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CONSTITUTIONAL ASSEMBLY

16 February 1996

To: Constitutional Committee Sub-Committee Members
From: Hassen Ebrahim
Re: Draft on Intergovernmental Co-operation

Please find attached a draft on "*Intergovernmental Co-operation*" prepared by the Technical Advisors in the delegation to Germany for consideration at the 19 February 1996 Constitutional Committee Sub-Committee

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THE NEW CONSTITUTION

DRAFT ON INTERGOVERNMENTAL CO-OPERATION

INTRODUCTORY NOTE

The attached Draft attempts to suggest a refined perspective to the question of inter-governmental co-operation, especially in view of the experience gained during the recent visit of CA members and technical advisers to Germany. Both Options 1 and 2 in Chapter 4 of the Working Draft were considered though the refinements rely more on Option 1 which is more consciously based on the model of co-operative federalism. The model proposed in the new Draft is based on the need to build co-operation in intergovernmental relations by according the provinces a meaningful role in determining the content of national legislation which impacts on their provincial administration or interests.

Firstly it is suggested that intergovernmental co-operation in the legislative sphere be dealt with separately from that in the executive sphere. The proposal in the said Option 1 for a single institution in this regard, the Council of Provinces, has not been followed mainly because of the weakening effect this may have on the principle of the separation of powers and doubt about its practicality. The dual role confuses the fact that the Council's function is pre-eminently a legislative one. To perform this role the Council or its committees will still have access to reports and documentation of the executive departments and intergovernmental forums.

In the executive field it is suggested that the President, in consultation with the Premiers, be empowered to establish a Joint Executive Forum or Council of Governments to initiate, promote and co-ordinate co-operation amongst executive and administrative organs of state at all levels, including the local level. However, in general executive interaction needs to be flexible and is often informal. Experts have suggested that such arrangements should not be reflected in the Constitution.

For the purposes of provincial participation in the national legislative process it is suggested that there should be a "National Council of Provinces". The word "National" in the name is essential to indicate that this institution operates at the national level, and not at the provincial level.

Secondly, the Draft takes on board the consensus that seems to be emerging that the "Second House" should be an institution primarily serving provincial interests as opposed to a kind of traditional Senate or "upper house" operating along the same party political lines as the National Assembly. For this reason the Draft incorporates certain suggestions to de-emphasize the role of the Council as a duplicate of the National Assembly serving the same national interests, and to focus the decision-making process in the Council as a meeting point between distinct provincial interests and national interests. This requires that the provincial representatives in the Council be a direct expression of the provinces they represent instead of political parties. The suggestions in the Draft include the following:

- **Composition of the Council**

Instead of individuals representing various political parties, the suggestion is that the Council should be composed of "delegations" from the provinces which represent the provinces. Each province will have a single delegation albeit with a mixed political composition. Seating in the Chamber will be per delegation and not per political party to demonstrate visibly that the delegations represent the provinces and not political parties.

- **Composition of provincial delegations**

The idea is that the main political forces in a province should be represented in a delegation and that delegates should be drawn from both the provincial legislature and the provincial executive.

The Draft provides in one option that each provincial delegation must consist of five delegates. The Premier or another member of the provincial Executive Council designated by the Premier will head the delegation. The rest of the delegation consists of representatives of political parties. The largest political party in the province will be entitled to two delegates and the second and third largest parties to one delegate each.

Alternatively the Constitution could merely leave it to each provincial legislature to choose its delegates without specifying from which parties they should come. The delegation size could be, as set out below, subject to some weightings.

- **Replacement of delegates**

Political parties will have a free hand to decide who its delegates will be in any particular debate, thus enabling them to use their different portfolio specialists as and when required and to give a wider spectrum of party members exposure at the national legislative level. The party delegates should be members of the provincial legislatures but this is contained in the Draft as an option.

- **Voting in the Council**

Each province will vote *en bloc* or have a single vote in the Council which will be cast on behalf of the province by its delegation or delegation leader. The vote itself is determined by the delegation, subject to and in accordance with the mandate or instructions of the provincial legislature. As a refined option a limited loading could be allowed only in respect of the weight of the vote i.e. say a small province's vote could count for 4 'points' and a very large province could claim a maximum of 8 points. In this way the Council will not simply reflect the interests of small provinces whose interests often differ from the larger ones with urban concentrations.

This weighting could take place either by loading the vote as suggested above or, alternatively, by the size of the delegation as suggested in the Working Draft.

- **Chairperson**

The Chairpersonship of the Council will rotate on an annual basis amongst the provinces. In order not to upset political balances within the delegations it is suggested that the Chairperson may not be a member of a delegation, and if a chairperson-designate is a member, that he or she must then relinquish membership of the delegation. As an option - to provide for continuity - provision could be made for the next incumbent to hold the vice-chairpersonship prior to his/her assumption of the chairpersonship.

- **Legislative function**

The Draft provides for the National Council to participate in the national legislative process more or less in the same way anticipated in Option 1. However, the Draft entitles the National Council to consider also Bills outside the Schedule 5 functional areas and to state whether it "supports" or "opposes" such Bills. If the Council opposes a Bill the National Assembly is then required to reconsider the Bill taking into account the Council's objections. It may accept or reject the Council's objections by a simple majority. Such Bills would not be referred to the Mediation Committee.

- **Mediation Committee**

As far as Schedule 5 legislation is concerned the Draft provides for disputes between the National Assembly and the National Chamber to be settled in the Mediation Committee as proposed in Option 1. The Draft proposes that the Mediation Committee be composed of nine members of the National Assembly elected proportionally, and one delegate from each of the nine provinces. Decisions in the Mediation Committee are reached by agreement between the two sides based on the support of a majority in each side. This would mean that there can be no agreement in the Mediation Committee without the support of the majority of the provinces.

The National Assembly can only overrule an agreement in the Mediation Committee by a two thirds majority vote. It can, however, endorse an agreement by a simple majority - thus passing the Bill as agreed to in the Mediation Committee.

If there is no agreement in the Mediation Committee the Bill lapses unless the Bill is passed by a two thirds majority in the Assembly.

Legislation passed by the National Assembly without the support of the National Council, loses the benefit of an "automatic" override over conflicting provincial legislation (see section 3(2)(e) of the separate proposal on legislative competences), if

- the National Assembly overruled an agreement on that legislation in the Mediation Committee; or
- the Mediation Committee failed to reach an agreement on the legislation.

Procedure

There is no need to constitutionalise the precise procedures and rules of the Council. However, it is pointed out that, from comparative experience, the formal council meetings need take only 1 or 2 days a month as the delegations will be voting on pre-established positions. The real work is done at and between provincial governments/legislatures or in the mediation committee. Such a process does, however, require fixed time-limits. It may also require some full-time presence at the seat of the Council for some representatives. This is a matter that Provinces could determine provided that MEC and MPL delegates should not lose their rights to participate in their own legislature's proceedings. On the other hand (option 2) for the sake of uniformity, and to guarantee an effective management of the provincial legislature's presence at the Senate, and to foreshadow the problem occasioned to the political balance in the province by absent MPL, the option is proposed that a maximum ½ of the delegation be delegated as full time representatives and that the Provincial Legislature be 'topped up' in respect of these 2-4 full-time delegates.

Constitutional Amendments

The procedure for constitutional amendments should be provided for elsewhere in the Constitution save to say that any constitutional amendments including amendments to the provincial competencies would require a two thirds majority of the Council and any further requirements as specified in the constitutional principles.

Quorum

As this is not a chamber of deputies, and provided there is proper notice, quorum provisions may not be necessary save in respect of the attendance of at least 5 delegations. It may be necessary to specify that a delegation must be represented by at least one member of the provincial executive committee when the actual votes are cast.

Financial Bills

To prevent damaging deadlocks or brinkmanship occurring in regard to the passage of the national budget, it is proposed that the national budget and related appropriations be treated as an 'objection' bill - but that other legislation, only if it has financial implications for the administration of provinces in the areas of concurrency, be treated in accordance with the principles above. This proposal does not deal with a possible role the National Council could play in regard to provincial fiscal allocations. This important subject needs to be dealt with in a comprehensive fashion together with the aspects of the Constitution dealing with taxation, fiscal allocations, equalisation etc.

Constitutional Court

The National Council may refer an Act of Parliament (not Bill) to the Constitutional Court to determine its constitutionality if more than one third of the Council so agrees. The right accrues only after the Act has been assented to.

Coming into Force

Should consideration be given to the coming into force of this institution only in 1999, then transitional provisions may also need to be considered.

DRAFT - 2 FEBRUARY 1996

Status: Suggestions from the technical advisors in the delegation to Germany.

CHAPTER ...

INTERGOVERNMENTAL CO-OPERATION

Co-operation at legislative level

National Council of Provinces

1. (1) There is a National Council of Provinces through which the provinces participate in the national legislative process.¹
- (2) The National Council is composed of delegations from the respective provinces.
- (3) Each provincial delegation must consist of -
 - (a) the Premier or another member of the provincial Executive Council designated by the Premier, who heads the delegation;²
 - (b) two representatives of the largest party represented in the provincial legislature; and
 - (c) one representative of each of the second and third largest parties represented in the provincial legislature.³
- (4) A party may vary its representation in a delegation as it pleases,⁴ but may not designate a member of the National Assembly to represent it in a delegation.⁵

¹ The National Council will not be a second or "Upper" House of Parliament as the Council will not have fixed members but participating delegations, the composition of which may continuously change.

² The presence of the Premier or a provincial minister in the delegation is essential if a proper focus on provincial interests is to be achieved. A provincial government would normally act in the common interest of the province as a whole and not as a party political instrument. This is definitely the experience in the German Bundesrat where it is not uncommon for a Land Government to vote in the Bundesrat against its party's position in the Bundestag.

³ An alternative approach would be to leave it to the provincial legislatures to choose its delegates without specifying from which parties they should come.

⁴ Party representation in a delegation will depend on the nature of the matter which is to be discussed in the Council. This provision will also assist in giving exposure at the national legislative level to a spectrum of party members.

⁵ Alternatively, it could be determined that delegates must be members of the provincial legislatures.

Participation in national legislative process

2. (1) All Bills passed by the National Assembly must be referred to the National Council of Provinces before they are submitted for the President's assent.⁶
- (2) With regard to Bills within the functional areas listed in Schedule 5, excluding appropriation Bills, the National Council participates in the legislative process as follows:
- (a) The National Council must consider the Bill and state⁷ whether it -
 - (i) supports the Bill;
 - (ii) supports the Bill subject to any amendments; or
 - (iii) opposes the Bill.
 - (b) If the Council supports the Bill, the Bill must be submitted for the President's assent.
 - (c) If the Council supports the Bill subject to amendments or if it opposes the Bill, the Bill, together with any proposed amendments, must be referred to the Mediation Committee.
 - (d) If the Mediation Committee agrees on the version of the Bill as passed by the National Assembly, the Bill must be submitted for the President's assent.
 - (e) If the Mediation Committee agrees on a different version of the Bill,⁸ the Bill must be referred back to the National Assembly for reconsideration. The Assembly may pass or reject that version of the Bill, provided that amendments to that version of the Bill may only be passed in the Assembly by a majority of at

⁶ Provinces have a real interest also in legislation outside the Schedule 5 areas, for instance water storage and distribution. The suggestion is that the procedure in subsection (2) applies to legislation within Schedule 5 and subsection (3) to other legislation. The Mediation Committee comes into play only where legislation falls within Schedule 5. As far as other legislation is concerned the Chamber is only given the right to comment on a Bill and to force its reconsideration by the National Assembly if it opposes the Bill. It is also suggested that the Mediation Committee procedure (subsection (2)) will not apply to appropriation Bills. These Bills are to be dealt with in terms of special procedures involving the Financial and Fiscal Commission. See also Introductory Note - Financial Bills.

The Council's role in constitutional amendments needs further attention.

⁷ The Council can either "support" or "oppose" a Bill. Because the Council is not part of Parliament it would be inappropriate for it to "pass", "approve" or "reject" a Bill.

⁸ For instance if the Mediation Committee agrees on the amendments of the Council or proposes amendments of its own.

- least two thirds of its members.⁹
- (f) If the Mediation Committee fails to agree on the Bill, or if the National Assembly rejects the version of the Bill agreed to in the Mediation Committee, the Bill as originally passed by the Assembly lapses unless the Assembly again passes it, with or without amendments, by a majority of at least two thirds of its members.
 - (g) A Bill referred to in paragraph (e) or (f) which has been passed by the National Assembly in terms of that paragraph, must be submitted for the President's assent.
- (3) With regard to appropriation Bills and Bills outside the functional areas listed in Schedule 5 the National Council participates in the legislative process as follows:
- (a) The National Council must consider the Bill and state whether it supports or opposes the Bill.
 - (b) If the Council supports the Bill it must be submitted for the President's assent.
 - (c) If the Council opposes the Bill, it must be referred back to the National Assembly and the Assembly must reconsider the Bill taking into account the Council's reasons for its opposition.¹⁰
 - (d) If the National Assembly again passes the Bill or passes an amended Bill, the Bill must be submitted for the President's assent.

Mediation Committee

3. (1) The Mediation Committee consists of -
- (a) nine members of the National Assembly elected by the Assembly in proportion to the representation of the respective parties in the Assembly; and
 - (b) one delegate from each province designated by the province's delegation in the National Council of Provinces.

⁹ The position is thus that the National Assembly may pass or reject the version of the Bill as agreed to in the Mediation Committee by an ordinary majority, but any new amendments proposed in the National Assembly can only be adopted by a two thirds majority.

¹⁰ Please note that the Mediation Committee plays no role here. The National Assembly is simply required to reconsider the Bill if the Council objects to it. No special majorities in the National Assembly are required.

- (2) Support by the majority of the National Assembly representatives and by the majority of the provincial delegates on any issue before the Mediation Committee constitutes an agreement in the Committee on that issue.¹¹
- (3) Rules and orders adopted by the National Assembly and consented to by the National Council regulate the Mediation Committee and its procedure.

Chairperson

4. (1) The chairpersonship of the National Council of Provinces rotates amongst the provinces with each province entitled to designate a Chairperson for one year.¹²
- (2) While occupying the chairpersonship a person may not be a member of a provincial delegation in the National Council.
- (3) The Chairperson has no vote in the National Council.

Sittings

5. (1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.
- (2) The Chairperson may summon the National Council to an extraordinary meeting at any time to conduct urgent business.
- (3) The seat of the National Council is the same as that of the National Assembly. Meetings at other places are permitted on the grounds of public interest, security or convenience, and in a manner provided for in the rules and orders of the Council.

¹¹ Thus, if at least five provinces vote against a Bill in the Mediation Committee, there is no agreement and the Bill lapses (unless the NA passes it by at least a two thirds majority). It should be remembered though that the Mediation Committee only comes into play in relation to Schedule 5 legislation, i.e. provincial functional areas.

¹² In order to provide for continuity provision could be made for the next incumbent to hold the vice-chairpersonship prior to his or her assumption of the chairpersonship.

Voting

6. (1) Each provincial delegation in the National Council of Provinces has one vote which is determined by the majority of the delegates in the delegation.¹³
- (2) All questions before the National Council are decided by the votes cast by a majority of the provincial delegations.

Attendance of members of national executive

7. Members of the Cabinet and Deputy Ministers may attend and may speak in the National Council of Provinces, but may not vote.

Internal autonomy

8. The National Council of Provinces may make its own rules and orders.

Co-operation at executive level

Joint executive forum¹⁴

9. The President acting in consultation with the Premiers of the provinces must/may establish a joint executive forum consisting of representatives of the Cabinet and the provincial Executive Councils -
- (a) to promote and initiate co-operative governance between the national, provincial and local levels of government; and
- (b) to co-ordinate and monitor executive and administrative interaction between organs of state operating at the same or at different levels of government.

¹³ The experience in Germany has been that the länder (provinces) tend to pursue their own (provincial) interests in the Second House (Bundesrat), and that even länder supporting the governing party in the First House (Bundestag) would not as a rule of thumb support their party where there is a clash of interests. The same is likely to develop here provided voting in the Council is exercised per province and not per individual member (where the caucus system plays a dominant role).

Instead of giving the provinces an equal vote, a limited "loading" of the vote could be considered, either by way of a points system or a differentiation in the size of the delegations. See Introductory Note - Voting in the Council.

¹⁴ If need be the name of the forum could be constitutionalised, e.g. the Council of Governments.

