

2/4/2/1/3/3

TC2/20(3)

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

Monday
29 May 1995
9h00-16h00
M46

SENATE
(BLOCK 2)

Minutes of Debates:
5 May 1995
22 May 1995

TABLE OF CONTENTS

	DOCUMENT	PAGE
1.	Minutes 5 May 1995: which includes the CPG presentation on the Senate	1 - 5
2.	Minutes 22 May 1995: which includes the Second Draft report on the Senate which was tabled at the meeting (the minutes includes the Third Draft, which emanated from the meeting)	6 - 56
	Second Draft	18 - 32
	Third Draft	33 - 52

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
MINUTES OF COMMITTEE MEETING

Friday 05 May 1995
9h00-12h30
M46

PRESENT.

Mahlangu MJ (chairperson)

Ackerman C
Diale N
Ebrahim AG
Foster JA
Groenewald PH
Holomisa SP
Hendrickse PAC (Alt)
Louw SK
Mashile NL (Alt)
Mohlamonyane GM
Mothoagae PK

Mushwana GM
Mutsila I
Nxumalo SDW
Pahad EGH
Phakathi NE (Alt)
Rabie JA
Ranchod BG
Shabangu S
Steenkamp PJ (Alt)
Taunyane DP
Tolo LJ

ABSENT

Mars I
Msomi M
Ndlovu VB

APOLOGIES

Badenhorst MJ
Beyers AS
Bester BC
Doidge GQ
Eglin CW
Ligege MG
Mabudafhasi RT
Sethema BEE

IN ATTENDANCE

Nene J, Fredericks C, Smit T, Motimele AAM, Steytler N, Van Wyk DH
CPG: Lategan, Lupunya, Van der Merwe, Vermaak

1. OPENING AND WELCOME

- 1.1. The meeting was chaired by Mahlangu MJ, who extended a special welcomed the delegation from the Commission on Provincial Government (CPG).

2. CORE GROUP REPORT

- 2.1. A written Core Group Report was tabled, which included an amended Work Programme for TC2. The report indicated that a decision was required in respect of the adoption or rejection of the programme on Monday 8 May 1995.
- 2.2. The report indicated that representatives from TC2 were required to attend upcoming CPM's, and workshops. The meeting agreed that names provided by the Core Group were approved, and outstanding names would be provided in due course to the Managing Secretary.
- 2.3. The report furthermore contained a draft advertisement calling for submissions in respect of outstanding blocks. The meeting adopted the advertisement, subject to the following amendments, which were to be affect by the Technical Committee:
 - (i) in respect of the portion relating to the electoral system, the

- (ii) words "proportional representation" should be included; and, in respect of the portion related to constitutional amendments, it should be made clear that the requested submissions are requested for the purposes of the final constitution, and not the interim constitution.

3. CPG PRESENTATION OF DOCUMENT *PRELIMINARY RECOMMENDATIONS ON SECOND CHAMBER*

- 3.1. The Acting Chairperson of the CPG, Mr Lategan, indicated that this was the first time the CPG was presenting recommendations to the CA or its substructures.
- 3.2. He indicated that the CPG's first responsibility had been to receive information and input from the provinces, and they had tried to do so to the best of their ability. He noted that in the process the CPG had built up a good working relationship with the Premiers of the provinces.
- 3.3. He indicated that the second responsibility was that in terms of the Interim Constitution the CPG was to advise the CA on issues of second and third tier governments. He indicated that in their advice to the CA, they were constrained in the following ways:
 - (i) they must take the existing constitution including the Constitutional Principles into account as a point of departure;
 - (ii) they have endeavoured to look at issues in a practical and not merely academic manner; and,
 - (iii) they had generally tried to "steer clear of political issues", although it was obviously not possible to avoid dealing with political matters; however, they had tried to do remain politically "neutral".
- 3.4. He further indicated that the CPG consisted of 14 fourteen members, 9 of which carried the approval in their appointments of the respective provincial Premiers. He noted further that Mr Thozamile Botha, who had been the chairperson of the CPG, had moved from the CPG to the Eastern Cape Province where he was attending to urgent matters.
- 3.5. He noted that the CPG had already submitted 6 documents to the CA, and would be submitting more. He indicated that Document 4, contained in the documentation pack pertained to the Second Chamber, and was pertinent to the presentation.
- 3.6. He gave a brief background to the formulation of the recommendations, indicating that prominent academics and practitioners had participated in various workshops and think-tanks

which served as the basis of the formulations.

- 3.7. He noted that they had come to a practical arrangement with the Chair and Deputy Chair of the CA, as to their access to the Theme Committees, where they would be presenting their preliminary documents. He noted that they were only "preliminary" as they would have to in terms of the Interim Constitution look at it again after discussions with the structures of the CA and after they had received comments thereon also from the Provinces.
- 3.8. He noted that the provinces are the best advocates for themselves, and the CPG believed it was important to receive greater input from the Provincial Administrations than the unfortunately insufficient response they had received at that stage.
- 3.9. He then presented the above CPG document 4, by briefly relating the contents of the document. Thereafter he invited questions.
- 3.10. The NP asked the CPG whether they had considered the basic question why there should even be a Senate. The CPG responded by saying that that was one of the matters that was thoroughly debated by the CPG. The CPG noted that their debates particularly took note of the need for such a chamber vis-a-vis the provinces. The CPG also noted that contrary to the suggestion by the speaker, the CPG did not believe that the Constitution can merely look after those interests. The CPG noted that political problems should be solved by politicians firstly. The CPG concluded that they would like to see the role of the Senate more seriously recognised, and that they believed that legislation pertaining to certain matters need to be introduced via the Senate.
- 3.11. The ANC indicated their opposition to the "ordinarily resident" requirement pertaining to Senators, particularly against its inclusion in the Constitution. The NP indicated their support of this requirement. The CPG offered an explanation for their support of the requirement, namely that they believed it could be conducive to a close and effective link between the representatives and the provinces. The CPG indicated that they may be flexible in respect of this matter.
- 3.12. The CPG was questioned as to whether they had considered the role of Traditional Leaders in their document. The CPG indicated that the role of Traditional Leaders was being considered and that they had held a workshop in Pretoria in this regard. They also noted that they were having follow-up discussions in this regard. They noted that they would be making further recommendations in this regard. A

member of the Committee indicated that comprehensive submissions had already been made by some organisations to the CA. The CPG indicated that they would follow this up after the meeting.

3.13. The ANC indicated that they were particularly interested in the fact that there seemed to be a shift from the present composition of the Senate which everyone seemed to agree made the Senate a mere clone of the National Assembly. The ANC noted that it would then be useful to indicate what specific tasks may in the premises be given to the Senate. The ANC noted that one of these tasks may well then be to, as provinces, to examine some legislation of the National Assembly. The ANC noted also that in developing their ideas, the CPG is requested to further develop the possibilities regarding means of representation of the provinces contained in 3.2.5.(ii), and 3.2.5.(iv), which the ANC indicated were not necessarily contradictory.

3.14. The CPG thanked the committee for the opportunity to present their views, and indicated that the discussions and debates were very useful and conducted in a good spirit. The CPG indicated that the discussions and debates would be taken into account in their further recommendations.

4. THE SENATE

4.1. The meeting agreed that the discussion of the Technical Committee's report on the Senate be postponed, as the ANC and NP still wished to make supplementary submissions. The meeting agreed that the deadline for the supplementary submissions on the Senate by any political parties would be postponed to Friday, 12 May 1995.

5. CLOSURE

5.1. The meeting closed at 12h30.

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
MINUTES OF COMMITTEE MEETING

Monday 22 May 1995
9h00
M46

PRESENT

Rabie JA (chairperson)

Ackerman C
Badenhorst MJ
Beyers AS
Diale N
Ebrahim AG
Foster JA
Groenewald PH
Lebona HJP (Alt)
Ligege MG
Louw SK
Mabudafhasi RT
Mahlangu JL
Mahlangu MJ

Mashile NL (Alt)
Mlangeni A
Moloto CP (Alt)
Mohlamonyane GM
Mothoagae PK
Mushwana GM
Mutsila I
Olifant DAA
Pahad EGH
Phakathi NE (Alt)
Ranchod BG
Sethena BEE
Tolo LJ

ABSENT

Mars I
Msomi M
Ndlovu VB

APOLOGIES

Beyers AS
Bester BC
Doidge GQ
Shabangu S
Taunyane DP

IN ATTENDANCE

Nene J, Fredericks C, Smit T, Steytler N, Van Wyk DH

1. OPENING AND WELCOME

1.1. The meeting was opened and chaired by Rabie JA.

2. REPORT ON NATIONAL ASSEMBLY, PRESIDENCY, CABINET

2.1. The meeting again discussed amendments to the **Second Draft** of the report on a point by point basis. These amendments are fully reflected in the **Third Draft** of the report (see separate documentation pack: TC2/20).

2.3. The meeting discussed the manner in which the committee takes note of the public submissions. The meeting noted that the summaries of the public submissions compiled by the Technical Committee are taken into consideration in the discussions of the actual reports, and copies of the full public submissions are available to the committee. The committee noted that it should be reflected in the report whenever the committee takes decisions which differ from the tenor of public submissions.

3. REPORT ON THE SENATE

3.1. The meeting agreed that parties will briefly give an overview of their positions in respect of the Senate, whereafter questions for clarification will be allowed. It was agreed that thereafter, the meeting would address the Technical Committee's **Second Draft Report** on the Senate on a point by point basis.

PRESENTATION BY THE ANC

- 3.2. They said they believed it was important to reconsider the role of the Senate and that the Interim Constitution does not give much detail on the exact role of the Senate. They stated that Senators were not regarded at present by the Provinces as their representatives. They stated that the ANC position will make Senate take care of their interests at National level; it will contribute to a more co-operative framework between national and provincial governments. They stated that if its is designed with that understanding it will be a functioning component of the National Legislature They stated that the functions and powers of the Senate should be founded on a system of Provincial government the parites want to entrench in the constitution, esp with regard to the relation with the national government.
- 3.3. They noted that the ANC consulted widely, and studied other constitutions. They stated that their main aim was to try to promote good governance at all tiers of government and to to introduce co-operative governance. They stated that the present framework actually promoted tension between province and province, and between province and national government; the Senate could resolve these problems. There stated that there are 3 elements on which they are basing their conception of the senate:
- (i) the collaboration of provinces at national level, how that relationship should be promoted;
 - (ii) looking at a division of competencies between the national and provincial levels of government; and,
 - (iii) a functional and efficient allocation of financial duties as between the different levels of government, and how the provinces become involved in the relation of financial distribution.
- 3.4. They noted that they were still finalising the composition of the Senate, and that they indicate various options for their appointment/election in their submission. Finally they noted that they advocated an ideal number of 5-10 representatives per province.

PRESENTATION BY THE DP

- 3.5. DP noted that they advocate a co-operative form of federalism, and that they do not think that in South Africa one could have a number of compartments governing separately. They stated that therefore the whole question of the relationship between the provinces and the centre is important, especially in respect of the question of fiscal allocations, which the DP thinks is a fundamental one. Therefore, they noted that on a philosophical basis they have no problem with

what the ANC has stated.

- 3.6. But the DP noted that they do not think that collaboration or co-operation with the centre should be at the expense of what could be called the rights and competencies of the provinces. They noted that it is one thing to say there are collective rights of provinces, but their are also the rights of provinces individually against all provinces collectively.
- 3.7. DP stated that they also believe that the Senate should be made a more effective instrument for representing a provincial point of view. They said that, in other words one could argue for changes in the composition and function of the Senate. In these circumstances, they noted, when it comes to the allocation of powers, one should take into account the allocation of powers as exercised by individual provinces, and not just the allocation of powers as determined by the majority of provinces. In other words, the province should have allocated powers; it should not be subservient to what the collective provinces decide his powers should be.
- 3.8. The DP stated that they think there should be provision made for exclusive powers, although the provision of the principles in Schedule 4 do dilute most of those powers, because they give a significant amount of override to the central government. Therefore, they noted, although the DP would argue for more exclusive powers, they accept that they work within the framework of principles which do impinge upon those powers. They noted that these principles had to be accepted because they are Constitutional Principles.
- 3.9. In respect of the allocation of members, the DP stated that they believe in a smaller number of 7. The DP noted that they believe that it could go down as far as 5, but not further. They stated that they believed it is one way in which one can still have proportionality operating; if the number gets smaller than 7, it becomes more difficult to apply the proportionality principle.
- 3.10. In respect of the question as to who shall be represented, the DP agreed that there should be a much closer link between the provinces and the central government. They noted that it cannot therefore be via the voters, because that makes it a very tenuous link. Although it would be democracy at its best, it would detract from the intimate relationship between the two levels of government, if one were to have a popular vote at provincial level in this regard. They stated that the issue is whether they should come from the executive or the legislature. They noted that they believe that they should essentially be drawn from the legislature: it is a legislature to legislature

function; It is not an executive to executive or an executive to legislature function - it is one legislature elected by popular vote, represented at another legislature. They stated that the Senators should come proportionately to the numbers in that particular House. But they indicated that one has an immediate problem: should the Senators be the members of that Legislature themselves, or should those Houses be able to elect anybody. The DP noted that they would like it to be members of the legislature, because it would mean the closest relationship. But they conceded that for practical purposes it would not be good to have persons as members of two Houses; that would not work for practical reasons.

3.11. The DP noted that although they had not put it in their document, they not hostile to the concept of recall. They believed it would concentrate the minds of the Senators, if they know that they can be recalled by the provincial legislature. They indicated that there may, however, be practical problems: unless you recall all of them, it is difficult to maintain proportionality unless the person is replaced by that particular party.

3.12. DP noted that they would argue that there should be co-equal powers with the central government on a range of issues, but there should be extraordinary powers regarding anything that deals with the rights and powers of the provinces. They commented that the ANC has the blocking mechanism at a different level, but the concept that when it comes to matters affecting the Provinces there should be special rights of the Provinces is the same. They noted that the DP differs in their belief that the provinces through the Senate should not be involved in general budgetary matters because they are not there to represent the nation. However, they noted that they believe that where there are specific recommendations coming from the Financial and Fiscal Commission concerning a share in the revenue, the Senate representing the provinces should have some say and that it cannot just be vetoed.

PRESENTATION BY THE NP

3.13. The NP noted that they also believe there should be a Senate, and that the provinces should have a say at national level over issues that affect them. They noted that they felt it was important that Parliament not be prescriptive to the provinces, which was a further reason for the need of a Senate, in which the provinces could be represented and make felt their influence on that level. they indicated that they too believed that there should be a closer link between parliament and the provinces, and in their submission they looked closely at the composition of the Senate.

- 3.14. They noted that there should be an equal number of Senators from each province, and that the present number of 10 Senators should be retained. They stated that they believed this number would ensure that Senate operates effectively, and it would ensure that smaller parties also obtain representatives in Senate.
- 3.15. They also indicated that they believed that the powers of the Senate should be extended. They stated that the Senate should have a say in all bills, including money bills. They also noted that the Senate should be able to make recommendations for certain top executive and judicial posts. They noted that in their submission they are quite clear that the Senate should also be involved in the nomination of the Public Protector, the Auditor General, in the impeachment of the President, in the establishment of the Pan South African Language Board. Furthermore, they noted, the Senate should be involved in the approving of constitutional bodies such as the Human Rights Commission, the Commission on Gender Equality, the Commission on Provincial Government, the Public Service Commission, and the Independent Electoral Commission, also in the appointment of ambassadors.
- 3.16. They noted they are not in favour of the right to recall in respect of Senators, because they feel that the Senators should have a much more independent role. They noted that they even went so far in their submission as to suggest that the convention should be developed that Senators do not vote on party lines, but in the interest of their provinces.

PRESENTATION BY FF

- 3.17. Groenewald PH noted that in the time he had spent in the Senate, he could not recall a single Senator standing up to fight specifically for the interests of the provinces during any of the budget votes. Therefore he concluded that the Senate does not fulfil the role for which it was designed.
- 3.18. The FF also noted that in a homogenous society, where there are very little differences, where there are no specific groups which could be the cause of friction or conflict, ethnic, cultural, even religious, there is no need whatsoever for a Senate, there may be no need for a Senate. They noted that in such a case the National Assembly can go ahead and do what it is designed to do.
- 3.19. They noted that in most other countries that have a Senate, the Senate was created to look after specific interests. They noted that the Senate was there in such case for the purpose of nation-building

and keeping the society together. They noted that therefore in some of our neighbouring countries like Lesotho, Swaziland or Botswana, where there are homogenous communities, there really is no particular need for a Senate. However, they stated that South Africa has enormous differences and that this should be recognised and provided for specifically by the constitution, i.e. specific groups, cultural and language groups, traditional leaders, and even some others. They noted that, however, somehow in our constitutional framework we do not provide for that.

3.20. They noted further that if one looked at the functions of government and applied that to what was under discussion, they could find no reason why the Senate should have any say in matters such as defence and foreign policy. They noted that there is no reason why they should do exactly what is done in the National Assembly. They noted that if one needs a Second House to somehow or other exercise control over the First House, then it would normally be a specific task such as the protection of the constitution. They noted that that would mean that the role of the Senate is applied particularly in the direction of institutions such as the Human Rights Commission, and noted that this role was not particularly necessary in South Africa.

3.21. They noted that therefore the role of the Senate depends to a large extent on what are the functions of the different institutions. They noted that addressing these matters in isolation is difficult, for example if the provinces had certain exclusive powers which the constitution provides for, then they have complete control, and then there is no necessity to have a Senate to protect those powers, because they have them provided in the constitution.

3.22. They noted that the role of the Senate in South Africa must be unique; it must reflect the true nature and spirit of South Africa, and what is best of all the peoples of South Africa. they noted further that it must be the institution which looks specifically at the points of friction in the South African society, and deals with those points of friction in such a way that the country does not split or fall apart. They noted that the Senate in South Africa should be unlike any other Senate anywhere else in the world. They stated that one of the lessons we should learn from other countries which had Houses of Traditional Leaders, or Royal Houses, is that in the democratisation process provision was made that they participate in that process. They noted, however, that we still do not know where traditional leaders should fit in in the decision making process, although the FF believes they have a role in the Senate. They emphasised that such groups represent specific cultural interests, and if there are other

groups which have this desire this is the place where they should be accommodated.

- 3.23. They suggested that it may be necessary to determine what are the specific powers and functions of the National Assembly, and then determine what are those of the Provinces. They believed that one would then find that provinces should exclusively look at socio-economic matters and cultural matters, although they indicated that cultural matter really resort under the third tier of government. They noted that the Senate should protect those interests that need specific protection, which include the traditional leaders, certain ethno cultural groups, and a yet to be defined role in representing the provinces.

QUESTIONS OF CLARIFICATION

- 3.24. In response to a questions eliciting further clarification, the FF stated that there are certain cultural groups defined by the constitution, which would like to be recognised as separate groups. They noted that these are first of all the Traditional Leaders, and secondly the Afrikaner people. The FF noted that their viewpoint was that provision should be made for their representation on the Senate where they could look after the interests of those particular groups. The FF stated that if the Senate is defined as protecting cultural interests, then one will find that most of the people in South Africa will find that their cultural interests are represented in the Senate. This does not mean that the Senate will look after national interests such as defence.
- 3.25. The FF also noted that they are in favour of retaining the number of Senators at approximately 90. They indicated how that number is comprised: 8 Senators from each province made up as the parties are represented at the present in the provincial legislatures; secondly 8 Senators nominated by the National Council of Traditional Leaders; 8 Senators elected by voters registered on the community voters' role registered as Afrikaner community voters; if then there are any other group which would also like representation, that should also take place on proportional basis. They noted that the number pertaining to Afrikaners is very close to the portion of the voters they represent.
- 3.26. The DP asked whether the FF means that any other group that so requests representation, will also get 8, or not. They asked whether the question of more cultural entities is an option. They asked further if anyone wanting to form an ordinary franchise through the provinces, are they confined to protection cultural matters, or would it in fact be additional representation on general matters.

Furthermore, they wanted to know how a minority of 8 would be able to protect cultural matters or is there going to be a separate vote on those cultural interest. They noted that although they understand the philosophy behind the FF's position, they would like to know how it could work.

- 3.27. The FF noted that they believed that additional representation should be on a proportional basis. The FF stated that the reason why you have representation at national level, is to provide co-ordination, whereas the fact is that most matters are dealt with at all level, even though cultural matters should be dealt with at local level.
- 3.28. The ANC stated that they have problems in respect of the FF's definition of the ethno-cultural groups; the white South Africans seem to be divided between an Afrikaans speaking one and others, which is wrong because there are Portuguese, English speaking, Argentinean, etc. They noted that even the whites are quite divided in respect of language and cultural matters. They noted furthermore that in respect of the African population, they are just represented in respect of their interest groups by the traditional leaders. They noted that once one start looking at the details one runs into problems.
- 3.29. The FF noted that they had not spoken of "white people", but only in respect of the only group which specifically asks separate representation and recognition of their culture as such, and provided for in Constitutional Principle xxiv. They noted that when they talk of the Afrikaners, they talk about a people who had had a long history in which they fought the first anti-colonial struggle in South Africa, and had international recognition in two separate republics until they were defeated in the Anglo-Boer War. They stated that therefore the Afrikaner had long tradition of self-determination, and their demands are recognised in the transitional constitution as well as the Constitutional Principles. They noted that they were looking for long-term solutions.
- 3.30. The ANC stated that the NP proposals seems to give more powers to the Senate, but retain the same number of Senators. They noted that it did not seem that they were able at that stage to fulfil its role, and it would be difficult to conceive it fulfilling its expanded role.
- 3.31. The ANC further stated that they have difficulty with the indirect elections to the Senate which the NP proposes with the rider that the smaller parties should find a bigger say in the representation. They stated that they understood this to mean an interference with the will of the people, after they had decided.

- 3.32. In response to the ANC, The NP noted that perhaps one could not merely say that the Senate is not fulfilling its function, as its functions are not clearly stated in the constitution, and Senators are representing in some regard, and increasingly so, their provinces. The NP also noted that members of the Provincial legislatures seem to indicate that they would not be able to play a dual role. In respect of the ANC's suggestion that the NP's proposal will tend to interfere with the will of the people, firstly the NP supports the fact that the PAC and the ACDP also be presented in the Senate, because the NP believed that political parties should represent minorities. Secondly, in the Northern Transvaal, where the ANC got about 92% of the vote, the NP believed that the present formula gives the majority parties an advantage in that all the Senators are ANC members, whereas the remaining 8% of the vote is not reflected in the composition.
- 3.33. The FF asked the ANC how does the ANC foresee that Senators are able to keep themselves up to date on provincial matters and at the same time occupy themselves with the full spectrum of work of the Senate.
- 3.34. The ANC responded to the question of the FF by stating that it would depend on what would be the primary function. They gave as an example the discussion of a bill on health, it would seem not inappropriate that those who come and sit in the Senate would include the MEC for health from the different provinces, including officials, and therefor there will not be merely National Assembly members sitting. They noted that therefore they will not merely be dealing with things of which they are unaware. They noted that there would be a measure of interchangeability regarding the Senators. They noted that they thought it would be more practical to involve the people from the provinces who would be implementing the legislation. They gave an example of the free health provisions, where a number of provinces were able to state that they do not have the capacity to implement those provisions. The ANC noted that in the final analysis, however one would constitute the Senate, the Senators would have a dual function, taking into account at the same time national and provincial interests. The ANC further noted that their proposals would allow the provinces to have a more direct impact even in respect of legislation concerning national interests.
- 3.35. The ANC, in response to a question from the FF on the ANC's perception of the role of Senate Select Committees, indicated that one would then indeed have to ensure that one does not overload members. In this regard, the ANC noted, the matter of interchangeability of members may be of assistance.

- 3.36. The DP suggested that the ANC's proposal had a great resemblance to the German system, although it also omitted some of the better elements of the German system. The DP asked the ANC whether it was still an open issue for the ANC whether the members could come from the legislature or the executive. The DP also wanted to know what is meant in the ANC proposals by allowing each province a "single delegation". The DP asked a further question of the ANC as to the meaning of provisions to be made for minority participation in the legislature; could appointment of an executive coming from a single party not completely undermine the concept of minority representation, because it is no longer proportional, but a single entity coming from the executive?
- 3.37. The ANC noted that whether they come from the legislature or executive is still very much an open matter. They stated that it is designed to deal with the situation where people coming from the provinces can present the provincial as opposed to the party political interests as a concept. The ANC noted that they probably would not be confined to the particular wording of their submission. They noted that the "single" merely intends to convey that the persons represent the particular interests of the province, rather than party; it is not designed to say more than that.
- 3.38. The DP noted that they have a problem in the case where they are represented by the executive of the province.
- 3.39. The ANC noted this and indicated that perhaps it may be possible to concede that they should then come from the legislature. They noted that this matter would be taken under consideration.
- 3.40. The NP raised the possibility that the fact that the Senate could block laws dealing with provincial matters, could be contrary to the Constitutional Principles which state that one may not minimise the authority of the provincial legislative bodies.
- 3.41. The ANC state that they do not understand the question, because their proposal is intended to increase the strength of the Senate.
- 3.42. The NP clarified their question: need provincial legislation be scrutinised by the Senate or not? They gave an example of the Gauteng Legislature passing a law; will the Senate have the power to veto that law?
- 3.43. The ANC noted that neither the Senate, nor the National Assembly, would be able to veto the legislation from any provincial Legislature.

**PRESENTATION OF THE TECHNICAL COMMITTEE'S SECOND DRAFT REPORT
ON THE SENATE BY PROF DAWID VAN WYK**

- 3.44. Prof Van Wyk read through the document and indicated that there are still a few outstanding public submissions which will be incorporated into the next draft. He indicated that the CPG in terms of s 164 of the Interim Constitution, is enjoined to advise the CA the development of a system of provincial government, including matters which in the opinion of the Commission affects the process. He noted that the Core Group agreed that their submissions be specifically included in the text, and that had been done. He noted that an additional submission was received from the DP Gauteng region which was included in the comment column. He noted that the division of items in this report had to be amended, as this was necessitated by the complexity of the supplementary submissions, but that the committee was free to amend it as they deem fit. He noted further that in tabular form is in essence a summary analysis of the party political submissions; this will be included in ordinary page by page form, together with inclusion of the other submissions, in conformity with the other block 2 reports.
- 3.45. Included in the minutes below are the **Second Draft** (tabled at the meeting for discussion), and thereafter the **Third Draft** of the TC2 Report on the Senate (compiled by the Technical Committee to reflect the debates of the meeting). The latter has also been updated by the Technical Committee to reflect further public submissions.

THEME COMMITTEE 2

DRAFT REPORT ON BLOCKS 2 AND 3

[*** for purposes of minutes: **SECOND DRAFT**]

THE SENATE (SECOND CHAMBER)

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	Terminology	Senate		

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p data-bbox="367 209 875 240">Nature and purpose of the Senate</p> <ol data-bbox="367 284 1160 1066" style="list-style-type: none"><li data-bbox="367 284 1160 619">1. The ANC proposes, within the context of "cooperative governance", and with a view to "good government", the senate as a perpetual body and a forum for provinces to bear co-responsibility for the management of the country as a whole. The Senate should be the main player in the relationship between the national and provincial levels. The Senate should be a working, as opposed to a reasoning and debating, body.<li data-bbox="367 624 1160 762">2. The DP proposes the Senate as second chamber of Parliament, with as primary but not exclusive functions review of legislation and representation of provincial interests.<li data-bbox="367 767 1160 906">3. The FF proposes that the Senate should reflect the diverse nature of the country and society, and that its primary function should be to look after provincial and cultural interests.<li data-bbox="367 911 1160 1066">4. The IFP proposes that the Senate should represent the provinces, and should monitor the Executive i r o certain activities which fall outside provincial competencies.			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>5. The NP proposes the Senate as the second chamber of Parliament with as main purpose representation of provinces, and control and revision and the promotion of good government as secondary purposes. The Constitution should contain an express reference to the main purpose of the Senate.</p> <p>6. The PAC is in favour of the abolition of the Senate.</p> <p>7. The CPG is in favour of a second chamber if it is designed to provide internal control over government and broaden representation of e g provinces or other significant interest in society.</p> <p>1. The ANC submission raises the question whether, in view of the "completely new character" of the Senate, the term "Parliament" should be confined to the NA; and whether the Executive should be accountable to the NA only (see also "Relationship towards the Executive").</p> <p>2. A submission was also received from the DP (Gauteng region) in which it is proposed that the Senate should be more powerful, not merely representing provincial interests, but also interacting with the provinces on a meaningful basis.</p>			
	<p><i>Individual submission:</i> <i>O Bothma: Provinces to send delegates to second chamber to advise State President</i></p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Composition and size: 5, 7, 8 and 10 per province</p> <ol style="list-style-type: none"> 1. The ANC proposes a senate of 5 or 10 members per province, drawn from provincial legislatures and/or executives, and possibly local government, as a single delegation. 2. The DP is in favour of 7 members from each province. 3. According to the FF, the size of the Senate would depend on its functions: it specifically proposes 8 Senators per province nominated by parties in the provincial legislature; 8 nominated by the "National Council of Traditional Authorities"; 8 elected by voters on the "community voters roll" (at least the Afrikaner one); an undefined number for other "cultural self-determination" entities. (In an earlier proposal, reference was also made to representation for "corporate entities", such as organised labour, organised business and organised culture.) 4. The IFP proposes equal representation of provinces (number unnamed). 5. The NP proposes 10 Senators per province. 6. The CPG is satisfied with equal representation of provinces, and would appear to favour the current 10 per province; it does not express an opinion on the representation of other interest groups, but draws the attention of the CA to this matter. 			<p>1. The DP (Gauteng region) proposes equal representation for each province.</p> <p><i>For individual submissions on the size of Parliament, see report on the NA</i></p>

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Appointment/election:</p> <p>1. The ANC proposes that senators be appointed from the members of the Provincial Legislature and/or Executive. 2. The DP proposes indirect election by the provincial legislatures on a proportional basis for 4 years.</p> <p>3. The FF suggests that 8 senators per province be nominated by the parties represented in the Provincial Legislature.</p> <p>4. The IFP supports election by the provincial legislatures for 5 years, in consultation with provincial cabinet.</p> <p>5. The NP is in favour of indirect election by the provincial legislatures on proportional basis, with a change in the present formula in favour of smaller parties.</p> <p>6. The CPG proposes that senators be elected members of the provincial legislatures, nominated by the legislatures on a proportional basis.</p>			<p>1. The DP (Gauteng region) proposes direct election on a list system.</p>
	<p>Recall</p> <p>The ANC is in favour of the principle of recall of Senators by the provincial legislatures and/or executives.</p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Powers and functions:</p> <p>1.1 The ANC proposes a fourfold function for the Senate:</p> <ul style="list-style-type: none"> a. To have a close and ongoing relationship with the provinces b. To have real say over NA bills relating to provinces, and articulate provincial interests at national level c. Initiate legislation relating to provincial interests, and be co-responsible for the country as a whole d. Less influence over national legislation dealing with exclusive national competencies. <p>1.2 The ANC specifically proposes the following i r o legislative competence:</p> <ul style="list-style-type: none"> a. disputes between the national and provincial levels on concurrent legislative powers: <ul style="list-style-type: none"> i. if approved by the Senate, such a bill will be deemed necessary for and desirable for the purposes of the "national interest, norms and standards" ii. if a dispute cannot be resolved by judicial interpretation of the Constitution, precedence will be given to national legislation; b. specific role for Senate in the approval of framework legislation i r o exclusive executive functions for provinces c. Senate's consent to be obtained i r o allocation of resources to provinces. 			<p>1. The ANC would like to see the judicial determination of the pre-eminence of national legislation replaced by the provinces themselves through the Senate determining the desirability of the national legislation.</p>

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>1.3 The ANC further proposes that the Senate should have a say over the content of national subordinate legislation affecting the provinces.</p> <p>1.4 The Senate should also be the channel through which the provinces participate in fiscal matters, in particular the budget.</p> <p>1.5 The Senate would have no legislative power to block financial legislation.</p> <p>1.6 The Senate would have the power to block or delay bills dealing with provincial matters, and to review other legislation.</p> <p>2. The DP is in favour of equal powers with the NA, except i r o money bills (excluding money bills allocating funds to provinces) and legislation affecting powers, functions and boundaries of provinces.</p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>3. The FF proposes that the Senate be empowered to interact with provinces and/or corporate groups, and review, revise and veto legislation relating to the provinces; also to initiate judicial review of legislation; to seek consensus and dialogue; to protect the Constitution; to protect minorities and minority rights.</p> <p>4. The IFP maintains that the Senate must have concurrent legislative power with the National Assembly.</p> <p>5. The NP would see the Senate:</p> <ul style="list-style-type: none">a. consider all billsb. in the case of ordinary bills that after disagreement with the NA have been considered by a joint committee, consider the bill separately againc. retain its powers i t o sec 61 i r o provincial boundariesd. have the same powers i r o money bills as in the case of ordinary billse. retain its current powers i t o bills relating to provincial finance and constitutional amendmentsf. be the chamber where bills affecting the provinces should be introduced (also for the provinces) on bills referred to in e.			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>g. having an extended role in certain appointments h. be represented in the CPG and Financial and Fiscal Commission i. be a watchdog over constitutionality of bills.</p> <p>6. The CPG -</p> <p>a. supports the present sec 59(1) on separate adoption of bills b. in the case of disagreement between the NA and the Senate, proposes that if the joint committee's proposals are rejected, the bill be introduced in both houses after six months, and only then, failing agreement, be submitted to the houses sitting together c. is in favour of the current arrangement on money bills, but proposes that administrative processes be strengthened to provide for dispute resolution before the introduction of bills d. proposes that bills i r o the functional areas of provinces be introduced in the Senate first, and only be passed with the concurrence of the majority of a province's senators if the matter relates to a specific province e. supports the current provisions on constitutional amendment f. proposes the incorporation of CP XVI, XX, XXI, XXII, XXIII AND XXVI into the final Constitution.</p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Relationship towards the executive</p> <ol style="list-style-type: none">1. ANC: Proposes that the Executive should not be accountable to the Senate.2. Other parties propose accountability to Parliament (see "Relationship towards the Executive" in report on NA).			
	<p>Relationship towards provinces (see also "Nature and purpose of the Senate" and "Powers and functions" above)</p> <ol style="list-style-type: none">1. The ANC proposes a close and ongoing relationship between the Senate and the provinces by virtue of the composition of the Senate.2. The DP proposes Standing Consultative Committees with the provinces.3. The FF proposes a constitutional mandate for the Senate to interact with the provinces4. The IFP would give the provincial premiers and/or their ministers the of designees the "privilege of the floor" in the Senate.			<p>The DP (Gauteng region) is in favour a constitutional requirement of meaningful interaction; constitutionally provided committees of the Senate to .</p>
	<p>Party discipline</p> <ol style="list-style-type: none">1. The ANC proposes that in order to avoid voting along party lines, the Executive should not be accountable to the Senate.2. The NP proposes that a convention be developed that senators are not required to vote along line on matters directly affecting the provinces.			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 49	<p>President and Deputy President:</p> <ol style="list-style-type: none">1. The FF proposes retention of the current provision.2. The CPG is also in favour of a provision resembling sec 49. <p>This issue has not been discussed by other parties, and one can only assume that there is no contention.</p>			
Section 50	<p>Qualifications for membership:</p> <ol style="list-style-type: none">1. ANC: A senator has to be a member of a provincial legislature/executive2. DP3. FF: Current provision4. NP: same as for NA, with requirement of ordinary residence in the province.5. CPG: Unless its proposal of Senators being members of provincial legislatures is accepted, it is in favour of the current provision, coupled with the requirement of ordinary residence.			<ol style="list-style-type: none">1. The DP (Gauteng region) proposes a residential requirement in addition to any other qualifications.

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 51	<p>Vacation of seat and filling of vacancy:</p> <ol style="list-style-type: none"> 1. ANC: In support of recall and replacement by provincial legislatures/excutives. 2. FF: Current provision. 3. NP: Current provision, in terms of stated position. 4. CPG: a. Would retain sec 51(1) (resignation etc) b. In favour of free mandate (i e change of party does not terminate membership of Senate) c. Following a dissolution of a provincial legislature, the Senators concerned should resign and be replaced i t o CPG proposals for nomination of senators d. Vacancy to be filled for remainder of term. 			
Section 53	<p>Sittings of Senate:</p> <ol style="list-style-type: none"> 1. The ANC's proposal of the Senate as a perpetual body, may affect the question of sessions/sittings. 2. FF: Current provision. 3. NP: current provision, i t o stated position. 4. CPG: Current provision. <p>The matter would appear not to be contentious.</p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 54	<p>Quorum:</p> <ol style="list-style-type: none">1. FF: Current provision2. NP: Current provisions i t o stated position.3. CPG: Current provision. <p>This matter might be contentious depending on which powers are given to the Senate. If the IFP model is followed of concurrent legislative power then the same quorum as that of the National Assembly might be required.</p>			
Section 55	<p>Powers, privileges, immunities and benefits:</p> <ol style="list-style-type: none">1. CPG: Current provision <p>The parties did not address this and we assumed that there is satisfaction with what is contained in Section 55 of the Interim Constitution</p>			
Section 56	<p>Sitting when disqualified:</p> <ol style="list-style-type: none">1. CPG: Current provision. <p>This matter was not addressed by the political parties.</p>			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 57	Joint sittings: 1. CPG: Current provision. This matter was not addressed by political parties (but see report on NA).			
Section 58	Rules and orders: 1. CPG: Current provision. We assume that the parties are satisfied with what is contained in Article 58 of the IC.			
	Oath or affirmation 1. FF: Current provision			

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Other issues not addressed by parties, but dealt with under National Assembly (see report on NA):</p> <ol style="list-style-type: none">1. Summoning of Senate2. Sessions3. Term and dissolution (see also "Sittings of Senate")4. Continuation of membership after dissolution of Senate5. Rights of non-members entitled to be in Senate (see also "Relationship towards provinces")6. Voting right of presiding officer7. Committees (see also "Relationship towards provinces")8. Majorities for decisions (but see "Powers and functions")9. Assent to bills10. Public access to the Senate11. Role of minority parties (see also "Composition", "Appointment/election", "Powers and functions").			

THEME COMMITTEE 2

DRAFT REPORT ON BLOCK 2

[*** for purposes of
minutes: THIRD
DRAFT]

THE SENATE

INTRODUCTION

This draft report deals with the Senate.

The draft report consists of two parts. The first is a numbered, tabular summary of the conclusions reached by the Theme Committee on each of the matters listed. In other words, it reflects the most recent state of the discussion in the Theme Committee.

The second part, also in summarised form and in the same sequence as in the table, contains the gist of the written submissions received by the Committee. The two parts of the draft should be read together.

It should be noted that a position adopted by a political party in a written submission, as reflected in the second part of the draft, may differ from that ascribed to the party in the table. During the discussion of the relevant issues and the various submissions in the Theme Committee, political parties had reserved the right to reconsider their position in order to ascertain areas of agreement and contention.

Proposals made by the Commission on Provincial Government, are referred to separately in the draft.

In the "Comment" column of the table, reference is made to the gist of the submissions of individuals and other organisations, where such submissions had been received. These references are made in italics.

THE SENATE (SECOND CHAMBER)

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	Terminology * 1	Senate		
	Nature and purpose of the Senate * 2	<p>1. There should be a second chamber of the Legislature, the Senate [except the PAC].</p> <p>2. The primary function of the second chamber is to represent the provinces and provincial interests.</p>	The definition and representation of interest groups in the Senate.	<p>1. PAC: the need for a second chamber has to go beyond the representation of provinces if the position and powers of the latter are clearly stated in the Constitution.</p> <p>2. The FF would see the Senate represent cultural and other interest groups; to be a nation-building and reconciliation institution, and to reduce conflict potential.</p>

34

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
		<p>3. Parliamentary laws affecting provincial interests can only be passed with the concurrence of the Senate.</p> <p>4. In respect of other parliamentary legislation, the Senate will have a power of review.</p>		<p>3. The ANC submission raises the question whether, in view of the "completely new character" of the Senate, the term "Parliament" should be confined to the NA; and whether the Executive should be accountable to the NA only (see also "Relationship towards the Executive").</p> <p>4. The CPG is in favour of a second chamber if it is designed to provide internal control over government and broaden representation of e g provinces or other significant interests in society.</p> <p>5. A submission was also received from the DP (Gauteng region) in which it is proposed that the Senate should be more powerful, not merely representing provincial interests, but also interacting with the provinces on a meaningful basis.</p>
				<p><i>Individual submission:</i> <i>O Bothma: Provinces to send delegates to second chamber to advise State President</i></p>

36

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Composition and size: * 3 5, 7, 8 and 10 per province</p>	<p>Equal number of senators per province.</p>	<p>Number of senators per province</p>	<p>1. The CPG expressed itself satisfied with equal representation of provinces, and would appear to favour the current 10 per province; it did not voice an opinion on the representation of other interest groups, but draws the attention of the CA to this matter.</p> <p>2. The DP (Gauteng region) also proposed equal representation for each province.</p> <p><i>For individual submissions on the size of Parliament, see report on the NA under the heading "Size of the NA".</i></p>
	<p>Appointment/ election * 4</p>	<p>Senators to be elected/appointed by Provincial Legislature</p>	<p>1. Whether or not Senators to be elected/appointed from Provincial Legislatures.</p> <p>2. Whether, in the appointment/election of Senators, the principle of proportionality should apply.</p>	<p>1. The CPG proposed that senators be elected members of the provincial legislatures, nominated by the legislatures on a proportional basis.</p> <p>2. The DP (Gauteng region) proposed direct election on a list system.</p>

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	Recall * 5 ; "			<p>To be revisited:</p> <ol style="list-style-type: none"> 1. The ANC expressed itself in favour of the principle of recall of Senators by the provincial legislatures and/or executives. The FF and the DP, during the first discussion, also indicated that they were not in principle against the notion of recall. 2. Question of rotation of Senators.

37

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p data-bbox="360 296 815 336">Powers and functions: * 6</p> <p data-bbox="360 580 992 651">1.1 The ANC proposes a fourfold function for the Senate:</p> <ul style="list-style-type: none"> <li data-bbox="360 676 1010 746">a. To have a close and ongoing relationship with the provinces <li data-bbox="360 767 1010 869">b. To have real say over NA bills relating to provinces, and articulate provincial interests at national level <li data-bbox="360 895 976 997">c. Initiate legislation relating to provincial interests, and be co-responsible for the country as a whole <li data-bbox="360 1023 976 1125">d. Less influence over national legislation dealing with exclusive national competencies. <p data-bbox="360 1158 936 1228">1.2 The ANC specifically proposes the following i r o legislative competence:</p>			<p data-bbox="1563 296 2069 550">1. The ANC would like to see the judicial determination of the pre-eminence of national legislation replaced by the provinces themselves through the Senate determining the desirability of the national legislation.</p>

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>a. disputes between the national and provincial levels on concurrent legislative powers:</p> <p>i. if approved by the Senate, such a bill will be deemed necessary for and desirable for the purposes of the "national interest, norms and standards"</p> <p>ii. if a dispute cannot be resolved by judicial interpretation of the Constitution, precedence will be given to national legislation;</p> <p>b. specific role for Senate in the approval of framework legislation i r o exclusive executive functions for provinces</p> <p>c. Senate's consent to be obtained i r o allocation of resources to provinces.</p>			

07

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>1.3 The ANC further proposes that the Senate should have a say over the content of national subordinate legislation affecting the provinces.</p> <p>1.4 The Senate should also be the channel through which the provinces participate in fiscal matters, in particular the budget.</p> <p>1.5 The Senate would have no legislat- power to block financial legislation.</p> <p>1.6 The Senate would have the power to block or delay bills dealing with provincial matters, and to review other legislation.</p> <p>2. The DP is in favour of equal powers with the NA, except i r o money bills (excluding money bills allocating funds to provinces) and legislation affecting powers, functions and boundaries of provinces.</p> <p>3. The FF proposes that the Senate be empowered to interact with provinces and/or corporate groups, and review, revise and veto legislation relating to the provinces; also to initiate judicial review of legislation; to seek consensus and dialogue; to protect the Constitution; to protect minorities and minority rights.</p>			

17

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>4. The IFP maintains that the Senate must have concurrent legislative power with the National Assembly.</p> <p>5. The NP would see the Senate:</p> <ul style="list-style-type: none">a. consider all billsb. in the case of ordinary bills that after disagreement with the NA have been considered by a joint committee, consider the bill separately againc. retain its powers i t o sec 61 i r o provincial boundariesd. have the same powers i r o money bills as in the case of ordinary billse. retain its current powers i t o bills relating to provincial finance and constitutional amendmentsf. be the chamber where bills affecting the provinces should be introduced (also for the provinces) on bills referred to in e.g. having an extended role in certain appointmentsh. be represented in the CPG and Financial and Fiscal Commissioni. be a watchdog over constitutionality of bills.			

42

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>6. The CPG -</p> <p>a. supports the present sec 59(1) on separate adoption of bills</p> <p>b. in the case of disagreement between the NA and the Senate, proposes that if the joint committee's proposals are rejected, the bill be introduced in both houses after six months, and only then, failing agreement, be submitted to the houses sitting together</p> <p>c. is in favour of the current arrangement on money bills, but proposes that administrative processes be strengthened to provide for dispute resolution before the introduction of bills</p> <p>d. proposes that bills i r o the functional areas of provinces be introduced in the Senate first, and only be passed with the concurrence of the majority of a province's senators if the matter relates to a specific province</p> <p>e. supports the current provisions on constitutional amendment</p> <p>f. proposes the incorporation of CP XVI, XX, XXI, XXII, XXIII AND XXVI into the final Constitution.</p>			

43

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Relationship towards the executive</p> <p>1. ANC: Proposes that the Executive should not be accountable to the Senate. 2. Other parties propose accountability to Parliament (see "Relationship towards the Executive" in report on NA).</p>			
	<p>Relationship towards provinces</p> <p>(see also "Nature and purpose of the Senate" and "Powers and functions" above)</p> <p>1. The ANC proposes a close and ongoing relationship between the Senate and the provinces by virtue of the composition of the Senate. 2. The DP proposes Standing Consultative Committees with the provinces. 3. The FF proposes a constitutional mandate for the Senate to interact with the provinces 4. The IFP would give the provincial premiers and/or their ministers the of designees the "privilege of the floor" in the Senate.</p>			<p>The DP (Gauteng region) is in favour a constitutional requirement of meaningful interaction; constitutionally provided committees of the Senate to .</p>

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<p>Party discipline</p> <p>1. The ANC proposes that in order to avoid voting along party lines, the Executive should not be accountable to the Senate.</p> <p>2. The NP proposes that a convention be developed that senators are not required to vote along line on matters directly affecting the provinces.</p>			
<p>Section 49</p>	<p>President and Deputy President:</p> <p>1. The FF proposes retention of the current provision.</p> <p>2. The CPG is also in favour of a provision resembling sec 49.</p> <p>This issue has not been discussed by other parties, and one can only assume that there is no contention.</p>			

カカ

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 50	<p>Qualifications for membership:</p> <ol style="list-style-type: none"> 1. ANC: A senator has to be a member of a provincial legislature/executive 2. DP 3. FF: Current provision 4. NP: same as for NA, with requirement of ordinary residence in the province. 5. CPG: Unless its proposal of Senators being members of provincial legislatures is accepted, it is in favour of the current provision, coupled with the requirement of ordinary residence. 			<ol style="list-style-type: none"> 1. The DP (Gauteng region) proposes a residential requirement in addition to any other qualificatibns.

45

1

46

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 51	<p>Vacation of seat and filling of vacancy:</p> <ol style="list-style-type: none">1. ANC: In support of recall and replacement by provincial legislatures/executives.2. FF: Current provision.3. NP: Current provision, in terms of stated position.4. CPG: a. Would retain sec 51(1) (resignation etc) b. In favour of free mandate (i e change of party does not terminate membership of Senate) c. Following a dissolution of a provincial legislature, the Senators concerned should resign and be replaced i t o CPG proposals for nomination of senators d. Vacancy to be filled for remainder of term.			

77

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
<p>Section 53</p>	<p>Sittings of Senate:</p> <ol style="list-style-type: none"> 1. The ANC's proposal of the Senate as a perpetual body, may affect the question of sessions/sittings. 2. FF: Current provision. 3. NP: current provision, i t o stated position. 4. CPG: Current provision. <p>The matter would appear not to be contentious.</p>			
<p>Section 54</p>	<p>Quorum:</p> <ol style="list-style-type: none"> 1. FF: Current provision 2. NP: Current provisions i t o stated position. 3. CPG: Current provision. <p>This matter might be contentious depending on which powers are given to the Senate. If the IFP model is followed of concurrent legislative power then the same quorum as that of the National Assembly might be required.</p>			

48

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 55	Powers, privileges, immunities and benefits: 1. CPG: Current provision The parties did not address this and we assumed that there is satisfaction with what is contained in Section 55 of the Interim Constitution			
Section 56	Sitting when disqualified: 1. CPG: Current provision. This matter was not addressed by the political parties.			
Section 57	Joint sittings: 1. CPG: Current provision. This matter was not addressed by political parties (but see report on NA).			

67

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
Section 58	<p>Rules and orders:</p> <p>1. CPG: Current provision.</p> <p>We assume that the parties are satisfied with what is contained in Article 58 of the IC.</p> <p>Oath or affirmation</p> <p>1. FF: Current provision</p> <p>Other issues not addressed by parties, but dealt with under National Assembly (see report on NA):</p>			

50

CP/SEC	CONSTITUTIONAL ISSUE	AGREEMENT	CONTENTION	COMMENT
	<ol style="list-style-type: none">1. Summoning of Senate2. Sessions3. Term and dissolution (see also "Sittings of Senate")4. Continuation of membership after dissolution of Senate5. Rights of non-members entitled to be in Senate (see also "Relationship towards provinces")6. Voting right of presiding officer7. Committees (see also "Relationship towards provinces")8. Majorities for decisions (but see "Powers and functions")9. Assent to bills10. Public access to the Senate11. Role of minority parties (see also "Composition", "Appointment/election", "Powers and functions").			

REPORT ON SUBMISSIONS: THE SENATE

1 Introduction

This part of the report should be read with the tabular summary above and the sections on the National Assembly, the Presidency and the Cabinet. It deals with the Senate under the following headings, which were identified on the basis of relevant Constitutional Principles, submissions received, and after discussion by the Theme Committee:

.....

1.1 Terminology

All parties, the CPG and individual submissions that expressed themselves on a second chamber, agreed that it should be called the Senate.

1.2 Nature and purpose of the Senate

1. The ANC proposes, within the context of "cooperative governance", and with a view to "good government", the senate as a perpetual body and a forum for provinces to bear co-responsibility for the management of the country as a whole. The Senate should be the main player in the relationship between the national and provincial levels. The Senate should be a working, as opposed to a reasoning and debating, body.

2. The DP proposes the Senate as second chamber of Parliament, with as primary but not exclusive functions review of legislation and representation of provincial interests.

3. The FF proposes that the Senate should reflect the diverse nature of the country and society, and that its primary function should be to look after provincial and cultural interests.

4. The IFP proposes that the Senate should represent the provinces, and should monitor the Executive *in* o certain activities which fall outside provincial competencies.

5. The NP proposes the Senate as the second chamber of Parliament with as main purpose representation of provinces, and control and revision and the promotion of good government as secondary purposes. The Constitution should contain an express reference to the main purpose of the Senate.

6. The PAC regards the Senate as redundant if its primary function is to look after provincial interests in a system in which the position and powers of the provinces are clearly circumscribed in the Constitution.

7. The CPG is in favour of a second chamber if it is designed to provide internal control over government and broaden representation of e g provinces or other significant interests in society.

3 Composition and size

1. The ANC proposes a senate of 5 or 10 members per province, drawn from provincial legislatures and/or executives, and possibly local government, as a single delegation.
2. The DP is in favour of 7 members from each province.
3. According to the FF, the size of the Senate would depend on its functions: it specifically proposes 8 Senators per province nominated by parties in the provincial legislature; 8 nominated by the "National Council of Traditional Authorities"; 8 elected by voters on the "community voters roll" (at least the Afrikaner one); an undefined number for other "cultural self-determination" entities. (In an earlier proposal, reference was also made to representation for "corporate entities", such as organised labour, organised business and organised culture.)
4. The IFP proposes equal representation of provinces (number unnamed).
5. The NP proposes 10 Senators per province.
6. The CPG is satisfied with equal representation of provinces, and would appear to favour the current 10 per province; it does not express an opinion on the representation of other interest groups, but draws the attention of the CA to this matter.

Appointment/election

1. The ANC proposes that senators be appointed from the members of the Provincial Legislature and/or Executive.
2. The DP proposes indirect election by the provincial legislatures on a proportional basis for 4 years.
3. The FF suggests that 8 senators per province be nominated by the parties represented in the Provincial Legislature.
4. The IFP supports election by the provincial legislatures for 5 years, in consultation with provincial cabinet.
5. The NP is in favour of indirect election by the provincial legislatures on proportional basis, with a change in the present formula in favour of smaller parties.
6. The CPG proposed that senators be elected members of the provincial legislatures, nominated by the legislatures on a proportional basis.
7. The DP (Gauteng region) proposed direct election on a list system.

Recall

The ANC expressed itself in favour of the principle of recall of Senators by the provincial legislatures and/or executives.

FOOTNOTES TO THIRD DRAFT

(Reflecting discussions additional to the conclusions reflected in the above numbered tabular summary)

2. NATURE AND PURPOSE OF THE SENATE

- 2.1. The PAC stated that if the powers of the provinces are going to be clearly defined, they do not see a need for a Senate because there are other mechanisms for the fulfilment of that task. They indicated that they would be prepared to look at the possibility of a Senate if there is a new role for the Senate beyond attending to the interests of provinces.
- 2.1. The ANC stated that they are not proposing a Second Chamber at national level; it should be more of a working structure, rather than a reasoning and debating structure, especially if Senators are drawn from the provinces. They stated that the difficulty is that the matter depends on how you want to define a "Second Chamber". They stated that, in any event, there will still be 2 Houses or separate institutions; however, what was important to them is that the composition of the Senate be made up in a different manner from the present Senate, and that the Senate will deal with matters in a different manner from the present Senate.
- 2.2. The ANC stated further that in terms of the ANC position the Senate is a perpetual body. They stated that therefore they do not think there is any disagreement (except for the PAC) for the need of this other institution to deal with the kinds of political issues under discussion.
- 2.3. The DP stated that there was a need to develop the discussion regarding possible agreement further, and that they wanted to know what was the ANC's conception of a "perpetual body".
- 2.4. The DP stated further that management is really an executive function, not a legislative function. They stated that if there was such a proposed quasi-legislative body, there was a need for another body attending to the relationship between national and provincial executives. They stated that the DP supports the idea that a Senate is essentially a body for interaction between legislative structures.
- 2.5. The ANC responded by saying that "perpetual body" means that once elected, it is intact for that period; it will then decide how to meet. They stated that the DP is correct in saying that although the ANC stated that it is a working body, this essentially applies to legislative purposes, and there would be a need for other fora for inter-governmental relations.
- 2.6. The NP stated that if another body is required for inter-governmental relations, it will mean that a duplication occurs. They stated that they were concerned as to how that body will be able to run the ordinary day to day business of the Senate. They stated that legislation is a process in steps and does not mean that a body can merely come for a meeting and resolve to pass legislation. They stated that they want to know whether the ANC

has looked into the consequences of the proposal, and whether the ANC had consulted for the purposes of their proposal.

- 2.7. The ANC first responded to the latter question by stating that the proposal had been worked out at their national conference, which was attended by many Premiers, members of provincial executives and legislatures, as well as Senators.
- 2.8. The ANC reiterated that what they are really talking about are legislative functions, because it would be wrong to intervene in executive functions. They stated that they need not be wedded to the strict interpretations of their written submission. They stated further that they envisaged a turnover of persons representing the provincial legislatures, for example a specific member of the executive may be required to attend in regard to a specific issue, representing the legislature as opposed to the legislature.
- 2.9. The ANC stated that the principle of it was to find a way to involve in a more meaningful way representatives from the provinces in the drafting of legislation, even if the legislation is national legislation. They noted that it may be an intractable problem, the dual functions of public representatives, as well as work overloading of public representatives. They noted that having accepted that state of affairs, the details could then be worked out so that people will be able to effectively perform their functions. They stated that in their general formulations they do not believe that they will be imposing a work-load on public representatives to the extent that they will be unable to perform their functions.
- 2.10. The NP stated that they have a grave problem with a lack of continuity, with people coming and going, and that they therefore see that as a very contentious issue. They noted that whilst the Senate is now in the process of developing its functions more effectively, it is a pity that a constitution is being drafted based on present impressions of the Senate.
- 2.11. The ANC agreed that one year may not be perfect for the drawing of conclusions, but in the circumstances that is what they have tried to do.
- 2.12. The ANC stated further that however the details are worked out, there seems to be general agreement that one of the primary tasks of the Senate is to represent the interests of provinces. They stated that there is contention precisely on the composition of the Senate, and that the ANC the ANC has still left this matter slightly open, in respect of either drawing Senators from the executive or the legislature; whereas the view of the NP seemed to be that minority parties should also find representation.
- 2.13. The ANC stated that they would always be willing to enter into bilateral discussions, but that TC2 needs to reach agreement in respect of the report to the CC, whilst realising that it was obviously impossible to reach agreement on all the finer details at that stage.
- 2.14. A member of the committee stated that the committee is dealing with a

philosophical concept, and that it was necessary to establish what underlies the vision of the ANC. The member asked whether, if one took it one step further, it was the intention of the ANC to achieve greater harmonisation of laws passed by the provinces, as well as greater co-ordination between the provinces, by this conception of the Senate. He questioned whether the ANC therefore meant the Senate to play a key co-ordinating role.

- 2.15. The ANC responded by saying that the ANC was trying to achieve that in general, looking at the interests of the country as a whole.
- 2.16. The DP stated that that was not what the member had meant, and that the member was talking about co-ordinating the legislature as between the provinces. They noted that the provinces could have their own inter-provincial co-ordinating committee, and the Senate can look at what national legislation infringes upon the interests of the provinces, but it is certainly not the role and function of the Senate to co-ordinate the internal legislation of the provinces. They stated that the latter they can do unilaterally, and that therefore the Senate should not co-ordinate the legislation within the provinces. They stated that that was what they understood the member to have been saying.
- 2.17. The member responded by stating that there was a need for harmonisation. The members stated in the US experience this was reflected in the experience where different trade laws applied in different states. The member stated that in the beginning of a new era in our history, and if each province is intent on going their own way, we are going to end up with difficulties that other mature democracies have experienced. He stated that this was a matter the committee needed to look at if it was not part of the philosophy of the ANC proposal.
- 2.18. The DP agreed that it was necessary to address that matter, but not that that was a function of the Senate. The DP stated that the DP's submission makes provision for provinces to create inter-governmental structures, so that they can have both lateral discussions amongst themselves, and between themselves and the central government. The DP stated that therefore the DP suggests that the Senate's function is to look after how the national legislature affects the provinces. They asked whether the NP was suggesting a whole new function for the Senate, namely the co-ordination of the provinces.
- 2.19. The member noted that he was not suggesting a party position, but was merely trying to establish what the ANC was saying.
- 2.20. The DP suggested items 2 and 3 in the "agreement" column, and the FF suggested the item under "comment". The meeting agreed to this.
- 2.21. The ANC noted that the FF's proposal to ensure unity rested on a definition of interest groups as ethno-cultural, and suggested that this be reflected in the "comment" column. They requested the FF to explain why the definition was so narrow, stating that there are strong economic and religious interest

groups, and that whites interests can also not be construed that narrowly. They requested that this matter be revisited.

3. COMPOSITION AND SIZE

- 3.1. The Technical Committee indicated that there appears to be two separate issues, namely size, and whether there should be equal numbers of representatives by the different provinces.

4. APPOINTMENT/ELECTION OF SENATORS

- 4.1. A member questioned the FF as to whether there was agreement that Senators be appointed/elected from provincial legislatures, as the FF suggested nomination by parties. The meeting noted that the agreement related specifically to election/appointment from the provincial legislatures.
- 4.2. The meeting entertained some discussion regarding the "surplus" in applying the system of proportional proportionality, and whether smaller parties are/are not and should/should not be benefited thereby. This arose from a statement by the NP that in the Northern Transvaal the NP had been prejudiced by the operation of the present system.
- 4.3. The ANC stated emphatically that they would not be happy with formulations in the report that would indicated that there is agreement that the way Senators are elected by the provincial legislatures is on the basis of proportional representation.
- 4.4. The DP stated that they wish to narrow the disagreement on that matter, and they do not understand whether the ANC is opposed to the concept of proportional representation, or whether there is not yet clarity in respect of the exact system of proportional representation. They stated that they understood proportional representation in general to be enshrined in the Constitutional Principles.
- 4.5. The ANC reiterated that it was not in agreement with the suggested formulations, and that they do not believe it was necessary to try to find the exact formulation at that point, until the committee had decided exactly what it meant. They noted that the ANC had to clarify certain of these matters first for itself, and that they would not have a problem if it were noted that the other parties, other than the ANC, were agreed to a formulation in this regard.
- 4.3. The DP indicated that proportional representation is the best protection for minority parties, and cited the examples of the DP's situation in two of the provinces.
- 4.4. The meeting agreed that further discussions are required in respect of the matter related above, in order that the CC does not have to be informed that no further agreement can be reached in this regard.