescribed by law.

(3) No person shall be appointed as an attorney-general unless he or she is academically qualified in terms of a law regulating the admission of advocates in the Republic to practise as an advocate and, after having become so qualified, has been involved in the practice, administration or teaching of law for a period of at least 10 years.

Magistrates Commission

100. There shall be a Magistrates Commission constituted by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, takes place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly and to ensure that no victimisation or improper influencing of magistrates occurs.

CHAPTER 10

Local Government

The changes indicated in this Chapter are based on the debate in the Negotiating Council of our 20th report and also reflects our editing. Additional amendments suggested in the bilateral document of the SA Government and the ANC are indicated in footnotes.

Establishment and status of local government.

140. (1) Local government shall be established for residents of areas demarcated by law.

(2) [A provincial law] Any law passed by a competent legislature¹¹ 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.

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

(4) A competent legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government and the status, boundaries, powers and functions of a local government shall [not] only be changed [without prior] after consultation with the local government concerned.¹²

11. The underlined words have been suggested in the bilateral document. The previous wording appears in brackets.

12. The underlined words have been suggested in the bilateral document. The word "any" has been replaced by "a".

(5) A bill of [a provincial] a competent¹³ 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, including organised local government¹⁴ shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

Powers and functions of local government

141. (1) The powers, functions and structures of local government shall be determined by law.

(2) A local government shall have powers and functions to provide such services as may be necessary to maintain and promote the wellbeing of all persons within the area of the local government.¹⁵

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

(4) A local government shall have the power to make bylaws not inconsistent with an Act of Parliament or a provincial law.

(5) A local government shall have executive powers which shall allow it to function effectively.

13. The underlined words have been suggested in the bilateral document. The previous wording appears in brackets. The word "any" has been replaced by "a".

14. The underlined words have been suggested in the bilateral document. We however consider these words to be vague and superfluous.

15. The underlined words have been suggested in the bilateral document. The bilateral document furthermore suggests that the following proviso, which was previously included, be deleted:

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.

(6) Any decision or legislative or executive action of any competent authority which may materially and detrimentally impact upon the environment of any local government shall be implemented only -

- (a) in consultation with the local government concerned; or
- (b) if reasonably required in the general public interest.

Administration and finance

142. (1) 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 persons within its area of jurisdiction and effective administration of its affairs.

(2) 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 within each local government such rates, levies, fees, taxes and tariffs shall be **[levied uniformly]** based on a uniform structure for its area of jurisdiction.¹⁶

(3) 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).

Elections

143. (1) 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 and

16. The underlined words have been suggested in the bilateral document. The previous wording appears in brackets.

not more than 5 years: provided that[, within any province,]¹⁷ the first local government elections after the coming into force of this Constitution shall take place on the same day.

(2) The electoral system for a local government shall include both proportional and ward representation and shall be regulated by a competent legislature [in provincial legislation].¹⁸

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

(a) a natural person who -

- (i) is eligible to vote in terms of section 6 of this Constitution;¹⁹
- (ii) is ordinarily resident within the area of jurisdiction of the local government for which such election is held, or under law 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; and
- (iii) is registered on the voters' role of 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

17. The deletion of the bracketed words have been suggested in the bilateral document.

18. The underlined words have been suggested in the bilateral document. The previous wording appears in brackets.

19. In the bilateral document it is suggested that the words "and section 15 of the *Electoral Act*, 1993" should be added. Such reference will however be unnecessary because section 6 will refer to the *Electoral Act*.

- (iii) registered on the voters' roll of the local government concerned.
- (4) A voter shall not have more than one vote per local government.
- (5) No person shall be elected a member of a local government if he or she -
 - (a) is not eligible to vote in terms of subsection (3); and
 - (b) is an elected member of any other legislature; or²⁰
 - (c) does not qualify to be elected as a member of the National Assembly under this Constitution; or
 - (d) [his or her spouse]²¹ 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
 - (e) is disqualified in terms of any other law.

Code of conduct

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

Transitional arrangement²²

145. (1) Until elections have been held in terms of the *Local Government Transition Act*, 1993, restructuring of local government shall not take place otherwise than in accordance with the provisions of that Act.

20. The bilateral document suggests that "the National Assembly" should replace "any other legislature". The reason for this suggestion is unclear and inconsistent with sections 43(1)(e), 53(1)(d) and 103(b).

21. Deletion of these words has been suggested in the bilateral document.

22. This is our reformulation of the provision suggested in the bilateral document. We have not yet been able to give consideration to the provisions of the proposed *Local Government Transition Act*.

(2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after the elections referred to in subsection (1) have been held, shall be effected in accordance with the principles embodied in this chapter and the Constitution as a whole.

CHAPTER "Y"

(To be inserted as a new chapter after the Chapter on Local Government)

(This chapter has been amended in accordance with the debate in the Council)

TRADITIONAL AUTHORITIES

Indigenous law

1. All matters pertaining to indigenous law or customary law shall be subject to regulation by law.

Traditional authority and local government

2. (1) Traditional authorities recognised by and instituted in accordance with indigenous law and legislation, shall continue to exist and exercise their powers and functions in terms of indigenous law and as regulated by enabling legislation.

(2) The traditional leader of a traditional authority within the area of jurisdiction of an elected local government referred to in Chapter 10 shall be an ex-officio member of that local government and shall be eligible to be elected for any office of such local government.²³

Provincial House of Traditional Leaders

3. (1) A House of Traditional Leaders shall be established in each province for representatives of traditional authorities within such province where such authorities exist.

23. The resolution refers to eligibility for the election for "chairperson of" a local government. The Constitution provides only a framework and makes no reference to particular offices or structures. These are to be dealt with by legislation to be dealt with the competent authority. We have therefore made provision for the eligibility of the ex-officio member to "any office". Subsections 2(2), (4) and (5) of our Twenty Fourth report have been deleted to bring the text in line with the resolution and the debate.

- (2) (a) A House shall consist of as many representatives elected or nominated by traditional authorities as shall be prescribed by provincial law.
- (b) The provincial legislature shall, prior to the introduction of such law, determine the method by which the views of the traditional leaders resident in the province concerned shall first be sought and established on the content of such law, and thereafter proceed to procure their views in the manner so determined.
- (3) (a) The House shall be entitled to advise and make proposals to the provincial legislature in respect of matters relating to indigenous law, tradition and custom.
- (b) All provincial bills relating to traditional authority, indigenous law, tradition and custom, and any other matter having a bearing thereon, shall be referred to the House by the Speaker of the provincial legislature for its comments before the passing of such bill.
- (c) The House shall indicate its support for or opposition to such bill within 30 days from the date of such referral.
- (d) If the House indicates that it is opposed to such bill, the provincial legislature shall not pass the bill before the lapse of a further period of 30 days from the date of receipt by the Speaker of such comment.
- (e) A provincial legislature shall enact laws to regulate the procedures applicable to the exercise of the powers and functions of the House in terms of this subsection.

Council of Traditional Leaders

4. (1) A Council of Traditional Leaders shall be established, composed of not more than 20 representatives of traditional authorities and elected by an electoral college, constituted by the members of the Provincial Houses of Traditional Leaders referred to in section 3 (1) in accordance with the procedures prescribed by Act of Parliament.

(2) (a) The Council shall meet whenever necessary to perform its functions.

(b) The composition, terms of office, functions, procedures and convening of meetings of the Council and all matters relating thereto shall be prescribed by Act of Parliament.

(3) The Council shall advise and make proposals to the national government in respect of all matters relating to indigenous law, tradition and custom.

(4) The President may seek the advice of the Council on any matter of national interest.

(5) All parliamentary bills pertaining to traditional authorities, indigenous law, tradition and custom and related matters, shall be referred by the Speaker, simultaneously with the submission of such bill to the Senate, to the Council for its comments.

(6) The comments of the Council shall indicate its support for or opposition to such bill within 30 days from the date of such referral.

(7) If the Council indicates its opposition to the bill such bill shall not be passed by the Senate or be finally adopted before the lapse of a further period of 30 days from the date of receipt of such comment by the Speaker.

(8) If the Council fails to comment within the period of 30 days it shall be deemed to support such bill.

(9) If a bill is introduced in the Senate and not in the National Assembly the procedures prescribed in subsections (5), (6), (7) and (8) shall mutatis mutandis apply.

(10) Procedures relating to the exercise of its powers and functions by the Council referred to in subsections (2) to (8) shall be prescribed by Act of Parliament.

EMBARGOED UNTIL TABLING IN THE
NEGOTIATING COUNCIL

TWENTY SIXTH REPORT OF THE TECHNICAL
COMMITTEE ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
15 NOVEMBER 1993

*CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA
1993*

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for
matters incidental thereto.

PREAMBLE

In humble submission to Almighty God,
We the people of South Africa declare that -

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

~~AND~~ WHEREAS it is necessary for such purposes that provision should be made for the ~~promotion~~ of national unity and the restructuring and continued governance of South ~~Africa~~ while an elected Constitutional Assembly draws up a final Constitution;

~~NOW~~ THEREFORE the following provisions are adopted as the Constitution of the ~~Republic~~ of South Africa:

CHAPTER 1

Formal and Constituent Provisions

National symbols

~~2~~ (1) The national anthem and the design of the flag of the Republic shall be as set out in a proclamation by the State President in the *Government Gazette* acting in terms of an Act of Parliament.¹

(2) The coat of arms and the seal of the Republic existing on the date of the coming into operation of this Constitution, shall continue to be the coat of arms and the seal of the Republic.²

Languages³

~~3~~ (1) Afrikaans, English, siNdebele, sePedi, seSotho, siSwati, xiTsonga, ~~seTswana~~, tshiVenda, siXhosa and siZulu shall be the official South African languages at national level and conditions shall be created for their development and for the promotion of their equal use and enjoyment.

(2) Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and Parliament shall make provision for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).

1. It is suggested that an Act of Parliament be passed in the coming special session empowering the State President to promulgate such proclamation on the advice of the Transitional Executive Committee.
2. If the coat of arms or seal is to be replaced, this provision will require a constitutional amendment. If however the intention of the Council is to provide for a new coat of arms and seal by means of an Act of Parliament passed by a simple majority, express provision should be made therefor.
3. This entire provision is based on a bilateral document of the South African Government and the ANC submitted to us.

- (b) the extension of those rights relating to language and the status of languages which at the date of commencement of this Constitution are restricted to certain regions;
- (c) the prevention of the use of any language for the purposes of exploitation, domination or division;
- (d) the promotion of multilingualism and the provision of translation facilities;
- (e) respect for languages spoken in the Republic other than the official languages and the encouragement of their use in appropriate circumstances; and
- (f) Non-diminution of rights relating to language and the status of languages existing at the commencement of this Constitution.

(10) Legislation shall provide for the establishment by the Senate of an independent Pan South African Language Board to promote respect for the principles referred to in subsection (1) and to further the development of the official South African languages.

(11) The Pan South African Language Board shall be consulted and invited to make recommendations in relation to any proposed legislation contemplated in this section.

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Signature and enrolment of Acts

64. (1) Any valid Act of Parliament which has been duly passed by Parliament, signed by the President, and published in the *Government Gazette* shall be enrolled in the office of the Registrar of the Appellate Division of the Supreme Court in such official South African languages as may be required in terms of section 3, and such copies shall be conclusive evidence of the provisions of the Act.