

**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**THURSDAY  
7 SEPTEMBER 1995  
GOOD HOPE CHAMBER  
14H00**

**DOCUMENTATION**

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## **CONSTITUTIONAL ASSEMBLY**

### **MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE**

Please note that a meeting of the above committee will be held as indicated below:

**DATE:** Thursday, 7 September 1995

**TIME:** 14H00 - 17H00

**VENUE:** Good Hope Chamber

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#### **DRAFT AGENDA**

1. Opening
2. National Assembly and Electoral system, *Pages 2 - 28*
3. Any other Business
4. Closure

*N.B. Please bring along CC pack of 11 August ( Vol 2) dealing with the Electoral System.*

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**HASSEN EBRAHIM  
EXECUTIVE DIRECTOR**

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*Enquiries: Ms MM Sparg, Tel 245031, page 4184616 Code 6970*

**FIFTH DRAFT - 24 AUGUST 1995**

**Status:** As processed after CC Subcommittee  
debate of 24 August 1995.

**Chapter ...**

**PARLIAMENT**

**Legislative power**

1. The legislative power of the Republic shall vest in Parliament.<sup>1</sup>

**Constitution of Parliament**

2. Parliament consists of the National Assembly and .....<sup>2</sup>

**THE NATIONAL ASSEMBLY**

**Composition of National Assembly**

3. The National Assembly consists of ... members.<sup>3</sup>

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<sup>1</sup> This is merely a provisional clause and its only purpose at this stage is to serve as an "opening statement" for what follows. Legislative competencies are dealt with by TC 3.

<sup>2</sup> The question of a Senate is contentious. Consequently no provisions on the Senate were included in this draft. Although there appears to be broad agreement that there should be a Senate further clarity is required whether the Senate should be part of "Parliament" or whether it should be a separate institution. Depending on what is agreed about the Senate, some of the provisions on the National Assembly may have to be rephrased and relocated to a joint section on the NA and the Senate (as, e.g. in the case of sections 55 - 67 of the Interim Constitution).

<sup>3</sup> The size of the National Assembly is contentious. See Block 5 of the Report on Parliament. Contralesa proposed that the legislative chamber should include traditional leaders.

The CC Subcommittee agreed that the matter be debated in the CA.

## National elections

4. The election of members of the National Assembly shall be conducted in accordance with an electoral system<sup>4</sup> which shall be based on a common voters' roll and, in general, proportional representation as provided for by national law.<sup>5</sup>

## Duration of National Assembly

5. (1) The National Assembly as constituted in terms of a general election shall continue [serve]<sup>6</sup> for a term of five years<sup>7</sup> as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.<sup>7</sup>

(2) The National Assembly may be dissolved before the end of the term for which it was elected if a vote of no-confidence in the Cabinet is passed by the National Assembly.<sup>8</sup>

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<sup>4</sup> The CC Subcommittee recommends that the electoral system be debated in the CA.

<sup>5</sup> As approved by TC 2 Report of 7 August 1995 on electoral system. The majority of parties and public submissions favour a system which includes party lists and constituency elections resulting in proportional representation.

<sup>6</sup> It was suggested in the CC that the word in bold brackets be replaced by "serve". The Law Advisor and the Technical Advisors recommended to the CC Subcommittee that the word "continue" be retained as an indication of the *duration* of the National Assembly. It was agreed by the CC Subcommittee that the word "continue" should be used.

<sup>7</sup> See Block 9 of the Report on Parliament. The DP proposes a term of four years.

<sup>8</sup> In terms of section 20 of the Draft on the National Executive the State President may either resign or dissolve the NA if a motion of no confidence is passed in the Cabinet (including the President). See also section 6(3)(b) of the Draft on the National Executive.

(3) When the term for which the National Assembly was elected expires or if the National Assembly is dissolved before its term expires, the National Assembly as then constituted shall remain competent to function, and its members shall continue as members, until the day before polling for the next National Assembly.<sup>9</sup>

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The DP proposed that the words underlined be inserted in subsection (1) and that subsection (2) be deleted. The ANC posed the question of snap elections and whether provision should be made for the dissolution of Parliament otherwise than as a result of a motion of no confidence.

In the CC Subcommittee it was observed that the question whether subsection (2) should be retained, is contingent upon the provisions pertaining to votes of no-confidence (dealt with under the National Executive, section 20). It was decided by the CC Subcommittee that the inclusion of this provision should be reconsidered once finality has been reached on the dissolution of Parliament.

<sup>9</sup> As per Block 10 of the Report on Parliament. As presently worded the National Assembly and its members remain competent to function after a dissolution up to the day before polling for the next NA. However, there was some discussion (and support) in the Theme Committee on whether this should be changed so that members of the NA only vacate their seats the day before the newly elected members take up their seats. However, in the CC debate concern was expressed that an extension of the National Assembly beyond an election may open the door for a government, after having lost an election, to legislate for instance on the validity of the election.

The Technical Advisers reported that among 15 other jurisdictions, three were found with a provision resembling section 5(3) (Botswana, Bangladesh and Namibia). None was found that provided for the continuation of membership or the functioning of Parliament between the day of the election and the first session of the newly elected Parliament. It was agreed in the CC Subcommittee that if such provision was required, stringent safeguards would have to be built in to prevent the "dissolved" parliament from abusing its ability to sit after the day of the next election (e.g. by legislating on the election, changing the Constitution, voting its members undue privileges and benefits).

**Speaker and Deputy Speaker<sup>10</sup>**

6. (1) The National Assembly shall at its first sitting after a general election, and thereafter as and when it becomes necessary to fill a vacancy, elect a Speaker and a Deputy Speaker from amongst its members.<sup>11</sup>

(2) The Chief Justice<sup>12</sup> or a judge designated by him or her shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

(3) The procedure set out in Schedule ... shall apply to the election of the Speaker and the Deputy Speaker.<sup>13</sup>

(4) The Speaker and the Deputy Speaker have the powers and functions assigned to them by this Constitution and the law, including the rules and orders of the National Assembly.<sup>14</sup>

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<sup>10</sup> Section 6 is based on section 41 of the Interim Constitution as per agreement in Block 16 of Report on Parliament.

<sup>11</sup> Agreed to in the CC.

<sup>12</sup> In terms of the Interim Constitution the Chief Justice presides over the election of a Speaker. As the Constitutional Court is the highest court as far as constitutional matters are concerned the question arises whether the President of the Constitutional Court rather than the Chief Justice should not fulfil constitutional functions such as presiding at the election of a Speaker. The TC is of the view that this function should remain vested in the Chief Justice.

The CC agreed that it was not vital to decide this issue at this stage. It should be settled in private discussions between the parties.

<sup>13</sup> The procedure referred to here is similar to that contained in Schedule 5 of the Interim Constitution. The CC agreed to this clause.

<sup>14</sup> Agreed to in the CC.

(5) The Speaker or Deputy Speaker ceases to hold office if he or she resigns from office or ceases to be a member of the National Assembly. The Speaker or Deputy Speaker may be removed from office by resolution of the National Assembly.<sup>15</sup>

**Qualifications of members of National Assembly<sup>16</sup>**

7. (1) Only South African citizens qualified to vote<sup>17</sup> in elections of the National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

(2) The following persons are disqualified from being members of the National Assembly:

- (a) Unrehabilitated insolvents.<sup>18</sup>
- (b) Persons declared to be of unsound mind by the courts of the Republic.<sup>18</sup>

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<sup>15</sup> Agreed to in the CC.

<sup>16</sup> Drafted as per Block 8 of the Report on Parliament.

<sup>17</sup> The franchise is dealt with by TC 1. Discussion of clause stands over pending TC 1's report.

<sup>18</sup> Agreed to in the CC.



- (c) Persons who at the commencement of the Constitution are serving a sentence of more than 12 months imprisonment without the option of a fine.<sup>19</sup>
- (d) Persons convicted after the commencement of the Constitution [27 April 1994]<sup>20</sup> of an offence in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, and sentenced to more than 12 months' imprisonment without the option of a fine. A person shall not be regarded as convicted until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired [or if such person has

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<sup>19</sup> The original formulation of this paragraph was based on section 42(1)(b) of the Interim Constitution which applied only to convictions after promulgation of the Interim Constitution, i.e. 27 April 1994. This formulation did not cover persons convicted of serious crimes before 27 April 1994 and who at the commencement of the new Constitution are still serving imprisonment. Inclusion of the additional paragraph was agreed upon by the CC Subcommittee.

<sup>20</sup> (a) In the CC debate there was a suggestion that the date could be deleted if "amnesty" is added at the end of the paragraph. However, it would appear that the inclusion of a reference to amnesty in the paragraph is inappropriate as the paragraph only deals with convicted persons. This provision should be understood against the background of the amnesty process which may indemnify persons who would otherwise have been convicted. It was agreed by the CC Subcommittee that reference to "amnesty" could be omitted.

(b) The Technical Advisers raised the issue of pardon as foreseen by the proposed paragraph (d) as it may be superfluous. Pardon has three possible meanings. First a free pardon expunges the conviction and sentence (in terms of section 327 of the Criminal Procedure Act of 1977). A person receiving a free pardon would thus not be disqualified by section 7(2)(c) as there is no conviction or sentence. Second, a pardon may wipe out the sentence only (section 325 of the Criminal Procedure Act). Where there is no sentence, the disqualification does not apply either. Third, a pardon may reduce a sentence (usually referred to as remission of sentence of imprisonment). For example, a person's 20 year sentence may be reduced to 10 years. The judicially imposed sentence is not reduced, merely the length of execution. Whether a person is disqualified would depend on the length of the original sentence of imprisonment.

The CC Subcommittee agreed that reference to "pardon" may be omitted.

**received a pardon or amnesty].**

- (e) Persons who are members of [the Senate], a provincial legislature or a local government.<sup>21</sup>**

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<sup>21</sup> **Stands over pending decisions on the Senate.**

- (f) Persons holding office of profit under the Republic<sup>22</sup>, excluding-
- (i) the Deputy State President;<sup>23</sup>
  - (ii) Ministers and Deputy Ministers;<sup>23</sup> and
  - (iii) any other office declared by national law not to be

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<sup>22</sup> A number of difficulties with this provisions have been highlighted. Traditional leaders receiving payments from the State run the risk of being regarded as persons holding office of profit under the Republic in terms of this section, in which event they will be disqualified from being members of the National Assembly. Their inclusion in the above list should be considered.

The ad hoc committee on traditional authorities was instructed by the CC to go into this matter.

The CC Subcommittee was requested to consider as a matter of principle whether a member of Parliament should be permitted to receive additional remuneration as a member of a statutory body. The Technical Advisers requested an opportunity to take another look at this paragraph. Inconsistency in the wording (e.g. that a pension from a public fund (subpar (iii) is hardly an office of profit) was pointed out. The Technical Advisers were instructed to produce an alternative wording and they reported as follows:

The underlying principle of this disqualification is the separation of powers. Positions in the judiciary, civil service and other statutory bodies requiring political neutrality and judicial detachment are incompatible with the duties and functioning of members of Parliament. Moreover, lucrative positions in the executive or statutory bodies may undercut the independence of MPs. It may thus be incompatible for an MP to be a justice of the peace, an office which requires judicial impartiality before issuing warrants of arrest.

In all the Commonwealth constitutions surveyed, public office paid from state revenue is a disqualification for membership of Parliament. Exceptions to the rule are recognized but never exhaustively defined in the constitutions; instead reference is made to a law providing for a comprehensive list of exceptions. See e.g. Antigua, Bahamas, Bangladesh, Botswana, Cyprus, Dominica, Gambia, India, Jamaica, Kenya, United Kingdom. It is thus suggested that, apart from excluding the positions of the Deputy State President, Ministers and Deputy Ministers, further exceptions should be regulated by national law, possibly in the Electoral Act. Exceptions would be permissible only if such positions are not incompatible with the functions and duties of a member of Parliament. The following formulation was thus suggested:

"Persons holding office of profit under the Republic excluding

- (i) the Deputy State President;
- (ii) Ministers and Deputy Ministers; and
- (iii) any other office declared by national law not to be incompatible with the functions and duties of members of Parliament."

The CC Subcommittee agreed to this formulation.

<sup>23</sup> Agreed to in the CC.

incompatible with the functions and duties of members of Parliament. [persons receiving a pension from public funds or from a pension fund aided by public funds;<sup>23</sup>

(iv) **justices of the peace and appraisers;**<sup>23</sup> and

(v) **members of statutory bodies performing a public function who receive remuneration as such a member not more than their salaries as members of the National Assembly.]**

(3) The disqualification imposed by this section on a person who served a prison sentence of more than 12 months shall lapse 5 years after [his or her release from prison] completion of the sentence.<sup>24</sup>

(4) A person not qualified to be a member of the National Assembly and who sits or votes in the National Assembly knowing that he or she is not qualified, shall be liable to a fine prescribed by the rules and orders of the National Assembly.<sup>25</sup>

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<sup>24</sup> The CC supported the principle that persons who served prison sentences of more than 12 months should not be disqualified for life. A five year ban was also supported, subject to a comparative study to be done by the Technical Advisers. The Technical Advisers reported that among the 15 foreign constitutions that they have surveyed, only two contained a provision resembling section 7(3) [Bangladesh (5 years) and Namibia (10 years)]. The CC Subcommittee agreed to the formulation.

<sup>25</sup> Agreed to in the CC.

**Vacation of seats<sup>26</sup>**

8. A member of the National Assembly shall vacate his or her seat upon -
- (a) ceasing to be eligible to be a member;
  - (b) resigning as a member;
  - (c) becoming a member of [the Senate] a provincial legislature or a local government; or
  - [(d) unauthorised absence for 15 consecutive parliamentary sitting days.]**

**Filling of vacancies<sup>27</sup>**

9. Vacancies in the National Assembly shall be filled in accordance with a national law.

**Oaths or affirmation by members**

10. (1) Every member of the National Assembly, before taking his or

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<sup>26</sup> The CC approved paragraphs (a), (b) and (c) and inserted paragraph (d). It was pointed out in the CC Subcommittee that it was not agreed by the CC to insert subparagraph (d), and it is accordingly recommended that it be deleted. At the CC Subcommittee it was further pointed out that the termination of membership through the rules and orders of Parliament may be constitutionally unsound. If Parliament should have the power to terminate membership, it should be provided for in the Constitution, the details being regulated in the rules and orders of Parliament.

The issue of including in the new Constitution the current requirement in section 43(b) of the Interim Constitution that a member vacates his or her seat upon ceasing to be a member of the party which nominated him or her, was referred to the CC Subcommittee. The CC Subcommittee is of the opinion that this question should be referred to the CA.

<sup>27</sup> Agreed to in the CC.

her seat in the Assembly, shall make and sign an oath or solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her, **[in the following form:]**

**[I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa and solemnly promise to perform my functions as a member of the National Assembly to the best of my ability.**

**(In the case of an oath: So help me God.)]<sup>28</sup>**

(2) A member **[nominated to fill]** filling a casual vacancy in the National Assembly shall make and sign the oath or solemn affirmation before the Speaker.<sup>29</sup>

### **Sittings and recess periods**

11. (1) The National Assembly may determine the time and duration of its sittings and its recess periods. The first sitting of the National Assembly after a **[general]** election shall take place not more than 10 days after the declaration of the result of the election at a time and on a date determined by the Chief

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<sup>28</sup> Subsection (1) amended by the CC as indicated. Words in bold brackets deleted and words underlined inserted.

See foot note 11 for which judge to take the oath/affirmation.

<sup>29</sup> Agreed to in the CC as amended.

Justice.<sup>30</sup>

(2) The State President<sup>31</sup> may at any time summon the National Assembly to an extraordinary sitting for the conduct of urgent business.<sup>32</sup>

(3) The seat of the National Assembly is ....<sup>33</sup> where all sittings of the National Assembly shall ordinarily take place. Sittings at other venues are only permitted on the grounds of public interest, security or convenience and if provided for in the rules and orders of the National Assembly.

## Quorum

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<sup>30</sup> Agreed to in the CC subject to the insertion of the underlined words. See foot note 11 as far as this subsection vests a function in the Chief Justice.

<sup>31</sup> The TC prefers the term "State President" to distinguish the Head of State from the President of the Constitutional Court, President of the Senate etc. See Block 1 of the Report on the Presidency. Term generally supported in the CC.

<sup>32</sup> As per Block 2 of the Report on Parliament. The National Party is in favour of a clause along the following lines:

"At the written request of ...% of its members, the Speaker shall convene a sitting of the National Assembly during a recess."

See also section 6(3)(a) of the Draft on the National Executive.

Joint sittings of the Houses of Parliament to be revisited once the role and status of the Senate have been clarified.

The CC decided that this provision should be shelved until states of emergencies are discussed.

<sup>33</sup> Legislative seat to be dealt with by TC 1. Subsection otherwise approved by the CC.

12. ...<sup>34</sup>

### **Decisions**

13. (1) Except where the Constitution provides otherwise, all questions before the National Assembly shall be determined by a majority of the votes cast by the members present. When, in terms of this section, a vote is taken on a Bill, a majority of all the members of the National Assembly shall be present, and when it is taken on any other matter, one third of all the members shall be present.<sup>35</sup>

(2) The member of the National Assembly presiding in the Assembly has no deliberative vote, but does have and shall exercise a casting vote in the event of an equality of votes.<sup>36</sup>

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<sup>34</sup> Agreed in the CC that quorums must be prescribed in the rules of the NA. No provision required. See section 15. The question of a quorum was raised in the CC Subcommittee. It was agreed that section 13 be amended to provide for the presence of a prescribed number of members for the purpose of decision-making.

<sup>35</sup> Section 13 approved by the CC. Constitutional amendments, and the majorities required, are yet to be dealt with. Following the discussion on a quorum, it was agreed in the CC Subcommittee that section 13(1) should be reworded along the lines of section 47 of the Interim Constitution to provide for a prescribed number of members to be present for decisions. The inserted formulation was accepted by the CC Subcommittee.

<sup>36</sup> Agreed to in the CC. Depending on the nature of the Senate, this provision may be extended to entitle also Ministers and Deputy Ministers to sit and to speak in the House of which they are not members.

36a. With regard to section 14, it was agreed in the CC Subcommittee that the word 'sit' be replaced with 'attend'.



**Note:** The provisions following below (i.e. sections 14 - 22) will apply to both the National Assembly and the Senate should agreement be reached on a second House of Parliament.

**State President's rights in National Assembly**

14. The State President is entitled to attend [sit] and to speak in the National Assembly, but may not vote.<sup>36a</sup>

**Internal autonomy**

15. (1) The National Assembly shall determine its internal arrangements and make rules and orders in connection therewith.<sup>37</sup>

(2) The salaries, allowances and benefits of members of the National Assembly shall be as provided for by a national law.<sup>37</sup>

**Parliamentary privilege**

16. (1) [There is] Members of the National Assembly shall have freedom of speech and debate in [and before] the National Assembly and its committees subject to the rules and orders [of the National Assembly]. This freedom may not be limited by or questioned in the courts.<sup>38</sup>

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<sup>37</sup> Agreed to in the CC.

<sup>38</sup> Amended in the CC. Words in bold brackets denote deletion and words underlined insertion.

(2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages as a result of anything they have said, produced or submitted in or before or to the National Assembly or its committees. The same immunity applies in respect of anything revealed as a result of what they have said, produced or submitted.<sup>39</sup>

(3) Other privileges, immunities and powers of Parliament shall be as prescribed by a national law.<sup>39</sup>

#### **Ordinary Bills**

17. ....<sup>40</sup>

#### **Money Bills**

18. ....<sup>40</sup>

#### **Bills affecting provincial matters**

19. ....<sup>40</sup>

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<sup>39</sup> Agreed to in the CC.

<sup>40</sup> These provisions are dependent on the role of the Senate in the legislative process. Consideration should also be given to the inclusion here of a provision similar to section 98(9) of the Interim Constitution which provides for the referral to the Constitutional Court of Bills where at least one-third of the members of the NA petitions the Speaker to do so. This provision has already been agreed to in TC 5, and has for present purposes been included in the Draft on the Administration of Justice.

**Bills amending Constitution**

20. ....<sup>41</sup>

**Assent to Bills**

21. (1) A Bill duly passed by Parliament in accordance with the Constitution shall without delay be [forthwith] assented to and signed by the State President.<sup>42</sup>

(2) If the State President is of the opinion that a Bill is inconsistent with the Constitution or that it has not been passed in accordance with the Constitution the State President may withhold assent to the Bill and refer it back to Parliament for reconsideration. If Parliament passes the Bill without correcting the defect the State President may again withhold assent and refer the Bill to the

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<sup>41</sup> The TC has not yet reported on constitutional amendments.

<sup>42</sup> Agreed to in the CC as amended.

Constitutional Court for a ruling on its constitutionality.<sup>43</sup>

(3) A Bill assented to and signed by the State President becomes an Act of Parliament upon its promulgation.

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<sup>43</sup> Stands over for further discussion in the CC Subcommittee. The Technical advisers were instructed to make a comparative analysis as to how this matter is dealt with in other jurisdictions. In the CC Subcommittee it was agreed that the Technical Advisers would produce another draft formulation, with an explanation of the system under the Interim Constitution. The following was received from the Technical Advisers:

In terms of the Interim Constitution, section 64(1), the President *shall* assent to a bill *duly* passed by Parliament, subject to section 82(1)(b). The latter section provides that the President may refer a bill back to Parliament *in the event of a procedural shortcoming in the legislative process*. This a very limited power, with no discretion (opinion) involved, and it is hard to imagine how this power would be exercised in practice.

The proposed section 21(3) introduces a wider and more subjective element - in paraphrased form, "if the State President reckons that a bill would be unconstitutional or that the correct constitutional procedure has not been followed ...". From a random number of other constitutions surveyed, it would appear that there is no single or preferred way in which assent to bills by the president is handled. In cases where provision is made for the withholding of assent, or referral back to the legislature, the patterns also differ. These differences would generally appear to be unrelated to the type of constitutional system (i.e. presidential, parliamentary or mixed). See attached addendum.

In order to accommodate the views expressed during the first debate on this subsection in the CC (see Minutes of the 24th Meeting of the CC, Friday 11 August, item 5.32), and the subsequent debate in the CC Subcommittee, the following reformulation is proposed:

(2) If the State President has reservations/concerns [NOTE: THE ONE OR THE OTHER] about the constitutionality of a Bill, or whether it has duly been passed by Parliament in accordance with the Constitution, the State President may refer the Bill back to Parliament with a clear indication of any defects. If the Bill is passed again, giving effect to the State President's reservations/concerns, the State President shall sign the Bill. If Parliament does not agree with the State President reservations/concerns, the Speaker shall refer the Bill to the Constitutional Court for a ruling on the constitutionality of the Bill, or whether it has been duly passed in accordance with the Constitution. If the Constitutional Court finds the Bill to be consistent with the Constitution, the State President shall sign the Bill. If the Constitutional Court finds the Bill to be inconsistent with the Constitution, it shall be referred back to Parliament for further consideration, failing which, it shall lapse.

The CC subcommittee agreed that the above formulation contained the principle agreed to but that it required reformulation. The issue should be revisited following debate in the CC.

**Safe keeping of and public access to Acts of Parliament**

22. (1) All Bills duly signed by the State President shall immediately after their promulgation as Acts of Parliament be entrusted to the Appellate Division [Constitutional Court] for safe keeping.<sup>44</sup>

(2) The signed copies of the Acts of Parliament entrusted to the Constitutional Court shall be conclusive evidence of the provisions of the Acts.<sup>45</sup>

[(3) Members of the public shall have access to all Acts of Parliament entrusted to the Constitutional Court, subject to reasonable control imposed by a national law or the President of the Constitutional Court.]<sup>46</sup>

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<sup>44</sup> Administration requested to obtain the views of the Constitutional Court and the AD on this matter. The CC Subcommittee agreed to propose that the words Appellate Division be inserted after Constitutional Court.

<sup>45</sup> The question of official languages and the language(s) in which laws are to be drawn up will be dealt with by TC 1, possibly in consultation with TC 2 and TC 5. Principle of the signed copy to be conclusive agreed to in the CC.

<sup>46</sup> Agreed in the CC that subsection (3) be deleted.

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

**BLOCK 6: THE ELECTORAL SYSTEM**

**REPORT AND DRAFT  
FORMULATIONS**

**TO BE READ WITH DRAFT FORMULATIONS ON NATIONAL ASSEMBLY**



CONSTITUTIONAL ASSEMBLY

## MEMORANDUM

**TO:** CC subcommittee  
**FROM:** Secretariat  
**DATE:** 5 September 1995  
**MEMO REF:** TC2/5 September 1995/1  
**SUBJECT:** DRAFT FORMULATIONS AND REPORT ON ELECTORAL SYSTEM

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TC2's report on the electoral system, as explained in the introduction to the report, identifies the core elements of the electoral system that should go into the Constitution.

As far as specific provisions regarding the election of representatives to legislative bodies are concerned, attention is drawn to footnote 1 of the report on the electoral system, which raises for discussion the question of an omnibus clause for all levels of government. TC2's brief was to deal with the national and provincial levels of government.

In respect of the national level of government, the suggested draft formulations have been incorporated and discussed at the CC and CC subcommittees as part of the National Assembly draft (section 4). In respect of provincial level of government, the suggested draft formulations have been incorporated as part of the chapter on provinces dealing with provincial legislatures (section 4(1)), which was approved by TC2 on Monday 4 September 1995. It was agreed in that TC meeting that the relevant provisions on the provincial level reflect those contained in the National Assembly draft.

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**HASSEN EBRAHIM  
EXECUTIVE DIRECTOR  
CONSTITUTIONAL ASSEMBLY**

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## **THEME COMMITTEE 2**

### **DRAFT REPORT ON BLOCK 6**

#### **THE ELECTORAL SYSTEM**

##### **INTRODUCTION**

- 1** This draft report deals with aspects of the electoral system relevant to the Constitution. It is clear from an analysis of party political and other submissions, that there is understanding for the notion that the Constitution should contain the principles governing the election of public representatives. Submissions received from political parties on the electoral system were, in general, brief. The same applies to the considerable number of other submissions (cf volumes 7, 8, 18, 23, and 25 of submissions made to Theme Committee 2).
- 2** The aim of the Theme Committee was to identify the core elements of the electoral system that should go into the Constitution, leaving detail to be governed by Act of Parliament. The Committee was guided by Constitutional Principles VIII, XVII and XIV. It was also mindful of Constitutional Principle XXXIII, which provides that there may not be a general election before 30 April 1999, unless Parliament is dissolved earlier as a result of a motion of no-confidence in the Cabinet.
- 3** Constitutional Principle VIII requires representative multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation. Constitutional Principle XVII deals with democratic representation at all levels of government, while Constitutional Principle XIV requires that provision should be made for participation of minority political parties in the legislative process in a manner consistent with democracy.
- 4** The draft report consists of three parts. The first is draft formulations to be included in the Constitution. The second is a numbered, tabular summary of the conclusions reached by the Theme Committee on each of the matters listed. The positions of political parties are briefly reflected in the "Comments" column of the table. The third part of the report deals with the written submissions received by the Committee.
- 5** In view of the fact that the written submissions of the political parties were brief and in most cases in itemised form, they are included in full in the second part of the report. The IFP did not make specific submissions on the electoral system but touched on the matter in earlier submissions. These are included in this report. As far as other submissions are concerned, useful and accurate summaries have been prepared by the CA Administration. These summaries are included in the second part of the report. There would appear to be strong support for some form of constituency element in the electoral system.



- 6** It should also be pointed out that an in-house workshop was held on the electoral system on 8 May 1995. A summarised version of the proceedings is available. Other documents at the disposal of the Committee were a prefaced collection of papers, entitled "Electoral Systems: Research Documentation" (prepared by the Research Department of the CA), and a document "An Overview of the Fundamental Principles of Selected Proportional Electoral Systems" (Department of Constitutional Development, March 1995). These papers were prepared on the request of the Theme Committee.
- 7** Most of the submissions received from political parties dealt with the election of representatives to legislative bodies. The election of the State President, provincial executives and other bodies or officials was not taken into account. It is assumed that the Constitution will contain specific provisions to cover these cases.
- 8** The right to vote (the franchise), which is linked to the electoral system, is dealt with by Theme Committees 1 and 4.
- 9** The IFP referred in its submission to a monitoring body, like the Independent Electoral Commission. This issue is addressed by Theme Committee 6.1.
- 10** Except for the DP, no party referred to the type of proportional representation that should be applied to the election of representatives. This matter was extensively addressed during the in-house workshop of 8 May 1995 and the other documents referred to in point 6 above.

## **PART 1**

### **Draft formulations for inclusion in the Constitution**

#### **1. To be included in the draft on the National Assembly as section 4:<sup>1</sup>**

The election of members of the National Assembly are conducted in terms of an electoral system which shall be based on a common voters' roll and result in general in proportional representation, as provided for by a national law.<sup>2</sup>

#### **2. To be included in the draft on the National Assembly as section 9:**

Vacancies in the National Assembly shall be filled in accordance with a national law.

#### **3. A general provision in the Constitution:**

An election for members of any legislature in the Republic shall be conducted under the supervision of an independent electoral commission, to be established by a national law.

## **PART 1**

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<sup>1</sup> The issue whether there should be an omnibus provision for elections at all levels of government, should be revisited.

<sup>2</sup> (a) The principles of multi-party democracy and universal adult suffrage are provided for elsewhere in the Constitution.

(b) Most parties and private submissions favour a system which includes elections on a constituency basis combined with party lists which results in proportional representation.

(c) Regular elections of the National Assembly is dealt with in section 5(1) of the draft formulations on the National Assembly.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
VIII; XVII	1 Multi-party democracy	All parties agree. Note: The issue is dealt with in the Bill of Rights (the freedom of association) by Theme Committee 4.		Where a party did not mention this expressly, it was strongly implied: The <b>ACDP</b> refers to "all parties at both national and regional level"; the <b>ANC</b> submission is unambiguous in its reference to a "multi-party state"; the <b>IFP, DP, NP</b> and <b>PAC</b> documents assume a multiplicity of parties; the <b>FF</b> submission refers to "a multi-party system based on democratic majority rule".
VIII	2 Regular elections	All parties agree. Note: Regular elections are provided for in the provision that the duration of the National Assembly is five years. See section 5(1) of the draft formulation on National Assembly.	Period between elections	1 The <b>ANC</b> and <b>FF</b> propose an election at least every five years. 2 The <b>DP</b> , from another submission, favours a 4 year term. The <b>DP</b> has also raised the issue of a fixed term of office. 3 The <b>ACDP, NP</b> and <b>PAC</b> submissions are silent on this issue, but from their support for the term of the National Assembly, it can be assumed that the <b>NP</b> and the <b>PAC</b> are in favour of an election at least every five years.
VIII	3 Universal adult suffrage			The issue of the franchise should be dealt with by Theme Committee 1.
VIII	4 A common voter's roll	All parties agree		1 Some parties refer in so many words to a common voters' roll ( <b>ACDP, ANC; FF</b> ); others refer to the registration of voters ( <b>DP, NP</b> ). The <b>PAC</b> is silent on this point.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
VIII	5 A combination of party list(s) and constituencies to produce a result which is "in general, proportional representation", as required by CP VIII		There is as yet no agreement of whether elections on a constituency basis should be combined with party lists, the end result of which will be proportional representation.	<p>1 The <b>ACDP</b> refers to party lists only</p> <p>2 The <b>ANC</b> suggests consideration of "both proportional and/or constituency-based representation"</p> <p>3 The <b>DP</b> favours multi-member constituencies and party lists</p> <p>4 The <b>NP</b> supports proportional representation based on lists, with "geographical allocation" of elected members to magisterial districts (in effect, multi-member constituencies); the <b>FF</b> has a similar proposal</p> <p>5 The <b>PAC</b> is in favour of proportional representation ("free list system") and a link between elected members and the voters.</p> <p>6. The <b>IFP</b> proposes a combination of party lists (to determine the amount of representation to which each party is entitled) and constituencies (to determine which candidates are elected).</p>
	6 Do the proposals apply to elections for the National Assembly only?	The principles of regular elections, a common voters' roll and in general proportional representation should apply to all levels of government.		<p>1 The <b>NP</b> submission assumes that the same system would apply to the Senate</p> <p>2 The <b>ANC</b> refers to regular elections for the provincial and national legislatures</p> <p>3 The <b>DP</b> covers only the NA</p> <p>4 The <b>FF</b> proposal relates to the "national level" only</p> <p>5 The <b>ACDP</b> and the <b>PAC</b> do not address this issue.</p>

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	7 Independent electoral commission.	An independent electoral commission is necessary to supervise elections.		This matter should be dealt with by Theme Committee 6.1, dealing with specialized institutions of government.
	8 Delimitation of constituencies	The task should be performed by an independent body such as the IEC		The DP proposes that a body like the IEC should be entrusted with this function, and that it should be done every 10 years. The IFP proposes that all electoral boundaries should be drawn by an independent body in cooperation with the political parties.
	9 Type of proportional representation to apply	It will be a matter for legislation.		Most of the parties are silent on this matter. The DP has three specific proposals in this regard (see "6. Allocation of seats", at p2 of its submission).

**Part 2**

**SUBMISSIONS**

- 1 The submissions received from political parties are contained in Addendum "A" to the report.
- 11 A summary of the submissions from individuals and other organisations (vols 7, 8, 18, and 25) is contained in Addendum "B" to the report.

**See CC documentation, Volume 2 of 11 August 1995.**

## **CONSTITUTIONAL ASSEMBLY**

### **CONSTITUTIONAL COMMITTEE MEETING OF FRIDAY 1 SEPTEMBER 1995 REPORT ON DISCUSSIONS IN CONSTITUTIONAL ASSEMBLY OF 25 AUGUST 1995**

#### **PART ONE : NATIONAL ASSEMBLY, COURTS AND ADMINISTRATION OF JUSTICE**

#### **1. NATIONAL ASSEMBLY**

##### **1.1 SIZE OF NATIONAL ASSEMBLY:**

***Issue: How many members should the National Assembly consist of ? ( See Clause 3 of Draft Formulation)***

The following views were expressed:

##### **1.1.1 The ANC said:**

- i** This matter had to be considered jointly with the issue of the electoral system. More particularly, it would depend on whether a system of pure proportional representation were agreed upon or whether constituencies were agreed. If constituencies were agreed upon, it would further depend on the number of constituencies and whether these were single or multi-member constituencies.
- ii** One had to consider the impact of a smaller National Assembly on the work of the Assembly, and alternatively, the impact of a larger Assembly on the financial resources of the country.

##### **1.1.2 The FF suggested a figure of 350. It said the CA should not be overly concerned with the size of the National Assembly and should take account of the following:**

- i** Whether the present structure was functioning well;
- ii** What the powers and function of central government would be. If more power was devolved to provinces and local government, the National Assembly could possibly be decreased;
- iii** The impact of the committee system in parliament and the fact that a smaller National Assembly would increase the burden on smaller parties; and that members would require more support to function effectively.

**1.1.3** The DP agreed that a final decision cannot be taken without a holistic look at all the structures that are to be created under the new Constitution. However, the DP suggested a figure of 300 as an "opening gambit" and identified three critical factors to take into consideration:

- i** The representivity of the National Assembly;
- ii** The issue of efficiency of members and whether size contributed to this; and
- iii** The issue of the cost-effectiveness of the new institutions.

**1.1.4** The PAC said the most important factor to consider is the representivity of the National Assembly.

- i** It agreed that the size of the Assembly would depend on the electoral system. On the issue of the electoral system, the PAC said it would support the creation of constituencies based on multi-representation from those constituencies.
- ii** One also had to look at other institutions which might be duplicating the work of the National Assembly and if one reduced these with cost-effectiveness in mind, one could possibly maintain the present size of the National Assembly.

**1.1.5** The NP agreed with other parties that the matter depended on the electoral system agreed upon. However, parties needed to be cautious about reducing its size in that :

- i** A smaller National Assembly could adversely affect its representivity, the position of small parties on parliamentary committees and the availability of Members of Parliament to the public.
- ii** Whilst the present structure is a costly one, these costs would not be dramatically affected by reducing its size by a few members.

**1.1.6** The ACDP strongly supported a smaller National Assembly of between 300 - 350 members and cited the following:

- i** The issue of representivity needed to be considered holistically in that South Africa also had nine provincial legislatures at present;
- ii** The present burden on National Assembly could be lightened with the assistance of the provincial legislatures; and
- iii** It supported the idea of proportional representation but one had to



consider the size of provinces and ensure a proper balance in parliament.

## 1.2 DURATION OF THE TERM OF THE NATIONAL ASSEMBLY:

***Issue: What should the duration of the term of the National Assembly be ?  
(See clause 5(1) of the draft formulation)***

The following views were expressed:

1.2.1 The NP said it supported a term of five years for the National Assembly and cited a number of cases of other countries in support of this view. It further motivated:

- i South Africa has always had a parliament with a five-year term; and
- ii The term should be long enough to ensure stability, continuity and economic development.

1.2.2 The ANC said it also supported a five-year term as this provided adequate time for an incoming government to develop and implement new policies. It opposed the idea of a fixed term, as proposed by the DP, as "an undemocratic approach".

1.2.3 The DP supported a four-year term and said the figures provided by the NP were flawed and that *in practice* South Africa had a four-year term since 1958.

- i It further motivated that a four-year term ensured more frequent accountability to the electorate; and that
- ii A fixed four-year term should be considered to ensure that government could take note of its executive and legislative programmes and to guard against a situation where many elections took place at different times and places.

1.2.4 The PAC also supported a five-year period as a term of office for the National Assembly as it allowed an incoming government time to implement its policies. It also supported the idea of a fixed term, to guard against possible manipulation of the electorate by the party in power.

1.2.5 The ACDP supported a fixed, five-year period for the term of office for the National Assembly.

## 1.3 ASSENT TO BILLS/ COURTS AND ADMINISTRATION OF JUSTICE

***Issue: Should the State President be entitled to withhold his or her assent to a Bill and refer it for a ruling to the Constitutional Court for a ruling;***

***and***

***Issue: Whether 20% of the members of the National Assembly, Senate or Provincial Legislature should be entitled to refer a Bill to the Constitutional Court to consider ?***

The following views were expressed:

1.3.1 The ANC said, on the issue of whether Parliament should be able to refer a Bill to the Constitutional Court, that this was an extraordinary procedure that was not required in the Constitution. However, the ANC would be prepared to look at the possibility of the President being able to refer a Bill, where there is an indication that the Bill may be unconstitutional. It motivated :

- i No other country had a provision allowing Parliament to refer a Bill to the Constitutional Court while the Bill is still before Parliament; and in those few countries which had a provision for referral, this was done by the President rather than Parliament;
- ii The concerns raised about the need to ensure that Bills are constitutional, was dealt with in that ordinary citizens had the right to take laws to the Constitutional Court;
- iii This could delay the passing of legislation and thus hold up the transformation of the country; and
- iv. It could not be argued that 20% was a "substantial" portion of Parliament.

1.3.2 The NP said:

- i The important principle was that of the supremacy of the Constitution and that the actual percentage and whether the President referred the Bill or Parliament, was in their view, a matter of detail and was open for discussion. However:
  - a It was not an adequate safeguard to say that ordinary citizens had recourse to the Constitutional Court as this could delay the matter and cause further conflict and emotion; and
  - b The fact that it existed in the Interim Constitution demonstrated how reasonable and practical a provision it is.

- ii In response to the ANC it cited various countries in which provision was made to refer legislation to a Constitutional Court or council.
- iii To withhold such a right from a certain political party violated the roots of democracy.

**1.3.3 The FF said that both the President and Parliament should be able to refer Bills to the Constitutional Court :**

- i On the one hand, one had to be careful not to place the President in a situation where he or she would appear to be a Constitutional Court of sorts. Thus, if it was clear that Parliament had not followed procedure in passing a Bill, the President had a clear responsibility to withhold his or her assent. On the issue of deciding whether it is in fact unconstitutional, the President should refer it to the Constitutional Court for a decision. The President should not be placed in a position where he or she would decide on their own on the constitutionality or otherwise of legislation;
- ii On the other hand, Parliament should also be allowed to refer Bills to the Constitutional Court according to an agreed procedure.

**1.3.4 The PAC supported the view that Parliament should have the ability to refer a Bill to the Constitutional Court before it is passed by Parliament. However, it did not support the idea that the President should have the same power. It motivated :**

- i In terms of the South African legislative system, most Bills would be piloted through Cabinet, party caucuses and Parliament. It was inconceivable that in this entire process, the issue of the constitutionality or otherwise of the Bill, would not have been resolved.
- ii Thus, by the time Parliament passed a Bill, there should be clarity on whether it is constitutional or not.
- iii The President, as the leader of the majority party would have been part of this process and it was therefore not necessary to give the President a veto power after this process, to decide on the constitutionality of a Bill. The assent by the President would for all intents and purposes become a formality.

**1.3.5 The DP:**

- i Supported the position of 20% of the members of Parliament being

able to refer a Bill to the Constitutional Court . It motivated :

- a. South Africa is a young democracy and the Constitution needed to be supported;
  - b. This provided a useful check and balance on the majority party;
  - c. This would not delay the legislative process as the Court would regard this as a matter of urgency and act accordingly; and
  - d. Reminded members that it is proposed that the procedure be applicable to provincial legislatures as well.
- ii Also supported the idea of the President being able to refer a Bill to the Constitutional Court before he had to assent to it.

#### 1.4 VACATION OF SEAT

***Issue: In terms of Clause 43(b) of the Interim Constitution, a member of the National Assembly vacates his or her seat if he or she ceases to be a member of the party that nominated him or her as a member of the National Assembly. Should a similar provision be made in the new Constitution ? ( See clause 8 of draft formulation)***

The following views were expressed:

1.4.1 The NP said that there should not be a similar provision in the new Constitution. It motivated:

- i The " imperative mandate" system as outlined in Clause 43(b) and 133(1)(b) of the Interim Constitution, implied that a member acted not in the national interest but only in the interests of those who elected him or her.
- ii This took Parliament out of the hands of the electorate and placed it in the hands of political parties. This was an assault on the democratic principle of representation and in conflict with Constitutional Principle VIII.

1.4.2 The ANC said this matter could not be decided upon in isolation from the electoral system. It would be prepared to consider not having such a provision in the new Constitution, if a qualification was built in to ensure that if and when a member "crossed the floor", a by-election would be held.

**1.4.3** The PAC agreed that this matter was linked to the issue of the electoral system but warned of the need to guard against opportunism. Thus, if a constituency system were agreed upon, the member should have to convince their constituency and come back either as an independent member or as a member of another political party.

**1.4.4** The ACDP did not support the inclusion of such a provision. It motivated:

- i** The essence of politics is the freedom of association; and
- ii** The Constitution should not be used to enforce party discipline and members of political parties should be able to true to their conscience and vote against party policies.

**1.4.5** The DP also rejected the inclusion of such a provision in the new Constitution. It motivated:

- i** The whole Constitution is based on openness and transparency, freedom of expression and association and the right to stand for office. Yet in the instance of clause 43(b) members are bound by decision which are not required to be taken openly;
- ii** A member's ability to function according to their conscience should not be dependent on the decisions of political parties;
- iii** Retaining such a provision in the new Constitution would "fossilise" the political process and prevent the natural re-alignment of political forces; and
- iv** The electoral system and the constraints of party politics would deal with individuals who abused the system.

**1.4.6** The FF also rejected the inclusion of such a provision in the new Constitution because it interfered with the natural process of constitutional development. It said that clause 43(b) had been inserted into the Interim Constitution to prevent any party in the Constitutional Assembly obtaining a 2/3rds majority for the purposes of writing a new Constitution. However, once this process was complete, there was no need for such a provision.

