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MEMORANDUM

MC/10/30Sept96

To: Members of the Management Committee

From: **HASSEN EBRAHIM**
Executive Director

Date: **30 September 1996**

Subject: **Technical Refinement**

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1. On 7 May 1996, the Constitutional Assembly passed a resolution giving authority for the technical refinement of the draft text. Such refinement was not possible prior to the text being submitted to the Constitutional Court.

2. The technical experts have now been able to study the text and have proposed that it be refined for purposes of language clarity, consistency and improvement of the formulations. In this regard, each party is provided with five copies of -

   a) the technical refinement of the entire text which are considered not to be substantive ***(separate document)***;
   b) a document containing those issues which may have some substantive implications regarding the text ***(attached hereto)***.

3. We would appreciate it if parties were to place these documents before their respective technical experts for consideration. This matter is due to be discussed at the Management Committee meeting of 3 October 1996. Parties would be required to indicate as to whether the refinement proposed is acceptable at this meeting.

4. Should there be any query in this regard, please do not hesitate to call.

MEMO

CERTAIN SUBSTANTIVE TECHNICAL MATTERS THAT REQUIRE RECONSIDERATION

1. INTRODUCTION

The following memo refers to some technical problems in the present draft of the Constitution that require reconsideration. In some cases policy decisions will have to be taken to resolve the difficulties.

2. CLAUSE 1 OF THE NEW TEXT

Clause 1 of the new text spells out a number of fundamental principles. Clause 74(2) stipulates that to amend clause 1 an amendment Bill must be supported by a 75 per cent vote. But it does not stipulate clearly what type of amendments would amount to amendments of clause 1.

It is clear that a proposal to delete, say, clause 1(c) would constitute an amendment of clause 1. It is not clear whether a decision to amend clause 46(1)(b) (which requires a common voters roll) by replacing it with a provision which says that only people employed by the state may vote constitutes an 'amendment' of clause 1. Such an amendment would introduce a contradiction into the Constitution and would probably be viewed by a court as an amendment of clause 1. However, as the text stands at present, it is not absolutely clear that clause 74 protects the provisions

of clause 1 from indirect amendment by passing an amendment to another provision of the constitution.

In summary, the ambit of the special protection granted to clause 1 by clause 74 (2) is unclear. Clause 74(2), read with section 1, may be understood in two, different ways. Does 'the 75% support requirement apply merely to a constitutional amendment Bill which wishes to explicitly repeal, add to, or amend s 1 itself - *and it alone* - or [does] the 75% entrenchment protect the substance of the values which are set out in it?' (A S Butler *The 1996 Constitution Bill, its amending power, and the Constitutional Principles* 1996 p 4).

Butler sets out arguments supporting both possible interpretations. However, if the intention is that the special protection of section 1 is to have what he terms a 'radiating' effect, it would be wise to stipulate that in section 74. Butler points out that this effect was expressly achieved in the 5th draft of the new Constitution which referred to an amendment to section 1 or an amendment which 'violates any of the principles listed in section 1'.

To achieve this effect one might redraft clause 1 as follows -

> Amendments which detract from the provisions of section 1 must be passed by .....

3. CLAUSE 104(4) READ WITH 104(1)(b): IMPLIED POWERS

3.1 Clause 104(4) confirms the existence of so-called incidental powers for provinces in relation to Schedule 4 and stipulates that legislation enacted pursuant to such power shall be considered to be Schedule 4 legislation.

3.2 No similar provision is made in relation to Schedule 5. The absence of a special provision relating to Schedule 5 leaves the position unclear. Although necessary 'incidental powers' are deemed to accompany all grants of powers, the wording of clause 104(1) read with 104(4) creates uncertainty in this regard.

3.3 The express categorisation of incidental powers in relation to Schedule 4 matters imply that incidental powers in relation to Schedule 5 matters do **not** fall under Schedule 5. Clause 104(1) provides a closed list of legislative powers that a province may exercise which covers Schedule 4 matters, Schedule 5 matters and other matters assigned by legislation. Implied powers in relation to Schedule 5 fall into none of these categories. (This is the implication of clause 104(4)).

3.4 The denial of a right to legislate on matters necessarily incidental to functional areas listed in Schedule 5 may create difficulties. For instance, provinces are likely to need legislation governing tender boards in relation to both Schedule 4 and Schedule 5 functions. Such legislation would be considered incidental to the effective exercise of the power. A proper interpretation of the present wording of the Constitution suggests that, as far as Schedule 5 functional areas are concerned, provinces are not empowered to enact such legislation.

SECURITY SERVICES

4. CLAUSE 199 (8): SECURITY SERVICES

The reference to 'rules and orders of Parliament' may be problematic. The constitutional structure of the legislature

allows for 'rules and orders of the National Assembly', 'rules and orders of the NCOP' and 'joint rules and orders'. Parliament as such does not have any rules and orders. To correct the problem the reference should be either to the rules and orders of the National Assembly, or the joint rules and orders or both.

5. CLAUSE 201(2) CONTROL OVER DEFENCE FORCE

This clause endeavours to regulate to separate matters:

1. The purpose for which the defence force may be employed; and
2. Presidential control of the defence force when employed.

As presently drafted the clause is ambiguous.

It is suggested that the clause be redrafted as follows:

"(2) The defence force may be employed only under the authority of the President and only when necessary-

(a) to assist the police service;

(b) in the defence of the Republic; or

(c) in the fulfillment of an international obligation".

6. CLAUSE 203(3): PARLIAMENTARY APPROVAL OF A DECLARATION OF NATIONAL DEFENCE

As presently drafted it is unclear what procedure is to be followed to approve the declaration of a state of national defence. There are three possibilities:

(i) approval by a joint sitting of the Assembly and NCOP called in terms of clause 42(5);

(ii) approval by the House of Assembly (as is required by clause 37(2)(b) in relation to the declaration of a state of emergency); or

(iii) approval by both NCOP and the Assembly sitting separately.

It is worth clarifying this matter so that there is no chance for a legal dispute when such approval is called for.

7. CLAUSE 244(1) - DATE OF COMING INTO FORCE OF NEW CONSTITUTION

As presently worded the Constitution must come into force by 1 January 1996 at the latest. As the Constitutional Court is unlikely to hand down its decision before the beginning of December even if it hears the case in mid-November, this date probably needs reconsideration.

8. CLAUSE 65(2) AND SCHEDULE 4 ITEM 21

Clause 65(2) requires an Act of Parliament to provide a method by which provinces can confer authority on their delegations to vote on their behalf in the NCOP. However, this Act must be passed by the NCOP. To enable provinces to function effectively in the NCOP before the Act is past (and to pass the Act), the addition of the following transitional provision is suggested:

Schedule 6 item 21 (5)

Until the Act of Parliament refered to in section 65(2) is enacted each province may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces.

September 30, 1996