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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: MEMBERS OF THEME COMMITTEE II AND III

**FROM: HASSEN EBRAHIM
EXECUTIVE DIRECTOR**

DATE: 5 APRIL 1995

RE: PRELIMINARY RECOMMENDATIONS BY COMMISSION ON PROVINCIAL GOVERNMENT (CPG)

I attach under cover hereof a copy of a letter and the preliminary recommendations which are made by the CPG on a second chamber and provincial government systems.

Kindly note that this submission should be accorded the necessary status as a recommendation made in terms of section 164(1)(a) of the interim constitution.

It is therefore necessary that your Theme Committee in preparation of the relevant report make specific reference to this submission.

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COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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1995-04-03

The Executive Director
Constitutional Assembly
P O Box 15
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Dear Mr Ebrahim

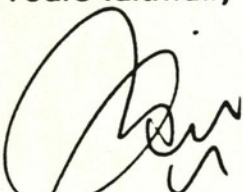
PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

Preliminary recommendations in regard to a second chamber

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully


CHAIRPERSON

md472

COMMISSION ON PROVINCIAL GOVERNMENT
PRELIMINARY RECOMMENDATIONS ON A SECOND CHAMBER
RECOMMENDATIONS - DOCUMENT 4

1. INTRODUCTION

- 1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 2).
- 1.2 The Constitutional Principles do not provide for the continued existence of the Senate in the new Constitution. The only reference to a possible second chamber of Parliament is contained in CP XVIII.4 dealing with an alternative in respect of majorities required for amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces. The relevant wording is: "... if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives ...". It is significant that while there is no certainty in regard to the continuation of the Senate as such, there is reference to the possibility of a second chamber being composed of provincial representatives.
- 1.3 From the documentation relating to a second chamber of Parliament before the Commission, it appears that there is considerable support for the continued existence of a second chamber. However, there are divergent views on its role, powers and composition, as well as other aspects.

2. INTERIM CONSTITUTIONAL PROVISIONS

Sections 48 to 54 of the interim Constitution deal specifically with the Senate, and sections 55 to 67 relate to matters affecting both the National Assembly and the Senate. The text of these sections is appended for easy reference.

3. DISCUSSION

3.1 Purpose of a second chamber

- 3.1.1 It is necessary to clarify the purposes a second chamber might fulfil in order to justify its institution and continued existence. Agreement in regard to such purposes is necessary for the formulation of other provisions required to give effect to these, such as the composition, powers and role of the second chamber. The specification of purposes also provides a measure for determining whether a second chamber is in fact functioning effectively.

3.1.2 It is generally accepted that in a national legislature a second chamber can serve either one or both of two main purposes, in both unitary and federal states, namely

- (a) to provide internal control over governmental actions, especially in the legislative process, and
- (b) to broaden the system of representation, for example to provide specifically for the representation of subnational units (regions, provinces, or states), or to include other significant interests in the society.

In regard to (a) it is argued that a second chamber helps to prevent flawed legislation from being passed by a single chamber. Nor does the first chamber have unchecked power that could threaten the freedom of individuals or minorities. The second chamber in fact provides a second opinion on matters dealt with by the first chamber. Even by exercising a delaying power, it could compel a government or a first chamber to reconsider a matter or to amend its proposals. Such a delay would also focus the attention of the public on the matter and encourage public debate which could influence the final outcome. It therefore enhances the quality of democracy.

In regard to (b) it is argued that second chambers can represent interests and views that might otherwise be ignored or subordinated (for example, rural versus urban interests; or less populous regions versus those with large populations) and which should be given the opportunity to make their voices heard in the process of government; or where distinctive and significant interests (such as those of regions, provinces or states) cannot be adequately accommodated in the system of representation employed in the other chamber.

In the case of South Africa, where the national legislature has the power to override provincial legislation in certain circumstances in respect of all Schedule 6 functional areas, the checks and balances that a second chamber could provide, might seem to be particularly appropriate.

- 3.1.3 The Commission is of the view that the provision of a second chamber in the South African Parliament would be justified if it is composed and empowered in such a way that it could effectively fulfil the purposes discussed in paragraph 3.1.2.

The Commission is of the opinion that the representation of provincial interests is of particular importance in view of the discussion in paragraph 3.1.2, and that this should be the overriding consideration in determining the need for a second chamber. It

therefore recommends that a second chamber of Parliament be retained, but that it be structured as discussed below.

To accommodate the obligation on the Commission to consider the provisions of the interim Constitution, and to facilitate the drafting of provisions for the new Constitution, the discussion will be based on the present constitutional text relating to the Senate.

3.2 Composition of the second chamber

3.2.1 Section 48(1) provides that the Senate shall be composed of 10 Senators for each province, nominated by the parties represented in a provincial legislature. Section 48(2) stipulates that the nominations shall be in accordance with the principle of proportional representation as determined by the formula described in the section.

3.2.2 The provision of an equal number of members for each province is in accordance with general international practice for the representation of states/provinces in a second chamber and is also regarded as suitable for South African circumstances. No cogent reasons have been brought to the Commission's attention why this allocation should change in the new Constitution.

The possibility of reducing the number of members in the second chamber has been raised, but the Commission must caution that this could result in there being insufficient members to participate effectively in the various structures of Parliament, especially if the role of the second chamber itself is to be enhanced.

3.2.3 The Commission does not regard it as being within its jurisdiction to express a view in regard to the representation of other interest groups in the second chamber, but draws this to the attention of the Constitutional Assembly, which may wish to pursue the matter. It should be borne in mind, however, that the determination of interest groups qualifying for representation could be a controversial matter. In addition, such representation could pose serious problems in satisfying criteria for democratic accountability.

3.2.4 In terms of the interim Constitution, members of the Senate have to be nominated by political parties. This could have the effect that senators regard themselves as party representatives, and are also regarded in this light by the public. In a Parliament where the representation of political parties in the first chamber is largely replicated by the representation of parties in the Senate, a situation could be created in which senators are obliged to follow the directions given by their party caucuses. The Senate therefore becomes no more than a rubber stamp for the first chamber. In such circumstances the Senate would obviously not be fulfilling any distinctive purpose and would become superfluous.

The Commission is consequently of the opinion that the new Constitution should contain provisions that clearly provide for provincial representation in the second chamber (CP XVIII.4) and for its members to have sufficient independence so as to enable them to represent their provinces effectively. This is discussed below.

3.2.5 More independent and effective representation of the provinces could possible be provided by -

- (i) direct election in each province of members of the second chamber. This would probably be the most democratic way to ensure representation of the provinces in the second chamber. The feasibility of such a procedure requires further investigation; or
- (ii) representation of the provinces by elected members of the provincial legislatures nominated by the legislatures on a proportional basis. This method would create a much closer relationship between members of the second chamber and their province's legislature, and could also allow for the interchangeability of members of the second chamber in Parliament and members of the provincial legislature; or
- (iii) requiring parties to submit lists of candidates for nomination to the second chamber together with their lists of candidates for election to the provincial legislatures. This would at least identify the candidates for the second chamber beforehand, but would not directly influence their appointment as this would still be by proportional representation according to the number of votes registered for each political party; or
- (iv) nomination of members of the second chamber by the provincial legislature on the basis of proportional representation instead of by the parties. This method would not differ materially from the present method provided in section 48, but may serve to strengthen their identity as the selected representatives of the province and its legislature and less as representatives of political parties; or
- (v) representation of the province in the second chamber by the requisite number of members drawn from the province's Executive Council. The feasibility of this method would require careful investigation, however, in the light of demands likely to be made on members of provincial Executive Councils simultaneously attending to parliamentary duties.

3.2.6 The Commission is of the view that, at this point in our constitutional history, the method described in paragraph 3.2.5 (ii) above could provide an effective form of representation for the provinces in the second chamber. In effect this system combines elements of the other methods described.

The Commission therefore recommends that this method be considered by the Constitutional Assembly.

3.2.7 Whatever the system adopted for appointment to the second chamber, the members' relationship with the provincial legislatures would be strengthened if they were required to report to the provincial legislature from time to time in regard to their activities and efforts to promote the interests of their provinces at national level. This would make their role as provincial representatives much more meaningful and accountable. Accountability could be strengthened further by making provision for the recall of members by their provinces if deemed to be performing unsatisfactorily. The Commission recommends that provisions to this effect be incorporated into the new Constitution.

3.3 President and Deputy President of the second chamber

Section 49 of the interim Constitution provides for the election of the President and Deputy President of the Senate and deals with other non-contentious matters relating to these offices. Similar provisions will have to be incorporated into the new Constitution if a second chamber is retained.

3.4 Qualification for membership of the second chamber

Section 50 specifies that no person shall be qualified to become or remain a senator unless he or she is or remains qualified to become a member of the National Assembly. These qualifications are prescribed in section 42 which should be retained. However, the section does not provide for residential qualifications. Nor does section 48 require that a senator should be ordinarily resident in the province that he or she represents. The CPG considers it essential that a member of the second chamber should be ordinarily resident in the province that he she represents. A similar opinion has been expressed by the Commission in respect of members of the provincial legislatures (paragraph 3.10.3 of Recommendation 3). The Commission recommends that provisions similar to those contained in section 50 should be incorporated into the new Constitution. However, if the recommendation in paragraph 3.2.6 above is adopted, the section may be omitted. If not, it should be amended to provide for residential requirements for members of the second chamber similar to those provided for members of provincial legislatures.

3.5 Vacation of seats by members and filling of vacancies

3.5.1 Section 51(1) stipulates that a senator shall vacate his or her seat if he or she ceases to qualify, resigns or is absent without leave for 15 consecutive days. This provision should be retained.

3.5.2 The Section [paragraph (b)] also provides for the vacation of a seat if a senator ceases to be a member of the party which nominated him or her as a senator. The issue is similar to that relating to members of the provincial legislatures dealt with in paragraph 3.11.2 of Recommendation 3. The Commission is of the opinion that democratic principles would be better served by the deletion of the provision which terminates membership of the second chamber if the member ceases to be a member of the party which nominated him or her. This recommendation will fall away if members of the second chamber are nominated by provincial legislatures instead of by parties, as recommended in paragraph 3.2.6.

3.5.3 Section 51(2) provides for the filling of vacancies in the Senate by nomination by the party which nominated the vacating senator. The provision will have to be amended if the recommendation in paragraph 3.2.6 above is adopted.

3.5.4 Section 51(3) provides that if a provincial legislature is dissolved, the senators from the province in question shall vacate their seats and that the vacancies shall be filled in terms of section 48(1)(a). The Commission is of the view that, in the event of a provincial legislature being dissolved, the province's members in the second chamber should vacate their seats. The vacancies should then be filled on the basis recommended in 3.2.6.

3.5.5 In the event of any other vacancies occurring in the second chamber before the expiry of the normal term of office, persons nominated to fill such vacancies should be appointed only for the balance of the unexpired period.

3.6 Oath and affirmation by members of the second chamber Sittings of the second chamber Quorum

These matters of a procedural nature are provided for in sections 52 to 54. The new Constitution should provide for similar provisions.

4. DISCUSSION - THE NATIONAL ASSEMBLY AND THE SECOND CHAMBER

- 4.1 Powers, privileges and immunities of Parliament and benefits of members
Parliament and benefits of members
Penalty for sitting or voting when disqualified by law
Joint sitting of Houses
Rules and orders

These are procedural matters dealt with in sections 55 to 58 of the interim Constitution. The new Constitution should contain similar provisions.

4.2 Ordinary Bills

4.2.1 Section 59(1) provides for the introduction of ordinary Bills in either the National Assembly or the Senate and for their adoption in each House in order to be passed by Parliament. Similar provisions should be incorporated into the new Constitution.

4.2.2 Section 59(2) provides that an ordinary Bill passed by one House and rejected by the other shall be referred to a joint committee consisting of members of both Houses and of all the parties represented in Parliament and willing to participate in the joint committee. After consideration and report on any proposed amendments to the Bill, it shall be referred to a joint sitting of both Houses, at which it may be passed with or without amendments by a majority of the total number of members of both Houses.

This procedure is fair up to the majority requirement at the joint sitting. The Senate is at a disadvantage in joint sittings requiring a simple majority to pass a Bill because of the relative smallness of its membership, namely 90 out of a total of 490 members. It could be argued that as half of the 400 members of the National Assembly have been elected from provincial lists of the political parties, this accommodates the interests of provinces. However, they are members of the National Assembly and their election from provincial lists instead of from national lists is of no practical significance. Moreover, political parties may not be obliged to present provincial lists in future elections.

On the other hand, deadlock-breaking mechanisms should be available in order not to bring government to a complete halt. Investigations of the deadlock-breaking procedures employed in other countries indicate that no absolute procedure has as yet been devised, except for referral of the matter to a constitutional court for judgement. The most effective political mechanism available is to provide for a cooling-off period which may persuade the government to reconsider or amend the Bill.

The Commission is consequently of the opinion that a Bill which has been referred to a joint committee as contemplated in section 59(2) should be reported on to both Houses and if still rejected by one House, should be reconsidered by both Houses after a period of six months. If the Bill is again passed by one House and rejected by the other, it should be referred to a joint sitting of both Houses, at which it may be passed with or without amendments by a majority of the total number of members of both Houses.

4.3 Money Bills

4.3.1 Section 60(1) provides that Bills appropriating revenue or moneys or imposing taxation shall be introduced in the National Assembly only. However, section 60(4) provides that the National Assembly shall not pass such a Bill unless it has been considered and reported on by a joint committee of both Houses. The Senate may not amend any Bill in so far as it appropriates revenue or moneys or imposes taxation [60(6)]. Section 60(7) stipulates that if the National Assembly passes a Bill imposing taxation or dealing with the appropriation of revenue or moneys and the Senate rejects it or proposes amendments to it, or fails to pass it within 30 days after it has been passed by the National Assembly, the Bill shall be referred back to the National Assembly for reconsideration. It may then pass the Bill with or without amendment, and if so passed it shall be deemed to have been passed by Parliament.

4.3.2 While the provisions of this section illustrate the dominance of the National Assembly in respect of money Bills, there are important reasons why such Bills should not be delayed unreasonably. As matters are, the Senate can delay such a Bill for 30 days if it wishes to do so. Further unreasonable delay may be harmful to good government if it should impair the ability to collect revenues or expend moneys.

A problematical situation arises in regard to the ability of the Senate to influence discretionary appropriation of revenues or moneys for provincial activities, and even the determination by law of the share of national revenues to be allocated to the provinces and local governments. In theory the second chamber should protect the interests of the provinces in these matters by using all mechanisms at its disposal. As indicated under paragraph 4.2.2 the interests of good governance dictate that it can at most use delaying mechanisms to achieve reconsideration of a relevant Bill. However, such delays could also be harmful to the activities of the provinces.

4.3.3 It is evident that the distribution of national revenues between the three levels of government will remain an issue for the foreseeable future. The Financial and Fiscal Commission may play an important role in resolving many of the disputes which could arise over money matters. As far as the parliamentary process for money Bills and the role of the second chamber in that process are concerned, no further solutions for breaking deadlocks have presented themselves to the Commission. It is a known fact that the need for money for government activities at all levels is almost infinite, while the sources of revenue are finite. All that could be achieved by any mechanism is to ensure a fair distribution of the available revenue. To this end, the administrative processes preceding the introduction of money Bills should be developed to the extent that as far as possible disputes are resolved before the parliamentary processes commence. Once such a Bill has been introduced, in the National Assembly, the views of the National Government can only be influenced to a certain extent during the procedures prescribed in Section 60. It does not appear to the Commission that the second chamber could be given more powers in respect of such Bills without increasing the possibility that the process may adversely affect efficient and effective governance.

4.4 Bills affecting certain provincial matters

4.4.1 Section 61 stipulates that Bills affecting the boundaries or the exercise or performance of the powers and functions of provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses. Such Bills can be passed by an simple majority in each House. The section further stipulates that a Bill, other than a Bill amending the Constitution, which affects the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, must also be approved by a majority of the senators of the province or provinces in question.

4.4.2 The provisions in Section 61 are not very clear. However, what is relevant is that Bills dealing with the exercise of concurrent powers in respect of Schedule 6 functional areas should enjoy the special attention of the second chamber. In effect, in terms of the interim Constitution Parliament can pass Bills in respect of such matters with ordinary majorities in both Houses. Additional protection of provincial interests could be provided by requiring a special majority for such Bills in the second chamber. However, this may be too onerous and in effect elevate every such matter to the level of constitutional changes for which such special majorities are required. The power of the second chamber in regard to provincial matters could be enhanced by requiring Bills of this nature to be introduced in the second chamber only, as the equivalent of the case with money Bills in the National Assembly. The Commission is consequently of the opinion that provision should be made for Bills

dealing with Schedule 6 functional areas to be first introduced in the second chamber. In addition, any such Bills relating to a particular province should also require the approval of the majority of that province's representatives in the second chamber. These requirements would open the way for discussions between the national government and the provinces to address issues and resolve differences before such Bills are considered in the first chamber.

4.5 Bills amending the Constitution

4.5.1 Constitutional Principle XVIII.4 provides as follows:

Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

4.5.2 Section 62(1) provides generally that a Bill amending the Constitution shall require a two-thirds majority at a joint sitting of the National Assembly and the Senate. Section 62(2) further provides that amendments of section 126 (legislative competence of provinces) and section 144 (executive authority of provinces) shall require a two-thirds majority of each House sitting separately. It further provides that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature.

4.5.3 The provisions of section 62 therefore appear to be in accordance with the stipulations of CP XVIII.4 and similar provisions could be incorporated into the new Constitution.

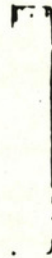
4.5.4 The Commission is of the opinion that certain constitutional principles should be incorporated into the new Constitution to further entrench the constitutional position of the provinces. The following principles are relevant:

CP XVI, CP XX, CP XXI, CP XXII, CP XXIII, CP XXVI

- 4.6 Requisite majorities
- Assent to Bills
- Signature and enrolment of Acts
- Rights and duties of President, etc. in Houses
- Public access to Parliament

The above matters are procedural in nature and similar provisions need to be incorporated into the new Constitution.

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COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

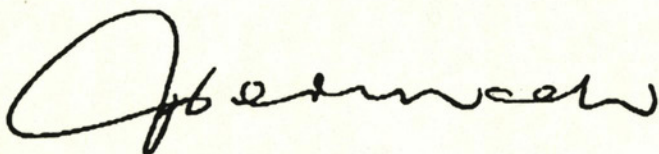
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TELEFAX COVERING SHEET/DEKBLAD

DATE/DATUM:	5 APRIL 1995
TO/AAN:	EXECUTIVE DIRECTOR : CA ATTENTION ANITA GEISSLER
FAXNUMBER/FAKSNOMMER:	021 - 241162
FROM/VAN:	J P VERMAAK CPG
SUBJECT/ONDERWERP:	DETAILED PROGRAMMES TC 1, 2 AND 3 FOR 18-24 APRIL
NUMBER OF PAGES/AANTAL BLADSYE:	1 + 0
If you have not received all the pages please phone: Indien u nie al die bladsye ontvang het nie skakel asseblief: (012) 442297	

COULD YOU PLEASE FAX ME THE
WORK PROGRAMMES FOR TC 1, 2 AND 3
FOR 18-24 APRIL INDICATING THE
SUBJECT MATTERS THEY WILL BE DEALING
WITH: ON EACH OF THE DAYS. WE URGENTLY
REQUIRE THE INFORMATION TO PLAN OUR
OWN WORK PROGRAMME FOR THAT WEEK

KIND REGARDS



COMMISSION ON PROVINCIAL GOVERNMENT

Established in terms of section 163 of Act 200, 1993

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2/7/1

Mr C Ramaphosa
Chairperson: Constitutional Assembly
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Dear Mr Ramaphosa

ATTENDANCE OF MEETINGS OF CONSTITUTIONAL ASSEMBLY STRUCTURES

Members of the Commission have been attending meetings of the Constitutional Assembly's structures over the past weeks in accordance with our agreement of 28 February 1995, although no confirmation has as yet been received that the arrangement was confirmed by your Management Committee. However, the arrangement has in practice not worked satisfactorily from the Commission's point of view, mainly because we have thus far been unable to ascertain timeously which particular matters would be discussed by the relevant committees of the Constitutional Assembly on any particular day. As a result, the delegated members often have travelled to Cape Town only to find that few if any matters relevant to the Commission's activities were being discussed in the committees.

The Commission has at present only two fulltime members and two technical advisors who have to manage the day to day functioning of the Commission, including attendance at the Constitutional Assembly committees. These persons therefore need to utilise their time very effectively in order inter alia to produce preliminary recommendations in synchronisation with your work programme.

The Commission has to date submitted four documents containing recommendations relating to provincial constitutions, legislative competence, staff matters, and a second chamber of Parliament, for consideration by the Constitutional Assembly in terms of section 18 of the interim Constitution. Copies have been forwarded to all provinces for submission of their comments to either the CA or the CPG. Two further documents will be submitted to you within the next few days. Others are still in preparation.

The Commission considers it important that some of its members and advisors should be present when these documents are discussed by the various committees of the Constitutional Assembly. I would therefore appreciate it if the Commission could be given at least one week's notice before any of its documents are due to be discussed by any committee, in order to make arrangements for attendance by its representatives.

The Commission will also endeavour to send representatives to any other meetings of committees where its presence may be required or desirable, provided that it is advised timeously of the matters to be discussed at such meeting.

I trust that the abovementioned arrangements will be acceptable to your Management Committee and look forward to your early confirmation.

Yours sincerely



CHAIRPERSON

95.04-25