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# **CONSTITUTIONAL ASSEMBLY**

**DRAFT REPORT  
MULTI-LATERAL DISCUSSIONS  
26 FEBRUARY 1996**

## CONSTITUTIONAL ASSEMBLY

### DRAFT REPORT

#### MULTI-LATERAL ON COUNCIL OF PROVINCES/SENATE, PROVINCES, AND LEGISLATIVE AND EXECUTIVE COMPETENCIES

MONDAY 26 FEBRUARY 1996

#### 1. OPENING

1.1 Mr Ramaphosa opened the meeting at 16h20.

1.2 The following documentation was used as basis for discussion:

*Draft Proposal (third draft) dated of the Technical Advisor to the ANC/NP Bi-laterals on Intergovernmental co-operation - National Council of Provinces.*

There was reference to the following documentation:

*DP Submission on Council of Provinces/Senate and National and Provincial Legislative and Executive Competencies dated 16 February 1996.*

*PAC Submission dated 12 February 1996, included in Submissions Volume 16 Part 1*

#### 2. COUNCIL OF PROVINCES/SENATE - CHAPTER 4

2.1 It was noted that bi-lateral meetings had taken place between the ANC and NP, and brief bi-laterals with the PAC and DP on the above *Draft Proposal on Intergovernmental Co-operation*.

2.2 It was noted that there was fairly substantial levels of agreement on the draft but that there were areas such as composition and voting that may require more time so that parties can explore each other's views on these matters. The DP indicated that they were conceptually not far from the document.

2.3 It was agreed that the debate could be advanced by taking into account what other parties had to add to the document. It was agreed that draft formulations be prepared by technical advisors Prof Deon Basson, Prof Dennis Davis, Prof Bongani Majola, and Prof Francois Venter, engaging the Technical advisor to the bi-laterals between the NP and ANC, and in consultation with the law advisors. It was agreed that in order to ensure consistency of the draft formulations with the rest of the working draft, it

would be referred to the Technical Refinement Team at a later stage after the draft formulations had been discussed.

- 2.4 It was agreed that the draft formulations would be prepared on the basis of the draft proposal and would take into consideration the matters raised below, taking account of issues on which there would be further developments. It was agreed to note what common ground there was, what further suggestions there are, and earmark issues that required further discussion.

#### **REGARDING PARAGRAPH 1: CONCEPT**

- 2.4.1 It was noted that there appeared to be broad agreement on the concept in broad terms of the NCOP as representative organ of the provinces.
- 2.4.2 It was noted that the DP would have preferred if their submission had been included as an option or sidebar in the working draft, as their approach differed conceptually. They stated that they saw the prime function of this organ as relating to Schedule 5 matters representing the interest of the provinces. They stated that for those matters the structure should have a blocking vote or veto. As secondary function, where it came to matters resorting under national competencies, the NCOP should have the right to review, with referral back to the National Assembly, but not as a blocking mechanism. They stated that this meant there were therefore two different procedures.
- 2.4.3 The PAC stated that some of their concerns were addressed by this proposal, notably by the possibility of a reduction of costs and of committees and that this proposal would not be simply a mirror image of the National Assembly. They stated that as to the crucial question of what the NCOP would do, as a house of review, they were not certain whether it would have more impact than the committees of the committees of the National Assembly. They stated that our system was still dominated by political parties, and it was unlikely that one would find neutral persons representing the provinces removed from their political background. They also stated that they did not think that the concept of provincialism was so deeply rooted yet that it constituted generally distinct interests that would require strong representation in the NCOP. They stated that rather than provincial or geographic factors, the political ideologies interests of some parties had more to do with development of the concept of provincialism.
- 2.2.4 The PAC stated that this concept was still developing and the need

for the NCOP had still not been made clear to them. They also suggested that African experiences and not merely Western European experiences be incorporated particularly with regard to the involvement of traditional leaders.

**Regarding Subparagraph 1.1**

- 2.4.5 The ANC suggested that the word "*veto*" be deleted and the word "*reject*" retained.

**Regarding Subparagraph 1.2**

- 2.4.6 It was noted that the ANC and NP agreed words "Accordingly it should be "*owned*" by them (the provinces)" be replaced with "Accordingly it should be *steered* by them".

**Regarding Subparagraph 1.4**

- 2.4.7 It was noted that an area requiring further clarity was paragraph 1.4 concerning the question whether this body should have the status of a parliamentary chamber. It was noted that the question was whether in defining Parliament one would make reference to both the National Assembly and the NCOP, or whether in defining Parliament one says that Parliament is actually the National Assembly only and although the NCOP has a legislative role it does not form part of Parliament. It was noted that this question was also related to the functions of the NCOP, and in particular the section on accountability of the National Executive. In this regard the following sensitivities were noted:

- i. The NP stated that the draft should read that Parliament consists of the National Assembly and the NCOP. They suggested that the formulation could read that Parliament "consists of the National Assembly and the NCOP as structured in chapter...". The NP stated that they cannot see what would be the problem with that, as the NCOP would partake in the same legislative process and pass nearly all the same Bills as the National Assembly.
- ii. The DP stated that the NCOP should be an integral part of and not subservient to the national legislature, and that collectively they would form the supreme legislature. The DP stated that many Parliaments have two houses where the roles of these houses were different. They stated that if the NCOP had the powers to review legislation within the exclusive powers of the national government, and in addition it had the special powers

in respect of matters falling within the provincial competence, they thought it was an integral part of the supreme legislator. They stated that this would hold true whatever one called it.

They stated, however, that it should not then be assumed that the NCOP could then elect the legislature. They stated that they supported the NCOP being called part of Parliament. The DP insisted that they would like to know whether there was an ANC reason why the Council should not be a part of Parliament.

- iii. The ANC stated their approach was that the Executive was not really accountable to the NCOP, although provision was made for the Cabinet to present itself to the NCOP on request and also on its own initiative. They stated that Parliament should in essence mean the National Assembly only. They stated that it would have an intergovernmental nature, and that if one stated its position as requested by the NP, it gives the impression of being like the English House of Lords. The ANC elaborated on this by saying that it would be a legislator of legislators, a "sister" to Parliament, because it is composed of other legislators. They stated that this also had bearing on the question of review. It was agreed that this matter would not be debated further now.

2.4.8 The ANC stated that before 1.4 would be finalised, many of the other matters had to fall in place, and stated that it had to be kept in mind what was the difference between the legislative process and the legislature. They stated the clause in the German Constitution read something to the effect that provinces shall participate in the legislative process at national level through the Senate, without saying that it is necessarily part of the Parliament. They stated that once the composition, mandate and voting was sorted out this question would be easily resolved.

2.4.8 The advisors indicated that there were no formal provision in the German Constitution which stated that the Bundestag and the Bundesrat constituted Parliament.

#### **REGARDING PARAGRAPH 2: POWERS OF THE NATIONAL COUNCIL**

##### **Regarding Subparagraph 2.1: Review of legislation within the Exclusive Competence of National Government**

2.4.9 It was noted that there was broad agreement on this concept and

process. It was stated that if there were differences the Committees should get together and try to resolve them, but finally that the National Assembly could pass these bills. It was noted that there may be some question of a delaying power being introduced here.

- 2.4.10 The ANC stated that they were not in favour of this and the other parties may raise that as a factor. The ANC also stated that there was a distinction between the mediation committee which is dealt with further on in the document and the kind of joint consultation between committees being addressed here.
- 2.4.11 The DP stated that one could refer back, and one could say this applied for a cooling-off period of 6 weeks, or whatever period it may be. They stated, however, that there should be no final blocking mechanism attached to the NCOP in this regard. You also would not require a mediation committee of the same kind you may require for provincial competences. You could have a joint Portfolio Committee to deal with those matters without them having the character of a mediation committee.
- 2.4.12 It was agreed as a starting point that once the bill has been introduced in the National Assembly, then the COP shall approve it within a certain amount of days, leaving a gap for the number of days.

**Regarding 2.2: Legislation within the concurrent competencies of the Provinces including "overriding" legislation shall require the support of the National Council**

- 2.4.13 It was noted that in essence if the COP was at variance with the National Assembly, a mediation committee would be invoked, and the function of the mediation committee would be to find some common ground between the two institutions.
- 2.4.14 It was noted that broadly speaking there was agreement on 2.2.1 and 2.2.2

**Regarding subparagraph 2.2.3**

- 2.4.15 The ANC noted that they may have a difficulty under 2.2.3. This concerned, first, the concept of the bill lapsing, and second, whether the National Assembly should be by two thirds of its members and at what stage.
- 2.4.16 The DP stated that they would require the approval of the Senate

here. They stated that they thought there was a case for a mediation committee, but that the mediation committee should not usurp the role of the Senate, and should be trying to find a formulae which would eventually become acceptable to the Senate and the National Assembly. They stated that they would therefore differ with this proposal in that they did not believe it should merely go from the mediation committee to the National Assembly. They stated that the mediation committee should look for an agreement and take it back to both the National Assembly and the NCOP. They stated that after all of these procedures, if agreement could not be found in the National Assembly and the NCOP, that legislation would lapse. They stated that this would mean that it could not be reintroduced in that session.

They stated that the German experience where there was such a provisions, was that since 1947 a Bill had lapsed only eight times because mediation had not found the answer. They stated that it was therefore only in rare circumstances that such a situation could not be resolved through mediation. They stated that as a variant to the blocking power they were considering a majority of two thirds of the National Assembly.

2.4.17 The PAC indicated that one of the problems of the present system has been the bureaucracy and delays and that they were worried about further delays introduced by a mediation committee. The PAC requested an explanation for these provisions.

2.4.18 It was explained as follows: that what was addressed in 2.2.3, where you have something going to the mediation committee as the result of a difference between that National Assembly and the NCOP, and as a result of the deliberations of the mediation committee there is no particular solution to that matter - 2.2.3 addressed what happens to that Bill. It recognises the National Assembly has some effective voice in terms of the matters that affect them, while also not to allow the National Assembly to willy nilly outvote or overcome the objection of the provinces via the NCOP. What we have under 2.2.3 are two things: One, if the mediation process fails, but if there is still a determination on the part of the National Assembly to go ahead with that Bill, even taking into account some of the views expressed in the COP, then a special majority of two thirds of the members would be required. This brings a kind of check and balance to be brought into play between the National Assembly and the COP. The second question regarded whether this should lapse but it was noted that this question was still under discussion. It was agreed that this discussion will continue when there are formulations in draft form.

- 2.4.19 The DP requested that the alternative view should not just fall away but included in the draft as a footnote or some other way.

**Regarding 2.3: Financial Bills**

- 2.4.20 It was noted that there was broad agreement on the way that appropriation Bills would be treated. It was noted that what may require greater clarity was Bills having general financial implications.

- 2.4.21 It was noted that the DP has a particular view on role on budget allocations that vary from FFC recommendations, and the role of provinces in approving them finally

- 2.4.22 The DP stated that they were substantially in agreement with 2.3, but under 2.2.5, there are options there and understand that the negotiating body dealing with that, what happens if difference of opinion between the national legislature and the Financial and Fiscal Commission on matters of allocation. They stated that subject to that matter being resolved, one should not have blocking power in respect of all appropriation bills, only in respect of concurrency or override bills.

**Regarding 2.4: Constitutional Amendments**

- 2.4.23 It was noted that there was agreement that there should not be any joint sitting on this, and that this was a prerogative of the National Assembly. However, it was noted that where amendments affected provinces, the provinces would participate in the COP on the basis of a two thirds vote.

- 2.4.24 It was noted that the DP had raised an issue regarding the last few lines of 2.4, and that is where a specific province is affected, namely what influence it would have on the constitutional amendment process.

- 2.4.25 The DP stated that, in order to amend a provincial Constitution, that province can only do it with a two thirds majority, and therefore if it is required to amend a provincial Constitution because the Senate wants it to and it needs the approval of the province, it should also need the two thirds of the particular province.

- 2.4.26 The NP stated that they also supported that regarding provincial constitutional amendments a two thirds majority in the provincial legislature was required.

**Regarding 2.2.4: Availability of the National Executive**



2.4.27 It was noted that there appeared to be agreement on this.

2.4.28 It was noted that the DP raised a query regarding whether members of the committees have a "right" to address the National Assembly or its Committees. They stated that it may not be appropriate to have this right also regarding its "committees".

**Regarding 2.2.5: Function in regard to other Financial or Fiscal Matters: Open Option**

2.4.29 It was noted that with regard to this matter the DP may wish to introduce a slight variance. They stated that it may require other appropriate financial powers, depending on what was done in those chapters in the Constitution.

**Regarding 2.2.6: Appointments**

2.4.30 It was noted that this was an area where agreement was still sought. It was noted that the ANC and DP were not likely to agree with the NP position, but that they had agreed with the NP to keep this on the table and to continue examining ways of involving the NCOP. It was noted that this could also entail the way that an institution like the Judicial Services Commission was constituted.

2.4.31 The DP stated that they do not believe that the provinces should be involved in the appointments of a national character, such as those related to foreign affairs. They stated, however, that the extent that many of the institutions supporting democracy, where they have a direct bearing on the activities or the work of the province, they should certainly have a direct say on the elections of those persons.

2.4.32 The NP stated that they wanted foreign affairs and defence included to be included in the draft, but that they may wish also to look at whether judges of the Constitutional Court should be included here, because the Constitutional Court may have a major impact on the provinces.

**Regarding 2.2.7: Accountability of National Executive**

2.4.33 It was noted that despite what was raised generally concerning this matter, there was agreement that the NCOP would have the power to pass motions of disapproval in some cases.

2.4.34 The DP stated that they also supported that the Senators would have a right to call Ministers to account, by way of questions, interpellation or motions. They stated, however, that they would not be an integral

part of the election of the executive, nor in votes of no confidence. They stated that they should be able to pass motions of censure, disapproval and ask questions, but that they would not be an integral part of decisions as to who would govern the country.

### **REGARDING PARAGRAPH 3: COMPOSITION**

- 2.4.35 It was noted that this area needs further discussion. It was noted that there was broad agreement on having two sets of groups involved in the NCOP; what could be called a permanent group, and what could be called a temporary/floating group.
- 2.4.36 It was noted that there were still differences amongst parties on:
- i. How they would be appointed
  - ii. Numbers
  - iii. The levels of proportionality introduced
- 2.4.37 The NP stated that regarding the composition, their position was not clearly stated, namely that the principle of proportionality should also be included as the basis of the composition.
- 2.4.38 It was noted that a question that arose here was whether the members of the executives would be members of the NCOP
- 2.4.39 It was noted that there was agreement that members of both the provincial legislature and the provincial executive participate in the council.
- 2.4.40 The NP indicated that they were still debating in their own ranks the issue of voting, especially what happens when a deadlock occurs in a province, and does or does not that vote count
- 2.4.41 The ANC suggested that perhaps the options could be built in by the drafters here.

### **Regarding Subparagraph 3.3**

- 2.4.42 It was noted that this was a matter that no one had fully canvassed at this stage; whether under option 1 local government should be given some presence in the NCOP.
- 2.4.43 It was noted that there may be one view that no additional groups other than delegations from provinces be involved, and there may be a view that only local government be additionally involved.

- 2.4.44 The NP also stated that they were in favour of option 1.
- 2.4.45 The ANC requested that the experts explore how local government, particularly given the approach in chapter 10, can be incorporated here as a separate tier rather than as a schedule 5 functional area.
- 2.4.46 It was noted that the PAC suggested one should explore ways of bringing in the African experience and not only a Western experience, and in that regard they proposed that traditional leaders also be incorporated.

#### REGARDING PARAGRAPH 4: VOTING

- 2.4.47 It was noted that this had also not yet been canvassed widely and may need some time. It was noted that the two options were essentially block votes or so-called proportional votes on the basis indicated.
- 2.4.48 The DP dealt with composition and voting together and stated that they believed there should be 7 permanent members elected by the provinces, and an indeterminate number of members of the Exco who could attend and take part when there are specific areas requiring their expertise. They stated that they supported them voting as a block. They stated that they should also make provision for those 7 members to attend provincial legislatures, and to be required to attend when the province wants to give them an instruction. They stated that this entailed a downward delegation to those matters. They stated that they would vote en block on the basis of the instructions given to them on the basis of a resolution of the particular provincial council. They stated that it would be a better to have a legislature to legislature arrangement, rather than bringing in executives.
- 2.4.49 It was agreed that drafters consider carefully the options listed for there was at this stage no agreement on the following matters:
- i. whether there would be block voting or individual voting
  - ii. from where each of them would derive their mandate
- 2.4.50 The DP requested that an additional option be taken into consideration. They stated that the option was implicit in their submissions, along the following lines:

*"For the purpose of legislation falling within the areas of competencies of the provinces there should be a block vote, whereas for purposes of ordinary review legislation there need not be a block*

vote."

## **REGARDING PARAGRAPH 5: FUNCTIONING**

### **Regarding 5.1: Chairperson**

- 2.4.51 It was noted that it had been canvassed how the chairperson of the NCOP should be elected; either that person being a member of the Council would be elected by the Council itself, or that the concept of a president of the Senate as we have it now, with two vice presidents who would be premiers would apply. It was noted that this had also not been canvassed in detail but that it should not be difficult to find agreement on this.
- 2.4.52 The ANC stated that it would be necessary to build in a provision under functioning that the permanent component of the NCOP could visit and address provincial legislatures and their committees and thereby create an active link between the two.
- 2.4.53 The NP stated that they also supported that member of the NCOP should be able to speak in the legislatures where they come from, and that there were no real differences in this regard.

### **Regarding 5.2: Committees**

- 2.4.54 It was agreed that the possibility be catered for that members may participate in provincial sessions.
- 2.4.55 The ANC stated that here too there should be provision for the committees of the NCOP could also link with committees of the provinces.
- 2.4.56 It was agreed that the advisers would note the options

## **REGARDING PARAGRAPH 6: SITTINGS**

- 2.4.57 This was agreed.

## **3. PROVINCES - CHAPTER 8**

- 3.1 It was agreed that this agenda item be dealt with later, once there was greater clarity on the other agenda items.

**4. PROVINCIAL AND NATIONAL LEGISLATIVE AND EXECUTIVE COMPETENCIES**

4.1 It was agreed that this agenda item be discussed next at a continuation of this multi-lateral meeting on Tuesday 27 February at 14h00.

**5. ANY OTHER BUSINESS**

5.1 It was noted that a meeting of the Constitutional Committee Sub-committee would take place at 10h00 to 13h00 on Tuesday 27 February. It was noted that the Major Urban Areas Association would make a presentation to the Sub-committee at 10h00, and the Volkstaat Council would meet with the Sub-committee at 11h00.

**6. CLOSURE**

6.1 The meeting closed at 18h00.

