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**CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT**

**INKATHA FREEDOM PARTY's
GENERAL SUBMISSIONS**

(As at 24 February 1995)



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

PRELIMINARY SUBMISSIONS TO CONSTITUTIONAL ASSEMBLY

PART I - GENERAL

Preliminary

On October 17, 1994 the Constitutional Committee has approved a document titled *Briefing Document for Theme Committees*. Within the parameter of the guidelines set out in such Document, each Theme Committee will need to define its scope of work and develop its own working agenda. During the aforesaid meeting the Constitutional Committee made the fundamental decision that Theme Committees should not be negotiation fora.

1. Guidelines for Theme Committee Work

Each Theme Committee should define its scope of work taking into account guidelines given to it by the Constitutional Committee. Since Theme Committees will be in closer contact with problems and issues, they will need to have discretion to organize their work as they best see fit. Moreover, it is not appropriate to give uniform guidelines to all six Theme Committees. Their scope of work varies and they should be given guidelines relevant to their interests.

The strict definition of the scope of work of Theme Committees is not necessary as it would limit fluidity and continuity in constitutional matters. Some overlapping of work between Theme Committees is unavoidable and is perhaps advisable to avoid defining the scope of Theme Committee work. Therefore, each Theme Committee must identify for itself the constitutional issues related and applicable to its scope of activity.

It is important that each Theme Committee understands what type of issues could be covered by its terms of reference and by its scope of work as it identifies it. Therefore, each Theme Committee should develop an agenda including

- (a) a working list of issues and
- (b) a set of guidelines to process information related to each issue.

Each party should make submissions to each of the Theme Committees with respect to a preliminary list of issues which they understand would fall under the scope of work of each Theme Committee. For instance the second Theme Committee will *inter alia* list the following issues: head of state and/or head of government, executive or parliamentary form of government, bi-cameralism or mono-cameralism, proportional or constituency representation, role of the Senate, parliamentary law, legislative initiative, protection of minorities in parliament, and so on and so forth.

Once each Theme Committee has developed a preliminary identification of its scope of work, it shall conduct an analysis of possible alternatives which fall under its scope of work with

respect to each item in the working list of issues. Theme Committees should promote the acquisition of technical information, expertise and testimony necessary for their respective work. They should examine each of the available historical and theoretical models in which the issues and alternatives they raise can be implemented. For instance, once the "issue" of application of the bill of rights is identified by the fourth Theme Committee as part of its scope of work, the "alternatives" are either horizontal or vertical application. A concurrent alternative is: either full and exclusive application by the national government or limited application by the national government with concurrent application by the provincial governments. The Theme Committees should be informed on the possible models relating to how far the horizontal application can be extended and about the relation between horizontal application and the need for constitutional adjudication to be conducted by a Constitutional Court rather than by an ordinary judiciary. These models will need to be cross referenced by the Theme Committees with the models related to the sharing of powers between different levels of government related to the implementation of the bill of rights.

Once each Theme Committee has identified and organized its scope of work, it will need to develop a system to organize and classify data on the basis of the issues and alternatives it has identified and has received in the various proposals submitted by political parties, organizations and the public. In this respect, while the *Overview of Submissions* prepared by the Directorate is appreciated, the concern must be expressed that this type of exercise might get ahead of the work of the Theme Committees.

2. Constitution Drafting Process

Theme Committees should be entitled not only to prepare reports, but also to clarify their thinking by means draft constitutional text to be processed in the next stage of constitution writing whenever they feel that there is a need to move discussion from matters of principle to draft constitutional text. Reports should not be intended as excluding actual constitutional verbiage when the issues at hand may be clarified by detailing proposals and concepts into actual norms and provisions.

The IFP fears that if we do not resort to the use of constitutional text when necessary, we could fall into a World Trade Centre-type of constitution making based on bottle-neck techniques which had the effect of silencing minority views, and may be used in such a way that opportunities to manipulate the process may arise. The WTC process was based on (a) consensus on constitutional principles, (b) consensus on reports written expressing principles, and finally (c) consensus on actual constitutional text based on the reports. We must avoid situations in which those who dislike sections of constitutional text, are prevented from raising their objections to the text by their having previously agreed to the principles and/or the reports.

3. Constitutional Principles

In developing their work Theme Committees could be required to table their interpretation of the constitutional principles relevant to their work. This interpretation should be fluid and not preemptory. Since their work does not consist of actual negotiation, the Theme Committees should adopt no binding interpretation of the applicable constitutional principles. Theme Committees should merely limit their activity to correlating proposals to any applicable

constitutional principle, without determining the compatibility of the proposal with the principle concerned.

4. **Consensus in the Theme Committee**

From the fundamental decision that the Theme Committees are not negotiation fora, the corollary necessarily follows that they shall not be engaged in decision-making. Therefore the need to determine what type of consensus is necessary to adopt a report does not arise. Each Theme Committee will limit its activity to determining whether some issues are non-contentious, whiz.: that they receive general consensus from all the members of the Committees, or whether they are contentious, whiz.: some members do not agree with others with respect to the issue concerned. Therefore, an issue is contentious when there is no general agreement on it, in which case the Theme Committee shall limit its activity to describing the respective positions in full detail without any need to determine which type of numeric majority or minority in the Theme Committee supports any of the conflicting views.

5. **Contentious Views and Proposals**

All reports and proposals originating from any given Theme Committee should contain a detailed overview of the all aspects of a contentious issue, and should report whatever constitutional text or concept is proposed by each of the parties or groups holding any of the conflict views. In doing so it must be ensured that each party or group concerned agrees on the form and contents of the portion of the report purporting to represent its views or proposals.

6. **Role of the Secretariat and Directorate**

The role of the administrative structures of the Constitutional Assembly should not become such that they lead the process. Reports should not be written by the secretariat or the Directorate, even if they are approved and modified by the Theme Committees. The work of the Theme Committees and the autonomy of the members of the Constitutional Assembly would suffer if the process is driven by documentation prepared outside of the Theme Committees.

7. **Status of the Interim Constitution**

Unless any of the political parties wish to make the 1993 Interim Constitution (Act 200/1993) as is, or as amended by it, its own proposal, the Interim constitution should have no status whatsoever, with the exception of the Constitutional Principles set out in Schedule 4 of the Constitution. The work of the Theme Committees should only be guided by the Schedule 4 and should not be influenced by the contents, format or provisions of the Interim Constitution. If, at any time, any party wishes to make its own some language of the Interim Constitution it may do so. If no party does so, it means that the relevant provisions of the Interim Constitution have no standing and should not form a basis for discussion. Should any provisions of the Interim Constitution be used as the basis for discussion at the request of, and with the consensus of the parties in the Theme Committees, this shall be done on a case-by-case basis.

The IFP warns against the use of the index of the Interim Constitution as a set of references, because it would not be conducive to identifying all relevant issues and alternatives. For instance it would set aside the study on the possibility of separating the functions of head of state from those of head of government or of establishing a true federal system. It could also bind the constitution making process to the present deplorable format of the constitution text.

8. **Handling of Proposals and Issues**

Theme Committees should be proactive, by originating new issues over and above those which they received from the parties or the public. Accordingly, Theme Committees should not limit their activity to the mere processing of proposals and issues received from the Constitutional Committee or outside sources, but should identify their own issues during the course of their work.

9. **Technical Experts**

Different types of experts will be needed in addition to lawyers. There should, *inter alia*, be experts available to Theme Committees in the fields of economics, finance, tax, land affairs, environment, police, defense and other subjects which might be relevant to constitution writing.

Since the Theme Committees are not, and should not become negotiation fora, the technical experts should not be instructed by a majority or by any given party, but should be available to each party in the Theme Committee to assist it in developing its own proposals and inputs.

The role of the technical experts is not to lead the Theme Committees by the nose but to assist them. At no time should technical experts get ahead of the Theme Committees. The IFP rejects the idea, which can be read into the proposal of the National Party, to structure the work of the Theme Committees around the discussion of and/or amendment to draft constitutional proposals prepared by technical experts, which committees would arguably also be composing together the various submissions received from the parties and the public.

10. **Preliminary Determination of the Form of State**

The IFP requests that each Theme Committee applies its mind to complying with the constitutional provision regulating the constitution making process and demanding that "the development of a system of provincial government shall receive the priority attention of the Constitutional Assembly" [section 161 (1)]. This means that the work of the Theme Committees must precede from a preliminary determination of the form of state, whiz. whether South Africa shall be organized as a unitary, or regional/provincial, or federal or confederal state. In fact, no Theme Committee may proceed with its work until and unless this preliminary issue is solved. In other words, to perform their respective work both the first and the fourth Theme Committees would need to know whether Provinces have residual powers, while the form of government and the role of the Senate laboring the second Theme Committee will necessarily reflect the chosen form of state, and the work of the fifth Theme Committee will be shaped by a decision on whether there should be a single or more than one judiciaries so as to complement the assignment of residual powers to the Provinces. The following simple issues are to be answered:

- (a) will Provinces have residual powers, which are those powers of Parliament which are not immediately and necessarily reflected in a governmental line function?
- (b) as a matter of principle, will all the powers and functions of government be assigned to the Provinces and only those powers which cannot be adequately and/or properly exercised at provincial level be devolved to the national level of government on the basis of the principle of subsidiarity/residuality?

- (c) will the Provinces be provided with an area of entrenched constitutional autonomy which the central government may not destroy or change at its own will? [Indestructible Provinces in an indestructible Union]
- (d) will Provinces have final decision-making power in the area of their constitutionally recognized autonomy, or will the central government have the power to overrule them or otherwise subjugate the provincial policy making?
- (e) subject to the need for equalization grants, will Provinces have sufficient financial and fiscal autonomy to support their functions and powers without depending on the discretion and control of the central government?
- (f) will Provinces have the power to participate as Provinces in the legislative decision-making process and possibly with respect to some executive functions of the central government?
- (g) will the constitutional system allow for asymmetry to enable each Province to use at its own option less powers and functions than the total amount of provincial autonomy allowed under the Constitution?

Once there is a negative or positive answer in principle to the foregoing question, each of the Theme Committees would have sufficient guidelines to develop their respective work.

11. **Format of the Constitution**

The Constitutional Committee should decide at the outset on the format of the constitution to be drafted with respect to its legalese language. The 1993 Interim Constitution is a unprecedented example of a constitution which has not been written in constitutional law language but was written with the same drafting technique used for regular legislation. Consequentially, the Interim Constitution does not have constitutional semantic solidity, is filled with loopholes and uncertainty and is extremely difficult to read and understand. A constitution should be written in a form which can be understood by the people and taught to our children as a part of their education. There is no reason justifying the departure from the established drafting techniques which shaped the great European constitutions of the last fifty years.

12. **9. Public Participation**

The IFP endorses the report titled *Public Participation - A Strategic Overview*, with the following reservations and qualifications.

a. Community liaison

Theme Committees should be the primary forum of interface with the public.

The public should be divided into "general public" and "affected interests". Affected interests are segments of the public which have a special standing to discuss certain subject matters, such as the case of the churches with respect to freedom of religion, or trade unions with respect to the labor provisions, or traditional authorities with respect to the preservation of traditional communities. A stable channel of communication between the Theme Committee concerned and the affected interests should be established and maintained.

Theme Committees should solicit the participation of the general public by means of adverts. The public should be consulted in a structured matter. In this respect it might be advisable to

propose that Theme Committees identify a set of questions on which they will solicit and receive the inputs of the public at different stages of their work. By way of example the type of solicitation which the theme committee could promote from the public could be on the basis "should we have this or should we have that?", e.g.: should we have a proportional representation or a constituency system?

All activities that the Directorate undertakes to promote community liaison, including Sector Fora and Area Fora should be organized in consultation with all parties concerned on the basis of a consensus rule. This shall include agreement of the date, venue and format of any given event, or invitations.

The IFP has some reservations on the use of the Toll-Free Information Line. The use of this line should be limited to receiving orders for Political Party Programs and other written information available for distribution to the public, or to verify dates and venues of Area Fora, or of meetings of Theme and Constitutional Committees. This line should not be used to give out any other information, otherwise it will become an uncontrollable tool of mass communication. This also apply to the information being distributed by the Provincial Information Offices.

b. Media

There is a real risk that the media effort to be organized by the Directorate of the Constitutional Assembly could be used to support political position or propaganda needs of any given political organization. This effort will include press conferences, media liaison, divulgative newspaper articles, regular bulletins with domestic and international circulation, posters, cassette, videos and brochures, and necessarily selective live television and radio coverage of constitutional debates. The former Department of Constitutional Development, the South African Communication Services and sections of the Department of Foreign Affairs provided similar services during the Codesa talks and the Multiparty Negotiation Process and their services failed to fairly and equally represent the positions of the various parties.

Two rules should be established:

1. At any given time each party shall be responsible to identify, phrase and package the message and the contents of any mass communication which reflect or interpret its positions and aspirations in the constitution making process.
2. The entire media and public relation effort shall be controlled by a Monitoring Committee in which the minority parties are over-represented. The Monitoring Committee will not direct but will have the power to rectify any aspect of the media effort which could damage any of the parties concerned as determined in the opinion of the party concerned. A qualified minority in the Monitoring Committee shall be authorized to request the Directorate to rectify any relevant action

The public relation and media effort organized by the Directorate and by the constitution making process of the Constitutional Assembly will need to interface with a broader discussion taking place in South African society. Clearly the Constitutional Assembly may not be responsible for the organization of such discussion, but will need to adjust its structure and procedures to

interface and liaise with it. The IFP will submit another position paper which addresses some of the issues related to this process of interfacing with the debate in the rest of society.

PART II -
ISSUES IDENTIFICATION AND AGENDA
(please note that the indication of the IFP positions
is of use also in assisting the identification of the relevant issues)

I. CHARACTER OF THE DEMOCRATIC STATE

PREAMBLE:

ISSUE :

Should the Constitution contain a Preamble?

What are (a) contents and (b) legal value of the Preamble

ALTERNATIVES:

The Preamble could be with or without normative value

The Preamble may or may not contain matters of substance

AGENDA:

Consider why in constitutions there are Preambles and how they affect the interpretation of the Constitution and the Legal system

IFP POSITION:

If the Constitution contains a Preamble it shall have normative value.

EQUALITY:

ISSUE :

What type of principle of equality should be entrenched in the Constitution?

ALTERNATIVES:

Formal equality will need to be entrenched. In addition the Constitution may entrench the principle of substantive equality. This can be achieved either by promoting equal opportunities or equal access to opportunity. The principle of equality may be implemented and enforced exclusively by the National Government or by the National Government and the Provinces in their respective areas of jurisdiction.

AGENDA:

All the main variations of the principle of substantive equality will need to be explored. The relation between substantive equality and the need of constitutional adjudication to be conducted by Constitutional Court only will also need to be explored. It will also be necessary to look at the many alternatives related to the application of the principle of formal equality with respect to the area of provincial autonomy. The difference between implementation and enforcement will also need to be fully explored.

IFP POSITION:

The principle of Equality should foster equal access to all political, social and economic opportunity and should mandate the Republic to remove all substantive hindrances to the implementation of this principle. Equal "access" to opportunities does not mean redistribution of wealth, assets or resources, nor does it mean "equal opportunities". However, special training opportunities and assistance to small business are required to substantiate equal access to opportunities, the principle of which should be constitutionalized.

The principle of Equality should be entrenched in the national constitution but implemented by the Provinces with respect to the matters of their competence (i.e. employment/labor, education, welfare, et cetera). The Republic might have the power to coordinate this implementing role of the Provinces.

NAME OF COUNTRY

ISSUE: Should the name of the country be changed.
ALTERNATIVES: As proposed by those who wish to change the name.
AGENDA: Different proposals should be collected along with the reasons supporting the position of those who wish to change the name.
IFP POSITION: The IFP does not see a reason justifying changing the present name of our country but will consider reasons which other parties or stakeholder may put forward to justify the need to change the name and to support alternatives names.

SUPREMACY OF THE CONSTITUTION:

ISSUE: In which form shall the Constitution be the supreme law of the land. Shall the Constitution apply in its entirety to interpersonal relations. To which extent should the Constitution apply with respect to the area of provincial autonomy.
ALTERNATIVES: The Constitution may apply to intergovernmental relations only or also to interpersonal relations. The constitution may also apply in its entirety with respect to provincial autonomy or in the alternative only some portions of the constitution may apply with respect to provincial autonomy. Furthermore, there might be differentiation between direct application of the text of the constitution to provincial autonomy and constitutional mandates which must be implemented by the provinces autonomously, with specific regard to the implementation of both sections of the Bill of Rights which require implementing government action (second, third and fourth generation human rights).
AGENDA: The full analysis of the position for various constitutions in the respect to legal systems must be undertaken with specific attention to federal systems including the US, the German and the European Union models.
IFP POSITION: The constitution shall not only all organs of the Republic but shall also apply to legal relations under the control of the Republic. The Constitution in its entirety shall not apply to the Provinces, social and cultural formations, or individuals with respect of their area of constitutionally recognized autonomy, but some portions of shall have some application. In this respect reference to the technique used in the Article IX and in 14th Amendment of the U.S., as well as to the proposed Constitution for a Federal Republic of South Africa tabled by the IFP at the WTC.

LANGUAGE:

- ISSUE:** What should be the official language(s) of the country? Should we have a unified notion of official language? What is the relation between national official language(s) and provincial official language(s).
- ALTERNATIVES:** One or more languages might become official languages. A language may be official only with respect to some purposes but not with respect with all purposes. An official language might relate only to relations between subjects and government or may also apply to some interpersonal relations of significant importance.
- AGENDA:** Full consideration should be given to the issue of official languages in plural societies across the world. A model should be developed to analyze the various segments of social life in which language plays a role which deserves constitutional attention.
- IFP POSITION:** The IFP believe that there is need to move away from the present system of 11 official languages. Greater emphasis must be given to official languages in the Provinces. Once the Provinces become the "primary government of the people", any given language will have primary protection at Provincial level. Additional protection will derive from the recognition of constitutional autonomy for cultural formations, which the IFP has been advocating
- CITIZENSHIP:**
- ISSUE:** Who should be a citizen? What are the purposes of a constitutional definition of citizenship? Should there be a unified notion of citizenship? How does citizenship affect the relationship between provincial governments and their subjects?
- ALTERNATIVES:** There could be a unified notion of citizenship or more than one notions. Citizenship could be based on *ius sanguinis* or *ius solis* or on a combination of both. Citizenship could be an irrevocable right or it could be revoked under some specified circumstances, among which there could be political circumstances. The matter could be determined entirely by the constitution or it could be partially left to the discretion of the legislature. There could be naturalization in specific cases and could be a right on the basis of *ius sanguinis*.
- AGENDA:** The committee should study the purpose of the notion of citizenship and its relation to human rights protection
- IFP POSITION:** The establishment of a common citizenship should not hindered the establishment of provincial citizenship with respect to the functions of the Provinces, which will be limited by the customary constitutional provisions prohibiting restrictions of inter-provincial commerce and the free circulation of goods, people, labor and services. Citizen should always be recognized on the basis of *jus soli* and often on the basis of *ius sanguinis*. Naturalization on the basis of *ius sanguinis* should be a right.
- DEMOCRACY:**
- ISSUE:** What type of Democracy? How far should the principle of democratic representation extend? How does the democratic principle related to

- pluralism and the notion of autonomy of social, cultural and economic formations?
- ALTERNATIVES:** Direct democratic participation is different from the principle of democratic representation. Democratic representation and/or participation could be limited to legislative functions or they could be principles which permeate governmental structures and functions in their entirety. All powers could be granted to the government which exercise them on the basis of the applicable democratic principle, or alternatively some powers could be left to the autonomy of individuals and social, cultural and economic formations respectively, thereby limiting the scope and extent of government.
- AGENDA:** The relation between individual and group freedom on the one side and the power of government on the other side should be carefully analyzed to determine how it relates to the needs of a plural society and to the promotion of pluralism.
- IFP POSITION:** The principle of participatory democracy should be constitutionally entrenched. The principle the autonomy of individuals as well as of economic, social and cultural formations should also be entrenched with respect to all activities for which any level of government does not have a compelling justification to regulate, control or directly exercise. The principles of transparency and political and civil accountability of governmental structures shall be constitutionally entrenched.
- SUFFRAGE:**
- ISSUE:** Who should have active and passive voting rights?
- ALTERNATIVES:** Different notions could be employed for active and passive voting rights. Different notion of suffrage could be employed at national and provincial levels.
- AGENDA:** Research international and particularly African trends in determining voting rights.
- IFP POSITION:** Only South African citizens 18 years or older should have active and passive voting rights for national and provincial elections. An higher age could be required to be elected to key political posts.
- REPRESENTATIVE GOVERNMENT:**
- ISSUE:** What type of provision should the constitution make for representative governments?
- ALTERNATIVES:** Representative government could be at national level only or also at provincial and local government level. Direct democracy, such as referenda is not an alternative, but rather a supplement to representative democracy.
- AGENDA:** It will be necessary to analyze the need of representative government at all levels with special regard to the plural nature of South Africa. The role of traditional leaders as administrators of traditional communities should also be studied. The relation between institutions of direct democracy and representative democracy should be considered.

IFP POSITION: The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities). The implementation of this principle with respect to provincial and local government should be left to the autonomy of the Provinces.
Provision shall be made for referenda to be held at the request of a reasonably small number of dissatisfied citizens at all levels of government.

PROPORTIONAL REPRESENTATION:

ISSUE: Should the constitution contain the principles of the electoral legislation?
What type of electoral system should be adopted?

ALTERNATIVES: The constitution may be silent about electoral the system deferring any decision to the law, or could decide the general parameters of the electoral system, or could go into the details of the electoral system.
The electoral systems, and each variations thereof, are too many to be mentioned.
Electoral boundary determination, and possible minimum thresholds to qualify for representation in parliament are also issues related to the electoral system.

AGENDA: Pros and cons of constitutionalizing the electoral principles should be assessed against available comparative experiences.
All major electoral models should be studied to determine how they affect the type democracy and political representation, the protection of minorities.

Techniques of drawing electoral boundaries and limiting representation to major parties only should be fully inventoried.

IFP POSITION: The electoral system is a fundamental element characterizing the form of government and the type of democracy, and therefore the constitution should set out the general principles of the electoral system, leaving to the law the task of implementing such principles.

The electoral system should use the pure proportional system on national and provincial basis (50%-50%) to determine the amount of representation to which each party contending election is entitled. However, it should use the constituency system to determine which candidates are elected.

There should be no minimum threshold to be represented in parliament, provided that a party may elect at least one representative. All electoral boundaries should be drawn by an independent body in cooperation with the political parties.

FREEDOM OF INFORMATION:

ISSUE: Should the constitution contain the right to access government of information?

ALTERNATIVES: The constitution may not consider this aspect of social life or may provide for the constitutional principles which will guide the adoption of a Freedom of Information Act

AGENDA: The FOIA of the USA should particularly studied as a reference point in conjunction with provisions in modern constitutions which have constitutionalized the right to access government information

IFP POSITION: The right to access all government information and private data bank's information shall be recognized in the constitution, with customary qualifications and exclusions, subject to judicial review.

ACCOUNTABLE ADMINISTRATION:

ISSUE: How should the constitution deal with the principle of administrative accountability?

ALTERNATIVES: The constitution may relegate administrative accountability as a part of the political responsibility of the party in power, or alternatively could provide for specific means of accountability, administrative justice and participation of the public in administrative procedures.

AGENDA: We should classify and study tools of administrative accountability, including (a) administrative justice based on judicial review of administrative actions and regulations, (b) personal liability of public officials, (c) Public Service commissions, and (d) participation of affected interests in all relevant executive or regulatory actions of government. This last aspects should be particularly analyzed with respect to the experience of the USA. Special attention should be given to the IFP proposal for a Regulatory Relief Commission and the report of the US Grace Commission.

IFP POSITION: The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched. Public official shall be personally responsible for gross negligence and malice. Provision shall be made for the recognition of the right to petition any government structure.

The constitution should entrench the notion of participation of the affected public interest in the formative process of an administrative action or regulation.

Reference is made to the proposed Constitution for a Federal Republic of South Africa tabled by the IFP at the WTC with respect to the IFP proposal for the Public Service Commission.

SEPARATION OF POWERS (Form of State):

ISSUE: How are powers to separated in the constitution?

ALTERNATIVES: There are two types of separation of powers, that which relates to the form of state and that which relates to the form of government. As it relates to the state, the final power of the state could be divided between two levels of government. In terms of form of government, the power allocated to each level of government is divided into legislative, judicial, and executive powers. A further division of power related to the form of

AGENDA:

state which can also be reflected in the constitution is the division of power between any level of government and civil society
Separation of power related to the form of state should be the object of a preliminary determination on the basis of the following questions:

- (a) will Provinces have residual powers, which are those powers of Parliament which are not immediately and necessarily reflected in a governmental line function?
- (b) as a matter of principle, will all the powers and functions of government be assigned to the Provinces and only those powers which cannot be adequately and/or properly exercised at provincial level be devolved to the national level of government on the basis of the principle of subsidiarity/residuality?
- (c) will the Provinces be provided with an area of entrenched constitutional autonomy which the central government may not destroy or change at its own will? [Indestructible Provinces in an indestructible Union]
- (d) will Provinces have final decision-making power in the area of their constitutionally recognized autonomy, or will the central government have the power to overrule them or otherwise subjugate the provincial policy making?
- (e) subject to the need for equalization grants, will Provinces have sufficient financial and fiscal autonomy to support their functions and powers without depending on the discretion and control of the central government?
- (f) will Provinces have the power to participate as Provinces in the legislative decision-making process and possibly with respect to some executive functions of the central government?
- (g) will the constitutional system allow for asymmetry to enable each Province to use at its own option less powers and functions than the total amount of provincial autonomy allowed under the Constitution?

IFP POSITION:

There shall separation of powers between national and provincial levels of government. National government shall have no overrides and Provinces shall have exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the powers of each level of government, based of the extension by relevancy or implication of the powers of one level of government into areas of competence of the other, as in theory is the case in the U.S. (i.e.: interstate commerce).

There shall be separation of powers between any level of government and civil society. Individuals as well as social, cultural and economic formations shall be recognized an area of protected constitutional autonomy defined by the interests they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.

ECONOMIC CONSTITUTION:

- ISSUE:** Should the constitution contain a set of economic provisions or should all economic matters be left to Parliament to decide. Which fundamental economic policies should be entrenched in the constitution?
- ALTERNATIVES:** All constitutions contain a set of economic provisions. There are endless variables which relate to the "Type of State" (see *infra*).
- AGENDA:** There should be a full analysis of the economic constitutions of advanced modern democracies
- IFP POSITION:** There shall be a set of economic provisions identifying the economic constitution including:
- a. Limits on government intervention in economic matters
 - b. Entrenchment of the free market enterprise system
 - c. Entrenchment of private and communal property
 - d. Principle of constitutionally mandated privatization
 - e. Limits on public property and accountability
 - f. Requirement for a balanced budget with procedures for exceptions

INTERNATIONAL LAW:

- ISSUE:** What is the relation between the domestic and the international legal system?
- ALTERNATIVES:** The Constitution may ignore the international legal system(s) or may recognize it (them) determining the rules of such recognition and the effects of international law on municipal law.
- AGENDA:** International law provisions in modern constitutions should be fully analyzed. The nature of the different types of international law should also be fully understood and analyzed
- IFP POSITION:** War shall be prohibited as a means to solve international controversies. Provision shall be made for the automatic reception of prevailing international law.
- Limitation of sovereignty may be allowed for purposes of international organization and integration. Possibly, specific mentions could be made for the promotion of a super-national sub-Saharan economic community for the management and utilization of environmental, mineral and water resources.
- The South African legal system should automatically adjust to international norms of general acceptance and recognition.

SEPARATION BETWEEN CHURCH AND STATE

- ISSUE:** Should state and church be separated. How and in respect to what church and state should be separated
- ALTERNATIVES:** Separation of state and church may create obligations for the State alone or for both the State and the church(es). Separation may be total or limited to certain and specified areas. The State be merely barred from authorizing and/or regulating churches (establishment clause) or may also be barred from supporting or interfering with them (no state involvement clause).

AGENDA:	The different aspect of separation between state and church should be studied and classified.
IFP POSITION:	Church and State should be totally separated. The State may not take any action which promotes, supports or hindered any given church or religion in general, and should not be involved in any religious matter. Churches may not engage in political action and can only criticize governmental legislative and executive activities when they directly affect their establishment or operation or when they would compel the members of the Church concern to perform actions which are contrary to their religious beliefs.
TYPE OF STATE ISSUE:	What type of State
ALTERNATIVES:	Socialist State, European type "Social State", Liberal State, an undetermined type of state. The type of state is defined by the fundamental policies and decisions entrenched in the Constitution
AGENDA:	The different types of states should be classified with respect to the list of constitutional choices which contribute to its determination, which range from the nature and extent of the bill of rights (social and economic rights) to the type of representative democracy and the constitutional obligation on the legislature. The extent and the role of government in social and economic life also contribute to define the type of State.
IFP POSITION:	South Africa should be social but not a socialist state. Private property and free-market enterprise and the role of government in economic matters should be severely limited. However the constitution should contain all recognized social and economic rights along with constitutional imperative s which mandate the legislature to operate to remove social injustice, and promote the social growth of all South Africa. For more specific reference see the IFP proposals to the WTC.

II. STRUCTURES OF GOVERNMENT

SEPARATION OF POWERS (Form of Government):

- ISSUE:** How should the various legislative governmental and executive powers be organized to ensure proper checks and balances?
- ALTERNATIVES:** There is a very broad variety of permutations based on the following elements: terms of office; structure of the institutions; powers and relations between institutions and so on and so forth.
- AGENDA:** The Committee should develop a model to classify information related to checks and balances and to the separation of powers to assess any relevant proposal also on how it achieves balancing of powers.
- IFP POSITION:** There shall be a parliamentary form of government. Head of State and Head of Government shall be separate. Parliament shall seat for a four year term. The President shall be elected by parliament in joint session for a seven year non renewable term and shall have the task to ensure the proper functioning of the constitutional and institutional machine. The President shall appoint the head of government who shall form the cabinet in its discretion. Cabinet shall be in a fiduciary relationship with Parliament which shall freely exercise its no-confidence vote without being dissolved.

HEAD OF STATE AND HEAD OF GOVERNMENT

- ISSUE :** Should the office of Head of State and the office of Head of Government be united or separated?
- ALTERNATIVES:** There are many permutations on how Heads of State and Heads of Government can exercise their functions with respect to the parliamentary or executive or semi-executive form of government.
- AGENDA:** The Committee should fully familiarize itself with a different institutional and constitutional roles of the Head of State and of the Head of Government and with the various comparative experiences in which these offices are either unified or separated.
- IFP POSITION:** In order to secure greater democracy and improve checks and balances, the office of the Head of State and that of the Head of Government should be separate. The Head of State should ensure the preservation of the constitutional order and the proper functioning of the constitutional machinery while the Head of Government shall be in charge of the daily operation of Government. Important functions related to the composition and operation of other constitutional organs, such as the constitutional court and the defense forces would be ascribed to the Head of State rather than to the Head of Government.

EXECUTIVE AND PARLIAMENTARY FORM OF GOVERNMENT

- ISSUE:** Which form of government?
- ALTERNATIVES:** Government derives its authority directly from the law (executive form of government), or derives its authority from a fiduciary relation with parliament (parliamentary form of government). Many intermediary

solutions are known, including those which limit the parliamentary prerogative to use the no-confidence vote, as the present constitution of S.A. The position of the head of government and his/her relation with the office of head of state qualifies differently any of the foregoing alternatives.

AGENDA:

The various forms of government should be studied and compared with the various alternatives on the election/appointment of the head of government, also with respect to the office of the head of state. For comparison purposes specific attention should be given to the constitutions of France, Italy, Namibia, Spain, Belgium, Japan, USA and Germany.

IFP POSITION:

South Africa should have a pure parliamentary system in which cabinet is collegially responsible to parliament, with which cabinet is to entertain a fiduciary relation. Parliament's vote of no-confidence should not be impaired. Once the head of government (Prime Minister) is selected and appointed by the head of state (President), the head of government shall form the Cabinet and submit it for ratification by means of vote of confidence of both Houses of Parliament.

ELECTORAL SYSTEMS

ISSUE:

Should the constitution contain the principles of the electoral legislation?
What type of electoral system should be adopted?

ALTERNATIVES:

The constitution may be silent about electoral the system deferring any decision to the law, or could decide the general parameters of the electoral system, or could go into the details of the electoral system.
The electoral systems, and each variations thereof, are too many to be mentioned.

Electoral boundary determination, and possible minimum thresholds to qualify for representation in parliament are also issues related to the electoral system.

AGENDA:

Pros and cons of constitutionalizing the electoral principles should be assessed against available comparative experiences.
All major electoral models should be studied to determine how they affect the type democracy and political representation, the protection of minorities.

Techniques of drawing electoral boundaries and limiting representation to major parties only should be fully inventoried.

IFP POSITION:

The electoral system is a fundamental element characterizing the form of government and the type of democracy, and therefore the constitution should set out the general principles of the electoral system, leaving to the law the task of implementing such principles.

The electoral system should use the pure proportional system on national and provincial basis (50%-50%) to determine the amount of representation to which each party contending election is entitled. However, it should use the constituency system to determine which candidates are elected.

There should be no minimum threshold to be represented in parliament, provided that a party may elect at least one representative. All electoral boundaries should be drawn by an independent body in cooperation with the political parties.

MONO-CAMERALISM OR BI-CAMERALISM

- ISSUE:** Should there be one or two legislative bodies?
What should be the relation between the two Houses?
- ALTERNATIVES:** Legislation could be adopted by one or by two Houses. The Houses may have equal or different functions and powers, to the point that all legislation is adopted by the "higher House" and the "lower House" has only advisory powers or legislative powers only with respect to limited subject matters. The second Houses may have specific non-legislative functions, such as judiciary functions and supervisory powers over the public administration.
- AGENDA:** The reasons and justifications for bicameralism should be studied, with special regard to bicameralism in federal systems. Bicameralism should also be related to the known models of supervision over the public administration and for the exercise of judicial functions.
- IFP POSITION:** There shall be bicameralism and the Senate shall represent the provinces. The Senate shall have as much legislative power as the other House. In addition, the Senate shall supervise certain executive functions, such as foreign affairs and national defense, over which provinces have no competence.

RECONCILIATION OF DIFFERENT TEXTS ADOPTED BY THE TWO HOUSES

- ISSUE:** What happens if and when the two Houses of Parliament adopt a legislative text which is not identical?
- ALTERNATIVES:** The text adopted by one of the two Houses may prevail over the other, or the legislative proposal shuttles between the two Houses until an identical text is approved or the two Houses sit jointly or the differences between the texts are reconciled by a joint committee of the two Houses, in which latter case the reconciliation might either be final or may require the approval of one or both Houses.
- AGENDA:** The pros and cons of each specific alternative should be considered with respect to the overall system of checks and balances and the special role of the Senate.
- IFP POSITION:** Differences between the text adopted by the two Houses should be reconciled by a Joint Standing Committee of the two Houses in which the Senate and the other House have an equal number of representatives. The text so reconciled shall be approved by both Houses separately. If one of the Houses does not approve it, the legislation is not enacted.

SIZE AND VENUE OF LEGISLATIVE HOUSE(S)

- ISSUE:** How many political representatives in each House? Should Parliament ordinarily sit in the same venue where the seat of government is?

ALTERNATIVES: A smaller contingent or a larger contingent of political representatives. Parliament may or may not sit in the same city where government is.

AGENDA: Considering pros and cons, with specific attention to post-liberation South African reality.

IFP POSITION: The IFP believes that present post-liberation South African reality demands that the present number of political representatives be maintained, but after 10 years it should be constitutionally reduced to 80 members for the Senate and to 170 members for the other House. Parliament shall continue to sit in Cape Town, but because of compelling reasons of efficiency and good government, by the year 2025 both parliament and government shall seat in the same city or contingent geographical area, the final venue to be chosen by law (sunset provisions).

PRIVILEGES AND IMMUNITIES OF MEMBERS OF LEGISLATURE

ISSUE: Should members of the Legislature have privileges with respect to their functions? Should the members of the Legislature be immunized from criminal and/or civil actions against them which are not related to the exercise of their functions?

ALTERNATIVES: The difference between privileges and immunities should be carefully studied to understand how privileges relate to the exercise of parliamentary functions and can apply either to conduct in Parliament or also to conduct outside Parliament, while immunities do not necessarily relate to the exercise of parliamentary functions by the Members of Parliament, but are usually granted to Members of Parliament to shield them from harassment or other pressure which may impair their independence.

AGENDA: Privileges and immunities in other parliamentary systems should be studied.

IFP POSITION: Members of Parliament should be privileged with respect to any statement that they make either within or outside Parliament and this privilege shall protect them from civil and criminal action but not from the duty of rectifying factually erroneous statements. The IFP believes that Members of Parliament should also receive some degree of immunity from civil and criminal action not in the form of total immunity (no criminal or civil liability). The immunity should last as long as the Member serves in Parliament and shall be limited to the need to receive an authorization from the House to which the member belongs before any criminal actions and certain civil actions which may impair the Member's function, may be brought against such Member.

LEGISLATIVE ITER

ISSUE: To what extent should the Constitution specify the process required for the approval of legislation? And what should that process be?

ALTERNATIVES: Only Government may have the power to introduce legislation or alternatively such power may also be given to a group of Members of

Parliament or to individual members. There may or may not be a distinction between private members and Government Bills. Bills introduced by Government might follow a different and faster or simplified process of approval. A Bill may be adopted by Standing Committees or may only be adopted by the full House. The assignment of Bills to the various Committees may be done by the Speaker of the House or by a Rules Committee.

AGENDA:

The Theme Committee should familiarize itself with a different type of legislative iter. Special attention should be given to models in which Standing Committees may give final approval to a piece of legislation.

IFP POSITION:

The IFP believes that parliamentary law is what guarantees the rights of minorities in Parliament and therefore should be entrenched in the Constitution in its general principals, rather than being left to be written by the majority controlling Parliament.

Any member of each of the two houses shall have the power to introduce legislation and there shall be no difference between private and public Bills. The Government shall have the power to introduce legislation in either or both Houses, but its Bills should not receive special treatment. Each legislative proposal shall be accompanied by a brief memorandum. Legislative proposals shall be assigned by the Rules Committee to one of the committees of the House. The committee shall read any proposal, submit it to article by article vote and to a vote on the entire proposal, and send it to the full House for approval. The full House shall read the proposal, submit it to article by article vote and to a vote on the entire proposal.

PARLIAMENTARY LAW:

ISSUE:

Should the Constitution contain the principles of parliamentary law related to matters other than legislative iter? Which chapters of parliamentary law should be entrenched in the Constitution? And which chapter should be left to the discretion of the Rules of Parliament?

ALTERNATIVES:

The different chapters of parliamentary law may receive constitutional consideration such as interpolations, motions, question time, public hearings, parliamentary investigations, parliamentary hearings, etc.

AGENDA:

Attention should be given to the role played by advance institutions of parliamentary democracy and the consolidation of parliamentary control over the Executive in Germany, the United States, Canada, Great Britain and Japan.

IFP POSITION:

The principles of parliamentary law must be spelled out in the constitution to (a) define the rights of parliament vis-a-vis the Executive, (b) to empower Parliament to control the administration of laws by the Executive by means of parliamentary committees, hearings, investigations, questions for written and oral reply, et cetera, (c) to transform Parliament into the real center of policy making, (e) to ensure that legislation begins in Parliament, protecting each member's right to initiate legislation, (f) protect parliamentary minorities and their views in

the legislative process, regulating but not prohibiting the tools of opposition politics in Parliament and (g) to allow vested interest to be heard during legislative procedures.

The committees of each House shall have the power to hold hearings in relation to which they may compel the appearance of witnesses and the production of documents, and shall have the power to request any Minister or public official to appear, provide information, conduct research and produce reports.

VETO POWERS:

ISSUE:

ALTERNATIVES:

AGENDA:

IFP POSITION:

Should the Head of State have the power to veto legislation?

The Head of State may or may not have the power to veto legislation. He may veto legislation in its entirety or on a line-by-line basis.

The use of veto power across the world should be studied. The relation between veto power and the need to have to separate the office of Head of State and Head of Government should also be studied.

The IFP believes that the Head of State, to be separate from the Head of Government, shall have the power to veto legislation on a line-by-line basis.

COMMISSIONS AND "REGULATORY AGENCIES"

ISSUE:

ALTERNATIVES:

AGENDA:

IFP POSITION:

Should the Constitution provide for the possibility that the public administration develops also into the establishment of Regulatory Commissions.

The South African system is familiar with Commissions. The IBA might be one of the first examples of regulatory agencies. Specific sectors of the Public Administration could be transformed into independent Regulatory Agencies or into Regulatory Agencies under the control of the Executive.

The study of the role, functions and operation of Regulatory Agencies should be conducted with special attention to the model of the United States of America.

The Constitution should provide for the possibility that Independent Regulatory Agencies could be established, setting in place the required guarantees.

SENATE

ISSUE:

ALTERNATIVES:

AGENDA:

Should the provinces be entitled to participate as provinces in the legislative and/or executive decision making of the national government?

The different types of functions which the Senate serves in the constitutional system depend on its (a) role (b) composition and appointment (c) functions.

The role of the Senate in established federal systems should be fully analyzed, both with regard to legislative functions of the Senate and the functions of controlling national executive competencies.

IFP POSITION: The Senate should not have less legislative authority than the one given to the other legislative House. The Senate should represent the provinces and its members should derive directly from the provinces either through appointment or through indirect elections. Each province shall be equally represented in the Senate. The Senate should have the specific power to control executive functions such as defense and foreign affairs in which provinces have no competence.

COMPOSITION AND APPOINTMENT/ELECTION OF THE SENATE

ISSUE: How should the Senators be selected?
ALTERNATIVES: The Senate could be elected directly or appointed by the Provinces.
AGENDA: The different models should be studied with specific attention to the federal system
IFP POSITION: Senators should be elected by the Provincial Legislatures

ROLE OF SENATE WITH RESPECT TO SOME EXECUTIVE FUNCTIONS

ISSUE: Should the Senate have special competence with respect to some functions exercised by the Executive?
ALTERNATIVES: The Senate could exercise special control over the Executive with respect to matters in which Provinces have no legislative or executive competence.
AGENDA: The role of the Senate in the United States should be particularly considered.
IFP POSITION: The Senate should have a special role in controlling the function of the Executive branch of government with respect to some activities which are outside the competence of the Provinces such as defence and armed forces. For instance, the Senate could be charged with the special task to authorize the execution by the Executive of international treaties or the employment of armed forces outside the country or even within the country for civil protection reasons.

COMPOSITION OF CABINET

ISSUE: Who appoints the Members of Cabinet?
ALTERNATIVES: Members of Cabinet could be appointed by the Legislature, by the Head of Government or by the Head of State. Their appointment could guide the terms of their fiduciary relation and their accountability as individuals.
AGENDA: The appointment and accountability of Members of Cabinet should be considered with respect to the overall system of checks and balances.
IFP POSITION: Members of Cabinet should be selected and appointed by the Head of Government and shall serve at his or her pleasure, subject to the power of Parliament to vote its no confidence with respect to Cabinet in its entirety. If the Head of Government changes one of the Ministers, this change should be ratified at least by one of the two Houses.

POWER SHARING OR ROLE OF MINORITIES IN CABINET

ISSUE: Should minorities have a constitutional right to be represented in Cabinet?

ALTERNATIVES: Cabinet could be the expression of the ruling majority and any coalition of parties which participate in the formation of such majority or could also include representatives of those political parties which are not necessary to form a parliamentary majority. The difference between governments of national unity on a political basis and constitutionally mandated power-sharing should be carefully analyzed and understood.

AGENDA: Different historical experiences of power-sharing should be analyzed, along with the political dynamics which supports governmental action. Special reference in this respect should be given to applicable notions and studies of political sciences.

IFP POSITION: The IFP does not believe in constitutionally mandated power-sharing arrangements. The IFP believes that the protection of minorities should be provided for by means of a federal system and by means of very effective protection of minorities in Parliament.

RELATION BETWEEN HEAD OF GOVERNMENT AND MINISTERS - COLLECTIVE OR PERSONAL RESPONSIBILITY OF CABINET

ISSUE: To whom are the Ministers responsible?

ALTERNATIVES: The Ministers could be accountable only to the Head of Government or could also be accountable to Parliament.

AGENDA: Ministerial accountability and responsibility should be studied with respect to the functioning of parliamentary and executive systems of government.

IFP POSITION: The Ministers shall be chosen by the head of government and shall serve at his/her pleasure, provided that any substitution shall be ratified by a resolution of at least one House of Parliament.
Cabinet shall be collegially responsible to Parliament. Each Minister shall be responsible to Cabinet for his/her Department, provided that Parliament may ask any Minister to provide information or to tender his/her resignation to Parliament.

CONSTITUTIONAL AMENDMENTS:

ISSUE: How can the Constitution be amended? Could the entire Constitution be amended? Should the entire Constitution be amendable or should there be a portion of the Constitution, intended as text or principles, which is not amendable?

ALTERNATIVES: There is a very broad variety of techniques by virtue of which the Constitution may be amended, some of which involve Parliament only, while others call for a referendum or the approval of the member states of Provinces. A non-amendable "hard core" of the Constitution could be identified and this could consist of specific sections or chapters of the constitution or of the underlying principles of the constitution.

AGENDA: Procedures for the amendment of the Constitution should be studied with special regard to those employed in federal positions. Limits to the amenability of constitutions around the world should be carefully

IFP POSITION:

analyzed and studied, with special reference to the notions of "hard core", grundnorm and amendment of the constitution in breach of the constitution as they are known in India, Germany, US, Italy, Spain, Namibia and other countries.

The Constitution shall be amendable only by means of reinforced procedures including (a) super-majorities to be no less than two-thirds, (b) a cooling off period, and (c) two separate legislative processes, or one legislative process and a referendum.

The "hard core" of the constitution contributing to the determination of the "form of state" of South Africa should not be capable of amendment.

Any amendment of the national constitution which may affect the powers, functions and boundaries of Provinces shall not be varied unless specifically approved by the Province(s) concerned in terms of the reform amendment procedures specified above.

TRADITIONAL LEADERS AND THEIR STRUCTURES

The IFP is firmly committed to the notion of social and cultural pluralism which demands that South Africa accepts, respects and capitalizes on its plurality of social and cultural formations and the existence of societies within the parameters of a broader society. In this respect the role of traditional leaders should not be considered in isolation but it must be realized that traditional leaders are the administrators of a traditional community.

The IFP is not only committed to preserving the role of traditional leaders but also to ensure the condition for the preservation and survival of traditional communities. The fundamental element of social cohesion of traditional communities is communal land which allows all the members of the traditional community to share in the enjoyment of use of land which can not be alienated or transferred to individuals who are not members of the community. Land may also not be accumulated in a capitalistic fashion but serves the purpose of individual use in a community economy which is not based on capital and money but rather on land.

Therefore, it is imperative that the Constitution preserves traditional communities as cohesive and comprehensive structures with respect to all its component elements. Its component elements are communal land, the role of traditional leaders in administering such land, the role of traditional leaders in administering the community and the system of laws which hold together the community and the administration thereof.

Inherent to the structuring of these communities is the fact that the community exists and operates in terms of indigenous and customary law which is to be protected from outside interference. This includes the system of endogenous administration of justice with respect to specific functions essential to the systems of the community, as well as the system of endogenous

local government powers which are to be exercised by the Traditional Council headed by the traditional leader.

Against this background it is important that the Constitution entrenches the protection of communal property. All constitutions entrench the right to private property. By the same token the South African Constitution should entrench the protection of communal property. Furthermore, the system of laws and norms which define the authority, status and role of the traditional leaders should also be entrenched. In order to entrench indigenous law both the law itself as well as its source of production and administration should be preserved.

Furthermore, indigenous and traditional law should be preserved with respect to those individuals who do not live within traditional communities but who wish to regulate their personal affairs in terms of indigenous and traditional law. Therefore indigenous and traditional law shall have necessary territorial application within traditional communities and voluntary personal application outside such communities for those who wish to abide by such laws. For instance, those who contracted marriage on the basis of the lobola system should be able to have the relation with their spouses and their inheritance rights regulated by such system, even if they do not reside in a traditional community.

Attention is drawn to the following provision of the Constitution of the State of KwaZulu-Natal adopted by the KwaZulu Legislative Assembly on December 1, 1992 and endorsed by the Inkatha Freedom Party.

13. Traditional and Customary Rules

The State of KwaZulu/Natal shall recognize and protect the application of traditional and customary rules not inconsistent with the principles and provisions of this constitution in all matters left to the autonomy of individuals and that of social and traditional formations to which individuals belong on a voluntary basis or from which they have not dissociated themselves in a manner prescribed by law. Traditional and customary rules are produced in accordance with the rules and the sources governing their production and shall not be modified or repealed by the law. Traditional or customary laws shall not have territorial application unless so authorized by law, in which case they shall be subject to the law to the extent that they apply to individuals who do not share in such tradition or custom. All traditional and customary law shall be collected and published by a committee of the General Assembly working in conjunction with the affected interests.

78. Specialized Courts

a. [OMISSIS...]

b. Tribal, customary, and religious courts shall have concurrent jurisdiction over cases and controversies which, when proposed, are based on the application of traditional and customary law and religious rules respectively. The law shall identify and recognise such courts, and determine to which limited extent they may decide on incidental issues and matters not based on traditional and customary law or on religious rules.

III. RELATIONS BETWEEN LEVELS OF GOVERNMENT

TYPE OF POWERS TO BE ALLOCATED

- ISSUE:** What are the powers and functions from which to choose in determining the powers which should be allocated to the provinces?
- ALTERNATIVES:** Powers could be identified on the basis of several models.
- AGENDA:** We should identify all relevant powers of a parliament and all relevant powers of a government. Special attention should be given to those powers of parliament which do not necessarily translate into a governmental line functions or powers of government, the so called residual powers.
- IFP POSITION:** It will be important to focus our attention on the fact that the most important powers, the so-called residual powers do not necessarily translate into governmental line functions or powers of government. Residual powers should be left with the provinces. \approx

ALLOCATION OF POWERS

- ISSUE:** Should the constitution list the national powers, the provincial powers or both?
Moreover, once identified, should any subject matter of provincial competence extend also to judicial functions in addition to legislative and administrative functions?
- ALTERNATIVES:** The three possibilities of listing powers can give rise to different models depending on the allocation of the residual powers.
Moreover, provinces may have full judicial powers in the matters of their competence or reduced or limited judicial powers
- AGENDA:** Special attention should be given to federal models such as the United States, the European Union and Germany against models of regional/provincial states such as Italy and Spain.
- IFP POSITION:** The IFP believes that only the powers of the national government ought to be listed in the constitution while all other powers should be left to the provinces.
The IFP believes that provinces should have full judicial powers in all matters of their competence.

RELATION BETWEEN POWERS

- ISSUE:** What institutional technique of coordination should be employed to regulate the relation between national and provincial levels of government.
- ALTERNATIVES:** The following are generally recognized alternatives: (a) mutually excluding national and provincial exclusive powers with an open set of national interferences on provincial powers, or (b) national framework legislation with either provincial (bi) concurrent powers or (bii) exclusive powers, or (c) national overrides with either provincial (ci) concurrent powers or (cii) exclusive powers (d) national general principles of

legislation with either provincial (di) concurrent powers or (dii) exclusive powers.

AGENDA: Each system and each alternative should be carefully analyzed to determine how in other countries national policies are made compatible with the need to protect provincial autonomy.

IFP POSITION: There shall be separation of powers between national and provincial level of government. National government shall have no overrides and Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the powers of each level of government, based of the extension by relevancy or implication of the exclusive power of the national level of government into the areas of competence of the provinces, as in theory is the case in the U.S. (i.e. interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used, as previously proposed by the IFP.

FISCAL AUTONOMY

ISSUE: Should provinces have the fiscal and financial autonomy to support their functions?

ALTERNATIVES: There could be a unified system of revenue raising and taxation or there could be two parallel ones, one for the provinces and one for the national level. The provincial level could also, or alternatively, be assigned a predetermined share of the revenues collected by the national government.

AGENDA: The various alternatives should be studied with special attention to how each of them relates to the need for equalization and to equalization grants and transfers of the national government.

IFP POSITION: The IFP believes that provinces shall have original and residual taxing and revenue raising powers on the basis of a parallel system of taxation.

FISCAL EQUALIZATION

ISSUE: Should the constitution provide for mechanisms ensuring that resources are transferred among the provinces for equalization purposes?

ALTERNATIVES: There could be fiscal and financial commission determining the allocation of nationally collected revenues on the basis of constitutionally mandated criteria which ensure equalization, or the provinces may be entitled to a predetermined amount of national revenues.

AGENDA: Different models of fiscal federalism should be studied.

IFP POSITION: There shall be constitutionally mandated equalization. The constitution may also provide for a predetermined share of nationally collected revenues to be transferred to provinces, for equalization purposes. This

function could be guided by an independent Fiscal and Financial Commission.

ENTRENCHMENT OF PROVINCIAL AUTONOMY

- ISSUE:** What techniques should be used to prevent the natural tendency of central government to corrode on provincial autonomy.
- ALTERNATIVES:** Broadly speaking there are political guarantees and guarantees deriving from the court system, specifically the constitutional court. All these guarantees work against provisions in the constitution which entrench constitutional autonomy.
- AGENDA:** All the various techniques to entrench provincial autonomy should be listed and considered. As a subsequent step, it should be verified how each of these techniques is guaranteed by means of judicial review, constitutional adjudication or constitutionally predetermined political dynamics. The study of how the Supreme Court of the U.S. has failed to protect the constitutional autonomy of member states should receive particular attention.
- IFP POSITION:** Provincial autonomy shall be indestructible, and no national legislative or executive action shall be valid if it encroaches on provincial autonomy. The constitutional court should judge any conflict between provinces and national levels of government. In addition, provinces should have the opportunity of influencing by means of their own judicial system how the national constitutional court interprets the constitutional provisions which define their autonomy.

ROLE OF CONSTITUTIONAL COURT IN PROTECTING PROVINCIAL AUTONOMY

- ISSUE:** Should there be a link between Constitutional Court and provinces?
- ALTERNATIVES:** The resolution of "conflicts between powers of the state" is the typical means of protection of provincial autonomy. However, the Constitutional Court is usually wholly appointed by representatives of the national government. The provinces could participate in the composition of the constitutional court, or the constitutional court should be integrated when hearing cases related to provincial autonomy.
- AGENDA:** Identify options and models
- IFP POSITION:** Each provincial legislature should elect judges from its own provincial court system to sit on the Constitutional Court as additional judges when the Constitutional Court adjudicates a conflict between the central government and that particular province. When assessing the compatibility of national legislation with provincial constitutions the Constitutional Court should be bound by the interpretation of the provincial constitution adopted by the court of final instance in the provincial court system.

PRINCIPLE OF SUBSIDIARITY:

- ISSUE:** What is involved in the principle of subsidiarity?

- ALTERNATIVES:** Application of the principle based on "efficiency": powers are allocated to the level of government which can more efficiently exercise them, OR an application of the same principle on the basis of allocation of powers to the lower level of government capable of exercise them, even it is not the most efficient solution, as long as it is a "practical" one.
- AGENDA:** Study of the notion of subsidiarity in the European Union and other federal models
- IFP POSITION:** The Provinces shall be the primary governments of the people and shall be entitled to those powers and functions which can be properly and adequately exercised at provincial level. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level, which shall enjoys only those powers specifically listed in the constitution.

LOCAL GOVERNMENT

- ISSUE:** Should the constitution provide for a system of local government.
- ALTERNATIVES:** There could be a uniform system of local government or a system which varies from province to province within each province. The system of local government could be provided for in the constitution or left to the discretion of the law or to the autonomy of the provinces.
- AGENDA:** The system of local government in countries such as United States, Germany, Belgium and Switzerland should be studied to understand how diversity in local government structures accommodates the needs of a plural society.
- IFP POSITION:** The national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation. This is necessary to allow a system of local government which reflects local administrative needs as well as the plural nature of South African society. In fact, the local government system will need to reflect a variety of realities ranging from traditional communities to metropolitan areas. This calls for fluidity and suggest the non-advisability of entrenching in the constitution any given type of local government system.

PROVINCIAL CONSTITUTIONS

- ISSUE:** Should the constitution allow for provincial constitutions.
- ALTERNATIVES:** The applicable constitutional principle would prohibit the constitutional assembly from completely deleting the power of provinces to adopt their own constitution to determine their executive and legislative structures as they best see fit. However, the process of approval of provincial constitutions could be changed as well as their scope of application.
- AGENDA:** The relation between provincial autonomy and the organization of provinces by means of provincial constitutions should be fully analyzed with special attention to the different functions served by provincial constitutions in federal systems in a comparison with provincial constitutions in provincial/regional states.

IFP POSITION: Provinces shall be entitled to adopt their own constitutions in autonomy without the preemptive control of any organ of the national government, provided that such constitution shall not exceed the area of autonomy recognized to the provinces and that such limitation be fully reviewable by the constitutional court.

**ASYMMETRY
ISSUE:**

Should the constitutional provide for asymmetry between the powers and functions of each of the provinces?

ALTERNATIVE:

The constitution could provide for a system of virtual but not necessary asymmetry, or could entrench asymmetry or could exclude it.

AGENDA:

The system of entrenched asymmetry in provincial/regional states such as Italy and Spain should be analyzed against the system of virtual asymmetry of federal systems such as the United States. Furthermore, the situation of special and unique arrangements should be considered with specific regard to cases where the political entity entertains a federal on a confederal relation with another political entity organized as a unitary state.

IFP POSITION:

The IFP believes that the national constitution should provide for the maximum degree of provincial autonomy. Each province would be free to opt to exercise lesser amount than the autonomy they are entitled to if such province is not ready, willing or able to exercise any legislative or administrative concerned. Furthermore the IFP believes that the issue of federalism cannot be settled by virtue of majoritarian rule and that even if the rest of South Africa wishes to organize itself as a unitary state regions such as KwaZulu-Natal should be entitled to receive the autonomy they demand and coexist with the rest of South Africa on the basis of a federal relation.

PROVINCIAL AUTONOMY AND ECONOMIC UNITY

ISSUE:

How does the segmentation of government affect economic unity?

ALTERNATIVES:

The segmentation of government could lead to the segmentation of economic environments or could take place in a unified economic environment.

AGENDA:

Unified economic environments such as Switzerland, Germany and European Union should be analyzed to determine how and why the segmentation of government has not adversely affected, but has actually preserved the economic unity of the regions concerned.

IFP POSITION:

The IFP believes in the segmentation of government not in the segmentation of the economic continuum. The IFP believes that the segmentation of governments has no necessary bearing on the preservation of economic unity.

**SENATE
ISSUE:**

Should the provinces be entitled to participate as provinces in the legislative and/or executive decision making of the national government?

- ALTERNATIVES:** The different types of functions which the Senate serves in the constitutional system depend on its (a) role (b) composition and appointment (c) functions.
- AGENDA:** The role of the Senate in established federal systems should be fully analyzed, both with regard to legislative functions of the Senate and the functions of controlling national executive competencies.
- IFP POSITION:** The Senate should not have less legislative authority than the one given to the other legislative House. The Senate should represent the provinces and its members should derive directly from the provinces either through appointment or through indirect elections. Each province shall be equally represented in the Senate. The Senate should have the specific power to control executive functions such as defense and foreign affairs in which provinces have no competence.

IV. FUNDAMENTAL RIGHTS

NATURE OF THE BILL OF RIGHTS:

ISSUE:

Should the Bill of Rights apply to relations between government and people only, or should it also apply to inter-personal relations? Should the Bill of Rights be implemented by the national government only, by the Provinces only, or by both?

ALTERNATIVES:

The Bill of Rights may either have exclusively vertical application or may also have horizontal application. When the Bill of Rights also has horizontal application it will protect against violations of human rights which may occur within inter-personal relations. No constitution will make the Bill of Rights applicable to any type of inter-personal relations. Almost all modern constitutions have a horizontal application of the Bill of Rights and employ different tests to determine which inter-personal relations fall within the domain of the Bill of Rights. Usually this test consists of general principles which are subject to judicial interpretation. A separate issue regards the implementation of those human rights, second, third and fourth generation human rights, which require an action by government in order to be implemented and fulfilled, such as the case of the right to work or the right to medical care. The implementation of these rights could be left to Provinces under the control of the national government. The control of the national government can be structured on the basis of several techniques and parameters.

AGENDA:

The different types of horizontal application of the Bill of Rights ought to be studied to analyze how human rights protection can be extended to inter-personal relations. Special attention should be given to the relation between a horizontal application of the Bill of Rights and the need for the interpretation of the applicable principles by means of constitutional adjudication to be conducted by the Constitutional Court rather than by the ordinary judiciary.

The implementation of second, third and fourth generation human rights in federal states should be particularly analyzed to determine how Provinces could be the level of government responsible for the implementation of these rights. Attention should also be given on the role to be played by the national government in ensuring the consistent implementation of these rights across the country.

IFP POSITION:

The Bill of Rights shall have horizontal application. The applicable test shall require that the Bill of Rights is extended to "all significant legal relations which are under the control of the State." The Bill of Rights shall be entrenched in the national constitution but shall be implemented by the Provinces with respect to the matters of their competence (i.e., employment/labor, education, welfare, et cetera). The Republic might have the power to coordinate this implementing role of Provinces.

LIMITATION OF RIGHTS:

ISSUE: Should human rights be limited and how should such limitations operate?

ALTERNATIVES: Human rights may be limited implicitly by virtue of their mutual interferences and there may be no need for a specific limitation clause in the Constitution. The Constitution may provide for a limitation clause specifying that a Legislature may limit human rights, in which case it may or may not provide for an applicable test. The test generally used refers to reasonable limitations as per manner, place and time. Usually the limitation clause is counter-balanced by a limit of the extent to which rights can be limited. Often the distinction between "right" and "exercise of right" is used as a parameter to direct the relevant constitutional adjudication, in which case the constitution states that the exercise of the right may be limited but not the right itself.

AGENDA: Limitation clauses around the world should be analyzed not merely in respect of the text of the constitution but especially in respect of the jurisprudence which has developed around such texts.

IFP POSITION: The IFP believes that human rights shall not be limited but that the exercise of such rights can be limited for compelling reasons of public interest, provided that the essential core of such right is not affected.

SUSPENSION OF RIGHTS

ISSUE: Should human rights protection be suspended under special circumstances?

ALTERNATIVES: The suspension of human rights under exceptional extreme or extraordinary circumstances could be provided for in the Constitution or the constitution could be silent on this point, leaving the matter at a meta-judicial level.

AGENDA: Suspension clauses should be carefully analyzed, bearing in mind that they constitute the weakest link of the constitutional chain and that as in the case of the Weimar Republic could lead to the collapse of the entire constitutional system.

IFP POSITION: Suspension of human rights should be limited to extraordinary and extreme situations and shall not affect a basic group of rights which relate to basic human freedom and dignity. The suspension of rights should be reviewable or alternatively should be approved by Parliament or in the absence of Parliament, by the President of the Constitutional Court, or the President of the Senate. Human rights should only be suspendible on the declaration of a state of emergency.

DUTIES AND OBLIGATIONS

ISSUE: Should the Bill of Rights contain a Bill of duties and obligations?

ALTERNATIVES: Several types of duties and obligations could be provided for in the Constitution.

AGENDA: There should be a full compilation of Bills of duties and obligations appearing in modern constitutions.

IFP POSITION: Reference is made to **Attachment I**.

LIST OF HUMAN RIGHTS

ISSUE:

Which human rights should be entrenched in the Constitution? What are the differences in nature between various types of human rights?

ALTERNATIVES:

Broadly speaking, there is an internationally recognized list of human rights. Broadly speaking four types of human rights have been identified and they are referred to as first, second, third and fourth generation human rights. The first generation human rights are individual rights which are self-implementing and require no action by government, and actually consist of freedom from adverse governmental action. Second generation human rights are individual rights which require the implementing action of government in order to be fulfilled. Third generation human rights are rights which require collective exercise and usually are also based upon the implementing action of government. Fourth generation human rights are group rights which are recognized to a group identified as a political, ethnic or cultural minority and also extend to the autonomy of social and cultural formations.

AGENDA:

The full list of internationally recognized human rights should be acquired and carefully studied with special regard to the Universal Declaration of Human Rights, first, second and draft Third International Covenant on Human Rights, the European Declaration on the Safeguard of Human Rights and the OAU Declaration of Human Rights. Bills of Rights contained in modern constitutions such as Spain, Namibia, Fiji and Liberia should also be particularly considered. The following human rights are tabled for specific consideration:

FIRST GENERATION

- Freedom of speech
- Freedom of religion
- Physical and psychological integrity
- Liberty
- Travel and movement
- Privacy
- Assembly and association
- Free enterprise
- Contractual autonomy
- Private property
- Political rights

SECOND GENERATION

- Freedom of the media
- Freedom to access government information
- Family rights
- Cultural and traditions
- Procreative freedom
- Right to work
- Free enterprise
- Functional private property
- Communal property

- Right to education
- Health care
- Housing
- Labor law and labor rights

THIRD GENERATION

- Protection of women, senior citizens and youth
- Universities
- Environmental rights

FOURTH GENERATION

- Cultural rights
- Minority rights
- Rights of ethnicity and self determination
- Group rights
- Autonomy of social and cultural formations
- Pre-eminence of civil society
- Preservation of traditional communities and role of traditional leaders

IFP POSITION: Reference is made to **Attachment II**

EQUALITY

ISSUE : What type of principle of equality should be entrenched in the Constitution?

ALTERNATIVES: Formal equality will need to be entrenched. In addition the Constitution may entrench the principle of substantive equality. This can be achieved either by promoting equal opportunities or equal access to opportunity. The principle of equality may be implemented and enforced exclusively by the National Government or by the National Government and the Provinces in their respective areas of jurisdiction.

AGENDA: All the main variations of the principle of substantive equality will need to be explored. The relation between substantive equality and the need for constitutional adjudication to be conducted by the Constitutional Court only will also need to be explored. It will also be necessary to look at the many alternatives related to the application of the principle of formal equality with respect to the area of provincial autonomy. The difference between implementation and enforcement will also need to be fully explored.

IFP POSITION: The principle of Equality should foster equal access to all political, social and economic opportunity and should mandate the Republic to remove all substantive hindrances to the implementation of this principle. Equal "access" to opportunities does not mean redistribution of wealth, assets or resources, nor does it mean "equal opportunities." However, special training opportunities and assistance to small business are required to substantiate equal access to opportunities, the principle of which should be constitutionalized.

The principle of Equality should be entrenched in the national constitution but implemented by the Provinces with respect to the matters of their competence (i.e. employment/labor, education, welfare, et cetera).

The Republic might have the power to coordinate this implementing role of the Provinces.

EVOLUTIVE CLAUSE OF THE BILL OF RIGHTS OPEN OR CLOSED LIST OF RIGHTS

- ISSUE:** Are the Bill of Rights protected in the Constitution only those specifically mentioned in the Constitution?
- ALTERNATIVE:** The Constitution could contain either a closed list or an open list of human rights. An open list of human rights would allow for the recognition by means of constitutional adjudication of new human rights as they emerge from changes and growth of society. In this case the Constitution would provide a test for constitutional adjudication which would direct the Constitutional Court in its process of interpreting the constitution and identifying new human rights.
- AGENDA:** The evolution of the protection of human rights in modern democracies by means of constitutional adjudication should be carefully studied to understand how all new and emerging human rights have been produced by means of interpretation of existing constitutions.
- IFP POSITION:** Reference is made to Section 29 of Attachment II.

FUNDAMENTAL RIGHTS AND CONSTITUTIONAL AMENDMENTS

- ISSUE:** Can the Constitution be amended to eliminate human rights?
- ALTERNATIVES:** Human rights could be entrenched in their entirety and protected from constitutional amendments or alternatively only their essential content could be shielded from constitutional amendment.
- AGENDA:** Limits to the amendability of the Constitution should be studied with special regard to the Constitutions of Germany, India, Namibia and Spain.
- IFP POSITION:** The essential content of fundamental rights other than economic, social and political rights shall not be modified by virtue of constitutional amendments.

ATTACHMENT I
FROM THE DRAFT OF THE CONSTITUTION OF THE
FEDERAL REPUBLIC OF
SOUTH AFRICA

Submitted by the Inkatha Freedom Party to the
World Trade Centre, June 1993

PREAMBLE

WE, the people of South Africa, mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognising the right of people to organise themselves in autonomy and independence at all levels of society, desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this constitution for the Federal Republic of South Africa to provide the people of South Africa and the member States with a Federal government to serve their individual and collective needs, wants and aspirations.

1. Inherent Rights and Obligations

The Federal Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the Federal State and a general obligation of social responsibility to the people of the Federal Republic.

2.- 58. [...]

OBLIGATIONS AND DUTIES

59. Allegiance to the Constitution

All citizens shall have the duty to uphold this constitution and live by the rule of law. All those who hold any of the offices provided for in this constitution shall take an oath or a solemn affirmation to uphold and defend this constitution, obey the law and exercise their public functions with discipline and honour.

60. Contribution to Public Expenditures and Needs

a. All citizens have the duty to contribute to the common needs and to public expenditure by reasons of their resources. The tax system shall follow principles of progressive taxation, but shall not create a disincentive for the production of wealth.

b. The Federal Republic of South Africa shall encourage voluntary charitable activities and other forms of expression of social solidarity.

61. Military obligations

All citizens have the sacred duty to defend the territory of the Federal Republic of South Africa from any external enemy and from any threat to the enjoyment of freedom, democracy and pluralism in the Republic.

62. Duty to work

All capable citizens have the duty to contribute with their work and skills to the common development and growth of the Republic.

63. **Family duties**
All citizens have the duty to provide moral and financial support to their spouses, to educate their children and to assist their parents when in need of care.

[...]

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ATTACHMENT II

FROM THE DRAFT OF THE CONSTITUTION OF THE
FEDERAL REPUBLIC OF
SOUTH AFRICA

Submitted by the Inkatha Freedom Party to the
World Trade Centre, June 1993

PREAMBLE

WE, the people of South Africa, mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognising the right of people to organise themselves in autonomy and independence at all levels of society, desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this constitution for the Federal Republic of South Africa to provide the people of South Africa and the member States with a Federal government to serve their individual and collective needs, wants and aspirations.

FUNDAMENTAL PRINCIPLES

1. **Inherent Rights and Obligations**
The Federal Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the Federal State and a general obligation of social responsibility to the people of the Federal Republic.
2. **Source of Government**
All political power is inherent in the people. All government originates with the people, is founded only upon their will, and is instituted only for the good of the people as a whole. Government shall respect and encourage the exercise of the power of the people to organise and regulate their interests autonomously.
3. - 5. [...]
6. **Citizenship**
South African citizenship is acquired, maintained and lost in accordance to the law. No one born in South Africa can be deprived of his or her South African citizenship. No one can be deprived of his or her citizenship for political reasons.

No citizen of the Federal Republic of South Africa shall be deprived of citizenship except in such cases as they may be listed in the law and based on voluntary relinquishment. Parliament may grant citizenship in special cases. The law shall regulate the right of asylum in the Federal Republic of South Africa.
7. **Language**
The official languages of the Federal Republic of South Africa shall be English and Afrikaans. The Federal Republic shall protect and encourage the use of languages other than the official languages at all levels of society with special attention to the use of other languages as a medium of instruction in private schools or in schools subsidised or financed by or through the Federal Republic, subject to compliance with such requirements as may be imposed by the law of the member States to ensure proficiency of the official languages or for pedagogic reasons.
8. [...]
9. **Federal obligations**
Through the exercise of its own powers or by assisting member States, the Federal Republic of South Africa shall ensure internal security and safety, promote balanced economic development, foster social development, guarantee

environmental and consumer protection, ensure health services, education and welfare for its citizens, constantly strive to improve the quality of life of all people in the Federal Republic, preserve and protect the State's religious, linguistic and ethnic heritage and cultural diversity, nourish the people's right to the pursuance of happiness both as individuals and as members of their social formations, protect the family, extend special protection to maternity and paternity and to the children, extend special protection for women, the disadvantaged and less privileged portions of the population, and strive in its actions and policies to achieve social justice in accordance with the principles of this constitution.

10. **Equality**
 - a. All citizens of the Federal Republic of South Africa have equal social dignity, shall be equal before the law and shall share an equal right of access to political, social and economic opportunities irrespective of sex, race, colour, sexual orientation, language, traditions, creed, religion, political affiliation and belief, and social and personal status.
 - b. The Federal Republic of South Africa shall remove social and economic hindrances which operate as a factual limitation on the freedom and equality of all its citizens, prevent their human and social growth and diminish their equal access to political, economic and social opportunities. For this purpose the Federal Republic of South Africa may take measures in favour of segments of the population requiring special assistance.
11. **Rule of Freedom**

All conduct and activities which are not prohibited shall be permitted. The Federal Republic of South Africa may prohibit and regulate conduct and activities for a demonstrable State's interest founded on public interests and welfare.
12. [...]
13. **Traditional and Customary Rules**

The Federal Republic of South Africa shall recognise and protect the application of traditional and customary rules not inconsistent with the principles and provisions of this constitution in all matters left to the autonomy of individuals and that of social and traditional formations to which individuals belong on a voluntary basis or from which they have not dissociated themselves in a manner prescribed by the law of the member States. For this purpose the Federal Republic of South Africa may assist member States to ensure that the integrity of the legal systems of traditional and customary rules is safeguarded so that such rules are produced in accordance with the canons and the sources governing their production and application, and are not modifiable or repealed by ordinary state law. Traditional or customary laws shall not have territorial application unless so authorised by law, in which case they shall be subject to the law to the extent that they apply to individuals who do not share in such tradition or custom.
14. **Supremacy of the Constitution**

This constitution shall be the supreme law of the State and shall be applied and enforced to the fullest extent possible in all judicial and administrative procedures as well as in interpersonal relations under the control of the Federal Republic of South Africa. No law adopted under this constitution may be derogated by laws of the member States.

CONSTITUTIONAL
ASSEMBLY

FUNDAMENTAL RIGHTS

24 APR 1995

15. **Individual and Collective Rights**

All human rights set out in this constitution are recognised and shall be protected both in their individual as well as in their collective exercise, and they imply the right to establish institutions, adopt rules of conduct and regulate interests which are instrumental to the collective exercise of such rights. All powers established and recognised under this constitution shall protect and nourish the exercise of these rights and respect and foster their collective exercise.
16. **Justiciability of rights**

All rights and freedoms recognised and guaranteed under this constitution shall be justiciable to the fullest practical and reasonable extent. In the case of a violation of the rights and freedoms recognised and guaranteed under this constitution any aggrieved party shall be entitled to be heard by a court of record on the basis of urgency and, upon showing a *prima facie* violation of rights, shall be granted preliminary relief pending the final disposition of the case.
17. **Limits on the exercise of the rights**

The law may impose reasonable restrictions on the exercise of the rights set forth in this constitution to protect the rights of others and for compelling reasons of public interest. However, in such a case the law must respect the

essential content of the rights, and the limitation on the exercise of the right must not have the practical effect of preventing or deterring the free exercise of the rights in their reasonable manifestations.

18. **Physical and psychological integrity**

- a. The physical and psychological integrity of any individual shall be inviolable. No one shall be authorised to inflict any type of violence on another individual or to take a life. Capital punishment and any form of physical or psychological torture and punishment shall not be allowed.
- b. No one shall be submitted to unusual or cruel punishment and all punishments shall aim at the personal and social rehabilitation of the person. During imprisonment juvenile delinquents shall be kept separate from other delinquents and so shall men from women. Failure by a public official to report any and all instances of physical or psychological violence on a person deprived of his or her liberty shall be a criminal offence.

19. **Freedom of communication**

- a. All persons shall be free to express and communicate their thoughts in private and in public, in oral, written, visual or any other fashion, and to establish institutions for such a purpose. All forms of censorship or limitation on the contents of such communications shall be prohibited.
- b. Limitations on the contents of commercial speech may be imposed to guarantee the truth and the fairness of the representations made to consumers and to ensure fair competition, provided that there shall be no prohibition of comparative advertising.
- c. Limitations on the form of communication may be imposed as to time, place and manner so as to protect and respect the rights of others and compelling public interests, but not to the extent that the limitation on the forms of communication becomes a limitation on the contents thereof.
- d. No one shall be compelled directly or indirectly to disclose or express his or her ideology, creed, religious belief, or political opinions.

20. **Freedom of Religion**

- Religious freedoms are recognised and shall be guaranteed. Everyone shall have the right to profess and promote his or her religion or belief, and to establish institutions and organise activities for this purpose. The Federal Republic of South Africa shall not take any action supporting or endorsing any particular religious belief or confession or conditioning the exercise of religious freedom to any requirement, and shall promote conditions for the equal and free exercise of all religions and beliefs in the State.

21. **Liberty**

- a. No one shall be deprived of his liberty without cause and due process of law. Unwarranted arrest and detention shall be allowed only on the basis of probable cause related to an offence punishable by imprisonment. Anyone arrested or detained shall be informed of his or her rights in a language that he or she understands, shall be informed of the reasons for the arrest and detention with an indication of the charges, and shall have a court hearing within twenty-four hours from the time of his or her arrest, after which the detention may continue only by court order based on factually corroborated allegations.
- b. Anyone detained or accused has the right to remain silent. Anyone detained or charged with an offence punishable by imprisonment has the right to consult counsel, and if he or she can not afford one the court shall appoint one at government expense. There shall be a right to counsel in any and all proceedings in which the accused participates.
- c. Detention prior to sentencing shall be limited to cases established by law and shall not exceed three months.
- d. Anyone detained, arrested or condemned unlawfully shall have the right to be rehabilitated, to receive indemnification and other rights determined by law.
- e. Any government authority shall inform anyone who is the subject of an investigation for any reason.
- f. No one may be tried twice for the same conduct. No one shall be charged for a conduct which at the time was not an offence, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed. There shall be no analogical or retroactive interpretation of criminal law.
- g. Anyone has the right to a speedy, open and public trial and to confront his or her accusers at trial. All trials shall be based on the accusatory principle and shall be subject to the right to appeal on the grounds of error of law.

- h. No one shall be removed from the authority of the judge with jurisdiction over the specific offence at the time the offence was committed. There shall be no special or *post facto* judges. Any accused person has the right to be tried in an impartial, independent and competent court. Anyone shall be presumed not guilty until proven guilty.
22. **Travel and movement**
Everyone shall have the right to travel, move and reside within or outside the Federal Republic of South Africa. No government policy forcing the relocation of people shall be allowed. Any citizen of the Federal Republic shall have the right to take domicile in the any part of the territory.
23. **Privacy**
a. Everyone shall have the right to the protection of privacy, of his or her personal life, of his or her domicile, and to protection of his or her personal dignity and reputation. All private communications and all aspects of private life shall be protected. Search and seizure may be allowed only on the basis of a warrant issued on the basis of corroborated allegations, and in the cases and with the guarantees established by the law. Personal search shall be allowed as an incident to a legitimate arrest and detention.
b. Anyone has the right to access the information collected on him or her by the Government or by private data or information banks.
24. **Freedom of the Media**
Anyone has the right to publish and distribute printed materials. The press and the media of mass communication shall have the right to inform the public on matters of public interest provided that they do not publish erroneous information as a result of gross professional negligence or malice. The media have the duty to rectify all erroneous information they publish which damages the reputation of others.
25. **Assembly and Association**
Everyone has the right of peaceful assembly. No notice shall be required for assembly in a private place or in a place open to the public. For assembly in a public place prior notice shall be given to the competent authority which may prohibit the assembly only for reasonable apprehension of public security and safety. Everyone has the right to associate for any legal purpose. Associations pursuing directly or indirectly political purposes by means of military training or association operating in a para-military fashion shall be prohibited.
26. **Family rights**
A man and a woman have the right to join in marriage in accordance with the rituals and with assumption of the obligations and privileges of their choice. However, both spouses shall have equal rights, obligations and dignity. Both parents shall have responsibility for the upbringing, formation and education of the children, even if born outside wedlock. The law shall ensure that comparable rights and social protection shall be extended to children born outside wedlock as they shall be recognised to children born in wedlock. Both parents have the right and the duty to exercise joint custody of the children unless a court otherwise decides in the interest of the children and on the basis of the specific circumstances of the case. Both parents have the right and the duty to choose an acceptable formation and education for their children.
27. **Procreative Freedom**
All people who so desire shall enjoy the freedom of procreative choice, including the right to receive sexual education, to use contraception and terminate unwanted pregnancy when safe. Anyone who finds these practices objectionable shall have the right to protect his or her own sphere of interests from any of these practices and from the exposure thereto.
28. **Cultures and Traditions**
Everyone shall have the right to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion.
29. **Human rights in the Constitution**
All fundamental human rights and all those other rights which are inherent to fundamental human needs and aspirations as they evolve with the changes and growth of society, and as they will be recognisable on the basis of the principles underlying the provisions of this constitution, are hereby entrenched in this constitution and in their essential content shall not be modified by virtue of constitutional amendments.

ECONOMIC, SOCIAL AND POLITICAL RIGHTS

Economic Rights:

30. **Free Enterprise**
The right to free economic initiative and enterprise shall be recognised, protected and encouraged by the Federal Republic and the member States. The Federal Republic shall assist the member States to assist small businesses and provide other incentives to encourage access to economic opportunities. Within the limits set forth by the law to protect the public interest, each enterprise shall be free to choose and organise the means of the production as it best sees fit.
31. **Contractual autonomy**
Within the limits set forth by the law to protect the public interest, the Federal Republic shall assist the member States to recognise and protect the right of individuals to self-regulate and organise their interests in economic and other matters by means of legally enforceable contracts and by establishing legal entities to carry out their purposes and objectives.
32. **Commercial and Insolvency Law**
Each member State shall promote uniformity of their commercial and insolvency laws with those of other states and countries.
33. **Permits and Licensing requirements**
The Federal Republic shall not subject human conduct to unreasonable or unnecessary licensing and permitting requirements. Permits and licences shall be issued on the basis of objective and reasonable standards and criteria.
34. **Private Property**
Private property shall be guaranteed and protected. Limitations on the use and enjoyment of private property may be imposed so as to satisfy social, environmental and collective needs. The right to convey one's own property by contract or inheritance shall be protected subject to the reasonable exercise of the power of taxation.
35. **Expropriation**
The Federal Republic of South Africa or another entity authorised by law may expropriate property for public necessity subject to the prompt payment of a fair market value compensation.
36. **Property of the Federal Republic**
The Federal Republic of South Africa or its instrumentalities may own property as private or public property. Public property shall not be alienated or encumbered and shall be related to the exercise of public functions or shall be held by the Federal Republic or its instrumentalities in the public interest. The law shall set forth the principles for the acquisition, administration and declassification of public property. Parliament shall publish a yearly report on the property owned by the Federal Republic indicating their current and planned use and their maintenance and carrying costs.
37. **Public Enterprise**
No enterprise shall be acquired or conducted by the Federal Republic of South Africa or its instrumentalities either as a monopoly or as a free competition enterprise, and no service shall be provided to the public unless so authorised by a law demonstrating a public need and the inadequacy of the private sector to satisfy such need with comparable efficiency and reliability. When these requirements no longer exist the enterprise or the service shall be privatised.
38. **Communal Property**
The Federal Republic shall assist the member States to recognise and protect Communal Property. Communal property shall be administered and regulated by traditional and customary Rules.
39. **Practices in restraint of trade**
All monopolies and practices and agreements in restraint of interstate trade, commerce and free market competition shall be prohibited.
40. **Agriculture**
The Federal Republic of South Africa shall assist the member States in encouraging productive agriculture, the socially just and responsible use and distribution of land and the access of citizens to land ownership. The Federal Republic of South Africa shall also assist the member States promoting agricultural cooperation and assisting farmers on a cooperative basis.

Social Rights:

41. **Right to Education**
 - a. All citizens shall have the right to receive a basic education and professional training. The Federal Republic of South Africa may set general standards to assist the member States in determining the period and the minimum educational requirements for compulsory education. The Federal Republic shall support the citizens' aspiration to higher education by means of scholarship and by promoting the highest standards of excellence in education.
 - b. Both private and public schools shall ensure open and equal access to educational opportunities. Parents shall be entitled to participate in the administration and operation of their children's schools.
42. **Right to Work**

Everyone shall have the right to access any job opportunity for which he or she is qualified. The Federal Republic shall assist the member States to promote the full employment of all citizens. No one's employment shall be terminated for political reasons or in violation of his or her constitutionally protected rights. Everyone shall have the right to receive a fair compensation for his or her work, shall be entitled to at least one vacation day a week, to a period of paid vacations during the year and to a severance payment. All workers shall be entitled to social security, pensions, invalidity and unemployment benefits as determined by law of the member States.
43. **Protection of Women**

The Federal Republic shall operate to ensure that both federal and state law extend special protection to women in recognition of their function and condition in society. The Federal Republic shall assist the member State to guarantee maternity leave, to provide assistance to mothers in the work force, and to ensure equal access of women to political, social and economic opportunities by means of special treatment and privileges to be in force until such time when the condition of women in the Federal Republic has significantly improved.
44. **Senior Citizens**

The Federal Republic shall assist the member States to promote the economic sufficiency of senior citizens and provide social services to assist them in relation to their housing, care, health, cultural and leisure needs.
45. **Youth**

The Federal Republic shall assist the member States to promote conditions for the free and effective participation by the youth in political, social, economic and cultural developments.
46. **Schools**

Everyone shall have the right to establish private schools. Private schools shall have the power to determine their own curricula and syllabi within the general parameters set forth by law of the member States and by the Federal Republic for the purposes of recognition and equipollence of degrees.
47. **Universities**

All public universities and institutes of higher education in the Federal Republic shall be entitled to regulate their organisation and operations within the general parameters set forth by law of the member States.
48. **Health Care**

All citizens shall have the right to receive medical attention and care in case of need. The law of the member States shall determine the implementation of this right. The Federal Republic shall assist the member States to develop policies of prevention, treatment, rehabilitation and integration of those who are physically, sensorially and mentally handicapped, including those who are substance addicted.
49. **Job Conditions**

The law shall ensure safe job conditions and shall provide special protection for women, minors and untrained labour.
50. **Housing**

The Federal Republic shall assist the member States to promote conditions to ensure that all citizens have the possibility of living in a dignifying habitation and to facilitate the purchase of residences through credit facilitation and other programmes. All citizens have the right to receive shelter and shall have equal access to housing opportunities.
51. **Research, Arts and Teaching**

The freedom of scientific research, artistic expression in all its forms and teaching is recognised and shall be guaranteed.
52. **Right to a Pleasant and Clean Environment**

The Federal Republic of South Africa shall recognise the rights of present and future generations of citizens to live in and enjoy a pleasant and clean environment. The law shall determine the cases and the limits in which citizens may bring legal actions on behalf of the community against those who cause environmental damages. The Federal Republic shall assist the member States in protecting and promoting the quality of the human and natural environment, and may set forth environmental standards and criteria.

53. Labour Rights

Everyone shall have the freedom to form and join trade unions and employers' associations. Member States shall respect and protect the right to strike but may limit its exercise in cases determined by their law for reasons of public security and safety. Labour organisations shall have the right to negotiate and execute collective bargaining agreements to be effective with force of law vis-a-vis the category of workers covered by their provisions. During these negotiations the labour organisation shall be represented on the basis of the number of their members. Trade unions shall have the right to conduct reasonable activities in the work place aimed at improving labour conditions. Member States may impose requirements on the trade unions only to ensure that they are organised and operated with full internal democracy.

Political Rights:

54. Right to Vote

- a. All citizens of eighteen years or older shall have the right to vote. The vote shall be personal, secret, free, and equal. The right to vote may be suspended by a judicial adjudication of incompetence, or by an irrevocable sentence for major crimes specified by the law.
- b. The law recognises, and the Federal Republic of South Africa shall facilitate, the exercise of the right to vote by citizens who are outside the State.

55. Right to Petition and to Initiate Legislation

Any citizen has the right to petition Parliament and any branch or level of government. A citizen's legislative proposal signed by five hundred citizens may be submitted to Parliament.

56. Freedom of Information

Any citizen has the right to access and receive any information or document which is in the possession of the Government of the Federal Republic of South Africa or its direct instrumentalities or of any of the commissions or agencies established under this constitution, provided that such document or information is not privileged as established by law to protect privacy, commercial secrets or national or State security. During the process of judicial review of the government's decision to withhold information, the court shall have the power to examine *in camera* the information withheld.

57. Political Parties

The citizens have the right to form political parties to participate in all levels of democratic life. No one shall be directly or indirectly compelled in any way to join a political party or shall be penalised for not belonging to one. Political parties shall ensure internal democracy in their organisation and operations.

58. Media of Mass Communication

Anyone shall have the right to establish media of mass communication, including newspapers, cable, radio and television stations. The law shall regulate the rights of citizens and political parties to access media of mass communication under the control of the government or in situations of virtual hegemony or monopoly.

OBLIGATIONS AND DUTIES

59. Allegiance to the Constitution

All citizens shall have the duty to uphold this constitution and live by the rule of law. All those who hold any of the offices provided for in this constitution shall take an oath or a solemn affirmation to uphold and defend this constitution, obey the law and exercise their public functions with discipline and honour.

60. Contribution to Public Expenditures and Needs

- a. All citizens have the duty to contribute to the common needs and to public expenditure by reasons of their resources. The tax system shall follow principles of progressive taxation, but shall not create a disincentive for the production of wealth.

- b. The Federal Republic of South Africa shall encourage voluntary charitable activities and other forms of expression of social solidarity.
61. **Military obligations**
All citizens have the sacred duty to defend the territory of the Federal Republic of South Africa from any external enemy and from any threat to the enjoyment of freedom, democracy and pluralism in the Republic.
62. **Duty to work**
All capable citizens have the duty to contribute with their work and skills to the common development and growth of the Republic
63. **Family duties**
All citizens have the duty to provide moral and financial support to their spouses, to educate their children and to assist their parents when in need of care.

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V. JUDICIARY AND LEGAL SYSTEM

STRUCTURE OF THE JUDICIARY SYSTEM

ISSUE:

Should there be one or more than one judicial system? If there is more than one judicial system, should each judicial system have the final competence on matters of its jurisdiction?

ALTERNATIVES:

There could be one system for all types of judicial functions in the country or there could be a division between subject matters and competencies which would extend also to judicial functions. Provinces could have judicial functions in respect of matters of their competence. Furthermore, civil society could also exercise some judicial functions. The judicial functions of Provinces could either be final or could be limited to first judicial instance, subject to Appellate review from the judicial system of the central government. Similarly, judicial competencies exercised by institutions of civil society could also be subject to the Appellate review of a different judicial system.

AGENDA:

The division of judiciaries in federal systems should be studied with special attention to the US model. Self-regulation and quasi-judicial functions of some institutions of civil society should also be considered with respect to applicable comparative experiences.

IFP POSITION:

Provinces shall be the primary government of the people and shall exercise all those functions which have not been devolved upwards to the federal government. Provinces shall have judicial functions with respect to all matters within their competence. The provincial judicial system shall have its own Appellate Division and should exercise final instance jurisdiction on matters of provincial competence.

There could be recognition of first instance jurisdiction to be exercised by certain institutions of civil society with respect to the interests that they administer and regulate. This jurisdiction should be subject to Appellate review of the provincial or the national judicial system. Civil society jurisdiction could include Tribal Courts, professional associations, trade unions and universities.

The national constitution should limit its provisions to the organisation of the national judicial system leaving the organisation of the provincial system to the autonomy of Provinces.

INDEPENDENCY OF THE JUDICIARY

ISSUE:

What techniques should be used to guarantee the independency of the judiciary?

ALTERNATIVES:

The judiciary could be organised as a self-governing power of the State, or alternatively could be subject to the Legislature and/or the Executive. The relation between Acts of Parliament and the organisation and governance of the judiciary also defines the degree of independence of the judiciary. Matters related to the appointment, promotion and transfer of judges are also related to the independency of the judiciary. A Judicial

Service Commission is one of the tools which can be used to achieve independency.

AGENDA: Different forms of judicial independence should be analysed with respect to comparative models. The alternative between appointed and elected judges should also be considered, along with possible powers of Parliament in ratifying judicial appointments.

IFP POSITION: The judiciary should only be subject to the law. However, all matters related to its organisation and governance should be regulated by an independent Judicial Service Commission, including the selection by public competition and qualification of judges, rules on transfers, promotion and assignments to office of judges, age limits and code of judicial conduct and responsibility.

RULES OF PROCEDURES

ISSUE: Should judges have the power to adopt Court Rules in addition to, or alternatively, to Rules adopted by Parliament?

ALTERNATIVES: The entire field of procedural law could be left to Parliament or to the judicial system, or it could be a shared responsibility.

AGENDA: Reference to comparative experience will assist with the understanding of this issue.

IFP POSITION: A distinction should be drawn between Rules of Procedures and Rules of the Court. The former should be the prerogative of Parliament, while the latter should remain within the jurisdiction of the judicial system in a fashion to be determined by the Judicial Service Commission.

FISCAL MANAGEMENT OF THE JUDICIARY

ISSUE: Should the judicial functions be a part of the State budget to be administered by the Department of Justice?

ALTERNATIVES: Judicial functions are usually revenue generated and cause a transfer from this function towards other governmental functions. Notwithstanding this fact judicial functions are often under-funded. Accordingly, the judiciary could operate on the basis of its own budget, financed by means of court filings, revenue stamps, court costs, etc. or it could be funded.

AGENDA: The fiscal administration of the judicial system should be analysed with respect to the South African budget and comparative models such as Germany and the United States.

IFP POSITION: The judiciary should operate on the basis of its own budget and revenues raised in connection with the administration of justice. The Judicial Service Commission shall submit a yearly budget to Parliament for approval which will include salary levels for all those working in the judicial service. All taxes and duties related to the administration of justice shall be used for the benefit of the judicial service, with the possibility of carrying over financial availabilities to the following year.

APPELLATE DIVISION

- ISSUE:** Should the principle of Appellate jurisdiction be constitutionalized? In addition to reviewing the merits of a case, should the Appellate Division exercise other functions?
- ALTERNATIVES:** The Constitution could provide that any party to litigation has the right to appeal the decision of a court of first instance, or alternatively could qualify this right for a certain class of cases and controversies, or alternatively could be silent, leaving the decision to the discretion of the Legislature.
The Appellate Division may have the specific task of ensuring the uniform application and interpretation of the law.
- AGENDA:** The constitutional principle of Appellate jurisdiction should be analysed with respect to modern constitutions and the prevailing notion of human rights protection.
- IFP POSITION:** The Constitution shall provide for the possibility of Appellate jurisdiction with respect to all cases and controversies handled by the judiciary.
The Appellate Division shall also exercise nomophilic functions, such as ensuring the uniform application and interpretation of the law in the courts of first instance.

SPECIALISED COURTS

- ISSUE:** Should Parliament be left with the discretion of establishing special courts and special jurisdiction? What is the difference between special jurisdiction and specialised courts?
- ALTERNATIVES:** The Constitution could prohibit special courts which are usually employed for political purposes. However, it could allow for specialised courts or special divisions of the existing court system. The Constitution could also mention specific special courts with special jurisdiction.
- AGENDA:** With reference to the experience of established democracies, special needs of judicial functions should be analysed against the prohibition of special courts.
- IFP POSITION:** There shall be no special or extraordinary tribunal courts. However, the Constitution shall make provision for military courts, specifying that during peace-time they have jurisdiction only over military personnel on active duty.
Within the ordinary court system, the Judicial Commission may create specialised sections for given subject matters such as labour or family law and for matters which may require the participation of qualified experts to the administration of justice.

TRIBAL COURTS

- ISSUE:** Should Tribal Courts be preserved?
- ALTERNATIVES:** They could be constitutionally entrenched, constitutionally prohibited or the choice could be left to the discretion of the Legislature.
- AGENDA:** The position of Tribal Courts in the administration of traditional communities and in the preservation of the role and authority of traditional leaders should be carefully considered.

IFP POSITION: Tribal, customary and religious courts shall be constitutionally protected. However, their jurisdiction should not be exclusive but only concurrent and should be limited to those cases and controversies which are based on the application of traditional and customary law or religious rules respectively, as per the time when such cases and controversies are initially proposed.

ROLE OF PROSECUTORS

ISSUE: Should a prosecutor be part of the judicial system, should a prosecutor be entitled to the same guarantees of independence set out for judges?

ALTERNATIVES: Should the prosecutor have discretion on whether and how to prosecute?

The office of prosecutor could be distinct and separate from that of a judge, or judges could freely move from judicial to prosecuting functions. The Prosecutor might be bound to prosecute in each case or might have the discretion on whether and how to prosecute.

AGENDA: The nature of prosecutions should be studied with respect to relevant considerations of human rights protection and impartiality of the judicial functions.

The need to ensure impartiality in prosecutions needs to be studied with respect to necessary checks and balances related to the need to determine prosecuting policies and coping with the fact that it is impossible to prosecute all crimes in the same way.

IFP POSITION: The office of the Director of Public Prosecution shall be a distinct and separate part of the judiciary equally governed by the Judicial Service Commission. The carrier and the roles of judgeship and prosecution are separate and only in exceptional circumstances shall the Judicial Service Commission authorise a prosecutor to take the office of judge or vice versa. Prosecutors are entitled to the same guarantees, immunities and financial treatment as judges. The prosecution of criminal offences shall be mandatory

The Director of Public Prosecution shall submit a yearly report to the Judicial Service Commission on the cases which his office has not prosecuted because of special agreements with the suspected party or for other public interest reasons. The report may omit the names of the concerned parties.

ENFORCEMENT OF THE CONSTITUTION:

ISSUE: How should the supremacy of the Constitution be guaranteed?

ALTERNATIVES: The supremacy of the Constitution may be guaranteed by means of political devices and checks and balances or by means of specific tools of judicial review. Judicial review of constitutionality could be administered by a specialised Constitutional Court in a unified and exclusive fashion, or alternatively concurrently with the functions exercised by the judicial system, or alternatively it could be administered by the ordinary judicial system exclusively.

AGENDA:

It might be worthwhile to study constitutional adjudication from its roots, tracing the terms of the debate between Karl Schmidt and Hans Kelsen. This exercise should lead to the understanding of the fundamental correlation between a "long" constitution, including *inter alia* second and third generation human rights, and constitutional policies, and the need for constitutional adjudication to be conducted by an independent Constitutional Court in an exclusive fashion.

The experience of the great Constitutional Courts of Austria, Germany, Italy and Spain should be correlated to those of the Supreme Courts of the United States and India.

IFP POSITION:

There shall be an independent Constitutional Court operating only under the constitution with exclusive jurisdiction on constitutional matters. To guarantee the independence of the Constitutional Court, it is essential that the law of Parliament has no power in defining its organisation, structure and functions, which should be the prerogative of the Constitution itself and of the autonomous power of self-regulation of the Constitutional Court.

COMPOSITION OF THE CONSTITUTIONAL COURT

ISSUE:

How does the composition of the Constitutional relate to its independence on the one hand and its capability of operating with awareness of political and institutional considerations on the other hand?

What guarantees can be put in place to ensure the independence and impartiality of the justices?

ALTERNATIVES:

The justices of the Constitutional Court could be appointed by judges and lawyers only, or they could be appointed by the political system or by a combination of both.

There are many known techniques to guarantee the independence and impartiality of justices.

AGENDA:

Special attention should be given to techniques which ensure that the composition of the Constitutional Court reflects the plurality of our society, while preserving the independence of the justice from the daily dynamics of the political system.

A full analysis of means to guarantee the independence and impartiality of justices should be conducted.

IFP POSITION:

Justices of the Constitutional Court shall be chosen among the best qualified judges, lawyers and law professors of the country. A portion of the justices shall be appointed by Provinces and shall originate from the judiciary systems of each Province. A second portion of justices shall be appointed by Parliament with resolutions supported by two-thirds of its members, while the third portion of justices shall be appointed by the Judicial Service Commission and/or the Bar Association.

In order to guarantee their independence and impartiality, justices shall serve only for one term, to be no less than seven years. Upon termination they shall not be able to assume any public office for five years.

FUNCTIONS OF THE CONSTITUTIONAL COURT

ISSUE:

What are the subject matters on which the Constitutional Court shall adjudicate so as to protect the constitutional order?

ALTERNATIVES:

The Constitutional Court is the cornerstone of the constitutional system and its final guarantee. Therefore the full list of functions of the Constitutional Court can only be assessed once there is clarity on the overall constitutional system and related need for checks and balances. By and large, any conflict between actions of any branch of Government and the Constitution should find adequate remedy within the parameters of constitutional adjudication. Sensitive issues relate to the reviewability of legislation before its enactment, the relation between the Constitutional Court and the judicial systems of Provinces and the reviewability of actions of civil society which might be relevant to the overall constitutional system, such as constitutions of political Parties and of trade unions. In this latter respect, constitutional adjudication completes the scheme of constitutional autonomy granted to institutions of civil society.

AGENDA:

A list of functions exercised by Constitutional Courts around the world should be compiled. In addition there should be a list of constitutional matters which emerge from the operation of the constitutional system which may require constitutional adjudication.

IFP POSITION:

The Constitutional Court shall have original and exclusive jurisdiction in the following matters:

- review the constitutionality of the legislation of the national Parliament
- provide a binding but general advice to any court of last resort of Provinces engaged in the interpretation or assessment of constitutionality or validity of national legislation
- resolution of conflicts between national and provincial legislation to be conducted in a fashion consistent with the provisions of provincial constitutions
- resolution of conflicts between the national level of government and Provinces to be conducted in a fashion consistent with the provisions of the constitutions of Province concerned
- resolution of conflicts between Provinces
- resolution of conflicts between powers of the national government
- resolution of conflicts between any social, cultural or economic formations or other institutions of civil society complaining about an action of government which unduly encroaches upon its constitutional autonomy and the government concerned
- criminal charges against the head of state, the head of government or Ministers
- verification of the democracy of the statutes of political parties
- other matters as set forth in the constitution or in constitutional laws.

ACCESS TO THE CONSTITUTIONAL COURT

- ISSUE:** Who would be entitled to raise an issue of constitutionality? At what point is an issue ripe for judicial review of constitutionality? Who decides whether the Constitutional Court should hear such an issue and what are the screening techniques?
- ALTERNATIVES:** Issues of constitutionality could be referred to the Constitutional Court with the discretion of the judge *a quo* who would hold the keys of constitutional adjudication, or alternatively screening could be left to the discretion of the Constitutional Court. All issues of constitutionality could be brought before the Court or only some of them. There could be "direct access" outside court proceedings, or "indirect access" from a pending court litigation, or both.
- AGENDA:** Techniques to ensure access to Constitutional Courts should be studied with reference to the Courts in Austria, Germany, Italy and Spain. Moreover, procedures such as *certiorari* of the US Supreme Court should also be considered.
- IFP POSITION:** Any issue of constitutionality of laws, or democracy of the statutes of political parties or validity and legitimacy of a collective bargaining agreement raised by any of the parties to a case or controversy before any court, which is not "manifestly without foundation", shall be remanded to the Constitutional Court for resolution. This means that the judge *a quo* may not screen issues, which prerogative is to be left to the Constitutional Court on the basis of its rules. Political parties represented in Parliament, the Public Protector as well as trade unions, civic and consumer groups, major media of mass communication and other social, religious and cultural formations registered with the Constitutional Court in accordance with its rules, shall have direct access to commence an action to declare the unconstitutionality of laws. One hundred members of a political party may commence an action to review the democracy of their political party statute. Any Province, any organ of the Republic of South Africa, the Public Protector, any power of the Federal Republic, or representatives of social, cultural and economic formations may commence an action to resolve a conflict among government organisations.

POWERS OF THE CONSTITUTIONAL COURT

- ISSUE:** What is the effect of the decision of the Constitutional Court?
- ALTERNATIVES:** The decisions of the Court could have *erga omnes* or *inter partes* effects, and they could have prospective or retractive effect, in which latter case may or may not regulate legal relation which occurred under an unconstitutional norm.
- AGENDA:** There should be full analysis of the constitutional jurisprudence of country such as Germany, Italy, Austria and India. Testimony from the Venice Commission should be obtained in this regard.

IFP POSITION:

Decisions of the Constitutional Court shall declare null and void any administrative action, or political party's statute or collective bargaining agreement which are in violation of the constitution. The decision of the Constitutional Court may also mandate the rule of resolution of a conflict among the government's organisations and powers of the Federal Republic.

All decisions of the Constitutional Court shall have *erga omnes* retroactive effect and may provide rules to recognise rights meriting protection and which vested in good faith under norms declared null, void or ineffective.

VI. SPECIALIZED STRUCTURES OF GOVERNMENT

A. SUBCOMMITTEE ON SECURITY

SUPREMACY OF THE CONSTITUTION:

- ISSUE :** Should the Police or the Defence Force operate on the basis of specially designed constitutional provisions or exceptions?
- ALTERNATIVES:** The constitution could bind the SAPS and the SANDF on the same level as other organs of the state, or could allow them to be regulated differently.
- AGENDA:** Analysis of the present international trends in this matter against the past South African experience.
- IFP POSITION:** Both the SAPS and the SANDF must operate within the constitution, including the bill of rights. The suspension of some human rights will be regulated only by means of a declaration of emergency or war which will bind both the SAPS and SANDF.
- STATUS:** Non contentious issue

POSITION OF INTELLIGENCE SERVICES IN THE CONSTITUTION

- ISSUE:** Should the constitution provide for intelligence functions? Is intelligence an independent function or is it part of defence and/or police?
Should intelligence be bound by the constitution?
- ALTERNATIVES:** Most constitutions are silent about intelligence, or assume that intelligence is a sub-function of police and/or defence falling within the regulation of police or defence. Across the world experience has proven that intelligence has the tendency to operate as an independent function with great capability of infringing human rights and even working against the constitution.
- AGENDA:** The deviances intelligence functions in our country and other country in the world should be analyzed with reference to human right protection and checks and balances considerations.
- IFP POSITION:** The constitution should provide for intelligence functions dividing them into police intelligence and military intelligence. Military intelligence shall not be able to operate within the country but only outside the country. The role of police intelligence should be limited to the prevention or investigation of crimes.
Intelligence functions must operate within the constitution, including the bill of rights.
- STATUS:** Non contentious issue

PRISON SECURITY FORCES AND PRISONERS

- ISSUE :** Should the constitution separately regulate the status and rights of prison security forces and prisoners?
- ALTERNATIVES:** The constitution could assume prison security forces are part of the broad-sense police forces

AGENDA : The specific past and present situation of prisons in South Africa should be studied with regard to human rights considerations and the need to promote an efficient and secure prison system.

IFP POSITION: There is need to have in the constitution provisions which specifically refer to prisons and prisoners. Prisoners constitutional rights must be carefully protected. The constitution must indicate that the failure by a public official to report crimes against those who are in custody shall be an offence.

There shall be a special ombudsman to defend the human rights of prison inmates as well as the prison force.

STATUS: Non-contentious issue

SANDF'S, SAPS' AND INTELLIGENCE'S CONSTITUTIONAL MANDATE

ISSUE: In their respective policy formulation should the SANDF, the SAPS and the Intelligence serve only the government of the day? What is the relation between the forces and the political phenomenon?

ALTERNATIVES: The policy formulation of each of the force could be inspired only by the political directives of the government of the day or of the political party controlling the departments concerned, or alternatively each of the forces may be required to formulate their respective policies "in the national interests" and "in the spirit of the constitution". The mandate to operate in the national interest would be tied to the statement that each of the forces operate directly under the constitution, while the reference to the spirit of the constitution usually calls for respect of political minorities. The forces could be allowed to be involved in politics or could be prohibited to do so

IFP POSITION : The constitution must indicate that the operations and the policy formulations of the SAPS, the SANDF and the Intelligence must reflect the national interest and be consistent with the letter and the spirit of the constitution.

All members of the SAPS, SANDF and Intelligence should make an oath or solemn affirmation to uphold and defend the constitution

However the following qualifications and limitations are necessary:

- The SAPS must operate only to ensure the prevention and the investigation of crimes rather than on the basis of a broad definition of "national interest".
- The SAPS should be specifically excluded from any involvement in political activity.
- Members of the SAPS should be allowed to be members of political parties but not to hold office or become actively involved in politics.
- Members of the SANDF should not be allowed to hold office in political parties.
- Members of intelligence services should be forbidden to become involved in politics.

- Members of the intelligence should not be allowed to recruit informers paid from state funds in political parties unless this is linked to a criminal investigation in the Republic.
 - Members of intelligence services should be constitutionally barred from infiltrating political parties in the Republic.
 - Members of intelligence organisations may not hold office in political parties.
 - Members of the prison services should not hold office in political parties and should refrain from political activity in prison.
- Non contentious issue

STATUS:

STRUCTURE AND SEPARATION OF POWERS IN THE POLICE

ISSUE:

Should there be one police service throughout the country or should each Province also have its own police service? In the latter case, how should the powers between police services be distributed?

ALTERNATIVES:

There could be one national police service throughout the country; this police service could be organised either exclusively at the national level or at national and provincial levels with the specific competence being left to the provincial sub-divisions. Alternatively, national and provincial police services could be distinct and separate and they could inter-relate on the basis of different competence and prerogatives.

The provincial police service could have jurisdiction over all matters which are not ascribed to the competence of the national police service or the competence of the national and the provincial police services could both listed in the Constitution.

AGENDA:

Special attention should be given to the structuring of police in federal systems, such as the United States. Also the present status of provincial police and of the police in the former TBVC states and self-governing territories should be considered to assess current South African trends.

IFP POSITION:

Provinces shall have their own separate and distinct police service which they shall be responsible to structure, organise and administer in terms of provincial law. The provincial police service shall be responsible for all matters which do not need to be handled at the national level. The Constitution should list only the competence of the national police, limiting them to organised crimes of an inter-provincial nature and other crimes which threaten national security and stability. Furthermore, national police should be responsible for logistical assistance to provincial police in forensic matters, finger-printing and data management.

- The Constitution shall require that provincial legislation gives special emphasis to community police.
- Provinces shall have the competence to run their own prison systems, including a prison force.
- Provinces shall have the power to develop intelligence capability with respect to the prevention and investigation of crimes and police functions.

STRUCTURE AND SEPARATION OF POWERS IN THE DEFENCE FORCE

- ISSUE:** Should there be one single Defence Force for the country or should the Defence Force also be structured on a provincial basis?
- ALTERNATIVES:** The Defence Force could be drawn from provincial organisations and responsibilities for the organisation, maintenance and operation of some aspects of the Defence Force could be given to Provinces.
- AGENDA:** Special attention should be given to the structuring of defence forces in federal states, such as the United States.
- IFP POSITION:** Provinces shall have the primary responsibility to gather and organise members of the Defence Forces to make them available to the central defence organisation as required.

SUPREME COMMAND OF THE DEFENCE FORCES AND PARLIAMENTARY OVERSIGHT

- ISSUE:** Who shall direct the final organisation and operation of the Defence Forces?
- Who shall bear the final political responsibility for the actions of the Defence Force?
- Who shall set the rules for the organisation of the Defence Force?
- ALTERNATIVES:** The command of the Defence Force could rest with the Department of Defence, or could be shared with other government institutions or with Parliament. The Defence Force might have a civilian or a military command.
- The organisation of the Defence Force could be the prerogative of the Executive or of Parliament or it could be shared by both.
- AGENDA:** Specific study should be made of the structuring, command and organisation of defence forces of recent democracies around the world. Attention should be given to the rules necessary to support the organisation and operation of the Defence Force.
- IFP POSITION:** The Minister of Defence shall be a civilian. The Head of State shall be the formal Commander-in-Chief of the Defence Forces. However, the Supreme Commander of the armed forces shall vest in a supreme military committee, consisting of the Head of State, the head of government, the Minister of Defence, the head of the army, the air-force and the navy, the chairperson and the deputy chairperson of the parliamentary joint committee on defence, the President of the Senate and representatives of Provinces.
- the parliamentary committee(s) on defence shall have special functions to oversee all aspects related to the defence forces and to advise the supreme military committee. For this purpose it may hold hearings, investigations, take evidence and subpoena witnesses. It shall also have the power to authorise the submission of the budget of the defence forces prior to its inclusion into the national budget.
 - The armed forces should be organised by general laws, adopted by a two-thirds majority in Parliament. Within the boundaries of these general laws, both the supreme military committee and the Minister of

Defence may adopt standing orders related to military organisation and operation.

PARLIAMENTARY OVERSIGHT ON INTELLIGENCE ACTIVITIES

- ISSUE:** How should intelligence functions be made accountable?
- ALTERNATIVES:** Intelligence may be accountable to the Executive alone or also to Parliament. Accountability may go into the details of the operations undertaken by intelligence with special regard to expenditures and covert operations.
- AGENDA:** Accountability of intelligence functions in countries such as Germany, Spain, Canada, Italy, the UK and the United States could be analysed as a reference point, with special attention to the past history of intelligence deviants in South Africa.
- IFP POSITION:** A joint standing committee of Parliament representative of all political parties shall oversee all intelligence activities and no intelligence information should be kept secret with respect to such joint committee. Members of the joint committee may be required to swear secrecy and to receive special security clearance. All intelligence budgets and expenses shall be disclosed to and approved by the joint standing committee before they are made part of the national budget.
- STATUS:** Non-contentious issue

STRUCTURE OF THE NATIONAL POLICE

- ISSUE:** To what extent should the Constitution determine how the police is to be organised and operated?
- ALTERNATIVES:** The organisation of the police could be left to the discretion of Parliament.
- AGENDA:** Specific items related to the organisation of the police could be identified for constitutionalization.
- IFP POSITION:** The Commissioner of the National Police should be a civilian. Police activity should be supervised by a parliamentary committee, with special regard to law enforcement policies.
- STATUS:** Non-contentious issue.

STATE OF EMERGENCY

- ISSUE:** Should the constitution provide for a situation which calls for remedies which are inconsistent with the constitutional framework ("emergency" in the constitutional sense)?
What the effects of a declaration of emergency?
Who can declare the emergency? What guarantees and checks and balances can be put in place to protect against the risk of autocratic involution
- ALTERNATIVES:** The suspension of regular constitutional rules under exceptional extreme or extraordinary circumstances could be provided for in the Constitution or the constitution could be silent on this point, leaving the matter at a meta-juridical level. During the emergency police and defence forces

AGENDA:

could receive greater powers, some of which might not even respect usual human rights guarantees. It is not possible to anticipate what extraordinary powers are required, and therefore the emergency clause could either be open one so as to respond to any type of situation, or a limited and qualified one, so as to provide for some minimum guarantees. Suspension of the constitution and emergency clauses in constitution around the world should be carefully analyzed, bearing in mind that they constitute the weakest link of the constitutional chain and that, as in the case of the Weimar Republic, could lead to the collapse of the entire constitutional system.

IFP POSITION:

- The Head of Government may declare an emergency in the Republic or in determined areas thereof. The Declaration of Emergency shall provide a general indication of the type of emergency and shall indicate in general terms which powers and resources of the Government, the Provinces and the local governments, or of the citizenry the Head of Government intends to employ to respond to the emergency, how such powers and resources are expected to be employed and for how long, and other measures and actions the President intends to undertake. Within twenty four hours the Head of State shall summon Parliament to a joint session to ratify the Declaration of Emergency. Parliament may modify the Declaration of Emergency. If the emergency is such that Parliament may not be summoned into session, the Declaration of Emergency shall be submitted to the Constitutional Court for approval. Should this not be possible the Declaration of Emergency shall be submitted for approval to the President of the Constitutional Court or the President of the Senate or the President of the National Assembly in this order.

- The President shall modify the Declaration of Emergency to provide additional information, to detail the information previously provided and to report on the actions undertaken to respond to the emergency.

- Parliament or the Constitutional Court may terminate or modify the terms of the Declaration of Emergency at any time. The President may require that Parliament or the Constitutional Court meets behind closed doors to discuss any matter related to the emergency, and that the contents of the Declaration of Emergency be kept secret.

- Any action taken during a situation of emergency shall respect to the fullest extent possible under the circumstances the rights and liberties of the citizens of the State recognised and guaranteed in the constitution.

- The declaration of emergency shall employ the defence force only when and to extent that the police forces are not sufficient to respond to the emergency.

- Provinces shall have right to declare State of Emergency and shall have the right to lift State of Emergency.

STATUS:

Contentious issue

DECLARATION OF WAR

ISSUE	<p>Under what circumstance can war be declared?</p> <p>Who can declare war?</p> <p>What the effects of the declaration of war</p> <p>Who is charge of conducting the war?</p>
ALTERNATIVES:	<p>The constitution could limit the power to declare war to defensive situations or could prohibit war. War could be declared by the executive alone or by the legislature alone, or by the executive pending ratification of the legislature.</p>
AGENDA:	<p>Attention should be given to the dynamics related to a declaration of war or hostility, with special attention to constitutional tools aimed at preventing military adventurism.</p>
IFP POSITION:	<p>South African troops may be employed in possible combat situations outside the country only on the basis of a declaration of war of hostility, the latter including so called peace-keeping exercises.</p> <ul style="list-style-type: none"> - the constitution must state that South Africa shall strive to respect and maintain all its international law obligations, and shall reject the use of war or international violence as means to resolve international conflicts. - The Head of State in consultation with the Head of Government may declare war or the status of international hostility. the Declaration of war or hostility shall provide a general indication of the type of military and logistical resources to be employed and effects of the declaration on the Government of the Republic, the Provinces and the citizenry. The declaration must indicate for how long the status of war or hostility is expected to last and the measures which the Government is undertaking to try to solve by diplomatic means the underlying international crisis. - Within twenty four hours the Head of State shall summon Parliament to a joint session to ratify the Declaration war or hostility. Parliament may modify the Declaration of war or hostility. If the situation is such that Parliament may not be summoned into session, the Declaration shall be submitted to the Constitutional Court for approval. Should this not be possible the Declaration shall be submitted for approval to the President of the Constitutional Court or the President of the Senate or the President of the National Assembly in this order. - Parliament may terminate or modify the terms of the Declaration of war or hostility at any time. The President may require that Parliament meets behind closed doors to discuss any matter related to war, and that the contents of the Declaration of war or hostility be kept secret. - Any government's action taken within the Republic during a situation of war shall respect to the fullest extent possible under the circumstances the rights and liberties of the citizens of the State recognised and guaranteed in the constitution.
STATUS:	<p>Contentious issue</p>

HUMAN RIGHTS IN THE POLICE, INTELLIGENCE AND DEFENCE FORCES

ISSUE:	Should the Constitution provide that the human rights of members of the Police, Defence and Intelligence Forces be limited over and above the limitation of the right of active participation in politics.
ALTERNATIVES:	How to protect human rights of members of the police and defence forces. The Constitution could limit a broad range of human rights related to human rights of members of defence and police forces, ranging from the freedom of speech to the right to strike. A different balance must be drawn between the need for discipline and effectiveness on the one hand and human rights protection on the other.
AGENDA:	Any limitation of human rights must be assessed against objective needs of defence and police forces in modern societies. The function of a police ombudsman should be considered.
IFP POSITION:	<ul style="list-style-type: none"> - Members of the Police, Defence Force and Intelligence shall have the right to disobey a clearly unlawful order. - The law may provide for special sanction for desertion of duty, mutiny and treason. With respect to the Defence Forces, special differentiation can be allowed between peace and war time. - The law may provide measures to limit the right to strike setting out compulsory dispute resolution mechanisms. The law could draw a differentiation between members of the police and intelligence forces and members of the Defence Forces. - There should be gender equality in the police force, intelligence and defence forces, however women could be exonerated from combat roles. - All other human rights shall be entrenched and protected, subject to measures to be adopted in terms of the declaration of war or hostility. - There shall be an internal ombudsman charged with the task of addressing internal conflict and disputes related to the human rights of members of the police and the defence forces.
STATUS:	Contentious issue.

MONOPOLY OF FORCE

ISSUE:	Shall the Government have the total monopoly on the legitimate views of force to protect one's own rights?
ALTERNATIVES:	In addition to the power of the State to act in the protection of people's rights, the people themselves could be recognised the right to react to wrongful situations within predetermined limitations.
AGENDA:	Forms of community self-help and self-reliance should be analysed to see how they relate to the drafting of the Constitution.
IFP POSITION:	<p>The State shall not suppress the citizens' right to bear arms, but may limit it in special cases and circumstances.</p> <p>Provincial constitutions may regulate matters such as police reserve and neighbourhood watches, to supplement police action.</p> <p>Moreover, provincial legislation should regulate self protection units.</p>
STATUS:	Contentious issue

FREEDOM OF INFORMATION

- ISSUE:** Should the constitution contain the right to access government of information? How does this right related to intelligence gathering?
- ALTERNATIVES:** The constitution may not consider this aspect of social life or may provide for the constitutional principles which will guide the adoption of a Freedom of Information Act
- AGENDA:** The FOIA of the USA should particularly studied as a reference point in conjunction with provisions in modern constitutions which have constitutionalized the right to access government information
- IFP POSITION:** The right to access all government information and private data bank's information shall be recognized in the constitution, with customary qualifications and exclusions, subject to judicial review which can take place *in camera* when necessary.
- Intelligence information may not be classified as secrete information without a showing of their sensitiveness with respect to national security.

2ND SUB-COMMITTEE ON ECONOMIC AND FINANCIAL MATTERS

A preliminary issue is to what extent there shall be an economic constitution in the new constitution of South Africa. In each constitution there are a set of provisions which relate to economic matters and they are usually referred to as the "economic constitution". The economic constitution might be minimal, including only basic provisions on private and public property, or it could be more extended including matters such as the role of government in economic affairs.

Modern constitutions, as "long" constitutions, usually include an extended economic constitution. The IFP believes that there is a close connection between the need to provide for an economic constitution and the overall determination of the form of state in the constitution. In fact, an important element in determining the form of state is the relation between governmental powers (*soveranitas*) and the underlying social economic phenomena. The IFP believes that the general terms of this relation should be determined in the constitution which should provide that, as a rule, government should not control or interfere with those social and economic phenomena which the people themselves are competent and able to organise and administer.

The IFP rejects the notion that this specific aspect of the form of state should be left open to be decided at any given time by the fluid activity of the legislature and of social and economic changes. In fact, it is common knowledge accross the world that the most salient modern "evil" of government is the overwhelming, unreasonbale and burdensome growth of government to the detriment of the autonomy and freedom of individuals and social and economic formations alike.

We must realise that nowadays there is less likelihood that government may degenerate into oldtime evils such as torture, as there is greater likelihood that government may develop an-out-

of-control bureaucracy which is moved by its own *raison d'être* and no longer serves the purposes for which it was established. The unjustified growth of government, which has been experienced in many modern countries, is closely related to the power of government to control and directly intervene in economic affairs. Moreover, the unjustified growth of government is closely related to its spending habits and to the justification for public property, to the extent that even in countries such as the United States, there are strong opinion movements calling for a balanced budget constitutional amendment. Growth of government is also often associated with corruption, inefficiency and government waste.

However, limitations on the power of government to interfere in economic affairs are in themselves not sufficient and ought to be extended also with respect to governmental powers affecting, abridging and unduly regulating social activities.

Modern evils of government share with the old evils the fact that government by itself has proven to be incapable to redress and limit its own degenerations, and can only be controlled by virtue of checks and balances which operate from outside government. This requires that civil society, as opposed to government, be empowered by specific provisions in the constitution with an area of recognised autonomy.

Furthermore it is necessary that civil society be provided with specific mechanisms which enable it to react and correct government's degenerations. This approach justifies the fact that modern constitution drafting includes several independent commissions as additional powers provided for in the constitution. Some of these commissions are tools of direct empowerment of civil society. The IFP proposals in this respect move from the identification of specific modern evils of government and provide one or more techniques to redress them.

The IFP believes that a modern constitution must address these issues and cannot be oblivious to the modern realities of government, and accordingly it rejects the notion that these fundamental matters should be addressed by the ordinary legislature. In fact, political experience all over the world shows that ordinary legislature does not have the political power to bring about the correction of the system once government's regulatory powers have gone haywire.

In the South African context the need to prevent future government degeneration is coupled with the need to redress the catastrophic situation we inherited from the past in which government directly or indirectly controls up to 65% of the economy. Therefore, as it was the case in Eastern European countries, in order to be effective the provisions in the constitution limiting the role of government shall also provide for transitional mechanisms such as a privatisation commission.

It must be stressed that in the South African context limiting the role of government should not be perceived as affecting the nature and obligation of the state as a "social state". There is no doubt that government will need to operate so as to redress the injustices of the past and achieve greater social justice at all levels of society. The issue, however, arises about what constitution parameters should government be bound by in achieving its social policies.

These are the parameters which will determine the difference between a social and a socialistic state and will finally dictate whether South Africa is to make that additional small step which is still keeping it away from pure socialism. The IFP believes that South Africa should be a social state but it should never fall into the trap of socialism and populism. Therefore, it is necessary that the constitution sets out clear parameters on how social goals are to be achieved, creating specific checks and balances to empower civil society to react and redress the generation's socialistic and populist degenerations.

The IFP stresses that the success of South Africa will depend on the balance between the achievement of goals of social reconstruction and the social cost to be paid for that purpose. Therefore this might very well be the most important chapter of the constitution which should receive greater attention than ordinary matters such as traditional separation of matters.

Following herewith, are the relevant provisions from the draft constitution of the for a Federal Republic of South Africa submitted by the IFP at the World Trade Centre (emphasis added).

WE, the people of South Africa, mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognising the right of people to organise themselves in autonomy and independence at all levels of society, desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this constitution for the Federal Republic of South Africa to provide the people of South Africa and the member States with a Federal government to serve their individual and collective needs, wants and aspirations.

[...]

1. **Inherent Rights and Obligations**

The Federal Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the Federal State and a general obligation of social responsibility to the people of the Federal Republic.

2. **Source of Government**

All political power is inherent in the people. All government originates with the people, is founded only upon their will, and is instituted only for the good of the people as a whole. Government shall respect and encourage the exercise of the power of the people to organise and regulate their interests autonomously.

9. **Federal obligations**

Through the exercise of its own powers or by assisting member States, the Federal Republic of South Africa shall ensure internal security and safety, promote balanced economic development, foster social development, guarantee environmental and consumer protection, ensure health services, education and welfare for its citizens, constantly strive to improve the quality of life of all people in the Federal Republic, preserve and protect the State's religious, linguistic and ethnic heritage and cultural diversity, nourish the people's right to the pursuance of happiness both as individuals and as members of their social formations, protect the family, extend special protection to maternity and paternity and to the children, extend special protection for women, the disadvantaged and less privileged portions of the population, and strive in its actions and policies to achieve social justice in accordance with the principles of this constitution.

11. **Rule of Freedom**

All conduct and activities which are not prohibited shall be permitted. The Federal Republic of South Africa may prohibit and regulate conduct and activities for a demonstrable State's interest founded on public interests and welfare.

15. **Individual and Collective Rights**

All human rights set out in this constitution are recognised and shall be protected both in their individual as well as in their collective exercise, and they imply the right to establish institutions, adopt rules of conduct and regulate interests which are instrumental to the collective exercise of such rights. All powers established and recognised under this constitution shall protect and nourish the exercise of these rights and respect and foster their collective exercise.

ECONOMIC, SOCIAL AND POLITICAL RIGHTS

Economic Rights:

30. Free Enterprise

The right to free economic initiative and enterprise shall be recognised, protected and encouraged by the Federal Republic and the member States. The Federal Republic shall assist the member States to assist small businesses and provide other incentives to encourage access to economic opportunities. Within the limits set forth by the law to protect the public interest, each enterprise shall be free to choose and organise the means of the production as it best sees fit.

31. Contractual autonomy

Within the limits set forth by the law to protect the public interest, the Federal Republic shall assist the member States to recognise and protect the right of individuals to self-regulate and organise their interests in economic and other matters by means of legally enforceable contracts and by establishing legal entities to carry out their purposes and objectives.

32. Commercial and Insolvency Law

Each member State shall promote uniformity of their commercial and insolvency laws with those of other states and countries.

33. Permits and Licensing requirements

The Federal Republic shall not subject human conduct to unreasonable or unnecessary licensing and permitting requirements. Permits and licences shall be issued on the basis of objective and reasonable standards and criteria.

34. Private Property

Private property shall be guaranteed and protected. Limitations on the use and enjoyment of private property may be imposed so as to satisfy social, environmental and collective needs. The right to convey one's own property by contract or inheritance shall be protected subject to the reasonable exercise of the power of taxation.

35. Expropriation

The Federal Republic of South Africa or another entity authorised by law may expropriate property for public necessity subject to the prompt payment of a fair market value compensation.

36. Property of the Federal Republic

The Federal Republic of South Africa or its instrumentalities may own property as private or public property. Public property shall not be alienated or encumbered and shall be related to the exercise of public functions or shall be held by the Federal Republic or its instrumentalities in the public interest. The law shall set forth the principles for the acquisition, administration and declassification of public property. Parliament shall publish a yearly report on the property owned by the Federal Republic indicating their current and planned use and their maintenance and carrying costs.

37. Public Enterprise

No enterprise shall be acquired or conducted by the Federal Republic of South Africa or its instrumentalities either as a monopoly or as a free competition enterprise, and no service shall be provided to the public unless so authorised by a law demonstrating a public need and the inadequacy of the private sector to satisfy such need with comparable efficiency and reliability. When these requirements no longer exist the enterprise or the service shall be privatised.

38. Communal Property

The Federal Republic shall assist the member States to recognise and protect Communal Property. Communal property shall be administered and regulated by traditional and customary Rules.

39. Practices in restraint of trade

All monopolies and practices and agreements in restraint of interstate trade, commerce and free market competition shall be prohibited.

40. Agriculture

The Federal Republic of South Africa shall assist the member States in encouraging productive agriculture, the socially just and responsible use and distribution of land and the access of citizens to land ownership. The Federal Republic of South Africa shall also assist the member States promoting agricultural cooperation and assisting farmers on a cooperative basis.

Social Rights:

41. Right to Education

- a. All citizens shall have the right to receive a basic education and professional training. The Federal Republic of South Africa may set general standards to assist the members States in determining the period and the minimum educational requirements for compulsory education. The Federal Republic shall support the citizens' aspiration to higher education by means of scholarship and by promoting the highest standards of excellence in education.

- b. Both private and public schools shall ensure open and equal access to educational opportunities. Parents shall be entitled to participate in the administration and operation of their children's schools.
42. **Right to Work**
Everyone shall have the right to access any job opportunity for which he or she is qualified. The Federal Republic shall assist the member States to promote the full employment of all citizens. No one's employment shall be terminated for political reasons or in violation of his or her constitutionally protected rights. Everyone shall have the right to receive a fair compensation for his or her work, shall be entitled to at least one vacation day a week, to a period of paid vacations during the year and to a severance payment. All workers shall be entitled to social security, pensions, invalidity and unemployment benefits as determined by law of the member States.
43. **Protection of Women**
The Federal Republic shall operate to ensure that both federal and state law extend special protection to women in recognition of their function and condition in society. The Federal Republic shall assist the member State to guarantee maternity leave, to provide assistance to mothers in the work force, and to ensure equal access of women to political, social and economic opportunities by means of special treatment and privileges to be in force until such time when the condition of women in the Federal Republic has significantly improved.
44. **Senior Citizens**
The Federal Republic shall assist the member States to promote the economic sufficiency of senior citizens and provide social services to assist them in relation to their housing, care, health, cultural and leisure needs.
45. **Youth**
The Federal Republic shall assist the member States to promote conditions for the free and effective participation by the youth in political, social, economic and cultural developments.
46. **Schools**
Everyone shall have the right to establish private schools. Private schools shall have the power to determine their own curricula and syllabi within the general parameters set forth by law of the member States and by the Federal Republic for the purposes of recognition and equipollence of degrees.
47. **Universities**
All public universities and institutes of higher education in the Federal Republic shall be entitled to regulate their organisation and operations within the general parameters set forth by law of the member States.
48. **Health Care**
All citizens shall have the right to receive medical attention and care in case of need. The law of the member States shall determine the implementation of this right. The Federal Republic shall assist the member States to develop policies of prevention, treatment, rehabilitation and integration of those who are physically, sensorially and mentally handicapped, including those who are substance addicted.
49. **Job Conditions**
The law shall ensure safe job conditions and shall provide special protection for women, minors and untrained labour.
50. **Housing**
The Federal Republic shall assist the member States to promote conditions to ensure that all citizens have the possibility of living in a dignifying habitation and to facilitate the purchase of residences through credit facilitation and other programmes. All citizens have the right to receive shelter and shall have equal access to housing opportunities.
51. **Research, Arts and Teaching**
The freedom of scientific research, artistic expression in all its forms and teaching is recognised and shall be guaranteed.
52. **Right to a Pleasant and Clean Environment**
The Federal Republic of South Africa shall recognise the rights of present and future generations of citizens to live in and enjoy a pleasant and clean environment. The law shall determine the cases and the limits in which citizens may bring legal actions on behalf of the community against those who cause environmental damages. The Federal Republic shall assist the member States in protecting and promoting the quality of the human and natural environment, and may set forth environmental standards and criteria.
53. **Labour Rights**
Everyone shall have the freedom to form and join trade unions and employers' associations. Member States shall respect and protect the right to strike but may limit its exercise in cases determined by their law for reasons of public security and safety.

Labour organisations shall have the right to negotiate and execute collective bargaining agreements to be effective with force of law vis-a-vis the category of workers covered by their provisions. During these negotiations the labour organisation shall be represented on the basis of the number of their members. Trade unions shall have the right to conduct reasonable activities in the work place aimed at improving labour conditions. Member States may impose requirements on the trade unions only to ensure that they are organised and operated with full internal democracy.

60. Contribution to Public Expenditures and Needs

- a. All citizens have the duty to contribute to the common needs and to public expenditure by reasons of their resources. The tax system shall follow principles of progressive taxation, but shall not create a disincentive for the production of wealth.
- b. The Federal Republic of South Africa shall encourage voluntary charitable activities and other forms of expression of social solidarity.

ECONOMIC PROVISIONS

79. Balanced Budget

- a. At the beginning of the fiscal year the Government shall submit to Parliament a balanced budget for approval. Parliament shall amend and modify any item or portion of the draft budget. The approved budget shall indicate sources of revenue to cover all federal State expenditure.
- b. By a vote of two-thirds of its members Parliament may authorise the Government to finance the budget by resorting to public debt. When seeking such authorization the Government shall provide a report indicating the foreseeable sources of repayment of the public debt and the underlying economic assumptions. Any increment of the public debt shall be so authorised.
- c. The budget shall be divided in titles, sections and chapters. Any allocated funds which by the end of the fiscal year have not been spent shall be automatically carried over to the next year within the same budget chapter if it exists, or shall be transferred to the most closely related budget chapter if the same budget chapter no longer exists.

80. Banking

The Federal Republic shall regulate banking to ensure harmony in the monetary policies set forth by the member states and to guarantee the strength and prosperity of the monetary and banking systems of the Federal Republic of South Africa. An autonomous Central Bank of the Federal Republic of South Africa shall be established. The President of the Central Bank shall be appointed by the President with the advice and consent of Parliament and serves at the pleasure of the President. The President of the Central Bank shall submit a yearly report to Parliament on the monetary status of the Federal Republic and on the status of the banking system of the country. The Central Bank shall have regulatory powers on banking and credit, and shall be independent within the parameters of the law to use tools of monetary intervention in the public interest. The Central Bank shall have the power to determine its organisation and operations.

81. Privatisation Commission

- a. A Privatisation Commission shall be established to transfer to the private sector the enterprises which are under the control of any government in conflict with the provisions of this constitution. The Commission shall consist of nine highly qualified and independent experts in economics, finance and business administration, three appointed by the President, four by Parliament and two by the Chamber of Commerce.
- b. The Privatisation Commission shall develop a privatisation plan to be submitted to Parliament for approval. The Commission shall adjust the implementation of the privatisation plan so as to best cope with changing economic circumstances, seeking the approval of Parliament when necessary. The privatisation effort shall be balanced, shall maximise economic efficiency and shall support economic growth. The phases and the time frame of this effort shall be set in the privatisation plan. The Government shall implement the privatisation plan.
- c. The Privatisation Commission shall monitor the implementation of the privatisation plan so as to ensure that the privatisation effort is completed in the absence of corruption, inefficiency, personal gains and governmental waste. Every six months the Commission will issue a report to Parliament.
- d. The Privatisation Commission shall operate for seven years unless it resolves to dissolve itself prior to such date or is extended in office by resolution of Parliament.

82. The Independent Auditor General

There shall be an independent Auditor General. The Auditor General shall audit the financial activities of the Federal Republic, the Commissions, the independent regulatory agencies, and any enterprise, entity or instrumentality owned or controlled by the Federal Republic. All administrative actions involving financial expenditure shall be subject to the preventive financial control of the Auditor General or his designees. The law shall ensure the independence of the Auditor General.

83. **The Civil Service Commission**
- a. The Civil Service Commission shall consist of thirteen members, two appointed by the President, three by Parliament, two by the Judiciary Commission, two by the Chamber of Commerce and four by the representatives of consumer groups registered with Parliament and convened for this purpose by a committee of Parliament. The members of the Commission shall be qualified and independent experts on public administration, business management or regulatory processes. The members shall not hold any other public office and prior to their appointment shall disclose any possible conflict of interest. After the appointment they may not undertake activities which may cause additional conflicts. The members of the Commission will hold office for three years and may be reappointed. Their salaries are set forth by the law and shall not be inferior to the salary of a Director General of the State administration. The Commission proposes to Parliament its own budget.
 - b. The Civil Service Commission shall propose to Parliament legislation organising and maintaining all public offices of the Federal Republic including independent regulatory agencies, determining missions, competence, jurisdictions and responsibilities of each office. The Federal Republic may submit proposed legislation to the Commission. Concerned interests may also submit proposals to the Commission.
 - c. The Commission shall oversee the operations of the public administration of the Federal Republic to ensure impartiality and efficiency, to prevent governmental waste, corruption, nepotism, inefficiency and disfunctions, and to guarantee equal access by all citizens to the services and job opportunities offered by public offices. The Commission shall investigate and report on complaints concerning the operation of any administrative office in the Federal Republic, including police, defence force and the prison service.
 - d. The Civil Service Commission shall identify requirements and qualifications for holding any given public office and supervise open competition to fill the posts. The Commission shall also develop and submit to the approval of the Federal Republic any affirmative action programme to be implemented within governmental structures.
 - e. The Civil Service Commission shall also develop, monitor and assist the adoption and implementation by the federal offices and agencies of procedures accompanying the major administrative actions and all rule-making processes to solicit and ensure the participation and the input of the affected interests and of the public.
 - f. The Civil Service Commission shall prepare a yearly report on the status of the public administration expressing any applicable recommendation, and may provide testimony to Parliament and hearings held by the Government.
85. **Regulatory Relief Commission**
- a. The Regulatory Relief Commission shall consist of thirteen members, two appointed by the President, three by Parliament, two by the Judiciary Commission, two by the Chamber of Commerce and two by representatives of consumer groups and two by representatives of industry registered with Parliament and convened for this purpose by a committee of Parliament. The members of the Commission shall be qualified experts on public administration, business management or regulatory processes.
 - b. The Regulatory Relief Commission shall be empowered to request the repealing or amendment of burdensome, unnecessary or inadequate regulations and permit requirements adopted by Parliament, the Government and any independent regulatory agency. Any entity receiving such a request of the Commission shall reply within twenty days. If the Commission does not deem the reply to be satisfactory, it may introduce legislation in the appropriate legislature.
 - c. The Regulatory Relief Commission may prepare reports of the regulatory matters expressing any applicable recommendations, and may provide testimony in Parliament and hearings held by Governments, as required.
86. **Economic Development Commission**
- a. The Economic Development Commission shall consist of thirteen members, one appointed by the President, four by the Senate, two by the Civil Service Commission, two by the Chamber of Commerce, two by representatives of consumer groups and two by representatives of the trade unions registered with Parliament and convened for this purpose by a committee of Parliament. The members of the Commission shall be qualified experts in economics, finance, business management and futurism.
 - b. The Economic Development Commission shall prepare a nation wide plan of economic development of the Federal Republic and assistance to businesses to be implemented through legislation and administrative activities of the Federal Republic. The Commission may recommend actions to be taken by, and forms of assistance to be provided to the member States. The Commission shall monitor the implementation of the plan as approved by the Federal Republic and recommend modifications and adjustments as necessary.
 - c. The Economic Development Commission shall prepare and submit to Parliament a yearly report on the status of the economy, and on foreseeable economic and technological trends at State, national and international level.

- d. The Regulatory Relief Commission may prepare or commission additional reports on economic and financial matters and may provide testimony in Parliament and hearings held by Government, as required.

87. Environmental Commission

- a. The Environmental Commission shall consist of thirteen members, two appointed by the President, three by Parliament, two by the Judiciary Commission, two by the Chamber of Commerce and four by representatives of environmental groups registered with Parliament and convened for this purpose by a committee of Parliament. The members of the Commission shall be qualified experts on environmental sciences or social sciences.
- b. The Commission shall investigate matters related to the protection of the natural and human environment, may introduce legislation at State and regional level to protect and enhance the quality of the natural and human environment, and may make recommendations to State and Regional Departments of the Environment.
- c. The Commission shall investigate and report on complaints concerning the improper utilisation of non-renewable natural resources, the degradation and destruction of ecosystems and the failure to protect the beauty and character of the State.
- e. The Environmental Commission shall prepare a yearly report on the status of the environment in the Federal Republic expressing any applicable recommendations, and may provide testimony in Parliament and in hearings held by Government, as required.

88. Consumer Affairs Commission

- a. The Consumer Affairs Commission shall consist of thirteen members, two appointed by the President, three by Parliament, two by Judiciary Commission, two by the Chamber of Commerce and four by representatives of consumer groups registered with Parliament and convened for this purpose by a committee of Parliament. The members of the Commission shall be qualified experts on consumer protection, environmental problems or social sciences.
- b. The Consumer Affairs Commission shall investigate matters related to the protection of consumers, and may introduce legislation at State and regional level to protect consumers. Of its own power the Commission may request that general terms and conditions of adhesion contracts be negotiated with and approved by the Commission as a condition of their validity and enforceability.
- c. The Commission shall have the power to determine the requirements for product labelling including product information and warnings.
- d. The Commission may be delegated by the State or regional legislature to set prices and rates for services and products rendered in conditions of natural monopoly.
- e. Any immediately adversely affected interest may seek judicial review of any decision of the Commission.
- f. The Consumer Affairs Commission shall prepare a yearly report on the status of consumer protection expressing any applicable recommendations, and may provide testimony in Parliament and in hearings held by Government, as required.

89. Other Powers

Individuals and social, cultural, religious and political formations when exercising their powers or their autonomy within the freedom and liberties recognised and guaranteed by this constitution, shall have equal standing as the powers of the Federal Republic.

92. Jurisdiction of the Constitutional Court

The Constitutional Court shall have original and exclusive jurisdiction in the following matters:

- review the constitutionality of the legislation of the Federal Republic
- provide a binding but general advice to any court of last resort of member States engaged in the interpretation or assessment of constitutionality or validity of federal law
- resolution of conflicts between federal and State legislation to be conducted in a fashion consistent with the provisions of the constitutions of member States
- resolution of conflicts between Federal Republic of South Africa and the member States to be conducted in a fashion consistent with the with provisions of the constitutions of the member States.
- resolution of conflicts between member States
- resolution of conflicts between powers of the Federal Republic
- criminal charges against the President and the Ministers

- verification of the democracy of the statutes of political parties
- other matters as set forth in this constitution or in constitutional laws.

94. Access to the Constitutional Court

- a. Any issue of constitutionality of laws, or democracy of the statutes of political parties or validity and legitimacy of a collective bargaining agreement raised by any of the parties to a case or controversy before any court, which is not manifestly without foundation, shall be remanded to the Constitutional Court for resolution.
- b. Political parties represented in Parliament, the Ombudsman as well as trade unions, civic and consumer groups, major media of mass communication and other social, religious and cultural formations registered with the Constitutional Court in accordance with its rules, may commence an action to declare the unconstitutionality of laws. One hundred members of a political party may commence an action to review the democracy of their political party statute.
- c. Any member State, the Federal Republic of South Africa, the Ombudsman and any power of the Federal Republic may commence an action to resolve a conflict among government organisations.
- d. Decisions of the Constitutional Court shall declare null and void any administrative action, or political party's statute or collective bargaining agreement which are in violation of this constitution. The decision of the Constitutional Court may also mandate the rule of resolution of a conflict among the government's organisations and powers of the Federal Republic.
- e. All decisions of the Constitutional Court shall have *erga omnes* retroactive effect and may provide rules to recognise rights meriting protection and which vested in good faith under norms declared null, void or ineffective.

95. The Ombudsman

- a. The Ombudsman shall be independent and subject only to this Constitution and to the law.
[....]
- b. [....]
The functions of the Ombudsman include the investigation of the complaints concerning violations of rights and freedoms, abuse or use for political purposes of power, corruption and misappropriation of public monies, unfair, harsh, insensitive or discourteous treatment of anyone in the Federal Republic by a public official of any level of government, including but not limited to police, defence forces and prison personnel, manifest injustice, or conduct of a public official of any level of government which would properly be regarded as unlawful, oppressive or unfair.
- c. The Ombudsman shall have the power to take appropriate action to call for the remedying, correction and reversal of injustices and violations of laws and regulations through the most fair, proper and effective means, including:
 - negotiation and compromise between the parties concerned,
 - causing the complaint along with the Ombudsman's findings to be reported to the superior of the offending party,
 - referring the matter to the Director of Public Prosecution, with a recommendation,
 - bringing proceedings in a competent Court for suitable remedies to secure the termination of the offending action or conduct, the compensation of the victims and/or the modification of the offending procedures,
 - bringing proceeding before the Constitutional Court to challenge the constitutionality of legislation, or before a court to challenge the validity of regulations,
 - reviewing laws in force before the enactment of this constitution to ascertain their consistency with the principles and provisions of this constitution so as to make recommendations to the President and Parliament.

The foregoing provisions show the complexity of the structure of an economic constitution which consists of several elements and checks and balances. Inter alia the following elements may be noted in the above text:

- Recognition of social, economic and cultural formation (preamble)
- Recognition of an area of protected constitutional autonomy for individuals and social, cultural and economic formations alike (preamble, Articles 2, 11, 30, 31, 33 and 89)
- Collective dimension to the recognition and exercise of human rights (preamble, Article 15).

- Social obligation of the state are clearly stated but are juxtaposed to potentially conflicting interests which are also equally protected (preamble, Articles 1, 9, 30 and 53)
- People have not only rights but also obligations (preamble, Articles 1, 60)
- Free market enterprise is entrenched (Articles 30, 31, 33, 34, 37, 39)
- Standard antitrust clause in force in North America and European Union (Article 39)
- Communal property is recognized in addition to private and public property
- Government waste is limited (Articles 36, 79, 82, 83)
- Government spending is controlled and accounted for (Articles 82 and 83)
- Social rights are carefully constructed to avoid to become unreasonable, clarifying their extent and application and often reserving the right of Parliament to decide at any given time to which extent the Republic can afford implementing such social rights, while abiding to international standards and obligations (Articles 41 to 53).
- Social and economic rights are carefully constructed to ensure that member states (provinces) have the primary responsibility of fulfilling such rights by means of their governmental action.
- Private schools, trade unions, universities, art, research and development, et cetera are provided with special autonomy.
- Balanced budget provision which can be derogated when necessary with adequate checks and balances (Article 79)
- The Central Bank must be (a) independent and (b) autonomous, and its activities must account for the possibility that provincial banks may differentiate their interest rates and credit policies (Article 80).
- Unjustified government interference in the economy is corrected (Articles 11, 33, 37 and 81).
- There are mechanisms which allow civil society counteract the growth of government, which is usually driven by (a) regulatory growth and (b) growth of offices and personnel. Governments have proven to be incapable of firing unnecessary personnel and to reduce their functions and competencies, and therefore civil society must be empowered to force government to act in this respect (Articles 11, 33, 82, 83).
- The action of government receives the benefit of the inputs of an economic development commission, an environmental commission, and a consumer protection commission, so as to interiorize and institutionalize the major policy concerns in modern government,

This also allow civil society to have an additional direct control on governmental planning functions, forcing government to act on the basis of plans and programs.

- The economic constitution is justiciable also by means of procedures which include civil society (Articles 89, 82 and 94)

The foregoing ideas, principles and actual provisions are organized as a system of checks and balances in which each element may necessitate the others.

With respect to other specialized structures of the Republic, the IFP is on the record to have made the following proposal with respect to an Electoral Commission. It may be noted how the IFP proposal identifies critical areas for the functioning of a democracy, such as the financing of political parties, on which the constitution should give general guidelines to the legislature.

84. Electoral Commission

- a. The Electoral Commission shall consist of nine members, three appointed by the President, three by Parliament, and three by the Judiciary Commission. The members of the Commission shall be qualified and independent professionals. The members may not hold any other public office and prior to their appointment shall disclose any possible conflict. After the appointment they may not undertake activities which may cause additional conflicts of interest. The members of the Commission will hold office for three years and may be reappointed. Their salaries are set forth by the law and shall not be inferior to the salary of a Director General of the Federal Republic administration. The Commission proposes to Parliament its own budget.
- b. The Electoral Commission shall organise and supervise the elections provided for in this constitution. The Electoral Commission shall ensure the fairness of the political debate and the effective opportunity for all citizens to participate in the democratic process. The Commission shall adopt rules to ensure fair campaigning and to prevent violence and intimidation, and shall have the power to summon and direct the Federal Republic police and militia to ensure peace and order during the political campaign period, and during and immediately after the elections.
- c. The Commission shall issue rules requiring all political parties and candidates to disclose sources and amounts of financing, rules setting limits to the financing received from any given source, and rules governing the conduct of political parties and candidates during the campaign period. All constitutions of political parties shall be deposited with the Commission.
- d. The Commission may initiate legislation on electoral matters and shall administer and distribute any public financing to political parties and candidates provided for the legislation.
- e. The Electoral Commission may organise political debates and decide time allocation in government controlled media of mass communication. When necessary to ensure the fairness, impartiality and balance of the electoral process, the Commission may require private media of mass communication to publish statements or to provide coverage of given information.
- f. The Electoral Commission shall determine and update the boundaries of the electoral constituencies of the National Assembly. In doing so the Commission shall aim to ensure internal balance in each constituency and representation of the variety of social and cultural interests present in the Federal Republic. Each constituency shall aim to have the same number of electors.
- g. The Electoral Commission administers the elections and announces the results.
- h. The rules adopted by the Electoral Commission and its actions may be challenged before the Constitutional Court with an emergency procedure for violation of the principles of this constitution, or because arbitrary or capricious or inappropriate.

With respect to traditional authorities and traditional communities reference is made to Page 25 *et seq.* of this document.

CONSTITUTIONAL
ASSEMBLY

24 APR 1995

