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**CONSTITUTIONAL
ASSEMBLY**

**CONSTITUTIONAL
COMMITTEE**

**FRIDAY
1 SEPTEMBER 1995
09h00
OLD ASSEMBLY
CHAMBER**

***SUB-COMMITTEE REPORT ON
THE NATIONAL ASSEMBLY***

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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE

FROM: HASSEN EBRAHIM

DATE: 30 August 1995

**RE: REPORT OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE
ON OUTSTANDING ISSUES IN THE NATIONAL ASSEMBLY REPORT**

The Constitutional Committee Sub-committee submits the following report on outstanding matters:

A. Composition of the National Assembly

Section 3: The size of the National Assembly was left over for consideration after the Constitutional Assembly debate.

At the Constitutional Assembly debate the following views emerged:¹

- 1.) The size of the National Assembly could only be determined after decisions on the electoral system and a holistic examination of all structures to be created by the Constitution had been made [ANC, DP, PAC, NP].
- 2.) The following principles were regarded as key guides to determining the size of the National Assembly:
 - 2.1 Efficiency [ANC, FF, DP]
 - 2.2 Cost effectiveness [ANC, DP, NP, PAC]
 - 2.3 Powers and functions of the levels of government [ACDP, FF]
 - 2.4 Burden on smaller parties [NP, ACDP, FF, ANC]
 - 2.5 Representivity [DP, NP, ACDP]
- 3.) Parties that supported the reduction of the National Assembly are the

¹See Report on Discussions in Constitutional Assembly of 25 August 1995, pages 23 - 25.

FF (350), the ACDP (300 - 350), and the DP (300).

B. National Elections

Section 4: The Electoral System was left over to be debated at the Constitutional Assembly. The matter was not debated.

C. Duration of the National Assembly

Section 5(1): The Term of the National Assembly was left over to be debated at the Constitutional Assembly.²

At the Constitutional Assembly debate all the parties, save the DP, supported a term of five years. The DP supports a term of four years.

The idea of a fixed term was supported by the DP, PAC, and ACDP. The ANC opposed a fixed term.

Section 5(2) is held in abeyance until section 20 of the Chapter on the National Executive is finalised.

D. Speaker and Deputy Speaker

Section 6(2): The issue of whether the Chief Justice or the President of the Constitutional Court should preside over the election of the Speaker was left to be settled in private discussions between parties.

E. Qualifications of Members of the National Assembly

Section 7(1): Discussion of this clause stands over pending discussion of Theme Committee 1's report on the franchise.

Section 7(2)(e): Discussion stands over pending decisions on the Senate.

Section 7(2)(f): The issue of whether traditional leaders receiving remuneration from the State are disqualified in terms of this clause is to be discussed after the presentation of a report from the Ad Hoc Committee on Traditional Authorities.

²See Report on Discussions in Constitutional Assembly of 25 August 1995, page 25.

F. Vacation of Seats

The inclusion of the requirements of Section 43(b) of the Interim Constitution in the new constitution was left for debate at the Constitutional Assembly.³

At the Constitutional Assembly debate opposition to the inclusion of a clause similar to section 43(b) of the Interim Constitution was based on the following grounds:

- 1) It implied that members act in the interest of those who elected them and not in the national interest [NP].
- 2) It is in conflict with Constitutional Principle VIII and the democratic principle of representation [NP].
- 3) It is in conflict with the principle of freedom of association and prevents members from voting in accordance with conscience and against party policies [ACDP, DP].
- 4) It does not give effect to principles of openness and transparency, freedom of expression and the right to stand for office [DP].
- 5) The electoral system and constraints of party politics present sufficient checks against abuse [DP].
- 6) It interferes with the national process of constitutional and political development [DP, FF] and is not necessary after the adoption of the new constitution [FF].

Rethink how report is presented!

The ANC and PAC hold the view that the matter should be considered in the light of the electoral system. Both parties favour the inclusion of qualifications to ensure that a member who leaves his or her party remains a member of the National Assembly only if he or she has the support of the electorate.

G. Sittings and recess periods

Section 11(2): The calling of extraordinary sittings of the National Assembly, for the conduct of urgent business is to be shelved until discussions are finalised on the declaration of states of emergencies.

*? This to be considered?
Who can call extraordinary meetings of parliament.*

H. Assent to Bills

Section 21(2): In order to accommodate the views expressed at the

³See Report on Discussions in Constitutional Assembly of 25 August 1995 pages 28 - 30.

Constitutional Committee meeting of 24 August 1995, the Constitutional Committee Sub-committee considered a new formulation of the clause. The Constitutional Committee Sub-committee agreed that the formulation below captured the principle agreed to but required refinement:

Referred to the sub-committee.

that the Bill was passed in accordance with the Constitution [deals with procedure, not content]

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

State President

The matter was to be considered further after the Constitutional Assembly debate.⁴

At the Constitutional Assembly debate, the ANC said it would be prepared to consider the possibility of the President being afforded the power to refer a Bill to the Constitutional Court.

The right of the President to refer a Bill to the Constitutional Court before assenting to it was supported by the FF and DP.

The NP held the view that the issue whether the President could refer a Bill to the Constitutional Court was simply a matter of detail and the primary issue was giving effect to the supremacy of the constitution.

The PAC was opposed to the President having the power to refer a Bill to the Constitutional Court before assenting to it.

? Should powers and duties of NA be clearly stipulated in Const. See Section 16(3)

**HASSEN EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

⁴See Report on Discussions in Constitutional Assembly of 25 August 1995, pages 26 - 28.

FIFTH DRAFT - 24 AUGUST 1995

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

Chapter ...

PARLIAMENT

Legislative power

1. The legislative power of the Republic shall vest in Parliament.¹

Constitution of Parliament

2. Parliament consists of the National Assembly and²

THE NATIONAL ASSEMBLY

Composition of National Assembly

3. The National Assembly consists of ... members.³

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

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

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

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

National elections

4. The election of members of the National Assembly shall be conducted in accordance with an electoral system⁴ which shall be based on a common voters' roll and, in general, proportional representation as provided for by national law.⁵

agreed: whatever system, provided it results in.

Duration of National Assembly

5. (1) The National Assembly as constituted in terms of a general election shall continue [serve]⁶ for a term of five years⁷ as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.⁷

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

⁴ The CC Subcommittee recommends that the electoral system be debated in the CA.

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

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

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

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

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

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

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

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

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

Speaker and Deputy Speaker¹⁰

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

(2) The Chief Justice¹² or a judge designated by him or her shall preside over the election of a Speaker, and the Speaker shall preside over the election of a Deputy Speaker.

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

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

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

¹¹ Agreed to in the CC.

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

¹³ The CC agreed that it was not vital to decide this issue at this stage. It should be settled in private discussions between the parties.

¹⁴ The procedure referred to here is similar to that contained in Schedule 5 of the Interim Constitution. The CC agreed to this clause.

¹⁴ Agreed to in the CC.

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

Qualifications of members of National Assembly¹⁶

7. (1) Only South African citizens qualified to vote¹⁷ in elections of the National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

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

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

¹⁵ Agreed to in the CC.

¹⁶ Drafted as per Block 8 of the Report on Parliament.

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

¹⁸ Agreed to in the CC.

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

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

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

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

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

received a pardon or amnesty].

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

²¹ Stands over pending decisions on the Senate.

- (f) Persons holding office of profit under the Republic²², excluding-
- (i) the Deputy State President;²³
 - (ii) Ministers and Deputy Ministers;²³ and
 - (iii) any other office declared by national law not to be

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

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

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

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

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

"Persons holding office of profit under the Republic excluding

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

The CC Subcommittee agreed to this formulation.

²³ Agreed to in the CC.

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

(iv) justices of the peace and appraisers;²³ and

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

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

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

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

²⁵ Agreed to in the CC.

Vacation of seats²⁶

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

Filling of vacancies²⁷

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

Oaths or affirmation by members

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

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

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

²⁷ Agreed to in the CC.

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

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

(In the case of an oath: So help me God.)]²⁸

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

Sittings and recess periods

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

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

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

²⁹ Agreed to in the CC as amended.

Justice.³⁰

(2) The State President³¹ may at any time summon the National Assembly to an extraordinary sitting for the conduct of urgent business.³²

(3) The seat of the National Assembly is³³ where all sittings of the National Assembly shall ordinarily take place. Sittings at other venues are only permitted on the grounds of public interest, security or convenience and if provided for in the rules and orders of the National Assembly.

Quorum

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

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

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

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

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

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

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

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

12. ...³⁴

Decisions

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

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

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

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

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

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

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

State President's rights in National Assembly

14. The State President is entitled to attend [sit] and to speak in the National Assembly, but may not vote.^{36a}

Internal autonomy

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

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

Parliamentary privilege

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

³⁷ Agreed to in the CC.

³⁸ Amended in the CC. Words in bold brackets denote deletion and words underlined insertion.

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

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

Ordinary Bills

17.⁴⁰

Money Bills

18.⁴⁰

Bills affecting provincial matters

19.⁴⁰

³⁹ Agreed to in the CC.

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

Bills amending Constitution

20.⁴¹

Assent to Bills

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

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

⁴¹ The TC has not yet reported on constitutional amendments.

⁴² Agreed to in the CC as amended.

Constitutional Court for a ruling on its constitutionality.⁴³

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

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

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

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

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

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

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

Safe keeping of and public access to Acts of Parliament

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

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

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

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

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

⁴⁶ Agreed in the CC that subsection (3) be deleted.

CONSTITUTIONAL ASSEMBLY

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

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

1. NATIONAL ASSEMBLY

1.1 SIZE OF NATIONAL ASSEMBLY:

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

The following views were expressed:

1.1.1 The ANC said:

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

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

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

parties; and that members would require more support to function effectively.

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

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

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

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

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

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

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

- i The issue of representivity needed to be considered holistically in that South Africa also had nine provincial legislatures at present;

- ii The present burden on National Assembly could be lightened with the assistance of the provincial legislatures; and
- iii It supported the idea of proportional representation but one had to consider the size of provinces and ensure a proper balance in parliament.

1.2 DURATION OF THE TERM OF THE NATIONAL ASSEMBLY:

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

The following views were expressed:

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

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

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

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

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

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

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

1.3 ASSENT TO BILLS/ COURTS AND ADMINISTRATION OF JUSTICE

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

and

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

The following views were expressed:

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

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

1.3.2 The NP said:

- i The important principle was that of the supremacy of the Constitution and that the actual percentage and whether the President referred the Bill or Parliament, was in their view, a matter of detail and was open for discussion. However:

- a It was not an adequate safeguard to say that ordinary citizens had recourse to the Constitutional Court as this could delay the matter and cause further conflict and emotion; and
 - b The fact that it existed in the Interim Constitution demonstrated how reasonable and practical a provision it is.
- ii In response to the ANC it cited various countries in which provision was made to refer legislation to a Constitutional Court or council.
 - iii To withhold such a right from a certain political party violated the roots of democracy.

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

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

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

- i In terms of the South African legislative system, most Bills would be piloted through Cabinet, party caucuses and Parliament. It was inconceivable that in this entire process, the issue of the constitutionality or otherwise of the Bill, would not have been resolved.
- ii Thus, by the time Parliament passed a Bill, there should be clarity on whether it is constitutional or not.
- iii The President, as the leader of the majority party would have been

part of this process and it was therefore not necessary to give the President a veto power after this process, to decide on the constitutionality of a Bill. The assent by the President would for all intents and purposes become a formality.

1.3.5 The DP:

- i Supported the position of 20% of the members of Parliament being able to refer a Bill to the Constitutional Court . It motivated :
 - a. South Africa is a young democracy and the Constitution needed to be supported;
 - b. This provided a useful check and balance on the majority party;
 - c. This would not delay the legislative process as the Court would regard this as a matter of urgency and act accordingly; and
 - d. Reminded members that it is proposed that the procedure be applicable to provincial legislatures as well.
- ii Also supported the idea of the President being able to refer a Bill to the Constitutional Court before he had to assent to it.

1.4 VACATION OF SEAT

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

The following views were expressed:

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

- i The " imperative mandate" system as outlined in Clause 43(b) and 133(1)(b) of the Interim Constitution, implied that a member acted not in the national interest but only in the interests of those who elected him or her.
- ii This took Parliament out of the hands of the electorate and placed it

in the hands of political parties. This was an assault on the democratic principle of representation and in conflict with Constitutional Principle VIII.

- 1.4.2 The ANC said this matter could not be decided upon in isolation from the electoral system. It would be prepared to consider not having such a provision in the new Constitution, if a qualification was built in to ensure that if and when a member "crossed the floor", a by-election would be held.
- 1.4.3 The PAC agreed that this matter was linked to the issue of the electoral system but warned of the need to guard against opportunism. Thus, if a constituency system were agreed upon, the member should have to convince their constituency and come back either as an independent member or as a member of another political party.
- 1.4.4 The ACDP did not support the inclusion of such a provision. It motivated:
- i The essence of politics is the freedom of association; and
 - ii The Constitution should not be used to enforce party discipline and members of political parties should be able to true to their conscience and vote against party policies.
- 1.4.5 The DP also rejected the inclusion of such a provision in the new Constitution. It motivated:
- i The whole Constitution is based on openness and transparency, freedom of expression and association and the right to stand for office. Yet in the instance of clause 43(b) members are bound by decision which are not required to be taken openly;
 - ii A member's ability to function according to their conscience should not be dependent on the decisions of political parties;
 - iii Retaining such a provision in the new Constitution would "fossilise" the political process and prevent the natural re-alignment of political forces; and
 - iv The electoral system and the constraints of party politics would deal with individuals who abused the system.
- 1.4.6 The FF also rejected the inclusion of such a provision in the new Constitution because it interfered with the natural process of constitutional

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development. It said that clause 43(b) had been inserted into the Interim Constitution to prevent any party in the Constitutional Assembly obtaining a 2/3rds majority for the purposes of writing a new Constitution. However, once this process was complete, there was no need for such a provision.

