

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

POLITICAL PARTIES SUBMISSIONS

BLOCK 2/3
(COMPOSITE EDITION)

ADDENDUM "B"

TABLE OF CONTENTS

NO	DOCUMENT	PAGE
1.	ANC's further submission on Block 2/3 : SENATE	1 - 7
2.	NP's further submission on Block 2/3 : SENATE	8 - 17



AFRICAN NATIONAL CONGRESS

OFFICE OF THE SECRETARY GENERAL

SECRETARIAT, CONSTITUTIONAL COMMISSION
PARLIAMENTARY OFFICE, V 251, PO BOX 15, CAPE TOWN
TEL (021) 403-2839 FAX (021) 461-9461

THE SENATE

CONSTITUTIONAL ASSEMBLY
SUBMISSION TO THEME COMMITTEE 2
PHASE 2 & 3

DISCUSSION

1. Introduction

The exact role and need for a Senate needs reconsideration. It does not currently have a sufficiently identifiable purpose or powers to warrant its special status. In its current form it is a mirror image of the Assembly. It does not appear to be regarded by the provinces as their "house". Without a specific regional function the Senate constitutes an institution with little to offer. However it could play an important role within a revised understanding of our provincial framework, one which would contribute to a more co-operative framework of provincial and national governance.

The Senate should, it is proposed, be a functioning component of the national legislature. However, the institution of the Senate, its powers, functions and composition, should be considered in convergence with the system of provincial government, as it constitutes an integral part of the general approach towards empowering the provinces and in expressing the relationship between national and provincial governance.

The challenge that the Constitutional Assembly faces, is to create a final constitution which will serve as a solid foundation for good government. In doing so the CA must confront the constitutional legacy of the last century of white rule, absorb the experience of the last 12 months of governance under the Interim Constitution, and, most importantly, must attempt to foresee the problems and challenges South Africa will face in 10, 20 or even a hundred years from now. Constitutions are as much about issues of tomorrow as they are about the conflicts of today.

The aspect of the new constitution to which the ANC has given the most careful and considered attention is that which deals with provincial governance. This party has undertaken considerable internal consultation, and has conducted wide-ranging comparative investigations concerning its proposals on this issue. The ANC has not drafted proposals to meet some abstract centralist or federalist agenda, but has sought to draft proposals which meet the requirements of "good governance".

2. A New Vision

The ANC, having considered a simple unitary state in which there are no regional governments, and in which services are delivered by an executive appointed and accountable only to the center, rejects this model. On the other hand, the ANC has considered some confederal models similar to those proposed by some parties and in which the country would be a loose federation of autonomous states. The ANC believes that this model offers the prospect of physical disintegration, racial and ethnic violence on par with that currently experienced by the former Yugoslavia, as well as the perpetuation of existing inequalities and economic impoverishment. The ANC proposes instead a new vision and a new framework for provincial governance which we call *co-operative governance*.

The federalism/centralism debate has for some time been stuck in a sterile and one-dimensional quantification of discreet national and provincial lawmaking competencies respectively. The ANC now proposes that provinces should become an important component of central government and national policy making itself, yet not lose areas of their current provincial legislative competency.

In short it is the challenge of a system of provincial government to provide for legitimate regional aspirations and needs without denying the context of overall national imperatives. The solution to these concerns lies in adopting a system of governance that provides for effective and responsive provincial government, as well as regional influences on national government, yet does not institutionalise shortsighted competition and promote only fractious governmental relations.

3. Potential Problems in the Current Framework

The current framework promotes tensions between region and region, and between regions and central parliament. This is not negative *per se* but, the absence of any integrating and co-operative mechanism which encourage provincial governments to work with each other and the national government in regard to national legislation provides no counter balance to these centrifugal forces. There is no forum nor process for provincial governance to bear co-responsibility for the general welfare and management of the country as a whole. While the principle of empowering the provinces to manage their affairs is important, the political structure should also promote a broader co-operative approach. It should counteract the tendency to make decisions from exclusively provincial perspectives. Is it the maturity of current provincial governance which has prevented major problems up till now.

The precise division of legislative and executive competences is uncertain, thus leaving important questions of governance to the courts to determine. They are expected to determine many political matters which should be resolved between the provinces or between the provinces and central government.

The present Senate does not contribute in a significant manner to resolving this problem, because it appears to duplicate the work and composition of the National Assembly and yet fails to integrate the provincial viewpoints in national law-making. It is structurally unable to give institutional expression to the relationship between national and provincial levels because the regions' powers reside solely in its provincial legislative and executive functions.

4. The Proposal

In brief, the elements of our proposal are:

- *The collaboration of provinces in legislation on national level.* The Senate should be the main player in the relationship between national and provincial levels of government and the consequent vertical distribution of power. Present legislative competences of provinces should in the main be retained as at present, while a more substantial responsibility for executive

power, as well as supplementary legislation, will rest with the provinces.

- *A division of competencies between the national and provincial levels of government* which supports the idea of cooperative governance in the sense of regard for the legitimate interests of national and provincial governments by recognising provincial aspirations and needs within a context of national imperatives.
- *A functional and an efficient allocation of the financial duties* as between the different levels of government, and a fair system of distribution of revenue (financial equalisation) between provinces and between provinces and national level.

5. Functions of the Senate

The Senate should have the following basic functions:

- Have a close and on-going relationship with the provincial governments and give expression to the views and the administrative experience and needs of the provinces.¹
- Have a real say over National Assembly bills that deal with the exercise of powers and performance of provincial functions and articulate the interests of provinces at national level.
- Regarding provincial interests the Senate should be able to initiate legislation and bear co-responsibility as a chamber for the Republic of South Africa as a whole.
- The Senate should have less influence over national legislation dealing with the exclusive competencies of national government than it does over legislation dealing with its concurrent areas of competence.

6. Composition of the Senate

Regarding the composition of a body like the Senate, it is possible to distinguish between three possible types:

- The members could be directly chosen by the people (as in the USA).
- The members could be other party members chosen by provincial legislatures, as they do now, on a proportional party political basis.
- The members could consist of members of the provincial executives or legislatures who appoint and recall them.

The ANC proposes that the third type be the basis of the composition of the Senate. In this model the provinces will have a more direct "ownership" of the Senate. The Senate could have between 50 or 100 members (5 or 10 per provincial executive, but the number of Senators as such has not been finalised by the ANC). The option to provide *representation for the third tier of government* (a total of 5 or 10 members) was considered favourably by the April 1995 National Constitutional Conference of the ANC. However, this should not open the way for representation by "interest groups" as such.

The forthcoming proposals of the ANC will detail the following:²

- 1 The Senate should be a "working parliament" – as against a "reasoning and debating" parliament – with a business-like style, and with a place for officials from the provinces at the Senate committee meetings.
- 2 The ANC requests an opportunity at a later stage to make submission to Theme Committee 2 on these matters.

...er in which provinces are to be represented in the Senate,

- the size of the Senate, and
- the administration and functioning of the Senate and its institutional relation with the National Assembly.

With regard to the last-mentioned aspect, the following question is to be answered amongst others: Should the National Executive be responsible to Parliament (National Assembly and Senate), or only to the National Assembly, in view of the completely new character of the Senate? Should the term "Parliament" be reserved for the National Assembly only? If government policy is defeated in the National assembly, a new government has to take over or an election must be called. The Senate has no obvious place in this scheme of things. If the National Executive is responsible to National Assembly *and* Senate, the consequence may be that the Senate would be more likely to vote on party lines, as the Australian Senate does for example, than to protect the interests of provinces. It is submitted that the National Executive should not be responsible to the new Senate.

7. Co-operative governance

The Interim Constitution *allocates powers and functions* of government as between the different regions and Parliament. To a lesser extent it also provides a small *voice for regions in national governance*. In our view the first method of giving expression to regional diversity could be retained whereas the second method needs to be strengthened.

The essential thrust of the proposed new framework is that the provinces will now have a greater say, through the Senate in the making of national legislation effecting their interests. This will impose national considerations upon provinces, and require them to interact with each other and the national assembly to consider the good of their province and the country as a whole. It will also impose provincial consideration upon the national law-making process.

If these powers are crafted so as to exclude the possibility of a need for national intervention they will amount to insignificant powers or window dressing e.g. "abattoirs". Even contemporary federal constitutions increasingly recognize national and even supra-national interests in matters such as police and education. As these proposals stand, the provinces' concurrent powers will be enhanced by certain exclusive executive functions, and the powers, through the Senate to collectively block legislation inimical to provincial interests.

These proposals make clear that the ANC will not simultaneously grant vastly enhanced powers to the provincial government over national laws *and also* increase the powers to ignore the very national norms and standards that they have approved. If we allow this development, the logic of co-operative governance will collapse in on itself and provinces through the Senate will cease to have meaningful roles in national legislation and will be relegated to fringe fiefdoms.

It would be myopic to argue that in this model some of the provinces (notably Natal and Western Cape) will have to surrender their individual autonomy for the "dubious benefit of being swamped by ANC Senators". Firstly their current powers remain largely intact if not augmented. Secondly the provinces have shown at intergovernmental meetings that they have common ground with each other across party political lines (this after all, is also the international experience). Thirdly, constitutions must be crafted on the basis of more lasting considerations than today's temporary political alignments. Overall, provinces' law-making competencies (save for policing powers which in reality were never properly a part of schedule 6) remain. Their executive powers will be significantly expanded (executive powers are not the menial bureaucratic duties that some parties have suggested but are the very essence of political governance) and they would have greater financial and fiscal powers to participate in the drafting of the national budget. For this reason we believe that our proposals

conform to the agreed constitutional principles.³

PROPOSALS

8. Cooperative governance

8.1 The final constitution should establish a cooperative system of governance with the following guidelines:

8.2 Cooperative and coordinated national and provincial governance should be promoted, while strengthening the role of provinces in national policy and law making.

8.3 National and provincial governments should have regard for one another's legitimate interests in the exercise of their powers and functions.

8.4 Recognition should be given to legitimate regional aspirations and needs through the exercise of appropriate provincial law-making and financial and executive powers, within a context of overall national imperatives.

9. General matters⁴

9.1 There should be democratically elected provincial legislatures, which should have the necessary executive and legislative powers. From each of these legislatures delegates⁵ shall be sent to the Senate, and a provincial executive should be formed. A provincial executive must be accountable to its provincial legislature.

9.2 The allocation of powers and intergovernmental relations should be based on the principle of coordinated and cooperative governance.

10. Elements of the provincial system

The provincial system should have the following elements:

10.1 A Senate, representative of provinces, which effectively reflects provincial needs and interests at national level, while providing an appropriate forum for intergovernmental coordination.⁶

10.2 Concurrent legislative competences for national Parliament and provincial legislatures.

11. The Senate

11.1 The final constitution should provide for a Senate, comprised of representatives of the prov-

3 As other parties have noted, this vision also informs the German Constitution.

4 Noted here for the sake of background. Full submission effected to Theme Committee 3.

5 It may be ordinary MPL's or MEC's, but see footnote 2 above.

6 The ANC is of the opinion that elaborate provisions on the detail of intergovernmental coordination in regard to especially executive and administrative matters should not be contained in the constitution, because executive and departmental structures and line functions are involved which must be allowed to develop gradually.

- ices and, possibly, representatives of government level, which should allow for effective influence and participation of the provinces in national law-making at national level, and which should function as the suitable forum for intergovernmental coordination.
- 11.2 Members of the Senate should be appointed and be subject to recall by provincial legislatures and/or provincial executives.
 - 11.3 Every province (and possibly the local level of government of South Africa as a whole) shall each be entitled to a single delegation of Senators.⁷
 - 11.4 The Senate should be a perpetual body. New representatives will be appointed after national or provincial elections, but may be changed by the provincial legislatures.
 - 11.5 The Senate shall be entitled to block or approve laws dealing with provincial matters,⁸ it may initiate laws regarding provincial matters and it shall have the right to review other legislation.
 - 11.5 The provinces shall be entitled, primarily through the Senate and its structures or committees, to participate in financial and fiscal matters affecting the provinces, especially in the drafting of the national budget, although the Senate will have no powers to block financial bills.
 - 11.7 The intention in the final constitution should be to introduce a framework whereby the judicial determination of the pre-eminence of national legislation is replaced by the requirement that the provinces themselves through the Senate conclusively establish the desirability of the relevant national legislation.⁹ The courts will still have a role to determine whether the overriding legislation fits the categories set out.
 - 11.8 Where the national government is empowered by national legislation to promulgate subordinate legislation or statutory instruments which affect the powers, functions or interests of provinces, the Senate should have a say over the content of such instruments, particularly where the provinces are required to implement such legislation or instruments.¹⁰

12. Aspects of legislative competences

- 12.1 In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and provincial governments:
 - 12.1.1 such legislation shall be deemed to be "necessary" or "desirable" in terms of the so-called "national interests, norms or standards"¹¹ if such legislation has been approved by the Senate, and further
 - 12.1.2 if such dispute cannot be resolved by a court by a construction of the constitution, precedence shall be given to national legislation.¹²

7 5 or 10, the precise number of Senators still to be recommended by the ANC.

8 In other words, the consent of the Senate shall be required for legislation dealing with provincial matters. The precise way in which the blocking power is to be exercised, shall be a matter of further discussion and proposals. Deadlocks may need to be resolved through mediation or joint committees.

9 Compare Constitutional Principle XXIII.

10 Thus providing opportunity for co-determination in administrative matters and for inputs from the provinces on account of their administrative experience.

11 Full submission in this regard made to Theme Committee 3.

12 Constitutional principle XXIII.

12.2 *Exclusivity of executive functions for provinces should primarily be in the context of executive implementation under enabling or framework legislation, as approved by the provinces in the Senate, and the implementation of provinces' own legislation.*

12.3 Provinces shall be allocated the resources and powers to implement or administer its legislation and such national legislation as is delegated or assigned to it. In general, provinces shall be responsible for the execution of the national legislation referred to in §12.1.1 above (the so-called national interests, norms and standards). Ordinarily such powers should, with the consent of the Senate, be allocated to provincial government and, where appropriate, to local government, even if the relevant legislation was passed at national level.

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**National Party
Nasionale Party**

**Federal Council
Federale Raad**

16 May 1995

Mr Hassen Ebrahim
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party submission to Theme Committee 2 in respect of the Work Programme, on The Senate.

Yours faithfully

Mr J A Rabie MP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 2

THE SENATE

A PURPOSES OF A SECOND CHAMBER

It is the considered opinion of the National Party that the constitution should provide for a second chamber of parliament, called the Senate. Our reasons for this are as follows:

- 1 The main purpose of a second chamber is to represent particular interests in society not adequately represented in the popularly elected house. This is particularly relevant in federations or other decentralised societies where second chambers are often established to represent the constituent states or provinces. We believe that a second chamber to represent the constitutionally entrenched, but still fledgling, South African provinces in decision-making at national level is strongly called for, both for symbolic reasons and for the real influence it can exercise in the governing process. This is particularly important in view of the fact that the national parliament has extensive powers to legislate on matters affecting the provinces, for example in the case of provincial finances and in those cases where national legislation overrides provincial legislation (see the present section 126(3)).

2 From a broad perspective, a second chamber can, by providing a second opportunity to consider legislation, enhance the quality of parliamentary decision-making and serve as an effective control mechanism in a democratic society. In this regard, a second chamber is often referred to as a house of revision, that promotes thorough consideration of matters before parliament, strengthens control over the executive and alleviates parliament's workload in the process. It is our contention that a second chamber can serve a useful purpose in this regard in South Africa.

3 A second chamber that represents the provinces would give appropriate effect to the Constitutional Principles contained in Schedule 4 of the transitional constitution. The Constitutional Principles dealing with aspects such as a three tier system, constitutionally entrenched provinces with a certain measure of autonomy and the close links between the national and provincial levels envisaged by those Principles, both financially and in respect of the exercise of their respective powers, obviously presuppose the legislative liaison that can be provided by a second chamber.

For these reasons, a bicameral legislature at national level seems a necessary and logical component of a future South African constitution. As a matter of fact, it could even be considered to include in the constitution an express reference to the purpose for which a second chamber is established. In view of the fact that a second chamber will, as a matter of course, fulfil a revising function by participating in the legislative process and other functions of parliament, only the main purpose of providing the provinces with representation in national decision-making, needs to be mentioned.

B COMPOSITION OF THE SENATE

1 Number of members

Two aspects should be considered in this regard:

- (a) **The National Party is of the opinion that the Senate should be composed of an equal number of members for each province.** By this arrangement, the equal status formally enjoyed by the provinces is recognised and the purpose of the Senate to represent the provinces at national level is confirmed.

- (b) **The present number of ten Senators per province should be retained.** The size of the country and of the population warrant a second chamber of at least the present size. A reduction in the number of Senators would make it very difficult for the Senate to function effectively and, in any case, make it even more difficult for smaller parties to obtain seats in the Senate.

2 Method of electing Senators

If it is accepted that the main purpose of the Senate should be to represent the provinces in national decision-making, **Senators should be elected/appointed according to a method that serves and promotes that purpose.** In this regard, the present method of nomination by the political parties holding seats in the various provincial legislatures has been criticised for not providing enough linkage between a province and its Senators. A few alternative methods could be considered:

~~(a) Direct election by the electorate of each province~~ The objection here is that it could lead to a mere duplication of the composition of the National Assembly.

- (b) *Indirect election on a proportional basis by the respective provincial legislatures.* The end result will probably be the same as at present, but a formal constitutional link, presently largely absent, will be established between Senators and their respective provinces.
- (c) *Nomination by the provincial legislatures from among their members.* This would strengthen the link between the provinces and the Senate even more, but would result in dual membership, which could create tremendous practical problems.
- (d) *Nomination by the provincial executives from among their members.* This is the German method, even providing that members of the executives rotate according to the matters to be discussed. We feel this can only lead to practical problems, a Senate lacking proper cohesion and injury to smaller parties. As it entails membership by members of the provincial executives in the national legislature, it in any case affects the principle of the separation of powers (Constitutional Principle VI).

The only feasible option seems to be the one in (b), indirect election by the provincial legislatures, and we propose accordingly. However, we further believe that the present proportional formula according to which the parties nominate Senators should be reconsidered as it tends to favour the bigger to the disadvantage of the smaller parties. Normally, in composing a parliamentary committee, for example, the smaller parties

are being favoured to some extent. The present formula should be applied in such a way that when the provincial legislatures elect their Senators, all but the very small parties represented in such a legislature will be able to nominate at least one Senator.

3 Qualifications of Senators

The qualifications for Senators should be the same as for members of the National Assembly, with the addition of the requirement that all Senators must be ordinary resident in their respective provinces. This, we believe, is a necessary concomitant to the main purpose of the Senate and the attempt to strengthen the ties between Senators and their provinces.

C POWERS OF THE SENATE

Powers should be assigned to the Senate in accordance with its purpose to (i) represent the provinces in national decision-making and (ii) provide an opportunity for reconsideration during the legislative process in parliament. On this basis, the following existing and additional powers should be assigned to the Senate:

- (a) As second chamber of the national parliament, the Senate, like the National Assembly, shall **consider all bills** introduced in parliament.
- (b) With regard to disagreements on **ordinary bills**, the present arrangement in terms of which a joint committee is established to submit proposals to a joint sitting where the bill must be adopted by a majority of all members of parliament (section 59 of the transitional constitution), is unsatisfactory. The purpose

of a joint committee always is to submit proposals that will be ~~acceptable~~ to both houses sitting separately (cf the conference committees of the United States Congress and the Mediation Committee of the German parliament). Our joint committee should fulfil the same function, namely to submit proposals to the houses sitting *separately* and only if agreement is still not reached, should a joint sitting be held.

- (c) Section 61 of the transitional constitution provides that bills affecting the **boundaries or powers and functions of the provinces**, must be adopted by both houses sitting separately. Furthermore, such a bill, if it affects a particular province or provinces only, must also be approved by a majority of the Senators from that province or provinces. In the absence of agreement between the houses, no law is made. For effective representation of the provinces in matters affecting them, this arrangement should be retained.
- (d) The present section 60 in terms of which the Senate can only delay and not veto **money bills**, emphasises the Senate's subordinate position with regard to this ^{crucial} category of bills. Actually, there is no substantial reason why the same arrangement as in the case of ordinary bills cannot apply here. In other words, if the Senate and the National Assembly disagrees on a money bill, a joint committee (eg the joint standing finance committee) could be asked to submit proposals to the houses sitting separately, and if agreement is still not reached, the bill is disposed of at a joint sitting. We propose accordingly.
- (e) **Other financial bills affecting the provinces** should be dealt with as provided in sections 155-157 of the transitional consti-

tution. Such bills should be adopted by both houses sitting separately and in the case of disagreement, the normal provisions for resolving disputes (section 59) shall not apply. This means that no law is made if the houses cannot agree.

- (f) The provision for **constitutional amendments** (section 62) should also be retained. In other words, amendments should be adopted by a two-thirds majority at a joint sitting, but (i) amendments affecting the legislative and executive powers of the provinces must be adopted by a two-thirds majority in both houses sitting separately, and (ii) amendments affecting a particular province or provinces should only be adopted with the consent of the affected province or provinces.
- (g) It could further emphasise the function of the Senate as the representative of the provinces, if it is required that **any bill directly affecting the provinces or a particular province shall be introduced in the Senate first.**
- (h) For such bills, the committees of the Senate could in addition be required expressly to hold **public hearings** where the provinces could state their views.
- (i) The Senate's role as the legislative body that has the "advise and consent" function, **ie to assent to, or make recommendations for, certain top executive and judicial appointments, should be extended.** The Senate is already involved in nominations for justices (section 105(1)(h)), the public protector (section 110(2)), and the auditor-general (section 191(2)) and, in addition, in the election and impeachment of the President (sections 77 and 87) and the establishment of a Pan South African Language Board (section 3(10)). In

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addition, the Senate should also be involved in the appointment of constitutional bodies such as the *Human Rights Commission*, the *Commission on Gender Equality*, the *Commission on Provincial Government*, the *Financial and Fiscal Commission*, the *Public Service Commission* and the *Independent Electoral Commission*. The Senate should also have the function to assent to appointments to bodies such as the *Land Claims Court*, and to offices such as the *National Commissioner of Police* and *Chief of the National Defence Force*.

- (j) The Senate should, in any case, be represented in the **Commission on Provincial Government and the Financial and Fiscal Commission**.
- (k) The Senate's role as watchdog over the constitutionality of bills (section 98(9)) should be confirmed.

D FUNCTIONING OF THE SENATE

We believe that the present provisions pertaining to the functioning of the Senate are in order and that no substantial amendment in that regard is necessary. With regard to voting, the convention should, however, be allowed to develop that in the case of bills or other matters directly affecting the provinces, party discipline does not apply so that Senators may vote freely. This would enable a Senator to put the view of the province before that of the party when he or she deems it appropriate.

E CONCLUSION

The Senate can and should be a dignified, respected and authoritative body that effectively represents provincial interests in national decision-making, contributes significantly to thorough consideration of legislation and other issues before parliament, strengthens parliamentary control over the executive and, in the process, furthers good government. We believe that the above proposals can contribute to the achievement of these objectives.