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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**THURSDAY
17 AUGUST 1995
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**AMENDED DRAFT FORMULATIONS:
NATIONAL EXECUTIVE**

(Third draft)

THIRD DRAFT - 16 AUGUST 1995

Status: Processed after CC debate of 11 August 1995 for CC Subcommittee.

Chapter ...

THE NATIONAL EXECUTIVE

Executive power

1. The executive power of the Republic as provided in the Constitution is vested in the national government consisting of the State President¹ and the Cabinet.²

The State President

Head of State and Government

2. (1) The State President is the Head of State, the Head of the National Executive and the Commander-in-Chief of the National Defence Force.³

(2) The State President shall at all times uphold, defend and respect the Constitution as the supreme law of the land and shall be responsible for the observance of the Constitution by the national government.⁴

¹ The term "State President" to be further considered in the CA.

² As per Block 7 of the Report on the Presidency. This clause should be revisited when the powers and functions of provinces have been resolved.

³ Agreed to in the CC.

⁴ Agreed to in the CC.

Election of State President

3. (1) The National Assembly⁵ shall at its first sitting⁶ after a national election, and thereafter as and when it becomes necessary to fill a vacancy during the term for which it was elected, elect a member of the National Assembly as the State President.⁷

(2) The Chief Justice⁸ or a judge designated by him or her, shall preside over the election of the State President. The procedure set out in Schedule ... shall apply to the election of the State President.⁹

(3) A member of the National Assembly shall upon being elected as the State President vacate his or her seat in the National Assembly.¹⁰

(4) A sitting of Parliament to fill a vacancy in the office of State President shall take place within 30 days after the vacancy occurred, at a time and on a date determined by the President of the Constitutional Court.

⁵ The role of the Senate in the election of the President will be revisited when finality is reached on the question of a second House.

⁶ The first sitting of Parliament will in terms of section 11(1) of the Draft on Parliament be convened by the Chief Justice within 10 days after the declaration of the result of a general election.

⁷ As per agreement in Block 3 of the Report on the Presidency. The DP prefers a directly elected President. Matter was not resolved in the CC.

⁸ The CC decided that the question which judge should preside must be resolved in private discussions between the parties.

⁹ The procedure referred to here has in the Interim Constitution been contained in a schedule (Schedule 5). Alternatively the procedure should be prescribed by a national law.

¹⁰ Agreed to in the CC.

Assumption of office¹¹

4. The State President-elect shall assume office within days of his or her election and shall, before assuming office, make and sign an oath or a solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her, [in the following form:]

[In the presence of those assembled here and in full realisation of the high calling I assume as State President in the service of the Republic of South Africa I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa, and do solemnly and sincerely promise at all times to promote that which will advance and to oppose all that may harm the Republic; to obey, observe, uphold and maintain the Constitution and all other Law of the Republic; to discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience; to do justice to all; and to devote myself to the well-being of the Republic and all its people.

(In the case of an oath: So help me God.)]

Term and vacation of office and filling of casual vacancies¹²

5. (1) The State President shall be elected for a term of office

¹¹ Amended by the CC. Underlined words inserted and words in bold brackets deleted. Outstanding aspects to be considered in CC Subcommittee.

¹² Section 5 to be further considered in CC Subcommittee.

commencing when he or she assumes office and ending when the person elected as the State President after the next election of the National Assembly assumes office.¹³

(2) No person may hold office as State President for terms of office exceeding a combined period of ... years.¹⁴

(3) The State President shall vacate office during his or her term upon -

(a) resigning from office by notice in writing to the Speaker; or

(b) adoption by the National Assembly of a resolution in terms of this Constitution removing him or her from office.

(4) A vacancy in the office of State President shall be filled as soon as a meeting of the National Assembly can be convened for the election of a new State President.¹⁵

¹³ See Block 5 of the Report on the Presidency. The life of Parliament generally determines the length of tenure. As the life of Parliament has a fixed term of 5 years, the term of office of the State President is limited to 5 years. The term of office may be shorter than 5 years where Parliament is dissolved before its full term or where the State President resigns or is removed from office. In order to ensure continuity the State President's term normally expires only when his or her successor assumes office.

The IFP prefers a seven year term for the State President.

¹⁴ The maximum period a State President may serve needs further debate. See Block 5 of the Report on the Presidency.

¹⁵ Removal from office is dealt with in section 11 below. Section 3(1) provides for the election of a State President not only after a general election but also whenever a casual vacancy may occur.

Powers and functions¹⁶

6. (1) The State President has the powers and functions entrusted to him or her by the Constitution and the laws of the Republic.

(2) All powers and functions shall be discharged by the State President in consultation with the other members of the Cabinet, except where the Constitution provides or implies otherwise.¹⁷

(3) The following powers and functions are vested in the State President alone with due regard to any specific provisions of the Constitution relating to them, and in the discharge of such powers and functions the State President is not obliged to act in consultation with the other members of the Cabinet:¹⁸

- (a) to summon the National Assembly to an extraordinary sitting for the conduct of urgent business;¹⁹

¹⁶ To be further discussed at CC Subcommittee level.

¹⁷ As per agreement in point 9 of Block 7 of Report on the Presidency. In section 233(3) of the Interim Constitution the term "in consultation with" is defined to mean that the concurrence of the other functionary is required.

¹⁸ The NP is not in favour of the State President acting alone, but prefers an arrangement whereby these powers are exercised in accordance with provisions similar to section 82(2) of the Interim Constitution, i.e. that there should be an obligation on the State President to consult the Executive Deputy President(s).

¹⁹ See point 6 Block 7 of the Report on the Presidency and also section 11(2) of the Draft on Parliament. The issue of summoning the two Houses to a joint sitting to be dealt with upon clarification of the role of the Senate. Otherwise approved in principle by the CC.

- (b) to dissolve the National Assembly after a motion of no confidence in the Cabinet has been passed by the National Assembly;²⁰
- (c) to assent to and sign Bills passed by Parliament;²¹
- (d) to refer a Bill passed by Parliament back to Parliament for reconsideration or to the Constitutional Court for a ruling on its constitutionality;²²
- (e) to confer honours;²³
- (f) to appoint, [accredit]²⁴, receive and recognise diplomatic representatives;²⁵

²⁰ Agreed to in the CC.

²¹ Agreed to in the CC.

²² See also section 21 of the Draft on Parliament. Matter to be taken forward at CC Subcommittee level.

²³ Agreed to in the CC.

²⁴ In the diplomatic sense "accredit" means to authorise as an envoy. It would appear that the word is superfluous and that it could be deleted.

²⁵ The NP and the DP prefer a system of prior Parliamentary approval of diplomatic representatives. To be further discussed in CC Subcommittee.

- (g) to negotiate and sign international agreements, and to delegate such power;²⁶
- (h) to [reprise and] pardon offenders and to remit fines, penalties and forfeitures²⁷;
- (i) to appoint and dismiss Ministers and Deputy Ministers;²⁸
- (j) to convene Cabinet meetings;²⁹ and
- (k) to appoint commissions of enquiry.³⁰

Confirmation of executive acts of State President

7. (1) Decisions of the State President taken in the discharge of his

²⁶ See point 4 Block 7 of the Report on the Presidency. It is advisable for practical reasons that provision also be made for the delegation of the power to negotiate and sign international agreements. The Theme Committee was of the view that this provision should be considered together with the question of Parliamentary approval of international agreements. See for instance sec. 231 of the Interim Constitution.

Matter to be discussed further when TC 5 reports on international law.

²⁷ TC 4 must still report on the right to life and the question of capital punishment under the new Constitution. The words in bold brackets should be deleted if the parties agree to maintain the present position on capital punishment.

²⁸ See point 8 Block 7 of the Report on the Presidency. See also section 13 below. NP prefers appointment and dismissal of Ministers and Deputy Ministers to be the same as in section 88 of the Interim Constitution (which would require a government of national unity with minority parties forming part of the Cabinet).

"Flagged" for further discussion.

²⁹ Agreed to in the CC.

³⁰ In the CC the question was raised whether the President should have the power to appoint commissions without consulting the Cabinet. Matter stands over.

or her powers and functions shall be [expressed] in writing under his or her signature.³¹

(2) Decisions of the State President taken in consultation with the other members of the Cabinet shall be countersigned by a Minister.³²

(3) The signature of the State President on any instrument shall be confirmed by [the Seal of the Republic].³²

Remuneration

8. (1) The salary, allowances and benefits of the State President shall be determined by Parliament.³³

(2) The State President may not hold any other public or perform any other [remunerative] paid work.³⁴

Deputy State President(s)/Prime Minister

9.³⁵

³¹ Amended formulation agreed to in the CC.

³² The Seal of the Republic is an issue for TC 1. Otherwise agreed to in the CC.

³³ Agreed to in the CC.

³⁴ Stands over. CC Subcommittee must consider whether the clause is necessary.

³⁵ The question whether there should be a Deputy President or a Prime Minister or more than one Deputy Presidents is in contention. Further clarity is needed before any provisions can be drafted. See Blocks 3 and 6 of the Report on the Cabinet.

Acting State President³⁶

10. (1) If the State President is absent from the Republic or is otherwise unable to fulfil the duties of the office, or if the office of State President is vacant, an office-bearer in the order mentioned below shall act as the State President during the State President's absence or inability or until the vacancy is filled:

- (a) The Deputy State President.
- (b) If the Deputy State President is not available or if the office of Deputy State President is vacant, a Minister of the Cabinet designated by the State President.
- (c) If the designation of a Minister by the State President is for any reason not possible, a Minister designated by the other members of the Cabinet.
- (d) If the designation of a Minister by the other members of the Cabinet is not possible, the [Speaker?].

(2) An acting State President has all the responsibilities, powers and functions of the State President.

³⁶ The issue of the Acting President was not dealt with in the Reports but was considered by the Theme Committee during its discussion of the Draft. The formulation may have to be adjusted depending on how the issue of more than one Deputy President and a possible Prime Minister is resolved.

To be taken further in CC Subcommittee. The DP proposed that par. (d) be replaced by a provision conferring power on the NA to elect an Acting President.

Removal of State President or Deputy State President³⁷

11. The National Assembly may remove from office the State President or the Deputy State President by resolution adopted by a majority of at least two-thirds of its members, but only on the grounds of a serious violation of the Constitution or the laws of the Republic, or of serious misconduct or inability rendering him or her unfit to exercise and perform his or her powers and functions.

Cabinet

12. (1) The Cabinet consists of the State President, the Deputy State President³⁸ and the Ministers.³⁹

(2) The State President or, in his or her absence, the Deputy State President or, in the absence of the Deputy State President, another member of the Cabinet designated by the President, shall preside at meetings of the Cabinet.

³⁷ No agreement on whether it is necessary to provide for the impeachment of the State President in view of the possibility of adopting a motion of no confidence in the State President. See section 20 below.

To be discussed at CC Subcommittee level.

³⁸ The NP prefers two Deputy Presidents.

³⁹ As per Block 4 of the Report on the Cabinet. See also Blocks 7, 8, 9 and 13 of the Report on the Cabinet. Some of the parties propose provision also for a Prime Minister. It is a contentious issue whether the number of Ministers should be prescribed by the Constitution and whether the Cabinet should proportionally include members of minority parties.

To be further discussed in CC Subcommittee.

Appointment and dismissal of Ministers and Deputy Ministers

13.⁴⁰

Oath or solemn affirmation⁴¹

14. A person appointed as a Minister or Deputy Minister shall before assuming office make and sign an oath or solemn affirmation in the terms set out in Schedule ... before the Chief Justice or a judge designated by him or her, [in the following form:]

⁴⁰ See point 8 Block 7 of the Report on the Presidency. There are two approaches; one basically in line with sections 88(2) to (6) and 94 of the Interim Constitution, the other more or less as follows:

- "(1) The State President shall appoint the Ministers of the Cabinet from amongst the members of the National Assembly* to administer the various portfolios for which the national government is responsible.
- (2) The State President may appoint Deputy Ministers from amongst the members of the National Assembly* to assist in the administration of portfolios for which the national government is responsible.
- (3) A Minister and a Deputy Minister hold office for as long as it pleases the State President, but shall vacate office if he or she resigns from office or ceases to be a member of the National Assembly.*"

* Appointment of Ministers and Deputy Ministers from the Senate will depend on the role and function of the Senate. Furthermore, the NP favours the appointment of a limited number of Ministers from outside Parliament. The IFP proposed that Ministers should be appointed by the Prime Minister subject to ratification by Parliament.

To be further discussed in CC Subcommittee.

⁴¹ Approved by the CC as amended, subject to a decision on which judge should take the oath/affirmative action.

[I, A.B., do hereby swear/solemnly affirm to be faithful to the Republic of South Africa and undertake before those assembled here to hold my office as Minister/Deputy Minister with honour and dignity; to respect and uphold the Constitution and all other Law of the Republic of South Africa; to be a true and faithful counsellor; not to divulge directly or indirectly any matters which are entrusted to me under secrecy; and to perform the duties of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

Accountability of Ministers and Cabinet⁴²

15. (1) Ministers are individually accountable both to the State President and the National Assembly for the administration of the portfolios entrusted to them, and all members of the Cabinet are collectively accountable to the National Assembly for the performance of the functions of the national government and its policies.

(2) All Ministers shall administer their portfolios in accordance with the policies of the Cabinet.

⁴² **As per agreement in Blocks 10 and 12 of the Report on the Cabinet. The DP is also of the view that the Deputy State President/Prime Minister should have a special responsibility to formally represent the Cabinet in Parliament.**

Matter to be discussed at CC Subcommittee level.

Conduct of Ministers and Deputy Ministers⁴³

16. Ministers and Deputy Ministers shall at all times act in accordance with a code of ethical conduct which shall be prescribed by a national law. It shall be particularly forbidden for Ministers and Deputy Ministers -

- (a) to take up any other paid employment;
- (b) to engage in activities inconsistent with that of their office or to expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; and
- (c) to use their position, or any official information entrusted to them, to enrich themselves or any other person.

Remuneration⁴⁴

17. The salaries, allowances and benefits of Ministers and Deputy Ministers shall be as provided for by national law.

Temporary assignment of Minister's powers and functions to another Minister⁴⁵

18. Whenever a Minister is absent or [for any reason] unable to exercise and perform any of the powers and functions entrusted to him or her, or whenever

⁴³ It was suggested by one of the parties to insert the word "improperly" before "enrich".

⁴⁴ Agreed to in the CC.

⁴⁵ Reformulated to simplify the clause as per instruction of the CC.

the office of a Minister is vacant, [a Minister has vacated his or her office and a successor has not yet been appointed], the State President may appoint any other Minister [to act in the said Minister's stead, either generally or] to exercise or perform any or all of the first-mentioned Minister's [specific] powers and functions.

Transfer of Minister's powers and functions to another Minister⁴⁶

19. The State President may assign the administration of a law entrusted to a particular Minister, or the discharge of any power or function entrusted law to a particular Minister, to any other Minister.

Votes of no confidence⁴⁷

20. (1) If the National Assembly passes a vote of no confidence in the Cabinet, the State President shall resign or shall dissolve the National Assembly and call an election of the National Assembly.

(2) If the National Assembly passes a vote of no confidence in the State President alone, he or she shall resign.

(3) If the National Assembly passes a vote of no confidence in the Cabinet, excluding the State President, the State President shall either resign or reconstitute the Cabinet.

⁴⁶ Agreed to in the CC.

⁴⁷ Dissolution of the NA and votes of no confidence to be taken further by CC Subcommittee.

