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CONSTITUTIONAL ASSEMBLY

**DRAFTS: CO-OPERATIVE GOVERNMENT
AND REARRANGEMENT OF NATIONAL
LEGISLATURE**

MEMORANDA

TO: Members attending Multi-lateral
FROM: Executive Director
DATE: 29 March 1996
RE: ADDITIONAL DOCUMENTATION: DRAFT FORMULATIONS ON CO-OPERATIVE GOVERNMENT AND RE-ARRANGEMENT OF NATIONAL LEGISLATURE

We enclose for your consideration these draft formulations prepared by the Mr Gerrit Grove', the CA law adviser.

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: conassem@iaccess.za



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THE NEW CONSTITUTION

DRAFT - 29 MARCH 1996

Status: For multi-party discussions.

**PROPOSED NEW CHAPTER ON CO-OPERATIVE GOVERNMENT
AND RE-ARRANGEMENT OF NATIONAL LEGISLATURE**

- Chapter 2A : Co-operative Government
- Chapter 3 : National Assembly
- Chapter 4 : National Council of Provinces
- Chapter 4A : National legislative process

CHAPTER 2A

PRINCIPLES OF CO-OPERATIVE GOVERNMENT

Basic structure

- 39A.** (1) Government under this Constitution is composed of/premised on three distinct but inseparable¹ levels/spheres of government, national, provincial and local.
- (2) National, provincial and local government -
- (a) must be loyal to the Constitution, the Republic and its people;
 - (b) must respect each other's constitutional status, institutions, powers and functions; and
 - (c) may not assume powers and functions other than those conferred on them in terms of the Constitution.

Intergovernmental co-operation

- 39B.** National, provincial and local government must equally be committed to co-operating and interacting with each other in the interest of -
- (a) preserving the peace, national unity and the indivisibility of the Republic;
 - (b) securing the well-being of the people of the Republic; and
 - (c) providing effective, responsible and coherent government for the Republic as a whole.

¹ Alternatively, "interrelated" could be used to underline the co-operative and common functions of the levels of government.

CHAPTER 3

THE NATIONAL ASSEMBLY

Composition and election of National Assembly

41. There is a National Assembly² which consists of between 300 and 400 members as determined by national legislation, who are women and men elected in terms of an electoral system that is -

- (a) prescribed by national legislation;
- (b) is based on a common voters roll; and
- (c) results, in general, in proportional representation.

Membership

42. (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except -

- (a) anyone who is appointed by or is in the service of the state and receives remuneration, other than -
 - (i) the President, Deputy President, Ministers and Deputy Ministers; and
 - (ii) any other office-bearers whose functions are compatible with the functions of a member of Parliament and have been declared compatible with those functions by national legislation;
- (b) delegates to the National Council of Provinces³ or members of a provincial legislature or a local government;

² The question whether Parliament will consist of the National Assembly only or both the National Assembly and the National Council is still unresolved. Depending on the final agreement the words in bold may change.

The question may be best resolved by not referring to Parliament at all in the text. Accordingly there need be no debate as to whether a particular House would be advantaged or disadvantaged by its inclusion in or exclusion from a formal definition of Parliament. Parliament is not referred to as such in the American and German constitutions.

³ As the parties have agreed on the National Council of Provinces this paragraph can now be finalised.

- (c) unrehabilitated insolvents;
 - (d) anyone declared to be of unsound mind by a court of the Republic; or
 - (e) anyone who, after this section takes effect, has been convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic; but, no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.
- (2) A person loses membership of the National Assembly if that person -
- (a) ceases to be eligible; or
 - (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.
- (3) Vacancies in the National Assembly must be filled in terms of national legislation.

43. ...

Oaths or affirmation by members

44. Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Sittings and recess periods

45. (1) The first sitting of the National Assembly after an election must take place at a time and on a date determined by the President of the Constitutional Court, but not more than 10 days after the election result has been declared. The National Assembly may determine the time and duration of its other sittings and its recess periods.
- (2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct urgent business.

Elections and duration of National Assembly

- 46.** (1) The National Assembly is elected for a term of five years.
- (2) If the National Assembly is dissolved in terms of section 46A or when its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved, or its term expired.
- (3) If the results of an election of the National Assembly are not declared within the period referred to in section 113(1) or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.
- (4) The National Assembly remains competent to function from the time it is dissolved or its term expires until the day before the first day of polling for the next Assembly; but, if the election results are not declared within the period referred to in section 113(1) or an election is set aside by a court, the Assembly, as constituted previously, again becomes competent to function until the day before the first day of polling in the next election.

Dissolution of National Assembly before expiry of its term

- 46A.** (1) The President may dissolve the National Assembly with the approval of the Assembly by a vote of the majority of the members.
- (2) An Acting President must dissolve the National Assembly if -
- (a) the President has resigned after a vote of no confidence in terms of section 93; and
- (b) the Assembly fails to elect a new President within 21 days of the vote of no confidence.

Speaker and Deputy Speaker

- 47.** (1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
- (2) The President of the Constitutional Court must preside over the election of the Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

- (3) The procedure set out in Schedule 4 applies to the election of the Speaker and the Deputy Speaker.
- (4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

Decisions

48. (1)⁴ Except where the Constitution provides otherwise -

- (a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill; or
 - (b) one third of the members must be present before a vote may be taken on any other question before the Assembly.
- (2) All questions before the National Assembly are decided by a majority of the votes cast, except where the Constitution provides otherwise.
 - (3) The presiding member of the National Assembly has no deliberative vote, but must cast a deciding vote whenever there is an equal number of votes on both sides of a question.

President's rights in National Assembly

49. The President may attend, and may speak in the National Assembly, but may not vote.

Internal autonomy

50. (1) The National Assembly may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.

⁴ The previous wording is unclear whether the words "except where the Constitution provides otherwise" also qualify quorums for Bills. Some Bills such as those amending the Constitution require the presence of at least two thirds of the members of the NA and not simply a majority of the members. The suggested reformulation above clarifies the position.

- (2) The rules and orders of the National Assembly must provide for the participation of minority parties in its legislative proceedings⁵ in a manner consistent with democracy.
- (3) A committee of the National Assembly may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents.

Privilege

- 51.** (1) Members of the National Assembly have freedom of speech and debate in the Assembly and in its committees, subject to its rules and orders.
- (2) Members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
- (a) anything they have said in, produced before, or submitted to the Assembly or any of its committees; or
 - (b) anything revealed as a result of anything that they have said, produced or submitted.
- (3) Other privileges and immunities of members of the National Assembly may be prescribed by national legislation.

Bills

52. ...⁶

Constitutional amendments

53. ...⁷

Assent to Bills

54. ...⁸

⁵ Words in bold replace "the legislative process" in the previous draft. This is necessary because the term "legislative process" extends beyond the internal proceedings of the NA. The NA can only make rules on its own proceedings and not on the whole legislative process which will now include the proceedings of the NCOP.

⁶ See sections 68, 70, 71 and 72 in the chapter on the legislative process.

⁷ Moved to section 69.

⁸ Moved to section 74.

Application by members to Constitutional Court

54A. ...⁹

Promulgation

55. ...¹⁰

Safekeeping of Acts of Parliament

56. ...¹¹

CHAPTER 4

NATIONAL COUNCIL OF PROVINCES

Establishment and composition of National Council

- 57. (1)** There is a National Council of Provinces through which the provinces participate in the national legislative process.
- (2)** The National Council is composed of delegations from the provinces.
- (3)** Each province is entitled to a single delegation consisting of -
- (a)** five/seven permanent delegates; and
 - (b)** five/three special delegates.

Permanent delegates

- 58. (1)** At its first sitting after its election, a provincial legislature must appoint candidates nominated by parties represented in the legislature as its permanent delegates in the province's delegation to the National Council of Provinces.
- (2)** Candidates must be members of the provincial legislature and must be nominated in accordance with a nomination procedure that -
- (a)** is prescribed by national legislation; and
 - (b)** results in a representation of parties in the permanent delegates component of the delegation in substantially the same proportion the parties are represented in the legislature.

⁹ Moved to section 75.

¹⁰ Moved to section 75A.

¹¹ Moved to section 75B.

- (3) The permanent delegates cease to be members of the provincial legislature upon their appointment, and must be available full-time for the business of the National Council.
- (4) The permanent delegates are appointed for a term that expires immediately before the first sitting of the provincial legislature after its next election.
- (5) A person ceases to be a permanent delegate if that person -
 - (a) ceases to be eligible to be a member of the provincial legislature;
 - (b) has lost the confidence of and is recalled by the party which nominated that person;¹² or
 - (c) is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the National Council prescribe loss of office as a permanent delegate.
- (6) Vacancies in the permanent delegates component of a provincial delegation must be filled in terms of national legislation without changing the proportions of party representation in that component of the delegation.¹³
- (7) Before permanent delegates begin to perform their functions in the National Council of Provinces, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, by solemn declaration in accordance with Schedule 3.

Special delegates

59. The special delegates in a province's delegation to the National Council of Provinces are -

- (a) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council; and

¹² This is the "recall option" which requires further consideration.

¹³ National legislation should provide that the provincial party should in effect fill vacancies occurring in the ranks of its delegates.

- (b) four/two other members designated by the provincial legislature either generally or for any specific business before the National Council.

Heads of delegations

60. The Premier of a province heads the province's delegation to the National Council of Provinces, or, if the Premier is not available, any other member of the provincial legislature designated by the Premier in terms of section 59(a) must head the delegation.

Sittings of National Council

- 61.** (1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.
- (2) The President may summon the National Council to an extraordinary meeting at any time to conduct urgent business.
- (3) The seat of the National Council is the same as that of the National Assembly. Meetings at other places are permitted on the grounds of public interest, security or convenience, and in a manner provided for in the rules and orders of the Council.

Chairperson

- 62.** (1) The National Council of Provinces must elect a Chairperson and a Deputy Chairperson.
- (2) The Chairperson and the Deputy Chairperson are elected for a term of one year, and must be succeeded by a delegate from another province.

Alternatively

- (2) (a) There are two Deputy Chairpersons elected annually at a meeting of the Premiers from among their number.
- (b) At least one of the Deputy Chairpersons must be elected from one of the minority parties if that minority party is a majority party in the province.

Decisions

- 63. (1)¹⁴** Except where the Constitution provides otherwise -
- (a) each provincial delegation has one vote which is cast on behalf of the delegation by the head of the delegation in accordance with a mandate given by the provincial legislature;¹⁵
 - (b) at least five provincial delegations must be represented in the National Council before a vote may be taken on any matter; and
 - (c) all questions before the National Council are decided by a majority of the votes cast.

Cabinet members' participation in National Council

- 64. (1)** A Cabinet member may attend, and may speak in the National Council of Provinces, but may not vote.
- (2) The National Council may summon a Minister or an official in the national government to a meeting of the Council or a committee of the Council.

Internal autonomy

- 65. (1)** The National Council of Provinces may determine and control its internal arrangements and may make rules and orders concerning its business and proceedings, including rules and orders regulating the establishment, composition, powers and functions, procedures and duration of its committees.
- (2) The rules and orders of the National Council must provide for the participation of minority parties in its legislative proceedings in a manner consistent with democracy.
- (3) A committee of the National Council may summon anyone to appear before it to give evidence on oath or affirmation or to produce documents.

¹⁴ This clause states the general position as far as decision-taking in the Council is concerned. Different procedures and quorums for constitutional amendments and Bills falling outside Schedule 5 are prescribed in sections 69 and 70.

¹⁵ This is the most effective way of giving a mandate to the delegation whilst allowing for the necessary flexibility on the part of the delegation to negotiate with other provinces and in the Council. The head of the delegation will always be one of the special delegates, and sometimes the Premier.

Privilege

- 66.** (1) Delegates to the National Council of Provinces have freedom of speech and debate in the Council and in its committees, subject to its rules and orders.
- (2) Members of the National Council are not liable to civil or criminal proceedings, arrest, imprisonment or damages for -
- (a) anything they have said in, produced before, or submitted to the Council or any of its committees; or
- (b) anything revealed as a result of anything that they have said, produced or submitted.
- (3) Other privileges and immunities of members of the National Council may be prescribed by national legislation.

Participation by local government

- 67.** Representatives of local government designated in accordance with national legislation may attend, and may speak in the National Council of Provinces or its committees, but may not vote.

Full-time delegates' participation in provincial legislatures¹⁶

- 67A.** The full-time delegates in a provincial delegation to the National Council of Provinces may attend, and may speak in their provincial legislature, but may not vote.

¹⁶ This section will have to move to the chapter on provinces.

CHAPTER 4A

NATIONAL LEGISLATIVE PROCESS

All Bills

68. (1) Bills may be introduced in the National Assembly only.
- (2)¹⁷ All Bills passed by the National Assembly must be referred to the National Council of Provinces before they are submitted for the President's assent, excluding a Bill -
- (a) amending the Constitution which does not require the National Council's approval; or
 - (b) passed by the National Assembly after completion of the National Council's participatory role in the Bill.

Bills amending the Constitution

69. (1) The Constitution may be amended by a Bill -
- (a) passed by the National Assembly by a vote of at least two thirds of its members; and
 - (b) approved by the National Council of Provinces by a vote of at least six provincial delegations, if the Bill alters the boundaries, powers, functions or institutions of provinces or any provisions of the Constitution regulating any provincial matter.
- (2) The National Council of Provinces may not approve a Bill referred to subsection (1)(b) which concerns any specific province or provinces only, unless the Bill has been approved by the provincial legislature of the relevant province or the legislatures of the relevant provinces.

¹⁷ This subsection states the general rule that all Bills once they have been passed by the NA must be referred to the National Council, except in three cases:

1. Constitutional amendments not requiring NCOP approval (see Section 69(1)(b)).
2. Bills passed by the NA after the NCOP has completed its role in the process (see for instance section 70(1)(b)(i) or 71(g)).

Bills within the national government's exclusive legislative power

- 70. (1)** When a Bill falling within the national government's exclusive legislative power is referred to the National Council of Provinces in terms of section 68(2), the following procedure applies:
- (a) The National Council must either -
 - (i) consent to the Bill;
 - (ii) consent to the Bill subject to amendments proposed by it; or
 - (iii) object to the Bill.
 - (b) If the National Council has objected to the Bill or has consented to the Bill subject to amendments, the National Assembly must reconsider the Bill taking into account any amendments proposed by the National Council, and may -
 - (i) pass the Bill again, either with or without amendments; or
 - (ii) reject the Bill.
 - (c) The National Assembly may only pass a Bill in terms of paragraph (b) after 30 days has elapsed since the National Council objected to it or consented to it subject to amendments, unless the Bill incorporates the amendments proposed by the National Council.
 - (d) A Bill passed by the National Assembly in terms of this section must be referred to the President for assent.
- (2)** To decide questions before the National Council in terms of this section -
- (a) section 63 does not apply;
 - (b) each delegate in a provincial delegation, including the delegate presiding in a Council meeting, has one vote;
 - (c) one third of the total number of delegates in the provincial delegations must be present before a vote may be taken on any question;
 - (d) a vote by the majority of the votes cast is required, and if there is an equal number of votes on both sides of a question the delegate presiding must cast a deciding vote.

- (3) The National Assembly and the National Council may establish joint committees to consider and report on Bills envisaged in this section.

Bills within the national government's concurrent legislative power

71. When a Bill falling within a functional area listed in Schedule 5 is referred to the National Council of Provinces in terms of section 68(2) the following procedure applies.

- (a) The National Council must either -
- (i) support the Bill;
 - (ii) support the Bill subject to amendments proposed by it; or
 - (iii) oppose the Bill.
- (b) If the National Council supports the Bill, the Bill must be submitted to the President for assent.
- (c) If the National Council supports the Bill, but proposes amendments to it, or if it opposes the Bill, the Bill, together with any proposed amendments, must be referred to the Mediation Committee.
- (d) If the Mediation Committee fails to agree on the Bill, or amendments thereto proposed by the National Council, the Bill lapses [unless the National Assembly passes the Bill by a vote of the majority at least two thirds of the members present].
- (e) If the Mediation Committee agrees on the version of the Bill as passed by the National Assembly, the Bill must be submitted to the President for assent.
- (f) If the Mediation Committee agrees on a version of the Bill different to that passed by the National Assembly, the agreed version of the Bill must be referred to the National Assembly, and if the Mediation Committee agrees on a version of the Bill different to that proposed by the National Council, the agreed version of the Bill must also be referred to the National Council.
- (g) If the agreed version of the Bill is passed by the National Assembly and, when applicable, supported by the National Council, the Bill must be submitted to the President for assent.
- (h) If the agreed version of the Bill is not supported by the National Council, the Bill lapses [unless the National Assembly passes the Bill by a vote of the majority of at least two thirds of the members present].

Money Bills

- 72.** (1) Money Bills may not provide for matters other than appropriating money or imposing taxation.
- (2) The National Assembly may not pass a money Bill unless the Minister responsible for national financial matters, or any other Minister acting with the concurrence of the Minister responsible for national financial matters, has introduced the Bill in the Assembly.¹⁸
- (3) Subsection (2) does not prevent the National Assembly from passing amendments to a money Bill introduced in the Assembly as prescribed in that subsection.
- (4) When money Bills are referred to the National Council of Provinces in terms of section 68(2), the procedure set out in section 69 must be followed.
- (5) A money Bill means any Bill appropriating money or imposing taxation, excluding a Bill providing for the imposition or appropriation of fines or other monetary penalties.

Mediation Committee

- 73.** (1) The Mediation Committee consists of -
- (a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules of the Assembly and results in a representation of parties in substantially the same proportion the parties are represented in the Assembly; and
- (b) one delegate from each provincial delegation in the National Council of Provinces designated by the delegation.
- (2) Support by the majority representatives of the National Assembly and by the majority of the delegates of the National Council on any question before the Mediation Committee constitutes an agreement in the Committee on that question.
- (3) Rules and orders adopted by the National Assembly and consented to by the National Council regulate the Mediation Committee and its procedure.

¹⁸ See section 60(3) of the Interim Constitution. The role of the Financial and Fiscal Commission needs to be determined.

Assent to Bills

- 74. (1)** The President must either assent to and sign a Bill adopted in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- (2)** If the President refers a Bill back to the National Assembly, the following procedure applies:
- (a)** the Assembly must reconsider the Bill in the light of the President's reservations.
 - (b)** If the Assembly does not reject the Bill and passes it fully accommodating the President's reservations, the President must assent to and sign the Bill.
 - (c)** If the Assembly confirms the Bill or passes it without fully accommodating the President's reservations, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality.
 - (d)** If the Constitutional Court decides that the Bill is constitutional the President must assent to and sign it. If the court decides the Bill is unconstitutional, the Bill lapses.

Application by members of National Assembly to Constitutional Court

- 75. (1)** At least one third of the members of the National Assembly may apply to the Constitutional Court for an order declaring that a Bill passed by the National Assembly or part of the Bill, or if the Bill has been promulgated, the Act, or part of the Act, is unconstitutional.
- (2)** An application -
- (a)** may not be made before the President has assented to and signed the Bill; and
 - (b)** must be made no more than 30 days after the Bill has been signed by the President.

- (3) When an application is made, the Constitutional Court may order that the Bill may not be promulgated or that the Act or part of it has no force until the Court has decided the application if -
- (a) the interests of justice require this; and
 - (b) the application has reasonable prospects of success.
- (4) If the application is unsuccessful the Constitutional Court must order the applicants to pay the costs unless the application had reasonable prospects of success.

Promulgation

75A. A Bill assented to and signed by the President must be promulgated and becomes an Act of Parliament upon its promulgation.

Safekeeping of Acts of Parliament

75B. The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and must be entrusted for safekeeping to the Constitutional Court immediately after promulgation.

