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THE SENATE  
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 discrete 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. Resolution of these concerns lies in adopting a system of governance that provides for effective and responsible 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 force. 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 province 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. It is 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' 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

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 I 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.  
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- 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

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2 The ANC requests an opportunity at a later stage to make submission to Theme Committee 2 on these matters.

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- The manner 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 matters (4)

9.1 There should be democratically elected provincial legislatures, which should have the necessary executive and legislative powers. From each of these legislatures delegates(5) 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 'Re 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)

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- 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 fine functions are involved which must be allowed to develop gradually.
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## 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 provinces and, possibly, representatives of local 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

11.6 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.<sup>10</sup>

## 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 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)

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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 pre way in which the blocking power is to be exercised, shall be a matter of further discussion and proposals. Deadlocks may need to be revolved 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 province account of their administrative experience.

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

12 Constitutional Principle XXIII

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12.2 Exclusivity of executive functions for provinces should primarily exist 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.