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**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**DRAFT REPORT ON DISCUSSIONS  
19 FEBRUARY 1996**

## CONSTITUTIONAL ASSEMBLY

### DRAFT REPORT

#### CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING MONDAY 19 FEBRUARY 1996

#### 1. OPENING

1.1 Mr. Ramaphosa opened the meeting at 10h14.

1.2 The following documents were tabled:

*Draft Formulations on Finance prepared by the Ad Hoc Committee on Finance dated 16 February 1996*

*Technical Refinement Team's revised formulation on the National Assembly Draft on Inter-governmental co-operation prepared by the Technical Advisors in the delegation to Germany*

*Report by the delegation of CA members and Technical Advisors on the trip to Germany.*

*Commission on Provincial Government: Recommendations to the Constitutional Assembly in terms of Section 164 of the Constitution of the Republic of South Africa 1993. - 16 February 1996*

*DP submission on Council of Provinces/ Senate and National and Provincial Legislative and Executive Competencies*

*Draft on National and Provincial Legislative Competencies prepared by the Technical Advisors in the delegation to Germany*

*Draft report of Discussions 12 February 1996*

#### 1.3 Chapter 13: Security Services

The meeting agreed that parties would meet on a multi-lateral basis on Friday 23 February 1996 to finalise a number of issues in Chapter 13 on the Security Services. A report-back would be given to the CC Sub-Committee on Wednesday 28 February 1996. It was further agreed that the Administration would make the necessary arrangements for the meeting.

#### 2. FINANCE

2.1 Dr Davies spoke to the document entitled: "*Draft Formulations on Finance - 16 February 1996*".

## 2.2 Section 148: Sources of provincial funding

- 2.2.1 The meeting agreed that this section be flagged for further discussion when the chapter on Local Government is finalised.
- 2.2.2 Regarding Section 148(1)(a), the DP expressed concern about the phrase "*and determined in terms of Section 193*" and stated that it should be ensured that the addition of this phrase did not weaken the provinces equitable share of revenue collected nationally.
- 2.2.3 Dr Davies reported that there was a conceptual difference between the concept of "*revenue collected nationally*" and the concept of "*national revenue*" and that this section had been redrafted in an attempt to take into account the vertical and horizontal distribution of revenue and to tighten up the exact definition.
- 2.2.4 The meeting agreed to give this matter further consideration when discussing Section 193.

## 2.3 Section 149:

- 2.3.1 The meeting noted that Section 149 is the present Section 193.

## 2.4 Section 150: Provincial Taxes

- 2.4.1 Regarding Section 150(1), the meeting agreed that this section be retained as it is, but noted that the DP reserved its position and had expressed the view that there should be exclusive provincial taxes.
- 2.4.2 Regarding Section 150(2(a), the meeting agreed that the Technical Refinement Team be requested to :
- i investigate the precise legal meaning of the test in this section and
  - ii reformulate to incorporate "*user charges*" in this section and not in a separate section.
- 2.4.3 The meeting noted a typographical error that the reference in Footnote 19 was to S150(2)(a) and not (b).

**2.5 Section 151: Provincial Loans**

2.5.1 Regarding Section 151(1) and 151(2), it was agreed that the Technical Refinement Team should redraft to provide more technical clarity and consistency between the two subsections. However, in doing so, they should ensure that the meaning is not changed, that is, **that one section referred to a short term borrowing function and the other to a far more discretionary one operating within a framework.** (Sue, could we listen to the tape - Alec and Rob did explain this more clearly - am concerned that this sounds a bit vague for purposes of record)

2.5.2 The meeting agreed to delete Section 151(4) as this was covered in Section 190.

**2.6 Section 151A: Provincial user charges**

2.6.1 It was agreed that this section be incorporated in Section 150(2)(a).

**2.7 Section 152:**

2.7.1 The meeting noted that this section had been moved to Chapter 14.

**2.8 Section 153: Provincial revenue funds**

2.8.1 It was agreed that this issue be flagged for further consideration when the chapter on Local Government had been discussed.

**2.9 Section 154: Provincial Constitutions**

2.9.1 The meeting accepted the intention of the proposed Section 154(4) but requested the Technical Refinement Team to reformulate this subsection so that this intention is clearly communicated.

2.9.2 The ANC stated that it had proposed the insertion of section 154(4) in order to cover the variations in provincial constitutions which may have financial implications.

2.9.3 The NP supported the intention of the subsection but agreed to its insertion in brackets as it may wish to revisit the issue once the Technical Refinement Team had provided the reformulation.

## 2.10 Auditor-General

Dr Davies reported that a meeting had taken place with the Auditor-General and his legal advisors in order to clarify a number of issues relating to the office of the Auditor-General.

## 2.11 Section 111: Functions of Auditor-General

2.11.1 The meeting agreed to Section 111 subject to the Technical Refinement Team providing a reformulation which takes into account:

- i the inclusion in Section 111(3) of a phrase to convey a sense of speed or expeditious submission of reports.
- ii the possible inclusion of an overall reference that "*national legislation shall provide for*" the structure of the Attorney-General.

2.11.2 The DP proposed the insertion in Section 111(3) of the words "*to the department/institution or accounting entity being audited*".

2.11.3 The ANC proposed that the formulation be retained as it is because this defined the constitutional responsibility and accountability of the Auditor-General and not the operating responsibility which would be provided for in legislation.

## 2.12 Section 112: Tenure and remuneration

2.12.1 Regarding Section 112(1), the meeting agreed that the Technical Refinement Team should reformulate to ensure that the intention is clear that it is a fixed term that is meant.

2.12.2 Regarding Section 112(2), the meeting agreed that the intention of the subsection was to prevent any "malicious interference" with the functions of the Auditor-General. They requested the Technical Refinement Team to consider whether this section was necessary or whether the Auditor-General was already protected by the independence of these institutions in this Chapter.

- 2.12.3 The Ad Hoc committee reported that there had been a strong submission from the Auditor-General for the inclusion of this provision and that this was in line with the treatment of the judiciary but that there were reservations about whether this subsection should be included. It was noted from the Panel, that the reason for providing this protection to Judges was to avoid placing them in an invidious position, should they be called upon to cast judgement in a dispute involving their own remuneration.

### 2.13 Section 112A: Acting Auditors-General

- 2.13.1 The meeting agreed to the intention of this section but requested the Technical Refinement Team to reformulate and to report back to the CC Subcommittee with a proposal which considers:
- i a possible a general clause applicable to all appointments in the Constitution and whether it is necessary in such a provision to bestow the necessary powers upon the Acting official; and
  - ii the formulation in Section 191(5) of the Interim Constitution.

### 2.14 Section 115: Appointments

- 2.14.1 Regarding Section 115(2), the meeting agreed to delete the words in brackets [*who does not hold office in any political party of organisation*] as this was covered by S106(2), but noted that the DP agreed to the removal of these words from this section but would want them included in similar provisions on the Financial and Fiscal Commission.
- 2.14.2 Regarding the "*committee*" referred to in Section 115(4)(a) and Section 116(2), the meeting noted that the issue of the composition of the committees was the subject of party discussions and agreed to defer discussion until the outcome of party discussions on the matter.

**2.15 Section 116: Removal from office**

2.15.1 Regarding Section 116(1)(a), the meeting agreed that the Technical Refinement Team should consider the use of the term "*misconduct*" as opposed to "*misbehaviour*" or "*gross misconduct*" taking into account:

- i that the standard set is not too high but neither should it be made frivolous and
- ii the distinction in labour legislation between "*misbehaviour*" and "*gross misconduct*".

2.15.2 The DP supported the insertion of "*gross misconduct*" which was the term used in relation to the judiciary and suggested that this be standardised for both the judiciary and the Auditor-General.

**2.16 Section 186: National revenue fund**

2.16.1 The meeting agreed to Section 186(1).

2.16.2 Regarding Section 186(2), the meeting agreed that the Technical Refinement Team further consider the term "*revenue collected nationally*" to ensure the necessary distinction between this term and "*national revenue*". (See 2.20.1 below)

**2.17 Section 187: National and provincial budgets**

2.17.1 The meeting noted that the FF had reserved its position.

**2.18 Section 188: Treasury Control**

2.18.1 Regarding Section 188(2)(a), the meeting agreed that this subsection be revisited when discussion on the second house is finalised.

2.18.2 Regarding Section 188(2)(c), the meeting agreed that this issue be revisited when discussion on the second house is finalised and noted that the DP proposed sunset clauses and special majorities.

**2.19 Section 192: Remuneration of persons holding public office**

- 2.19.1 The meeting agreed to this section subject to:
- i Section 192(1)(d) being retained in brackets and being revisited when the chapter on traditional authorities is finalised.
  - ii The deletion of the words "*and impartial*" in Section 192(3).
- 2.19.2 The meeting accepted the explanation from the Panel that reference to the Cabinet in Section 192(1)(a) included the President and Deputy President as expressed in Section 85.

**2.20 Section 193: Equitable sharing and allocations to provinces**

- 2.20.1 The meeting agreed that the Technical Refinement Team consider the term "*revenue collected nationally*" in relation to this section, Section 148 and Section 186 to ensure a distinction between revenue collected nationally which is divided on a vertical and horizontal basis and national revenue which is revenue collected nationally which *belongs* to the national government..
- 2.20.2 It was agreed that Section 193(2)(d) be revisited when the chapter on Provinces is finalised.
- 2.20.3 The meeting agreed to flag Section 193(2)(h) and Section 193(3)(b) for further consideration when Local Government is finalised.

**2.21 Section 196: Appointment of members**

- 2.21.1 The meeting agreed to await the memorandum from the Panel on the question of "*and may not hold office in any political organisation or party*" before considering the matter further.

- 2.22 The meeting agreed that when the chapters on local government, the second house and the provincial competencies had been finalised, the Ad Hoc Committee would reconvene to give further consideration to financial aspects of these chapters.



### **3. NATIONAL ASSEMBLY**

#### **3.1 Section 41: Composition and election of the National Assembly**

3.1.1 The meeting agreed to defer discussion of the electoral system to allow parties to complete their discussions on this matter.

3.1.2 The ANC stated that it would give serious consideration to the inclusion of the word *[results]* when finalising the formulation.

3.1.3 The meeting noted that the Technical Refinement Team was in the process of reformulating Section 42(1)(a)

#### **3.2 Section 45: Sittings and recess periods**

3.2.1 Regarding Section 45(3) relating to the seat of the National Assembly, the NP reported that it was still considering its position.

#### **3.3 Section 46: Elections and duration of National Assembly**

3.3.1 The meeting agreed that the Technical Refinement Team should reformulate taking into account the proposals of the DP and ANC and the formulation in Section 93 dealing with the National Executive and that the reformulation should avoid conflating elections with votes of no confidence. It was agreed that the Technical Refinement Team should interact with the parties to obtain a record of agreements reached to assist in the redrafting process.

3.3.2 The ANC proposed a formulation along the following lines:

*"The President with the concurrence of the majority of the National Assembly may call an election before its terms expires."*

3.3.3 The DP proposed that votes of no confidence should remain in the chapter on the National Executive and that Section S46(1) be redrafted along the lines :

*"The National Assembly is elected for a term of five years unless it is dissolved prior to that term in terms of the Constitution."*

3.3.4 The DP stated its preference for a fixed term to apply to the provinces and to local government and would agree to a fixed term with the degree of flexibility that the President may call a snap election with the concurrence of the majority of the National Assembly.

3.3.5 Regarding Section 46(3), the Panel clarified that this referred to the side-bar note in the Working Draft and referred to the notion that the electoral commission only declare the results free and fair. The period would be made clear in Section 113 and these clauses would refer to that section. ?? MARION

3.3.6 The meeting noted this clarification and agreed that it was not ready to propose a specific period.

#### **3.4 Section 50: Internal autonomy**

3.4.1 The meeting agreed to the deletion of the footnote.

#### **3.5 Section: 52: Bills**

3.5.1 The meeting agreed that this matter be deferred for further discussion between the parties.

#### **3.6 Section 53: Constitutional amendments**

3.6.1 It was agreed that this matter stand over for further discussion by parties.

#### **3.7 Section 54A: Application by members to Constitutional Court**

3.7.1 The NP requested clarification on the practical effects of the 30 day time limit and proposed that the word "*must*" in Section 54A(3) be replaced with "*may*" and the rest of the sentence be deleted so as to read:

*"If the application is unsuccessful the Constitutional Court may order the applicants to pay the costs."*

3.7.2 The ANC expressed the view that based on its understanding of the issue, the word "*must*" should be retained and that section 54A(3) should remain as it is.

3.7.3 The DP expressed concern regarding the question of costs stating that the implication was that if the Constitutional Court believed that the application had reasonable prospects of success, the National Assembly would bear the costs of the application and that, if that is the case, this should be stated explicitly in the Constitution and not in an indirect reference.

3.7.4 Mr De Lange referred the meeting to Section 99(b) in the Chapter on the Courts which is the general clause which sets out what a Constitutional Court can do as far as costs are concerned. He stated that the ANC's position was that in this particular issue once an application has been brought, then the general clause does not apply and this section would apply. Where the smaller parties or one third of the parties wished to bring an application all they would have to show is a reasonable prospect of success. When they have done so, then this clause applies and not the general clause. The general clause should remain in the chapter on the Courts and that is the way in which the courts would deal with cost orders and would make a just and equitable order.

3.7.5 On this basis, the ANC opposed any further delimitation of the kind of court order that can be made in this regard as this is catered for in the general provision.

3.7.6 The meeting agreed that Section 54A be referred for further discussion by parties with the attendance of the Panel of Experts and with consideration being given to the statements made by Mr De Lange.

**4. CHAPTER 4: COUNCIL OF PROVINCES/ SENATE  
CHAPTER 8: PROVINCES  
CHAPTER 9: COMPETENCIES**

4.1 The Chairperson expressed disappointment that there had been no progress on these matters and that a composite draft had not been produced.

4.2 The meeting agreed to the proposal from the Chairperson and Deputy Chairperson that a multi-lateral meeting be held on Monday 26 February 1996 at 10h00 to discuss the Chapters on Senate/Council of Provinces, Provinces and Competencies and that this meeting would continue until a point of agreement was reached. It was further agreed that prior to the meeting parties should continue to hold bilateral discussions.

4.3 Mr Gordhan reported that arising out of the trip to Germany, the Technical Advisors had formulated a proposal which could have served as the way forward on the issues of the Senate/COP and Competencies. There had been many bilaterals between the ANC and the NP on these particular questions and a fair amount of agreement had emerged. However the ANC expressed its disappointment that after many weeks of negotiating in good faith at a bilateral level, it appeared that matters had reached almost a deadlock and there now appeared to be minimal agreement. He was therefore unable to report substantial progress.

- 4.4 Mr Ackermann of the NP stated that the issue of the Senate was a difficult one and it would take time for an agreement to be reached. He drew the meeting's attention to the fact that there was also a minority report of one of the technical advisors which should be taken into account. The NP stated that it had faith that a solution could be found through further bilaterals and gave its assurance that it was committed to continuing negotiations which would be conducted in good faith and in which agreement could be reached.
- 4.5 The DP proposed structured multi-laterals and argued strongly that there is sufficient common ground for an agreement to be reached.
- 4.6 Mr De Lange reported on the progress which had been made in the meetings between the parties with regard to the question of Competencies. He summarised the position as follows:
- 4.6.1 Following the trip to Germany a document was drafted in particular by Adv Grove with Mr Van der Merwe and Mr Haysom adding their expertise. This document was used as the basis for discussion in bilaterals and both the ANC and NP were in agreement with the framework of that document. He noted that there were a few technical aspects which the parties agreed needed to be resolved and which were being attended to by the Technical Advisors. There are only two outstanding aspects which could be resolved in further discussions namely:
- i The presumption in the proposal around the issue of what is the "*national objective*". He reported that there has been discussion around the term "*strategic interests*" and that parties were unfamiliar with this term and had requested the advisors to give further consideration to this.
  - ii When there is Council of Provinces or a Senate, what will its function be in the drafting of legislation particularly in those areas that are concurrent between national and provincial government.
- 4.6.2 He noted that the COP/Senate proposal was linked to the question of Competencies and further consideration would have to be given to this matter.
- 4.7 Dr King added to Mr De Lange's report by stating a misunderstanding had arisen because a document which had been distributed had not been properly edited, but reiterated that the NP continued to negotiate in good faith. The NP had concerns about the question of "overrides" which had led to the misunderstanding.

4.8 The ANC stated that it had thought it necessary to record that there were serious problems at the bilateral level but that they were willing to engage in further discussions with parties before the multi-lateral meeting and invited parties to contact them before the 26th February so that serious consideration could be given to all the issues concerned.

4.9 The PAC stated that it supported further multi-lateral discussions between the parties.

5. **CLOSURE**

The meeting closed at 15h06.

