

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

REPORT ON THE SENATE
(BLOCK 2)

ADDENDUM A:
FURTHER SUBMISSIONS RECEIVED
FROM THE ANC AND NP

(As at 05 September 1995)

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FURTHER PRELIMINARY ANC SUBMISSION

THE SENATE / COUNCIL OF PROVINCES (COP)

5 September 1995

INTRODUCTION

The ANC has made previous submissions to the Constitutional Assembly concerning the role and functioning of the present Senate. We believe that the Senate as it currently exists:

- * does not have a sufficiently identifiable purpose or powers to warrant its status as an Upper House;
- * is lacking a specific regional function;
- * is not viewed by the provinces as a body representing or reflecting provincial interests;
- * lacks any integrating or co-operative mechanisms to encourage provincial governments to work with each other and with national government which therefore allows tensions to develop between regions and between regions and central government;
- * does not serve to deepen democracy, but rather merely serves to check it.

We are accordingly of the view that the current Senate amounts to an institution which has little to offer and it is for this reason that we have proposed the reformulation of the current Senate. We propose that the functions, powers and composition of a revised Senate should be considered in conjunction with the system of provincial government. In addition, such a revised Senate (or Council/House of Provinces) would:

- * become a functioning component of the national legislature;
- * play an integral role in the creation of a more co-operative framework of provincial and national relations, defining and expressing the relationship between national and provincial government;
- * play a central role in accommodating the concerns and diversity of the regions while maintaining coherent and co-operative governance;
- * serve to develop the general trend towards empowering provinces in regard to national legislation over provincial matters;
- * prevent the relationship between provinces from degenerating into mere competition and require provinces to take responsibility for the co-management of the nation through exercising collective influence at national level and without reducing the range of function competencies.

ANC PROPOSALS

1. NAME

The ANC has no firm proposals regarding the name of the proposed reformulated Senate. For purposes of this submission, the name Council of Provinces (COP) has been used.

2. ROLE OF COP

- 2.1 In order to function effectively a new Senate must be subject to the effective control of the provinces.
- 2.2 The COP must not amount to an Upper House in the usual sense (as the existing Senate or British House of Lords). It will be a component of the legislature in regard to law-making affecting the provinces but will not play a role in regard *inter alia* to the election of the President, appointment of the National Executive or in impeachment proceedings. The National Executive will therefore not be accountable to such structure.
- 2.3 The COP is to be a legislative organ whose role would be to consider national legislation affecting the provinces. The COP will accordingly amount to a collective source of power for the provinces regarding national legislation affecting them.
- 2.4 The COP will be entitled to initiate legislation.
- 2.5 The COP will be entitled to consider but not block national legislation regarding national competencies.
- 2.6 The COP will be an additional institution charged with the task of addressing relationships between levels of government within the legislative process.
- 2.7 The Constitution should contain the principles relevant to the establishment and role of the COP.

3. COMPOSITION AND SIZE

- 3.1 The COP will be composed of provincial representatives delegated by provincial legislatures and not by provincial executive councils. Provincial representatives shall remain accountable to provincial

legislatures and subject at all time to recall by such legislatures. The ANC prefers but is not wedded to a system which would allow representatives to be nominated in accordance with party political strength in the legislature.

- 3.2 There is to be a compromise between the equality of the provinces and representivity in the COP. Larger provinces are to be granted limited but additional representation. Each province is to have a minimum of 4 and a maximum of 8 representatives on the Council.
- 3.3 The COP is to be a perpetual body. At least one half of representatives shall be delegated by provinces to serve on the COP on a full-time basis.
- 3.4 Provision may be made for the representation of a single delegation of 4 -6 person persons representing local government structures on the COP. This provision could allow for local government to have a voice but not representation as such on the COP. The ANC believes this proposal may enrich the COP but is not wedded to it.

4. POWERS AND FUNCTIONS

4.1 National Legislation Affecting Provinces

4.1.1 Through participation in the COP, provinces will consider all legislation from the National Assembly affecting them (i.e in areas over which the provinces also have legislative competence). Provinces will retain the right to block such legislation through the COP. Blocking can be taken to mean an absolute veto. Alternatively, it may refer to a delaying mechanism in combination with the right of the National Assembly to override the COP only with an increased majority.

4.1.2 The COP will be entitled to initiate legislation relating to provincial interests.

4.2 National Legislation Based on National Competencies

4.2.1 The COP will be afforded opportunity to comment on national legislation based on national competencies.

4.3 Financial Matters

The COP could be used to make inputs on the following matters:

- 4.3.1 the national budget process;
- 4.3.2 the national departmental budget process;
- 4.3.3 negotiations on all allocations through recommendation of the financial and fiscal commission.

This involvement will give provinces an important opportunity to influence financial allocations at all levels. Precise mechanisms by which the COP will intervene can be detailed at a later stage.

5. JOINT SITTINGS

There will be no joint sittings of the COP and National Assembly as the COP will not constitute an Upper House.

6. ADDITIONAL MATTERS

The constitution must provide for circumstances in which a province ceases to function and determine the role or limitations placed upon provincial representatives on the COP in such a case.

A component of this proposal, and linked to it, is the belief that the COP has a critical role to play in regard to the determination of the necessity and desirability of national legislation which would override provincial legislation or *vice versa*. The ANC will be proposing, with regard to the formula which will determine which legislation prevails, where national and provincial contradict each other, that where the COP has approved the legislation and the legislation belongs within the categories as identified in the Constitutional Principles (ie. economic unity, preservation of a common market, uniformity and so forth) that the legislation shall be deemed to be desirable and necessary as the case may be.

The ANC believes that the COP as a political body is the more appropriate body to determine the necessity and desirability of such legislation than any administrative or legal body. The courts shall otherwise continue to play the role envisaged in the existing section 126 of the Interim Constitution. It is self-evident that the ANC envisages that the provinces will therefore have at least the same legislative and possibly greater executive competencies with regard to the same functional areas set out in Schedule 6, save for police.

FURTHER PRELIMINARY ANC SUBMISSION

NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCIES

5 September 1995

As a starting point and subject to some fine-tuning, the ANC believes that the functional areas in respect of which the provinces should have concurrent legislative competence should in general be those set out in Schedule 6 of the Interim Constitution, save for police (which should not in reality have been a component of Schedule 6 but left to Chapter 14). With regards to local government, we believe that careful consideration needs to be given to its continued inclusion in Schedule 6, it being our view that local government is in fact a tier of government and not a functional area. The ANC contends that the police service needs to be dealt with separately in light of its special features, national significance and the history of regional police forces in South Africa.

Subject to more detailed remarks, the ANC considers the report of the Technical Experts in this regard as the starting point, save that we contend that the necessity and desirability of national legislation for purpose of determining pre-eminence should be established by the reformulated Senate or Council of Provinces (COP) and not by the court. The court is required to determine the other requirements for valid and overriding pre-eminent legislation, including the nature and extent of any inconsistency, whether the legislation falls within the categories proposed or deals with matters covered by the overrides. The ANC contends that placing this power formally in the collective hands of the provinces cannot be construed as a diminution of provincial powers particularly as it seeks (as the German Constitutional Court has urged) to have political questions resolved politically without diminishing the role of the courts as the final guardian of the mechanism.

Provinces would have exclusive executive competence in regard to legislation passed by them and exclusive legislative competence only in the sense suggested by the experts (in respect of legislation in circumstances in which provincial legislation would be pre-eminent).

Should it be contended that the provincial legislatures should be granted even greater powers than they currently possess under the Interim Constitution to override national legislation (which under our proposal, the provinces themselves will be empowered to confirm and consent to), the ANC will withdraw its proposal on the COP as the system would become nonsensical (ie. It makes no sense to give the provinces much greater powers to make national legislation and simultaneously give them the powers to ignore the very legislation that they have shaped).



National Party
Nasionale Party

Federal Council
Federale Raad

05 September 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
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Dear Mr Ebrahim

Enclosed please find the National Party proposal for Theme Committee 2 regarding
The Role of the Senate.

Kind Regards

P. J. A. RABIE MP

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NATIONAL PARTY SUBMISSION

THE ROLE OF THE SENATE

1. The National Party wishes to reiterate not only the actual content of its initial submission on the Senate, but the following points of departure in respect of the position and role of the Senate as well:

1.1 The Senate should be a fully-fledged second or upper chamber of Parliament, equal in principle to the National Assembly.

1.2 The main purpose of the Senate should be to represent the provinces in the national legislature

1.3 The composition, powers and functions of the Senate and its relationship to the National Assembly should be arranged accordingly.

2. With regard to the composition of the Senate, various alternative methods were discussed in our submission, but our preference was that *Senators should be indirectly elected on a proportional basis by the respective provincial legislatures*. In this regard the National Party wishes to point out that although we are open to suggestions as to the most effective way of representing the provinces in the Senate, we do not share the notion of a Senate composed of *delegations* from the provincial executives and/or legislatures. The situation in Germany, where this idea originates, is totally different from ours:

(a) The German provinces or *Länder* do not enjoy legislative powers over the same range of matters than the South African provinces and are mainly engaged in the execution of federal legislation. Therefore, it makes perfect sense to involve their governments in the legislative function at federal level through intensive participation in the *Bundesrat*. This is not our view of the proper position of our provinces. The provinces should not be mere agents of the national level. They enjoy original legislative powers over a wide range of matters which should be respected and on which they should be allowed to function autonomously. For this reason, Parliament should not use the "overrides" as an excuse to legislate extensively on the matters under the jurisdiction of the provinces, but only when it is really necessary in terms of those "overrides". Although extensive mechanisms for inter-governmental relations are necessary, we therefore do not perceive the Senate, which is a legislative body, to be the primary vehicle for liaison between the national and provincial governments - both the legislative and the executive levels. As pointed out in another submission, various other mechanisms should be created for that purpose.

(b) On a practical level we doubt the feasibility of a Senate composed of serving members of the provincial legislatures and/or executives. Given South African *geographical* realities, we believe the logistical problems in this regard to be virtually insurmountable. Of course, this poses no problem in Germany, which is much smaller and which possesses some of the most advanced transport facilities in the world. In addition, we believe that the mammoth task of establishing strong provincial government require the permanent attention of the provincial governments and does not allow their members simultaneously to serve in the Senate.

3. With regard to the powers of the Senate, we proposed as follows:

3.1 The Senate should consider all bills.

3.2 In the case of disagreement between the Houses on *ordinary* bills, the Houses should consider the recommendations of a joint committee separately before a joint sitting is convened.

3.3 The Senate should retain its powers in terms of section 61 with regard to bills affecting provincial boundaries, powers and functions.

3.4 The Senate should also be the House where bills affecting the provinces should preferably be introduced.

3.5 The Senate should have the same powers in respect of *money bills* as in the case of ordinary bills.

3.6 It should retain its current powers in respect of bills relating to provincial finance and constitutional amendments.

3.7 The "advise and consent" role of the Senate in certain appointments should be extended.

3.8 The Senate should be represented in the Commission on Provincial Government and the Financial and Fiscal Commission.

3.9 The Senate should be a watchdog over the constitutionality of bills.

4. In view of the above approach towards the proper role and function of the Senate, the National Party is also in favour of a provision subjecting national legislation adopted in terms of the "overrides" to the approval of the Senate.