

NATIONAL PARTY

25 October 1995

SUBMISSION ON THE SENATE AND COMPETENCIES OF PROVINCES

1. Purpose of Senate

It is the opinion of the National Party that the new constitutional text should provide for a **second chamber of Parliament**, called the Senate.

* **The main purpose of a second chamber is to represent particular interests in society not adequately represented in the popularly elected house.** A second chamber to represent the constitutionally entrenched, but still fledgling, South African provinces in decision-making at national level is strongly called for, both for symbolic reasons and for the real influence it can exercise in the governing process. This is particularly important in view of the powers of the national Parliament to legislate on matters affecting the provinces, for example in the case of provincial finances and in those cases where national legislation overrides provincial legislation.

* A second chamber can, by providing a **second opportunity to consider legislation**, enhance the quality of Parliamentary decision-making and serve as an effective control mechanism in a democratic society. In this regard, a second chamber is often referred to as a house of revision, that promotes through consideration of matters before Parliament, strengthens control over the executive and alleviates Parliament's workload in the process. A second chamber can serve a purpose in this regard in South Africa. It should be considered to include in the Constitution an **express reference** to the purpose for which a second chamber is established.

2. Composition

2.1 The Senate should be composed of an **equal number of members** from each province. By this arrangement, the equal status formally enjoyed by the provinces is recognized and the purpose of the Senate to represent the provinces at national level is confirmed. The present number of **ten Senators per province** should be retained. The

size of the country and of the population warrant a second chamber of at least the present size. A reduction in the number of Senators would impede the ability of the Senate to function affectively and, in any case, make it even more difficult for smaller parties to obtain seats in the Senate.

2.2 If it is accepted that the main purpose of the Senate is to represent the provinces in national decision-making, Senators should be elected in a way that serves and promotes that purpose. In this regard, the present method of nomination by the political parties holding seats in the various provincial legislatures has been criticised for not providing enough linkage between a province and its Senators. Accordingly, it is proposed that Senators be elected **indirectly by the respective provincial legislatures on a proportional basis**. This will establish a formal constitutional link, largely absent at present, between Senators and their respective provinces. This also allows for a direct link between the provincial representatives and the province itself as well as the provincial legislature.

In addition, the present proportional formula according to which the parties nominate Senators should be reconsidered as it tends to favour the bigger to the disadvantage of the smaller parties. Normally, in composing a Parliamentary committee, for example, the smaller parties are being favoured to some extent. The present formula should be adapted accordingly and applied in such a way that when the provincial legislatures elect their Senators, all but the very small parties represented in such a legislature will be able to nominate at least one Senator.

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

3. Powers

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

* As second chamber of the national Parliament, the Senate, like the National Assembly, shall **consider all bills** introduced in Parliament.

* With regard to disagreements on **ordinary bills**, the present arrangement in terms of which a joint committee is established to submit proposals to a joint sitting where the bill must be adopted by a majority of all members of Parliament (section 59 of the transitional constitution), is unsatisfactory. The purpose of a joint committee always is to submit proposals that will be acceptable to both houses sitting separately (*cf* the conference committees of the United States Congress and the Mediation Committee of the German Parliament). Our joint committee should fulfil the same function, namely to submit proposals to the Houses sitting *separately* and only if agreement is still not reached, should a joint sitting be held.

* Section 61 of the transitional constitution provides that bills affecting the **boundaries or powers and functions of the provinces**, must be adopted by both Houses sitting separately. Furthermore, such a bill, if it affects a particular province or provinces only, must also be approved by a majority of the Senators from that province or provinces. In the absence of agreement between the Houses, no law is made. For the effective representation of the provinces in matters affecting them, this arrangement should be retained.

* The present section 60 in terms of which the Senate can only delay and not veto **money bills**, emphasises the Senate's subordinate position with regard to this crucial category of bills. Actually, there is no convincing reason why the same arrangement as in the case of ordinary bills should not apply here. In other words, if the Senate and the National Assembly disagrees on a money bill, a joint committee (e.g. the joint standing finance committee) could be asked to submit proposals to the Houses sitting separately, and if agreement is still not reached, the bill is disposed of at a joint sitting. The NP proposes accordingly.

* **Other financial bills affecting the provinces** should be dealt with as provided in section 155-157 of the transitional constitution. Such bills should be adopted by both Houses sitting separately and in the case of disagreement, the normal provisions for resolving disputes (section 59) shall not apply. This means that no law is made if the Houses cannot agree.

* The provision for **constitutional amendments** (section 62) should also be retained. In other word, amendments should be adopted by a two-thirds majority at a joint sitting, but (i) amendments affecting the legislative and executive powers of the provinces must be adopted by a two-thirds majority in both Houses sitting separately, and (ii) amendments affecting a particular province or provinces should only be adopted with the consent of the affected province or provinces.

* It could further emphasise the function of the Senate as the representative of the provinces, if it is required that **any bill directly affecting the provinces or a particular province shall be introduced in the Senate first**. For such bills, Senate committees could be required to hold public hearings where the provinces could state their views.

* The Senate's role as the legislative body that has the "advise and consent" function, *ie to assent to, or make recommendations for, certain top executive and judicial appointments, should be extended*. The Senate is already involved in nominations for justices, the Public Protector, and the Auditor-General and the establishment of a Pan African Language Board. In addition, the Senate should also be involved in the appointment of constitutional bodies such as the *Human Rights Commission*, the *Commission on Gender Equality*, the *Commission on Provincial Government*, the *Financial and Fiscal Commission*, the *Public Service Commission* and the *Independent Electoral Commission*. The Senate should also have the function to assent to appointments to bodies such as the *Land Claims Court*.

* The Senate should be **represented in the Commission on Provincial Government and the Financial and Fiscal Commission**.

* The Senate's role as **watchdog** over the constitutionality of bills (section 98(9)) should be confirmed.

4. Competencies of provinces

The distribution of powers between levels of government entails some of the most crucial issues to be resolved in the constitution-making process. Not only the status, powers and functions of both the provinces and the national government are involved; the relationship between these levels of government and, eventually, the form of the

future South African state itself, is at stake. For this reason, the National Party wishes to make a responsible, fair and constructive contribution to the deliberations on this aspect of the constitution in the best interests of the whole country and all its regions and people.

The Constitutional Principles call for extensive arrangements covering in detail all aspects of the relationship between the different levels of government, but they also presuppose a strong, viable and entrenched provincial system as an integral part of a strong and democratic dispensation. (*Constitutional Principles XVIII, XIX, XX, XXI, XXII and XXIII*). It is accordingly necessary to protect and strengthen the autonomy and position of the provinces. Due to the complex and dynamic nature of modern government and of the relationships between different levels of government, the formal distribution of powers often do not fully and accurately reflect the true relationship between those levels and that we should allow for continuous growth and development in this respect. For the same reason, we should not focus too narrowly on a particular theoretical model, but should work towards the development of a system unique to our own circumstances and needs.

The NP accordingly submits the following proposals:

* We believe in strong and viable provincial government for South Africa based on federal principles and our proposals are directed at protecting and strengthening the position and autonomy of the provinces.

* In South African circumstances, the powers of the provinces should be listed as at present in a Schedule to the constitution and residual powers should vest in the national government. In addition, the following should be provided for:

- In terms of the criteria for the allocation of functions to the provinces set out in *Constitutional Principle XXI*, we propose that **Agency and Delegated Functions, Forestry, Land Affairs, Publication control, Public Works and Water Affairs be added to the present list**. However, we believe that a proper allocation can be accomplished only if all relevant information is available. We propose, therefore, that accurate information should be obtained from the state administration on the progress made with the implementation of the present list of provincial functions before a list of provincial functions is finalised.

- Due to the complexities of modern government, a strict separation between the levels of government is impossible and undesirable. Therefore, we propose that Parliament should have **concurrent powers** with the provinces over its list of functions.
- Provincial laws in respect of these matters should, however, prevail over national laws except insofar as national laws comply with certain prescribed criteria. These **overrides** should be restricted *inter alia* by narrower definition, the principle of subsidiarity and the Constitutional Principle that the national level may not encroach on the geographical, functional and institutional integrity of the provinces. A provision in this regard could read as follows:

"(1) A law passed by a provincial legislature in terms of this Constitution shall prevail over and Act of Parliament which deals with a matter allocated to the provinces, except insofar as -

- (a) the Act of Parliament deals with a matter than cannot be regulated effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards for the management or administration of that matter that apply generally throughout the Republic;
- (c) the Act of Parliament is necessary to et minimum standards not provided by provincial legislation for the rendering of public services;
- (d) the Act of Parliament is necessary for the maintenance of national economic boundaries, the promotion of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
- (e) the provincial law materially prejudices the economic, health or security interests of another province or republic.

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic.

(3) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and openly to the extent that, they are, expressly or by necessary implication, inconsistent with each other.

(4) An Act of Parliament and a provincial law shall prevail over a provincial law only if a dispute in this regard cannot be resolved by the Constitutional Court on a construction of the Constitution.

(5) In exercising its powers in terms of this or any other section of the Constitution, Parliament shall not encroach or cause, enable or allow any encroachment on the geographical, functional or institutional integrity of any province.

(6) This section shall be construed in terms of the principle that a power shall be allocated to the level of government at which it can be exercised most effectively."

* The principle of **subsidiarity** in terms of which functions should be allocated to the lowest level of government where it can be exercised and performed effectively, should apply to the allocation of functions and the application of the overrides - see subclause (6) of the above draft clause.

* A *second list of matters* should be identified over which Parliament may only adopt **framework legislation**, containing mere general principles and/or guidelines, norms and standards, in order to allow the provinces to make detail legislation on those matters not subject to any other overriding powers of the national level. The national government should not be able to prescribe detail on these matters on the grounds, for instance, of effectiveness, maintenance of economic unity, promotion of interprovincial commerce, etc. This will allow the provinces the opportunity to provide detail peculiar to their different circumstances and needs, thus giving expression to provincial diversity, without sacrificing national control over norms, standards, etc. We believe there are a number of matters even now in the list of provincial functions, as well as other matters presently under exclusive national jurisdiction, which the national government need not deal with in detail. Those matters may, therefore, extend to both the residual and concurrent powers. Moreover, some matters in the existing list of provincial functions do not readily present themselves as matters over which national legislation will ever be required for the sake of, for example, the maintenance of economic unity, the protection of the common market, the security of the country or the implementation of national economic policies. They may, however, require uniform norms, and standards. Such matters should then rather form part of a separate list **not subject to the whole range of "overrides"**. We further propose that in order not to impede or even prevent the freedom of the provinces to act, they should be able to proceed in respect of these matters in the absence of national framework legislation. Of course, as soon as such framework legislation is promulgated, their own arrangements will be subject to the principles or guidelines enunciated in such framework legislation. A further submission on matters to be included in such a list again depends on expert advice, *inter alia* from the state administration, on which matters qualify for such a list. The following draft provision on framework legislation is submitted for consideration:

"(1) Subject to subsection (2), a provincial legislature shall be competent to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule Y.

(2) The national Parliament shall be competent to enact only framework

legislation which sets out principles and/or guidelines, and which shall be generally applicable in all the provinces, with regard to the matters which fall within the functional areas specified in Schedule Y."

* Regional differences are part of the South African reality and the principle of **asymmetry** in terms of which differences may exist among the provinces in respect of their structures, powers and functions, should be allowed to develop. Asymmetry can be promoted as follow:

- Provinces must be able to adopt their own constitutions.
- Provinces must be able to take up functions according to their different needs and capabilities. In this regard, the transfer of functions to the provinces should be the responsibility of an independent body and not the executive.
- Provision should be made for the performance of functions on an agency or delegated basis in order to allow provinces to request other governments to perform particular functions on their behalf.
- Asymmetry will finally be furthered by the concept of framework legislation which will enable provinces to make detailed legislation on those matters peculiar to their own circumstances and needs.

5. Intergovernmental Relations

In any modern state in which powers and functions are distributed constitutionally among different levels of government, formal and informal structures, mechanisms and procedures regarding intergovernmental relations are imperative. Various *Constitutional Principles* also envisage extensive provision in this regard. However, the objective of mechanisms for intergovernmental relations should never be to subject the provinces to national control, supervision or domination. Unless the different levels of government always liaise and co-operate on the basis of equality, and respect each other's constitutional status and domain, the *practice* of intergovernmental relations will be in conflict with the constitutional entrenchment of different levels of government and their status and powers, and the *idea* of constructive intergovernmental relations will be lost. This basic point of departure should be followed throughout.

The transitional constitution make limited provision for intergovernmental relations. Various *informal* mechanisms for intergovernmental relations have nevertheless been established. Accordingly, it is proposed, *firstly*, that the necessity for structures, mechanisms and procedures for intergovernmental relations which, at the same time,

respect the constitutional status and domain of each level of government, be **acknowledged in the constitution**. The constitution should only lay down the principle that intergovernmental relations must be provided for in parliamentary legislation and should not provide all detail itself.

Secondly, consideration should be given to the inclusion in such legislation of the structures and mechanisms such as those already established informally, such as

- * the **Intergovernmental Forum**, jointly chaired by the Ministers of Provincial Affairs and Constitutional Development and of Public Service and Administration, and attended by the Premiers of all nine provinces
- * the **Technical Committee on the Intergovernmental Forum**, which is responsible for its preparatory work
- * **Ministerial Forums** established *ad hoc* on a line-function basis between ministers at national level and members of provincial executive councils
- * **Technical Committees** consisting of officials which assist the Ministerial Forums
- * a **Senate Secretariat** which promotes communication between the Senate and the provinces.

The following additional mechanisms could be considered:

- * A single structure for the co-ordination of intergovernmental relations, called the **Advisory Committee on Intergovernmental Relations**, and consisting of representatives of the national government, the provinces and other bodies concerned, such as the Commission on Provincial Government, could be established.
- * Provision should be made for the representation of the **Senate** on certain bodies such as the Financial and Fiscal Commission and the Commission on Provincial Government.
- * Senate liaison with the provinces, *inter alia* through the **Senate Secretariat**, should be extended.
- * Express scope for further formal and informal developments could be built into the legislation. The legislation should, in other words, provide for a compulsory minimum of mechanisms, with room for additional optional structures and procedures.

6. Finances

The National Party proposes that a **revenue-sharing model** be followed to empower provinces financially. The National Party accordingly proposes that direct personal and corporate taxes, VAT or other sales tax, fuel levies, customs and excise, estate duties should be collected **nationally** and deposited in the National Revenue Fund for revenue sharing purposes.

The servicing of national debt should have first claim on these incomes. The balance should then be shared between the national government and the provinces on the basis of formulae recommended by the Financial and Fiscal Commission (section 155(4)), but subject to the condition that the fiscal competencies of and taxes raised but the provinces, in view of the limited extent of the sources of revenue in this regard, shall not be taken into account to determine the share of each province. It should also not be possible for the national government to use these financial relations as a political weapon and to withhold a province's share for any other reason than financial maladministration. A provision to this effect should be included in the constitution.

Provinces (see *Constitutional Principle XXV*) should have **exclusive** competence over stamp duties, transfer duties, vehicle licences, toll taxes and taxes, levies and duties imposed on casino's gambling, wagering, betting and lottery tickets. It should be possible to add to the list on the recommendation of the Financial and Fiscal Commission. Provinces should also be able to impose user charges and should be competent to impose levies on taxes raised nationally (section 156(1)).