

# Constitutional structures

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**Fundamental differences between  
the proposals of the  
South African government and the  
African National Congress**

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## Constitutional structures

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When we talk of constitutional structures such as “unicameral” or “bicameral” parliaments and “presidential” or “parliamentary” executives, we must be careful to pay more attention to the substance of the particular structures that are under discussion than to the words used to describe them. Unfortunately press reports of proposals put forward by participants in the political process frequently have regard to form rather than substance, with the result that incorrect conclusions are drawn and suggestions are sometimes made that the parties are close to agreement, when in truth they are really very far apart. Terminology can also be the basis of confusion amongst political supporters and can lead to the belief that a particular system is good or bad, or that policies that have been agreed upon are no longer being pursued because of the words used by the press to describe them. It is of the utmost importance, therefore, that we should pay attention to substance rather than terminology and that we should be willing to examine proposals on their merits, and not tie ourselves to particular words or slogans. If we do not do so we may lose opportunities of reaching important agreements, either now at Codesa, or later at the constituent assembly.

The difference between words and substance is of particular importance in the debate concerning the structure and powers of parliament and the executive. This is well illustrated by contrasting the proposals made in this regard on the one hand by the National Party and on the other hand by the ANC Constitutional Committee. Both the National Party and the ANC constitutional committee propose a bicameral legislature and a presidential system. The terms are the same, but if one looks at the substance, the two proposals are poles apart.

## National Party proposals

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### National Assembly

The bicameral system proposed by the National Party consists of National Assembly and a Senate. The National Assembly is to be elected by proportional representation. There can be no objection to this. It is the system of election favoured by the ANC. It results in an allocation of seats in proportion to the votes received by each of the parties that participates in the election. If you get 60% of the votes you get 60% of the seats. That is fair. The problem in the National Party's proposals lies not in the Assembly, but in the Senate. They propose that the Senate should be elected on the basis of regional representation. In itself, that is not objectionable. What is objectionable, however, is the method of election that is proposed. The system of proportional representation favoured for the National Assembly is abandoned. In its place is a system which provides that in each region all parties that get more than a minimum percentage of the regional vote will be allocated the same number of seats. As far as I am aware there is no comparable system anywhere else in the world. The National Party does not state what minimum percentage it has in mind, but whatever it may be, it will put all parties who pass the cut-off point on an equal basis irrespective of the votes that they actually receive. Say the cut-off point is 10% and the voting in a particular region produces the following results: ANC 60%; National Party 20%; Inkatha 10%. The National Party and Inkatha who together have a combined total of only 30% of the total regional vote, would finish up having a combined representation double that of the ANC, which gained 60% of the regional vote. In other words, the National Party proposes a bicameral system designed to enable two minority parties together to outvote the majority party.

But that is not all. The National Party's proposal also requires special types of legislation to be passed with weighted majorities in the senate. They do not say exactly what the special types of legisla-

tion will be, but indicate they have in mind legislation relating to the interests of so-called minorities, the interests of regions, and “entrenched provisions” of the constitution. Taken together, these provisions create a senate which could appropriately be called a “house of veto”. The primary purpose of the Senate under the National Party’s proposal is to empower minority parties to veto legislation which is passed through the Assembly. In other words, a democratically-elected Assembly which accurately reflects the support of each political party, is disempowered by an undemocratically-constituted Senate. It is this purpose that characterises the bicameral system proposed by the National Party. And it is the purpose, and not bicameralism as such, that makes the system unacceptable.

### **Executive government and multi-party presidency**

A similar theme is apparent in the National Party’s proposals for executive government. Executive power is vested in what is called a “presidency”. The presidency is not, however, the presidency of the person or party commanding the most support. It is a multiple presidency consisting of the leaders of the three largest parties, or up to five, if the three largest parties do not command 50% of the votes. The presidency functions under a rotating chairpersonship and is required to take its decisions by consensus. It is stipulated that the cabinet will be a multi-party body, appointed by the presidency – also by consensus – with the responsibility of carrying out the policy of the presidency. In effect the multiple presidency and the multiparty cabinet, linked to the consensus requirement, will lead to a situation in which executive decisions can be blocked by the veto of the second or third largest party (or second, third, fourth or fifth largest party if five are to be included in the presidency). Once again the impact of such a provision can be illustrated by an example. Assume that at the first election the three top parties are the ANC with 60% of the vote, the National Party with 20% of the vote and the Conservative Party with 5% of the vote. Under the National Party’s proposals the

National Party and the Conservative Party could block policies of the ANC, notwithstanding the fact that the ANC commands 60% of the vote. But the proposal goes even further than that. Assuming that the ANC and the National Party together command 90% of the vote, and the Conservative Party is the third party and commands 5% of the vote. That 5% would be sufficient to block a policy which the two bigger parties representing 90% of the voters have agreed upon. And if the third party has been elected on the basis of a mandate to preserve white privilege as far as possible, the veto power could be used to frustrate policies of the ANC designed to reconstruct society and eliminate the legacy of apartheid.

So much for the bicameral and presidential system offered by the National Party. Let us now contrast the substance of the proposals of the National Party with those of the ANC constitutional committee.

## **ANC proposals**

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### **National Assembly**

The ANC constitutional committee also proposes a bicameral parliament consisting of a National Assembly and a Senate. There seems to be no difference between the National Assembly which it has in mind, and the National Assembly offered by the National Party. Each model envisions that the National Assembly will be elected on the basis of proportional representation by universal suffrage in which all persons will have an equal vote. The difference lies in the composition and functions of the Senate. The constitutional committee recognises the importance of regional representation in the Senate, but envisions a more conventional system of election based on proportional representation rather than the artificial system of equalising majorities and minorities that is put forward by the National Party. Furthermore, the function of the Senate under the constitutional committee's model is essentially different to the function

of the Senate under the National Party's model. The Senate of the constitutional committee is not a "house of veto". Instead, it is constituted as a house of review, with specific powers to maintain and uphold the constitution, and to review legislation which has passed through the assembly. It can delay legislation, by referring a bill back to the Assembly for reconsideration, but it cannot prevent legislation from being enacted for its approval and is not ultimately required for the passage of legislation. According to the constitutional committee's model the Senate cannot delay legislation indefinitely. When it reconsiders a bill referred back to it by the Senate, the Assembly is empowered to pass the legislation finally without any obligation on its part to send the bill back to the Senate again. This is a system with precedent elsewhere in the world, and is for instance in line with the powers given to the second house in countries such as England, Canada and Namibia.

Important governmental functions can be vested in the Senate which has the status of a house of parliament and whose deliberations and decisions will command respect. The constitutional committee feels that one of the special responsibilities which should be vested in the Senate would be for it to act as guardian of the constitution. This would involve not only scrutinising legislation to ensure that it meets the requirements of the constitution, and referring matters upon which doubt exists to the constitutional court for its consideration, but also through its deliberations and committees to investigate practices which may be unconstitutional. Generally, it will be able to act as a watchdog and expose corrupt or unconstitutional action. Other functions can be vested in it, such as special responsibility for regional and local government, and special responsibility for monitoring affirmative action policies and other steps taken to ensure the dismantling of apartheid. These are all important functions and give a significant role to the Senate.

## The presidency

The presidency in the constitutional committee's model is also different to the presidency proposed by the National Party. The constitutional committee's proposals make provision for one president who will be elected to office. She/he will hold office for five years and will be entitled to serve as president for a maximum of two terms. The president will be subject to impeachment by a resolution passed for good cause by a two-thirds majority of the National Assembly. The president appoints the cabinet, and the president and the cabinet have responsibility for the executive functions of the state. Under this system the president will be able to formulate executive policy and secure its implementation within the framework of the checks and balances provided by the constitution. The president would not, for instance, be able to act contrary to the provisions of a bill of rights or to claim powers which are not vested in the office of the president by the constitution. In other words the president will not be an autocratic figure who is beyond the law. She/he can hold office for a maximum of ten years and at all times will be subject to the terms of the constitution, to impeachment for misconduct, and to the checks and balances which the constitution imposes.

The difference between the two models, each providing for a bicameral system, is apparent. It is a distinction between legitimate majority rule on the one hand, and imposed consensus government on the other. Under the model proposed by the constitutional committee, a majority party elected on the basis of a mandate to reconstruct society and eliminate apartheid, will be empowered to carry out that policy. It will not, however, have arbitrary powers. Freedoms entrenched in the bill of rights will have to be respected. The government will also be answerable to the electorate and for that reason provision is made for regular elections. Any government which does not meet the needs of the people can be replaced at the next election. It is a form of government entirely consistent with democracy, and with the constitutions of multi-party democracies



elsewhere in the world. The same cannot be said for the National Party's model.

## Bicameral or unicameral

Having looked at these two models let me go back to consider what may be the advantages or disadvantages of having a bicameral parliamentary system rather than a unicameral system and a presidential executive system rather than a parliamentary executive system.

In opting for a bicameral parliamentary system the constitutional committee of the ANC was influenced largely by three factors:

1. A house of review has an important role to play in the making of legislation. It provides an opportunity for further debate upon contentious issues and generally for the identification of inconsistencies or ambiguities in the draft legislation. The legislation which ultimately emerges after the further debate and scrutiny of the text by a house of review is likely to be better than would be the case if there were no opportunity for review.
2. A bicameral parliamentary system creates opportunities for greater participation in the political process than a unicameral system would do. In particular, it creates opportunity for representatives of regional interests to be brought into the parliamentary process. In the conditions presently existing in South Africa this may be of particular importance.
3. Such a system can perform special functions such as those that have already been referred to. These are likely to be of particular importance during the period of reconstruction when the primary task of a new government will be to dismantle apartheid in substance as well as in form.

There are a number of questions which arise in regard to the details of the bicameral model proposed by the constitutional committee. Some of the details are as follows:

1. Should the terms of office of the members of the national assembly coincide with the terms of office of the members of the senate? In other words, should they be elected at the same time and for the same period? Or would it be preferable to have the elections at different times, so that the terms of office of the members of the national assembly and the members of the senate are staggered? This could be achieved either by holding the elections at different times, or by electing the incumbents for different periods. If the terms of office are staggered it is more likely that conflict will be encountered between the national assembly and the senate than would be the case if the terms of office are identical. If the terms of office are staggered, then the house which is first re-elected may reflect a shift in political opinions, while the house which remains in office will continue to reflect the old opinions. The provisional thinking of the constitutional committee is that the terms of office should coincide. This will enable elections to be held at the same time and result in the substantial saving in expense. It does, however, mean that the composition of each house will be affected by the political views prevailing at the time that the elections are held.
2. Should the method of election of the senate also be proportional representation, or should a constituency-based system be adopted? By using constituency-based systems in the senate, a more diverse parliament may be created than would be the case if the senate is elected on the same basis as the national assembly. On the other hand, there is the additional expense of delimitation of constituencies, of preparing different voters' rolls, and in the case of the first elections, the delays which would take place in establishing the boundaries of the constituencies. Although the constitutional committee accepts that the senate ought not to be a mirror image of the assembly, it favours a system which will

combine proportional representation on a national basis with proportional representation on a regional basis. A portion of the senate seats will be allocated on a regional basis and these will be determined by voting within the regions. The balance of the senate seats will be awarded on a national basis and the allocation will be determined with regard to the total number of votes cast for each of the parties in all of the regions and the number of seats that are required to make good their quotas. This will ensure that regional interests become issues in the senate elections and that regional interests will be taken into account in the debates in the senate. Regional interests will be of particular importance if the senate is given special responsibility for regional and local government.

3. Should there be equal representation for each region, or should the regional seats be distributed between the regions in proportion to their respective populations? The constitutional committee favours a proportional allocation of seats, but some commentators suggest that there should be equal division of seats between the regions, irrespective of the differences in populations. The object of this would be to prevent larger regions from having a greater say in the proceedings of the senate than the smaller regions.
4. Finally, should the senate have legislative powers in the sense that it has to approve of all bills, or should it only have delaying powers? It has already been mentioned that the constitutional committee is in favour of giving the senate only powers of delaying legislation.

## A parliamentary or a presidential system?

As far as the executive is concerned, the broad question is whether a parliamentary system or presidential system should be adopted. A parliamentary system ordinarily involves a ceremonial head of state and an executive head who is a member of parliament, elected by parliament and answerable to parliament. A presidential system usually combines the ceremonial and executive functions in one person who is elected to the office of the president either directly by the general public, or indirectly by parliament.

The doctrine of separation of powers, which is a feature of modern constitutionalism, requires the legislature, the executive and the judicial branches of government to function independently of each other. The constitutional committee agrees with the principle of separation of powers and believes that the constitution should be designed so as to give effect to that principle. A presidential system in which executive power is vested in an elected president and exercised by her/him independently of parliament, meets this requirement more precisely than a parliamentary system under which the executive is part of and answerable to parliament. As long as the constitution provides appropriate checks and balances to guard against the abuse of executive power, a presidential system in the conditions existing in South Africa offers a number of advantages over a parliamentary system, particularly where parliament is elected on the basis of proportional representation. In particular:

1. Proportional representation encourages small parties to become engaged in the political process. On the whole this is a good thing. But as long as the small parties can command the minimum percentage of votes prescribed by the constitution they will be represented in parliament. This makes for a more diverse parliament than is the case in constituency-based parliaments, in which parliamentary executives are typical. Thus, on the continent where proportional representation is a common system, there are many examples of parliaments in which there are no clear

majorities and coalitions have to be formed. If the executive is directly answerable to parliament then shifting coalitions can result in changes in the executive structure as one coalition takes precedence over another.

2. In South Africa the executive will have an important task to perform particularly during the period of reconstruction. The constitutional committee holds the view that there will be a need for effective executive government in South Africa, particularly in the early years of the new constitution, and for this reason, it favours a presidential system over a parliamentary system.
3. There is a difference between strong executive government and autocratic executive government. To guard against the concentration or abuse of executive power, the powers of the executive must be clearly defined, and where appropriate, be made subject to checks and balances imposed by the constitution. The constitutional committee supports the entrenchment of these safeguards in the constitution. This should result in executive government without the executive being vested with excessive powers.

There are a number of detailed questions which arise in regard to the presidential system. Some of them are as follows:

1. What should the term of the president be? The constitutional proposes that the term of office of the president should coincide with the term of office of the national assembly and the senate. Their view is that this term of office should be five years. They also consider that the president should only be elected for two terms at the most and that if the president exercises her/his powers to dissolve parliament, she/he should be required to resign at the same time. In this way, the office of president will follow the same time period as the tenure of parliament, and the president will not be able to use her/his powers to get rid of an unco-operative parliament, without putting her/his position in jeopardy as well.

2. How should the president be elected? Should the elections be directly by the public or indirectly by parliament. As long as the president is elected for a fixed term and her or his office does not depend upon sustaining a majority in parliament, the principle of separation of powers and the creation of a strong executive government will be satisfied. Direct elections are more consistent with the theory of separation of powers than election by parliament. It gives the president an independent mandate and provides a secure base on which to function. Election by parliament is, however, less expensive and in many respects easier to conduct.
3. Whether the president is elected directly by the public, or indirectly by parliament, the constitutional committee believes that the system of election should be one which requires the elected candidate to receive an absolute majority of the votes cast – i.e. over 50%. Otherwise, a split vote can result in the election of a president who does not enjoy the support of the majority. If several candidates are nominated for the office of president, the system should provide that a candidate has to receive over 50% of the votes cast to be elected. This would involve either a complicated multiple voting system, in which voters rank all the candidates according to their personal preferences, or a system in which there are run-off elections, with minor candidates being eliminated from successive ballots. There are various ways in which multiple voting or run-off elections can be conducted. The constitutional committee holds the view that in view of South African conditions, multiple voting is not desirable, and that a system of run-off elections should be adopted.
4. The constitutional committee has not yet taken a final decision as to whether to recommend that the president be directly or indirectly elected.

I would like to make two observations before concluding. It is important that the issues I have mentioned and other related issues should be debated now. The debate should not be seen as anticipating

decisions by the constituent assembly, but rather as helping to inform the decisions that will ultimately be taken by this assembly.

It is important to be clear on which principles are fundamental and which are not. The constitution should as far as possible be one which is acceptable to a broad cross-section of the population. If it is acceptable, it will be stronger than a constitution to which there is strong opposition by particular sectors of the population. Compromises on some issues may be desirable for the purpose of achieving unity. It is important, therefore, that we should have a clear view on what is fundamental, and be capable of distinguishing between features that are desirable but not essential, and those which are clearly essential. It is only by debate and discussion that we will be able to achieve that clarity. And it is in that spirit and for that purpose that the constitutional committee has raised issues for debate at this and at other conferences.

