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Hoof: Administrasie
Onderhandelingsforum
Wêreldhandelsentrum
JOHANNESBURG

Geagte dr Eloff

MEMORANDUM AAN TEGNIESE KOMITEE OOR GRONDWETLIKE AANGELEENTHEDE

Met verwysing na ons gesprek op Donderdag, 16 September 1993, stuur ek hiermee aan u 30 eksemplare van 'n memorandum aan die Tegniese Komitee oor Grondwetlike Aangeleenthede in sake die Derde Konsep van 'n Grondwet van die Republiek van Suid-Afrika wat dié Komitee aan die Onderhandelingsforum voorgelê het.

Ek sal dit waardeer indien u so vriendelik sal wees om die memorandum aan die lede van die Tegniese Komitee beskikbaar te stel.

By voorbaat dank

Die uwe

R C DOUGLAS
SEKRETARIS VAN DIE PARLEMENT

CL4.3

MEMORANDUM
TO
THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES
ON
THE THIRD DRAFT OUTLINE
OF
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

1 INTRODUCTION

Having recently acquired a copy of the Third Draft Outline of the Constitution of the Republic of South Africa, 1993 [dated 20 August 1993], as submitted by the Technical Committee on Constitutional Issues to the Negotiating Forum, the Secretariat of Parliament has identified a number of issues which require clarification in order to ensure the smooth operation of Parliament and to obviate possible interpretational difficulties.

I therefore respectfully submit the following points for your consideration.

2 COMMENT ON VARIOUS PROVISIONS OF DRAFT CONSTITUTION

Section 16: Assembly, Demonstration and Petition

Section 18: Freedom of Movement

Sections 16 and 18 of the Draft Constitution deal with the right of assembly and demonstration and with the right to freedom of movement. In terms of section 34 the rights entrenched in Chapter 3 [which include the right of assembly and demonstration and the right to freedom of movement] may be limited by a law applying *generally* and not *solely to an individual case*. This provision would seem to override the provisions of section 2 of the *Gatherings and Demonstrations in the Vicinity of Parliament Act, 1973* [Act 53 of 1973], which prohibits, subject to certain exceptions, all gatherings and demonstrations in the vicinity of Parliament as defined in the Schedule to the Act.

Section 35(2)(b): Ratification of declaration of state of emergency

Section 35(2)(b) stipulates that the declaration of a state of emergency and any action taken in consequence of that declaration shall cease to be valid in law unless that declaration is ratified by a majority of the total number of the directly elected members of Parliament within 14 days of the declaration.

The exact meaning of the term "directly elected members" is not clear. In terms of section 40(1) the members of the National Assembly are elected according to a system of proportional representation, of whom 200 shall be elected on national and 200 on SPR lists as provided in Schedule 5. The members of the Senate shall be elected by the members of the SPR legislatures. The question is which of these members are to be considered as having been *directly* elected.

There should be clarity on whether the declaration is to be ratified by a majority of the total number of members in an extra-Parliamentary procedure, or by Parliament [the Houses sitting in joint session] taking a decision by such a majority.

Section 39: Duration of Parliament

This section provides that Parliament may be dissolved "as a result of a vote of no confidence in the national executive". It is not clear whether, for the dissolution to become effective in this case, the vote of no confidence must be taken by Parliament as such, *eg* by the National Assembly and the Senate in joint session, or whether a vote of no confidence passed by either House would lead to the dissolution of Parliament. Furthermore it is not clear whether after such a dissolution the two-year period during which the Constitution should be drafted would start afresh.

It is also assumed that the term "national executive" is for this purpose synonymous with "Cabinet" and "Government". In this regard, please refer to the Annexure to the 11th Report [Constitutional Issues], sections 9(4) and 10.

The further question arises whether, if Parliament were to reject any finance bill, *ie* a bill appropriating revenue or moneys or imposing taxation, this should not be regarded as sufficient cause for its dissolution inasmuch as such action would be tantamount to a vote of no confidence in the "national executive".

Furthermore it is not clear whether the President would be able to also summon Parliament after a vote of no confidence in the national executive had been passed [see subsection (4)].

Section 40: Composition of the National Assembly

Section 40(2) stipulates that persons nominated as candidates on SPR party lists shall be ordinarily resident in the SPR in respect of which the party list applies. Although such persons would therefore be obliged to be resident in their SPRs at the time of nomination, would they be bound to remain resident in their SPRs once they have been elected?

Section 41: Speaker and Deputy Speaker of the National Assembly

Section 41(1): Duties, powers and functions of Speaker

Apart from the duties and functions assigned to the Speaker in terms of the Draft Constitution and the rules and orders of the National Assembly, as is provided for in subsection (1), the Speaker also derives certain duties, powers and functions from established parliamentary practice and precedents, and in terms of other existing Acts of Parliament.

For example, in terms of resolutions of the Rules Committee and its predecessors, the control of the parliamentary precincts and building complex as well as the determination of certain benefits of office of members is vested in the Speaker. He also controls the parliamentary staff, determines its service conditions, and, in terms of section 31 of the *Powers and Privileges of Parliament Act, 1963* [Act 91 of 1963], is responsible for the financial arrangements in respect of Parliament.

In the absence of rules, it is not clear what election procedure should be followed, *eg* should the presiding officer call for nominations; should every nominee be seconded; does the Speaker take the Chair immediately after his election in order to preside at the election of a Deputy Speaker under subsection (2); will the Speaker be empowered to adjourn the House after the election procedure?

Section 41(3): Deputy Speaker presides in absence of Speaker

The fact that only the Speaker or his deputy may preside over a meeting of the National Assembly could place a very heavy burden on those two office-bearers, particularly in the event of long sittings. Bearing in mind, too, that the Speaker will have numerous administrative duties to attend to, it may be as well to consider providing for the election or nomination of a panel of two or three presiding officers who can relieve the Speaker or his deputy in the Chair. Such provision could, with a suitable adjustment of this section, be made in the rules drawn up by Parliament.

Section 41(5): Filling of vacancy in office of Speaker and Deputy Speaker

Section 41(5) provides that whenever the office of Speaker or Deputy Speaker becomes vacant, the National Assembly shall "in like manner" elect a member to fill the vacancy. This implies that the procedure set out in subsections (1) and (2) should be followed, namely that the Chief Justice or another judge should act as Chairperson. In respect of

the election of a Speaker this seems a feasible procedure, but in respect of the election of a Deputy Speaker the Speaker himself could be empowered to preside.

Section 41(6): Election of acting Speaker

In terms of section 41(6) a member shall be elected "to act" as Speaker when the Speaker and the Deputy Speaker are not available. It is not clear whether it is the intention that such a member should be vested with all the powers, duties, etc, of the Speaker [see also comment under section 41(1)]. Perhaps provision should also be made for a member to act as Speaker should both the Speaker and the Deputy Speaker be unavailable during a recess in order to perform such administrative duties as may be required.

It is not clear what election procedure should be followed.

Furthermore it would be advisable to provide that the Secretary to Parliament *or an officer of Parliament designated by him* shall act as Chairperson at the election of an acting Speaker.

Section 41(7): Presiding officer has casting vote only

It is not clear whether a presiding officer who is not in the Chair may take his seat on the floor of the House and participate in a vote of the National Assembly nor is it clear what the position of the presiding officers of the National Assembly will be during a vote at a joint session of the Houses or in the Constitutional Assembly.

See proposed wording of section 62.

Section 42: Qualifications of Members of the National Assembly

Section 42(1)(e): Offices of profit

The reference to "select committee" in subparagraph (v) of paragraph (e) should be reconsidered in the light of references elsewhere in the Draft Constitution to—

- (1) "committee" of Parliament – section 55(1);
- (2) "committee" of the National Assembly or the Senate – sections 57(1) and (2);
- (3) "standing committees" of Parliament representative of all parties in the National Assembly and the Senate – section 57(4);
- (4) "joint committee consisting of members of all parties represented in Parliament" – section 58(3);
- (5) "joint committee of both Houses" – section 59(1);
- (6) "committees" of the Constitutional Assembly – section 65(6); and
- (7) "commissions, technical and parliamentary committees and other advisory bodies" appointed by the Constitutional Assembly – section 67(1).

Furthermore, consideration should be given to specifying what is included in/excluded from the definition of "remuneration". It is also not clear whether a distinction should be drawn between the terms "remuneration" and "salary".

Section 43: Vacation of Seats in the National Assembly

Section 43(1)(c): Resignation addressed to Speaker

At present a member resigns his seat in writing addressed to the Secretary to Parliament, rather than to the Speaker. This is perhaps a more practical arrangement, since the Secretary has, and no doubt will also have under the new dispensation, duties – upon which a time limit is set – to be performed upon notification of the vacation of a seat.

Section 43(1)(d): Leave of absence

Since in terms of paragraph (d) of section 43(1) a member stands to lose his seat in Parliament on the grounds of absence, it may be advisable to define clearly the meaning of the expression "15 consecutive sitting days". It seems necessary, for example, to specify whether the phrase "sitting days" refers solely to days on which the National Assembly sits in plenary session, or whether it also includes days on which only committees of the Assembly sit, or days on which joint sittings of the Houses or sittings of the Constitutional Assembly take place, etc. This would be required to cover, for example, the case where days on which plenary sessions take place are interspersed with working days on which only committees of the House sit. It might also be advisable to indicate what would be regarded as adequate attendance at meetings. An example of such a detailed definition of attendance may be found in section 2(1) of the *Payment of Members of Parliament Act, 1974* [Act 40 of 1974].

Consideration might also be given to exempting from the provisions of such a section certain office-bearers, who may be expected to have onerous outside duties that could legitimately keep them from parliamentary attendance for extended periods.

It is suggested that the grounds for leave of absence should not be prescribed in the rules and standing orders, as these are generally concerned only with the conduct of the business of the House.

Proposed section 43(1)(f): Dissolution of party which holds seats

Consideration should be given to the continued membership or otherwise of those members who hold seats won at a general election by a party that has since ceased to exist.

Section 43(2): Vacancy filled by nomination

Since the only body entitled to nominate a member to fill a vacancy, is the party which nominated the original member to sit in the National Assembly, it follows that if a party is dissolved, all seats occupied by that party up to the time of its dissolution must remain vacant until the next general election.

If section 43(1)(b) were to be omitted, it would still be the case that if a member vacated his seat on the dissolution of his party, the seat would remain vacant until the next general election.

It may therefore be advisable to provide in some other or additional way for the filling of vacancies.

Depending on the decision regarding the membership of those members who hold seats won at a general election by a party that has since ceased to exist, additional provision may have to be made for the filling of such vacancies.

Section 43(3): Person ordinarily resident in SPR

See the comment on section 40.

Section 44: Quorum

If the expression "for the exercise of its powers and for the performance of its functions" implies that a quorum of one-third of the members [134] will be required at all times, ie for debate as well as for the decision of questions, it could place a considerable burden on the Chair/Table to verify the presence of a quorum at all times. One assumes, though, that the Chair would only have the House counted in the event of the numbers being questioned from the floor.

A quorum requirement for ordinary debate could, in addition, also be misused by parties or coalitions of parties in that they could deliberately break the quorum and thereby hamper the work of Parliament.

For this reason, a number of parliaments have quorum requirements only in the case of the decision of questions.

Section 45: Oath or Affirmation by Members of the National Assembly

It is suggested that not only the Chief Justice or any judge designated by him, but also the Speaker of the National Assembly should be empowered to administer the oath or solemn affirmation to members taking their seats in the House for the first time. Specifically in the case of casual vacancies arising during the course of a session, it would be more practical and convenient for the Speaker to administer the oath or affirmation to new members than to have to arrange for the Chief Justice or another judge to come to the National Assembly for that purpose.

Section 46: Sessions of the National Assembly

Section 46(1)(a): Venue of National Assembly

Section 46(1)(a) provides that the National Assembly may sit at venues other than the Houses of Parliament in Cape Town, should the Speaker so direct.

In the light of the major administrative and logistical problems such a relocation could create, such a decision should at least be taken in consultation with the President of the Senate and the President of the Constitutional Assembly.

The standing rules and orders should also contain provisions for committees of Parliament to sit beyond the seat of Parliament in the circumstances contemplated in section 46(1)(a).

Section 46(1)(b): Session not later than 10 days after election

Section 46(1)(b) provides that a session must be held not later than 10 days after the election of the National Assembly. The *Independent Electoral Commission Bill* [B 151—93] provides that the Commission has up to 10 days after the completion of the ballot to certify that the results of an election were substantially free and fair.

As it is presumably not the intention that the first session should commence before the Commission has completed its certification, it is suggested that the first sitting day of Parliament should take place not later than a certain specified time after the ratification of the election results. Even then, from an administrative point of view, a period longer than 10 days would almost certainly be required, as this Office would have to communicate with and arrange travelling facilities for the new members, allocate office accommodation and attend to numerous other matters relating to their membership.

Section 46(1)(c): National Assembly determines dates of session

Any resolution regarding its sessions should where necessary perhaps be taken by the National Assembly in consultation with the Senate.

Section 46(2): Sitting days and hours

The regulation of sitting days and hours of sitting could be regarded as entirely a household matter and it is therefore perhaps not necessary to grant the Houses the right to regulate sitting days and hours of sitting. This provision in any event appears to be superfluous in the light of the provisions of section 57(1).

See also paragraph 4: **Parliamentary Powers and Privileges** below.

Section 46(3): Alteration of date of commencement

It should perhaps be stipulated that alteration of the date of commencement should be made known, *eg* by the insertion after the words "The President may" of the words "by proclamation in the Gazette".

Section 47: Senators elected by members of SPR

The Senate will be composed of members elected by "the members of" the SPR legislature. It is not clear whether the intention is that the members sitting as the SPR legislature will elect Senators, or whether a separate meeting of such members [*ie* not a meeting of the SPR legislature] is to be called for such election. If the latter, section 47 should perhaps specify who should convene a meeting of such members, who shall preside, and the method of election.

Section 48: President and Deputy President of the Senate

Section 48(1): Duties, powers and functions of President

The comments in respect of the duties, powers and functions of the Speaker [see section 41(1)] apply equally in the case of the President of the Senate.

Particular attention should be given to the control of the parliamentary staff and precincts.

Section 48(3): Presiding over joint meetings

In terms of section 48(3) the President of the Senate shall preside over meetings of *inter alia* joint sessions of the National Assembly and the Senate. On the other hand, the Constitutional Assembly constituted in terms of section 65 shall also be "the National Assembly and the Senate sitting in joint session", but will then elect its own presiding officer [who may therefore not necessarily be the President of the Senate].

See also the comments on section 48(7) and section 62 regarding a presiding officer's vote and section 65 regarding the status of the Constitutional Assembly.

Section 48(5): Filling of vacancy in office of President and Deputy President

The comments in respect of a vacancy in the office of Speaker [see section 41(5)] apply equally in the case of a vacancy in the office of the President of the Senate.

Section 48(6): Election of acting President

The comments in respect of the election of an acting Speaker [see section 41(6)] apply equally in the case of the election of an acting President of the Senate.

See also the comments on section 41(3) regarding the appointment of a panel of presiding officers.

Section 48(7): Presiding officer has casting vote only

It is not clear whether a presiding officer who is not in the Chair may participate in a vote in the Senate or in a joint meeting and what the position of the Presiding Officers of the Senate will be in a meeting of the Constitutional Assembly.

See proposed wording of section 62.

Section 51: Quorum

The comments in respect of quorum requirements for the National Assembly [see section 44] apply equally in the case of quorum requirements for the Senate.

Section 52: Oath or Affirmation by Senators

The comments in respect of the making and subscribing of an oath or solemn affirmation by members of the National Assembly [see section 45] apply equally in the case of Senators.

Section 53: Vacation of Seats by Senators

Section 53(1)(b): Resignation addressed to President

See comments on section 43(1)(c).

Section 53(1)(c): Leave of absence

See the comments on section 43(1)(d). It is also noted that Senators may not absent themselves for periods in excess of 30 consecutive sitting days while members of the National Assembly may not absent themselves for periods in excess of 15 consecutive sitting days.

Section 53(2): Vacancy filled by nomination

The comments in regard to the filling of casual vacancies in the National Assembly [see section 43(2)] apply equally in the case of casual vacancies in the Senate.

Section 54: Sessions of the Senate

Section 54(1)(a): Venue of the Senate

The comments in regard to the Speaker's power to change the venue of the National Assembly in certain circumstances [see section 46(1)(a)] apply equally in the case of the powers granted to the President of the Senate to change the venue of the Senate.

Section 54(1)(b): Session not later than 10 days after election

The comments in regard to the commencement of the National Assembly within 10 days after the general election [see section 46(1)(b)] apply equally in the case of the Senate.

Section 54(1)(c): Senate determines dates of session

The comments in regard to the determination of sessions of the National Assembly [see section 46(1)(c)] apply equally in the case of the Senate.

Section 54(2): Sitting days and hours

The comments in regard to the sitting days and hours of the National Assembly [see section 46(2)] apply equally in the case of the Senate.

Section 54(3): Alteration of date of commencement

The comments in regard to the alteration by the National Assembly of its date of commencement [see section 46(3)] apply equally in the case of the Senate.

Sections 55 – 7: See paragraph 4: **Parliamentary Powers and Privileges.**

Section 58: Ordinary legislation**Section 58(1): Definition of ordinary legislation**

This subsection provides that "laws relating to finance" will not be considered to be "ordinary legislation". However, many bills that do not exclusively "appropriate revenue or moneys or impose taxation" [see section 59] will nevertheless directly or indirectly "relate to finance". It is understood that the intention is that such bills would be regarded as "ordinary legislation" for purposes of the Act. Substituting "money bills/finance bills as provided for in section 59" for the expression "laws relating to finance" would perhaps put the matter beyond doubt.

Section 58(3): Referral of ordinary legislation to joint committee

In terms of this subsection any ordinary legislation passed by one House and rejected by the other is to be referred to "a joint committee consisting of members of all parties represented in Parliament". However, should a party or parties in Parliament refuse to be represented on such a joint committee in respect of any bill, it could be argued that the terms of the Constitution have not been complied with. Consideration should therefore be given to providing for this eventuality.

Furthermore, as all the parties represented in Parliament could conceivably be represented in each House, the effect could be that the "joint committee" would consist of members of only one House. It would therefore perhaps be advisable to amend the provision in such a way as to ensure that both Houses will be represented on the committee.

Section 59: Finance Bills

See the comments on section 58(1) regarding the term "finance bill".

Section 59(1): Introduction of finance bill

The manner in which and process by which a money bill or finance bill is introduced in the National Assembly in terms of this subsection could, it is respectfully suggested, give rise to problems. When the budget proposals for any year are made public, they have an immediate impact on the economy. For that reason they are customarily regarded as highly confidential until they are officially introduced in Parliament by way of the budget speech. If, before the introduction of the budget in the National Assembly, it must be considered and reported on by a joint committee of both Houses and possibly by the Financial and Fiscal Commission, as the subsection now provides, it could prove to be very difficult to ensure its confidentiality until the time of its formal introduction.

Furthermore, the joint committee would have to consider a matter which would not yet have been formally laid before or introduced in Parliament. A possible solution would be for the Commission to make its input at the drafting stage, *ie* before the introduction of the bill in Parliament, and for the budget to stand referred to a joint committee of the Houses immediately after its formal introduction by way of the budget speech.

A further problem with the provisions of section 59(1) is that it is not clear how the reports of the joint committee and the Commission are to be dealt with by Parliament. Presumably, the joint committee, if not the Commission, will not be at liberty to amend a finance bill.

The manner in which Parliament is to deal with a finance bill after its introduction should perhaps preferably be left for Parliament itself to determine and prescribe in its Rules. The Constitution would nevertheless define the role of the Senate vis-a-vis the National Assembly and provide a deadlock-breaking mechanism, as it indeed does in subsections (3) to (5).

Sections 59(3) and (4): Reconsideration of finance bill

It is noted that the National Assembly will reconsider a finance bill only if the Senate rejects or fails to pass it within the prescribed period. However, the Senate may wish to propose an amendment without being compelled on those grounds to reject the bill in order to ensure its reconsideration by the National Assembly. Consideration should therefore perhaps be given to providing that the bill will also be reconsidered by the National Assembly if the Senate passes the bill but also proposes an amendment.

Section 59(5): Presentation of finance bill for assent

Section 59(5) provides that a finance bill adopted by the National Assembly after reconsideration "may" thereafter be presented to the President for his or her assent. It is thought that the provision should read "shall" thereafter be presented ..., in order to indicate that that step will necessarily follow upon the bill's adoption.

Section 62: Requisite Majorities

Section 62 deals with the required majorities for the passing of Bills and for the taking of decisions or resolutions by the National Assembly or the Senate. It is suggested that the following wording be considered:

Save as provided in this Constitution all questions in the National Assembly or the Senate shall be determined by a majority of votes of members present other than the presiding officer, who shall, however, have and exercise a casting vote in the case of an equality of votes.

Section 63: Assent to Bills

Publication of an Act in the *Government Gazette* is not ordinarily necessary for it to be a valid Act of Parliament.

Section 64: Signature and Enrolments of Acts

As far as section 64(2) is concerned, it is felt that it would perhaps be more appropriate for the Chief Justice to regulate the protection of the copy of the Act as it will be kept in a building under his or her control. Parliament should not make regulations which bind the office of the Chief Justice.

The Constitution should perhaps also stipulate who is responsible for lodging an Act in the office of the Registrar of the Appellate Division.

Section 65: The Constitution-making Body

The wording of this section would seem to indicate that the Constitutional Assembly in session will not be a normal joint session of the Houses, *ie* a joint session as contemplated in, *inter alia*, section 48(3), but a totally separate meeting. The Constitutional Assembly shall elect its own presiding officer, it may make its own rules of procedure and may appoint its own commissions, etc, and is granted specific legislative authority to draw up a Bill of Rights [see section 37] and a new Constitution [see section 65(2)], as well as to amend Chapter 5 of the Draft Constitution [see section 69(2)].

In the light of the above it would appear that the Constitutional Assembly could in fact be regarded as a further component of the Legislature. If this assumption is correct, the following aspects may need further clarification:

- (1) Should a stipulation regarding the seat of the Constitutional Assembly not be made [see sections 46(1)(a) and 54(1)(a)].
- (2) No mention is made of the election procedure of the presiding officer. It is therefore not clear whether the Secretary to Parliament shall preside at such election meeting, or whether the Chief Justice or another judge shall preside.
- (3) In terms of section 65(6) the Constitutional Assembly may make its own rules. It is not clear when these are to be drafted and/or approved. The question arises as to whether such rules ought to be drafted in advance [*ie* before the first meeting of the Constitutional Assembly] by some other body, and if so, at whose instance.
- (4) It is also not clear whether normal parliamentary conventions and precedents will apply in this meeting.
- (5) It is not clear what powers, other than the normal powers to maintain order, the President of the Constitutional Assembly will have.
- (6) Section 69(2) stipulates a quorum requirement for amendments of the provisions of Chapter 5. It is not clear what the quorum requirements are for the conducting of other duties and business of the Constitutional Assembly.
- (7) It is not clear whether the Constitutional Assembly will be able to regulate its sessions and sittings in the same way as the National Assembly [see section 46] and the Senate [see section 54] will be able to regulate theirs.
- (8) It is not clear who will be responsible for the financial administration of the Constitutional Assembly.

It is suggested that "and" be substituted for the first "or" in section 65(5).

Section 67(1): Power to appoint commissions, etc

In terms of section 67(1) the Constitutional Assembly may appoint "commissions", "technical committees" and "advisory bodies". If these are to be extra-parliamentary bodies, under whose administrative control will they function; who will be responsible for their financial arrangements, *eg* expenditure incurred in connection with their enquiries, members' remuneration, etc; what the powers of these bodies will be; and whether their members will enjoy any privileges and immunities [see section 55].

Section 68: Adoption of new constitutional text

The terms "adopted", "approved", "supported" and "accepted", and derivatives thereof, are used in a number of instances in section 68 apparently with the same meaning. This possibly needs refinement.

The period of thirty days referred to in subsections (3) and (4) of section 68 presumably refers to calendar days. It must be borne in mind that the thirty days could expire in a recess, in which event Parliament may need to be specially convened before the expiration of such time in order to comply with this requirement.

As the National Assembly and the Senate may well commence their first sessions on different dates [see sections 46(1)(6) and 54(1)(b) respectively], the requirement in section 68(1) that the new constitutional text is to be adopted by the Constitutional Assembly within two years "from the commencement of the first session of Parliament" may lead to confusion. Is it perhaps the intention that the two-year time span should be linked to the first meeting of the Constitutional Assembly [see section 65(3)]?

3 CHAPTER 9: SPR LEGISLATURES

Certain provisions in Chapter 9 may pose the same problems for the SPR Administrations as those that are foreseen in respect of the central Parliament. I have decided, however, not to make any detailed comment in that regard, save to say that, as far as section 109(2) is concerned, it is felt that Parliament should not make regulations which bind the office of the Chief Justice or the SPR legislature, and that it would perhaps be more appropriate for the Chief Justice to regulate the protection of copies of SPR legislation as these will be kept in a building under his or her control.

4 PARLIAMENTARY POWERS AND PRIVILEGES

Section 55 deals with privileges and immunities of members of Parliament. The Draft Constitution is otherwise silent on those powers and privileges of Parliament itself which form the essence of the current Act on that subject, namely the *Powers and Privileges of Parliament Act, 1963* [Act 91 of 1963], and upon which a substantial part of the custom, practice and standing rules and orders applied in the present Parliament is based.

The protection which section 55(1) seeks to confer on members specifically [and which is contained in section 8 of Act 91 of 1963], is derived from or an effect of the wider parliamentary privilege of freedom of speech [as conferred at present by section 2(1) of the said Act]. It appears to be an accepted corollary to that privilege that not only members but also strangers taking part in parliamentary proceedings are afforded such protection. That appears to be the underlying reason why express provision had to be made for the exclusion from the immunity of witnesses who are not members [section 2(3) of Act 91 of 1963]. Moreover, it is the only ground upon which protection may be afforded to office-bearers who, although not members of Parliament, may under section 65 of the Constitution Act, 1983, or the standing rules of Parliament, take part in parliamentary proceedings.

The parliamentary privilege of freedom of speech is founded upon another privilege or power vested in Parliament. Parliament has, namely, complete control over its internal affairs and its members, including its own procedures and the right of any person to sit as a member. Any outside interference in the examination, discussion, decision or adjudication of matters arising in this sphere is excluded, except in so far as it has been authorized by Parliament itself; for example, section 33 of Act 91 of 1963 and Chapter VI of the *Electoral Act, 1975* [Act 45 of 1979].

In support of these attributes of Parliament, it has the power to punish members and non-members alike for breach of privilege or for any contempt committed against it. Such punishment may take the form of a reprimand, a fine, suspension or even expulsion or imprisonment. It forms the basis of standing rules authorizing the Speaker to punish a recalcitrant member by, for example, suspending him.

A clear distinction should be drawn between the parliamentary privileges, immunities and powers referred to above and the power of Parliament to make laws. The privileges and immunities are directed inward, toward Parliament itself as an autonomous institution, and

are generally regarded as necessary for the proper functioning of Parliament. The legislative power is directed outward, toward the people of the country. It is submitted that Parliament in its legislative capacity is the proper subject to be bound by the provisions of Chapter 3 of the Draft Constitution [see section 7(1)(a) thereof].

The Draft Constitution itself contains provisions which appear to be based on such a distinction; for example, section 55(1) would no doubt be invoked to debar any legal action to enforce the right to respect for and protection of personal dignity [section 10] where the would-be plaintiff claims to have been defamed in Parliament by a member thereof.

Apart from the omission from the Draft Constitution of any reference to the privileges and immunities of Parliament itself, there are substantive provisions in the Draft which are not or not entirely compatible with such privileges and immunities and which raise doubts as to any intention to retain them or as to the extent of their retention.

Members of the parliamentary staff are appointed by, or under the authority of, Parliament acting, not in terms of any law passed for that purpose, but solely under its privilege or power to control its internal affairs. In the final analysis Parliament, not the Secretary or the Speaker, is the employer of such staff. It is not clear how section 28 of the Draft Constitution would be applicable in such circumstances.

The right of public and media access to meetings of the Houses, to be conferred by section 56, will be consistent with the exclusive control hitherto exercised by Parliament, through the Speaker, over the precincts of Parliament and its own meetings, only if the reasonableness of such control is beyond doubt. Assurances that the control is indeed reasonable would undoubtedly not be accepted by everybody under all circumstances. The right to be so expressly conferred could hardly be said to support the efforts of the Speaker and his officials to ensure the safety of members, the security of the precincts of Parliament and the orderliness of meetings.

If Parliament retains full control over ordering its own internal affairs, there is no need for a provision such as section 57. If, however, any provision is made in this regard, it would be sufficient to merely confirm the power of the Houses by stating that each may make rules and orders for the order and conduct of its business and proceedings and that they may jointly make rules and orders for the conduct of their separate or joint proceedings.

The provisions relating to committees in section 57 are unnecessary and may prove to be needless restrictions on the Houses when they wish to institute committees according to practical needs. Moreover, committees are instruments created and used by Parliament or a House for its own purposes. The terms of reference and powers of each committee are framed in accordance with the task assigned to it. It is suggested that the reference to restrictions on access to committees (implying a right to such access, but not stating whose right it is), as also subsection (2), conferring a power to *subpoena* on all committees, should be omitted. These are matters which should be dealt with in the rules either generally or in respect of each committee or of committees belonging to the same category. It should be borne in mind that the summoning of witnesses may entail considerable expense.

Furthermore, a requirement that a standing committee must represent all parties in the National Assembly and the Senate [see sections 57(4) and 58(3)], presents an opportunity to one party [even one member] to frustrate the wishes of Parliament and the Executive by refusing to participate. Nor is it advisable to confer functions by Act of Parliament on parliamentary committees, whose existence may be of a temporary nature.

5 FINANCIAL ADMINISTRATION IN RESPECT OF PARLIAMENT

Section 31 of the *Powers and Privileges of Parliament Act, 1963* [Act 91 of 1963], vests the control over the moneys for the services of Parliament in the Speaker. This is in conformity with the autonomy of Parliament [see paragraph 4: **Parliamentary Powers and**

Privileges] as the legislative arm of the State, and means *inter alia* that the estimates for those services are not formally subject to the approval of the Treasury or any other executive organ. The Draft Constitution is silent on these matters. Whether Parliament is to retain its independence in this regard or is to be subject to some other dispensation is a question to which a clear answer is required in order to ensure a smooth transition.

6 TRANSITIONAL PROVISIONS

It is assumed that transitional arrangements in the Draft Constitution will include provisions regarding the following Acts which concern Parliament and its members:

- (a) Payment of Members of Parliament Act, 1974 [Act 40 of 1974];
- (b) Powers and Privileges of Parliament Act, 1963 [Act 91 of 1963];
- (c) Parliamentary and Provincial Medical Aid Scheme Act, 1975 [Act 28 of 1975]; and
- (d) Members and Political Office-bearers Pension Scheme Act, 1984 [Act 112 of 1984].

7 POLITICAL ACTIVITIES BY PARLIAMENTARY STAFF

Sections 21(1)(a) and (b) state that every person shall have the right "to participate in the activities of a political party" and "to campaign for a political party or cause". It is noted that the limitation clause [section 34] as well as *Constitutional Principle No XXVII* allow for reasonable and justifiable limitations to be imposed on the individual's political rights in certain circumstances, notably when such individual is a member of the security forces.

It is a long-standing tradition in the South African Parliament, as in many other parliaments, that parliamentary staff do not engage in party-political activities or in any way further or prejudice party-political interest.

In order for them to provide a completely impartial and professional service and to enjoy the trust of all members of Parliament, regardless of political affiliation, it is necessary for them to be regarded exclusively as "servants of Parliament". Any suggestion of Government or political patronage would tend to erode their ability to perform their functions effectively.

It is respectfully suggested, therefore, that in the interests of Parliament itself the political rights of parliamentary staff should remain subject to prescribed limitations.

8 CONCLUSION

In conclusion I should like to add that, should oral elucidation of the above comments be required, my colleagues and I will be most happy to provide it.



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SECRETARY TO PARLIAMENT

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