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PREFACE

The major purpose of this publication is to re-examine the KwaZulu/Natal Indaba's 1986 regional constitutional proposals from the perspective of the forthcoming national negotiations.

It seeks to draw attention to aspects of the proposals that may prove to be useful in drawing up South Africa's future constitution. It also draws attention to omissions and mistakes, made by the Indaba.

Initially it was anticipated that the report would be published before major parties published their constitutional proposals. It was hoped that such timing might lead to the publication serving as one of the points of departure for those drafting their parties's proposals.

The report was completed shortly before both the National Party and the Democratic Party released details of the constitutional proposals they plan to present to the national negotiations on South Africa's future.

The timing may prove to be a happy coincidence. If those parties had published their proposals earlier it would have been difficult to resist using them, rather than the Indaba proposals, as this publication's own point of departure.

As it is, the report seems to be somewhat prophetic in its suggestion that various parties have been dusting off their copies of the Indaba proposals in recent months. Many ideas from the Indaba have clearly been incorporated in the proposals put forward by both parties. Understandably, others have not.

However, there are still many untapped ideas of value contained in the Indaba proposals that may yet find their way into South Africa's new constitution and the accompanying new rules of the political game. Among these are the more detailed workings and desirable consequences of the Indaba's constituency based system of proportional representation. There are also aspects of the workings of the Indaba's proposed legislature and executive, and other checks and balances, that deserve further attention.

It is hoped that this report will encourage a more detailed examination of the Indaba's proposals by all parties that will participate in the national negotiations. If it succeeds in doing so, it may also facilitate the incorporation of valuable components into the new constitution. In turn this may increase the prospects of creating a constitutional framework in which multi-party democracy and political tolerance will take root and flourish in what, historically, has been pretty barren soil.

PETER MANSFIELD
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SUMMARY

The publication reviews the history and current relevance of the KwaZulu/Natal Indaba's 1986 regional constitutional proposals. Its emphasis is on the product rather than the process of those historically significant yet flawed negotiations. The subject is approached from the perspective of the forthcoming national negotiations on South Africa's constitutional future and seeks to identify issues of relevance to such negotiations.

The author as did the Indaba, favours maximum devolution of power to both local and regional government but argues that separate, rather than cascading, devolution to both lower tiers of government might achieve the desirable ends of devolution whilst avoiding the pitfalls and suspicion of federalism.

In Section 2 the Indaba's bi-cameral legislature proposals are reviewed in detail. The author recognises the controversial nature of the Indaba's second chamber proposals but argues that a geographically based second chamber could inadvertently undermine rather than protect the rights of minorities and their participation in the political system.

The author argues against Africa's and indeed South Africa's "leaders of life" tradition and favours limiting the number of terms of office that a president or prime minister may serve.

The use of the single transferable vote system in intra-parliamentary elections and the appointment of the executive is explained, as are the Indaba's proposals for powerful all-party standing committees representative of both the first and second chambers.

The role of cultural councils in protecting the interests of minorities is also explained.

Section 3 deals with the electoral system. The workings of a constituency-based system of proportional representation are explained in some detail. Also detailed are proposals for dealing with by-elections and the issue of inter-party defections in a system of proportional representation.

Innovate proposals that obviate the need for voters' rolls, reduce the risk of intimidation and increase freedom of choice by allowing voters to vote in the constituency of their choice are also explained. So, too, is the role of a proposed independent electoral commission.

Section 4 deals with a number of additional issues including the composition of the proposed electoral commission and constitutional court, the role and terms of reference of a public service commission, and amendments to the constitution.

The author concludes that although the Indaba process and "blueprint" was regionally focused and flawed, its proposals offer a useful and important point of departure for those involved in national negotiations.

1. THE BACKGROUND

INTRODUCTION

The KwaZulu/Natal Indaba conference met for eight months in Durban in 1986. It produced a set of constitutional proposals for "Non-racial power-sharing" at second-tier (provincial) level in the combined area of KwaZulu/Natal. The Indaba Plan, as it became known, proposed a considerable devolution of legislative and administrative powers from central government to both regional and local government.

In retrospect, it seems unlikely that there was ever much chance of the Indaba's proposals being implemented. It is true that when they were published at the end of 1986 they gained wide support both nationally and internationally. Yet they were also vehemently attacked by the white right. For very different reasons they were rejected by the then still-banned and exiled ANC as well as other extra-parliamentary organisations and their local and international supporters. Unsurprisingly the proposals themselves (the process was applauded) were initially rejected by representatives of the P W Botha government. The government later modified this stance and put the proposals into a "we will look at them sometime" limbo.

The for and against debate about the Indaba and its proposals raged until late 1989. On 2 February 1990 the Indaba Plan and the debate surrounding it were deflated by President De Klerk's historic speech in parliament. The speech resulted in a sudden quantum shift in the debate about negotiations and South Africa's constitutional future. Suddenly the Indaba proposals had been overtaken by events and were irrelevant. Or had they and were they?

CURRENT RELEVANCE

By the time the government had become seriously interested in the proposals (after Botha's resignation in 1989) the ANC and its allies were developing an effective veto over unilateral constitution-making by government. It had become clear that the costs (political as well as human) of implementing the proposals would almost certainly outweigh the benefits of doing so.

On the face of it, then, the Indaba's proposals were to be thrown on the trash-heap of the constitution-making efforts of the 1980s. There was no doubt that the Indaba's proposals were flawed. In addition, the Indaba Plan had never claimed to be directly addressing South Africa's national constitutional future. Instead it had focused its attention exclusively on second-tier government in the KwaZulu/Natal region in the hope of helping to break the then political log-jam that had become firmly entrenched at national level.

Can the Indaba proposals still serve any useful purpose? Can they make a contribution to the national negotiations that are expected to decide South Africa's constitutional future?

PARTIAL ACCEPTANCE

In fact, a number of aspects of the proposals (not widely accepted at the time) have become part of the political wisdom of players across a wide part of the political spectrum: a justiciable bill of rights, proportional representation, and universal adult sufferage were all part of the proposals.

Nor should it be lightly forgotten that the Indaba process itself led politicians across the political spectrum to start to believe, for the first time, that it might be possible for South Africans of all races and political persuasions to negotiate a new constitution. In addition, constitutional options currently being mentioned by various of the future negotiation players suggest that there has been a dusting off of copies of the Indaba Plan.

R. W. Johnson, writing in the Johannesburg *Sunday Times* earlier this year, discussed the coming constitutional negotiations. "Quite probably both the process and the final draft will look something like the Kwa-Natal Indaba: this was, after all, the only other time South Africans of all races sat down to work out a democratic constitution."

PURPOSE OF THIS PUBLICATION

The dust surrounding the Indaba and its proposals has now largely settled. This report, by revisiting the proposals, seeks to encourage evaluation or re-evaluation of the proposals by those who (for whatever reason) were not in a position to apply their minds to them when they were first published. I believe such a re-evaluation will show that many of the issues the Indaba dealt with will be echoed at the national negotiations and that many of the Indaba's findings will probably be reflected in the outcome of these negotiations. Others will not. But even the not insignificant flaws and omissions in the Indaba proposals may help national negotiators decide what suggestions should be rejected, and why.

In some instances I have taken editorial licence and have written about the Indaba proposals as if they were designed as national rather than provincial or regional proposals. I have done so in order to highlight their applicability or otherwise to the national negotiation process.

The emphasis of this paper is on the product rather than the process of the Indaba negotiations. It focuses on three main areas: the composition and working of the legislature, the executive, and the electoral system. In addition, there is limited discussion on the role and composition of the supreme court, an independent electoral commission, and other issues which will need to be addressed by the framers of the new constitution.

DEVOLUTION OF POWER

In practice, all Indaba delegates shared the belief that for decision-making and administration to be appropriate it should be as close to the people as possible. By its nature the Indaba was about the maximum devolution of

power - both legislative and administrative - which it sought to have constitutionally entrenched. The powers which it believed should be devolved from central to provincial government are set out in detail in the Indaba proposals themselves.

It also proposed the strengthening of local government: "The powers and structures of local authorities will be entrenched in the constitution on a non-racial basis in accordance with the Bill of Rights."

Further it proposed that the principle of "extended powers" for local authorities (as practised in Natal) be entrenched in the constitution and added that "the principle of maximum devolution of power will be guaranteed by the constitution".

DEVOLUTION FROM WHERE?

The Indaba proposals were based on the assumption that the devolution of power would cascade downwards - from central government to provincial government to local government. In view of the Indaba's regional nature this assumption is understandable, but proponents of devolution should give serious thought to a twin devolution process - from central government to regional/provincial government on the one hand, and from central government to local government on the other.

Such an approach might well result in greater devolution to the local government level than might otherwise be achieved. By so doing it could achieve the major advantages of federalism (the devolution of power) while allaying the fears of those who see geographic federalism as a threat to the unity and integrity of a new South Africa.

This is not to argue against the significant devolution of power to elected provincial/regional authorities as well - clearly such devolution is essential. But it may well be that more devolution can be achieved (at less actual or perceived cost) by central government devolving separately to local government and regional government. This would result in both tiers of government reporting to (separate?) central government ministries. In this way local government and regional government could both be strong tiers of government yet pose less of a threat to a new central government apprehensive of the risks of divisionism and secessionism.

Whatever degree of devolution ultimately takes place to local and regional level, it is essential that such devolution be constitutionally guaranteed and not subject to the whim of any government of the day. It is also essential that provision be made in respect of the financing of such regional and local government. Again provisions for such financing must be constitutionally entrenched. Without such a guarantee local and regional authorities could effectively be dictated to via the central government's purse strings.

CHECKS AND BALANCES AND CONSENSUS-SEEKING

The Indaba's proposals (not all of which are recorded here) included a significant range of checks of balances aimed at creating a political system which places major emphasis on power-sharing and consensus-seeking as opposed to unrestrained majoritarianism. It should, however, be recorded that "power-sharing" did not refer to the National Party's then current commitment to the Heunis-speak of racial power-sharing and "concurrent majorities".

Power-sharing was promoted by such means as proportional representation in parliamentary elections and the use of the single transferable vote (a mini form of proportional representation) in the election of standing committees and even the cabinet. Of considerable significance was the proposed two-chamber legislature which sought a "win-win" outcome to the competing demands for "one-person-one-vote" on the one hand, and the demand for minority protection and participation on the other.

Consensus-seeking mechanisms included the standing committees themselves and the functioning of the multi-party cabinet. An "ultimate" check and balance is to be found in the right of cultural councils and second chamber groups to take issues on appeal to the supreme court.

2. THE LEGISLATURE

TWO-CHAMBER SYSTEM

The Indaba decided on a two-chamber system elected on a "one-person-two-votes" basis - one vote for the first chamber and one vote for the second chamber. Using proportional representation, seats were to be won in direct proportion to the number of votes cast for each party in the overall election (nation-wide in the case of national elections). The decision to use proportional representation made possible a number of the Indaba's innovative proposals (for example the "no voters' rolls" and "vote where you like" provisions recorded elsewhere in this publication).

Of interest is the fact that the Indaba's decision to settle for a two-chamber system occurred late in the Indaba's proceedings and resulted from perceived necessity rather than from any ideological or constitutional proclivity on the part of delegates. In fact, the Indaba laboured for many months with proposal after proposal that sought to avoid having a two-chamber system. As it turned out, every effort to ensure democracy and checks and balances with a single chamber produced a product that looked more and more like a constitutional camel designed by inept "amateurs".

In the end it was concluded that the complementary objectives (democracy and checks and balances) could more easily be achieved through a two-chamber (bi-cameral) system. It may well be that national negotiations will go through the same experience. Certainly it should not be necessary for negotiators to agree with the details

of the Indaba's second chamber proposals in order to conclude that a second chamber might make a significant and positive contribution to the checks and balances needed in the new constitution.

EQUAL CHAMBERS

Both the British Westminster and the United States constitutional system make use of a two-chamber system. But the significance of the so-called "upper house" is very different in the two systems. In the British parliament, the "upper" House of Lords is little more than a historical political appendix - of little value but a possible cause of discomfort to the "lower" House of Commons. In the United States Congress, the House of Representatives and the Senate have equivalent powers.

The Indaba opted for the latter system. To underline the point, it avoided the terms "upper" and "lower" and instead used the terms "First Chamber" and "Second Chamber". In terms of this "equality" the Indaba proposed that all legislation should be approved by the appropriate joint standing committee and the first chamber and the second chamber.

THE FIRST CHAMBER

The Indaba proposed a 100-member first chamber elected by all adult citizens through the use of a multi-member constituency-based system of proportional representation that sought to ensure that all shades of political opinion were represented in the chamber.

THE INDABA'S CONTROVERSIAL SECOND CHAMBER

The Indaba proposed a 50-member second chamber consisting of ten members elected by each of five "groups". It was envisaged that on election day each voter would be given two ballot papers - one ballot paper for the first chamber and one ballot paper for the second chamber, with the voter indicating the party of his choice on each ballot paper.

The five second chamber groups envisaged were as follows:

- African background group
- Afrikaans background group
- Asian background group
- English background group
- South African group.

In terms of the proposals every voter (irrespective of the background group to which he or she "belonged") was entitled to choose to be a member of the South African group. However, voters choosing to be members of any

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of the other groups had to "belong to the group" concerned.

The Indaba sought to use the second chamber as a bulwark against majoritarian domination of minorities. Yet at the same time it wished to avoid racial groups and racial classification. The result was the "background group" compromise. The groups were not racially defined (for example, coloureds with Afrikaans as their home language would be free to vote in the Afrikaans background group). Yet it was equally true that the electoral rules were designed to prevent "non-group" voters from swamping a group election and thus defeating the protective intentions of the proposed constitution.

It was accepted that group voting without group voters' rolls (no voters' rolls were proposed) could lead to difficulties. This was dealt with by establishing regulations to deal with arguments as to who belonged to which group.

It is of interest to note the decision of the Indaba not to create a "coloured" background group. In part this approach was opted for because such a group would have been a contradiction in terms. In addition some "coloured" delegates argued persuasively that they were the new South Africans and needed no group protection.

The creation of separate Afrikaans and English background groups owed as much to the hope that this feature would make the overall proposals more acceptable to the Botha government as it did to perceived differences between the two groups. The Indaba rejected muted suggestions that separate provision should be made for non-Zulu black groups.

SECOND CHAMBER ALTERNATIVES

It became clear at the Indaba that appropriately composed second chambers can add to democracy and assist with the protection of rights - especially those of minorities. But the legacy of apartheid has left the majority of South Africans with a strong antipathy to anything that smells of dealing with rights on a group/ethnic basis.

There is no question that the Indaba's second chamber proposals were and are controversial. But reaction against them should not be allowed to cloud the fact that the Indaba was unable to come up with a single-chamber solution it believed was likely to achieve the checks and balances needed to reassure minorities. Nor should it be allowed to cloud the Indaba's almost universally shared conclusion that in a non-homogeneous, plural society, a sustainable political system must give some form of representational recognition to the plural nature of such a society.

It would be easy to take a single-chamber view. But to do so would remove checks and balances that may well turn out to be essential to the acceptance of a new constitution by minority groups.

An all too obvious alternative would be to create a spatially defined second chamber along the lines of the

American Senate - with an equal number of popularly elected representatives from each state/province/region. But such an approach would do little to re-assure apprehensive minorities. Indeed, it might well exacerbate their fears. This could be the case for two reasons.

Firstly, the American constitution was appropriately designed to address the burning issue of the day that would make or break its proposed federation - the issue of state's rights. South Africa's burning issue of the day - ethnic minority fears - has nothing to do with regional or state loyalties. Indeed, it would not be unkind to say that regional or provincial loyalties are of far greater interest to rugby, soccer or cricket followers and administrators (and their sponsors!) than they are to people concerned about their future.

In addition, the inevitable relative lack of <u>effective</u> proportional representation in such a second chamber electoral system would almost certainly lead to the presumably unintentional creation of a chamber in which minority group interests were almost totally unrepresented. Thus the following of the American model would address a relative non-issue (regionalism) but would in no way address a real issue - that of minority rights.

There can be little doubt that the challenge of finding a "win-win" solution to this question - how to compose a second chamber or how to create a checked and balanced system, without a second chamber, that would be acceptable to minorities - will require goodwill, statesmanship and lateral thinking of the highest order.

NUMBERS OF TERMS OF OFFICE

The Indaba did not address the issue as to whether there should be a limitation on the number of terms of office its "prime minister" could serve. Failure to address the issue at a national level could be a serious mistake.

The American constitution lays down that a president may serve a maximum of two four-year terms. On the other hand, the British system manages pretty successfully to address the issue without such regulations. However, Britain may be close to the exception that proves the rule. Political systems in many countries, especially in Africa, have been emasculated by leaders who have ruled for decades. Under such "leader for life" systems, typically robust and healthy intra- and inter-party competition withers and is replaced by personality-cultish "cronyism". This in turn leads to a situation in which the only realistic means of change is by means of *coups d'état*.

The placing of a firm limitation on the prime minister's or president's tenure of office could be crucial in determining the future of multi-party government in South Africa - whether it becomes deeply rooted in our political culture or whether it mutates into the pseudo-democracy invariably associated with leaders who outstay their usefulness.

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POPULAR ELECTION OF PRESIDENT

The Indaba gave little thought to the possibility of a prime minister directly elected by the people. But it would be wise for national negotiators to consider the popular election of the president. Such an election could add to the legitimacy of the overall political system. In addition, such an independently elected president provides an additional check and balance.

If such an approach were to be adopted, it would be important for the president to be elected by a clear majority (over 50 per cent of the votes cast). It would therefore be necessary to make provision for some form of "run-off" election in the event of no candidate achieving such an overall majority. Such an election could take the form of the French system of a second ballot involving the two candidates that achieved the highest vote in the first round.

COMPULSORY COALITION

One of the most common arguments against proportional representation is that it does not produce strong government and/or there can be long delays in establishing the coalitions and alliances needed to form a government at all. Italy and Israel are the examples most frequently used to support this viewpoint. Many observers, however, suggest that these countries may be special cases and point out that proportional representation works well in the many other countries that use it.

The Indaba did, however, seek to deal with this issue by establishing a system that amounted to the compulsory establishment of a coalition of "national reconciliation". The details of the Indaba's proposals in this regard are probably not as significant as the process - which dictates the formation of a coalition rather than leaving it to the outcome of party bickering and horse-trading.

The Indaba's proposals achieved this by laying down the manner in which a prime minister would come into office and a cabinet created. The proposals dictated that the leader of any party that gained an overall majority (more than 50 per cent) of the votes cast in the national election for the first chamber would automatically become prime minister. However, "if no party or coalition of parties obtained an overall majority (of votes and seats) in the first chamber, the Prime Minister shall be elected by the first chamber". This provision, combined with the use of the single transferable vote, effectively guaranteed that wrangling between parties could not prevent the appointment of a prime minister.

With regard to the members of the cabinet the Indaba laid down that half the members would be appointed by a "majority" prime minister - the other half being elected by an electoral college consisting of the members of all other parties from both chambers. In the event of there being a "minority" prime minister (elected by the first chamber), all cabinet ministers were to be elected by an electoral college consisting of all members of all parties in both chambers. The cabinet elections were to use the single transferable vote version of Proportional

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Representation in order to ensure that parties were represented in proportion to the number of seats they held.

The creation of a cabinet in this way would be unusual but it could have advantages, especially in the early years of new democracy in a deeply divided society such as South Africa. One argument against such a system - that cabinet ministers should be experts in their fields - is not borne out by modern practice which tends towards the appointments being made on the basis of the pool of talent available.

STANDING COMMITTEES

The Indaba envisaged a "system of strong and influential" standing committees consisting of representatives of both chambers. It was proposed that each committee would consist of 15 members (ten from the first chamber and five from the second chamber). In another attempt to encourage consensus decision-making it was proposed that all standing committee decisions were to be taken by "a more than two-thirds majority".

Standing committees were to be composed as follows :

- Five from the second chamber - with each background group electing one member.

- Ten from the first chamber elected using the single transferable vote system in order to ensure that parties were represented in proportion to their support in the chamber.

- In order to avoid one-party domination, no party was to have more than 60 per cent of the members of any standing committee.

- A significant and rather novel proposal was that every (usually small) party that did not achieve representation on any standing committee was entitled to nominate one of its members of parliament to serve on such a committee. Committee members nominated by members in this way would be fully entitled to speak and otherwise participate in the affairs of the committee, but would not be entitled to vote. The purpose of this provision was to ensure that every party represented in both chambers had the opportunity for involvement in the shaping of legislation at the very important standing committee stage.

DEADLOCK

The adoption of a two-chamber, equivalent-powers system has important procedural consequences - the most important of which is the need for a deadlock-breaking mechanism to deal with situations, perhaps frequent, when the two chambers reach different conclusions. The United States Congress has portfolio-specific committees in both the House of Representatives and the Senate with a system of joint committees to negotiate, compromise and make deadlock-breaking deals.

The Indaba opted to achieve this through a series of portfolio-specific joint committees (consisting of members of both chambers and including representatives of all parties). These - like many other aspects of the Indaba's proposals - are designed to prod the overall system in the direction of consensus-seeking and mutual accommodation.

It seems inevitable that a two chamber, equivalent-powers system will slow down the process of law-making. This is certainly the case in the United States. In terms of the Indaba system, controversial bills (in theory at least) may never achieve the requisite approval of the relevant standing committee and the first and second chambers and may, as a result, go round and round the system forever. This may even be healthy. However, it seems likely that such conflict would be resolved by "trade-offs". But the Indaba did not place its full faith in likely compromises. On the vital issue of possible deadlocks over money bills - i.e. bills related to the financing of the activities of government and its departments - the Indaba proposed a prime minister's committee (consisting of equal numbers of members from both chambers) with the power to effectively make final decisions. This was achieved by requiring both chambers to pass money bill compromises as thrashed out by the prime minister's committee. Perhaps wrongly, the Indaba made no provision for deadlock-breaking for non-money bills.

CULTURAL COUNCILS

Prior to agreement on the composition of the second chamber, it had been proposed that it should consist of representatives of cultural councils. Although this form of representation was rejected as undemocratic (the representatives would not have been elected) the concept of cultural councils was retained.

Such councils were to operate outside the legislatures but be constitutionally recognised and entrenched and were to deal with the "protection, maintenance and promotion of the religious, language and cultural rights and interests of groups representing the principal segments of the population ...". Their establishment was not deemed to be compulsory and would depend on demand from the groups concerned. Procedures for the establishment of such councils was laid down in the proposals.

Such councils would have the right to receive copies of all draft legislation; would be consulted and kept informed on action taken or intended which might affect the rights and interests of the group they represented; and would make representations to all branches and levels of government, including standing committees, on matters affecting such rights and interests.

In addition they were to be given the right to apply to the supreme court for an order pronouncing on any bill or executive order which the court might consider likely to infringe or affect any right or cultural interest of the group concerned or its members generally. However, a cultural council contemplating such action would be required to endeavour to resolve such a dispute by first approaching the relevant standing committee or other provincial or local government authority.

TRADITIONAL AUTHORITIES

The Indaba sought to recognise the tenacity of traditional authorities elsewhere in modern-day Africa. In addition to the cultural councils, provision was also made for the establishment of a council of chiefs to represent the interests of the traditional authorities. It was envisaged that this council would have the same rights as the proposed cultural councils.

In addition, the proposals resolved to recognise traditional authorities as part of the system of local government but added that such authorities would "in the urban and peri-urban areas be encouraged to evolve into part of the system of local authorities".

3.   THE ELECTORAL SYSTEM

ALL ELECTED

The Indaba rejected suggestions of appointed, indirectly elected, or nominated members of parliament. It decided that all members of both chambers should be elected. Suggestions that provision should be made for the appointment of legislators to represent minority interests or parties were countered by arguments that the electoral system itself should be designed to ensure that all significant interest groups could achieve parliamentary representation.

VOTES FOR ALL

The Indaba proposed that every adult man and woman (over the age of 18) should vote. Perhaps surprisingly the Indaba decided that it would not be necessary to compile a voters' roll(s), since the proportional representation electoral system proposed by the Indaba would render them unnecessary (this is discussed in the section entitled "No voters rolls!" below). The Indaba concluded that the book of life identification of voters would be sufficient. Advantages included avoiding the lengthy period needed to draw up voters' rolls. In addition such a "non-roll" would be permanently up to date!

PROPORTIONAL REPRESENTATION

The need to ensure that all interests were fairly represented in the legislature led, virtually inevitably, to a conclusion that the members of both chambers should be elected using a system of proportional representation.

Why did proportional representation - almost unheard of in South Africa at the time - become popular with Indaba delegates? In part, in reaction to South Africa's history of gerrymandering of constituency boundaries and the numbers of voters in each constituency. Delegates wanted to break from a system that could be manipulated so easily by the government of the day.

Secondly because it _is_ so fair: every vote would count and every vote would count equally. Voters would not lose their democratic rights in uncontested constituencies. Nor would votes be wasted on unsuccessful candidates. Nor would a few "dead men's votes" or "steamed-open postal votes" make the vital difference in closely contested constituencies. Nor would it be possible for a party to win a majority of seats with a minority of votes (as happened more than once in the history of white politics in this country).

In addition, virtually every voter (more than 99 per cent) would know that his or her vote has directly contributed to the election of one or more member and will feel represented in parliament. This would encourage participation in the political system. A non-vote (an abstention) would become the equivalent of a vote for the opposition, because the outcome of the elections would be determined by the national percentages actually cast for each party. Party supporters who stayed at home would deprive their own party of seats in parliament. Thus there would be a strong incentive for everyone to vote, even in areas in which one party predominates.

In Westminster-type single-member constituency systems it is not uncommon to have a situation in which the _majority_ of voters have not voted for successful candidates and feel unrepresented. It is equally true that in many safe constituencies votes cast by many voters actually _are_ irrelevant.

Also of importance was the realisation that a majority of democracies now use proportional representation and that the trend is strongly away from the disadvantages of the single-member constituency systems.

There are many forms of proportional representation. The Indaba gave consideration to some of the more complicated forms, which allow voters to influence the level at which a candidate would appear on a party's list of candidates. Effectively this is achieved by voters ranking their party's candidates in the order of their own preference. However, the system _is_ complicated and probably impossible to use in the case of illiterate voters. Such variations were therefore rejected in favour of the simplest system in which each party publishes (in rank order) its list of candidates and voters mark an "X" next to the name/symbol of the party of their choice.

Despite the ultimately overwhelming support for proportional representation, the issue of _how_ it should be implemented led to lively debate. Fears that it would lead to too many small parties being represented in parliament had to be addressed. Another objection was that the required lists of candidates would be decided by political parties and not by the electorate. A third objection was that legislators would not be elected in constituencies and citizens would not know which member(s) of parliament to approach in event of their needing advice or assistance.

TOO MANY SMALL PARTIES?

The "too many parties" argument led to discussions about setting a minimum percentage of votes a party would have to achieve in order to gain any representation. Consideration was given to setting such a limit at 5 per cent

of the total vote. Such an approach was rejected largely on the grounds that in a volatile political climate the exclusion from parliament of parties that had gained almost one-twentieth of the national vote could lead to political crisis. (Current polls suggest that, for example, the Conservative Party, the PAC, Azapo and the Democratic Party could be excluded from parliamentary representation through the use of such a "cut-off" system.)

While such exclusions may be appear tempting, there are grave risks attached to pushing all "under 5 per cent" parties into the "extra-parliamentary" arena. Their supporters, combined, could represent a not unsubstantial portion of the total electorate. There was an almost unanimous view that it would be better for all parties to be represented inside parliament, even the small ones.

In addition, it was regarded as likely that even if there was an initial "explosion" in the number of political parties, the first election would dramatically reduce the number of those of any significance.

Finally, the existence of a multi-party system in which all views would be represented was seen to be a strong bulwark against any tendency towards an authoritarian single-party system. And there was little doubt that the use of a system of proportional representation (its detailed workings are described later) would significantly increase the prospects for the development of a multi-party democracy.

COMPILING PARTY LISTS

The issue of the party compiling lists of candidates is a very real one. However, it is also very much a fact of modern-day political life, even in single-member constituency systems. It is also arguable that the electorate will force parties to take public opinion into account in compiling their lists. In addition the problem is significantly reduced by electing most members of parliament through multi-member constituencies - in which each party will put up a list in each multi-member constituency. This will force parties to take local preferences into account, or they will run the risk of alienating potential supporters. The Indaba's "vote where you want to" provision (see below) also gives voters a greater measure of choice in that they are free to go and vote for one of their own party's "other" lists in a constituency other than their own.

In order to optimise its seat allocation each party would produce a list of candidates for every constituency in the country. Parties would not be forced to contest every constituency but failure to do so would inevitably lead to a decline in the total number of votes cast for such parties on a national basis. This pressure to contest all constituencies would tend to place strains on the limited resources of "micro" parties and raise questions about their long-term viability. In doing so it would reduce the risk of there being a multiplicity of parties.

The maximum number of names on each constituency list may not exceed, but may be less than, the number of seats allocated to each specific constituency. In terms of the Indaba proposals no candidate may appear on more that one constituency list. This obviates the problems that would arise in the event of a candidate being

elected in more than one or even many constituencies. However, candidates names <u>may</u> appear on a (one only) party's constituency list as well as on its national list. The names of such candidates would automatically be removed from the national list if they were elected in a constituency. Balancing allocations (see below: "How does self-balancing work?") are made to the "cleaned" national lists of each party.

Proportional representation does place great emphasis on party lists and this makes them and the public open to manipulation. The public will need to be encouraged to discern the difference between a genuinely balanced ticket and one that purports to be so.

Clearly the whole list of candidates is not going to be elected. Thus the top half of the list is far more important than the composition of the bottom half. The cut-off point between those on a list who are likely to get elected and those who are not will depend upon the electoral strength of a party in a particular constituency. But voters will need to keep a sharp eye out for parties with apparently balanced tickets that, for example, are uni-racial at the top of the list and non-racial at the bottom, or that restrict their female or youth candidates to the bottom half of the lists.

CONSTITUENCIES

Indaba delegates recognised the strength of the argument that most voters would prefer to vote for <u>their</u> members of parliament and would want to know which members of parliament to approach in the event of the need arising. The Indaba decided that two-thirds of the 100-member first chamber should be elected in 15 multi-member constituencies. Thus, depending on the estimated number of voters in each particular constituency, voters in each constituency would elect between, say, two and ten members to represent them.

Because of the self-balancing nature of the system, the accurate estimation of the number of voters in each constituency is relatively unimportant. However, it is an axiom of proportional representation that the larger the number of constituencies, the less perfectly the system will work. In particular it is likely to show a bias against smaller parties.

Thus there is a trade-off between the number of constituencies and the ideal working of proportional representation. But the problem can be solved. The Indaba did so by deciding that one-third of the seats should be filled from separate national lists. This mechanism results in a system that allocates seats to each party in almost perfect proportion to the number of votes cast for each party. (For an example of how this works see the section "How does the self-balancing work?")

NO VOTERS' ROLLS!

As indicated earlier, the Indaba concluded that the use of proportional representation rendered the production of voters' rolls "non-essential". A simple solution lay in a voter simply producing his/her book of life which would prove that he/she was

- a South African citizen, and
- over the age of 18.

In discussion it was envisaged that the book of life would be marked to indicate that a person had voted. Various methods of preventing double-voting (for example the use of dye) were discussed, but no conclusions were reached. If the Indaba found "no voters' rolls" satisfactory at regional level, there is an even stronger case at national level - the Indaba faced the risk of cross-regional boundary voting, an issue that would have no relevance in national elections conducted concurrently in all regions.

VOTE WHERE YOU LIKE!

A valuable spin-off from the Indaba's decision to use proportional representation (without voters' rolls) was that it enabled it to decide that voters could vote at the polling station of their choice. The Indaba proposal, extrapolated to a national election, would mean that citizens who are on holiday could vote at the nearest polling station. Statistically more important, migrant workers (South African citizens only, of course) could vote, for example, in Johannesburg or their home town or village if they happened to be there at the time.

The "vote wherever you want to" provision has additional advantages. Three are particularly worthy of note:

- It considerably reduces the potential for, and impact of, intimidation. Potentially harassed voters would be free to vote at the polling station nearest their homes or at polling stations on the way to, or nearest, their place of work, or at any other polling station. Thus intimidation would have to be all-pervasive to significantly affect the outcome of elections by preventing voters from voting, or pressuring them into voting for a party other than the one of their choice.

- Another considerable benefit is that the system obviates the need to make use of the provenly corruptible postal voting system.

- A third benefit is that it gives voters a greater freedom of choice in the candidates for whom they vote, even if they are firm about which party they plan to vote for. This is because they can either vote for their party list in their own constituency or (if they prefer it) they can choose to go and vote for the same party (different list) in any another constituency. Notwithstanding this freedom it should be anticipated that most voters will tend to vote for their own party's list in their own constituencies.

The "no voters roll" and "vote where you like" provisions, and their attendant benefits, are made possible by the use of a self-balancing system of proportional representation. Marginal seats are non-existent and the outcome of the election (in terms of the various parties representation in parliament) will not be affected in any way - by either the lack of voters' rolls or the freedom of voters to vote where they wish. This holds true even if millions (literally) of voters chose to vote at the "wrong" polling station, or even, in the "wrong" province or region.

THE SELF-BALANCING SYSTEM OF PROPORTIONAL REPRESENTATION

In most electoral systems, an important reason for compiling voters' rolls is that it enables some "body" to determine "fair" single- or multi-member constituency boundaries. This is of low relevance in a self-balancing system of proportional representation even if it is based on (multi-member) constituencies.

The self-balancing system requires only that some "body" draws multi-member constituency boundaries (ideally functionally based) and makes reasonable guestimates of the number of seats that should be allocated to each constituency. It is, however, important to realise that it makes no significant difference even if these guestimates are far out. Of course the challenge facing the "body" will be to get the guestimate as accurate as possible. Unlike the case of single-member constituency systems, intentional or unintentional gerrymandering of constituency boundaries offers no benefits to any party. It only offers egg on the faces of those who have drawn the boundaries and seriously miscalculated the size of the electorate within each constituency. It could, for example, undermine confidence in an electoral commission (see below).

HOW DOES THE SELF-BALANCING WORK?

The critical point to understand is that the outcome of the election is determined by the percentage of voters that each party wins on a national basis.

Thus in an election for a 500-member first chamber, each party would gain five seats for every one per cent of the total votes cast. For example, the following:

Party	Percentage of votes	Seats
A	6	30
B	15	75
C	7	35
D	44	220
E	20	100
F	3	15
G	1	5
H	4	50
	100	50

Thus, the first issue is the number of seats allocated to each party. This is determined by the percentage of votes cast for each party on a national basis. The second issue is to determine who has been elected. (In this respect

the Indaba unnecessarily complicated the issue by <u>first</u> deciding <u>who</u> had been elected in each constituency and then determining the total numbers of seats allocated to each party. The outcome is the same but it is more confusing and more difficult to explain.

The first <u>who</u> is decided on the basis of the various parties' constituency lists. "Within" constituency allocations are done on the basis of proportional representation.

The second <u>who</u> is decided on the basis of the parties' national lists. Seats are allocated to candidates on these lists to make up the total seats for each party to the number it has earned in terms of the percentage of votes cast for it on a national basis.

In terms of the Indaba's proposals, two-thirds of the seats are allocated on a constituency basis. The remaining one-third of the seats are allocated to the parties who are underrepresented (in terms of the national percentages) by the constituency allocations. For example (by extending the previous example):

Party	Percentage of votes	Seats entitlement	Seats allocated by constituency	Seats allocated from national lists
A	6	30	15	15
B	15	75	4O	35
C	7	35	32	3
D	44	220	165	55
E	20	100	64	36
F	3	15	3	12
G	1	5	0	5
H	4	20	14	6
	100	500	333	167

Thus the <u>overall</u> outcome is as fair to all parties as it is mathematically possible to be.

The above example applies to a 500-member first chamber. Despite the fact that it is constituency-based, it achieves almost mathematical perfection in allocating the seats on a proportional basis. It manages to achieve this because, for the purposes of determining the overall outcome of the election, it treats the whole country as a single constituency.

The same system of proportional representation can be used for determining the composition of a second chamber. The Indaba used it for its "intra-group" elections for its proposed background group-based second chamber. It could also be used for "intra-provincial" elections to a spacially based second chamber, if such a chamber were deemed to be desirable. However, it must always be borne in mind that proportional representative becomes ever less effective as the number of constituencies increases and results in smaller numbers of representatives being elected by each constituency. Unless, of course, the whole country was ultimately treated as a single constituency for determining the final electoral outcome. But this would defeat the

purpose of a second chamber. It would result in a mirroring of the first chamber election. In turn, the second chamber would become a poor carbon copy of the first and would be neither a check nor a balance.

BY-ELECTIONS

A significant oversight of the Indaba was its failure to deal with the question of by-elections caused by the death or resignation of one or more members of either chamber. Nor did it deal with the issue of members who changed parties subsequent to an election.

The former (the by-election question) can be dealt with in a number of ways. One solution is to hold a single-member election in the relevant constituency.

This is, of course, impractical in the event of a by-election caused by the death or resignation of a member elected in terms of a <u>national</u> list. In any event, a single-member election in a multi-member constituency runs counter to the basis of the whole system of proportional representation. In addition a number of such by-elections could, over time, upset the perhaps delicate balance between the parties in parliament.

The most obvious by-election solution seems to lie in the automatic election of the next nominee on the relevant constituency or national list (at the last national election) of the party the member represented. However, such an arrangement could be open to serious abuse. A better alternative would be to give the party the freedom to elect a new member of its choice. This has the advantage of allowing a party to introduce new blood rather than forcing it turn to the next bit of dead wood lying near the bottom of an increasingly outdated list. This also deals with the issue of what happens if the next person down the party's list has since resigned from the party or whose standing within the party is in dispute. It is also less of an invitation to abuse.

DEALING WITH DEFECTORS

The second problem (a member who decides to change his political affiliation or has, for some reason, been expelled by a party) is more problematic. It is clear that he was chosen by the party to represent it and that he was elected on this basis. This is even clearer than in the case of single-member constituencies in which a representative can claim (seldom with much justification) that he or she was elected on the basis of his/her own particular merits.

One solution is that such a member may be forced to resign from parliament (as is the case in Namibia). But this seems to place the "the person of conscience" at a serious disadvantage in relation to the (possibly) "immoral" majority holding sway within a party. Broadly speaking, there seems to be little alternative to this approach as it is unlikely that parties to a new constitution will be happy to allow unlimited freedom to members of parliament to change their affiliations as they please. This view is likely to have been strengthened by reactions to the House of Delegates "musical chairs" spectacle. In addition, proportional representation, by its

nature, can lead to fine balances in parliament that could be significantly affected by small numbers of defections.

The forced-resignation approach could be somewhat softened - for example by a time delay of, say, six months. Another, and possibly better, approach would be a regulation that a member could only be expelled from parliament by a two-thirds majority decision of the caucus to which he was elected.

ELECTORAL COMMISSION

The Indaba proposals referred to the need for an electoral commission. How this body was to be constituted was not spelled out, nor was the degree of independence it would have. Its main role was the allocation of seats to each multi-member constituency. Presumably it was also intended to play a role in supervising the actual elections (but such a role was not recorded). An additional role, in terms of the Indaba proposals, was to adjudicate disputes arising from votes cast in the proposed complicated second chamber elections.

Experience in other developing democracies points to the value of having a completely independent electoral commission with overall control of elections at all tiers of government. Such a commission's powers could include the drawing of constituency boundaries, allocating seats to constituencies, supervising the compilation of voters' rolls (if required), supervising all elections and the counting of votes, and dealing with any disputes arising from such elections.

The value of such a commission as an electoral neutral referee could be of considerable value, especially in the early years of democracy in South Africa, and there is no reason why such an institution could not become a permanent feature of political life. There is no good case to be made for the government of the day, and its appointed officials, managing the process whereby a new government is chosen.

It is essential that any electoral commission be fairly appointed and be fully independent (answerable, perhaps, to the supreme court or even a special constitutional court). Given such conditions - and an honourable performance on the part of the commission - participating political parties are likely to have faith in it. In turn, this could obviate allegations of electoral fraud including miscounting of votes, ballot-box "stuffing" and other electoral disputes so common in non-institutionalised democracies.

4.   ADDITIONAL ISSUES

THE ARBITERS

Constitutional mechanisms that give power to "arbiters" such as the supreme court, a constitutional court or an independent electoral commission raise important questions about the composition of such bodies, the terms of office of their members, and the manner in which they can be insulated against public and especially political

pressure.

In all instances it would seem to be important to lay down "must have" qualifications for candidates for appointment or election to such offices. Secondly, it is important that their term of office be fixed. i.e. not determined by political evaluations of their performance. Fixed "one only" terms of office allow far greater rein to conscience and limit the impact of pressure. In the United States, this is achieved by appointing members of the supreme court for life. But such an approach can result in such institutions becoming increasingly out of touch with a rapidly evolving society. Germany and France seem to offer a better example in their appointment of members of their supreme courts for single 9-10-year terms which are followed by automatic retirement.

Another vital question is: who appoints or elects the arbiters? It seems unwise to leave the appointment "in the gift" of powerful politicians as, for example, is the case in the United States, France and South Africa. One solution would be to allow each five-year parliament to elect ten members of such bodies to hold office for ten years. This could be done by the first or second chamber or a combination of both. Provided such elections were conducted using the single transferable vote system, such bodies would be widely representative of the political system as a whole. At the same time the ten-year term of office would leave such constitutional mechanisms less subject to the vagaries of temporary majorities. The requirement of "special majorities" within the decision-making processes of such bodies could promote consensus-seeking and restrain majoritarianism.

PUBLIC SERVICE COMMISSION

At a regional level, the Indaba assumed that the two administrations in the area - the Natal Provincial Administration and the KwaZulu government's administration - would be merged but made no definitive decisions about the composition of a regional public service commission.

The composition and terms of reference of such commissions at central, regional and local government levels will be of critical importance in the process of transforming administrations from racial to non-racial. Clearly the commissioners must be competent. Equally clearly, they must demonstrably reflect the composition of South Africa's total population. Will such commissions be directed to implement policies of affirmative action? The answer to such questions should probably be included in the overall "negotiated package" rather than be left to the government of the day.

AMENDMENTS AND REVIEW OF CONSTITUTION

The Indaba recognised that a constitution, however carefully constructed, may need to be updated or amended. It did so by proposing a pro-active constitutional review committee, such a committee to "be appointed by the legislature and charged with the task of reviewing the constitution and formulating recommendations to the legislature regarding revisions and improvements to the constitution".

In terms of the Indaba's proposals, a bill aimed at amending the constitution would have to be passed by a two-thirds majority in both chambers of the legislature. In this way the Indaba made amendments to the constitution possible but also sought to achieve a degree of entrenchment which protected the constitution against the whims of temporary majorities.

THE MEDIA

The Indaba did not deal with the role of the media in the political system neither with the fact that parties without access to the media would be at a serious disadvantage. Particularly in the case of television (but also in the case of other media) it seems essential that all parties be given equal access. This can be achieved in a number of ways, but the critical issue is that the system should be fair and should give all parties reasonable opportunities to promote their policies. Failure to make provision for such access (it could be enforced by an electoral commission) could threaten the political system through intense frustration and reaction on the part of "media-marginalised" parties.

REGISTER OF ASSETS

Corruption on the part of some senior politicians and civil servants is an inevitable consequence of the human condition. But steps can be taken to limit such corruption and make it easier to expose. One such step could be to lay down that all politicians and senior civil servants shall regularly record their assets in a register kept for the purpose.

POPULAR VOTE

Indabas, multi-party conferences and even constituent assemblies are all subject to the vagaries of political party self-interest and manipulation. It is of interest to note that the Indaba agreed that its constitutional proposals would "be submitted to the people of Natal for approval by way of popular vote".

5.   CONCLUSION

UNINTENDED CONSEQUENCES

"A beneficiary of the Law of Unintended Consequences" might be an apt way to describe the outcome of the Indaba exercise. The Indaba set out to design a new constitution for second-tier government in the combined Natal/KwaZulu region. Unintentionally it designed a constitution which has considerable relevance as a blueprint for a new national constitution.

Clearly the blueprint is flawed, in part because of the composition of the Indaba itself (it was not fully representative). In part it is flawed because the Indaba did not focus its attention on drawing up a constitution

of national relevance (some constitutional issues simply do not arise at second-tier level). In part it is flawed because of the political constraints operating at that time (1986). Finally, it is flawed because a debate about complex constitutional issues tends to focus on some issues at the expense of others. In the heat of debate and compromise some important issues may even be overlooked entirely.

Despite these flaws and omissions the Indaba constitution offers a useful point of departure for those involved in national negotiations. At very least the proposals offer some useful and innovative ideas that could profitably be included in a new national constitution. In addition, the flaws and omissions themselves may serve as a useful checklist of what not to do, what not to forget, and why.

In the final analysis, the Indaba's greatest contribution to future constitution-making may be that it succeeded in bringing the then virtually unknown system of proportional representation (in South Africa) to centre stage. Its exploration of the system's application in South Africa in context, and its potential contribution to power-sharing, should also prove valuable.

In addition, the Indaba's exploration of a uni-cameral system and its conclusion that a second chamber would be an essential component of effective power-sharing, minority participation and protection, and a "checked and balanced" system, may prove to be prophetic.

Finally, the highlighting of the opportunity to ensure power-sharing at all levels through the use of the single transferable vote system in intra-parliamentary elections may prove crucial in creating a new constitution in which the centrifugal forces of intense competition for political power are outweighed by the centripetal forces of power-sharing, mutual accommodation and compromise.

ADDITIONAL READING

Indaba - a leadership publication 1987 contains articles by David Welsh, Paul Maylam and John Wright, Graham Linscott and Arthur Konigkramer, Alan Paton, Peter Mansfield, George Sewpersadh, Dawid van Wyk, Bishop A H Zulu, Tony Ardington, Val Volker, Jack Niven, Chris Hattingh, Carl Mouton, Chris Saunders, Fred Clarke, Alec Erwin and Desmond Clarence.

New frontiers - the KwaZulu/Natal debates (*research editors Karin Roberts and Graham Howe*), An Indicator Issue Focus, October 1987, contains articles by Chris Saunders, Peter Mansfield, Karin Roberts, Gerhard Mare, Marinus Wiechers, Lawrence Boulle, Dawid van Wyk, Oscar Dhlomo, Johan Steenkamp, Mewa Ramgobin, Ken Hartshorne, George Trotter, Robert Cameron, Karl Magyar and Lawrence Schlemmer.

The Indaba Papers are housed in the Africana Killie Campbell Museum in Durban.