

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**WEDNESDAY
28 FEBRUARY 1996
E249
(10h00)**

DOCUMENTATION

*Entire Document Embargoed Until
10h00 28 February 1996*

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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: Wednesday, 28 February 1996

TIME: 10h00 - 18h00

VENUE: E249

DRAFT AGENDA

1. Opening
 2. General Provisions - *Chapter 15*
 3. Preamble
 4. Transitional Arrangements
 5. Schedules
 6. Closure
-

N.B. Please bring your copy of the *Refined Working Draft (Third Edition)* to the meeting

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE SUB-COMMITTEE
FROM: EXECUTIVE DIRECTOR
DATE: 27 FEBRUARY 1996
RE: TRANSITIONAL ARRANGEMENTS

We enclose for your consideration draft formulations produced by the Technical Refinement Team on Transitional Arrangements.

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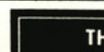


You've made your mark



Now have your say

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Embargoed until 10h00
28 February 1996

DRAFT - 8 FEBRUARY 1996

Status: For consideration by TRT.

BILL¹

To regulate the transition to the new constitutional order established by the Constitution of the Republic of South Africa, 1996, and to provide for incidental matters.

Definitions

1. In this Act, unless inconsistent with the context -

"homeland"² means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or a selfgoverning territory;

"new Constitution" means the Constitution of the Republic of South Africa, 1996;

"old order legislation"³ means legislation enacted before the previous Constitution took effect;

"previous Constitution" means the Constitution of the Republic of South Africa, 1993.

¹ It is suggested that because of their temporary nature, the transitional provisions are not incorporated into the new Constitution but dealt with in a separate Act to be called the Constitution Complementary Act. As this Act will be intrinsically part of the new Constitution it will have to be passed by the CA. See also foot note 4 below.

² The term "homeland" is used to describe those territories which prior to the Interim Constitution were regarded in South African legislation as "independent" or "self-governing" territories. The definition is necessary for identifying legislation and also courts of these former territories which are still operational pending rationalisation.

³ There is still a vast body of especially old RSA legislation that needs to be referred to and dealt with in this Bill.

Application

2. This Act must be regarded and applied as if it form part of the new Constitution.⁴

Continuation of existing law

3. (1) All law which was in force immediately before the new Constitution took effect, continues in force subject to -
- (a) any repeal or amendment by a competent authority; or
 - (b) invalidation by a competent court on the ground of inconsistency with the new Constitution or this Act.⁵
- (2) Old order legislation which continues in force in terms of subsection (1) -
- (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application;⁶ and

⁴ See foot note 1. The whole or at least some of the provisions of this Bill would need entrenchment against amendment. For this reason a provision along the following lines will have to be inserted in the new Constitution.

"STATUS OF CONSTITUTION COMPLEMENTARY ACT, 1996

The Constitution Complementary Act, 1996, is for all purposes deemed to be part of the substance of the Constitution and [sections of that Act] may not be amended or repealed otherwise than in accordance with section 53 of the Constitution, and, unless inconsistent with the context or clearly inappropriate, any reference in this Constitution to itself, and any reference in any legislation to this Constitution, must be construed as a reference also to that Act."

⁵ "Law" referred to in this provision includes statutory, common and customary law. The reference to "invalidation by a competent court" is necessary to avoid this section to be understood entrenching existing law inconsistent with the new Constitution against invalidation by the courts.

⁶ Legislation of the former separate parts of the Republic only applies in the areas for which that legislation was originally enacted. Old RSA legislation, for instance, only apply in the Republic excluding the former homelands unless subsequently amended to apply uniformly in the whole of the Republic. The problem usually comes in where the old RSA legislation provides, as it often does, for its application in "the Republic" which today, of course, includes the former homelands. See also section 6(1)(a) of this Bill which may lead to arguments that these laws are automatically extended to the whole of the Republic.

- (b) continues to be administered by the authorities which administered them immediately before the new Constitution took effect.⁷

Repeal of laws

- 4. The laws mentioned in Schedule 2 are hereby repealed subject to section 14.⁸

Continuation of international agreements

- 5. The Republic under the new Constitution acquires all rights and obligations under international agreements vested in or binding on the Republic immediately before the new Constitution took effect, unless an Act of Parliament determines otherwise.⁹

Interpretation of existing legislation

- 6. (1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation which existed when the new Constitution took effect -
 - (a) to the Republic of South Africa or a homeland, must be construed as a reference to the Republic of South Africa under the new Constitution;¹⁰
 - (b) to Parliament, the National Assembly or [the Senate], must be construed as a reference to Parliament, the National Assembly or [the Senate] under the new Constitution;
 - (c) to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed -

⁷ Under section 235(6) and (8) of the Interim Constitution old order legislation were either allocated to authorities in the national government or the provincial governments. Today there is more or less clarity which authorities administer which laws. The above provision stabilises the factual position as sorted out under the very complicated provisions of the Interim Constitution. See also section 12 of this Bill which provides for any outstanding laws that still have to be assigned to the provinces.

⁸ Ideally the Interim Constitution should be repealed and replaced by the new Constitution as soon as possible after the adoption and certification of the new Constitution. Whether this would be feasible depends on final decisions on the Second House. See section 7 and applicable foot notes below.

⁹ Based on section 231(1) of the Interim Constitution.

¹⁰ This provision would basically apply to references to "the Republic" in old order legislation otherwise than in a territorial context. Section 3(2)(a) above would prevent old order legislation, because of a reference in it to the "Republic" or to the name of the previous homeland, from being understood to apply in an area for which it was not originally enacted. See foot note 6 above.

- (i) until 30 April 1999, as a reference to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet under Schedule 1 of this Act; and
 - (ii) after 30 April 1999, as a reference to the President, the Deputy President,¹¹ a Minister, a Deputy Minister or the Cabinet under the new Constitution;
- (d) to a provincial legislature, Premier or Executive Council, must be construed as a reference to a provincial legislature, Premier or Executive Council under the new Constitution;¹²
- (e) to an official language or languages, must be construed as a reference to [any of the official languages under the new Constitution].¹³
- (2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation -
- (a) to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or a homeland, must be construed as a reference to -
 - (i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Act to the national government; or
 - (ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Act to a provincial government;¹⁴

¹¹ Drafted on an assumption that a single "Deputy President" would replace the present "Executive Deputy Presidents" after 30 April 1999. This provision would need revisiting once the matter of the GNU after 30 April 1999 is settled.

¹² This clause would need adjustment if any province passes its own constitution before the new Constitution takes effect.

¹³ Question of language still to be settled.

¹⁴ The allocation of old order legislation to either national or provincial governments was done, and virtually completed, under section 235(6) and (8) of the Interim Constitution. Section 12 of this Bill provides for the completion of the process. Unfortunately old order legislation still teem with references to historical institutions and functionaries.

- (b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or a homeland, must be construed as a reference to -
- (i) the President referred to in subsection (1)(c), if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Act to the national government; or
 - (ii) the Premier of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Act to a provincial government.¹⁴

Transition: Parliament¹⁵

Option 1: (Suspension of Chapters 3 and 4 of new Constitution)

7. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved after a vote of no confidence in the Cabinet.¹⁶

¹⁵ The transitional provisions contained in this section are based on an assumption that the Senate would be replaced by a National Council of Provinces. As the composition of the National Council would depart radically from that of the Senate, provision will have to be made for the accommodation of the incumbent senators. There would appear to be three options:

Option 1: A continuation of the present two chamber Parliament until 30 April 1999, which would require the suspension of at least Chapters 3 and 4 of the new Constitution until that date. This option would render implementation of the new Constitution before 30 April 1999 very difficult.

Option 2: Immediate implementation of Chapters 3 and 4 of the new Constitution with the incumbent senators becoming members of their respective provincial legislatures. This would result in a temporary increase in the membership of these legislatures, but would, on the positive side, open the way for senators to represent their provinces in the National Council of Provinces.

Option 3: Immediate implementation of Chapters 3 and 4 with the incumbent senators becoming members of the National Assembly, in which case the membership of the NA will temporarily until 30 April 1999 be increased to 490.

If on the other hand it is decided to retain the present or an adjusted Senate a simple transitional provision would be needed.

¹⁶ See CP XXXIII.

- (2) Until the National Assembly is reconstituted in terms of an election after 30 April 1999 -
 - (a) Chapter 4 of the previous Constitution continues to apply;¹⁷ and
 - (b) Chapters 3 and 4 of the new Constitution are suspended.¹⁸

Option 2: (Senators becoming members of the provincial legislatures)

7. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 93(1) of the new Constitution after a vote of no confidence in the Cabinet.
- (2) Until a new National Assembly is constituted in terms of an election under the new Constitution the Assembly consists of 400 members.¹⁹
- (3) Anyone who was a member or office-bearer of the National Assembly immediately before the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer subject to the new Constitution.
- (4) The National Assembly as constituted in terms of subsection (3) is for all purposes deemed to have been elected under the new Constitution for a term which expires on 30 April 1999.²⁰
- (5) The rules and orders of the National Assembly in force immediately before the new Constitution took effect, continue in force subject to any amendment or repeal under the new Constitution.

¹⁷ Chapter on Parliament, i.e. both National Assembly and Senate.

¹⁸ If the present Senate is to be abolished from a future date, e.g. 30 April 1999, it will be virtually impossible, because of the interrelatedness of the two Houses in the Interim Constitution, to implement the Chapter on the NA in the new Constitution alone. Many other provisions of the new Constitution will also be affected.

¹⁹ The agreement in the CC Subcommittee is that the NA will consist of between 300 and 400 members as determined by national legislation. However, the 400 membership will have to be retained until 30 April 1999 as no election may be held before that date.

²⁰ This provision is necessary to slot the present NA into the new provisions in Chapter 3. See for instance section 46(3) of the 3rd Ed. Working Draft.

- (6) Anyone who was a member of the Senate immediately before the new Constitution took effect becomes a member of the provincial legislature of the province from which that person was nominated as a senator.²¹
- (7) Until a provincial legislature is constituted in terms of an election under the new Constitution the legislature consists of the number of members determined for the legislature under the previous Constitution plus nine; but, vacancies occurring among members of the legislature who became members because of their membership of the Senate, may not be filled.

Option 3: (Senators becoming members of the National Assembly)

7. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 93(1) of the new Constitution after a vote of no confidence in the Cabinet.
- (2) Until a new National Assembly is constituted in terms of an election under the new Constitution the Assembly consists of 490 members.
- (3) Anyone who was a member of the National Assembly or the Senate, or an office-bearer of the Assembly immediately before the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer subject to the new Constitution.
- (4) The National Assembly as constituted in terms of subsection (3) is for all purposes deemed to have been elected under the new Constitution for a term which expires on 30 April 1999.
- (5) Vacancies occurring in the office of members of the National Assembly who became members because of their membership of the Senate, may not be filled.
- (6) The rules and orders of the National Assembly in force immediately before the new Constitution took effect, continue in force subject to any amendment or repeal under the new Constitution.

²¹ See section 48(2) of the Interim Constitution. As the senators were proportionally nominated on the basis of voting patterns in the province, the inclusion of the senators in the provincial legislatures will not upset proportionality in the legislatures.

Transition: National executive

8. (1) Chapter 5 of the new Constitution is suspended until 30 April 1999 and during its suspension Schedule 1 of this Act applies in its place.²²
- (2) Anyone who was the President, an Executive Deputy President, a Minister or a Deputy Minister of the Republic under the previous Constitution immediately before the new Constitution took effect continues in and holds that office in terms of Schedule 1 of this Act.²³

Transition: Provincial legislatures

9. (1) Until a new provincial legislature is constituted in terms of an election under the new Constitution the legislature consists of the number of members determined for that legislature under the previous Constitution.²⁴
- (2) Anyone who was a member or office-bearer of a provincial legislature of a province immediately before the new Constitution took effect becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer subject to the new Constitution.

²² In terms of CPXXXII the new Constitution must provide for the national executive to be composed and to function substantially in the manner provided in Chapter 6 of the Interim Constitution until 30 April 1999. It must be noted that the CP does not require Chapter 6 itself to continue in force, but that the new Constitution must contain provisions providing for a system substantially the same as the one contained in Chapter 6.

As Chapter 6 as presently formulated would not technically fit in with the scheme of things as they are now ordered in the new Constitution, the proposal, as contained in section 8 above, is to repeal Chapter 6 together with the rest of the Interim Constitution but to re-enact its provisions in a Schedule attached to this Bill. This would allow space for technical adjustments necessitated by the other provisions of the new Constitution (for instance the President's power to refer Bills to the Constitutional Court), without changing the substance or essence of Chapter 6 relating to the government of national unity, its composition and its functioning. The modified Chapter 6 is contained in Schedule 1 to this Bill. Provision is further made for the suspension, until 30 April 1999, of Chapter 5 of the new Constitution dealing with the national executive.

²³ Schedule 2 contains all provisions necessary for the proper functioning of the national executive under the new Constitution, including terms of office of office-bearers, their replacement, filling of vacancies, etc. It also provides for the transition after 30 April 1999 when Chapter 5 of the new Constitution takes effect.

²⁴ But see Option 2 under section 7 and foot note 13 above.

- (3) A provincial legislature as constituted in terms of subsection (2) is for all purposes deemed to have been elected under the new Constitution for a term which expires on 30 April 1999.²⁵
- (4) The rules and orders of a provincial legislature in force immediately before the new Constitution took effect, continue in force subject to any amendment or repeal under the new Constitution.

Transition: Provincial executives

10. Anyone who was the Premier or a member of the Executive Council of a province immediately before the new Constitution took effect, continues in and holds that office in terms of the new Constitution.

Provincial constitutions

11. (Provisions needed if any province passes a constitution before the new Constitution takes effect).²⁶

Assignment of old order legislation to provinces

12. (1) Old order legislation with regard to a matter within a functional area listed in Schedule 5 of the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation in the Government Gazette, to an authority within a provincial executive designated by the Premier of the Province.²⁷
- (2) If it is necessary for an assignment of legislation under subsection (1) to be effectively carried out, the President, by proclamation in the Government Gazette, may -
 - (a) amend or adapt the legislation to regulate its interpretation or regulation;
 - (b) where the assignment does not apply to any piece of legislation as a whole, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those

²⁵ This provision is necessary to slot in with section 125(3) of the Working Draft.

²⁶ Should any province adopt a provincial constitution before the new Constitution takes effect, provision will have to be made for a requirement that the provincial constitution must comply with the new Constitution.

²⁷ See foot note 7 above. The provision is necessary to provide for the President to assign certain laws which are still administered at the national level, to the provinces. As indicated in section 12(1) above this relates only to Schedule 5 legislation, i.e. laws falling within the provincial functional areas.

- of its provisions to which the assignment applies or to the extent that the assignment applies to them;
- (c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial government or any department of state, administration, force or other institution.²⁸
- (3) When legislation is assigned under subsection (1), any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it has been assigned.
- (4) Any assignment of legislation under section 235(8) of the previous Constitution including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is deemed to have been effected under this section.²⁹

Transition: Courts³⁰

13. (1) Every court of law existing immediately before the new Constitution took effect continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to -
- (a) any amendment or repeal of that legislation by a competent authority; and
- (b) consistency with the new Constitution and this Act.
- (2) (a) The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.

²⁸ Subsection (2) above is a virtual re-enactment of section 235(8)(b) of the Interim Constitution and goes hand in glove with the main function of assigning laws contained in subsection (1). The President's power to amend laws when assigning them is a very limited one which can only be exercised to the extent necessary to make the assignment effective.

²⁹ The general rule is that if an enabling provision (such as section 235(8)), of the Interim Constitution, is repealed subordinate legislation and arrangements made under that provision are automatically cancelled. Section 12(4) is necessary to avoid this happening as far as measures taken under section 235(8) are concerned.

³⁰ The rationalisation of the courts envisaged by section 242 of the Interim Constitution is still in the investigation stage, with the result that the position, at least structurally, is still very much the same as it existed before the Interim Constitution.

- (b) Anyone holding office as the President, the Deputy President or a judge of the Constitutional Court immediately before the new Constitution took effect, becomes the President, the Deputy President or a judge of the Constitutional Court under the new Constitution, and holds office subject to the new Constitution for the unexpired portion of the term for which they were appointed; but, the four youngest judges may continue in office for an additional period of two years after the expiry of their terms.³¹

- (3) (a) The Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal under the new Constitution.
- (b) Anyone holding office as the Chief Justice, the Deputy Chief Justice or a judge of the Appellate Division immediately before the new Constitution took effect, becomes the Chief Justice, the Deputy Chief Justice or a judge of the Supreme Court of Appeal under the new Constitution.

- (4) (a) A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subsection (6).³²
- (b) Anyone holding office or deemed to hold office as the Judge President, the Deputy Judge President or a judge of a court referred to in paragraph (a) immediately before the new Constitution takes effect, becomes the Judge President, the Deputy Judge President or a judge of such a court under the new Constitution, subject to any rationalisation contemplated in subsection (6).

³¹ The Constitutional Court judges were appointed in terms of section 99 and 97(2)(b) of the Interim Constitution for a non-renewable period of seven years. Section 102(1) of the Working Draft says that CC judges are appointed for non-renewable terms of up to nine years.

It is proposed that all CC judges continue in office for the unexpired portions of the terms for which they were appointed, but that the four youngest judges be given the option to continue for an additional two years in order to provide for a measure of staggering new appointments.

³² See foot note 30 above. The Interim Constitution did not provide for the TBVC supreme courts to become divisions of the Supreme Court of South Africa. As a result a specific reference to them in the transition is still necessary.

- (5) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation or process to -
- (a) the Constitutional Court under the previous Constitution, must be construed as a reference to the Constitutional Court under the new Constitution;
 - (b) the Appellate Division of the Supreme Court of South Africa, must be construed as a reference to the Supreme Court of Appeal; and
 - (c) a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or general division of that court, must be construed as a reference to a High Court.
- (6) (a) As soon as is practical after the new Constitution takes effect all courts, including their structure, composition, functioning and jurisdiction and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.
- (b) Initiating the rationalisation is the responsibility of the Cabinet member responsible for the administration of justice acting after consultation with the Judicial Service Commission.³³

Rationalisation of public administration

14. (1) Section 237 of the previous Constitution, including all other provisions of the previous Constitution referred to in that section to the extent that they relate to the rationalisation of the public administration -
- (a) continue in force until 30 April 1999 as if the previous Constitution has not been repealed;³⁴ and
 - (b) must be applied with due regard to Chapters 12 and 13 of the new Constitution.³⁵

³³ See section 242(2) of the Interim Constitution.

³⁴ As the rationalisation of the public service at national and provincial levels is still in progress, it is suggested that section 237 and other relevant provisions of the Interim Constitution be retained for the time being, say until 30 April 1999.

Because of the very intricate and complicated mechanics of this whole process, it is not regarded as feasible to incorporate these provisions in this Bill.

³⁵ As both Chapters 12 and 13 of the Working Draft would impact on the rationalisation process, it is suggested that the whole process be subjected to them.

- (2) The Public Service Commission and the provincial service commissions as they existed immediately before the new Constitution took effect, continue to exist and to perform their functions in terms of the legislation applicable to them until 30 April 1999, on which date they are abolished.³⁶
- (3) Subsection (3) does not affect the implementation of section 172 of the new Constitution.³⁷
- (4) The repeal of section 237(3) of the previous Constitution does not affect any proclamation issued under it, and any such proclamation continue in force subject to any amendment or repeal by Parliament or invalidation by a competent court on the grounds of inconsistency with the new Constitution or this Act.³⁸

Other constitutional institutions³⁹

15. (1) In this section "constitutional institution" means -

- (a) the Public Protector;
- (b) the Human Rights Commission;
- (c) the Commission on Gender Equality;
- (d) the Auditor-General;
- (e) the South African Reserve Bank; or
- (f) the Financial and Fiscal Commission.

³⁶ The Working Draft does not provide for a Public Service Commission or provincial services commissions as they exist today. However, because of their involvement in the rationalisation of the public service it is suggested that they be retained until the rationalisation process is completed.

³⁷ The retention of the existing public service commissions should not delay the implementation of the Public Administration Commission envisaged in section 172 of the Working Draft.

³⁸ Section 237(3) of the Interim Constitution has been used extensively to amend or replace laws by proclamation for purposes of rationalisation. It is imperative that the laws enacted by proclamation under the section continue in force until eventually repealed by Parliament. A case in point is the new Public Service Act, 1994, which established a single Public Service for the whole country. This Act was enacted by proclamation under the section.

³⁹ The following institutions created by the Interim Constitution have not been provided for:

Commission on Provincial Government, Volkstaat Council, Commission on Remuneration of Representatives.

The Public Service Commission is catered for in section 14(2) of this Bill.

Draft: 8 February 1996

- (2) Any constitutional institution established by or under the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member, a member of the board of the Reserve Bank, the Public Protector or the Auditor-General continues to hold office in terms of the legislation applicable to that office, subject to -
- (a) any amendment or repeal of that legislation by a competent authority; and
 - (b) consistency with the new Constitution and this Act.

Short title and commencement

- 16.** This Act is called the Constitution Complementary Act, 1996, and takes effect when the new Constitution takes effect.

SCHEDULE 1

CONTINUATION OF THE GOVERNMENT OF NATIONAL UNITY⁴⁰

Definitions

1. In this Schedule -

"the Constitution" means the Constitution of the Republic of South Africa, 1996, excluding Chapter 5 thereof but including the Constitution Complementary Act, 1996.

Executive authority of the Republic

2. (1) The executive authority of the Republic is vested in the President.

(2) The national executive consists of the President and the other members of the Cabinet, who must act in accordance with the Constitution and who may perform any act required to give effect to the Constitution.

The President

3. The President -

- (a) promotes the unity of the nation and that which will advance the Republic;
- (b) is the Head of State, Head of the national executive and Commander-in-Chief of the defence force;
- (c) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
- (d) is responsible for the observance of the Constitution by the national executive.

Powers and functions of President

4. (1) The President has the powers and functions entrusted to the office by the Constitution and any legislation.

⁴⁰ This Schedule, which will replace Chapter 5 of the new Constitution until 30 April 1999, provides for the government of national unity to be composed and to function substantially in the same manner as prescribed in the Interim Constitution. However, where possible the formulations of Chapter 5 have been followed, but without upsetting the continuation of the GNU as it functions today.

- (2) The President must exercise the powers and perform the functions entrusted to the office in consultation with the other members of the Cabinet, except where -
 - (a) the Cabinet has determined that the President may act in consultation with a member or a committee of members; or
 - (b) the Constitution states or implies that the President may act alone or must consult the Executive Deputy Presidents.
- (3) The President may act alone when -
 - (a) assenting to and signing Bills;
 - (b) referring a Bill back to Parliament for reconsideration of the Bill's constitutionality;
 - (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;⁴¹
 - (d) summoning the National Assembly to an extraordinary sitting to conduct urgent business;
 - (e) dissolving the National Assembly and calling an election after a vote of no confidence in the Cabinet has been passed by the Assembly; and
 - (f) conferring honours.
- (4) The President must consult the Executive Deputy Presidents -
 - (a) in the development and execution of the policies of the national government;
 - (b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;
 - (c) in the assignment of functions to the Executive Deputy Presidents;
 - (d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;
 - (e) before appointing commissions of enquiry;
 - (f) before calling a referendum;
 - (g) before signing any international agreement; and
 - (h) before pardoning or relieving offenders.
- (5) Subsections (3) and (4) do not prevent the President from consulting with any other Cabinet member or members or any other person.

⁴¹ This is a new provision which is not contained in the Interim Constitution.

- (6) Decisions of the President taken in consultation with the other members or a member or committee of the Cabinet, must be in writing, signed by the President, and countersigned by another Cabinet member.

Election of President

5. (1) At its first sitting after any election of the National Assembly,⁴² and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.
- (2) The President of the Constitutional Court must preside over the election of the President, or designate another judge to do so. The procedure set out in Schedule 4 of the Constitution applies to the election of the President.
- (3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the President of the Constitutional Court, but not more than 30 days after the vacancy occurs.

Assumption of office by President

6. When elected President, a person ceases to be a member of the National Assembly, and, within five days, must assume the office of President by swearing or affirming faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3 of the Constitution.

Term of office of President

7. The President holds office until the person elected President after the next election of the National Assembly held before or after 30 April 1999, assumes office.⁴³

Executive Deputy Presidents

8. (1) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

⁴² In the event of the NA adopting a motion of no confidence in the Cabinet an election must be held (see CP XXXIII). The theoretical possibility of such an election cannot be ruled out which explains the need for the provision.

⁴³ This provision provides for continuity in the presidency after an election, whether the next election is held before or after 30 April 1999.

- (2) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.
- (3) On being designated an Executive Deputy President may elect to remain or to cease to be a member of the Assembly.
- (4) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by this Schedule or assigned to that office by the President.

**Term of office of Executive Deputy Presidents
and filling of vacancies**

9. (1) An Executive Deputy President holds office -

- (a) until 30 April 1999 unless replaced as Executive Deputy President by the party entitled to make the designation in terms of section 8; or
- (b) until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.⁴⁴

(2) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

Acting President

10. (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of the office of President, or during a vacancy in the office of President, an office-bearer in the order below acts as the President -

- (a) an Executive Deputy President designated by the President;
- (b) a Minister designated by the President;
- (c) a member of the Cabinet designated by the other members of the Cabinet;
- (d) the Speaker;
- (e) a member of the National Assembly elected by its members.

⁴⁴ If an election of the NA is held before 30 April 1999 the Ex. Dep. President continues in office until the President then elected assumes office. New Ex. Dep. Presidents are designated depending on the results of the general election. See section 8 above.

- (2) When designating an Acting President, the President or the members of the Cabinet making the designation must take into consideration the exigencies of government and the spirit underlying the concept of a government of national unity.
- (3) An acting President has the responsibilities, powers and functions of the President.

Removal of President or Executive Deputy Presidents

- 11. (1)** The National Assembly [and the Senate], by a resolution [at a joint sitting] of at least two thirds of all the members, may remove the President or an Executive Deputy President from office only on the grounds of -
- (a) a serious violation of the Constitution or the law;
 - (b) serious misconduct; or
 - (c) inability to perform the functions of office.
- (2) Anyone who has been removed from the office of President or Executive Deputy President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.

Cabinet

- 12. (1)** The Cabinet consists of the President, the Executive Deputy Presidents and -
- (a) not more than 27 Ministers who are members of the National Assembly [or the Senate] and appointed in terms of subsections (2) to (6); and
 - (b) not more than one Minister who is not a member of the National Assembly [or the Senate] and appointed in terms of subsection (7), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.
- (2) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1)(a) are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

- (3) Cabinet portfolios must for the purposes of subsection (2) be allocated to the respective participating parties in accordance with the following formula:
- (a) A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Minister referred to in subsection (1)(a) are to be appointed, plus one.
 - (b) The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.
 - (c) The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph (b).
 - (d) The result, subject to paragraph (e), indicates the number of portfolios to be allocated to that party.
 - (e) Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.
- (4) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must -
- (a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (3);
 - (b) appoint in respect of each such portfolio a member of the National Assembly or the Senate who is a member of the party to which that portfolio was allocated under paragraph (a), as the Minister responsible for that portfolio;
 - (c) if it becomes necessary for the purposes of this Schedule or in the interest of good government, vary any determination under paragraph (a) subject to subsection (3);
 - (d) terminate any appointment under paragraph (b) -
 - (i) if the President is requested to do so by the leader of the party of which the Minister in question is a member; or
 - (ii) if it becomes necessary for the purposes of this Schedule or in the interest of good government; or

- (e) fill, when necessary, subject to paragraph (b), a vacancy in the office of Minister.
- (5) Subsection (4) must be implemented in the spirit underlying the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on -
- (a) the exercise of a power referred to in paragraph (a), (c) or (d)(ii) of that subsection, the President's decision prevails;
 - (b) the exercise of a power referred to in paragraph (b), (d)(i) or (e) of that subsection affecting a person who is not a member of the President's party, the decision of the leader of the party of which such person is a member prevails; and
 - (c) the exercise of a power referred to in paragraph (b) or (e) of that subsection affecting a person who is a member of the President's party, the President's decision prevails.
- (6) If any determination of portfolio allocations is varied under subsection (4)(c), the affected Ministers must vacate their portfolios but is eligible, where applicable, for re-appointment to other portfolios allocated to their respective parties in terms of the varied determination.
- (7) The President must -
- (a) in consultation with the Executive Deputy Presidents and the leaders of the participating parties -
 - (i) determine a specific portfolio for a Minister referred to in subsection (1)(b) should it become necessary pursuant to a decision of the President under that subsection;
 - (ii) appoint in respect of such a portfolio a person who is not a member of Parliament, as the Minister responsible for that portfolio;
 - (iii) fill, if necessary, a vacancy in respect of that portfolio; or
 - (b) after consultation with the Executive Deputy Presidents and the leaders of the participating parties terminate any appointment under paragraph (a) if it becomes necessary for the purposes of this Constitution or in the interest of good government.

Cabinet procedure

13. (1) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit underlying the concept of a government of national unity otherwise demand.
- (2) The Cabinet functions in a manner which gives consideration to the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government.

Appointment of Deputy Ministers

14. (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.
- (2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula as that in which the portfolios in the Cabinet are allocated to it.
- (3) The provisions of section 12(4) to (6) apply with the necessary changes in respect of Deputy Ministers, and in such application a reference to -
- (a) a Minister or portfolio must be construed as a reference to a Deputy Minister and a deputy ministerial post, respectively; and
- (b) subsection (3) of section 12 must be construed as a reference to subsection (2) of this section.
- (4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister -
- (a) that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to such Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by such Minister; and
- (b) any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in pursuance of an assignment under paragraph (a) by the Minister for whom that Deputy Minister acts.

- (5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister's stead, either generally or in the exercise or performance of any specific power or function.

Oath of office

15. Before an Executive Deputy President, Ministers and Deputy Ministers begin to perform their functions, they must swear or affirm their faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3 of the Constitution.

Conduct of Cabinet members and Deputy Ministers

16. (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Cabinet and Deputy Ministers may not -
- (a) undertake any other paid work;
 - (b) act in any way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - (c) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

Accountability of Ministers and Cabinet

17. (1) Ministers are accountable individually to the President and to the National Assembly [and the Senate] for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.
- (2) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.
- (3) If a Minister fails to administer his or her portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with such policy.
- (4) If the Minister concerned fails to comply with a requirement of the President under subsection (3), the President may remove the Minister from office -

- (a) in the case of a Minister referred to in section 12(1)(a), after consultation with the Minister and if the Minister is not a member of the President's party, or is not the leader of a participating party, also after consultation with the leader of that Minister's party; or
- (b) in the case of a Minister referred to in section 12(1)(b), after consultation with the Executive Deputy Presidents and the leaders of the participating parties.

Temporary assignment of powers and functions

- 18.** The President may assign to a Cabinet member any powers and functions of another member who is absent from office or is unable to exercise those powers or perform those functions.

Transfer of powers and functions

- 19.** The President by proclamation may transfer to a member of the Cabinet -
- (a) the administration of any legislation entrusted to another member; or
 - (b) any power or function entrusted by legislation to another member.

Votes of no confidence

- 20.** (1) If the National Assembly passes a vote of no confidence in the Cabinet, the President must either resign or dissolve the Assembly and call an election.
- (2) If the National Assembly passes a vote of no confidence in the President alone, the President must resign.
- (3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the President, the President must either resign or reconstitute the Cabinet in accordance with section 12.
- (4) [A majority/two thirds] of the members of the National Assembly, must be present when a vote of no confidence is passed.

Continuation of Cabinet after elections

- 21.** If an election of the National Assembly is held before 30 April 1999, the Cabinet, its members and the Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.

Draft: 8 February 1996

SCHEDULE 2

LAWS REPEALED

Number and year of law	Title
Act 200 of 1993	Constitution of the Republic of South Africa, 1993
Act 2 of 1994	Constitution of the Republic of South Africa Amendment Act, 1993
Act 3 of 1994	Constitution of the Republic of South Africa Second Amendment Act, 1993
Act 13 of 1994	Constitution of the Republic of South Africa Third Amendment Act, 1993
Act 14 of 1994	Constitution of the Republic of South Africa Fourth Amendment Act, 1993
Act 24 of 1994	Constitution of the Republic of South Africa Sixth Amendment Act, 1994
Act 29 of 1994	Constitution of the Republic of South Africa Fifth Amendment Act, 1994

