

2/4/21/9/7

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT**

THEME COMMITTEE MEETING

**MONDAY
13 March 1995
9H00-12H00
M46**

**TECHNICAL COMMITTEE REPORT 1
IN-HOUSE WORKSHOP
THE EXECUTIVE**

**ANNEXURE "B"
PAPER BY PROF N C STEYTLER**

THEME COMMITTEE TWO: CONSTITUTIONAL ASSEMBLY

IN-HOUSE WORKSHOP: THE EXECUTIVE

15 FEBRUARY 1995

**PRESENTATION BY PROF N C STEYTLER
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"THE PRESIDENCY"

1. INTRODUCTION

The aim of this presentation is to set the scene on an important aspect of the executive, the presidency. I will proceed by outlining, firstly, the relevant Constitutional Principles, secondly, the broad models which pertain to the appointment of the president, thirdly, the present position of the presidency under the interim Constitution, and finally, the major issues which should be dealt with by this Committee.

2. CONSTITUTIONAL PRINCIPLES

The Constitutional Principles form the basic framework for devising a presidency, but they leave wide open the form and powers of this office. The following guiding principles can, however, be extracted.

The first and very basic principle is the separation of powers: Constitutional Principle VI states that "There shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness".

All parties have agreed upon the principle of separation of powers. The content of the principle is not, however, fixed as there are various degrees of separation.

The principle of separation of powers means as a minimum that different organs of state - the legislature, the executive and the judiciary - perform different functions or tasks, and, to that end, are empowered to do so. There are thus clear lines of function or task demarcation. Consequently, the executive should not have any legislative powers (only delegated legislative powers) or judicial powers.

A stricter version of the separation of powers principle is that the personnel who exercise the different powers, are also to be separated. The clearest example is that a judge cannot be a member of the legislature. A more difficult question is whether members of the executive could also be members of the legislature?

The second part of the separation of powers principle is that there are clear

controlling mechanisms between the three organs of state. It has been said that the doctrine of separation of powers is rather a "system of reciprocal controls" marked by numerous checks and balances.¹ The checks and balances are there to ensure accountability, responsiveness and openness, the second part of Constitutional Principle VI.

Consequently, the courts should exercise some control over the presidency by ensuring that it remains within the four corners of the law and in particular the constitution. Likewise, there should also be controls by the legislature over the executive. Constitutional Principle VI refers to the latter relationship when it seeks to secure accountability, responsiveness and openness. These qualities cannot necessarily be secured by the judiciary but fall within the proper domain of the legislature.

This Theme Committee has also reported agreement that "the executive shall be accountable to the legislature."² The question is then what form should the accountability take? The power to veto executive decisions such as appointments, the power ultimately to dismiss the president?

As the principle of separation of powers is a system of reciprocal controls, the question is also what powers the presidency should have over the legislature. A veto over legislation; the power to terminate the life of the legislature?

Answers to these questions will depend much on the type of executive and presidency that is established.

3. MODELS OF THE PRESIDENCY

There are two broad models of the presidency: a president can be directly elected by the electorate, or indirectly elected by the legislature. The method of appointment usually affects the degree of control that the legislature can exercise over the president. Where the president obtains his or her mandate to govern directly from the electorate, the power of the legislature is then usually weaker than where the president receives his or her mandate from the legislature.

3.1. POPULARLY ELECTED PRESIDENT

If the president is directly elected by the people (such as in the United States and Namibia) then the following consequences usually pertain:

1. **LENGTH OF TENURE.** The president is usually elected for a fixed term because his or her tenure is not dependent on the life of the legislature. Thus in USA and Namibia the president may be elected only for two

¹ Kammers The Constitutional Jurisprudence of the Federal Republic of Germany (1989) 121.

² Report on Block 1, Separation of Powers, par 2.3.2.

terms.

2. PERSONNEL. The president is elected from outside the legislature and the cabinet is usually drawn from outside the legislature as well.

3. POWERS. He or she is both the head of state and head of government and as such exercises real power. It is unlikely that there would be any public interest in electing a purely ceremonial head of state.

4. DISMISSAL. Because the president is not elected by the legislature, the latter can only dismiss him or her with difficulty. The usual process is through impeachment, and then only on specified ground and with specified majorities in the legislature.

5. RELATIONSHIP WITH LEGISLATURE. There are usually effective reciprocal controls between the president and the legislature. The president usually has a legislative veto but it would be unusual for him or her to have the power to dissolve the legislature. The legislature can exercise some control over the president with a veto over appointments, or disapproving of a legislative programme.

The system of an elected president can produce a weak presidency, such as the case in the United States at the moment where the president cannot get his legislative programme past a hostile Republican dominated Congress.

3.2 PARLIAMENTARY ELECTED PRESIDENT

Where the president is elected by parliament, harmony is ensured between the executive and legislature. A different set of consequences then follows:

1. LENGTH OF TENURE. There is usually no fixed term and the length of tenure is tied to the life of parliament (and the fortunes of the political party which has elected him or her).

2. PERSONNEL. The president is usually elected from the legislature and he or she then appoints a cabinet also from the legislature.

3. POWERS. The powers of the president may vary considerably. A ceremonial head of state may have no real powers, while a president which combines the offices of head of state with head of government will be very powerful.

4. DISMISSAL. The president may be dismissed through a motion of no confidence. Such a motion forces the president to resign or dissolve parliament and a call a new election.

5. RELATIONSHIP WITH THE LEGISLATURE. Because the legislature elected the president and can dispose of him or her through a vote of no confidence, no further controls over the actions of the president are

usually required. Thus the legislature has no veto over appointments, and conversely, the president has no veto over legislation.

The system of indirect election, can produce a strong presidency as long as there is harmony between the president and the majority party in the legislature. Parliament as such is not much of a controlling mechanism. It is rather opposition in parliament than opposition of parliament which is the most effective check on the executive.³ Because of this principle, the German Federal Constitutional Court ranks the principle of multipartyism equal with the principle of separation of powers.⁴

4. INTERIM CONSTITUTION

The differences between the two models are best illustrated with reference to the interim Constitution.

4.1. Appointment of President.

The president is elected by Parliament. The National Assembly and Senate in joint sitting elect from one of its members a President (s 77). In effect he or she is elected by the majority party when it has an absolute majority in Parliament. On election, the President vacates his or her seat in the National Assembly.

On a practical level the president's mandate is not solely derived from Parliament. The president was first on the majority party's election list, and was as such presented to the electorate as the prospective president. The president can thus claim that he or she derives his or her authority not only from Parliament, but also indirectly from the people.

4.2 Tenure of the appointment

There is no fixed term. After the first five years, the president can be re-elected by the new parliament.

4.3 Dismissal of the president

The duration in office of the president is linked to Parliament in two ways.

First, if Parliament is dissolved then the president holds office until a new president is elected by the incoming Parliament.

Parliament can be dissolved before the expiry of the five year term in two

³ Kammers op cit 122.

⁴ Ibid, 123.

ways:⁵

1. If Parliament passes a vote of no confidence in the Cabinet, including the president, the President may (a) resign, or (b) dissolve Parliament and call an election (s 93(1)).

2. If Parliament passes a vote of no confidence only in the Cabinet, excluding the president, then the president has three options: (a) resign, (b) reconstitute the cabinet, or (c) dissolve parliament (s 93(3)(c)).

Thus the only manner of dissolving parliament prior to its five year duration, lies in the hands of Parliament itself. The president does not have an independent choice to bring the life of parliament to an end.

The question is whether it is likely that Parliament would opt for a motion of no confidence. One possibility is if the balance of power in parliament changes. This is not possible in view of the list system. Should an MP cross the floor, he or she will presumably lose his or her party membership and thus also his or her membership of parliament. It is thus not likely that there would be a rearrangement of political power within Parliament before a general election.

The president may be forced to resign when he or she falls out of favour with the party that brought him or her into power. A second possibility is that the president contrives a motion of no confidence, that is, even though the majority party supports the president, it could nevertheless pass a motion of no-confidence in order to allow the president the opportunity to dissolve parliament. This happened in West Germany in 1984. The provisions pertaining to the dissolution of the legislature are very similar to ours. Chancellor Kohl, while enjoying the support of the majority party, contrived to lose the vote of confidence. He then requested the president to dissolve parliament so that a new election could be held. The Constitutional Court upheld the legality of his actions and thus of the election, which Kohl and his coalition partners won handsomely.

The second method of terminating the tenure of the president does not involve the dissolution of Parliament. There are two possibilities:

1. If Parliament passes a vote of no confidence in the president, but not in the other members of the cabinet, the president shall resign (s 93(2)).

2. The president may be impeached. Parliament in a joint session can, by a two third majority vote, impeach the President on the ground "of a serious violation of this Constitution or the other laws of the Republic, or of misconduct or inability rendering him or her unfit to exercise and perform his or her powers and functions" (s 87).

⁵ Excluded are the arrangements pertaining to the drafting of a final constitution.

The first option, a motion of no confidence in the president, allows the party to get rid of the president of their choice. All that is required is an absolute majority of votes. The second option, impeachment, is a more labourious process, and the majority party would probably need the assistance of other parties in Parliament. The latter method is usually the only method of removing a popularly elected president.

The interim Constitution thus establishes a parliamentary presidency directly accountable to Parliament. This ensures that the president will always be in harmony with the majority party in parliament. The system differs from a classical Westminster system in that the president vacates his or her seat in Parliament on election. Unlike a prime minister the president does not control the life of parliament. He or she cannot dissolve parliament and call a snap election when the conditions are favouring the majority party, unless, a motion of no confidence is contrived.

4.4. Powers of the president

Powers of the President are that of a limited executive president,⁶ but in practice can be extensive because of the harmony between the executive and Parliament. Some of the president's powers are the following:

1. The president has no veto power over legislation. Section 82(1)(b) provides that he or she may only send a bill back to parliament if there are procedural shortcomings in the legislative process.
2. The president has the power of making important appointments.
3. The president has the power to conduct international relations.
4. The president may call for a mandate from the people via referenda.

4.5. EVALUATION

The president combines the positions of head of state and head of government. He or she is elected by Parliament and is ultimately controlled by Parliament. The control is rather weak for as long as there is harmony between the majority party and the president.

5. THE DEBATE

In view of the present position, what is the debate around the presidency? Without preempting what parties will submit on the precise nature of the presidency, the following is already apparent from their submission on the separation of powers.

⁶ The provisions of the government of national unity obviously impact dramatically on the powers of the president.

5.1 PARLIAMENTARY PRESIDENCY

The political parties in their submission on the separation of powers show a clear preference for a parliamentary president. The ANC suggests that the executive and the president shall be accountable to Parliament.⁷ Similar sentiments are expressed by the NP⁸ and the DP.⁹ The IFP favours that Parliament has the power of a no-confidence vote, without being itself being dissolved. The cabinet appointed by the head of government, should also be ratified by the legislature. The FF is also explicit in their preference for a parliamentary president; the president should be elected by parliament and could remain a member.¹⁰

5.2 SPLIT IN OFFICE BETWEEN THE HEAD OF STATE AND HEAD OF GOVERNMENT

On the powers of the president, there is some support for a split between the positions of the head of state and head of government. The IFP proposes that the positions should be kept separate. The FF urges the consideration of the split on the ground of the workload which the combined office entails.¹¹

The IFP proposal on the head of state advocates more than a ceremonial office. The function of the head of state should be "the preservation of the constitutional order and the proper functioning of the constitutional machinery".

The PAC, on the other hand, is opposed to a split office. It argues that separation of office can lead to tension and even conflict.¹²

5.3 LENGTH OF TENURE

The IFP proposes a seven year non-renewable term of office.

5.4 POWERS OF THE PRESIDENCY

⁷ ANC Submissions to TC2, separation of powers, 25 Jan 1995.

⁸ NP submission to TC2, separation of powers, 26 January 1995.

⁹ DP submissions to TC2, separation of powers, 25 Jan 1995.

¹⁰ FF submissions to TC2, separation of powers, 28 Jan 1995.

¹¹ FF submissions to TC2, separation of powers, 28 Jan 1995.

¹² PAC submission to TC2, separation of powers, 31 January 1995.

The PAC excludes from the power of the executive the termination of the life of parliament; the matter should be regulated exclusively by the constitution.¹³

6. CONCLUSION

From the above discussion, this Theme Committee should deal with the following issues:

1. Should there be a separation of head of state from head of government?
2. If there is to be such a split, what should be the powers of the head of state?
3. What should be the length of tenure of the president?
4. What should be the precise form of legislative control over the president and the executive?
5. What control may the president or the executive exercise over the legislature, for example, may it dissolve Parliament?

¹³ PAC submissions to TC2, separation of powers, 30 Jan 1995.