

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

ELEVENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

20 AUGUST 1993

1. INTRODUCTION

- 1.1 In our Fifth Report we drew attention to decisions that needed to be taken for the purposes of drafting the Chapter of the Constitution dealing with the executive. We requested participants to respond to this request and subsequently the Negotiating Council also asked them to do so by 12 July 1993. Although some of the participants have provided information relating to their constitutional proposals, (some in the form of draft legislation) we have not received responses to the specific questions raised by us. Some of the drafts that we have received deal with the "final constitution" and not the "government for the transitional phase" which we were instructed to deal with
(See: Resolution 21).
- 1.2 The issues raised in our Fifth Report have not been the subject of debate in the Negotiating Council. The participants hold different positions with regard to these issues, which have not been resolved by the Council. In the circumstances we do not have sufficient clarity concerning the "government for the transitional phase" to enable us at this stage to present detailed texts for debate in the Council.
- 1.3 As there are still important issues of principle that have to be resolved by the Negotiating Council, before a detailed text dealing with a "government for the transitional phase" can be presented to the Council, we identify these issues and make suggestions as to ways in which they could possibly be dealt with.

2. ELECTION OF THE HEAD OF STATE

- 2.1 It seems generally to be accepted that the head of state should be an executive president.
- 2.2 In proposals submitted to us by participants who favour a "one stage process" there is support for a directly elected president. None of these submissions address the question whether such a procedure would be appropriate for the election of a president for the transitional period.
- 2.3 The proposals that deal with a constitution for a transitional period favour a procedure whereby the President is indirectly elected by the members of the national legislature.
- 2.4 Factors which favour an indirect election, are:
 - (a) A ballot for the election of the President in a direct election conducted at the same time as the election for the National Assembly would make the election more complicated.
 - (b) If there are several candidates in a direct election for the President, there is a risk that run-off elections might be necessary. This would be costly, and in the circumstances presently existing in South Africa, undesirable.
- 2.5 We require instructions from the Negotiating Council on the procedure that it favours.

3. APPOINTMENTS TO AND THE FUNCTIONING OF THE CABINET

- 3.1 The conventional way in which a cabinet is appointed by an executive president is for the President to determine the portfolios and to make the appointments at his or her discretion.
- 3.2 It has been suggested, however, by some participants that there should be a multiparty cabinet during the transition. This could be left to be dealt with by the political process in the ordinary way, or it could be catered for by a constitutional provision to the effect that parties holding more than a defined percentage of seats in the National Assembly are entitled, but not obliged, to be allocated seats in the cabinet.
- 3.3 The question of proportional representation in the executive during the transitional period is raised in our previous reports, and we made provision for this in the draft text dealing with SPR executives.
- 3.4 For the purpose of facilitating the debate in the Negotiating Council we make the same assumption, namely, that the Constitution for the transitional period should make provision for proportional representation in the cabinet.
- 3.5 This raises a number of issues concerning the way in which appointments should be made to the cabinet and the way in which it should function. The tension that exists is on the one hand between prescribing procedures conducive to achieving consensus, both in regard to the composition of the cabinet and the taking of decisions, and on the other hand in not prescribing procedures that could lead to the paralysis of executive government.
- 3.6 A number of different structures have been considered by us. We deal with these possible structures later in this report. But before doing so we consider it necessary to refer to other related issues.

4. SHOULD THE PRESIDENT BE A MEMBER OF PARLIAMENT?

- 4.1 A possible procedure for an indirect election of the President would be for the members of the National Assembly to elect one of their number as the President. Having been elected, the President would become both head of state and head of government. The President would then withdraw from the National Assembly, and be replaced by a member chosen from the relevant party list.
- 4.2 This would serve two purposes. First, it will enable the President to avoid the hurly burly of parliament, and to play a unifying role at a time when national reconciliation is likely to be a high priority. Secondly, it will free the President to attend to the executive affairs of state outside of parliament, and to perform the ceremonial functions that go with the office of president.

5. SHOULD CABINET MINISTERS BE MEMBERS OF PARLIAMENT?

- 5.1 It has been suggested that Cabinet Ministers need not be appointed from amongst the members of parliament, and that if members of parliament are appointed as Ministers they should resign their seats.
- 5.2 This would bring about a clear separation of powers between the legislation and the executive, but could make Ministers less accountable than they would be if they were to remain or become members of parliament answerable to it.

6. SHOULD THERE BE A PRIME MINISTER?

If the President withdraws from parliament a Prime Minister could provide the link between Parliament and the executive. The Prime Minister would be the principal representative of the government in ordinary parliamentary business and would be accountable to Parliament in that capacity.

7. SHOULD THERE BE A DEPUTY PRESIDENT/VICE PRESIDENT ?

- 7.1 A deputy president/vice president could be elected on the basis of majority support or on the basis that he or she should come from a party other than the President's party.
- 7.2 A deputy president/vice president could alleviate the heavy responsibilities of the President. If chosen from a party other than the President's party, he or she may play a unifying role during the transitional period, provided that the respective powers and functions of the President and the Deputy President/Vice President are structured in such a way as to avoid conflict.
- 7.3 An objection to creating such an office is that it could have an impact on the question of succession should that ever arise as an issue. That difficulty could be addressed by a provision that the Deputy President / Vice President will act for the President during his or her absence, but will not necessarily succeed to the office of president if it should become vacant. The vacancy could be filled by a new election in the National Assembly.

8. APPOINTMENTS TO THE CABINET

- 8.1 We have considered a number of different ways in which a Cabinet might be appointed. Common to all of them is that the Constitution provides that all parties with 5 % or more of the seats in the National Assembly are entitled, but are not obliged to accept, positions in the cabinet in proportion to the seats held by them in the National Assembly. The threshold is, however, an issue that should be debated in the Negotiating Council.
- 8.2 The question as to how the cabinet should be composed and portfolios allocated is a political issue. For the purposes of facilitating debate in the Council on this issue, we have formulated

examples of possible structures, which we set out below. These are merely examples and are not intended as a complete list of all the possibilities. Different features of the various examples can also be combined to create different models.

8.3 **EXAMPLE 1**

The President appoints the members of the cabinet, allocating portfolios proportionally to the parties entitled to participate in the cabinet. The President is required to secure the agreement of the Deputy President/Vice President or the leaders of the participating parties in regard to the way in which the appointments are to be made and portfolios allocated.

COMMENT:

Implicit in this model is the risk of deadlocks when the President attempts to compose the cabinet. If agreement has to be reached on the allocation of portfolios with the Deputy President or the leaders of the parties entitled to seats in the cabinet, the President could be obliged to meet their requirements in order to avoid a deadlock and the possibility of paralysis of government. If this were to be a requirement, the President's position would be weakened, and the Deputy President, or leaders whose consent is necessary, could in effect dictate the way in which portfolios are allocated.

8.4 **EXAMPLE 2**

8.4.1. The President consults with the leaders of the parties entitled to seats in the cabinet in regard to the composition of the cabinet, and then appoints a Prime Minister and other members of the cabinet. The President allocates portfolios on the basis of proportionality to those parties that choose to participate in the cabinet, after taking into account the views expressed by the leaders with whom consultations have been held.

8.4.2. The appointment of persons to the portfolios allocated to the "minority parties" is made by the President in consultation with the leaders of such parties.

8.4.3. The President is required to terminate the appointment of a Minister from a minority party at the request of the leader of such party, or if there is a vote of no confidence in the Minister by parliament.

8.4.4 Vacancies are filled in accordance with the provision of paragraph 8.4.1.

COMMENT:

This model vests in the President effective power to compose the cabinet. The President is, however, obliged to accommodate all parties with more than 5 % of the seats in the National Assembly who wish to join the cabinet, and to choose members acceptable to the parties to which they belong. Minority parties would be in a position to make demands for particular portfolios if their support is necessary to secure the majorities needed by the President's party to enable it to govern, or as a quid pro quo for the benefit the governing party would derive from having their support. It strengthens the hand of the President and lessens the risk of deadlocks arising over the allocation of portfolios.

8.5 EXAMPLE 3

This is the same as Example 2, save that the following additional requirements are laid down by the Constitution.

8.5.1 The President in consultation with the Prime Minister formulates the broad terms of the policy that the government will follow.

8.5.2 The Prime Minister consults with each of the Ministers in regard to the

particular policy to be followed by his or her department, and with the approval of the President, formulates policies for such departments.

8.5.3 The approval of Parliament (possibly by a specified majority) to the government's policy must be secured within a prescribed time, failing which the cabinet is dissolved and a new cabinet appointed.

8.5.4 A Minister is obliged to comply with the approved policy and can be removed from office by the President if he or she fails to do so, or if a vote of no confidence in such Minister is passed by Parliament (possibly by a specified majority). Vacancies are filled from the same party.

COMMENT

This makes the cabinet and its policy directly accountable to Parliament and requires the government and individual Ministers to adopt and implement policies that have the approval of Parliament.

8.6 **EXAMPLE 4**

8.6.1 The President consults with the leaders of the parties entitled to seats in the cabinet in regard to the policy to be pursued by the cabinet, the allocation of portfolios, and the appointments to be made.

8.6.2 The President must compose a cabinet committed to a known policy and do so in a way which will secure the participation of parties representing at least a specified majority of the members of the National Assembly.

Alternatively to 8.6.2:

- 8.6.3 The President is obliged to secure the approval of a specified majority of the National Assembly to the proposed policy and the composition of the cabinet. If the necessary support of the National Assembly is obtained, the cabinet is confirmed. If it is not, policy changes which may involve changes in the composition of the cabinet, will have to be made.
- 8.6.4 All parties entitled to seats who are willing to adhere to the proposed policy, and accept the allocation of portfolios made by the President, are entitled to a proportional allocation of portfolios.
- 8.6.5 If at any time the necessary support is lost, the cabinet will be dissolved and the President will have to form a new cabinet which is able to command the necessary support. If the President is unable to do this Parliament will be dissolved and new elections held.

COMMENT:

This model seeks to replicate the model of a voluntary coalition by setting a specified majority as a condition for governing. If the President's party is unable to command that majority on its own it has to find coalition partners. It can do this in any way it chooses, though places must always be offered to the parties entitled to cabinet seats for as long as they comply with the policy formulated by the President. This will lead to bargaining which will be reflected in the allocation of portfolios and the policy that the government adopts. Disagreements over policy at any time thereafter can lead to the collapse of the government and possibly to new elections. If the majority party has to secure outside support to enable it to obtain the prescribed majority, its position is weakened, but this does not necessarily lead to paralysis of government. It enables the cabinet to function as coalitions ordinarily do, and to bargain for the support that is required, without necessarily having to meet the demands of any particular party or parties. It would facilitate decision making in the cabinet which could function in the normal way of coalition cabinets.

9. TAKING DECISIONS IN THE CABINET

9.1 Decisions in the cabinet could be taken in various ways depending upon political decisions to be made concerning the relationship between the participants in the cabinet. The possible mechanisms include:

- a) Decisions which have the support of a majority of the cabinet.
- b) Decisions which have the support of a specified majority of the cabinet.
- c) Decisions which are supported unanimously by the cabinet.
- d) Decisions which are supported by particular groups within the cabinet.
- e) A combination of some or all of the above procedures depending upon the nature of the decision that is taken.

9.2 The way in which decisions are to be taken could be prescribed in the Constitution, or could be left to be formulated as part of the policy guidelines accepted by cabinet members when they join the cabinet, or determined by them after the cabinet has been composed.

10. DESIGNING MULTI-PARTY GOVERNMENTS

Multi-party government calls for co-operation between parties who enter the government. Inherent in all multi-party governments is the risk, in varying degrees, of weak government, or of the collapse of government and the possibility of new elections. In extreme cases there is even the risk of paralysis of executive government. The securing of a balance which promotes co-operation and avoids a possible paralysis of government, ought to be kept in mind in the debates on the form of government to be adopted. In this regard, the right, or the obligation to call elections if deadlock persists can not only serve to break deadlocks, but also to put pressure on the parties in the cabinet to reach the compromises needed for effective government.

11. A FRAMEWORK FOR EXECUTIVE GOVERNMENT

We attach to this report a provisional outline of a framework for executive government. The outline is put forward for the purpose of facilitating debate and can be developed in the light of the debate in the Negotiating Council and instructions given to us.

12. DECISIONS TO BE TAKEN BY THE NEGOTIATING COUNCIL

To enable us to finalise the preliminary text dealing with the executive we need instructions from the Negotiating Council on the issues raised in this report.

ANNEXURE TO THE 11th REPORT (CONSTITUTIONAL ISSUES)

Head of State

- 1 . The President shall be the Head of State.

Election of the President

2. (1) The President shall be elected within 15 days of the general election by the Electoral College consisting of all the members of the National Assembly (and the Senate) in the manner provided for in Schedule 8.
- (2) The Electoral College shall be presided over by the Chief Justice or a judge of appeal designated by him.
- (3) No person may be elected as President unless he or she has been elected to the National Assembly.

- (4) On being elected, the President shall vacate his or her seat in the National Assembly and the political party to which he or she belongs, shall be entitled to fill the vacancy by nominating, according to the order of preference, a person on such party's election list compiled for the general election, or if there is no such person, by nominating any member of such party.

Oath or affirmation

3. The President-elect shall, before formally assuming office, make an affirmation or take an oath in the form contained in Schedule 6, which shall be administered by the Chief Justice or a judge designated by the Chief Justice for this purpose.

Tenure of office

4. The President shall hold office until he or she is removed from office in terms of this Constitution, or until he or she is replaced in terms of the provisions of the new constitutional text contemplated in Chapter 5 of this Constitution.

Responsibility of the President

5. The President shall uphold, protect and defend the Constitution as the supreme law of the land, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government of National Unity, subject to the terms of this Constitution and the laws of the Republic, which he or she is obliged to protect, to administer and to execute.

Executive power

6. The executive power of the Republic regarding all matters falling within the legislative power of Parliament shall vest in the President who shall exercise his or her powers and functions subject to the provisions of this Constitution.

Powers and functions of the President

7. (1) The President shall be competent to exercise the following powers and functions in his discretion -
 - (a) to assent to, sign and promulgate bills duly passed by Parliament;
 - (b) in the event of a procedural shortcoming in the legislative process, to refer a bill passed by Parliament back for further consideration by Parliament;
 - (c) to convene meetings of the Cabinet, including extraordinary meetings for the resolution of disputes among the members of the Cabinet;
 - (d) to refer disputes of a constitutional nature between political parties represented in Parliament or between organs of the State at any level of government to the Constitutional Court or other appropriate institution or body for resolution;
 - (e) to make such appointments as he or she may deem fit under powers conferred upon him or her by this Constitution or any law and to exercise such powers and perform such functions as may be conferred upon or assigned to him or her in terms of this Constitution or any other law; and to proclaim referenda and plebiscites in terms of this Constitution or any other law.
- (2) The President shall be competent, after consultation with the Cabinet and subject to the provisions of this Constitution and any other law, to -
 - (a) confer honours on citizens, residents and friends of the Republic in consultation with interested and relevant persons and institutions;

- (b) appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
- (c) negotiate and sign international conventions, treaties and agreements; and
- (d) pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit and to remit any fines, penalties or forfeitures.

Removal from office of the President and filling of the vacancy

- 8. (1) The President shall be removed from office if two thirds of all the members of the National Assembly and the Senate, at a joint sitting adopt a resolution impeaching the President on the grounds of a serious violation of the laws of the land or of such gross misconduct or ineptitude as to render him or her unfit to perform his or her functions in accordance with the provisions of section x5.
- (2) If the President, resigns, or is removed or ceases to hold office for any reason, the vacant office of President shall be filled in the same manner as the first President was elected.

Executive policy guidelines and directives

- 9. (1) *(Provision could here be made for the manner in which the policy guidelines and directives are to be formulated in the light of the debate of the 11th Report.)*
- (2) Ministers shall administer their departments in accordance with the policy determined in terms of this section.
- (3) If a Minister fails to administer the department for which he or she is responsible in accordance with the policy determined in terms of this section, the President may

either require the Minister concerned to bring the administration of such department into conformity with the agreed policy, or, after consultation with the Minister and the leader of his or her Party, dismiss the Minister.

- (4) If Parliament is not satisfied with the way in which the government is functioning, or the way in which a Minister administers a department for which he or she is responsible, it may express its disapproval through a vote of no confidence in the government, or in the Minister, as the case may be.
- (5) If a vote of no confidence is passed in a Minister the President shall dismiss the Minister.

The Cabinet

10. (1) The Cabinet shall consist of the President (*the Deputy President, the Prime Minister*) and the Ministers appointed by the President in accordance with the provisions hereof.

((2) The President shall appoint a Prime Minister who shall be responsible for the management of the Cabinet and, in the absence of the President, shall be accountable to Parliament for the policy of the government.)

(3) A party holding at least 20 seats in the National Assembly shall, subject to (*the details of the model adopted*), be entitled to be allocated Cabinet portfolios in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other parties represented in the Cabinet.

(4) The President shall consult with the leaders of the parties qualified to hold Cabinet portfolios in terms of subsection (3) regarding the portfolios to be allocated to each party.

- (5) The leader of each of the parties qualified to hold Cabinet portfolios in terms of subsection (3), shall designate persons in consultation with the President to be appointed as Ministers.
- (6) The President shall terminate the appointment of any Minister if requested to do so by the leader of the Party from which such Minister was chosen.
- (7) In the event of a vacancy in the Cabinet, occurring in the manner described in subsection (5), or as a result of the death or resignation of a Minister, the President shall appoint another person from the ranks of the qualifying party on the recommendation of the party leader concerned.

Appointment of Deputy Ministers

- 11. The President may after consultation with the relevant Minister, appoint any person to hold office during the President's pleasure as Deputy Minister of any specified Department of State and to exercise or perform on behalf of the Minister any of the powers, functions and duties entrusted to such Minister in terms of any law or otherwise which may, subject to the directions of the President and Cabinet be assigned to him or her from time to time by such Minister.

Ministerial accountability

- 12. (1) All ministers shall be accountable individually for the administration of the departments allocated to them, and collectively for the administration of the work of the Cabinet both to the State President and to the National Assembly.
- (2) During their tenure of office, Ministers may not take up any other paid employment, engage in activities inconsistent with their position as Ministers, or expose

themselves to any situation which carries with it the risk of a conflict developing between their interest as Ministers and their private interests.

- (3) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the Cabinet, directly or indirectly to enrich themselves or their families.

Decision making process in the Cabinet

13. (1) Meetings of the Cabinet shall be chaired by the President, or in his or her absence, by the Deputy President.

(2) Decisions of the Cabinet will, in so far as it is attainable, be taken by consensus, in the absence of which, and if any Minister requests a vote, by a (*specified*) majority of the Ministers present and voting.

- (3) In the event of a (*the specified*) majority not being achieved in the Cabinet regarding the national budget, financial matters and national security, an absolute majority of the total number of Ministers shall be sufficient, provided that both the President and the Deputy President are in favour of such decision.

(It may be necessary to develop further deadlock-breaking mechanism.)

Rights and duties of President, the Deputy President and Ministers in Parliament

14. (1) The President, Deputy President (and a Minister) shall be entitled to sit and to speak in the National Assembly and the Senate, and in a joint session of both Houses, but may not vote.

- (2) The National Assembly and the Senate may by resolution summon the President, the Deputy President (and any Minister) to attend any session of such House and require him or her to reply to questions in the House.