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**Demokratiese Party**  
**Democratic Party**

SUBMISSION BY THE DEMOCRATIC PARTY  
TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS

*One Nation. One Future. Een Nasie. Een Toekoms.*

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**Demokratiese Party**  
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12 May 1993

TO: The Technical Committee on Constitutional Issues  
FROM: The Democratic Party  
DATE: 13 May 1993

The Democratic Party has pleasure in submitting the following comments and documents to the Technical Committee on Constitutional Issues for its consideration.

I. Core Documents

The following documents marked 'A', 'B', 'C', etc are core documents reflecting the Democratic Party's attitude towards the various constitutional issues that have been referred to the Committee.

- 'A' General Constitutional Principles.
- 'B' Policy Position Paper on Constitutional Proposals.
- 'C' A balanced approach to Constitutional Decentralisation.
- 'D' The Meaningful Participation of Political Minorities.
- 'E' Policy Position Paper on a New Electoral System.
- 'F' Policy Position Paper on Transition.

The Democratic Party trusts that the documents and comments contained in this submission will be of assistance to the Technical Committee on Constitutional Issues.

COLIN EGLIN  
on behalf of THE DEMOCRATIC PARTY

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II COMMENTS

Without derogating from the contents of the above core documents we shall endeavour to relate them to the relevant sections of the Codesa Reports.

We trust that this will assist the Committee in identifying and evaluating the main points on which the Democratic Party agrees with or differs from the constitutional principles, processes etc recorded in the Codesa Reports.

Note: References in our comments are to the "Consolidated Document - based on Codesa Reports".

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FORM OF STATE/CONSTITUTIONAL PRINCIPLES

1. Subject to the comments that follow below the Democratic Party is in general agreement with the following:

Para 1.1 (page 30)

The six principles contained in the Declaration of Intent.

Para 1.4 (pages 31,32)

The eleven areas of commonality with regard to general Constitutional principles prepared by the Steering Committee and submitted to Working Group 2 on 12 May 1992.

Para 3 (pages 33,34)

The four draft principles prepared by the Steering Committee on 23 March 1992.

2. In order to ensure that there is no doubt about the federal nature of the constitution and to make provision for important fiscal matters to be written into the constitution the Democratic Party would amend Para 1,4, sub-paragraph 10 as follows:

The Constitution, which shall be federal of nature shall provide for Government [shall] to be structured at national, regional and local levels.

- 10.1 At each level there shall be democratic representation.
- 10.2 Each level of government shall have appropriate and adequate legislative [and] executive and fiscal powers, duties and functions that will enable each level to function effectively; such powers, duties and functions to be entrenched in the constitution.
- 10.3 [In addition to the powers, duties and functions entrenched in the constitution, each level of government may delegate powers, duties and functions to other levels of government.]

Each level of government shall have a constitutional right to a share of designated nationally collected income, in particular so that each region or local government is equally able to provide basic services and to address socio-economic backlogs.

- 10.4 The general principles of the constitution including the terms of the Bill/Charter of Fundamental Rights shall apply to each level of government.

Core Document 'C' indicates by means of five 'flip charts' how the legislature, executive and fiscal interrelationship between the three levels of government could be achieved in a balanced way.

3. Core Document 'D' makes it clear that except during the period of transition when it will be necessary to have a multi-party government of national unity the Democratic Party does not believe that special constitutional provision should be made for "the effective participation of minority political parties".

The effective participation of political minorities is best ensured by a number of interrelated factors, including:

- a federal system invoking the multiplication of the 'sites' at which power can be exercised
- a Bill of Rights
- constitutional checks and balances
- a bicameral legislation
- proportional representation system of election
- special majorities on constitutional matters
- appointments to the judiciary
- the public service
- a vigorous civil society.

4. Both Para 1.1 and Para 1.4 contain the following principle:

"there will be separation of powers between the legislature, executive and judiciary with appropriate checks and balances".

It is the view of the Democratic Party that the degree of separation and the checks and balances that have existed in successive South African constitutions have been woefully inadequate.

In particular

- 1) the Executive must not have the sole right to appoint members of the judiciary, and
- 2) the Executive must be more separate from the Legislature and more accountable to it.

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5. The Democratic Party would add to the constitutional principles listed in the Codesa Reports, the principle of "openness and accountability of government."

There are various constitutional mechanisms for achieving this. These include;

- legislature holding public hearings on executive action
- ombudsman
- the rights of citizens to administrative justice
- rights of recall

#### THE CONSTITUTION-MAKING PROCESS

As will be seen from Core Document 'D' the Democratic Party advocates a process whereby a democratic constitution would be drawn up by the parties at Constituent Assembly elected on a one person one vote basis.

In drawing up this new constitution, the Constituent Assembly would be bound by the Constitutional Principles and the decision making procedures/percentages already agreed to at a Multi-Party Negotiating Forum.

After the new constitution drawn up by the Constituent Assembly has come into force constitutional power will be transferred to the new legislature and executive by means of an election held in terms of the new constitution.

The process outlined in the Codesa reports envisages a very different process, one in which constitutional power will be transferred to a new legislature and executive before an elected Constituent Assembly has drawn up a new democratic constitution.

As neither a new legislature nor a new executive can exercise power in a political vacuum, this Codesa process will require a constitution, in terms of which they can exercise power, to be drawn up by somebody other than an elected Constituent Assembly.

In practice this means that a first democratic constitution will have to be negotiated and drawn up by the participants in Multi-Party Negotiation Process.

The Democratic Party is strongly of the opinion that in view of the fact that sovereign constitutional power will be transferred

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to a new elected legislature and a new executive, the constitution in terms of which this transfer will take place, must comply with all the constitutional principles agreed to at the MPNP and incorporate all the essential constitutional structures, separations of power, checks and balances and Bill of Rights that are necessary to ensure that the new constitution is in fact democratic.

There will be arguments used against drawing up a substantial or full constitution at this stage. The Democratic Party deals with them as follows:

1. "The first constitution is only an interim/transitional constitution."

In a sovereign independent country where the constitution is the supreme law, there can be no such thing as an "interim" constitution.

The constitution that is in force at any time is the only constitution.

While such constitution may contain 'sunset' clauses to permit certain features of the constitution to be phased out, it cannot allow any features of the constitution to be phased out, or to lapse, in a manner that would result in a constitutional void.

In other words the first constitution is the only constitution until, and if, it is amended or replaced in terms of the procedures it itself contains.

2. "The final constitution will be decided upon by the new parliament."

Firstly, there is no such thing as a 'final' constitution. Any constitution is capable of being amended or replaced in terms of the procedures it itself contains.

Secondly, the Democratic Party is not aware of any constitutional mechanism that can compel a parliament to amend or replace a constitution, let alone to do so within a given time period.

Thirdly, the Democratic Party is not aware of any constitutional mechanism that could prevent a parliament which can muster the necessary majority, say two-thirds, from adopting the first constitution as the 'final' constitution.

3. "An elected body operating within the parameters of agreed principles and procedures/percentages would be the most democratic way of drawing up a new constitution."

It is precisely because the Democratic Party agrees with this statement that it favours having a constitution drawn up by an elected Constituent Assembly before a transfer of constitutional power takes place.

It is those organisations/parties who insist that the transfer of constitutional power takes place before an elected Constituent Assembly draws up the constitution, who compel the adoption of the procedure whereby a body like the Multi-Party Negotiation Process draw up the constitution.

4. "An elected parliament is an appropriate body to act as a Constituent Assembly in drawing up an amended/final constitution."

The Democratic Party contends that it is not.

There is a fundamental difference between the process in which the various contenders for power negotiate a constitution prior to them getting into power - and a process in which the contenders who are already in power are expected to amend or replace a constitution

The members of Constituent Assembly would be elected with a mandate to draw up a new constitution. Their term of office would lapse upon the completion of their constitution-making task.

The members of a parliament would be politicians whose mandate would be to govern the country. Far from seeing their term of office as temporary they would inevitably use their term of office to stay in office.

5. "An elected parliament acting also as a Constituent Assembly will ensure that the 'final' constitution is truly democratic."

Partly for the reasons mentioned above the Democratic Party rejects this assertion entirely.

There is no reason whatsoever to believe that a parliament composed of persons who are engaged in exercising political power under one constitution will produce a new constitution that is more democratic than the one through which they got into power.

For example:

- a) there is little or no likelihood that members of parliament who were elected to power on the basis of a particular electoral system would adopt a different electoral system that was likely to have them lose power.



- b) There is little or no likelihood of a parliament with total legislative power surrendering significant elements of that power to regional or local governments over which it had no control.
- c) There is little or no likelihood of a party in power to place any more restrictions on its power than those restrictions already contained in the constitution under which it exercises power.

For the above reasons the Democratic Party wishes to reiterate its view that the 'first' constitution must be a substantial constitution and that it must incorporate all the essential features to ensure that it is truly democratic.

#### CONSTITUTION-MAKING/TRANSITIONAL PROCESS

On the assumption that the constitution-making and transitional process are not going to be kept separate i.e. the processes outlined in the Codesa Reports are going to be followed, the Democratic Party proposes that the following steps be taken:

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CONSTITUTION-MAKING/TRANSITIONAL PROCESS

1. Multi-Party Negotiating Process must agree on constitutional principles which must form the basis of first democratic constitution and any subsequent amendments thereto.
2. MPNP must draw up first constitution based on above constitutional principles and incorporating the concept of an interim/transitional government of national unity.
3. MPNP must agree on
  - 3.1 procedures and percentages whereby the new parliament shall amend the first constitution to produce a 'final' constitution
  - 3.2 the independent body which will adjudicate whether any amendments referred to in 3.1 above are in line with the constitutional principles agreed to in 1.
  - 3.3 a time-scale and mechanisms to ensure that parliament will produce a 'final' constitution - if indeed this is possible.
4. While the MPNP is doing the above it must agree upon a Transitional Executive Council (TEC) together with an IEC, IMC and ITA which will 'level the playing fields' and ensure free and fair elections for the new parliament which will function in terms of the first constitution.
5. Once the MPNP has completed 1. and 4. above a TEC etc can be brought into being.
6. Once the MPNP has completed 1,2,3,4 and 5 a firm election date be proclaimed and the formal election process will commence.
7. Once the election has been held:
  - 7.1 the new parliament will be installed
  - 7.2 the new multi-party interim government will be structured
  - 7.3 the new structures at regional and local government level will be phased in.
8. When parliament amends the first constitution to produce a 'final' constitution, the new structures of such final constitution could also be subject to a phasing in process.
9. NB: The TEC structures relate to the election and to the 'levelling of the playing fields' in relation to the election.

The Democratic Party strongly recommends that TEC type structures be used in other sensitive fields, eg education, housing, health. This will enable a greater degree of joint responsibility to be exercised during the period prior to the installation of government structures envisaged in the first constitution.

**General Constitutional Principles  
of the Democratic Party**

- (a) The Superiority of the Constitution over Ordinary Law  
This requires that such a principle be established through mechanisms which will render the Constitution less easy to change or amend than ordinary laws and will require constitutional and practical adherence to the principle that the rules of the Constitution be regarded as more binding than other laws. The principle also implies that derogations from the Constitution will only be permitted in extra-ordinary and strictly defined circumstances. Adherence to this first principle leads to the second principle.
- (b) The Constitution will be Rigid  
This contrasts the new Constitution with so-called "flexible" Constitutions which can be formally amended by the same procedures used to pass ordinary laws. The new Constitution may only be changed through special majorities with ratification of such amendments by way of special procedures, for example, referenda.
- (c) Equality before the Law  
The Constitution will be founded on the principle of equality before the law, meaning that no legislation or executive or administrative act shall directly or indirectly favour or prejudice any person on the grounds of his or her race, colour, sex, religion, ethnic origin, social class, birth, political conviction and other views or disabilities or other natural characteristics.
- (d) The Ultimate Power of Interpretation of the Constitution will repose in the Judiciary  
This principle requires elaboration on the hierarchy of the courts and the provision of a special Constitutional Court, if necessary. However, underlying this principle is acceptance of the proposition that the Supreme Court will have a justiciable testing power over the interpretation of the Constitution and the laws enacted under it.
- (e) Protection of the Separation of Powers - Horizontally  
Insofar as it is possible in terms of modern government the Constitution, and State practice, will respect the division of *trias politica* i.e. the separation of the State between the legislature, the executive and the judiciary.
- (f) The Principle of the Vertical Division of Competencies: Genuine Devolution of Power  
The constitutional principle in issue here is an adherence to the genuine devolution of power between the central government and regional and local government formations. The Constitution will assign specific powers and duties to each level of government, which powers and functions will not be capable of recall save by special measures so elaborated upon in the Constitution. Without derogating from the generality of the foregoing principle, consideration will be given to the question of whether South Africa will be a federal or unitary state but regardless of the ultimate location of sovereignty, the aforesaid principle will apply in either case or in any other dispensation so agreed.

- (g) The Electoral System will be based on the Principle of Equal Franchise for Adults and the Principle of Proportionality  
In this regard principles will be established: to guide the formulation of an electoral system to reflect best the principle of according representation in the legislature in proportion to the support gained at the polls; and, in respect of the principle of safeguarding the rights of the individual, the right of citizens to enjoy a close or proximate relationship with their public representatives, and to have control over their appointment and removal.
- (h) The Legislature will be Divided Bicamerally and each House of Parliament will be Elected on a Separate Basis with each Enjoying Joint and Several Responsibilities  
This principle will also require elaboration on the question of conflict-breaking and decision-making options.
- (i) A Justiciable Bill of Fundamental Human Rights will be Enacted  
This Bill of Rights will contain guarantees for the rights of the individual against the State which will include all civil and political rights and those social and economic rights which are justiciable. The civil and political rights will at least include the following: equal rights guaranteed by the law and equal protection under the law; personal liberty save by due process of law in the ordinary courts of the land; freedom of speech and expression, of movement, of association, and of worship; the rights of peaceful assembly, to privacy of home and correspondence, to own, acquire, occupy and dispose of property, to compensation in the event of expropriation, and to start and carry on any lawful trade, business, profession or occupation; and the guarantee of regular and free elections. The Bill of Rights will be justiciable before the courts.
- (j) The Judiciary will be Independent and Enjoy Security of Tenure  
Under this principle, consideration will be given to the nature of judicial appointments and to the question of impeachment procedures for members of the judiciary.
- (k) The Principle of Checks and Balances will be Enshrined in the Constitution and will be formulated to ensure that each arm of the State acts as an effective counterbalance of the other, including other sites of Government operating as a restraint on the central site of Government.
- (l) The Definition of Citizenship and principles relating to its acquisition and relinquishment.
- (m) The Principle of Accountability  
This includes techniques for direct democracy (eg referenda and rights of recall) and the establishment of the rights of citizens' complaints through the office of ombudsmen.

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# DEMOCRATIC PARTY POLICY POSITION PAPER ON CONSTITUTIONAL PROPOSALS

Note: Unless the context indicates differently, any mention of federal government refers to central government, and state or state government refers to the states which will make up the federation.

## 1. Basic Points of Departure

### 1.1 The Nature of the Constitution

1.1.1 The Democratic Party believes that to be durable and binding, a new constitution for South Africa must be the expression of the will of all the people of our country. As such, it should be the product of negotiation between political leaders, and endorsed by the people as a whole.

1.1.2 Because the new constitution will represent a fundamental break with the past, the DP believes that this constitution must be the founding document for the "new South Africa", specifying, amongst other things

- A statement (preamble) of ideals;
- The relationship between the major organs of government, the powers and functions of these, the eligibility of people to serve on them and the method by which they are elected or appointed;
- The division of powers, functions and responsibilities between the various branches of government, and the distribution of powers, functions and responsibilities between the different levels of government;
- The rights of individuals and the obligations of government, and the way in which such rights and obligations are enforced or protected (eg Bill of Rights); and
- The mechanisms by which the constitution or parts of it are protected and/or can be amended.

### 1.2 The DP believes that the constitution is superior to the ordinary law

1.2.1 The Democratic Party believes that the constitution is more fundamental than the ordinary law. This is so because the constitution determines the basic rights of citizens, and the framework within which the ordinary law is made.

1.2.2 This implies that the constitution and constitutional laws must be less easily amended than the ordinary law.

### 1.3 The DP believes in the supremacy of the constitution

Because the constitution is more fundamental than the ordinary law, the courts (or some specialized branch of the courts) must be able to render null and void legislative provisions

or executive acts which violate the rights of individuals, or the basic principles contained in the constitution.

1.4 **The DP believes that the constitution should be rigid**

1.4.1 The Democratic Party believes that the constitution should be beyond the whim of transient majorities in the legislature, and should only be amended by following special procedures which make the amending process much more difficult than the ordinary legislative process. The amending procedure should itself be entrenched to prevent manipulation.

1.4.2 Accordingly, the DP recommends that any amendment to entrenched clauses in the constitution should be approved by a two-thirds majority in each house of the Federal Parliament, and by simple majorities in three-quarters of the state assemblies. Any amendment to this procedure should be approved by a two-thirds majority of voters in a nation-wide referendum.

1.5 **The DP believes in the maximum devolution of power**

The Democratic Party believes that the people must govern, and that there is no more effective way of giving this expression than for the constitution to provide for a variety of sites of power in which the people themselves can participate in making decisions affecting them.

2. **Federalism**

2.1 **Federalism will distribute power**

By providing a variety of different sites of power, federalism enables more people to take part in the process of government. It brings government closer to the people. This promotes accountability of political office-bearers to their constituents, and promotes the establishment of a democratic culture. It can also reduce the intensity of the struggle for power at the central government level as it ceases to be a 'winner take all' contest.

2.2 **Federalism is a defence against tyranny**

The Democratic Party believes that an over-concentration of power in central government leads to the retention of power for its own sake, and the use of power and patronage for the advantage of the party or group which is in power. South Africa's history is littered with examples of the use of the monopoly of centralized political power to impose an oppressive philosophy on the entire country. A federal structure makes this very much more difficult, and the system also provides a variety of sites of power in which more people can exercise power, making the retention of central government power relatively less important.

2.3 **Federalism accommodates pluralism**

2.3.1 The Democratic Party accepts the cultural, linguistic, geographic and political diversity of South Africa. This diversity is a national asset which needs to be developed in a spirit of mutual respect, tolerance and conciliation. Federalism helps to accommodate this diversity by multiplying the sites of power.

2.3.2 Moreover, by multiplying sites of power and competition, new and transcending alliances based on regional or common interests can be forged, which can lead to the resolution of problems and issues at a localized level. This will certainly make the resolution of seemingly intractable problems far easier.

## 2.4 How federalism will be established

- 2.4.1 The nature of the federation, and the powers of the various levels of government will have to be negotiated.
- 2.4.2 It is essential, however, that in this process the rights, powers and responsibilities of the state political authorities are written into and entrenched in the constitution. It is a central tenet of DP policy that the federal parliament will enjoy co-ordinate sovereignty with the state parliaments. It is also essential that the constitution guarantees equitable access by state political authorities to the resources of the nation as a whole: otherwise any rights, powers and responsibilities of such authorities will be meaningless.

## 2.5 The Boundaries of the Federation

- 2.5.1 The Democratic Party accepts the boundaries of the country as established at the time of Union, and believes that the TBVC countries should be part of a common South Africa. The mechanics of how the TBVC states return to form part of South Africa will, however, have to be negotiated with representative leadership in those countries. Within these boundaries of South Africa, various options for the delineation of federal units should be considered.
- 2.5.2 Subject to the qualifications in paragraphs 2.5.3 and 2.5.4, the DP favours a federation of ten states based on the present nine development regions, plus a state which includes much, if not all, of the Ciskei, Border and Transkei.
- 2.5.3 A key principle of federalism is to bring government as close to the people as possible. Subject to the requirements of efficiency and the capacity for effective service delivery to its residents, the possibility of having more than ten states should be considered. In addition, consideration could be given to incorporating parts of region B (North Cape) into region J (Western Transvaal).
- 2.5.4 The exact number of states and the delimitation of boundaries should be determined by an impartial delimitation commission, which should inter alia devise mechanisms for testing the will of the people in regions or sub-regions. However, this commission should be bound to take the following criteria into account in determining the boundaries:
- The firm rejection of states delineated on racial or ethnic lines;
  - Community of interests of the population of an area;
  - Economic viability and potential; and
  - Administrative effectiveness.
- 2.5.5 There must be free movement of people, goods, money, information and assets between states.

## 2.6 The Powers of the Federal Government and the States

- 2.6.1 In the process of drawing up a new constitution, the powers exercised by the federal government and those exercised by the states will have to be specifically defined and entrenched. It is accepted that provision will have to be made for concurrent responsibility to be exercised in respect of certain of the powers enumerated in paragraphs 2.6.2 and 2.6.3, and provision may have to be made for certain exceptions in respect of designated powers.
- 2.6.2 The federal government will exercise those powers essential to the national interest. All other powers will be exercised by the state and local governments. The state governments could, for example, handle the following powers: health, local government, licensing, town

planning, the management of urbanization, housing, state taxation, nature conservation and tourism promotion, regional development (rural and industrial), agriculture and forestry, manpower, roads, education, culture, police, prisons, the administration of justice, gaming and land settlement.

- 2.6.3 The federal government would exercise inter alia the following powers: foreign relations, macro-economic policy, water affairs, citizenship, currency and monetary policy, defence, national security, borrowing on the credit of the government, immigration and emigration, foreign trade, customs and excise, national transportation, posts and telecommunications, and mineral and energy affairs.
- 2.6.4 Certain institutions, such as a Federal Investigation Bureau, the South African Tourism Board, the South African Certification Council and the Department of Environment Affairs may require co-ordinate management by both federal and state governments. Joint committees of the federal and state governments may be established for the purposes of liaison and co-operation. In addition, other aspects of what are presently government functions, such as broadcasting, may be devolved to independent or multi-party authorities.
- 2.6.5 All national legislation will be applicable to the matters over which the states have control until such time as the state assemblies amend such legislation.

## 2.7 The Structure of State and Local Governments

- 2.7.1 The structure of state government should be laid down and protected in the constitution. Local government should, as far as practical, be established on the same basis as first and second tier structures. The question of majorities, entrenched sections and vetoes, where applicable, should be contained in the constitutions of all levels of government. Very importantly, the Bill of Rights must be enforceable at all levels of government and administration.
- 2.7.2 The minimum powers of local authorities will be written into, and entrenched in, the constitution, and may only be altered by following the procedure laid down in the constitution.
- 2.7.3 In accordance with the principle of maximum devolution of power, local governments will be given as much responsibility and authority as is practical. This may include some of the powers set out in 2.6.2 above.
- 2.7.4 Every local authority may, by arrangement with the state and/or federal government, agree to perform or receive additional services on an agency basis for or from another level of government. In such cases, compensation will be paid for the rendering of such services.
- 2.7.5 No local authority will be compelled to perform any service for any other level of government except with its consent, and subject to any reimbursement as may be agreed upon.

## 2.8 Financial Relations between the States and Federal Government

- 2.8.1 Each state and each local authority shall have the power to raise its own taxes. However, the major taxing authority will be the federal government. Each state and each local authority will be entitled to a proportion of all revenue raised by the federal government, which shall be distributed in the first instance on the basis of the population size of each state and local authority.
- 2.8.2 A Federal Finance Commission will be established to investigate the reasonable cost to each State of administering its areas of responsibility, and to ensure that Federal



Government funds are allocated in such a way as to ensure that all states are in a position to provide basic services of equal quality.

2.8.3.1 The Federal Finance Commission will consist of

- (a) a chairperson, who shall be a judge from the Constitutional Court;
- (b) one person nominated by each state;
- (c) three persons nominated by the federal government;
- (d) three persons nominated by the South African Institute of Chartered Accountants;
- (e) one person nominated by the Association of Law Societies;
- (f) one person nominated by the General Council of the Bar; and
- (g) three persons nominated by the Committee of University Principals.

2.8.3.2 No person who is an elected public representative will be eligible to be a member of the Federal Finance Commission.

2.8.3.3 The Commission will attempt to take decisions by consensus. If this is not possible, decisions shall be taken by a two-thirds majority.

2.8.4 The federal government will be required to allocate constitutionally specified minimum proportions of its total income to states, local authorities and the Federal Finance Commission. In particular, each state and local authority must have, or be given, the capacity to be equally able to address socio-economic backlogs, development and empowerment. This would be a constitutional obligation of the Federal Finance Commission.

2.8.5 The powers and obligations of the Federal Finance Commission will be written into, and entrenched in, the Constitution.

2.8.6 States and local authorities will be required by legislation to limit the proportion of their total income raised by way of loans (say, to 10%) and the proportion of their annual budgets that can be applied to debt servicing (say, to 20%). In addition, there should be a provision that prevents states and local authorities from using loans to finance current expenditure.

2.8.7 The constitution will make provision for the Federal Government to raise funds to be used in the event of war, natural disasters and national emergency. Such funds would not be subject to the requirement of allocation to states, local authorities and the Federal Finance Commission.

### 3. **Central Government**

#### 3.1 **Separation of powers**

3.1.1 Subject to the executive being accountable to parliament for its administration, there should be the maximum separation of powers and functions between the legislature, the executive and the judiciary.

#### 3.2 **The Executive**

3.2.1 The DP proposes a (dual) executive consisting of a President, and a Prime Minister together with a Cabinet drawn from and accountable to Parliament.

3.2.2 The President and Vice President shall be elected by the entire electorate of South Africa for a fixed period of four years. Once elected, the President may be removed only by

following impeachment procedures laid down in the Constitution. No President can serve for more than two terms.

- 3.2.3 The President, in addition to being Head of State, will have defined powers, as follows:
- (a) he/she will be commander-in-chief of the defence force and will preside over meetings of the high command of the defence force;
  - (b) he/she will appoint the Prime Minister and President of the Senate, and, on the advice of the Prime Minister, will appoint Ministers of State;
  - (c) he/she will be available to resolve deadlocks which may occur in the Cabinet;
  - (d) he/she will shape foreign policy, and will appoint ambassadors subject to confirmation by the Senate;
  - (e) he/she will negotiate treaties, and subject to approval by the Senate, sign them on behalf of the government;
  - (f) he/she may declare States of National Disaster and Emergency : provided that Parliament shall not be dissolved during the exercise of emergency powers by the President;
  - (g) he/she may proclaim referenda and plebiscites;
  - (h) he/she may commute criminal sentences, or grant partial or complete pardon, or declare amnesties;
  - (i) he/she may confer titles and honours;
  - (j) he/she may communicate with the National Assembly and Senate by message, and will annually address both Houses on the State of the Nation.
- 3.2.4 The President will appoint a member of the National Assembly as Prime Minister who is capable of forming a Cabinet which enjoys the support of the National Assembly. The right to allocate portfolios within the Cabinet shall be vested in the Prime Minister.
- 3.2.5 The Prime Minister can be removed from office by a vote of no confidence passed by a majority of the National Assembly: provided that the motion of no confidence shall also nominate a proposed successor to such a person. The President shall, however, have the final authority to nominate the new Prime Minister, and call on him/her to form a Cabinet that **does** enjoy the confidence of the National Assembly.
- 3.2.6 **Because** of the divisions of the past, the DP believes that it is essential that the first Cabinet should be as broadly representative of as wide a political spectrum as possible. The first Cabinet will, therefore, be constituted on a proportional basis from representatives of political parties enjoying 5% or more support in the National Assembly: provided that any party which does not wish to serve on the Cabinet will be free to decline to do so. These provisions will lapse after four years.
- 3.3 **The Legislature**
- 3.3.1 There shall be a bi-cameral legislature consisting of a National Assembly and a Senate. The National Assembly and the Senate will have co-equal powers except in respect of appropriation and other money bills, where the National Assembly will be able to override the objection of the Senate.

- 3.3.2 The National Assembly will consist of 400 members elected on the basis of proportional representation by all adult citizens at intervals of four years. 300 members will be elected by three member constituencies, while 100 will be elected by means of national lists provided by each party in such a way as to ensure that the final composition of the National Assembly represents, as closely as possible, the wishes of the voters.
- 3.3.3 The Senate will be constituted as follows:
- (a) Each state will elect, by universal adult franchise and on the basis of proportional representation, a minimum of four and a maximum of nine senators based on the number of registered voters in that state; and
  - (c) The President of the Senate, who will be appointed by the President.
- 3.3.4 Each state will be entitled to elect a minimum of four senators. Those states with numbers of registered voters three times greater than the state in which the smallest number of voters is registered shall be entitled to one additional senator; those with numbers of registered voters four times greater, to two additional senators; those with numbers of registered voters five times greater, to three additional senators; those with numbers of registered voters six times greater, to four additional senators; and those with numbers of registered voters seven times or more than seven times greater, to a maximum of five additional senators.
- 3.3.5 The election of the Senate shall take place at fixed periods of four years.
- 3.3.6 The Senate shall have the power to introduce Bills, subject to approval by the National Assembly.
- 3.3.7 The Senate shall have the power to review all Bills introduced by the National Assembly, subject to the following qualifications:
- (a) It will not be able to reject the Budget, or any other money Bill (see para 3.3.1);
  - (b) In the case of "reserved" legislation (i.e. any legislation affecting the federal states, the competence and powers of the federation), the veto of the Senate will be absolute and the Bill will lapse;
  - (c) Its negating of an "unreserved" Bill may be overridden by a two-thirds majority of both Houses sitting together. Alternatively, such legislation will automatically be enacted after the lapse of the first anniversary of its assent in the National Assembly, if the Bill is re-introduced and passed by a two-thirds majority of the National Assembly. The choice of method to attempt to override the objection shall be the prerogative of the President; and
  - (d) In the case of amendments to the entrenched sections of the constitution, the Senate will be required to register a two-thirds majority to assent to the Bill (see para 1.4.2).
- 3.3.8 In addition to its legislative functions, the Senate will also have special powers to approve treaties and to approve senior appointments to the public service (including the Defence Force and the Police) and diplomatic corps recommended by the Senior Appointments Commission. In addition, it will approve appointments to the judiciary on the advice of the Judicial Appointments Commission, and approve the appointment of the Ombudsperson and Auditor-General.
- 3.3.9 There shall be a system of inter-house standing committees, with the following specific powers and operating as follows:

- (a) the members of each house will vote separately;
- (b) the standing committee will be empowered to introduce legislation to Parliament;
- (c) there shall be one standing committee established to oversee the activities of the security forces, and one to oversee "clandestine operations" by the intelligence services;
- (d) there will be one standing committee for each Department of State, which will scrutinize each budget vote before submission to Parliament, and which will have the power to summon the Minister, the Chief Accounting Officer and any other official to account for money expended during the previous financial year, and intended expenditure during the forthcoming financial year.

### 3.3.10 The Position of Traditional Leaders

Because of the important position which traditional leaders occupy amongst some communities, in some parts of the country, and in some areas of customary law and procedure, it may be necessary to create an institution through which the views of such leaders can be ascertained. This could take the form of a Council of Traditional Leaders, or of similar Councils on a regional basis, to which certain specified powers could be devolved. The exact nature, form, method of election, and constitutional status of such Council or Councils will have to be negotiated and written into the Constitution.

## 3.4 The Judiciary

- 3.4.1 There should be a single judicial system for all South Africa. The Federal Supreme Court should be the highest judicial body in the country and should hear appeals to this court from the various state courts.
- 3.4.2 A Constitutional Court should be established to interpret the constitution, the Bill of Civil Rights and the Statement of Social, Economic and Cultural Obligations of Government.
- 3.4.3 Federal Judges should be appointed from the legal profession on the advice of a Judicial Appointments Commission representing the judiciary and the legal profession, and approved by the Senate. In making its recommendations, the Judicial Appointments Commission should consider not only demonstrable competence, but also the need for the Bench adequately to reflect the broad population of South Africa.

## 3.5 Administrative Appointments

- 3.5.1 An **efficient** and accountable civil service is an essential adjunct to achieving a functional **democracy** in our country. For regrettable historical reasons, the public service does not **remotely reflect** the public it serves and this has tended to undermine public confidence in the administration of South Africa.
- 3.5.2 The Democratic Party believes in equal opportunity in government service for all qualified applicants and employees, and in the prohibition of discrimination in such employment on the basis of race, colour, ethnicity, gender or creed. This notwithstanding, and in order to redress the imbalances of the past, there should be continuing affirmative action programmes in each government department. These programmes should govern every aspect of personnel practice in respect of employment, development, advancement and treatment of all employees.
- 3.5.3 Key senior appointments, as defined, should be made by the Prime Minister acting on the advice of an independent Senior Appointments Commission, and these appointments should be endorsed by the Senate.

3.5.4 Each federal state would likewise have a civil service charged with the administration of functions under state control.

### 3.6 **The Ombudsperson**

3.6.1 A parliamentary ombudsperson should be appointed to investigate complaints on alleged abuse of power or violation of basic rights and freedoms by the executive, military or police. Such officers should also be appointed in respect of the state assemblies.

3.6.2 The ombudspersons should be independent, given security of tenure and adequate staff, and should have investigative powers. They should be officers of the parliaments concerned.

3.6.3 The Auditors-General should be given the same powers, and report in the same way.

## 4. **The Electoral System**

### 4.1 **Universal suffrage**

All adult citizens, irrespective of race, religion, national origin or gender should have a vote of equal value in elections for representatives of legislative institutions at all levels.

### 4.2 **Regular and Free Elections**

A multi-party system is essential to guarantee true democracy and the constitution should guarantee regular and free elections. Such guarantees should include the maximum period between elections, the right of individuals to form and support political parties of their choice, a secret ballot and protection against harassment or intimidation of candidates and voters.

### 4.3 **Representativity**

The electoral system must produce a result that ensures that the opinions and various interests of the electorate are fairly represented, and must not be capable of being manipulated at the expense of minorities.

### 4.4 **Proportional Representation**

The Democratic Party favours a proportional representation voting system.

### 4.5 **The Electoral System**

The DP's proposals for the electoral system which conforms to these requirements is set out in its discussion paper "A New Electoral System for South Africa".

## 5. **The Bill of Civil Rights and the Statement of Social, Economic and Cultural Obligations of Government**

5.1 The Constitution should contain a Bill of Civil Rights and a Statement of Social, Economic and Cultural Obligations of Government.

5.2 The Bill of Civil Rights will guarantee all persons irrespective of race, ethnicity, colour, religion, gender, sexual preference or other arbitrary criteria, the following basic rights:

- (a) Equal protection of the laws
- (b) Personal liberty save by due process of law in the ordinary courts of the land
- (c) Freedom of speech and expression

- (d) Freedom of movement
- (e) Freedom of association
- (f) Freedom of worship
- (g) The right to peaceful assembly
- (h) The right to privacy of home and correspondence
- (i) The right to own, acquire, occupy and dispose of property, and the right to compensation in the event of expropriation
- (j) The right to start and carry on any lawful trade, business, profession or occupation
- (k) The guarantee of regular and free elections

These rights should be fully justiciable either by the constitutional court or the ordinary courts.

5.3 The Statement of Social, Economic and Cultural Obligations of Government shall contain at least the following:

- (a) The obligation of government to respect the national symbols and traditions of groups;
- (b) The necessity for government actively to address the huge economic, social and developmental backlogs which exist;
- (c) The responsibility to ensure a clean and healthy environment, and to protect the natural resources of the country;
- (d) The duty to apply affirmative action programmes in the public sector as long as these are needed.

## 6. National Symbols

New national symbols must be adopted which symbolize unity and common nationhood. Because of the potentially divisive effects of adopting national symbols which represent only sections of the community, the greatest amount of consultation and popular participation aimed at achieving the broadest consensus should precede the adoption of new symbols.

## 7. Language

- 7.1 The Democratic Party upholds the right of all South Africans to speak their own language, although a single language of record may be required. The various languages of South Africa represent one of our greatest cultural assets and should, therefore, enjoy constitutional protection. In addition, languages should be promoted by means of federal and state appropriations for dictionaries, linguistic research and the arts, channelled through cultural councils.
- 7.2 Each **federal** state would, in addition to the language of record, be entitled to adopt further **languages** as official languages.
- 7.3 The right of linguistic communities to choose mother-tongue education, and to promote their culture, should be constitutionally protected.

A BALANCED APPROACH  
TO  
CONSTITUTIONAL DECENTRALISATION

(5 "flip charts", prepared by Colin Eglin, Democratic Party)

"Much attention has been given to the areas of government where the central and regional governments might exercise separate powers."

"But less attention has been given to those important areas of government where, in both the national and regional interests, regional and central governments will have to exercise joint responsibility."

"The Flip Charts indicate both how central and regional governments can exercise separate powers and also how joint responsibility can be achieved without either regional or central governments losing their constitutional competence."

Assumptions which are fundamental to the proposals for "Constitutional Decentralisation":

1. That there will be a constitution that has been negotiated and agreed to by the people of South Africa and that this constitution will be the country's basic law, providing the formal legal framework within which legislation and administration can take place.
2. That there will be a number of States or Regions whose boundaries will be drawn on a geographic and functional and not a racial basis.
3. That there will be a Bill of Rights outlawing apartheid and discrimination and the guaranteeing of basic rights of citizens - and that this Bill of Rights will operate in all structures of government and at all levels of society.

NOTE: *Italic print is used to denote new constitutional provisions added to each of the "flip charts" A through to E.*

A	LEGISLATIVE	EXECUTIVE	FISCAL
CENTRAL	NATIONAL (Defined)	All "National"	Own Responsibility 1. Own Central Taxes
REGIONAL	REGIONAL (Residual)	All "Regional"	Own Responsibility 1. Own Regional Taxes
LOCAL	REGULATORY (Defined)	All "Regulatory"	Own Responsibility 1. Own Local Taxes

Chart A

1. Chart A represents a classic territorial federation in which the central, regional and local governments enjoy legislative, executive and fiscal autonomy within their demarcated territories.
2. What are the practical problems that will arise?
  - 2.1 The system makes no constitutional provision for mutual support between the various constitutional structures.
  - 2.2 Given the uneven distribution of resources and wealth in South Africa the consequence of fiscal autonomy will be that the rich regions will become richer and the poor regions poorer.
  - 2.3 As most regions will not be financially viable they will become increasingly dependent upon the central government for financial support - and as a consequence will lose on a de facto basis, some of their constitutional autonomy.
  - 2.4 The separateness of the central, regional and local government especially in the fiscal field, will make it extremely difficult to succeed with the task of eliminating the tremendous disparities of wealth, education and development which are largely the consequences of generations of minority domination and apartheid.



B	LEGISLATIVE	EXECUTIVE	FISCAL
CENTRAL	NATIONAL (Defined)	All "National"	Own Responsibility 1. Own Central Taxes <div style="border: 1px solid black; padding: 2px; margin: 5px 0;"><i>Collects "National Taxes" for redistribution to Central, Region &amp; Local levels</i></div> 2. <i>Share of National Funds</i>
REGIONAL	REGIONAL (Residual)	All "Regional"	Own Responsibility 1. Own Regional Taxes 2. <i>Share of National Funds</i> 3. <i>Share of Equalisation Funds</i>
LOCAL	REGULATORY (Defined)	All "Regulatory"	Own Responsibility 1. Own Local Taxes 2. <i>Share of National Funds via the Regions</i>

Chart B

1. Constitutionally determined share of "national" and "equalisation" funds secures "fiscal autonomy" of components and prevents **the gap** between rich and poor regions and local areas from increasing.
2. Of **fundamental importance** is that once financial resources are known, fiscal responsibility and discipline must be exercised **at the level** at which services are supplied and used.
3. Constitutional provision is made for mutual support in the fiscal/financial field.

C	LEGISLATIVE	EXECUTIVE	FISCAL
<b>CENTRAL</b>	<p>NATIONAL (Defined) Matters of overall National concern, eg. Foreign Affairs, Defence, Citizenship etc.</p> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;"> <p>Outlining legislation (Defined)</p> </div>	<p>All "National"</p>	<p>Own Responsibility</p> <ol style="list-style-type: none"> <li>1. Own Central Taxes</li> </ol> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;"> <p>Collects "National Taxes" for redistribution to Central, Region &amp; Local levels</p> </div> <ol style="list-style-type: none"> <li>2. Share of National Funds</li> </ol>
<b>REGIONAL</b>	<p>REGIONAL (Residual) LESS CONCURRENT (Defined) Matters which could be legislated for regionally but in respect of which it is in the overall national interest to legislate centrally - Subject to "House of Regions" approval.</p>	<p>All "Regional"</p> <p>All "Concurrent" - Subject to Central Government supervision</p>	<p>Own Responsibility</p> <ol style="list-style-type: none"> <li>1. Own Regional Taxes</li> <li>2. Share of National Funds</li> <li>3. Share of Equalisation Funds</li> </ol>
<b>LOCAL</b>	<p>REGULATORY (Defined) Regulate within the framework of Central &amp; Regional legislation</p>	<p>All "Regulatory"</p>	<p>Own Responsibility</p> <ol style="list-style-type: none"> <li>1. Own Local Taxes</li> <li>2. Share of National Funds via the Regions</li> </ol>

Chart C

1. "Outlining **legislation**" ensures a national approach to matters such as the media, the use of water resources, environment, etc., which do not require national administration. Regional legislation and Local regulation and Regional and Local Administration will take place within these "outlines".
2. The concept of "concurrent" matters - where Central Parliament will legislate subject to collective regional approval and Regions will execute subject to Central Government supervision, adds the element of "Functional Federalism" to that of "Territorial Federalism".
3. Expands areas of mutual support in the legislative and executive fields.

Both the above introduce the concept of interrelated responsibility in the legislative and executive fields.

D	LEGISLATIVE	EXECUTIVE	FISCAL
CENTRAL	NATIONAL (Defined) Matters of overall National concern, eg. Foreign Affairs, Defence, Citizenship etc.  <div style="border: 1px solid black; padding: 2px; width: fit-content; margin: 10px auto;">Outlining Legislation (Defined)</div>	All "National"   <div style="border: 1px solid black; padding: 2px; width: fit-content; margin: 10px auto;">Joint Tasks (Defined concurrent)</div>	Own Responsibility 1. Own Central Taxes  <div style="border: 1px solid black; padding: 2px; width: fit-content; margin: 10px auto;">Collects "National Taxes" for redistribution to Central, Region &amp; Local levels</div> 2. Share of National Funds
	REGIONAL	REGIONAL (Residual) LESS CONCURRENT (Defined) Matters which could be legislated for regionally but in respect of which it is in the overall national interest to legislate centrally. (Subject to "House of Regions" approval)	All "Regional"  All "Concurrent" - Subject to Central Government supervision
LOCAL	REGULATORY (Defined) Regulate within the framework of Central & Regional legislation	All "Regulatory"	Own Responsibility 1. Own Local Taxes 2. Share of National Funds via the Regions

Chart D

1. "Joint Tasks" provide a constitutional basis for executive co-responsibility between the Central and Regional Governments.
2. "Joint Tasks" **not only** require Concurrent legislation, but as they are in the national interest they require joint administration **and** fiscal responsibility, e.g building of institutions for tertiary education and economic development programmes.

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100

E	LEGISLATIVE	EXECUTIVE	FISCAL
CENTRAL	NATIONAL (Defined) Matters of overall National concern, eg. Foreign Affairs, Defence, Citizenship etc.  <div style="border: 1px solid black; padding: 2px; width: fit-content; margin: 10px auto;">Outlining Legislation (Defined)</div>	All "National"   <div style="border: 1px solid black; padding: 2px; width: fit-content; margin: 10px auto;">Joint Tasks (Defined concurrent)</div>	Own Responsibility 1. Own Central Taxes  <div style="border: 1px solid black; padding: 2px; width: fit-content; margin: 10px auto;">Collects "National Taxes" for redistribution to Central, Region &amp; Local levels</div> 2. Share of National Funds
REGIONAL	REGIONAL ( <i>Residual/ Defined</i> ) LESS CONCURRENT (Defined) Matters which could be legislated for regionally but in respect of which it is in the overall national interest to legislate centrally. (Subject to "House of Regions" approval)  <div style="border: 1px solid black; border-radius: 50%; padding: 5px; width: fit-content; margin: 10px auto;"><i>Metropolitan Areas (treated as Regions)</i></div>	All "Regional"  All "Concurrent" (Subject to Central Government supervision)  <div style="border: 1px solid black; border-radius: 50%; padding: 5px; width: fit-content; margin: 10px auto;"><i>Regional and Concurrent where resources are adequate</i></div>	Own Responsibility 1. Own Regional Taxes 2. Share of National Funds 3. Share of Equalisation Funds
LOCAL	REGULATORY (Defined) Regulate within the framework of Central & Regional legislation	All "Regulatory"	Own Responsibility 1. Own Local Taxes 2. Share of National Funds via the Regions

Chart E

1. Provision is made for the possibility of certain metropolitan areas to be treated as Regions - with legislative, executive and fiscal responsibility.
2. Local areas should at all times have maximum administrative powers subject to resources and administrative viability. In appropriate circumstances local areas could administer "Regional" and "Concurrent" matters, subject to fiscal responsibility.
3. Regional matters could also become "Defined" subject to a Constitutional Court determining whether any matters not "defined" should be Central, Regional, Concurrent, or Local matters.

THE MEANINGFUL PARTICIPATION OF POLITICAL MINORITIES

PRECIS OF VERBAL SUBMISSION BY C W EGLIN ON BEHALF OF THE DEMOCRATIC PARTY

1. The DP sees both political minorities and political majorities as the product of citizens expressing their individual rights on a collective basis. As a consequence political minorities formed as the consequence of voluntary political association have no claim to "special" rights.

Likewise while headcounts are often used as a mechanism for taking decisions, the individuals forming a political majority have no "divine" right to rule over others.

2. The system of representative parliamentary democracy only works effectively in circumstances where a political minority or minorities have the opportunity and the real prospect of becoming the political majority from time to time - a form of "power sharing" by rotation.

Parliamentary democracy will not work if because of linguistic, religious, cultural, ethnic or racial factors political minorities are relegated to a positions of political impotence and have to endure the prospect of being permanent political minorities.

In such circumstances the pressures within the society become unbearable and on occasions are dealt with by such radical procedures as partition or the creation of a one party state.

3. The DP rejects both the concept of partition and of the one party state. It believes that the political pressures generated by the diversity of our population and the urge of citizens in political minorities to play an effective political role must be accommodated in an organic and holistic way bringing all the structures of government and society into account. Important that access to executive power in the central government structures is, it must not be seen as the only mechanism for satisfying the urge for access to power.
4. Quite apart from the structures of Government three constitution mechanisms should be invoked to deal with the issue of granting access to power for persons who belong to political minorities.

- a) The multiplication of the "sites" at which power can be exercised. By creating a number of sites of power at national, regional and local level political parties which may be minorities at one level of government may well find themselves to be majorities in others.
  - b) A Bill of Rights will not only guarantee individuals belonging to political minorities equality before the law and freedom from discrimination, but would also guarantee the right to freedom of association, speech and political mobilisation.
  - c) Checks and balances in the constitution in addition to preventing an abuse of power would distribute power away from a single central authority.
5. The various structures of government, and of society should be used to deal with the urge from political minorities. While no single structure on its own can resolve this issue, the many structures taken together can make a meaningful contribution to resolving the minority/majority power equation.

a) The legislatures

The various legislatures functioning at regional and local level the legislature at national level could include the following elements where appropriate:

- i) A lower house where proportional representation would ensure minority participation as well as the right of minorities to use parliament and the electoral process as a basis for political persuasion and mobilisation.
- ii) An upper house elected through regions in turn ensuring the representation of minorities measured on a regional basis.
- iii) Special majorities, giving minorities a special say in matters affecting the constitution as well as such matters as language, religion, culture and fundamental rights.

In plural societies the democratic process often accords special electoral importance to cultural, religious or ethnic minorities.

e.g. Italians, Jews, Blacks, Hispanics, etc on a "balanced" ticket in New York

e.g. Mr Mandela stressing to the ANC the importance of the so-called "coloured" group in the Western Cape.

b) The Judiciary

As the judiciary must be both non-racial and impartial, and judicial appointments would be by an independent Judicial Appointments Commission individuals, irrespective of their political persuasions or indeed other factors, would have access to appointment to the judiciary at all levels. The judiciary would belong to the people as a whole and not merely to a "majority".

c) The Public Service

The Public Service and as well as parastatals and government boards and commissions would have to reflect the non-racial, non-sexist and democratic character of the State.

Appointments would have to comply with non-discriminatory provisions of the Bill of Rights. Individuals, whether from majorities or minorities would be able to "exercise aspects of power" through the public service.

d) The Civil Society

Power and influence are not exercised only through the political and constitutional structures but throughout the structures of the civil society - in, inter alia, labour, business, church, sport, cultural and community organisations.

The recognition of the diversity of culture, language and religion and the development of civil organisations in these fields will not only contribute to satisfying the urge for power and influence but will help to reduce the risk of these emotional issues becoming the basis for political mobilisation.

A vigorous civil society is an important agency for spreading power more evenly.

c) The Executives

The DP does not envisage a single all-powerful executive. Rather a range of executives operating at national, regional and local levels in terms of powers laid down and entrenched in the constitution.

Because of the plural nature of our society and the risk of ethnic political mobilisation the DP would like to see the emergence of executives that are broad rather than narrowly based.

It would prefer for these broad based coalition type of coalitions to evolve in a natural way. Indeed the DP is confident that when we have succeeded with our task of

nation building and have then eliminated some of the inequities of racially based apartheid, that this will become the nature of our politics. However, the DP believes that while South Africa is in the process of transition to entirely new political structures at all levels and is still both developing democratic conventions and cross-cutting interests it will be necessary to make provision in the constitution for "shared executives" drawn from the parties with proven support.

These "shared executives" should not be denigrated as "enforced coalitions". Nor should they be used to render government ineffective by imposing a "minority veto". Rather, they should be used as a mechanism for making the exercise of power as inclusive as possible and for encouraging the development of political cooperation during the formative period of our new South African democracy.

The exact nature of these "shared executives", as well as the length of time for which they should function and the procedure for phasing them out at some stage in the future, is a matter for negotiation.

The DP believes that by shifting the nature of our politics away from the struggle for dominance at a central site of power and by encouraging a multi-party rather than a two party approach to politics, South Africa will be able to do justice to the urge of political minorities for meaningful participation without doing violation to the democratic rights of people who form political majorities.



# DEMOCRATIC PARTY POLICY POSITION PAPER ON A NEW ELECTORAL SYSTEM FOR SOUTH AFRICA

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## 1. Introduction

- 1.1 At its 1991 National Congress, the Democratic Party resolved to propose an electoral system for the new South African constitution which
- (a) will be based on the principle of proportional representation;
  - (b) requires the development of a culture of democratic pluralism;
  - (c) will be based on geographic constituencies; and
  - (d) will attempt to overcome the problems arising from illiteracy.
- and requested the Policy Advisory Committee to submit proposals, based on these criteria, to its next Congress.
- 1.2 The Policy Advisory Committee invited various experts to give their views on the most ideal electoral system. A study group examined electoral systems from a theoretical perspective, and examined those systems operating in various other countries, particularly those whose societies were deeply divided, and whose populations contained large numbers of illiterate people.
- 1.3 Electoral systems are the mechanism whereby popular wishes – expressed as votes – are translated into seats in any representative body. They are a crucial part of any democratic process. Ideally, an electoral system should
- (a) be equitable, in the sense of not greatly distorting the translation of votes into seats;
  - (b) be easily understandable and perceived to be fair;
  - (c) be easily amenable to effective and impartial supervision, so that electoral malpractices can be minimized;
  - (d) be immune, as far as possible, from gerrymandering;
  - (e) result in stable, effective and accountable government, at the same time as providing equitable representation for minorities, however defined or configured.

In addition, in South Africa's case, the electoral system should embody, as far as possible, features which facilitate and promote alliances or coalitions which will help to transcend the historical cleavages which characterize our society.

## 2. Recommendations

### 2.1 The Electoral Commission

A permanent independent Electoral Commission should be established, headed by a judge (or judges), drawn from the Constitutional Court. This Commission, which should be scrupulously neutral, should be vested with the legal capacity to enforce electoral law, to oversee the electoral process, to determine constituency boundaries, to hear complaints and take evidence on an ongoing basis on the electoral system.

### 2.2 The Senate

- 2.2.1 Each federal state will be entitled to elect a minimum of four and a maximum of nine senators (see Constitutional Proposals).

2.2.2 Every adult registered as a voter within a state will have one vote for the Senate, based on a vote for a party which will have registered a list of candidates for election to the Senate from that state with the Electoral Commission.

2.2.3 Senators will be elected from such lists, in order, based proportionately on the number of votes polled by parties in the election.

2.2.4 (a) Notwithstanding paragraph 2.2.3 above, in a state to be represented by  $x$  senators, a party will be required to poll more than  $\frac{x}{(x + 1)}$  of the total votes cast

to be entitled to elect all the senators from that state.

(b) In the event of proportionality resulting in only one party being entitled to have senators elected, but that party not meeting the requirement stipulated in paragraph 2.2.4 (a) above, then a senator will be elected from the list of the party which received the next largest number of votes.

2.2.5 Elections for the Senate will take place at fixed periods of four years.

### 2.3 The National Assembly

2.3.1 The National Assembly will consist of 400 members. 300 will be elected by 100 constituencies, each of which will return 3 members to the National Assembly.

2.3.2 Every adult registered as a voter within a constituency will have one vote for the party of his/her choice, which party will have registered a list of candidates for election from that constituency with the Electoral Commission.

2.3.3 (a) Members of the National Assembly elected to represent constituencies will be elected from such lists, in order, based proportionately on the number of votes polled by parties in the election: provided that in order to be entitled to all the representatives from a constituency, a party will have to have polled more than  $\frac{3}{4}$  of the votes cast in that constituency.

(b) In the event of proportionality resulting in a party being entitled to all three representatives, but that party not receiving more than  $\frac{3}{4}$  of the votes cast, the third member will be elected from the list of the party which polled the next largest number of votes.

2.3.4 The boundaries of the constituencies will be determined by the Electoral Commission. No constituency will be in more than one federal state, and each constituency shall have, as far as practical, the same number of voters.

2.3.5 One hundred members of the National Assembly will be elected from national lists registered by each party with the Electoral Commission, in such a way that the final composition of the National Assembly reflects the preferences of voters, when all the constituency votes have been aggregated on a national basis, as closely as possible: provided that no party which polls less than 3% of the vote nationally shall be entitled to be represented in this way, but provided further that any person elected by a constituency will not be disqualified on the grounds that the party of which that person is a member did not attract more than 3%

of the total votes cast.

2.3.6 Candidates may be on both national and constituency lists. If such a candidate is elected both by a constituency and from his/her party's national list, the Electoral Commission shall be advised within two days of which position such candidate wishes to fill, failing which such candidate's name will be removed from the national list.

2.3.7 Elections for the National Assembly will take place at fixed periods of four years.

#### 2.4 The State Assemblies

2.4.1 Each State Assembly shall consist of one House.

2.4.2 The State Assemblies shall primarily consist of representatives elected from constituencies, on the basis of three representatives from each constituency. Each state constituency will consist of half of a constituency for the National Assembly, and will likewise be determined by the Electoral Commission.

2.4.3 The method of election for the State Assemblies from constituencies will mutatis mutandis be as for the elections for the National Assembly.

2.4.4 Additional members of state assemblies, amounting to one-fifth of the number of members elected from constituencies, will be elected from state lists registered by each party with the Electoral Commission, and the method of election shall mutatis mutandis be as for the election of list candidates for the National Assembly.

2.4.5 Because the issues on which members of the State Assemblies will be elected are distinctively different from those in terms of which members of the National Assembly will be elected, elections of members of the State Assemblies will take place at fixed periods of four years, the first election occurring two years after the first election of the National Assembly.

# DEMOCRATIC PARTY POLICY POSITION PAPER ON THE TRANSITION

## 1. Introduction

### 1.1 What is "Transition"?

- 1.1.1 South Africa is already in a process of moving from a political system characterized by minority domination, to a new, inclusive democracy. This process is commonly referred to as "the transition", and encompasses the passage of time and sequence of events that will, or should, take place between now and the date on which the new constitution for South Africa comes into operation.
- 1.1.2 There are two distinct features or processes which will characterize the transition:
- (a) the negotiation process itself from which a new constitution, economic system and social order must emerge; and
  - (b) the manner in which the country is governed and managed until the introduction of a new constitution.

## 2. The Multi-Party Conference

### 2.1 Introduction : Codesa and the last year

- 2.1.1 On 20th and 21st December 1991, the Convention for a Democratic South Africa met in Johannesburg and resolved to adopt a declaration of intent and to establish a number of working groups to negotiate

- conditions under which elections could be held
- constitutional principles, and the process by which a new constitution should be negotiated
- transitional government and administrative arrangements
- the reincorporation of the TBVC countries, and
- time-frames and methods of implementing decisions made by Codesa.

- 2.1.2 Codesa was an endorsement of the position which the Democratic Party adopted at its 1991 Congress. The fact that it was able to be convened at all, given the suspicion and mutual hostility of the various parties and organizations in South Africa at that time, was remarkable; the fact that it made rapid and substantive progress was nothing less than miraculous. However, following a meeting of the Management Committee of Codesa on 15th June 1992, proceedings of Codesa were adjourned, and have remained deadlocked ever since.

- 2.2 Despite the evident shortcomings of Codesa itself, the DP believes that the negotiation and transition processes must still commence with the holding of a Multi-Party Conference (MPC), which should be more inclusive than Codesa. This body will

- Negotiate, and cause to be implemented, those measures necessary for the holding of free and fair elections;

- Negotiate the powers, restraints, composition and terms of office of the Transitional Council, the Council of Leaders, and any subsidiary sub-committees of such bodies; and
- Negotiate the constitutional principles which will guide and bind the Constitutional Conference when it draws up the new constitution, as well as the procedures to be followed by the Constitutional Conference.

### 3. Proposals for Transitional Government

#### 3.1 The Transitional Council

- 3.1.1 However imperfect the present constitution may be, South Africa has an elected government recognised by the international community. Nevertheless the constitution excludes the vast majority of South Africans from participation in the formation of the government and accordingly lacks legitimacy.
- 3.1.2 It is, therefore, necessary to create a Transitional Council with a multi-party character, which must be the product of agreement at the Multi-Party Conference.
- 3.1.3 The broad objectives of the Transitional Council should be:
- To create conditions under which free and fair elections can take place;
  - To preserve constitutional and legal continuity of government;
  - To build credibility, legitimacy and acceptability of government decisions and policies by broadening the base of government;
  - To promote and, as far as possible, ensure even-handed and impartial stewardship of key government functions, particularly control of government expenditure, of the broadcast media and of the security forces;
  - To ensure stability, and the continued loyalty and commitment of public servants;
  - To promote shared responsibility and to build trust and goodwill between participating political groups; and
  - To prepare for and to facilitate the transition to a democratic constitution.
- 3.1.4 The initial and primary purpose of the Transitional Council (and any sub-councils it may choose to create) will specifically be the achievement of a level playing field, the creation of a climate favourable to free political participation and the holding of free and fair elections for a Constitutional Conference and for a new democratic parliament.
- 3.1.5 Decisions of the Transitional Council (and any sub-councils it may create) will be made on the basis of consensus. Should it/they be unable to reach consensus, it/they may take decisions with a positive vote of eighty percent of the total number of its members.
- 3.1.6 Until a new parliament has been elected and a new government formed, the Transitional Council will function with the existing legislative and executive structures.
- 3.1.7 After elections for a Constitutional Conference have been held, the composition of the Transitional Council will be adjusted so that only parties with representation at the Constitutional Conference will be represented on the Transitional Council. The number of members that a party or organization has on the Transitional Council shall be in proportion to the number of votes it received in the election, provided that no party shall have fewer

than two, nor more than six, members on the Council.

- 3.1.8 After such elections for the Constitutional Conference, the Transitional Council may expand its range of responsibilities and the number of sub-councils, which would act as multi-party cabinet committees. Such sub-councils/multi-party cabinet committees would interact closely with bodies such as the National Economic and Housing Forums.
- 3.1.9 The Transitional Council will also deliberate and decide upon the nature and scope of the involvement of the international community in the monitoring of the electoral process, or of other events requiring such monitoring.

### 3.2 **The Council of Leaders**

- 3.2.1 After the elections for the Constitutional Conference, the six parties receiving the most votes shall be entitled to nominate a person to serve on the Council of Leaders; provided that no party receiving less than three per cent of the votes shall be entitled to representation on the Council of Leaders.
- 3.2.2 The chairing of the Council of Leaders shall rotate amongst its members on a monthly basis.
- 3.2.3 The State President will exercise all executive functions provided for in the constitution on the advice of the Council of Leaders in a manner in which he normally acts on the advice of the Cabinet.
- 3.2.4 In the event of an inability to reach consensus on a matter of significance, the Council of Leaders may refer this dispute back to the Transitional Council.
- 3.2.5 The State President and the Council of Leaders shall:
- Give effect to decisions of the MPC; and
  - Resolve deadlocks which may be referred to them by the Transitional Council, sub-councils of the Council or multi-party Cabinet committees.
- 3.2.6 The State President and the Council of Leaders may further together decide to:
- Change the composition and structure of the Cabinet;
  - Provide for interim participative structures on provincial and local government level;
  - Set up procedures for the reintegration of the TBVC and national states;
  - Broaden the representivity of the judiciary, public service and armed forces;
  - Appoint specialist commissions to investigate and resolve particular issues; and
  - Make appointments to various government advisory bodies.

### 3.3 **Multi-Party Cabinet Committees**

- 3.3.1 Each Cabinet Minister, or where it is practical, group of Cabinet Ministers, will in the execution of his, her or their responsibilities act on advice of a multi-party cabinet committee, appointed by the Transitional Council.
- 3.3.2 The multi-party cabinet committee will be consulted before legislation is introduced to parliament and before the Minister(s) exercise(s) any executive power vested in

him/her/them, and will not proceed with the legislation or executive action until the committee has given its advice, subject to reasonable time limits.

- 3.3.3 Should the Minister, or Ministers, be unwilling to follow the advice of the multi-party cabinet committee, the matter shall be referred to the Transitional Council, and in the event of this body not being able to resolve the dispute, to the Council of Leaders.

### 3.4 Transitional Constitutional Adaptations

- 3.4.1 While the formation of the Council of Leaders, the Transitional Council and the Multi-Party Cabinet Committees are essentially political contracts between consenting parties, some changes will have to be made to the present constitution to sanction transitional structures and procedures, as outlined above, prior to the negotiation of an entirely new constitution.

- 3.4.2 Specifically, Parliament should, as soon as possible, pass legislation abolishing the distinction between so-called "own affairs" and "general affairs", and providing for single, functional departments of health, education, agriculture and so on, as well as for a unicameral legislature. Parliamentary procedure (including the appointment of joint committees) should be likewise amended, and Ministers' Councils abolished.

### 3.5 A Bill of Rights for the Transitional Period

- 3.5.1 The MPC should negotiate an interim Bill of Rights, covering basic rights, *inter alia* freedom of speech, of assembly, of movement, of association and of religion. Also included should be provisions outlawing race and gender discrimination of any nature, as well as protection against arbitrary arrest and detention.

- 3.5.2 Such a Bill ought also to contain a Code of Conduct for Political Parties, including an obligation to conduct their activities peacefully, the prohibition of intimidation and the obligation that financial statements be properly audited.

- 3.5.3 To have legal force, the Bill of Rights would have to be submitted to, and endorsed by, Parliament.

## 4. Proposals for the Procedures for the Negotiation of a New Constitution

### 4.1 Principles

- 4.1.1 The principles upon which the constitution is to be based and procedures to be followed in the negotiation of a new constitution should be agreed to by the Multi-Party Conference, and will be binding on all parties.

### 4.2 Neutral Facilitation or other Chairmanship

- 4.2.1 The MPC may determine a permanent or rotating system of chairing from amongst the parties participating, or it may invite a neutral facilitator or facilitators to convene and chair meetings of the body or bodies established to undertake the task of drawing up the new constitution.

### 4.3 The Independent Negotiation Commission and Secretariat

- 4.3.1 The facilitator or person designated by the MPC to chair its proceedings will be the head of an independent negotiation commission which will supervise the negotiation process. The duties of the commission will include providing facilities for the body or bodies negotiating the constitution, providing legal or other research and information, supervising the election of any body or bodies which may be agreed upon, ensuring compliance with any interim

arrangements which may be negotiated, and certification of the results of an election held after the adoption of the new constitution.

4.3.2 The negotiation commission will be served by a secretariat.

4.3.3 The negotiation commission will have a budget, which will include the costs associated with meetings of the body or bodies set up to negotiate a new constitution, to be drawn from the State Revenue Account.

#### 4.4 The Negotiation of the New Constitution

4.4.1 In order to ensure that the forum charged with the task of negotiating the new constitution is representative of the widest cross-section of political opinion, while simultaneously having a high degree of popular legitimacy, the Democratic Party proposes that the Multi-Party Conference agree to the election of a Constitutional Conference, whose only task will be to draw up a new constitution.

4.4.2 The Constitutional Conference will be elected on the basis of universal adult franchise, with each voter voting for a party of his or her choice, on a basis of proportional representation, with a cut off of 1%. The elections will be supervised by the negotiation commission.

4.4.3 The Constitutional Conference should consist of 200 members.

4.4.4 The Constitutional Conference will sit only as long as it takes to negotiate a new constitution, or for nine months, whichever is the shorter period, after which it will be dissolved. In the event of the constitution not having been finalized after nine months, fresh elections for another Constitutional Conference will be held.

4.4.5 The Constitutional Conference will be convened and chaired by the person or persons agreed to by the MPC. Committees of the Conference may be established. The Conference will be empowered to determine its own procedures, including the right to hold all or any part of its sessions in committee.

4.4.6 The Constitutional Conference will endeavour to take decisions on the basis of consensus, especially in respect of such matters as the entrenchment of the constitution, the Bill of Rights, the language issue and so on.

4.4.7 Decisions of the Constitutional Conference will be bound by the constitutional principles agreed to by the MPC, and where it has been unable to achieve consensus, the Constitutional Conference shall make decisions on the basis of a positive vote of seventy per cent of the total number of its members.

4.4.8 The Constitutional Conference shall also negotiate the process and timing of a phased implementation of the new constitution, if this is desirable and/or necessary.

4.4.9 Once the Constitutional Conference has approved a new constitution and each of the clauses thereof, it will be put to the voters of the country by way of a referendum and upon endorsement at such a referendum it will become the new constitution.

#### 4.4.10 Adjudication of Disputes during the Negotiation Period

In the event of differences or disputes during the negotiation period around the interpretation of the constitutional principles and procedures to which the Constitutional Conference will be bound to adhere, it is recommended that the Appellate Division appoints a panel of three judges of appeal to adjudicate on such disputes. The decision of the panel will be final and binding on the parties.



#### 4.5 Constitutional Continuity

In order to ensure the legal continuity of South African constitutions, Parliament should pass enabling legislation which establishes the Constitutional Conference, provides for elections thereto, and which gives that body the legal competence to draw up a constitution for South Africa. This legislation should also make provision for set procedures to be followed, failing which the new constitution would be invalid, for the repeal of the present constitution upon the approval of the new constitution and for transitional measures contemplated in this document.

#### 4.6 Elections under the New Constitution

4.6.1 Subject to agreement on the phasing in of the new constitution, elections in terms of the new constitution will be held within three months of the constitution becoming law.

4.6.2 These elections will likewise be supervised by the negotiation commission or such other body as may be agreed upon by consensus by the MPC.

#### NATIONAL SYMBOLS

The Democratic Party favours an incremental approach, involving the combining of symbols until such time as new symbols are agreed to. In particular, Nkosi Sikelel iAfrika and Die Stem ought to be played at all official occasions until a single national anthem is decided upon.