

IFP PROPOSED DRAFT

THEME COMMITTEE No. 2

STRUCTURES OF GOVERNMENT ON BLOCK 1: SEPARATION OF POWERS

SEPARATION OF POWERS (Form of Government):

DP

1. The Constitution must contain specific provisions in which the separate powers are allocated. Reference is made to Sections 37, 75, and 77(4) of the Constitution.
2. Judicial authority shall be separate. Reference is made to Section 96 of the interim constitution.
3. There should be number of mechanisms\structures that should be included in the Constitution to ensure 'accountability, responsibility and openness'.
4. The most important 'checks and balances' are to be found in the relationship between the President and his cabinet.

IFP

1. There shall be a pure parliamentary form of government.
2. Head of State and Head of Government shall be separate. Parliament shall sit for a five year term.
3. The President shall be elected by parliament in joint session for a seven year non renewable term and shall have the task to ensure the proper functioning of the constitutional and institutional machine.
4. The President shall appoint the head of government who shall form the cabinet in his/her discretion.
5. Cabinet shall be in a fiduciary relationship with Parliament which shall freely exercise its no-confidence vote without being dissolved.

ANC

1. There should be separation of powers both to limit and to co-ordinate the powers exercised by the executive, judicial and legislative branches.

The IFP made its submission under protest, for it argued that the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work progress so as to allow international mediation to take place.

2. Separation of powers should be designed to entrench accountability, independence and 'checks and balances'. choosing specific forms which are suitable to South Africa.
3. 'Checks and balances' shall restrain each branch of Government from seeking to centralize power to dominate the orders.
4. There shall be independent judiciary to be impartial and subject both to the constitution and the law. An independent constitutional court shall have the power to nullify" laws which are in conflict with the constitution.

5. The judiciary must be protected from political interferences and anyone should have access to independent courts of law and other tribunals.

NP

1. The current 'checks and balances' are to be improved upon.
2. The legislature of the national, provincial and local levels shall comprise of elected representatives who directly represent the voters. Such representatives shall lack independence from the respective executive authorities.
3. The electoral system is to be based on proportional representation which may include elements of geographical representation. Corporate self determination, is a method of furthering collective rights of self determination, should be considered.
4. Government at all levels must be transparent, accountable and responsive.
5. The complete independence of the judiciary as the interpreting authority and protector of the Constitution shall be ensured. In particular, the judiciary shall protect and enforce the Constitution and all fundamental rights.
6. The mechanisms and procedures for the appointment of judges must be credible and transparent.
7. The exercise of all state powers shall be controllable and within set limits.

FF

1. The traditional separation between legislative, executive and judicial powers is the main feature of the essential frame worker for orderly government and security, for prevents the concentration or monopoly of power.
2. This basic principle of democratic government will be decisive for the establishment of a volkstaat.

PAC

1. The PAC believes that if the objectives of efficiency and political freedom are to be served, complete separation of powers is neither feasible nor effectual in preventing malpractice. 'Checks and balances' are more effective than total separation: though too great a degree of direct control of one government organ over another would constitute interference and would stand in the way of efficient government, a measure of control and partial separation of powers is conducive to the basic principle of limited government.
2. Although the doctrine of separation of powers cannot, by itself, give adequate guarantees of protection against excess of power by any organ of government, it certainly has an important contribution to make if interpreted in a limited sense. The PAC proposes enforceable limitation of powers, the following being the minimum requirements:
 - 2.1 The legislature shall not administer laws.
 - 2.2 The legislature shall not function as a court of law except with regard to internal disciplinary action. legislative powers (except when such powers have
 - 2.3 The executive shall not exercise leg been delegated to it by the legislatures.
 - 2.4 Control by the legislature over the executive authority in the sense that the former has to vote funds for the latter.
 - 2.5 The executive shall not function as a court of law.
 - 2.6 The judiciary shall not exercise legislative powers.

2.7 The judiciary shall not perform executive functions.

ACDP

1. Separation of powers should secure a small central government a strong provincial and local government.
2. The one party state must be both an constitutional and impossible.
3. The constitution must be the supreme law of the land.
4. Church and state ought to separate.

HEAD OF STATE AND HEAD OF GOVERNMENT

IFP

1. In order to secure greater democracy and improve checks and balances, the office of the Head of State and that of the Head of Government should be separate.
2. The Head of State should ensure the preservation of the constitutional order and the proper functioning of the constitutional machinery while the Head of Government shall be in charge of the daily operation of Government.
3. Important functions related to the composition of other constitutional organs, such as the Constitutional Court and the defense forces 13 could be ascribed to the Head of State rather than to the Head of Government.
4. The Head of State shall own exercise functions with respect to the representation of the state in international relations, ceremonial functions, the political resolution of conflicts within the institutional machine, and clemency and granting of honors.

ANC

- I. The Head of State shall be the President. The President shall also be Head of Government.
2. The President shall appoint and supervise the functioning of cabinet.

12 The ACDP challenges the validity of section 71 (2) of the interim constitution with specific respect to the majority require with the adoption of a new constitutional text. Moreover the ACDP challenges the fact that the constitutional principles may not be modified by the constitutional assembly. Specific reference is made to the fact sexual orientation is specifically indicated as an illicit ground of discrimination.

The IFP has proposed that the Defense Force be under the control of a collegial civilian body headed by the Head of State, who is also the Commander-in-Chief of the Defense Forces.

3. The President shall consult with cabinet when taking important decisions.
4. There shall be an Executive President who will be accountable to the President and to Parliament.

NP

1. The matter of appointment, the functions and the functioning. of the Head of State, the Head of Government and the cabinet, including its composition should best serve the national interest.

FF

1. The Head of State shall be the President and section 75 and 76 of interim constitution should be maintained. However because of the workload involved the separation of the offices of the Head of State and the Head of Government should seriously be considered.

EXECUTIVE AND PARLIAMENTARY FORM OF GOVERNMENT

DP

1. The present system set out in Section 93 of the interim constitution is to be preserved.

IFP

1. South Africa should have a pure parliamentary system in which cabinet is collegially responsible to parliament, with which cabinet is to entertain a fiduciary relation.
2. Parliament's vote of no-confidence should not be impaired. Parliament shall freely exercise its no-confidence vote without being dissolved .
3. After consultation with the leaders of the political parties the Head of Government (Prime Minister) shall be appointed by the Head of State (President). ,
4. The Head of Government shall form the Cabinet and submit it for ratification by means of a vote of confidence of both Houses of in joint session.

ANC

1. The Executive shall govern the country and shall be accountable to Parliament.
2. The separation of powers between different levels of government should be provided for in a manner that ensures the accountability of the executive to parliament and shall not undermine the principle of majority rule.
3. The executive shall be accountable to the legislature

NP

1. All executives should be responsible to the relative legislatures. In this regard the advisability to define the rights of the legislature viz-a-viz the executive in the Constitution should be explored. lie same applies to Parliament's control over the administration of laws by the executive.
2. Provision must be made for Cabinet members to also be appointed from outside the ranks of parliament, and on the grounds of expertise.

PAC

- I. Members of the executive shall have seats in any legislative body.
2. Members of the executive shall not appoint any member to any legislative authority.
3. The executive shall have no powers with regard to the holding or not holding of elections, which matter shall be regulated exclusively by the constitution.
4. The executive shall have no power to convene or to terminate assemblies of the legislature arbitrarily, since this should be regulated either by the constitution or by the legislature itself.
5. The executive shall have no powers to determine or to change the salaries, pensions, conditions of conditions of members of legislative assemblies, such powers to be laid down solely in the constitution legislature to enable voters to exercise control thereof in elections.
6. The legislature shall control the country's budget, and the executive shall account for the funds app any secrecy.
7. No legislature may delegate legislative powers to the executive without retaining control. Such con least direct parliamentary control over delegated legislation, for example by a parliamentary public pi and in any case the powers of review of the courts should be retained as they exist at present.
8. The executive shall execute valid legislation.

MONO-CAMERALISM OR BI-CAMERALISM

DT

1. There shall be a bicameral system and the Senate shall represent the Provinces.
2. The Senate shall have as much legislative power as the National Assembly.

ANC

- I. The political parties will have to discuss the question of bicameralism, including the definition of the composition, powers and function of each chamber.

NP

- I. The legislature shall comprise the National Assembly and the Senate.
2. The number of members of the national assembly should be decreased.

FF

- 1 Parliament shall consist of the National Assembly and the Senate. The National Assembly shall represent all voters on an individual basis. The electoral system could be based on constituency, or PR or both.

RECONCILIATION OF DIFFERENT TEXTS Adopted BY THE TWO HOUSES

1. Differences between the texts adopted by the two Houses should be reconciled by a Joint Standing Committee of the Houses in which the Senate and the National Assembly have an equal number of representatives.
2. The text so reconciled shall be approved by both Houses separately.
3. If one of the Houses does not approve it, the legislation is not enacted.

THE SENATE

1. The Senate should not have less legislative authority than the one given to the National Assembly.
2. Senate should represent the provinces and its members should derive directly from the provinces by direct appointment or through indirect elections.
3. Each province shall be equally represented in the Senate.
4. Legislation affecting the powers, functions and boundaries of Provinces may only be introduced in the Senate. Legislation affecting one or more specific Provinces must be approved by the senators of the Province(s) concerned.

NP

- 1 The Senate should represent the provinces at a national level and its members shall be directly elected and empowered to act authoritatively on behalf of the provinces, jointly and separately.

FF

1. The Senate must reflect the true soul and character of the peoples of South Africa. It is this House that shall distinguish South Africa from any other democracy in the world. The Senate should therefore have the following Functions:
 - 1.1 The protection of provincial interests. It should also ensure that centralist monopolistic behavior and bureaucratic red tape do not frustrate the efficient functioning of provincial and local government.
 - 1.2 Nation building and the protection and development of the different languages and cultures of South Africa.
 - 1.3 The protection of minorities and minority rights within the framework of the constitution.

- 1.4 To seek consensus through dialogue without violating the democratic process.
- 1.5 The protection of the Constitution. Thus the Senate must have the power to:
 - a. Review, revise or even veto legislation related to the functions of the Senate. There should however be a deadlock breaking mechanism.
 - b. To initiate judicial review of legislation.
- 1.6 To seek consensus through dialogue without violating the democratic process.

COMPOSITION AND APPOINTMENT/ IFP

ELECTION OF THE SENATE

- I. Senators should be elected for a five year TERM by the Provincial legislatures in consultation with the provincial Cabinet.
- 2. The Premiers of the Provinces shall have the privilege of the floor for themselves and/or for their ministers or designees.

FF

- I. The Senate should, without increasing the number of Senators, be elected as follows:
 - 1.1 Equal representation from the provinces. (60 % of its members).
 - 1.2 The true pluralistic nature of South African society must be represented. Thus the Traditional Leaders and any community seeking self-determination should each elect a fixed number of representatives to the Senate.
 - 1.3 The larger and nationally organised corporate entities in South African society, which in their constitutions honors the constitutional demands and criteria, should also elect a fixed number of representatives. Examples of such institutions are:
 - a. Organised labor,
 - b. Organised business,
 - c. Organised agriculture.

ROLE OF SENATE in RESPECT TO SOME EXECUTIVE FUNCTIONS

IFP

- 1. The Senate should have a special role in monitoring the function of the Executive of government v activities which are outside the competence of the Provinces such as defense and armed forces".

COMPOSITION OF CABINET

IFP

- 1. Members of Cabinet shall be appointed by the Head of Government and shall serve at his or her pleasure of Parliament to vote its no confidence with respect to Cabinet in its entirety.

POWER SHARING OR ROLE OF MINORITIES IN CABINET

IFP

IN CABINET

- 1. The IFP does not believe in constitutionally mandated power-sharing arrangements.

2. The IFP believes that the protection of minorities should be provided for by means of a federal system very effective protection of minorities in Parliament".

ANC

1. Separation of powers .. shall not undermine the principle of majority rule.

NP

- 1 The role of opposition parties should encompass meaningful consultation and participation in decision making in the legislature.

RELATION BETWEEN HEAD OF GOVERNMENT AND MINISTERS - COLLECTIVE OR PERSONAL RESPONSIBILITY OF CABINET MEMBERS

DP

1. A Minister shall be accountable individually both to the President and to Parliament. Reference is made to the interim constitution.

IFP

1. The Ministers shall be chosen by the Head of Government and shall serve at his/her pleasure and substitution shall be ratified by a resolution of at least one House of Parliament.
2. Cabinet shall be collegially responsible to Parliament.
3. Each Minister shall be responsible to Cabinet for his/her Department, provided that

For instance, the Senate could be charged with the special task to authorise the execution by the Executive of treaties or the employment of armed forces outside the country or even within the country for civil purposes.

11. As a part of the second Report of this Theme Counting, the IFP will address the issue of protection of minorities in Parliament.

Parliament may ask any Minister to provide information or to tender Committee resignation to Parliament.

CONSTITUTIONAL COURT

IFP

1. A portion of the justices of the Constitutional Court shall be appointed by the Provinces from their own judicial systems and legal fraternities.

TRADITIONAL LEADERS AND THEIR STRUCTURES

IFP

1. The separation of powers of government should be cross-referenced with the recognition of the role of traditional leaders and the preservation of traditional communities.
2. In fact, traditional communities are autonomous societies, organised by traditional and customary law and administered by traditional leaders. Within a traditional community, legislative and executive and judicial functions are exercised in terms of indigenous and customary law, which also determines the degree and the modalities of the separation of these powers. Among the most significant aspects which regard the exercise of these powers is the institution of communal property.
3. Given its speciality, this matter will be treated in the third Report of this Theme Committee as per the approved schedule.

MISCELLANEOUS

DP

- 1 . Section 185 and 186 of the interim constitution related to National Revenue Fund and Annual Budget shall be preserved.

PAC

- 1 . An Independent Judiciary is imperative.
2. The judiciary should be independent in the following respects:
 - 2.1 Judicial officers shall not be elected, appointed or dismissed by the legislature or the executive.
 - 2.2 The term of office of judicial officers shall not be laid down by the legislature or the executive, but the term of office and reasons for dismissal shall be laid down in the constitution.
 - 2.3 The salaries and pensions of judicial officers shall not be controlled by the legislature and the executive, save as is provided in the constitution.
3. An entrenched, justiciable bill of human rights is fundamental to the principle of the separation of powers, checks and balances, and the limitation of powers.
4. Judicial review of administrative and executive acts is likewise fundamental; like a bill of human rights, this should be entrenched.
5. Formal, judicial acts should be supplemented by a strong public protector institution.
6. It shall be compulsory for the executive to carry out court orders, which shall mean inter alia that legislation and executive acts which have been declared unconstitutional or ultra vires by the courts shall not be administered or carried out.
7. It is self-evident that sanctioning is a function of a court of law. and pre-pre-eminently a constitutional court.
8. It follows therefore that any citizen should be given the locus to institute an action to enforce the above-mentioned principles which must be embodied in the constitution.