ANC Policy Proposals for the Final Constitution

15 June 1995

Contents

Bill of Rights

Part 3

National Government

National Assembly

The Franchise

Number of Representatives

Recall

Checks and Balances and Accountability

Party Funding

Parliamentary Committees

Proposals

The Senate

The National Executive

Proposals

Part 4

Provincial and Local Government

The System of Provincial Governance and the Senate

Concerns and Objectives

Potential Problems

The Proposal

Functions of the Senate

Composition of the Senate

Co-operative Governance

Proposals

General Principles

Cooperative Governance

General Matters

Elements of the Provincial System

The Senate

Legislative Competences

Executive Competences

Local Government

Proposals

Traditional Authorities and Cultural Bodies

Discussion and Proposal

Part 5

Judicial Authority

Proposals

The Public Protector, Human Rights Commission, Commission on Gender Equality, Restitution of Land Rights

Proposals

Part 6

The Public Service

Proposals

The Security Services

General Guidelines

Intelligence Services

The National Defence Force

SA Police Service

Part 7

Finance

National Financial Affairs

Provincial Financial and Fiscal Affairs

Financial and Fiscal Commission

Proposals

Introduction

Approaches and Principles*

It will be the task of the Constitutional Assembly (CA) to review the entire Interim Constitution, that is, to begin afresh**. This must take place even though many formulations have already found expression in the Interim Constitution`s text. In this regard the positive and negative experiences of this Constitution are taken into account.

*This memorandum draws on the policy guidelines adopted by the National Conference of the ANC on 31 May 1992, entitled Policy Guidelines for a Democratic South Africa (also known as Ready to Govern), as well as the "list of principles" adopted at the National Conference of 17 December 1994. It also draws on an unmandated constitutional blueprint. During 1990 - 1992 the Constitutional Committee considered and drafted a constitutional "blue print": Working Paper 3. This text formed the basis of submissions to the Multi-Party forum, but differed from the Interim Constitution in material respects. Furthermore the Constitutional Committee published two relevant documents, The Bill of Rights (1993) and Constitutional Principles (1993). Other parts of this memorandum came from submissions to Codesa or the Multi-Party Forum, or were adopted at the recent Kempton Park Constitutional Conference of the ANC in April 1995.

** The new constitution will in any event dispense with certain special features of the Interim Constitution, such as the CA, the GNU, deadlock-breaking and the transitional provisions. Sections 234 - 238, which deal with the transition, will need to be examined in the light of the consequences and arrangements which have resulted from their application. See also Section 239 dealing with assets and liabilities. We assume that those provisions which provide for continuity in regard to various political institutions and arrangements will no longer have application.

The final Constitution needs to avoid some of the approaches to constitution-making and the consequent characteristics of the interim Constitution, which:

were too detailed, and purported to deal with issues which should be left to Parliament to legislate on. It is not in our interests to negotiate provisions in the Constitution which can be dealt with by statute. It is in our interest only to ensure that there are no unnecessary constitutional limitations on the expression of the will of Parliament. Other parties will be seeking to elaborate on the provisions in the Constitution. In general, the only issues which should be constitutionalised are the principles upon which our democracy is founded and guaranteed, as well as the necessary identification of the essential features of the institutions which give expression to these. The mechanics and rules of such institutions should be left to Parliament to create.

provided an excessive set of structures, duplication of functions, often boosting the costs of government, sometimes without any clear benefit to our people. The process did not encourage a "costing" of the measures and means introduced.

concentrated on regional government and a variety of forms of regional representation at the expense of local and national levels of government.

abounded with complex, legalistic language. The constitution should be written in a concise style and be suitably designed, yet it should be drafted in clear, simple and understandable language.

Guiding Principles

Just as the CA will be bound by the Constitutional Principles in Schedule 4, so too the ANC sets out its own constitutional principles. The more elaborated proposals on actual structures and institutions of government, which this memorandum addresses, are based on these principles. The guiding and pre-eminent principles are as follows:

The constitution of South Africa shall create the framework to build a united and undivided nation.

The character of the state shall be a multi-party democratic state based upon democratic majority rule.

The Constitution shall commit the country to a non-racial and non-sexist order based on the inherent dignity of all persons and the equal enjoyment of all human rights.

There shall be a bill or rights guaranteeing all accepted human rights including socioeconomic rights and which shall be, where appropriate, applicable against all sources of power.

The Constitution shall as far as possible empower the poor and the vulnerable to enforce their rights and shall inter alia create a Human Rights Commission and a Public Protector to perform this function.

There shall be regular elections, at no longer than five year intervals, on a common votes roll based on universal adult suffrage at all levels of government. The electoral system at the various levels shall ensure accountable representation.

Parliament shall, subject to the Constitution, be the supreme law-maker, and the expression of the will of the people. The executive will be accountable to it.

Parliament must not be limited in its capacity to legislate so as to address the legacy of the past including such issues as land restoration, re-distribution, and affirmative action.

Government shall be formed by the majority party or voluntary coalitions, if any.

Government shall be honest, accountable, transparent and cost effective.

There shall be democratically elected government at regional and local levels, both urban and rural, whose powers shall be set out in the constitution. The powers of regional government shall be subject to the need for national uniformity, national reconstruction and development, as well as the values in the Bill of Rights. National government shall be ultimately responsible for financial and fiscal matters.

The civil service shall be representative, impartial, and shall loyally serve the Government of South Africa and mechanisms shall be adopted to ensure the accountability and transparency of the public service.

Separation of Powers between the organs of government shall be provided for in a manner consistent with the accountability of the executive to Parliament.

The role and status of traditional leaders in the non- partisan promotion and protection of customs, culture and customary law, shall be recognised, subject only to the principles set out above.

Powers should be distributed to the provinces so as to promote on the one hand government closer to the people, and popular participation in governance, and, on the other hand, to minimise antagonistic divisions between provinces and between levels of government.

All provisions of the final constitution shall be capable of amendment subject only to the constitutionality prescribed majorities and procedures.

Part 1

Constituting the Republic of South Africa

Binding Constitutional Principles

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.

IV

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

Preamble

Proposals

The preamble to the Constitution will express a commitment to:

1.1

a free and open society based on democratic values where the dignity and worth of every South African man or woman is protected by law,

1.2

a unified South Africa,

1.3

a society founded on the sovereignty of the people of South Africa, and on the principles of equality, non- racialism, non-sexism and mutual respect,

1.4

overcoming the legacy, redressing the injustices and healing the divisions of the past, and preventing new forms of oppression,

1.5

taking our place amongst the family of nations in Africa and the world.

One nation

1.6

The final constitution shall give expression to the goal of building the people of South Africa as one undivided and united nation.

Territory

Proposal

1.7

The territory of South Africa shall be the whole territory of South Africa as it was on 27 April 1994.

Language

The language provisions have been subjected to various criticisms, regarding on the one hand its practicability and, on the other hand the de facto elevation of certain languages above others. Save for section 3(2) which entrenches the status of various existing official languages, the existing language provisions are derived from ANC policy which tries to balance the need to safeguard our diverse languages with the practicalities of governance.

Proposals

1.8

Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu 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.

1.9

The languages of South Africa shall all be equally recognised.

1.10

Every person shall have the right to communicate in the courts, in Parliament and with Government in his/her own language.

1.11

National and Regional Governments may designate a language or languages as the official language or languages of communication for any particular purpose, or generally.

1.12

The languages of South Africa shall be promoted and developed.

1.13

A mechanism shall be created to promote respect for and development of both the official languages and other languages used by communities in South Africa.

Citizenship

1.14

All South Africans shall be entitled to equal and full citizenship. Citizenship may be acquired by birth, decent, marriage or naturalisation. No citizen shall be arbitrarily deprived of his citizenship though legislation may set out the circumstances in which citizenship shall be lost.

The Democratic Constitutional State

The South African state should have the character of being a democratic constitutional state expressing a balance and the inter-connection between democracy and constitutionalism.

1.15

The concept of the democratic constitutional state (to be included at least in the Preamble of the Constitution) should be a positive guide and not a political programme, and should in an harmonious way encompass the following:

1.15.1

The principle of democracy: The right of the people of South Africa to exercise state power through the vote as well as state organs and institutions.

1.15.2

The principle of constitutionalism: The national law-giver (Parliament) should be bound by the Constitution except and in so far as the Constitution may be amended in the prescribed way, whilst the executive and judiciary should be bound by written and unwritten law*.

* It follows that all organs of state at all levels of government are to be bound by the constitution, including Parliament, but only Parliament may amend the Constitution in the prescribed way.

1.16

The integration of constitutionalism and democracy should be sought along the following lines:

1.16.1

Democracy should be seen as the supremacy of the people through the supremacy of law/the constitution: the idea of democratic constitutionalism. There should be no democracy without constitutionalism, and no constitutionalism without democracy.

1.16.2

Constitutionalism should be legitimate, and it is legitimate when it is seen against the background of democratic law-making and the democratic system of responsible and accountable government.

1.16.3

Expression should be given to the doctrine of the separation of powers, and a fair balance between rigidity and elasticity regarding amendment of different parts of the constitution*.

* This consideration will in turn be influenced by the technical style in which the constitution is to be written, in the sense that the more detailed the constitution is, the easier it should be to amend it, while a constitution which is written in a principled way could be more rigid.

1.16.4

The supremacy of the Constitution could be seen as meaning that democratic decisions should with regard to material content and procedure only be legally possible within the limits and empowering set by the Constitution, and thus in accordance with the Constitution.

1.16.5

The supremacy of the constitution should not be a system against the state, but it should be a system for the democratic state, to guard against the state degenerating into anarchy, arbitrariness and illegality, without a framework of rules. Such a state would undermine democracy and democratic practices.

1.17

The judicial determination of the constitutionality of legislation should be directed at establishing the legal compatibility of national or provincial legislation with the Constitution, or the compatibility of provincial legislation with other national legislation.

Part 2

Bill of Human Rights

Binding Constitutional Principles

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justifiable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

III

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

IV

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

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.

X

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

XII

Collective rights of self-determination informing, 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.

XII

(1) 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 fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

(2) Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

XVIII

Notwithstanding the provisions of Principle XII, 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. Provision shall be made that every person shall have the right to fair labour practices.

Introduction

South Africa has never had a Bill of Rights which guarantees the fundamentals principles of democracy, equality, non-racism and non-sexism. The ANC`s proposals on the Bill of Rights provide that South Africa will be a multi- party democracy enjoying fundamental rights that are universally recognised in a range of international treaties and documents. The Bill of rights will be a victory for all the peoples of South Africa , in that after decades of struggle and sacrifice they will have guarantees that will ensure the elimination of oppression, discrimination, inequality and division. It will also ensure that the basic rights and freedoms of all are respected while the rich diversity of our society is fully acknowledged.

General considerations

The current chapter on fundamental rights covers political and civil rights. In general, the rights represent a progressive charter in regard to this limited field. However consideration needs to be given to:

Making the chapter on fundamental rights applicable horizontally where appropriate and enshrining applicable and appropriate socioeconomic rights. A balance needs to be established between equality and freedom. Even in this regard our vision of freedom should focus on the rights which protect the dignity of individuals, rather than those which protect their economic privileges. In short the balance which the interim constitution establishes leans in favour of liberty rather than equality. The Bill should apply to human beings.

Drafting the rights in a way in which they would give expression to a balance between democratic Government and the protection of individual liberty. It may be that some of the rights in the Interim Constitution were drafted without a proper perspective of the challenges of governance and thus do not reflect the appropriate balance between the role of the courts and the role of Parliament.

Some sections need reconsideration and have been the subject of political and jurisprudential criticism. These critiques are too detailed to enumerate here, but can be summarised in further elaboration. These sections are Administrative Justice, Economic Activity, Labour Relations, Property, Children, Education, Access to Information, and the limitations clause (section 33).

Notwithstanding the need to address socioeconomic rights in the Constitution, it is also clear that such rights must be costed against an audit of available resources. It helps no-one to promise which can not be granted, or which enables judges to set and prescribe government priorities. The task of allocating scarce resources to job-creation before health car, or vise versa, is the government`s job, not the courts. This does not preclude a floor of basic economic rights, capable of expansion through legislation or the constitution. This is also true of civil and political rights.

Juristic persons should be entitled to the rights to the extent that the rights permit. (See Sect 7(3), Interim Constitution.)

Having regard to the above-mentioned considerations, the Bill should include civil, political, economic, social and culture rights. Environmental rights should also be addressed. The provisions on social and economic rights should be formulated in a way that does not hamper effective government.

Not all rights can be appropriately set out in the Constitution and they may require proper elaboration in legislation.

Bill of Rights

Proposals

2.1

The Bill of Rights will guarantee that South Africa is a multi-party democracy in which people enjoy freedom of association, speech and assembly and the right to change their government. Furthermore, the public have a right to know what is being done in their name*.

*The National Conference felt that the right to free speech should not include the right to "hate speech". This should be regulated by legislation.

2.2

The Constitution shall enshrine a strong right to information and a firm guarantee regarding the free circulation of ideas and opinions*.

*The detailed questions regarding the right to free publication and the circulation of pornography should be regulated by legislation. The right to information should be exercised within the parameters and procedures set out in legislation.

2.3

The Bill of Rights shall be binding upon the State and organs of government at all levels and, where appropriate, on social institutions and persons.

2.4

The Bill of Rights shall guarantee a right to a fair trial, and prohibit torture, cruel and unusual punishment or degrading treatment.

2.5

The Bill of Rights shall enshrine the right of a citizen to choose his or her place of residence, as well as the right of freedom of movement.

2.6

The Bill of Rights shall protect the right to life and the dignity of all. Such a right shall not preclude the legislature, if it so chooses, from providing for and regulating the right to an abortion by legislation*.

*Thus preserving the right of a democratically elected government to decide on the issue of abortion. The matter could, however, also be seen from the wider perspective of reproductive rights, on which the Women`s Charter for Effective Equality states in article 11: "Women have the right to control over their bodies, which includes the right to make reproductive decisions". The RDP White Paper in paragraph 2.12.6.4 refers in this regard to the guaranteeing of reproductive rights, the promotion by reproductive health services of privacy and dignity, termination of pregnancy as well as education, counselling and confidentiality. The right to abortion touches on many human rights. The ANC will present further proposals in this regard.

2.7

The Bill of Rights shall protect the privacy of all persons subject only to reasonable restrictions to allow inter alia the state to enter property to protect vulnerable persons.

2.8

The Bill of Rights must guarantee language and cultural and religious rights. It will respect the diversity of faiths and give guarantees of freedom of religion.

2.9

The Bill of Rights will protect workers rights to set up independent trade unions, to engage in collective bargaining and their right to strike and picket must be protected. The State will be a signatory to the International Labour Organisation (ILO) conventions and commit itself thereby. The Bill of Rights will also prohibit slave labour, forced labour, the exploitation of children and discrimination in the work place*.

*Sect 27(5) of the Interim Constitution should be scrapped.

2.10

The Bill of Rights will provide for the principle of equal rights for women and men in all spheres. The right to be protected from unfair discrimination must specifically include those discriminated against on the grounds of ethnicity, language, race, birth, sexual orientation and disability*.

*The creation of special agencies to ensure that equal opportunity operates in practice should receive attention in the constitution as well as in normal legislation, though not in the chapter on the Bill of Rights.

2.11

The Constitution will make it clear that seeking to achieve substantive equality and opportunities for those discriminated against in the past should not be regarded as a violation of the principles of equality, non-racialism and non-sexism, but rather as their fulfilment.

2.12

A new system of just and secure property rights must be created, one which is regarded as legitimate by the whole population. This should include provision for access to land and for the redress of inequities, as well as the protection of personal property.

2.12.1

The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

2.12.2

Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected and will not be based solely on the market value of such property.

2.12.3

Regulating the use of property in the public interest, e.g. of the environment, or the health and safety of the public shall not be construed as a taking of property rights.

2.12.4

The Bill of Rights shall establish the principles and procedures whereby land rights will be restored to those deprived of them by apartheid statutes. A Land Claims Court Tribunal, functioning in an equitable manner according to principles of justice laid out in legislation, will, wherever it is feasible to do so, restore such rights.

2.13

The Bill of Rights should support the provision of homes, employment and utilities such as light and water.

2.14

The Bill of Rights shall affirm the right of all persons to have access to basic educational, health and welfare services. It will establish principles and mechanisms to ensure that there is an enforceable and expanding minimum floor of entitlements for all, in the areas of education, health and welfare. It shall commit the courts to take into account the need to reduce malnutrition, unemployment and homelessness when making any decisions.

2.15

Special and additional levels of protection shall be afforded to children who will have a right to be protected from neglect, abuse, exploitation or exposure to harm, as well as a positive right to basic nutrition and health care.

2.16

The Bill of Rights will direct that the environment be protected from desecration and nurtured, on a sustainable basis, for the benefit of South Africa, its children and its children`s children.

2.17

The Bill of Rights will direct the state to ensure that all South Africans live in security and peace.

2.18

The Rights contained in the Bill shall be capable of limitation where such limitation is justifiable in a democratic, open society based on freedom and equality.

2.19

In the international sphere, the state shall become a party to suitable human rights conventions and in particular those dealing with racism, gender discrimination and the rights of children, which apartheid has until now rejected. In this way we shall assert our rightful place in the international community. Treaties which impact on South African legislation shall require the approval or participation by the South African Parliament in the form of a national law.

2.20

The Bill of Rights shall guarantee a right to procedurally fair administrative action where a person`s rights or interests are affected*.

*To make it compatible with the practicalities of governance.

2.21

These rights shall be derogated from

2.21.1

only in a state of emergency necessarily and properly declared to protect the security of South Africa, and

2.21.2

only if the Constitution does not specify that the right in question may not be derogated from, and

2.21.3

only to the extent necessary to restore the security of the nation and the safety of its people, and

2.21.4

only to the extent that such derogation is consistent with international law on the nature and extent of derogation of human rights in exceptional circumstances.

Proposals regarding the Interim Constitution

2.22

Sect 23 should be retained but reformulated to allow the method and extent of this right to be set out in law.

2.23

Sect 24 on administrative justice should be retained, subject to its reformulation in line with the necessary practicalities of governance.

2.24

Sect 26 on economic activity should be removed.

2.25

Sect 27(5) on labour relations should be deleted.

2.26

Sect 28 on property: It should be reformulated to accommodate the right of access to land and the redress of past and existing inequities in access to land, dealt with elsewhere in the Interim Constitution.

2.27

Sect 30 on children: To be retained.

2.28

Sect 32 on education: To be retained, though care should be taken to ensure that Sect 32(c) does not condone discrimination.

2.29

Sect 33 on "limitations" is to be endorsed, subject to its reformulation to make it simpler and clearer.

Part 3

National Government

Binding Constitutional Proposals

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.

XIV

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

XV

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

VIII

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

X

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

XXII

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

XVII

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

XXXII

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.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

The National Assembly*

*Those provisions of the Interim Constitution which deal with the legislature`s constitution-making function will not be required in a future Constitution (including those sections dealing with deadlock-breaking.)

The Franchise

There has been some criticism of the lack of effective constituency representation in the National Assembly, which arises from the system of list based proportional representation. There is also an acknowledgment of the importance of proportional representation as a device to ensure representativeness and inclusivity. In this regard, there is a view that a mixed system should be considered. This system may allow for single member or multi-member constituencies but also ensures proportional representation*.

*The question of single member or multi-member constituencies is the subject of further reflection by the ANC, as is the case with the relative percentages of constituency and proportional representation.

Secondly, the system of National and Regional lists could be reconsidered together with the role of the Senate. It is clear that the need for regional lists for the National Assembly falls away if the constituency basis to the electoral system is accepted. There is no need for such a list if the proposals on the Senate are accepted.

It follows that there should be regular elections for Parliament, at least once every 5 years, on the basis of proportional and constituency representation in Parliament.

Number of Representatives

The number of representatives needs to be reconsidered, given the resources and size of the country. The size of regional legislatures similarly needs reconsideration. South Africa now has a costly form of representation, which is out of line with highly industrial countries. Including regional representations, there are close to 900 lawmakers. The cost, having regard to the resources of the country, can be justified if we can demonstrably show that the number of members of the National Assembly can not be reduced without affecting the quality of its decision making or diluting the nexus between the people and Parliament. In a PR list system, the relationship between voter and MP, is minimally affected by a reduction in the numbers in Parliament. Reducing the numbers of these legislatures by say 25 per cent, would have more impact on the attempt to secure funds for the Reconstruction and Development Plan (RDP), than trimming the salaries of MP`s. It could be argued that some MP`s could play a more appropriate role in the civil service, at other levels of government, in the various institutions of government, or in civil society. The National Assembly needs more resources for its MP`s, especially for research capacity.

Against the above it is contended that the large number of representatives has contributed to the stability and the inclusivity of the political process. This in itself is a contribution to the economic climate in the country. Final proposals in this regard will be submitted, together with final proposals on the electoral system.

Recall

A further consideration relates to the question of "recall". The introduction of a constituency component to the electoral system will facilitate or allow for this at a constituency level, while party congresses can audit compliance with mandates by those elected on lists. Respectively it means that the electorate and political parties should have the right in principle to recall their representatives as determined by national legislation. Whilst the constitution should contain only the fundamentals regarding elections, the electoral system (which includes the detailing of the franchise and the question of recall) and actual procedures should be the subject of a

national electoral law. Final proposals, as with the electoral system, will be advanced in due course.

Checks and Balances and Accountability

In regard to the question of "checks and balancesÓ and "Separation of Powers", we need on the one hand to insist on the primacy of Parliament, in the schema of government by and for the people, and on the other hand to avoid a multiplicity of watchdog functions/bodies/and institutions, and an overly literal interpretation of the Separation of Powers doctrine. Currently the Executive is the subject of scrutiny by Parliament, the Parliamentary party caucuses, and Standing Committees, the Senate and its committees, the Human Right Commission, the Public Protector, the Premiers and their governments, the Judiciary and the Constitutional Court, and the Auditor-General. It is also the primary focus of the Bill of Rights. There are sufficient checks and balances in this schema.

In general the formal provisions and those which have to do with Cabinet accountability to Parliament are in line with the ANC`s previous conception of Parliament`s functioning. However, a close reading of the various formal provisions needs to be undertaken regarding those aspects which make governance unnecessarily complex and procedurally rigid. Some of these flow from the GNU arrangements and will fall away.

Party Funding

Freedom, democracy and democratic life as such demand that political parties be in a position fully to undertake their tasks in accordance with the Constitution. To serve this aim political parties should be able to draw funds on a proportional and constituency basis. Such a proposal recognises the importance of parties to the political process. Such mechanisms could go together with proposals regarding control on public contributions to parties, which should not be prohibited. This should be left to a national law*, and the constitution should not preclude such legislation.

*The national law will have to deal with matters like the principles and extent of public financing of parties, an assessment procedure and the provision and disbursement of funds.

Parliamentary Committees

A commitment to a full and open parliamentary committee procedure structured to ensure executive accountability to an informed Parliament, and capable of pro- active investigations, and proposing new legislation, should be included in the final constitution. Ministers of state should not be members of committees, but should attend such committees when invited to do so.

Proposals

3.1

South Africa shall be an undivided state in which there shall be a democratic government at local, regional and national levels. The Bill of Rights and principles of non- racialism, non-sexism and democratic accountability shall apply at all three levels of government.

3.2

Parliament shall consist of the National Assembly and Senate. The National Assembly will be elected by universal suffrage on a common voter`s roll according to proportional representation. It will pass the national budget and have primary responsibility for the preparation and adoption of the country`s main laws. (There shall, however, be a role for the Parliamentary committees and the provinces in the process of preparing the budget.)*

*See below: Parts 6 and 7.

3.3

The ANC proposes the use of the Parliamentary Committee system, structured to ensure executive accountability to an informed Parliament. The Committees will have a right to consider forthcoming legislation and to initiate new legislation in consultation with the relevant

ministries. The Committees shall have the necessary powers to conduct public inquiries into matters within their area of jurisdiction.

3.4

Parliament shall decide on the remuneration and benefits of the President and its members including Ministers, Deputy Presidents and Deputy Ministers.

3.5

Amendments to the Constitution shall be effected only by a two thirds majority of both houses.

3.6

The executive shall be accountable to Parliament, and the Constitution.

3.7

There shall be a Speaker elected by Parliament and Parliament shall determine its own rules of procedure. The question of a Leader of the House and his/her responsibilities and status should fall within the ambit of the Rules of Parliament.

3.8

There shall be regular elections for a representative Parliament, at least once every 5 years based on proportional and constituency representation in such a manner that the representation of parties in Parliament reasonably and equitably reflects their electoral support*. There shall be a common voters roll, and universal adult suffrage.

*The ANC`s position on the total number of representatives in the National Assembly is presently under consideration.

3.9

The elections shall be administered and supervised by an independent body, the Electoral Commission. The Electoral Commission shall consist of 6 persons of integrity elected by a 75 per cent majority of the National Assembly and shall be granted all the necessary authority to administer and direct the conduct of the elections.

The Senate

Discussion

The exact role and need for a Senate needs reconsideration. It does not currently have a sufficiently identifiable purpose or powers to warrant its special status. In its current form it is a mirror image of the Assembly. It does not appear to be regarded by the provinces as their "house". Without a specific regional function the Senate constitutes an institution with little to offer. However it could play an important role within a revised understanding of our provincial framework, one which would contribute to a more co-operative framework of provincial and national governance.

The Senate will, it is proposed, be a functioning component of the national legislature. The Senate, however, will be dealt with in Part 4 below, dealing with provincial government, as it constitutes an integral part of the general approach towards empowering the provinces and in expressing the relationship between national and provincial governance.

The National Executive

The provisions which provide for the Government of National Unity, and which are inappropriate for a democratic government need to be evaluated and withdrawn. Any government of national unity arrangement will be voluntary, and at the instance of the majority party.

It is clear that the President needs a Deputy to deputise for him or her. The position and office of a Deputy President* should be continued.

*As against the creation of the position of Prime Minister.

Consideration must be given to principle XXXII. In this regard the provisions which establish the GNU could be linked to a date upon which they automatically expire. The words "substantially" would allow for some amendments to the GNU during the remainder of the 3 or so years of its

existence. The functions which the President can perform without consultation need to be expanded, if only for the smoother functioning of Government.

3.10

The ANC proposes that the Head of State be a President with both ceremonial and executive powers. The President should be elected by the National Assembly. He of she will have the same term of office as the National Assembly and be available for re-election only once.

3.11

The President will appoint and supervise the functioning of the Cabinet. The President shall appoint and dismiss Ministers, and Deputy Ministers at his or her discretion.

3.12

Other than Minister or Deputy Ministers, a member of Parliament may not be a full-time member of the executive or the civil service.

3.13

Coalitions between parties of the Cabinet will be based on voluntary political pacts and will not be compulsory nor required by the Constitution.

3.14

The President shall consult with her or his Cabinet when taking important decision. The President shall vacate his/her seat upon assumption of Office.

3.15

The National Assembly will elect from amongst its members a Deputy President who will be a member of the Cabinet, and who will be the parliamentary leader of the majority Party in Parliament. He will act as President in the President`s absence, and will be accountable to both the President and Parliament, and will perform such duties and functions as the President assigns him or her.

3.16

Should the President resign or otherwise be unable to continue in office, the National Assembly shall elect a new President for the remainder of the unexpired part of the President`s period of office.

3.17

The members of the Cabinet shall be accountable to Parliament and the President.

3.18

The President or Deputy President may be impeached on a resolution of both houses with a 2/3 majority, on the grounds of a serious violation of the Constitution or other laws or inability to perform the functions of his or her office.

3.19

Parliament may pass a motion of no-confidence in the President and her/his Cabinet, in which event the President may either resign or call a general election.

3.20

Ministers shall not be eligible to sit on parliamentary committees.

Part 4

Provincial and Local Government

Binding Constitutional Principles

VI

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

XVIII

(1)

The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

(2)

The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or inferior to those provided for in this Constitution.

(3)

The boundaries of the provinces shall be the same as those established in terms of this Constitution.

(4)

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, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds 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.

(5)

Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at 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 recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

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

(1)

The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

(2)

Where it is necessary for the maintenance of essential national standards, for the establishment of manimum standards required for the rendering of services, 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 Constititution.

(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 - power should be allocated to the national government.

(4)

Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated to the national government.

(5)

The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

(6)

Provincial governments shall have powers, either exclusively or concurrently with the national government, inter alia - (a) for the purposes of provincial planning and development and the rendering of services; and (b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

(7)

Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to government service, the powers should be allocated concurrently to the national government and the provincial governments.

(8)

The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

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

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government 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.

XIV

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

XV

The national government 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 XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

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.

XVII

Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the rpovicnes as well as the population and developmental needs, adminstrative responsibilities and other legititmate interests of each of the provinces.

The System of Provincial Governance and the Senate

Concerns and Objectives

Discussion

The challenge that the ANC, and indeed the Constitutional Assembly faces, is to create a final constitution which will serve as a solid foundation for good government. In doing so the ANC must confront the constitutional legacy of the last century of white rule, absorb the experience of the last 12 months of governance under the Interim Constitution, and, most importantly, must attempt to foresee the problems and challenges South Africa will face in 10, 20 or even a hundred years from now. Constitutions are as much about issues of tomorrow as they are about the conflicts of today.

The aspect of the new constitution to which the ANC has given the most careful and considered attention is that which deals with provincial governance. This party has undertaken considerable internal consultation, and has conducted wide-ranging comparative investigations concerning its proposals on this issue. The ANC has not drafted proposals to meet some abstract centralist or federalist agenda, but has sought to draft proposals which meet the requirements of "good governance".

The ANC has considered a simple unitary state in which there are no regional governments, and in which services are delivered by an executive appointed and accountable only to the centre. It has rejected this model. On the other hand the ANC has considered some confederal models similar to those proposed by some parties and in which the country would be a loose federation of autonomous states. The ANC believes that this model offers the prospect of physical disintegration, racial and ethnic violence on par with that currently experienced by the former

Yugoslavia, as well as the perpetuation of existing inequalities and economic impoverishment. The ANC proposes instead a new vision and a new framework for provincial governance which we call co-operative governance.

The federalism/centralism debate has for some time been stuck in a sterile and one-dimensional quantification of discreet national and provincial lawmaking competencies respectively. The ANC now proposes that provinces should become an important component of central government and national policy making itself, yet not lose areas of their current provincial legislative competency.

The ANC`s vision of co-operative governance in the relation between national and provincial government is guided by the following concerns:

The government should be brought closer to the people. This should also mean, in addition to representative law making at provincial level, that the administration and the execution of laws should be brought closer to the people. More specifically the responsibility for the delivery of services to people in the provinces and at local government level should be by a government which is accountable to those it serves. This implies elected regional governments.

Local and regional government should have the capacity to make laws and apply laws in a way which is responsive to our diverse regional circumstances, needs and aspirations. This implies that regional governments must have the necessary executive and law-making powers. These powers must be original in the sense that they are conferred and guaranteed by the constitution itself.

At the same time the structures of government should be cost-effective and directed at effective and efficient governance. South Africa must marshal all its resources in a most productive way for the task of reconstruction and development. The pressure on governmental resources is extreme, and many of South Africa`s problems are national in nature and require national solutions. For example, our health, housing, education, crime and other problems are national in character. Solutions to them can not be found solely within provincial boundaries. Solutions to the problems in one region which exacerbate the problems in another are not solutions at all.

Geographic size, and the level of economic and social integration in South Africa requires a certain level of legal homogeneity. The memory and experience of the "bantustans" is still fresh

in our minds. The creation of economically not viable and politically autonomous units promoted economic irrationality, poverty, corruption, bloated and competitive bureaucracies and endemic political and ethnic conflict. Ironically, fragmentation has proved just as inimical to securing "freedom of the individual" as it has been to ensuring "equality of citizenship".

South Africa requires to embark on a process of national unity, reconciliation and nation building. It needs to unite the nation and, without sacrificing the principle of democratic government at regional level, minimize divisions and conflict between regions, races, ethnic and linguistic groups. The balkanisation of South Africa could as in Eastern Europe lead to devastating self- destruction should the constitutional structures pit our regions and provinces against each other and against national government. The prospect of the fragmentation of the country into competing and belligerent fiefdoms is neither farfetched nor improbable having regard to our history.

In short it is the challenge of a system of provincial government to provide for legitimate regional aspirations and needs without denying the context of overall national imperatives. The solution to these concerns lies in adopting a system of governance that provides for effective and responsive provincial government, as well as regional influences on national government, yet does not institutionalise shortsighted competition and promote only fractious governmental relations.

Potential Problems in the Current Framework

The current framework promotes tensions between region and region, and between regions and central parliament. This is not negative per se but, the absence of any integrating and co-operative mechanism which encourage province governments to work with each other and the national government in regard to national legislation provides no counter balance to these centrifugal forces. There is no forum nor process for provincial governance to bear co-responsibility for the general welfare and management of the country as a whole. While the principle of empowering the provinces to manage their affairs is important, the political structure should also promote a broader co-operative approach. It should counteract the tendency to make decisions from exclusively provincial perspectives. It is the maturity of current provincial governance which has prevented major problems up till now.

The precise division of legislative and executive competences is uncertain, thus leaving important questions of governance to the courts to determine. They are expected to determine

many political matters which should be resolved between the provinces or between the provinces and central government.

The present Senate makes too little of a contribution to resolving this problem because it appears to duplicate the work and composition of the National Assembly and yet fails to integrate the provincial viewpoints in national law-making. It is structurally unable to give institutional expression to the relationship between national and provincial levels because the regions` powers reside solely in its provincial legislative and executive functions.

The Proposal

In brief the elements of our proposal are:

The collaboration of provinces in legislation on national level. The Senate should be the main player in the relationship between national and provincial levels of government and the consequent vertical distribution of power. Present legislative competences of provinces should in the main be retained as at present, while a more substantial responsibility for executive power, as well as supplementary legislation, will rest with the provinces.

A division of competencies between the national and provincial levels of government which supports the idea of cooperative governance in the sense of regard for the legitimate interests of national and provincial governments by recognising provincial aspirations and needs within a context of national imperatives.

A functional and an efficient allocation of the financial duties as between the different levels of government, and a fair system of distribution of revenue (financial equalisation) between provinces and between provinces and national level*.

*See Part 7 below.

Functions of the Senate

The Senate should have the following basic functions:

Have a close and on-going relationship with the provincial governments and give expression to the views and the administrative experience and needs of the provinces*.

*The Senate should be a "working parliament" as against a "reasoning and debating" parliament with a business-like style, and with a place for officials from the provinces at the Senate committee meetings.

Have a real say over National Assembly bills that deal with the exercise of powers and performance of provincial functions and articulate the interests of provinces at national level.

It should be able to initiate legislation and bear co-responsibility as a chamber for the Republic of South Africa as a whole regarding provincial interests.

The Senate should have less influence over national legislation dealing with the exclusive competencies of national government than it does over legislation dealing with its concurrent areas of competence.

Composition of the Senate

Regarding the composition of a body like the Senate, it is possible to distinguish between three possible types:

The members could be directly chosen by the people (as in the USA).

The members could be other party members chosen by provincial legislatures, as they do now, on a proportional party political basis.

The members could consist of members of the provincial executives or legislatures who appoint and recall them.

The ANC proposes that the third type be the basis of the composition of the Senate. In this model the provinces will have a more direct "ownership" of the Senate. The Senate could have between 50 or 100 members (5 or 10 per executive, but the number of Senators as such has not been finalised by the ANC). The option to provide representation for the third tier of government (a total of 5 or 10 members) was considered favourably by the National Constitutional Conference on the grounds that it is a level of government which contribute to

the Senate as a body giving expression to all levels of government. However, this should not open the way for representation by "interest groups" as such*.

*The forthcoming proposals of the ANC will detail the following: (1) the manner in which provinces are to be represented in the Senate, (2) the size of the Senate, and (3) the administration and functioning of the Senate and its institutional relation with the National Assembly. With regard to the last-mentioned aspect, the following question is to be answered: Should the National Executive be responsible to Parliament (National Assembly and Senate), or only to the National Assembly, in view of the completely new character of the Senate? Should the term "Parliament" be reserved for the National Assembly only? If government policy is defeated in the National assembly, a new government has to take over or an election must be called. The Senate has no obvious place in this scheme of things. If the National Executive is responsible to National Assembly and Senate, the consequence may be that the Senate would be more likely to vote on party lines, as the Australian Senate does for example, than to protect the interests of provinces. It is submitted that the National Executive should not be responsible to the new Senate.

Co-operative Governance

The Interim Constitution allocates powers and functions of government as between the different regions and Parliament. To a lessor extent it also provides a small voice for regions in national governance. In our view the first method of giving expression to regional diversity could be retained whereas the second method needs to be strengthened.

The essential thrust of the proposed new framework is that the provinces will now have a greater say, through the Senate in the making of national legislation effecting their interests. This will impose national considerations upon provinces, and require them to interact with each other and the national assembly to consider the good of their province and the country as a whole. It will also impose provincial consideration upon the national law-making process.

In the current framework, executive powers follow legislative powers. In our view there is no need to rigidly link these and it should be possible to extend further executive powers to the

provinces in regard to national framework legislation dealing with matters under the concurrent jurisdiction of provincial and national governance. In addition there should be a functional and efficient allocation of the financial duties as between the different levels of government, and a fair system of distribution of revenue between provinces and between provinces and national level.

In general the specific functional areas as presently specified in Schedule 6 of the Interim Constitution are the appropriate areas of concurrent legislative powers. With the new role of provinces in regard to national legislation, it will be possible to explicitly authorise general framework legislation as a category of legislation overriding provincial legislation in the final constitution. Framework legislation could, however, be subject to the pre- eminent right of provinces to supplement such legislation and to preclude parliament from so doing.

Where there is "concurrency" it is necessary to establish priority or precedence in cases of conflict between provincial and parliamentary laws. The ANC proposes a formula broadly similar to the existing section 126 save that the onus of proving priority or precedence should fall upon the provincial government - as it was originally formulated at Kempton Park*.

*This is not a significant amendment and indeed when the ANC introduced the amendment at the original Kempton Park formulation placing the onus on the national government, it was rebuked for "playing with words". It is therefor strange that this "playing with words" should now be interpreted as a fundamental shift in the framework by those same critics.

The formulation of the clause which sets out conditions for the preeminence of legislation also reflects the fact that the "desirability" or "necessity" of such national legislation will have been affirmed by the provinces through the Senate, and that the courts will establish whether the legislation concerned belongs to the categories identified for the preeminence of either national or provincial legislation.

In general the ANC believes that attempting to list "exclusive" provincial legislative powers which are not also potentially matters of national concern, is a fruitless exercise. We are in agreement with those other parties who believe that the constitution should not attempt to

amplify exclusive provincial legislative competencies save for those which can be said to arise from the application of the override principles.

If these powers are crafted so as to exclude the possibility of a need for national intervention they will amount to insignificant powers or window dressing e.g. "abattoirs". Even contemporary federal constitutions increasingly recognize national and even supra-national interests in matters such as police and education. As these proposals stand, the provinces` concurrent powers will be enhanced by certain exclusive executive functions, and the powers, through the Senate to collectively block legislation inimical to provincial interests.

The ANC proposes a national and uniform framework for provincial constitutions which would allow for provincial variation in certain respects. More detailed proposals in this regard, and in regard to the size of provincial legislatures will be made in a further proposal.

These proposals make clear that the ANC will not simultaneously grant vastly enhanced powers to the provincial government over national laws and also increase the powers to ignore the very national norms and standards that they have approved. If we allow this development, the logic of co- operative governance will collapse in on itself and provinces through the Senate will cease to have meaningful roles in national legislation and will be relegated to fringe fiefdoms. It could perhaps be suggested that in this model some of the provinces (notably Natal and Western Cape) will have to surrender their individual autonomy for the "dubious benefit of being swamped by ANC Senators".

This is myopic. Firstly their current powers remain largely intact if not augmented. Secondly the provinces have shown at intergovernmental meetings that they have common ground with each other across party political lines (this after all, is also the international experience). Thirdly, constitutions must be crafted on the basis of more lasting considerations than today`s temporary political alignments. Overall, provinces` law-making competencies (save for policing powers which in reality were never properly a part of schedule 6) remain. Their executive powers will be significantly expanded (executive powers are not the menial bureaucratic duties that some parties have suggested but are the very essence of political governance) and they would have greater financial and fiscal powers to participate in the drafting of the national

budget. For this reason we believe that our proposals conform to the agreed constitutional principles*.

*As other parties have noted, this vision also informs the German Constitution.

General Principles

4.1

The following ideals, which are relevant to the inner consistency of the whole of the final constitution, should be achieved in relation to the provincial system:

4.1.1

National unity, reconciliation and nation building;

4.1.2

cost efficient and effective government, capable of redressing the iniquities of the past and the disparities of the present;

4.1.3

the promotion of maximum participation in democratic and accountable governance at all levels;

4.1.4

the promotion of governance close to the people, which is responsive to their needs and accommodates the diversity of regional aspirations and circumstances.

Cooperative Governance

4.2

The final constitution should establish a cooperative system of governance with the following guidelines:

4.2.1

Cooperative and coordinated national and provincial governance should be promoted, while strengthening the role of provinces in national policy and law making.

4.2.2

National and provincial governments should have regard for one another`s legitimate interests in the exercise of their powers and functions.

4.2.3

Recognition should be given to legitimate regional aspirations and needs through the exercise of appropriate provincial law-making and financial and executive powers, within a context of overall national imperatives.

General Matters

4.3

The constitution should provide for a national framework for provincial constitutions, which would allow for provincial variations on defined aspects*.

*The ANC will make further submissions with regard to the principles applicable to provincial constitutions at a later stage.

4.4

There should be democratically elected provincial legislatures, which should have the executive and legislative powers as set out below. From each of these legislatures delegates* shall be sent to the Senate, and a provincial executive should be formed. A provincial executive must be accountable to its provincial legislature.

*It may be ordinary MPL`s or MEC`s.

4.5

The allocation of powers and intergovernmental relations should be based on the principle of coordinated and cooperative governance.

4.6

The final constitution should make a distinction between the following two aspects of the division of powers:

4.6.1

The division of legislative powers between national and provincial levels, and

4.6.2

the division of executive/ administrative powers between national and provincial levels.

Elements of the Provincial System

4.7

The provincial system should have the following elements:

4.7.1

A Senate, representative of provinces, which effectively reflects provincial needs and interests at national level, while providing an appropriate forum for intergovernmental coordination*.

*The ANC is of the opinion that elaborate provisions on the detail of intergovernmental coordination in regard to especially executive and administrative matters should not be contained in the constitution, because executive and departmental structures and line functions are involved which must be allowed to develop gradually.

4.7.2

Concurrent legislative competences for national Parliament and provincial legislatures.

4.7.3

Executive and administrative competences at national and provincial levels, with the weight of executive competences being assigned to provinces.

4.7.4

A clear framework for determining uncertainties between national and provincial competences.

4.7.5

The location of residual competences at national level.

The Senate

4.8

The final constitution should provide for a Senate, comprised of representatives of the provinces and, possibly, representatives of local government level, which should allow for effective influence and participation of the provinces in national law-making at national level, and which should function as the suitable forum for intergovernmental coordination.

4.9

Members of the Senate should be appointed and be subject to recall by provincial legislatures and/or provincial executives.

4.10

Every province (and possibly the local level of government of South Africa as a whole) shall each be entitled to a single delegation of Senators*.

*5 or 10, the precise number of Senators still to be recommended by the ANC.

4.11

The Senate should be a perpetual body. New representatives will be appointed after national or provincial elections, but may be changed by the provincial legislatures.

4.12

The Senate shall be entitled to block or approve laws dealing with provincial matters*, it may initiate laws regarding provincial matters and it shall have the right to review other legislation.

*In other words, the consent of the Senate shall be required for legislation dealing with provincial matters. The precise way in which the blocking power is to be exercised, shall be a matter of further discussion and proposals. Deadlocks may need to be revolved through mediation or joint committees.

4.13

The provinces shall be entitled, primarily through the Senate and its structures or committees, to participate in financial and fiscal matters affecting the provinces, especially in the drafting of the national budget, although the Senate will have no powers to block financial bills.

4.14

The intention in the final constitution should be to introduce a framework whereby the judicial determination of the pre-eminence of national legislation is replaced by the requirement that the provinces themselves through the Senate conclusively establish the desirability of the relevant national legislation*. The courts will still have a role to determine whether the overriding legislation fits the categories set out.

*See also the footnote to the text at 4.9.5 above.

4.15

Where the national government is empowered by national legislation to promulgate subordinate legislation or statutory instruments which affect the powers, functions or interests of provinces, the Senate should have a say over the content of such instruments, particularly where the provinces are required to implement such legislation or instruments*.

*Thus providing opportunity for co-determination in administrative matters and for inputs from the provinces on account of their administrative experience.

National and Provincial Legislative Competences

4.16

Provincial legislatures shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6 of the Interim Constitution*. Legislative competence shall include the competence to make laws which are necessarily ancillary to the effective exercise of their legislative competence. Parliament shall have the same powers to make laws in regards to the above matters.

*Save for policing which was never really a Schedule 6 area but was subject to Chapter 14.

4.17

In the event of an inconsistency between national and provincial legislation, the Act of Parliament shall prevail over a law passed by provincial legislation, only to the extent of any inconsistency between them, if:

4.17.1

The national law deals with a function in respect of which uniformity across the nation is desirable.

4.17.2

The national law deals with a matter in respect of which it is necessary for South Africa to speak with one voice or to act as a single entity - in particular, in relation to other states.

4.17.3

The national legislation is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, 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.

4.17.4

The national legislation deals with national economic policies, the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of good services, capital and labour.

4.17.5

The national legislation provides for equality of opportunity or access to a government service.

4.17.6

The national law establishes a national framework for the provision of public services or the management of institutions relating thereto.

4.18

Where a provincial law deals with matters other than those referred to in 4.17 above, such as a specific socioeconomic and cultural need of a particular province, it shall prevail over national

legislation. Provinces are not precluded from passing laws in regard to the matters intended in 4.17 above, provided such legislation is not inconsistent therewith.

4.19

In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and provincial governments:

4.19.1

such legislation shall be deemed to be "necessary" or "desirable" in terms of the requirements stated in 4.17 above if such legislation has been approved by the Senate, and further

4.19.2

if such dispute cannot be resolved by a court by a construction of the constitution, precedence shall be given to national legislation*.

*Constitutional principle XXIII.

4.20

Without derogating from the powers of national government under the constitution, national government shall not otherwise exercise its powers so as to encroach upon its geographical, functional or institutional integrity of the provinces.

4.21

Residual powers shall be within the exclusive competence of the national government.

4.22

Provinces shall, in addition to its powers to legislate in its concurrent areas of legislative competence, be responsible for developing the details of the framework legislation of the national government, more specifically in relation to its implementation and in ensuring that regional and sub-regional variations are taken into account.

National and Provincial Executive Competences

4.23

Also in respect of executive or administrative competences the constitution should give expression to the following two guiding principles:

4.23.1

Bringing government closer to the people, allowing for governance to fit the specific conditions and variations in each province, region or sub- region, and

4.23.2

at the same time building and maintaining a single harmonious and prosperous nation and maintaining effective and cost-efficient government.

4.24

Both national and provincial government shall have executive powers in regard to their concurrent competences.

4.25

Exclusivity of executive functions for provinces should primarily exist in the context of executive implementation under enabling or framework legislation, as approved by the provinces in the Senate, and the implementation of provinces` own legislation.

4.26

Provinces shall be allocated the resources and powers to implement or administer its legislation and such national legislation as is delegated or assigned to it. In general, provinces shall be responsible for the execution of the national legislation set out in <185>9 above. Ordinarily such powers should, with the consent of the Senate, be allocated to provincial government and, where appropriate, to local government, even if the relevant legislation was passed at national level. In this regard,

4.26.1

executive powers shall be allocated to the level at which it can be exercised most effectively and efficiently, and

4.26.2

in the event of a province failing or refusing to implement national legislation, the national government may itself implement the legislation or intervene.

Local Government

Binding Constitutional Principles

VI

Government shall be structured at national. provincial and local levels.

VII

At each level of government there shall be democratic representation. This principle shall not derogate from the provision of Principle XIII. [Principle XIII relates to the status of traditional leaders - see below.]

XXIV

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

Discussion

In general the Interim Constitution resolves the balance between national, provincial and local government to the disadvantage of local government. It should be noted that Constitutional Principle XXIV requires that a framework should be set out in the final constitution for local government and that the comprehensive treatment of local government should be the subject of parliamentary or provincial legislation, or both. The ANC takes the position that local government is a matter of both national and provincial interest in view of the history of using local government as a tool of apartheid policy, and because it is the main point of delivery of the National Reconstruction and Development Program.

Framework legislation on local government should be enacted at national level, and not asymmetrically through separate legislation in different provinces. Provinces should be responsible for the implementation of local government, and the provincial management of local government. It should have power to make laws not inconsistent with the national framework so as to take into account provincial diversity. The framework should also protect local government by specifying its powers of self-administration*.

*Because of nation-wide underdevelopment of local government in some areas and their role in the national economy of South Africa and the RDP, the link between local government and the national level could be fleshed out by giving local government representation in the Senate in the form of a delegation of Senators.

It is suggested that the term self-administration* be used in respect of local government**. Self-administration duties could be divided into those where the local authority can decide whether and how to perform the duty, and those where the local authority can only decide how to carry out the duty.

*Which, while allowing local authorities to act on their own responsibility, leaves open the possibility of interaction with provincial and national government in matters which are, respectively, of provincial or national concern.

**Rather than autonomy, which could mean that interference with the exercise of local authorities` duties by superior authorities may be resisted: an absolutely free sphere of discretion for local authorities may then exist.

The ANC insists that local government should be democratically constituted, and function in accordance with democratic principles. Traditional leaders may and should participate in local government, subject to the principle of democratic and accountable local government. The provinces could determine the precise form that such participation should take.

*In this connection the ANC confirms that participatory democracy and mechanisms to give effect thereto are vital to democracy in South Africa, and that civil society and its various organisations have a crucial role in democratising and transforming South Africa. The final constitution, supplemented where necessary by national legislation, should provide for the principles and appropriate/effective mechanisms of participatory democracy, as well as for organs of civil society.

**Principle VII states that the principle of democratic local government should not derogate from Principle XIII, which provides that the institution, status and role of traditional leaders shall be recognised. It is submitted that the role of traditional leaders is not threatened by democratic local government if they retain an advisory and cultural function in local government within their traditional areas.

The final constitution should not exhaustively lists the powers and duties of local government councils. The most basic functions should be described in the constitution and the rest of the detail should be left to the comprehensive parliamentary legislation referred to above*.

*Local government authorities should have the following basic rights and duties:

Choice of organisation and personnel of the local government within the framework of national legislation.

Financial authority: the right to have its own revenue, determine expenditure and administer financial affairs.

Planning powers: This could include the right to specify types of buildings and the permissible land use in a municipal area.

Provision of facilities: This includes the establishment and operation of public institutions for the benefit of the population.

Mandatory functions: Local authorities should also carry out functions mandated by provincial or national government, provided the necessary financial capacity is or is being made available.

By-laws: Municipalities should have the right to issue by- laws.

Administrative decisions: This is the right to make administrative decisions arising out of the enforcement or implementation of national, provincial and local government laws and by-laws. These need to be set out in the final constitution.

4.27

Comprehensive provision for local Government, including its powers functions and structures shall be provided for in national legislation. The implementation and supervision of the legislation shall be delegated or assigned to provinces. The national legislation shall:

4.27.1

prescribe the areas of self- administration of local government,

4.27.2

make provision for mandatory functions,

4.27.3

allow for the implementation of this legislation by provinces which may pass legislation not inconsistent with the framework,

4.27.4

confer the right to make by-laws upon local government,

4.27.5

confer the necessary financial entitlements, authority and controls upon local government, subject to the provinces` right to supervise such controls.

4.28

Elections to local government shall take place on either a proportional or ward basis, or both, by general, direct, free, and secret ballot.

4.29

Local government shall be required to function in a manner which would allow interested parties to be appraised of and make representations regarding decisions affecting the community.

Traditional Authorities and Cultural Bodies

Constitutional Principles

XIII

(1)

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 fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

(2)

Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

VII

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

XXIV

(1)

This Schedule and the recognition therein of the right to the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

(2)

The Constitution may give expression to any particular form of self-determination provided there is a substantial proven support within the community concerned for such a form of self-determination.

(3)

If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

Discussion

The institution of chieftainship has played an important role in the history of our country and chiefs will continue to have an important role to play in unifying our people and performing ceremonial and other functions allocated to them in law.

Proposals

4.30

The powers of chiefs shall be exercised subject to the provisions of the constitution and other laws. Provision will be made for an appropriate structure consisting of traditional leaders to be created by law, in order to advise national Parliament, and, where appropriate, provincial legislatures, on matters relevant to customary law and other matters relating to the powers and functions of chiefs. Changes in the existing powers and functions of chiefs will only be made by parliament after such consultation has taken place. (More detailed proposals will be provided in due course.)

Part 5

Judicial Authority

Binding Constitutional Principles

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.

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.

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.

Discussion

Only the fundamental principles concerning the administration of justice, and conduct of the courts, the right to a fair trial, including the right to legal representation should be contained in the Bill of Rights. This chapter of the Constitution should only deal with the structure of the Courts, their respective jurisdictions and the appointment of the staff who administer them. The Constitution should only set out the constitutional pre- requisites for a fair judicial system. Consideration, therefore, must be given to the method of appointment of judges, the composition of the Judicial Service Commission and perhaps the manner in which the Attorney-Generals are appointed. Special provision should be made to ensure an obligation to ensure access to justice for all. In general however, most of the matters relating to the functioning of the Courts should be left to legislation.

There will be some debate on the meaning of the word "independent" as it relates to the Judiciary. In our view this does not mean that only judges or lawyers should be allowed to appoint judges, but rather that once appointed, the judge or judges are free from external political pressures. This is done, usually, through protecting their tenure, e.g. by providing for non renewable terms of office, or for life time tenure.

The Constitutional Court being a contentious and politically central institution requires an appointment mechanism which is legitimate, sensitive to the need for representivity, integrity, political and other diversity, as well as legal wisdom. A mechanism solely in the hands of the legal profession would only perpetuate a narrow professional vision of constitutional adjudication. In any event, a legitimate court is more likely to be an independent and courageous court.

Structure of Courts

5.1

The existing structure of courts in the Interim Constitution should be retained, except that most courts should be given the power to deal with constitutional matters. The Constitutional Court will therefore become the highest court of appeal for constitutional matters.

The Constitutional Jurisdiction of the Different Courts

Constitutional Court

5.2

The Constitutional Court should have final jurisdiction on all constitutional matters. It should be the only court that can deal with the following matters:

5.2.1

Issues that are in its exclusive jurisdiction, for example when Parliament refers a bill for an opinion on its constitutionality.

5.2.2

The declaration of national legislation as being invalid.

5.3

The Constitutional Court should have the power to decide which cases it will hear. It should have the power to take cases directly from lower courts without waiting for a full appeal process to take place.

5.4

Provision will be made for direct access to the constitutional court by members of the public, subject to the Court itself having the right to determine whether to hear any matter. This matter should be dealt with in national legislation.

The Appeal Court and Supreme Court

5.5

These courts should have full constitutional jurisdiction except as outlined above. They will be able to declare national or provincial legislation valid. However, if they are of the opinion that national legislation is invalid, they must refer the matter to the Constitutional court for a final decision*.

*The National Conference did not feel it was necessary to limit these powers to legislation passed before 27 April 1994.

Magistrate`s Courts

5.6

Magistrates` courts should be able to deal with constitutional issues that arise from the Bill of Rights, but they will not have any jurisdiction to strike down legislation, not even local government bye-laws. However, the jurisdiction of courts other than the constitutional and supreme courts is best left to legislation and should not be dealt with in the constitution.

Appointment of Judicial Officers

Mechanism

5.7

The Constitutional Court could sit in smaller committees but should not necessarily be comprised of distinct panels.

5.8

Constitutional and Supreme court judges should be appointed by a judicial Service Commission as provided for in the Interim Constitution*.

*The National conference was not in favour of Parliament appointing Constitutional Court judges.

In this regard it is proposed that:

5.8.1

The Judicial Service Commission should be restructured to ensure greater public representation.

5.8.2

The transparency of the Judicial Service Commission should receive attention. This should be the subject of legislation.

5.8.3

The Judicial Services Commission should also have a role in regard to the functioning of the magistracy, judicial training, law reform, the functioning of the courts and complaints against judges. The JSC will be empowered to initiate impeachment proceedings.

Criteria

5.9

The criterion for appointment of both Constitutional Court judges and other should be that of a "fit and proper person" rather than the present strict criteria for Constitutional Court judges.

Tenure

5.10

The tenure of Constitutional court judges should be extended to 10 years, with the following guidelines:

5.10.1

Appointment should not be for life.

5.10.2

There should be a fixed retirement age of 70.

5.10.3

Appointments should be non- renewable.

5.10.4

A method should be devised to ensure continuity, e.g. half the panel could be re-appointed every six years.

Provincial Courts

5.11

Whether each province should have its own division of the Supreme Court is a matter to be left to legislation*.

*The IFP proposals that there should be a parallel system of provincial courts under the provincial governments which would have a final say on matters of provincial competence were rejected.

National Attorney-General

5.12

Justice should be a national function and the present structuring of Attorneys General on federal lines is not acceptable. The appointment and tenure of Attorneys General should be dealt with in national legislation*.

*The ANC broadly favours that the highest judicial executive officer should be the Attorney General, who may be a member of the Cabinet and who shall be responsible for prosecuting offences in the name of the People of South Africa. The provincial Attorneys General shall be accountable to him or her.

Participation and Access

5.13

Legislative provision shall be made for the participation of lay-people in the administration of justice, and to ensure that indigent persons are legally represented where the interests of justice so require.

5.14

The final constitution should lay an obligation on government to take legislative and other measures to improve access to justice for all people, for example through community courts, increased legal aid et cetera.

Traditional Courts

5.15

Traditional authorities should be recognised in the constitution in accordance with constitutional Principle 13.

5.15.1

The constitution should, however, contain little detail on traditional courts, as it should be dealt with in legislation.

5.15.2

Where necessary national legislation should provide for special courts and/or alternative dispute resolution mechanisms*.

*This is necessitated by the fact that there are other traditional legal systems such as Hindu and Islam law.

General

5.16

All other matters relating to the administration of justice, establishment of special courts and the jurisdiction of any court, shall be set out in legislation.

The Public Protector, Human Rights Commission, Commission on Gender Equality, Restitution of Land Rights

Binding Constitutional Principle

XIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, and Auditor-General and a Public Prosecutor 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 public service.

Discussion

Whereas many of these Commissions are set out in the Interim Constitution in the form as originally conceived by the Constitutional Committee, there has been some debate as to whether the Human Rights Commission and the Commission on Gender Equality overlap and whether they need to be distinguished in form and function, or should be merged. The question of land claims and reparations should be dealt with in the chapter on human rights.

Proposals

5.17

The Bill of Rights shall establish the principles and procedures whereby land rights will be restored to those deprived of them by apartheid statutes. A Land Claims Court Tribunal, functioning in an equitable manner according to principles of justice laid out in legislation, will, wherever it is feasible to do so, restore such rights*.

*The rights, however, should go beyond restoration, and include access rights. Much of the procedural matters and detail which are currently addressed by the Land Claims Court must be provided for in national legislation and not the final constitution.

5.18

There shall be an Human Rights Commission charged with ensuring observance of Human Rights. There shall be a Public Protector charged with ensuring clean government, free of corruption, rudeness and maladministration. The Human Rights Commission shall be empowered to litigate on behalf of complainants. Both bodies shall report annually to Parliament. The details of their functioning shall be set out in law. They shall have power to investigate the systemic sources of any malpractices. These institutions shall have the necessary resources and powers to perform their functions, and shall be empowered to negotiate or mediate between complainants and the body or person who is the subject of the complaint. The length of tenure of the Public Protector should be seven years, renewable for a further term of seven years.

5.19

The Constitution shall protect the independence of these institutions, inter alia by requiring their appointment by Parliament, with a 2/3 majority, and protecting them from dismissal save on grounds of incapacity or misconduct.

5.20

There shall be a Commission to advance gender equality, inter alia by consulting women and by conducting enquiries and research on the situation of women. The detail regarding this Commission could be the subject of national legislation.

5.21

These bodies may establish provincial offices.

5.22

The establishment and appointment of the Public Protector:

5.22.1

Sect 110(1), (2)(a) and (b) and (3) is to be endorsed.

5.22.2

Sect 110(4) is to be amended to provide for qualifications other than legal qualifications to be acknowledged in this regard. Ten years administrative experience of any kind should be regarded as sufficient.

5.23

Sect 113 on staff and expenditure is to be removed.

5.24

Sect 117 on staff and expenditure is to be removed.

Part 6

The Public Service and Security Services

Binding Constitutional Principles

XXIX

The independence and impartiality of a Public Service Commission...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 public service.

XXX

(1)

There shall be an efficient, non-partisan, career-oriented public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance of its administrative functions. The structures and functioning of the public service of its members shall be regulated by law.

(2)

Every member of the public service shall be entitled to a fair pension.

The Public Service

Discussion

On the Public Service the Interim Constitution is especially detailed and deals with issues which should be left to Parliament for legislation*.

*E.g. the extensive treatment of the Public Service Commission and the transitional arrangements.

ANC Policy states:

"The whole of the civil service will have to be opened up so as to make it a truly South African civil service, and not the administrative arm of a racial minority. The civil service should be impartial in its functioning, and be accountable both to parliament and to the broad community it serves,"

and:

"We do not support giving positions to unqualified people simply on the grounds of race or gender. What we will insist on, however, is that the hundreds of thousands of highly merit-

worthy persons who have been unjustifiably kept out of jobs, denied advancement in their careers and excluded from training, be given their due. Those who have been kept back by apartheid education and by sexist assumptions should be given special backing to catch up. The rich life experiences, knowledge of languages, and cultural diversity of those previously discriminated against should be seen as enriching the contribution of individual South Africans."

The main directions of the ANC with regard to the Public Service in the final constitution are the following:

The present powers of the Public Service Commission should be made compatible with the powers of a democratically elected government.

An excessive set of structures and duplicated functions should be avoided*.

*This is especially true in relation to ombud structures, though the need is acknowledged - see below.

The national cohesion of the public service is to be maintained.

Corruption and nepotism should be effectively countered.

Equality of opportunity and affirmative action should be ingrained in the Public Service.

The Interim Constitution has an extensive set of provisions that directly affect the way the public service is structured and managed. There is now a consensus developing that the management of the public service needs to be thoroughly transformed to bring it in line with the best management practices both within South Africa and internationally. The problem is that the provisions in the Interim Constitution limit this kind of transformation. In particular:

The Public Service Commission is not merely an advisory and evaluation body, but is responsible for organisational structuring, bargaining and the day-to-day operational management of the public service.

There is no proper executive responsibility for setting the overall policy and management framework for the public service.

Only deracialisation is referred to in transformation, without also referring to democratisation of the working and organisational environment of the public servant.

Efficiency (how quickly and competently inputs are turned into outputs) is the only underlying principle of management referred to, thus ignoring the equally important management principle of effectiveness (the extent to which objectives are achieved).

Although provincial government is elected and democratically accountable to its provincial citizens, provincial government cannot be held entirely accountable for the practices of its public servants because the provinces do not have sufficient control over the day-to-day management of these public servants.

The notion of a professional public service has been abused to ensure the internal promotion of existing public servants in preference to external lateral entrants.

The Constitution should adopt a minimalist approach consisting of a broad statement of principles and general references to a governing framework.

Proposals

6.1

The final constitution should contain the principles within which the Public Service should be regulated.

6.2

The constitution should provide that an independent and impartial Public Service Commission is to be established by a national law (a Public Service Commission Act):

6.2.1

Under direction of the relevant Ministry, the Public Service Commission should be charged with ensuring that the objectives as stated in paragraph 6.4 below and the constitution are attained.

6.2.2

The Public Service Commission shall cater for all government employees at all levels of government.

6.2.3

The Public Service Commission shall perform a watchdog/ombud role in such a way that legislated national standards and norms shall be monitored, investigated and reported upon.

6.2.4

The extent of the powers and functions of the Public Service Commission shall be compatible with democratic governance and accountability.

6.2.5

The Public Service Commission shall have a component to deal with the security services.

6.3

The functions of the Public Service Commission shall not be done by way of the constitution, but rather through a national law. The structure of the Public Service Commission shall ensure provincial representation in national processes while simultaneously ensuring that there is full and direct accountability at provincial level for the implementation that takes place at that level*. There shall be no Provincial Service Commissions.

*With regard to the Public Service Commission Act, it is to be proposed that Commission should consist of 10 Commissioners:

A chairperson appointed by the President in consultation with the Executive from nominations by a (joint) Committee of Parliament;

A person appointed by each of the Executive Councils of the provinces from nominations of a committee of each legislature;

Each Commissioner of the Public Service Commission shall establish an Office which, together with the relevant Commissioner, shall be accountable to the legislature (at national or provincial level).

6.4

National legislation should be adopted to ensure merit, equity and representivity in appointments and promotions, and create ability for change, development and administrative reform.

6.4.1

There shall be uniform minimum conditions of service for all government employees at all levels. The rights of all public sector workers, as well as the terms and conditions of service of its members, should be regulated by national labour law.

6.4.2

The constitution should provide that appointments by the executive in the Public Service may be made.

6.4.3

Other than that required for fair labour practices, there shall be no special job guarantees for any public servants.

6.5

The Public Service should:

6.5.1

be professional and career-development orientated,

6.5.2

be broadly representative of the South African society,

6.5.3

be efficient, effective and responsive in terms of the delivery of service to the public,

6.5.4

be transparent and accountable to the public and legislature,

6.5.5

be loyal to the government of the day,

6.5.6

ensure equitable delivery of service at all levels of government.

6.6

During their tenure of office no public official* shall use his or her position to directly or indirectly enrich themselves or to directly or indirectly benefit any person in a manner which is not fit and proper in the circumstances**.

*This term will require suitable definition.

**Taken from sect 42(1), Namibian Constitution.

The Security services

Binding Constitutional Principle

XXI

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

Discussion

General Guidelines on Security

The history of South Africa with regard to the misuse of security apparatuses compels a principled treatment of security services in the final constitution.

The fundamental approach of the ANC is that the final responsibility for security should be taken out of the hands of the security apparatuses and be placed squarely in the jurisdiction of the democratically elected Parliament and Executive, thus restricting the security apparatuses to act within the law and guidelines laid down by Parliament and the Executive. Terminology used by the old security forces should be not be used in order to avoid their interpretations to creep into the new system*.

*For example, the terminology of "law and order" should be replaced by "rule of law", and "internal security" should be replaced by "safety and security", because old style Security Branch thinking may possibly otherwise argue for a wide domestic intelligence brief, rather than a crime intelligence brief.

The potential for anti-democratic action on account of the armed nature of these forces and the access to technology and resources for conducting covert operations puts them in a different relationship to a democratic constitution. It does not, for example, suffice to say somewhere that the constitution is supreme and therefore all organs of society are bound by it. The security services are to be bound explicitly. It is preferred that the constitution should refer to a national defence force, a police service, a civilian domestic intelligence service and a civilian foreign intelligence service.

The following principles are expanded on in the proposals below:

The fundamental objectives of any security policy should be constitutionally enshrined in the sections dealing with the security services.

Civilian control over the security services at ministerial level and through other mechanisms should be constitutionally enshrined. Security ministries should be civilian ministries.

Parliamentary oversight of the different security services (subject to the need for security within oversight mechanisms where necessary) must be constitutionally enshrined.

The right of the public to access information must be provided for constitutionally, provided that this be limited as specified in law, in the interests of current national security.

Members of the security services shall have the rights as defined in the Bill of Rights, subject to a limitation clause, as in Sect 33(a) of the Interim Constitution, with the retention of mechanisms for giving effect to the essence of such rights.

The constitution should define the presidential powers in relation to the security services, declarations of emergency and states of national defence or war*.

*As already proposed.

Certain provincial functions in relation to the security services could be provided for in the sections of the constitution dealing with the division of powers, provided that intelligence, defence and police should be national competences*.

*But see below under Police for the role of MEC`s for Police and community policing.

Proposals

6.7

Security institutions should not act on their own authority, but rather under guidance of, and by virtue of functions defined by, Parliament and the Executive*.

*The constitution as the supreme law of South Africa must thus be binding on the security services and final responsibility for national security should rest with Parliament and the Executive.

6.8

The final constitution should give effect to a progressive concept of security and should accordingly provide principled guidelines regarding the objectives of security and the interpretation of threats to security*.

*The ANC endorses the following:

Security is an all-encompassing and holistic concept that enables people to live in peace and harmony, enjoy equal access to resources as well as to transform and develop their lives.

The objective of national security shall therefore go beyond achieving an absence of war and physical violence to include the consolidation of democracy, respect for human rights, social justice, sustainable economics development and protection of the environment.

Threats to security shall not be interpreted as being limited to external military aggression, but shall include poverty, social injustice, socio-economic deprivation, abuse of human rights and disjunction of the environment.

6.9

The Executive should not be able to employ the security services in violation of the constitution.

6.10

The constitution must prescribe that the security services should:

6.10.1

not discriminate on the grounds of sex, race, sexual preference, religion or belief,

6.10.2

reflect the composition of South African society,

6.10.3

be non-partisan as institutions and not allow partisan political activity in the services as such,

6.10.4

reflect at all times a reasonable balance between democratic transparency and secrecy,

6.10.5

be guided by an approach to the resolution of conflict, whether internal or external, primarily by non-violent means,

6.11

The members of security services should:

6.11.1

be obliged to carry out all lawful orders and disobey any unlawful orders,

6.11.2

be educated to a reasonable level in relevant international law and conventions, the constitution, human rights and applicable law.

Intelligence Services

The holistic descriptions of national security in footnote 10 above is not intended to be also the brief or mandate of any single security service. The door should not be opened for another "total onslaught" methodology by the security services. They should not be left unchecked to go into every corner of society*.

*See also 6.8 - 6.11 above, which is of fundamental importance for the restrictions on security services.

In the description of the mandates of the different security services which follows here, the guiding principle is still that the responsibility for security is taken out of the hands of the services as such and placed in Parliament and the Executive. The intelligence services should have the primary duty to equip the Executive and Parliament to safeguard the South African public and South Africa`s national interests by selecting, processing and analysing information, and to advise the government on security and public safety concerns.

The following aspects of the control, accountability and structure of Intelligence services should be provided for in national legislation rather than the constitution:

The national Intelligence services of South Africa should consist of the following:

a civilian intelligence organisation that shall be responsible for the conduct of domestic intelligence and fulfillment of the national counterintelligence responsibilities;

a civilian intelligence organisation that shall be responsible for the conduct of foreign intelligence;

the appropriate structure of the Police service that is responsible for the conduct of crime intelligence;

the department within the National defence force which is responsible for the conduct of military intelligence.

The President should be able to draw on the executive support of a Minister to be known as the Minister of Intelligence. Together they should exert ministerial control over intelligence and have accountability to Parliament for intelligence.

Operational control and management of the intelligence services is to be exercised by the Director General of the various structures under the direction of the relevant Minister.

A coordinating mechanism essential to coordinate the flow of information, priorities, activities, policies, resources, interpretation and other matters pertaining to the functioning of national intelligence, as defined in an Act, shall be chaired by a Coordinator of Intelligence who shall be appointed by and accountable to the President.

The intelligence structures and its members shall be governed by a code of conduct that shall regulate their activity strictly within the Bill of Rights, and define the reciprocal obligations of the Service towards its personnel.

Proposals

6.12

The President shall be ultimately responsible for, and have control over, the Intelligence services, and he is accountable to Parliament for intelligence matters with executive support of a minister responsible for intelligence.

6.13

There shall be a multi-party Parliamentary oversight committee, to be appointed by the Speaker of Parliament in consultation with the President after consultation between the President and Heads of the political parties represented in Parliament*.

*Members of the committee must take an oath of secrecy relevant to their work.

6.14

The constitution should provide for judicial control over intrusions onto individuals` rights of privacy when there is a perceived threat to national security.

6.15

Members of the intelligence services shall have the rights as defined in the Bill of rights, subject to a limitation clause, as in Sect 33 of the Interim Constitution. Freedom of speech and association should be curtailed for the duration of their employment and for the length of time legally determined for classification of material.

6.16

National intelligence should be a function and responsibility of the national government and should not be delegated to provincial governments.

6.17

The constitution should provide that access to information, relating to defence, national security or public safety, that is current and obtained in confidence, should be limited for a specified time as defined in law.

6.18

The Intelligence services should operate within the law.

6.19

The constitution should prohibit their having an influence, directly or indirectly, over political events in foreign countries, except in circumstances of war in the last-mentioned instance.

6.20

The members of the Intelligence services will be bound by an oath of secrecy and allegiance to the Constitution.

6.21

The constitution should state that provision is to be made in national legislation that each intelligence service must be subject to independent civilian oversight by way of an inspectorate. Such an inspectorate will also function as a mechanism of grievance resolution.

6.22

The constitution shall stipulate that there shall be no private intelligence services.

The National Defence Force

Discussion

The Interim Constitution contains both matters of details that belong lawfully in normal national legislation and matters that belong in a constitution. This is particularly true of matters

relating to the defence function. The constitution should not contain matters which fix structural and command provisions with respect to a specific state department.

It should accordingly not be necessary to cover the range of defence issues currently set out in the Constitution, particularly those dealing with the structure of the national defence force. It will also not be necessary to deal with the various provisions essentially directed at the integration process. What the Constitution should deal with are the fundamental principles relating to the place of the Defence force in democracy. Proposals on the organisation of the Ministry need not be spelt out save to ensure that the Constitution does not preclude it.

Proposals

6.23

The primary duty of the national defence force should be to defend the inhabitants, the territorial integrity and the sovereignty of South Africa. Actions of the defence force should conform to relevant international, constitutional and other law, and conventions.

6.24

There shall be only one national defence force. The President shall appoint the Chief of the national defence force, who shall perform his or her functions subject to the directions of the Minister of Defence, and during a state of war, of the President.

6.25

The national defence force shall be politically impartial and non-partisan. Members of the national defence force shall not hold office in a political party. The national defence force shall comply with international customary law and treaties regarding armed conflict, and its members shall be obliged to obey lawful orders and shall be obliged to disobey orders in breach of such international law or unlawful orders.

6.26

The departmental structure including function and powers of role players other than Minister responsible for defence should be dealt with in a Defence Act.

6.27

The constitution should provide for one national defence force, structured in terms of law.

6.28

The constitution should define the President as Commander-in-Chief.

6.29

The constitution should state that the President as Commander-in-Chief should have the power to employ the national defence force for specified functions*, as defined in law.

* Including those presently mentioned in Sect 227(1)(b)-(f) of the Interim Constitution.

6.30

The defence force should at all times defend and uphold the constitution and should be prohibited from acting on their own and bypassing Parliament and the Executive.

6.31

There shall be a multi-party oversight committee of Parliament on defence to exercise oversight control over the Defence force. Such a committee shall initiate and deal with legislation relating to the Defence force, and must be able to make recommendations on budgets, budget functioning, organisation, armaments, policy, morale, and state of preparedness of the national defence force, and to perform such other functions relating to parliamentary supervision as may be prescribed by law.

6.32

The constitution should provide for presidential power to declare a state of national defence or war subject to parliamentary confirmation. The oversight committee and Parliament should be informed by the President if the national defence force is deployed in defence of the country, in support of the Police or in compliance with any international obligations. Parliament may review such deployment.

6.33

The President shall confer upon members of the national defence force permanent commissions and cancel such commissions.

6.34

The provision of section 224(2) of the Interim Constitution should be enacted in a transitional clause in a defence act in order to provide for the continuation of the present NDF.

6.35

The constitution should provide for a specific military ombud function/person to deal with complaints of members of the defence force and the public against the national defence force. The precise role of the ombudsperson and its relationship to the public protector and human rights commission should be contained in relevant legislation.

SA Police Service

Discussion

The provisions dealing with the Police will need revision in the light of current problems experienced regarding dual authority over policing agencies.

The ANC is committed to the creation of a single police service. The primary function of policing will be the prevention of crime and to guarantee the personal security of citizens and peaceful exercise of their rights as defined in the constitution. The principles governing the new police service, which shall also be inculcated in their training shall be:

Policing shall be based on community support and participation.

the Police shall be accountable to society and the community it serves through its democratically elected institutions.

The Police shall uphold the values of the Constitution.

Proposals

6.36

The police service should have the primary duties to prevent crime, to investigate offenses or alleged offenses, to maintain the rule of law and to protect the safety and security of citizens. The police should adhere to and protect the constitution.

6.37

Community policing:

6.37.1

The principle of community policing must be defined in the constitution as a guiding principle of the police service. The details of appropriate structures, budgetary provisions, composition etc must however be defined in a national law.

6.37.2

There shall be established, in accordance with a law, police-community forums which shall evaluate visible police services and the efficiency and accountability of the service in respect of the community for which it is established.

6.38

There should be one national Police service in South Africa, loyal to the national constitution, and with structures devolved to the provinces.

6.38.1

The President shall appoint the National Commissioner in consultation with the relevant Minister. The duties of the National Commissioner should be as currently enshrined in the Interim Constitution.

6.38.2

The National Commissioner shall appoint Provincial Commissioners after consultation with the relevant MEC`s.

6.38.3

A responsible MEC should have the responsibility to monitor effective policing on provinces together with the Provincial Commissioner. He/she should see to the establishment of appropriate structures for community policing, and have oversight responsibility over the Provincial Commissioner.

6.38.4

Provision should be made by law, and not in the constitution, that there will be a civilian secretariat within the Ministry of Safety and Security.

6.38.5

Statutory provision should be made for an executive structure consisting of the Minister and the relevant MEC`s.

6.39

Members of the police service shall have the rights as defined in the Bill of Rights, subject to a limitation clause, as in clause 33(a) of the Interim Constitution.

6.39.1

The constitution should not address the details of labour relations, which should be set out in regulations and law*.

*Compulsory collective bargaining and dispute resolution and arbitration should be provided for in a law. Those provisions should curtail the right of members of the Police service to strike.

6.40

An independent mechanism may be set out in a national law whenever the need arises, to receive and investigate, or monitor the investigation of complaints by members of the public against members of the service.

6.41

Border policing should be the responsibility of the police, except under certain conditions such as a state of war.

6.42

Although there must evidently be an oversight committee in Parliament, there is no need for special provisions for this committee.

6.43

The constitution should not deal with details on the matter of public order policing* **.

*Public order policing is a national competency, and there may be a need for the establishment in a national law of a rapid response unit which could only be activated by the National Minister

or National Commissioner. This unit should be able to perform other functions necessary for policing in general.

**The constitution should also not deal with private security companies. The lack of accountability in the function of private security companies, except to their owners/or people employing them, requires a review of present legislation to ensure it provides for the establishment and function of these companies within the parameters of a Parliamentary Act.

6.44

The establishment of municipal or metropolitan police, and the resolution of the question of tribal police, should be left to national legislation, which should not be precluded by the constitution.

Part 7

Finance

Binding Constitutional Principles

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, and Auditor-General and a Public Prosecutor 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 public service.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

Discussion

National Financial Affairs

The provisions regarding the Auditor-General, South African Reserve Bank, Financial and Fiscal Commission, require concrete analysis in the light of the existing experience of these institutions. In general it is not appropriate for the Constitution to deal with these issues, although arguments will be advanced that these institutions should be guaranteed a degree of administrative autonomy. Current provisions are essentially adequate.

The general approach of the ANC towards the constitutional provisions relating to financial institutions* is that these constitutional provisions should be restricted to broad general principles with details to be dealt with in normal national legislation. The constitution should only deal with those institutions specifically required to be dealt with by the Constitutional Principles.

*Like the Financial and Fiscal Commission, the Reserve Bank and auditor-General.

The clauses in the Interim Constitution on the Reserve Bank should be taken over unchanged into the final constitution, except that Sect 196(2) should spell out that the consultation between the Reserve Bank and the Minister responsible for national financial matters should amount to "in consultation with" rather than the weaker "after consultation".

There are no specific provisions in the Interim Constitution relating to public enterprises, although these are governed by legislation. The ANC sees no reason for specific provisions on public enterprises to be included in the final constitution.

Provincial Financial and Fiscal Affairs

The ANC should accept as guiding principles for provincial* financial and fiscal affairs that:

*In some respects applicable to local government as well. See below.

The national-provincial fiscal and financial system should address fiscal inefficiencies and financial inequities that exists in South Africa by reason of the apartheid legacy, and the need for special mechanisms occasioned by the new provincial system.

National, provincial and local levels of government should have adequate financial resources at their disposal to exercise their responsibilities and to function effectively and efficiently.

The economic principles which should guide the approach to financial and fiscal relations between local, provincial and national government should be the following:

Fiscal efficiency

Fiscal equity

Affordability, accountability and flexibility

The preservation of the economic union of South Africa

Tax harmonisation

Accommodation of spillovers of benefits or costs across provincial borders

The promotion of economic democratisation, and reconstruction and development

Prudent fiscal management.

South Africa should have a predominantly unified legislative and administrative fiscal and public financial system: it should be a joint fiscal system under leadership of national government, and not a rigidly divided system between national and provincial levels of government*.

*Canada, for example, is experiencing a crisis with its system of divided fiscal federalism.

In this regard there should be a co-operative rather than a competitive relationship between national and provincial governments. This would amount to the provinces being incorporated into decision-making in regard to the budget. In return the provinces would be required to accept greater responsibility for acting within agreed policy frameworks. Giving effect to this new arrangement would require:

Inserting provisions in the final constitution giving the new Senate an appropriate role in the passage of money bills*.

*This would need to be part of an overall package arrangement.

Any recommendations in this regard should also fit in with proposals to broaden and strengthen the role of the legislature in the passage of money bills.

Considering incorporating into the constitution provision for the involvement of mandated political representatives of the provinces and national government in structures engaged in the budgetary drafting process, such as the budgetary committee.

The final constitution should provide that the bulk of revenue should be apportioned at national level after participation by provincial and local levels of government. This implies horizontal and vertical financial equalisation.

In general original taxing powers for provinces should not be constitutionalised. Where, however, it is more efficient to collect a tax locally or regionally, this level could be allocated this power, and use the income*.

*E.g. it would be inappropriate to charge one level of government to raise taxes only to pay it over, because the task may be done inefficiently.

The policy of the ANC should be tax harmonisation, with the following objectives:

Efficiency in the national internal market: Differential tax policies across provinces can lead to distortions in the interprovincial allocation of resources, to wasteful tax competition among provinces, and to excessive use of private sector resources (like accounting, financial and management resources) simply to comply with different tax regimes and to avoid taxes.

National equity: Tax competition may reduce the redistributive content of the tax system. Different redistributive policies across provinces may detract from national equity goals.

Ease and cost of administration: Collection and compliance costs can be reduced; avoidance and evasion may be reduced.

The financial constitution should be a flexible system. Flexibility lies in the fact that fiscal efficiency may sometimes drive decentralisation, while fiscal equity may sometimes drive centralisation.

Financial and Fiscal Commission

A strong, independent and accountable FFC can make a major contribution to achieving fiscal stability and to promote equitable relations between different tiers of government. Macro-economic stability depends on maintaining control at national level over borrowing of provincial and local governments. The FFC should have the role to provide advice to the Executive in preparing the budget and to Parliament to deal with the budget.

7.1

Provision will be made for an effective and independent Auditor-General and Reserve Bank.

7.2

Revenue from taxes, except those specifically designated by national legislation as being provincial taxes, shall accrue to and be collected by the national level of government, to be allocated for national, provincial and local governments in accordance with national legislation.

7.3

The provinces should be entitled to an equitable share of national revenue, as provided for in Constitutional Principle XXVII.

7.4

The Financial and Fiscal Commission (FFC) shall be established to advise the government on the apportionment of revenue to the provinces. Its function and structure should be governed by legislation, with the proviso that the constitution should provide for representation from the provinces*.

*Much of the detail of appointment, structure and function should be dealt with in legislation and not in the constitution.

7.5

The final constitution should deal both with borrowing powers of the provinces as well as guarantees along the lines of Sect 157 of the Interim Constitution.

7.6

Provinces may raise and collect those taxes (including surcharges on other taxes) when they are authorised to do so by national legislation after consideration by the Financial and fiscal Commission*.

*The constitution should not go into detail of the kind of taxes that may or may not be raised by the provinces.

7.7

Provinces may impose user charges after consulting the FFC and provided such charges do not discriminate against non-residents.

7.8

The constitution should include provisions both for borrowing by local government as well as for guarantees for local government loans as is the case for provincial government*.

*The content of these provisions requires further reflection, as some consideration of the differences between provincial and local government and between different forms of local government will need to be taken into account.