

28 March 1995

Enclosed please find the National Party proposals regarding

1. Executive
 2. Checks and Balances
- pertaining to Block 2 and 3 of Theme Comaittee 2.

J A RABIE MP

CONSTITUTIONAL CHECKS AND BALANCES

In the narrow sense of the word, constitutional checks and balances refer to the way in which the different branches of government, viz the legislative, executive and judicial branches, control one another. In a wider sense, the purpose of constitutional checks and balances is to prevent the concentration of government power, which may lead to abuse, and to ensure control over the exercise of power without effective government. In this wide sense of the word, constitutional checks and balances may refer to an those democratic techniques which promote and ensure responsible constitutional government.

A number of constitutional checks and balances can be identified.

I An entrenched constitution

An entrenched constitution is a crucial form of control over government. A constitution creates government bodies and allocates powers to them. In the process, a constitution defines and limits those powers, and determines the relationship between the state and the individual. If a government can amend a constitution easily, the constitutional limitation of government power is not effective. The fact that a constitution is entrenched and that the government can amend it only by special or more difficult procedures than for ordinary laws, is therefore in itself a check on government power.

2 Separation of powers

One of the most well-known and important methods to prevent the concentration of power, is by the application of the doctrine of the separation of powers. In terms of, this doctrine, attributed to Montesquieu, government authority is divided into legislative, executive and judicial authority, and exercised by different bodies. In theory the object is that the body responsible for

the of laws shall not also be responsible for their execution or for adjudication on them. Likewise the executive is not supposed to enact laws or to administer justice, and the judiciary should not make or execute laws. In practice, a larger or smaller degree of overlap may be among the different branches of government. No system exists in which a total or absolute separation of powers can be found, or in which government bodies act in total isolation.

An integral aspect of the doctrine of separation of powers is that the different branches of government control one another. In this narrower sense of the word, reference is also sometimes made to *the system of checks and balances*, the whole idea being that no single branch of government can exercise too much authority on its own and that for important decisions, they need one another's co-operation. Checks and balances in this sense probably function strongest in the American system, where the legislature and the executive are to a large extent in a power equilibrium. Examples are: Congress makes laws but the president must also approve thus and has a veto which congress can override only with a two-thirds majority in both houses. The Senate must consent to all senior presidential appointments and congress may also impeach the president for misbehaviour. With the co-operation of the Senate the president appoints justices of the Supreme Court, but the Court reviews the commonality of all congressional and presidential actions.

As in many other countries, a relative separation of powers exists in South Africa. Legislative authority is vested in parliament, but through his or her power to confirm bills, the President is involved in its exercise. In addition the executive has the delegated power to make subordinate legislation. Executive authority is vested in the President, but he or she is elected by parliament his or her ministers must be members of parliament, and the President and cabinet is dependent on the support of parliament for staying in power. Justices are appointed by the executive, a matter in which parliament is also involved. A separation of powers is prescribed by the Constitutional Principles (Principle VI). Although applied on a relative basis, the separation of powers remains the most important formal method for distributing government authority.

3 Levels of government

Another manifestation of the distribution of government authority can be found in the existence of different tiers or levels of government. The term *levels of government* refers to the vertical distribution of government authority among bodies that usually exercise those powers on a nationwide, regional and local basis. The purpose is, firstly, to allocate functions to that level of government where it can be performed most effectively, secondly, the existence of different levels of government serves to distribute power and prevent its concentration and possible abuse. The constitutional method by which this distribution of power is effected, may determine whether the state can be called a union or a federation.

Different levels of Government are entrenched in the South African constitution in terms of the Constitutional principles, they must also be provided for in the final

constitution (Principle xvi).

4 Bills of rights

The relationship between the state and the individual is an unequal relationship. They have the power to order the individual to do something against his or her will and, therefore, the state can easily violate the rights of the individual. A bill of rights limits the competency of the state to limit the rights of the individual and thus attempts to prevent abuse of power by the state. The purpose of a bill of rights is not to paralyse the state so that it is unable to perform necessary functions. It does, however, contain rules on how and when the state may limit the rights of the individual, and if the state does not observe those rules, the limitation of rights is invalid. In this sense a bill of rights is one of the most powerful checks on the powers of government.

South Africa has a bill of rights which is entrenched in the constitution and which can be enforced by the courts against the state. Again the constitutional principles prescribe the inclusion of a justiciable bill of rights in the final constitution (Principle ii).

5 Control

The constitutional function of control over the exercise of government authority takes many forms.

5. Public control

The public has an important control function through the press public congresses and debates, and interest and pressure groups. Ultimately, the public controls government through regular, multi-party elections in which the government may be rejected. Control by the public presupposes democratic elections and an informed electorate. Fundamental rights such as freedom of expression, free association and the right to vote and participate in politics, are of course of major importance in this regard.

5.2 Parliamentary control

As the directly elected representative of the electorate, controls the executive in various ways.

- (a) Parliament must approve the *budget*, in the absence of which the government has no money to execute its policies.
- (b) In question time and through *interpellations*, members of parliament obtain explanations from ministers with regard to their actions.

- (c) During *debates*, members may criticise the executive.
- (d) Parliamentary *committees* may investigate the activities of the executive.
- (e) *Subordinate legislation* issued by the executive must be tabled in parliament.
- (f) The *auditor-general* submits regular reports to parliament on state expenses. The *public protector* investigates and reports to parliament on any aspect of government administration.
- (h) If parliament adopts a *motion of no-confidence* in the government, it will be unable to remain in power.

5.3 Judicial control

The courts have the authority to control both parliament and the executive through the review of their laws and actions. In this regard, the constitution is of crucial importance. In terms of section 4 of the constitution, the constitution is the supreme law of the Republic, and any law or act which is in conflict with the constitution, shall be of no force and effect. The authority to enforce the constitution and to review all government actions is vested in the courts. In other words, government is subject to the law and the courts have the authority to declare government decisions invalid wherever they are in conflict with the law. This is the single most important feature of a constitutional state, which is a state in which the law is supreme.

6 Other control

There are quite a number of other extremely important forms of control over the exercise of government authority. Some of them are expressly aimed at the prevention of domination and thus at the protection of minority and other interests.

6.1 Bicameralism

In many parliaments, a second house is created to represent interests as the provinces or states of a federation. This may imply special decision-making procedures which confer a substantial or delaying veto on the second house. See for example the role of the Senate in the South African parliament - section 61 and 155-157.

6.2 Electoral systems

It is common knowledge that some electoral systems reflect the support of political parties more accurately than others. In particular, systems of proportional representation are better suited to represent minority parties and interests than constituency systems. An electoral system that prevents the majority from commanding a disproportional number of seats is in itself a check on government power..

6.3 The executive

More and more, it is accepted that in modern societies that the executive enjoys a commanding role. Modern government has become so complex that the executive, with the vast bureaucracy at its disposal, is the only branch of government that has the expertise, information and infrastructure to cope with the demands made on the government. The most important decisions are thus made by the executive. For this reason, it is not enough any more to have different interests in society represented in parliament and be satisfied that they are represented effectively in the decision-making process. In a modern society, the most prominent if not all of these different interests should also be represented in the executive. An executive consisting of different interest groups or political parties, by definition limits the power of the majority to govern alone. This feature has been provided for expressly and intentionally in the transitional constitution. In addition, co decision-making in the executive furdw curbs the power of the mgjority see section 89(2) of the transitional constitution.

6.4 Parliamentary decision making

The power of parlaiment to take simple major decisions can be limited in particular instances.

- (a) Especially in the case of legislation affecting the provinces quite a number of arrangements has been made in the constitution to ensure the input or control of the provinces or protect their interests - see sections 61, 62, 155, 156 and 157.
- (b) The constitution can be amended only by a two-thirds majority - section 62.
- (c) The Constitutional Principles and the provision that the Consutational Court must certify the final constitution may not be amended at all - section 74.

6.5 Consultation

There are many instances in the transitional constitution where the government is allowed to exercise its powers only in or after consultation with certain bodies or persons.

- (a) The President normally acts in consultation with his cabinet (section 82(3)).
- (b) The President may exercise some of his most important powers only after consultation with the Deputy Presidents (sections 82(2), 88(4) and 94(1)).
- (c) Some top judicial appointments may be made only after consultation with bodies or persons, such as the Chief Justice, the President of the Constitutional Court and the Judicial Service Commission (sections 97(1) and 99(4) and (5)).
- (d) In many cases, parliament may make laws only after consultation with certain bodies. Two examples will suffice: (i) Certain laws dealing with provincial finances may be adopted only after recommendations have been received from the Financial and Fiscal Commission (sections 155-157). (d) Laws affecting traditional communities may be adopted only after consultation with the council for traditional leaders (on 184(5)).

7 Conclusion

Without doubt, constitutional checks and balances are an extremely important feature of any democratic constitution. They are not designed to prevent the government from governing. Their purpose is to ensure and protect what has taken so long to develop - democratic government. Without sufficient and effective constitutional checks and balances most societies will simply deteriorate into a system where either a dictator or the masses will govern and not the law. That will bring an end to democracy.

NATIONAL PARTY SUBMISSION THEME COMMITTEE 2 BLOCK 2

ITEM 2.1(b): THE NATIONAL EXECUTIVE

The following views on the composition, powers and functioning of the national executive are hereby submitted. These views adhere to the relevant Constitutional Principles, especially Principle VI with regard to the separation of powers as applied in the transitional constitution, and sufficient constitutional checks and balances to ensure accountability, responsiveness and transparency. The

views in this document expand on the proposals already submitted to Theme Committee 2 which called for a national executive that will best serve the interests of the nation, that is responsible to parliament, transparent, accountable, responsive and inclusive, and that provides for appointments to the executive from outside parliament as well.

A. THE HEAD OF STATE/GOVERNMENT

We believe that the powers of head of state and of government should be combined in the office of the executive President as at present. A developing democracy needs strong government and leadership and, except for important checks and balances to prevent the abuse of power, the office of the head of state and of government should be structured to provide that.

A ceremonial head of state is not recommended. In theory, such an office serves as a unifying symbol, but this is not necessarily the case in diverse societies.

In view of the uncertainty in this regard, it is our view that provision should not be made for such an office. Furthermore, it is our view that, after his or her election, even an executive head of state has the duty to represent the whole nation and in that sense becomes a symbol to everybody.

The President should be indirectly elected by parliament as at present. In principle, we are not opposed to a directly elected head of state, as it may enhance strong leadership. However, a directly elected head of state can lead to a measure of separation between the legislature and the executive that may, at this stage in the development of our fledgling democracy, cause an undesirable degree of tension between those branches of government. Of course, sufficient separation is needed for parliament to control the executive effectively.

In principle, the President should have the powers provided for in the transitional constitution, the most salient of which include the following:

- (a) The President *chairs* the cabinet. (Provision can be made for a deputy president to chair meetings in his or her absence - see below.)
- (b) The President has a number of important *executive powers*, which he or she exercises mainly in consultation with the cabinet.
- (c) The President is responsible for the *observance of the constitution*, and to uphold and defend the constitution. The President shall with dignity provide executive leadership in the interests of national unity.
- (d) The President *appoints* ministers, deputy ministers and other office holders according to procedures laid down in the constitution.
- (e) The President *confirms bills* adopted by parliament, but has no substantial veto. [In order for the President effectively to ensure observance of the constitution, his or her power to refer a bill back to parliament in the event of a procedural shortcoming, could be extended to bills violating the constitution or, at least, he or she could be empowered to refer such bills to the Constitutional Court. This would supplement the existing provision for prior control by the Court - see section 98(2).]

The term of office of the President is linked to that of parliament and after every election for parliament, a presidential election takes place. The President and his or her cabinet is subject to motions of no-confidence by parliament - see below.

5 Succession to the office of President depends on our proposal for two deputy presidents. If adopted, one of the deputy presidents nominated by the cabinet could, in the event of a vacancy, act as President until a new President has been elected by parliament

B. THE DEPUTY PRESIDENT(S)

Provision should be made for two or, at least, one deputy presidents. There are two reasons for this proposal. (a) Experience has told us that an executive head of state cannot possibly do justice to all his or her executive powers, responsibilities and duties and perform all the ceremonial functions of the office as well. The President simply needs assistance in respect of both his or her executive and ceremonial functions. (b) Provision for one or two deputy presidents creates the opportunity for the accommodation of a minority party and thus for much needed coalition politics in a diverse society.

Examples that may be considered in this regard are, *firstly*, of course, the present constitution and, *secondly*, a country like the Netherlands where the office of deputy premier is held by the leader of the second largest party in the coalition.

The deputy president(s) should have substantial powers. The President must assign certain powers to them, and they may act on behalf of the President in his or her absence, including as chairpersons of the cabinet. They must also be consulted on important policy decisions, ministerial appointments, etc., as provided in the present constitution.

C. THE CABINET

It remains our view that it would be in the best interests of the country if the executive were constituted on a multiparty basis. This can be motivated very briefly.

(a) In modern states, the executive is by far the most powerful and prominent branch of government. With the vast bureaucracy at its disposal, the executive is the only branch that has the expertise, information and infrastructure effectively to cope with the demands made on modern governments. The executive is furthermore better equipped to act on short notice and to plan ahead. For these and other reasons, governmental initiative has long since shifted to the executive and, to a considerable degree, the function of the legislature has been reduced to little more than the legitimation of executive initiatives. When the accommodation in government of different interests in society is considered, it would be, at the very least, extremely shortsighted not to take cognisance of this simple fact. Mere representation in the legislature suddenly appears much less effective, against this background. Therefore, if the purpose of the system of proportional representation in the legislature is to afford minority and other interests effective representation in the decision-making process, it would be logical to extend their representation to the executive as well.

(b) The purpose of government is not only to govern, but to provide peace, order and stability to its subjects. In diverse societies, where differences may be strong and permanent, or at least long term in nature, it is particularly imperative upon government to ensure that all views are accommodated. In a diverse society, this is as strong incentive for the accommodation of different parties in the executive as for the formation of a coalition government in a more homogenous country where no party commands an absolute majority: In both cases this is the only sound way to ensure stable and responsible government. Put another way, it should be as necessary in a diverse society to form a multi-party executive as in countries like Germany, Switzerland, Belgium and the Netherlands.

Representation in the executive of some non political experts is recommended in principle, but should be used sparingly, as it could undermine the executive's responsibility to parliament.

Although we are convinced of its merits, we understand that the idea of a multi-party executive is novel and contentious. We therefore propose that consideration be given to the following mechanisms to facilitate the smooth functioning of the executive. Their purpose is to ensure effective government in the interests of the nation, while allowing minority involvement and influence for the sake of stability and harmony.

(a) The basis of any multi-party executive arrangement should be an extensive policy accord. The more contentious issues can be agreed upon and decided beforehand, the less conflict will arise in the executive. This is standard procedure in all Western European coalition governments, and the fact that, in South Africa, a multi-party executive is prescribed by the constitution, does not in any way detract from this basic point of departure. In practice, this would imply that the parties constitutionally entitled to cabinet membership would sit down before assuming office to thrash out as complete a policy accord as possible.

(b) An extensive general policy accord could be supplemented by an annual accord on the priorities for that year. This will allow for some flexibility in respect of the application of the general accord, as well as for the inclusion of new priorities. This is the procedure followed in Germany.

(c) Matters not included in the general and annual accords are simply not allowed on the cabinet agenda. This may sound inflexible, but is very strictly adhered to in Germany. It forces the parties to include beforehand every conceivable detail in the accords and, more often than not, prevents hasty and emotional action on *ad hoc* issues.

(d) An alternative to the previous course of action could be the appointment of a special cabinet committee to consider all matters not contained in any policy accord before it is allowed on the cabinet agenda. This is the practice followed in Denmark and also serves to defuse contentious issues and allow for some measure of give and take before hard decisions are to be taken.

(e) Classification of issues into different categories with the purpose of distinguishing between routine or non-contentious matters (over which consensus is less important), and contentious issues or matters of principle (over which consensus may be imperative), can relieve the pressure on consensus decision-making on every issue and thus on the multi-party executive.

(f) With regard to cabinet responsibility, a directive could apply that on matters covered by the policy accord(s), full joint cabinet responsibility will apply and all members of the executive shall defend decisions publicly, but that in the case of other matters, every party shall be free to maintain and express its own views. Of course, in the case of an extensive policy accord, as explained above, these matters could be reduced to an absolute minimum.

(g) It is, of course, much too early to pronounce on the success of the present multi-party executive. We believe that it will yet prove to be one of the outstanding innovations of the constitutional transformation and that it will be at least shortsighted, if not irresponsible, to reject it out of hand and, in any case, this early in the life of the transitional constitution. Various conventions that will facilitate the functioning of the executive, and will provide us with valuable guidance for the future, should be allowed to develop.

With regard to cabinet procedure we propose that consensus decisionmaking be the norm as at present (see section 89), but that it be qualified by the classification of decisions into different categories in order to allow for majority decisions on non-contentious issues (see above). Cabinet responsibility should also be applied on a qualified basis as explained above.

D. A PARLIAMENTARY EXECUTIVE

It is evident from the above that a parliamentary executive is preferred. We believe that the formal link between the executive and the legislature should be retained. As argued above, it may be undesirable in a developing democracy to provide for a more pronounced separation of powers between the executive and the legislature. In this respect, we therefore argue in favour of a qualified application of Constitutional Principle VI, which deals with the separation of powers.

The executive should thus be dependent on the support of and should also be responsible to parliament. This implies that, although the President will not be a member of parliament, his or her ministers and deputy ministers should, in the main, remain members of parliament. Provision for some members of the executive to be non political party experts can be made as indicated above. Another implication is that the executive will be unable to govern without the support of parliament and that it should resign or call an election if parliament adopts a motion of no-confidence in the executive. (The present section 93 seems to be in order.) Parliament should also be able to impeach members of the executive for misconduct or inability to perform their functions.

Sufficient constitutional checks and balances effectively to control the executive and prevent excessive concentration and possible abuse of power, should also be provided in the constitution. Such mechanisms include, *inter alia*, *public control* through a free press and regular, multi-party elections, *parliamentary control* through various parliamentary forums and instruments, and *judicial control* by the courts over all government actions. These mechanisms may affect the position of the executive as explained in this document.