

[7]

**CONSTITUTIONAL
ASSEMBLY**

**MANAGEMENT
COMMITTEE**

**THURSDAY
15 FEBRUARY 1996
(08h00)
V16**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE MANAGEMENT COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

Date : Thursday 15 February 1996

Time : 08h00 - 10h00

Venue: V16

AGENDA

1. Opening
 2. Minutes: *Pages 2 - 4*
 3. Matters Arising: See Agenda Items Below
 4. Evaluation: *Pages 5 - 23*
 5. AOB
 6. Closure
-

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries: Ms M M Sparg, Tel 245-031, Page 418 4616 code 6970

CONSTITUTIONAL ASSEMBLY
MINUTES OF THE MANAGEMENT COMMITTEE MEETING
THURSDAY 1 FEBRUARY 1996

PRESENT

RAMAPHOSA M C (CHAIRPERSON)

Chabane O C
Eglin C W
Meshoe K R
Meyer R P
Moosa M V

Myakayaka-Manzini M
Sizani R K
Van Breda A
Viljoen C
Wessels L (Deputy Chairperson)

Absent: P F Smith.

In Attendance: H Ebrahim, P Lilienfeld, M Sparg, L Zondo, G Grové and M Keegan.

1. OPENING

1.1 The Chairperson opened the meeting at 08h06.

1.2 The meeting approved the agenda with two additions under 5. AOB:

5.1 *Role of the Technical Experts; and*

5.2 *Preamble.*

2. MINUTES

2.1 The meeting adopted the Minutes of the Management Committee Meeting of Wednesday 17 January 1996.

3. MATTERS ARISING

None - included in agenda items below.

4. DISCUSSION ON OUTSTANDING ISSUES

4.1 Mr. Ramaphosa introduced the document entitled "*Schedule of Issues Requiring Attention*," included in the documentation.

4.2 It was agreed that the NP proposal for a Cultural Commission would be added to the "*Schedule*" under Chapter 7.

4.3 The meeting agreed that item 35 of the "*Schedule*", entitled

"Amendment of the Constitution", would not only address standard amendments, but also clauses or principles that could not be amended.

4.4 The meeting agreed that the Constitutional Assembly should hold meetings with provincial cabinets to brief and consult them. The Chairperson ruled that:

- i.** All members of the Management Committee should participate in these meetings, and
- ii.** A firm proposal with dates would be forwarded to the Management Committee for its consideration.

4.5 Mr. Viljoen of the FF said that agreements on self-determination would not be put in a separate chapter but probably be included in various chapters of the new constitution, and thus would affect the constitution as a whole. The Chairperson reported that bilaterals were occurring on the matter and said that consultation with the Volkstaat Council needed to be taken further.

4.6 The Chairperson said that the Constitutional Assembly (CA) should set the following targets:

- i.** End of March: complete the new constitution;
- ii** First two weeks of April: tidy the final document up;
- iii.** Third week of April: table the final text for consideration by the CA.

4.7 The meeting agreed that the Administration would draw up a schedule setting out what needs to be completed to meet these deadlines. The schedule would be considered by Management Committee at the 15 February evaluation.

5. ANY OTHER BUSINESS

5.1 ROLE OF TECHNICAL EXPERTS

The meeting agreed that the Technical Committee for Theme Committee 4 should be brought back to assist Subcommittee discussions on the Bill of Rights.

5.2 PREAMBLE

5.2.1 Mr. Meshoe of the ACDP said that discussion of the Preamble

should be brought forward, to give it the attention it required.

5.2.2 The meeting agreed that the deadline for political party submissions on the Preamble would be 15 February.

5.3 NEXT MEETING OF THE MANAGEMENT COMMITTEE

The Chairperson ruled that members would be notified about when the next meeting of the Management Committee would be.

6. CLOSURE

The meeting closed at 08h40.

MEMORANDUM

To: Members of the Management Committee

**From: Hassen Ebrahim
Executive Director**

Date: 9 February, 1996

RE: PROPOSALS ON PROCESS

At the Management Committee meeting of 1 February, the Directorate were instructed to develop proposals regarding the schedule of work to ensure completion of the new Constitution by 9 May 1996. The schedule has to however also take account of the time required for the adoption process itself. A proposal on the adoption process is also therefore included in this memorandum. Based on the research done and opinions obtained (See Attached Notes), the following proposals are made for consideration by the Management Committee:-

1. The draft schedule be approved in general and be subject to changes in the schedule of meetings. (See Annexure 1)
2. The amendments effected to the 3rd Edition of the Working Draft in the various Sub-Committee meetings be incorporated into a 4th Edition, to be completed by the end of February.
3. The 4th Edition of the Working Draft be considered by the Constitutional Committee in early March.
4. A sitting of the Constitutional Assembly take place in early March to consider -
 - 4.1. a report which includes a list of outstanding issues;
 - 4.2. an evaluation of the process;
 - 4.3. a resolution on the process of adoption; and
 - 4.4. debate on the 4th Edition of the Working Draft structured in the format of the last sitting of the Constitutional Assembly.
5. The Sub Committee continue to process the remaining outstanding issues which should culminate in the 5th Edition of the Working Draft by towards the end of March.

6. The 5th Edition of the Working Draft be prepared together with the final report to the Constitutional Assembly for discussion in the Constitutional Committee in early April.
7. The Technical Refinement Team continue with the technical preparation of the final text during the recess period.
8. The Constitutional Committee consider the final text at its meetings after recess.
9. It be agreed that since the process of Constitution making has thus far taken place in committees, the resolution contained in Par. 4.3 above on the process of adoption be based on an acceptance that it is not necessary to adhere to the Rules in the strict sense of following the four stages for the passage of the final text. Accordingly, the resolution referred to should confirm that the process as stated below be followed.
10. The final text of the Constitution be published in the Government Gazette and distributed to all Constitutional Assembly members together with the Assembly final report towards the end of April. The language of the text be in as many of the official languages as may be possible.
11. A sitting of the Constitutional Assembly be called on at the end of April for purposes of the simultaneous First and Second stage tabling of the final text in terms of the Rules. That the nature of the debate during this sitting, if any, be agreed to by the Constitutional Committee.
12. A sitting of the Constitutional Assembly be called on in early May for purposes of the Third Stage debate on the final text.
13. The final sitting of the Constitutional Assembly take place on 8 May for purposes of -
 - Adoption;
 - Tabling of the final report;
 - A resolution amending the interim constitution to make provision for the instance where the text is not certified; and
 - A resolution mandating the Chairperson to file the final text with the Constitution Court.
14. That the Management Committee consider the details of the process and form of petition for certification of the approved text at a later stage.

SUPPORTING NOTES

1. Objectives of Evaluation

- 1.1. To identify the outstanding issues that require attention;
- 1.2. To consider the programme and schedule of work;
- 1.3. To identify the tasks that need to be attended to;
- 1.4. to establish as to whether the tasks could be completed within the time frame.

2. Outstanding Issues that require attention

As at 5 February, 1996 there are 67 issues that remain outstanding. See Annexure 2. These include; matters of a non-contentious but technical nature such as the definition of national territory, various proposals that require consideration (e.g. Cultural Councils, self-determination) and politically contentious issues.

3. Constitutional Provisions - Passing of Text

- 3.1. **Sec 73(1)** requires the Constitutional Assembly to pass the final text **within two years** as from the date of the first sitting of the National Assembly. The first sitting took place on **9 May 1994**. Therefore the final date of adoption must be no later than **8 May 1996**.
- 3.2. **Sec 73 (2)** requires a **majority of two-thirds** of all members of the Constitutional Assembly provided that all provisions relating to boundaries, powers and functions of provinces shall also require a two thirds majority of the Senate. Procedurally, there should therefore be two sets of votes cast on the draft text.

4. Constitutional Assembly Rules - Passing of Text

- 4.1. The Rules envisage four stages that a Bill should pass through. See Annexure 3 These are:-
 - a) **The First Reading**, at which the bill is introduced, and statements on it are made;
 - b) **The Second Reading**, at which the objects and principles of the bill are discussed - this is the main debate on the bill;

c) **The Third Stage**, at which each clause or other provision of the bill, together with any amendment proposed thereto, may be considered before it is agreed to or negatived.

d) **The Third Reading**, at which the bill or, as the case may be, the bill as amended during the third stage, may be discussed. A two-thirds majority of the Constitutional Assembly, as well as a two-thirds majority of the Senate in respect of certain clauses relating to the provinces, is required.

4.2. On the basis of a conservative estimate, should we follow the process in terms of the strict letter of the Rules, we would need no less than 12 work days in the Constitutional Assembly.

4.3. On the other hand, the Constitutional Assembly has from the onset attended to all debates in the process in committee and the draft text itself has not been drafted by anybody other than the very political representatives in the Constitutional Assembly.

5. Constitutional Assembly Rules - Certification

5.1. While the Interim Constitution states in Sec 71 that the new text will not be of any force or effect unless it is certified by the Constitutional Court to be in compliance with the Constitutional Principles, it is silent as to the procedure for certification.

5.2. In terms of Rule 97 (1) two 'fair' copies of the text passed by the Constitutional Assembly must be certified accordingly by the Secretary and lodged with the Constitutional Court with a view to the certification.

5.3. Rule 97 (2) states that with due regard to the Rules of the Constitutional Court, the said two copies of the text must be accompanied by a request to the effect that, if the Constitutional Court certifies the text, one of the copies bearing the Court's certificate should be returned to the Secretary for presentation to the President for assent.

6. Constitutional Court Rules

- 6.1.** In terms of Rule 15, the Chairperson of the Constitutional Assembly is required to "certify in writing the content of the constitutional text passed by the Constitutional Assembly and submit such text to the registrar with a formal request to the Court to perform its functions in terms of section 71 (2) of the Constitution". This certificate should include a statement specifying that the provisions of the text were passed by the requisite majority and whether any of the political parties represented in the Assembly wish to address the Constitutional Court.
- 6.2.** The President of the Constitutional Court may direct that;
 - 6.2.1.** the Chairperson provide such further information as may be necessary to deal with the matter; and
 - 6.2.2.** all interested parties in the Assembly may be allowed to table written submissions and may present oral argument if necessary.

7. Consequences of Non-Certification (See Annexure 4)

- 7.1.** There is nothing in the Constitution which suggests that the Constitution Assembly will not be able to continue to function after 8 May 1996 for purposes of reformulation of provisions to ensure compliance with the constitutional principles.
- 7.2.** It may be arguable that the President will be compelled to act in terms of Sec 73 (9) and dissolve Parliament if the constitution is not certified by the Constitutional Court after 8 May 1996. Another problem that may be encountered is the absence of any provisions for the passing of a text after non-certification.

ANNEXURE 1:

CONSTITUTIONAL ASSEMBLY PROGRAMME - 1996

FEBRUARY

MON	TUES	WED	THURS	FRI	SAT	SUN
			1	2 <i>Party Caucuses</i>	3	4
5	6 Multi-Party Consultation, 10:00 - 18:00 E249 (Finance)	7 Sub-Committee 10:00 - 18:00 E 249 (Bill of Rights, Language, Anthem)	8 Consultation V16 8:00 - 10:00 (Auditor General)	9 <i>President's Speech</i>	10	11
12 Sub-Committee, 10:00 - 18:00 E249, (Courts & Admin. of Justice, National Executive, Finance & National Assembly)	13 <i>President's Speech Debate</i>	14 <i>President's Speech Debate</i>	15 Man Com, (Evaluation), 8:00 V16. Parties submission on Preamble 14:00 - 18:00 <i>President's Speech Debate</i>	16 <i>Party Caucuses</i>	17	18
19 Sub-Committee, 10:00 - 18:00, E249, (Senate & Competencies & Provinces)	20	21	22 Man Com V16 08:00 - 10:00 (Continue Discussion on Evaluation)	23 Multilateral Consultation (Bill of Rights Issues) 10:00 - 18:00	24	25
26 Sub-Committee 10:00 - 18:00 E249 (Senate/Council of Provinces, Competencies)	27 Sub-Com. 10:00 - 18:00 E249 (Local Gov. & Traditional Authorities, Self-determination, VolkstadRaad)	28 Sub-Committee 10:00 - 18:00 E249 (Gen. Provis, Preamble, Transit. Arrangements & Schedules)	29			

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MARCH

MON	TUES	WED	THURS	FRI	SAT	SUN
				1 Con. Committee 9:00 - 18:00 OAC	2	3
4 Con. Committee 9:00 - 18:00 OAC	5 Sub-Committee 14 - 18:00 E249 (Bill of Rights, Languages, Anthem)	6 Sub-Committee 10 - 18:00 E249 (Finance, Inst. Of Const Democracy, Public Admin, Security Services)	7 Man Com 8 - 10:00 V16	8 Const. Assembly - 10:00 - 18:00 NAC (Evaluation, Resolution on Process, Debate on 4th Edition of Working Draft)	9	10
11 Sub-Committee 10 - 18:00 E249 (Courts & Admin of Justice, Nat. Exec, & Nat. Assembly)	12 Sub-Committee 10 - 18:00 E249 (Provinces, Competencies & Senate)	13 <i>Budget Speech</i>	14 Man Com 8-10 V16	15 Sub-Committee 14 - 18:00 E249 (Local Gov, Tradit. Authorities & Self Determination)	16	17
18 Sub-Committee 10 - 18:00 E249 (Bill of Rights, Language, Anthem & Preamble)	19	20	21	22 Sub-Committee 10 - 18:00 E249 (Finance, Inst of Const. Democracy, Public Admin, Security Services & Transitional Arrangements)	23	24
25 Sub-Committee 10 - 18:00 E249 (Courts & Admin of Justice, Nat. Exec, & Nat. Assembly)	26	27	28	29 Sub-Committee 10-18:00 E249 (Provinces, Competencies & Senate)	30	31

APRIL

MON	TUES	WED	THURS	FRI	SAT	SUN
1 Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues)	2 Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues)	3 Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues)	4 Man. Committee V16 8:00 - 10:00 Const. Committee 10:00 - 18:00 OAC (Debate on Outstanding Issues)	5 <i>Good Friday</i>	6	7
8 <i>Family Day</i>	9 <i>RECESS</i>	10 <i>RECESS</i>	11 <i>RECESS</i>	12 <i>RECESS</i>	13	14
15 Const. Committee OAC 10:00 - 18:00 <i>Committee on Votes</i>	16 Const. Committee OAC 10:00 - 18:00 <i>Committee on Votes</i>	17 Const. Committee OAC 10:00 - 18:00 <i>Committee on Votes</i>	18 Man. Committee V16 8:00 - 10:00 Const. Committee OAC 14:00 - 18:00 <i>Committee on Votes</i>	19 Const. Committee OAC 10:00 - 18:00 <i>Committee on Votes</i>	20	21
22 Const. Committee OAC 10:00 - 18:00 (Last Meeting)	23 <i>Parliament</i>	24 <i>Parliament</i>	25 <i>Parliament</i>	26 Const. Committee OAC 10:00 - 18:00 (Last Meeting)	27	28
29 Const. Assembly 10:00 - 18:00 (First & Second Stage)	30 <i>Parliament</i>					

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Embargoed until 08h00
15 February 1996

MAY

MON	TUES	WED	THURS	FRI	SAT	SUN
		1 <i>Worker's Day</i>	2 Const. Assembly 10:00 - 18:00 (Third Stage - 1st Day)	3 Const. Assembly 10:00 - 18:00 (Third Stage - 2nd Day)	4	5
6 Const. Assembly 10:00 - 18:00 (Third Stage - 3rd Day)	7 <i>Parliament</i>	8 Const. Assembly 14:30 - 18:00 (Adoption)	9	10	11	12

Embargeod until 08h00
15 February 1996

ANNEXURE 2:
SCHEDULE OF ISSUES REQUIRING ATTENTION
as at
Tuesday 30 January 1996

No	Section	Issue
1.	Preamble	
Chapter 1 - Founding Provisions		
2.	1 (2)	National Territory
3.	5	Anthem
4.	6	Languages
Chapter 2 - Bill of Rights		
5.	7	State's Duty
6.	8	Equality
7.	10	Life
8.	11 (2) (b)	Freedom & Security of Person
9.	13 (d)	Privacy
10.	14 (3)	Freedom of Religion
11.	15	Freedom of Expression
12.	18 (2) & (3)	Political Rights
13.	20 (4)	Freedom of Movement
14.	21	Economic Activity
15.	22 (2) (c)	Right to strike
16.	22 (3) (c)	Right to lock Out
17.	22 (4)	Right to form Trade Unions
18.	24	Property
19.	25 (3)	Housing and Land
20.	27 (1) (f)	Children
21.	28	Education
22.	29	Academic Freedom
23.	30	Language and Culture
24.	31	Access to information
25.	32	Just Administrative Action
26.	34 (1) (d)	Arrest & detention
27.	35 (1) (a)	Limitation of Rights
28.	36	States of Emergency
29.	38(3)	Application
Chapter 3 - National Assembly		
30.	41	Composition & Election of National Assembly
31.	45 (3)	Seat of National Assembly
32.	46 (4)	Duration of Assembly
33.	50	Internal Autonomy
34.	52	Bills - Procedure
35.	53	Amendment of Constitution
36.	54	Assent to Bills
Chapter 4 - Senate		

No	Section	Issue
37.		Chapter on 2nd House - Two Options
Chapter 5 - National Executive		
38.		Government of National Unity
39.	93	Snap Elections
40.	93 (4)	Vote of no Confidence
Chapter 6 - Courts and Administration of Justice		
41.	95	Traditional Leaders
42.	97 (2)	Inherent Jurisdiction
43.	100	Appointment of Judges
44.	104 (1)	Judicial Service Commission
45.	105	Attorney General
Chapter 7 - State Institutions Supporting Constitutional Democracy		
46.	108	Tenure of Public Protector
47.	109	Human Rights Commission
48.	110	Gender Commission
49.	111	Auditor General
50.	113 (1)	Electoral Commission
Chapter 8 - Provinces		
51.	117 (2)	Provincial Boundaries
52.	118	Provincial constitutions
53.	140	Provincial Government
54.	148 -153	Provincial finances
Chapter 9 - Provincial Competencies		
55.		Provincial Competencies
Chapter 10 - Local Government		
56.		Local Government
Chapter 11 - Traditional Authorities		
57.		Traditional Authorities
Chapter 12 - Public Administration		
58.	171 (2)	Public Administration
59.	173 (3)	Public Service
Chapter 13 - Security Services		
60.	182	Control of Police Service
Chapter 14 - Finance		
61.	189	Contracts for Goods & Service
62.	191	Accountability for Enterprises
63.	196	Appointment of FFC members
64.	199	Reserve Bank
Chapter 15 - General Provisions		
65.	201	International Agreements
66.	Self Determination	
67.	Schedules	
68.	Transitional Arrangements	

ANNEXURE 3:

PRELIMINARY NOTES ON THE STANDING RULES OF THE CONSTITUTIONAL ASSEMBLY RELATING TO THE PASSING OF THE BILL CONTAINING THE NEW CONSTITUTIONAL TEXT

25 January, 1996

PRELIMINARY

In terms of Standing Rule [SR] 2(1), any provisions of the Rules may be suspended by resolution of the Assembly. However, the process detailed in the Rules has been framed with due regard to the provisions of the interim Constitution as well as Parliamentary legislative procedure. This should be borne in mind when contemplating possible rule changes.

The Third Stage, as discussed below, harks back to the Westminster procedure of the Committee of the Whole House, dropped here in 1987, whereby the plenary Assembly considers each clause in detail. This represents a departure from standard South African legislative practice, whereby a specialised committee considers the details of the bill and reports to the plenary.

The relevant procedure was no doubt specified with the following in mind -

- * it enables separate decisions to be taken in the plenary Constitutional Assembly in respect of clauses relating to the provinces, as required by section 73(2) of the Constitution
- * the significance of this legislation and the need for the Constitutional Assembly to consider it in detail. (This is also in line with the resolution of the Constitutional Assembly to guide, rather than rubber-stamp, the process.)

Tabling the bill:

The Chairman of the Constitutional Committee or his Deputy is in charge of the bill containing the new constitutional text. He must lay it upon the Table, together with the committee's report on that text¹ [SR76]. Having done so, he may thereupon immediately proceed to introduce the bill (see 'First Reading' below).

STAGES OF THE BILL

The bill must pass further through four stages, as follows:

- (a) the First Reading, at which the bill is introduced, and statements on it are made;
- (b) the Second Reading, at which the objects and principles of the bill are discussed - this is the main debate on the bill;
- (c) the third stage, at which each clause or other provision of the bill, together with any amendment proposed thereto, may be considered in the Constitutional Assembly before it is agreed to or negatived. Thus at this stage any member can propose amendments to any clause(s); and
- (d) the Third Reading, at which the bill or, as the case may be, the bill as amended during the third stage, may be discussed. A two-thirds majority of the CA, as well as a two-thirds majority of the Senate in respect of certain clauses (to be identified) relating to the provinces, is required to pass the bill.

The Rules stipulate that no more than one stage may be taken at one sitting. Also, on any day that a stage of the bill is moved, notice must be given accordingly on the Order Paper or Agenda. [SRs 78(2), 54 & 55].

1. Re the Report: This is not a constitutional requirement. A memorandum accompanying an ordinary bill conveys the objectives of the bill and often reflects those consulted in its drafting. No doubt a brief, appropriately worded report could be devised, conveying the background to the bill and that it has been drawn up in accordance with the provisions of the Constitution. Possibly this would be an appropriate place to outline the structure and process whereby the final constitution was written, and to make reference to the administrative structure which supported it.

By parliamentary convention, "notice" means that at least a working day's notice must be given on the Order Paper of a question to be considered by the Assembly. The rules of the Constitutional Assembly do not specifically stipulate this; nevertheless it is appropriate that the Assembly be given reasonable notice of its proceedings. Particularly with a view to the third stage of the new text, consideration will have to be given to bringing out daily, even on days when the CA is not sitting, an agenda reflecting forthcoming business.

First Reading stage:

The First Reading may be set down for the day on which the bill is laid upon the Table, provided members are supplied with copies of the bill before the First Reading is moved. The member in charge of the bill, after moving that the bill be read a first time, may deliver his or her introductory speech on the bill. No amendment is allowed to the motion. After the introductory speech, one member of each political party in the Constitutional Assembly may make a statement on the bill on behalf of his or her party.

When all such statements have been made, the presiding officer shall order the bill to be read a first time, without the question being put.

Second Reading stage:

After the bill has been read a first time, the member in charge of the bill shall place it on the Order Paper for Second Reading.

No amendments shall be allowed to the motion for the Second Reading of the bill, except amendments to omit all the words after "That" and to substitute words which state some special reason or reasons against the Second Reading.

The debate on the Second Reading shall be conducted on the objects and principles of the bill. This is the "set-piece" general debate on the bill.

Third Stage

After the bill has been read a second time, the member in charge of the bill places it on the Order Paper for the consideration of the clauses and other provisions. At this stage the principles of the bill are not discussed, but only its details. The Chair puts the clauses and schedules individually for discussion.

Amendments to the clauses or other provisions of the bill may be moved during this stage of the bill. Any member may do this by placing such amendments on the Order Paper at any time after the bill has been read a first time. An amendment must be in writing signed by the proposer, and must be delivered to the Secretary not later than 12:00 on the work day before the day on which it is to appear on the Order Paper. This must, at the latest, be the day on which the clause is to be debated. (An amendment which does not appear on the Order Paper may not be moved except by the member in charge of the bill.)

An amendment which is contrary to the principles of the bill or which is inconsistent with a clause or provision already approved or is substantially the same as one already negatived or which is out of order for any other reason, may not be placed on the Order Paper, and the Chairperson's decision on any question as to whether an amendment is or is not out of order, is final. Here the Chair is likely to require substantial legal backup; it is suggested that Parliamentary and CA staff assist jointly in this regard.

The presiding officer declares the debate on the third stage of the bill to be concluded when he is satisfied that all the clauses and other provisions of the bill and all amendments duly moved have been duly dealt with.

Timeframe for debate

It is a matter to be determined politically whether this third stage becomes an arena for political dispute, or whether it is utilised merely for changes agreed to in advance within the CA structures. As matters stand, however, there is nothing to stop any member or party from giving notice on the Order Paper of moving any number of amendments to

clauses. If this is to become a political arena, then careful consideration must be given to the timeframe for this debate. The objective would be to keep the time for the debate within reasonable limits and prevent filibustering, without stifling meaningful debate.

Clearly, there can be no set list of speakers for technical debates of this nature. The CA Rules make no provision for limitation of debate, and some agreement will have to be reached in this regard, preferably leading to a motion framing a time-limits rule in terms of SR1(1). Here it should be borne in mind that the 208 provisions of the draft constitution, multiplied by only 10 minutes of debate each, translates to 36 hours, or roughly 5 full days, of debating time - not counting time for divisions.

In the past, any member could have a maximum of three 10-minute turns to speak on any one clause. This is clearly open to filibustering unless further restrictions are built in. Another possibility is to determine an overall time for debate. If this is exceeded, further clauses, together with any proposed amendments thereto, are put to the vote without discussion. The difficulty is that this may be regarded as stultifying this stage of debate from an arbitrary point. (This happened in the debate on the Tricameral Constitution.) Another is for a maximum period per clause to be determined. A third - possibly the most realistic - is to negotiate the maximum time for each clause in advance with the parties; hopefully many clauses would require no discussion.

Technical aspects of this type of debate

This stage of legislation (in Westminster called the Committee of the Whole House) was in 1987 replaced in this Parliament by referral of the bill to a committee. When it is dealt with in the plenary, management of the debate on any clause can become technically very complex. Careful preparation, law advisers standing by and a full complement of Table staff would be required. (It is also with these complexities in mind that SR90 has been framed in order to afford the Chair leeway in dealing with several amendments to a clause.)

Particularly with reference to this debate, note should be taken of Rule 3(2) to (4), which provides for participation, with the consent of all members present, in the debate by members of the Panel of Experts and of the Technical Committees. This could be particularly useful at this technical stage.

Third Reading Stage (fourth stage)

After the conclusion of the debate on the third stage of the bill, the member in charge of the bill shall place the bill - or, as the case may be, the bill as amended at the Third Stage - on the Order Paper for Third Reading. If the bill has been so amended, the Secretary shall cause the amended bill to be printed and copies to be supplied to members. The Third Reading of the bill cannot be moved until this has been done.

The rules do not stipulate a debate at the Third Reading stage; this would be subject to the Chair's discretion, in consultation with the whips.

Divisions

In view of the special majorities required (see section 73(2) of the Constitution and SR96), in determining the question on the Third Reading the number of members in favour of the question shall be recorded, whether a division is called for or not. A separate division should be held to determine the number of senators who vote or are in favour of the provisions referred to in section 73(2). In both instances a two-thirds majority is required. In the case of the full Constitutional Assembly, this means 327 members, while in the case of the Senate, it is 60 members.

OVERALL TIMEFRAME:

On the assumption that each stage is started on a new day, three days are set aside for the second reading debate, 7 days for the third stage and 1 day for the Third Reading, and that no hitches occur, the process might be expected to take at least 12 work days.

FURTHER PROCEDURES:

The following Standing Rules are self-explanatory:

Bill passed in accordance with section 73(2)

Lodging of bill with Constitutional Court

97. (1) If the bill is passed in accordance with section 73(2) of the Constitution at the Third Reading, two fair copies thereof shall be certified accordingly by the Secretary and lodged with the Constitutional Court with a view to the certification of the text in terms of section 71(2) of the Constitution.

(2) With due regard to the rules of the Constitutional Court, the said two copies shall be accompanied by a request to the effect that, if the Constitutional Court certifies the text as contemplated in section 71(2) of the Constitution, one of the copies, bearing or accompanied by the Court's certificate, should be returned to the Secretary for presentation to the President of the Republic for his or her assent.

Presentation of certified bill for assent

98. If the Constitutional Court certifies the text as contemplated in section 71(2) of the Constitution, the fair copy of the bill which has been endorsed by the Secretary as provided above and which bears or is accompanied by the certificate so contemplated shall, upon its being returned to the Secretary, be presented to the President of the Republic for his or her assent.

Amended text recommended under section 73(4)

Tabling of amended text submitted

99. If the bill was not passed at the Third Reading in accordance with subsection (2) of section 73 of the Constitution and an amended text is submitted by the panel of constitutional experts in accordance with subsection (4) of that section, the Chairperson shall lay such text upon the Table.

Distribution of amended text

100. The Secretary shall supply to each member a copy of the amended text.

Consideration of amended text

101. Except as may be otherwise directed by the Chairperson after consultation with the Rules Committee, the provisions of these Rules which applied to the various stages of the bill after it had been read a first time, shall apply to the amended text as if it were the bill and had been read a first time.

Amended text passed in accordance with section 73(2)

102. If passed in accordance with section 73(2) of the Constitution at the Third Reading, the bill embodying the amended text shall be further dealt with in accordance with Rules 97 and 98.

P A Lilienfeld
Secretary to the Constitutional Assembly

FASECS CA-NOTES.196/pl

ANNEXURE 4:

MEMO

TO: THE CHAIRPERSONS OF THE CA
FROM: THE PANEL OF CONSTITUTIONAL EXPERT
RE: CONSEQUENCES OF NON-CERTIFICATION OF THE DRAFT
CONSTITUTIONAL TEXT BY THE CONSTITUTIONAL COURT (CC)
DATE: 24 JANUARY 1996

1. INTRODUCTION

- 1.1 A memorandum addressed to the panel by the Executive Director requests advice on behalf of the Chairpersons as to the competence of the CA to amend the Draft constitutional text if the CC does not certify it without qualification. The question arises because of the assumption that the CA automatically ceases to exist once a new constitutional text has been passed by it.
- 1.2 This assumption is incorrect. There is nothing in the constitution to suggest such an unceremonial demise.
- 1.3 However, an examination of chapter 5 of the constitution pursuant to the above request does reveal two problems, the solution of which would require constitutional amendment:
 - 1.3.1 It is at least arguable that the President will be compelled to dissolve Parliament by S. 73(9) of the interim Constitution if the constitutional text passed by the CA within the 2 year period referred to in S. 73(1) is not certified by the Constitutional Court as complying with the CPs.
 - 1.3.2 The constitution does not say what must happen if the CC says that the draft constitutional text does not comply with the CPs.
- 1.4 It was accordingly thought desirable that some advice should be furnished in this regard.

2. THE MEANING OF "PASSED" IN CHAPTER 5 OF THE INTERIM CONSTITUTION

- 2.1 S. 73(9) requires the President to dissolve Parliament if the new constitutional text is not passed in terms of this chapter within 2 years of the date of the first sitting of National Assembly. The question arises as to whether the words in bold mean that the CA must pass a draft constitutional text which is certifiable by the CC. The contention is that a draft constitutional text which does not comply with the CPs cannot be properly be said to have been passed "in terms of this chapter" by reason of the provisions of S. 71(2) which declares that the draft constitutional text can be of force or effect unless the CC certifies that it complies with the CPs. The provisions of S. 71(1)(a) requiring the draft constitutional text to comply with the CPs can also be said to support this contention.
- 2.2 The other side of the coin is, however, that the word "passed" refers simply to the new constitutional text being passed by the CA with the two-thirds majority referred to in S. 73(2) of the interim Constitution. This contention urges that certification and compliance with the CPs are conceptually speaking separate matters from the mechanism for the approval of the new constitutional text by the CA. This argument is supported by the following:
- 2.2.1 S. 71(1) distinguishes between compliance of the text with the CPs (sub-sec (1)(a)), and the passing of the text by the CA (sub-sec (1)(b)).
- 2.2.2 The obviously separate references to passing of the constitutional text and its certification in S. 71(2).
- 2.2.3 S. 73(1) and 73(2) read together make it plain that the draft constitutional text must be passed by a two-thirds majority of the CA within the period of 2 years referred to above.
- 2.2.4 The law makers must have realised that the CA will have no control over the process of certification of the constitutional text by the CC and that it would therefor be extremely difficult for the CA to plan its programme and conduct its affairs in such a way as to ensure that the entire process is concluded within the 2 year period
- 2.2.5 The law maker could not have intended to subject the CC to a time limit.
- 2.3 The Panel prefers the reasoning in 2.2 above but suggests that it may be wise to clarify the position. If it was intended that the passing of the text was a matter separate from certification, S. 73(9) could be

amended by the removal of the words in terms of this chapter and the substitution of the words in accordance with sub-section 2.

3. PROCEDURE OF NON-CERTIFICATION

3.1 The interim constitution appears to have been prepared on the basis of the assumption that the CC will certify any constitutional text passed by the CA as complying with the CPs. The only relevant references to certification are the following:

3.1.1 The provision that the constitution will have no force or effect unless certified by the CC (S. 71(2)).

3.1.2 The words after certification by the CC in S. 73(6) with reference to what should happen before the referendum contemplated in that sub-section.

3.1.3 The provision in S. 71(4) for an opinion on the compliance of a part or the whole of the new text with the CPs if the text is submitted to the CC by at least 20% of the members of the CA.

3.2 It is suggested that this gap be filled. The constitution should provide for the following in an appropriate place:

3.2.1 If the CC finds that the new constitutional text does not comply with the CPs, it must refer the matter to the CA with its full reasons for non-certification.

3.2.2 The period within which the CA must remedy the defect could be either laid down in the constitution or left for determination by the CC.

3.2.3 A majority by which the CA must rectify the defect must be determined.

3.2.4 The CA must also decide what must happen if the majority to rectify the defect is not secured. The dissolution of Parliament in terms of S. 43(9) or a further referendum such as that contemplated in S. 73(6) are possibilities.

3.3 The distinction between the "passing" of the new constitutional text and "adoption" of the new constitution which is already foreshadowed in the interim constitution could well serve a useful purpose. The Constitution could provide for the final adoption of the constitution by the CA after it has been passed and after certification.

4. ALTERNATIVE SUGGESTIONS

- 4.1 If it is felt that the passing of the constitution should be linked to certification and that the CA should be required to pass a certified constitution within a specified period, the following can be done:**
 - 4.1.1 S. 73(9) can be amended to make this abundantly clear.**
 - 4.1.2 The period of 2 years can be extended by the amount of time it might take to secure the CC ruling and to make the necessary amendments.**
 - 4.1.3 The procedure in S. 71(4) could be used to secure an opinion from the court before the text is actually passed.**
- 4.2 This route, however, does entail the estimation of the time which will be required. If this guess turn out to be wrong, the interim constitution will have to be changed again.**

