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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Party Secretaries
FROM: Executive Director
DATE: 28 March 1996
RE: Urgent Distribution of *"The Presidency and the Executive and the relationship between the Executive and Parliament."*

Herewith please find the above document for urgent distribution.

**H EBRAHIM
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THE NEW CONSTITUTION

PANEL OF CONSTITUTIONAL EXPERTS**MEMORANDUM**

To: Chairpersons and Executive Director of the CA
Date: March 11, 1996
Re: The Presidency and the Executive and the relationship between the Executive and Parliament

1. INTRODUCTION

- 1.1 The Panel was asked to consider the position of the President in the Working Draft. We had a meeting with Professor Haysom, legal advisor to the President, in which he pointed out some serious problems with the position under the Interim Constitution. These problems are not avoided in the present draft on the Executive.
- 1.2 Broadly speaking the problems concern the relationship of the President to the rest of Cabinet and the relationship of the Cabinet to Parliament.

The Working Draft requires the President to consult with Cabinet or a member or members of the Cabinet whenever 'exercising the powers and performing the functions entrusted to that office by the Constitution'. A narrow list of exceptions is provided (cl 78(3)). The requirement of consultation is problematic in many situations. For instance, it seems to require the President to consult cabinet or a member of cabinet before attending a soccer match in his capacity as Head of State. In addition, it requires consultation before a number of minor legal decisions concerning the running of the Presidential office. On the other hand, the present draft suggests that the President need not consult Cabinet or the line-function

Minister when speaking on important matters of policy. This simply does not reflect the true position.

- 1.3 In this memo the Panel suggests that the best solution to the problems is to remove the requirement that the President consult the Cabinet before acting and to flesh out notions of cabinet accountability. This solution has the added advantage of offering a more coherent account of the relationships between the President, Cabinet and Parliament.
- 1.4 The proposed solution requires some amendments to the Chapters on the Executive and on Parliament. The amendments to the chapter on the Executive would remove the consultation requirement and establish the notion of collective cabinet accountability very clearly. Amendments to the chapter on Parliament would ensure that the accountability of Cabinet to Parliament is effective.
- 1.5 The next part of this memo sets out the proposal by suggesting what the wording of the Constitution might be if it were to be accepted.¹ The third part of the memo explains the proposal in more detail. Finally, the memo draws attention to certain issues relating to the executive that seem not yet to have been considered.

Note: If this proposal is not accepted section 78(2) of the Working Draft will need to be reconsidered to address certain problems.

¹ We should emphasise that this wording is tentative and would need refinement.

2. PROPOSED TEXT

CHAPTER 5 PRESIDENT AND EXECUTIVE

The President

- 1 The President -
- (a) is the Head of State, Head of the National Executive and Commander-in-Chief of the defence force;
 - (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
 - (c) promotes the unity of the nation and that which will advance the Republic.

Powers of President

- 2(1) The President has the powers entrusted by the Constitution and legislation. These powers include those that are necessary for the fulfilment of the offices of Head of State, Head of the National Executive and Commander in Chief of the defence force.
- (2) The President -
- (a) appoints the Deputy President, Ministers and Deputy Ministers from among the members of the National Assembly, and may dismiss them, and assigns powers to them;
 - (b) convenes [Cabinet/National Executive]² meetings;³
 - (c) assents to and signs Bills;

2 The words in brackets are used interchangeably in the present draft. It would be better to choose one term and to use it consistently.

3 This provision seems unnecessary and may even trivialize the role of the President as Head of the National Executive.

- (d) may refer a Bill back to Parliament for reconsideration of the Bill's constitutionality;
- (e) may refer a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
- (f) may summon the National Assembly to an extraordinary sitting to conduct urgent business;
- (g) may dissolve the National Assembly and call an election after a vote of no confidence in the Cabinet has been passed by the Assembly;
- (h) appoints commissions of enquiry;
- (i) accredits foreign diplomatic representatives;
- (j) appoints ambassadors; and
- (k) confers honours.

Executive Authority of the Republic⁴



- 3(1) The executive power of the Republic is vested in the President and other members of the National Executive/Cabinet who are collectively responsible for -
 - (a) implementing national legislation; and
 - (b) developing and implementing national policy.

Alternative to 3(1)

- (1) The executive power of the Republic is vested in the President.
- (1)A The national executive consists of the President and the other members of the National Executive/Cabinet who are collectively responsible for -
 - (a) implementing national legislation; and

⁴ The Panel was asked to comment on the implications of executive authority being vested in the President rather than Cabinet. Under the Interim Constitution executive authority is vested in the President. In spite of this, legislation often requires specific ministers to carry out executive functions. The Panel would like more time to consider the matter.

- (b) developing and implementing national policy.
- (2) Members of the National Executive/Cabinet must act in accordance with the Constitution and may perform any act required to give effect to the Constitution.
- (3) Members of the National Executive/Cabinet are accountable collectively and individually to Parliament for the performance of their functions.
- (4) Ministers must provide Parliament with full and regular reports concerning matters under their control.
- [(5) In the performance of their functions ministers are bound by the policy of Cabinet.]⁵

Executive decisions

- 4 Legislation must specify the manner in which orders, regulations and other instruments of subordinate legislation promulgated by the Cabinet/National Executive must be made accessible to the public and the extent to which they must be
- (a) tabled in Parliament; and
- (b) approved by Parliament.

CHAPTER 3 PARLIAMENT

Provision for beginning of chapter:

39A The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a forum for the public consideration of issues, by passing legislation

5 This provision seems to have no meaning. ~~The principle of collective cabinet accountability covers it~~

and by scrutinizing and controlling executive action.

Parliamentary committees

The purpose of the committee system could be spelled out by amending cl 50 to include a provision along these lines:

50(2)

Option 1

Committees of Parliament must be established for the purpose of holding Ministers to account for the [implementation of legislation and national policy/performance of their functions] and to assist in the preparation of legislation.

Option 2

Committees of Parliament must be established with powers to seek information from Ministers and others so as to monitor the implementation of legislation and national policy and to assist in the preparation of legislation.

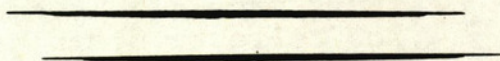
Option 3

Committees of Parliament may be established to seek information from Ministers on the performance of their functions and to investigate matters that may require legislation.

Ministers must account openly to such committees and attendance before such committees may be required by law.

50(3)

A person must appear before a committee of the National Assembly to give evidence on oath or affirmation or to produce evidence if summoned to do so.



3. EXPLANATION OF PROPOSAL

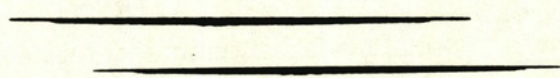
As we understand it, the political agreement is that the South African model of the President and Executive should be one in which an executive presidency is fused with the best features of parliamentary government. This means that the President should have executive power (unlike the traditional Westminster Head of State) but that the collegiate nature of the executive and the collective accountability of the executive to Parliament should be retained.

Our proposal builds on this understanding. It has three main features:

- (i) It provides a clear description of the role of the President and, by removing a technical limitation on the President's powers, makes his or her role as an executive President clear.
- (ii) It emphasises the role of collective Cabinet responsibility as a method of making the Cabinet, including the President, accountable to Parliament but, at the same time, accepts that the way in which the Cabinet operates is fundamentally a political matter and that the most effective controls are political ones.
- (iii) It attempts to strengthen the role of Parliament to ensure that Cabinet accountability is effective and to comply with CP VI.

3.1 THE PRESIDENCY AND CABINET

The current proposals for the Presidency are derived from the model established in the 1983 Constitution and provide for an executive president who governs through a Cabinet made up of members of Parliament.



This model fuses the functions of Head of State and Head of the Government. It means that the President is not only ceremonial leader of the nation but also the political leader.

3.1.1 Presidential powers under the interim Constitution
Section 82 of the interim Constitution deals with the powers of the President. Section 82(3) stipulates that the President may act alone only when that is authorized by the Constitution. In all other cases the President acts in consultation with the cabinet. This means that when legislation authorizes the President to act, the President is required to consult Cabinet or a member of cabinet delegated for this purpose by cabinet before acting.⁶

In addition, section 82(2) provides that in certain matters the President must consult the Deputy Presidents.

3.1.2. Presidency as proposed in Working Draft

The present proposals retain the model in the interim constitution according to which:

- (i) the President is both Head of the government and Head of State;
- (ii) the President is elected by Parliament from among its members but must leave Parliament on election;
- (iii) the President governs the country through a Cabinet which he must consult before acting in all but a limited number of cases; and
- (iv) Cabinet members are also members of Parliament.

3.1.3. Consultation with Cabinet

Both the interim Constitution and the present draft require the President to exercise the powers and perform the

⁶ Two narrow exceptions to this principle are provided in ~~section 82(1)(h) and (j)~~ which allow legislation to confer the power to act alone on the President.

functions' entrusted to the President by the Constitution or law in consultation with Cabinet.⁷ The requirement that the President must act in 'consultation with' means that the President requires the concurrence of Cabinet before acting. Cabinet may delegate its consultation function to a particular Minister or Ministers.

(a) Legal implications of the provision in the Working Draft

Because the draft Constitution entrusts the President with all executive power, section 78(2) of the draft may be interpreted to mean that all Presidential action, with the exception of party political action such as campaigning, is constitutional only if consultation takes place. This would be problematic.

The requirement of consultation is not always appropriate. For instance, the President runs his office, makes decisions about travel and addressing gatherings both in and outside South Africa, attends sports functions, and engages in political activity such as facilitating meetings to resolve internal conflicts on a regular basis.

It is uncontroversial that the President should be free to make some of these decisions such as those concerning the running of the Presidential office and the President's programme of meetings and travel without consulting Cabinet.

At present the President's office interprets the requirement of consultation in section 78(2)'s counterpart in the interim constitution to require the President to consult only when performing 'legal' duties. This would include

⁷ Interim Constitution s 82(3); draft s 78 - although the wording differs in these two provisions, the legal position is identical.

duties imposed by statute and duties specifically imposed by the Constitution.

This interpretation excludes some activities that may be considered to be matters in which the Cabinet has an interest such as meeting foreign leaders. A decision to meet a foreign leader can have direct implications for foreign relations and it would be unusual to suggest that these decisions could be made without at least discussion with the Minister of Foreign Affairs.

Similarly, again because it deals only with decision making, it does not require the President to consult Cabinet before making speeches which deal directly with government policy. For instance, theoretically the President could make a speech dealing with major and controversial issues of crime control and perhaps describing what he thinks to be an appropriate strategy without consulting Cabinet or the line function Minister.

Although it is unlikely that a wise President would do this kind of thing, the limitation of the requirement of consultation to decision-making skews the framework of shared government implicit in the Cabinet model.

But the present wording as it is interpreted by the president's office is not only too narrow, it is also too wide. It also potentially covers a range of mundane matters in which consultation should not be necessary and on which, were the President an ordinary Minister, he would be able to act alone.

(b) Purpose of consultation requirement

The requirement of consultation developed in Britain as a result of Parliament's successful struggle for power against the Crown. Although the monarch remained head of state and

executive power was formally vested in the monarch, the monarch was restrained from acting without consulting the government which was based in Parliament. A similar position was adopted in South Africa.

Under the GNU the consultation requirement has another possible function, it seeks to provide a formal method of ensuring that the President involves all members of the Cabinet in decision-making.

In the present draft the only function of the consultation requirement is as a method of ensuring that the President remains accountable to Parliament through the collective responsibility of Cabinet. But it does not seem to be a particularly effective means of achieving this.

First, the accountability of the whole Cabinet, including the President, to Parliament is achieved more directly by the requirement of collective cabinet accountability itself.

The requirement of collective accountability means that the full cabinet must be prepared to bear responsibility for every executive decision. If an individual minister feels unable to accept some or another aspect of the executive's policy, that minister must resign (or remain silent) or may be dismissed by the President. The possibility of ministerial dissent is a constant restraint on Presidential decision-making. It is the President's sense of his or her support in Cabinet, and in Parliament, that will determine Presidential action. Although the President has the power to appoint and dismiss ministers, those appointments will be guided by the needs of the government and the distribution of political power and interests in Parliament. The President's position in this regard is very similar to that of the Prime Minister in a Westminster style system.

The formal requirement of consultation appears to add nothing to this. Should a minister or ministers feel unable to agree to proposed executive action and the President is confident that the action is correct and will have political support, the President may simply ask the minister/s to resign.

In the absence of a specific requirement that the President must consult Cabinet before acting, the notion of collective accountability means that the President must be confident that he or she can carry the Cabinet with him or her before acting.

Secondly, the requirement of consultation introduces complex legal requirements into an area in which decisions are political. In doing so, it burdens the presidency without enhancing accountability in any real way and 'legalizes' a process which is political in reality.

(c) Removing the requirement of consultation

As we indicate above, we understand there to be political agreement that the Constitution should establish a model of the presidency and the executive which is essentially a hybrid of an executive presidency and parliamentary government. In doing this the best of both systems must be used.

Following the interim Constitution, the present draft incorporates provisions relating to the President that are derived from the position of the head of state in the Westminster system and provisions describing the President as head of the executive. To these are added a description of the way cabinet functions which is taken from the Westminster system. This is presumably how the requirement of consultation came to be included.

As we have argued above, there appear to be no reasons for the inclusion of a requirement to consult. It is an anachronism, derived from a model which is no longer fully applicable in South Africa. Moreover, it undermines the President's position as head of the executive, leaving him or her with less power than a ordinary Cabinet minister in some respects.

The model becomes more coherent and practical if the technical requirement of consultation is removed and the requirement of collective accountability emphasized. Under this model, the Constitution would grant the President real power as head of the executive. It would also comply both with the political agreement on the subject and Constitutional Principle VI which requires 'appropriate checks and balances to ensure accountability, responsiveness and openness'.

3.2. PARLIAMENT

In full, Constitutional Principle VI requires 'a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

The proposal outlined above relies mainly on the principle of collective cabinet accountability to achieve the objects of CP VI.⁸ Accordingly, we suggest that the enhanced role of the President should be matched by a strengthening of the role of Parliament.

3.2.1 Role of Parliament

8 Of course, collective Cabinet accountability is not the only mechanism established under the present draft to secure 'accountability, responsiveness and openness'. Among other things, the institutions established under Chapter 7 will play a role in ~~this as will certain of~~ the rights granted under the Bill of Rights.

The role of Parliament in a democracy is to represent the people. However, how it is to do this and what it is expected to do in fulfilling this function is not always clear.

One view of a parliament's role in a parliamentary system is that it is basically an electoral college, putting the government of the day into place. Its function then is to support the government (financially and through legislation). Because a government is usually chosen from the majority party in Parliament and because of the development of strong party discipline in most democracies, many parliaments seem to fit this description.

Another view of Parliament is broader. It is that Parliament should perform a deliberative function and be a forum in which government action is carefully scrutinized and government is made accountable between elections. In addition, it could be a place in which major public issues are debated and brought to the attention of the public. This approach does not mean that Parliament and the executive will be in constant competition with each other. On the contrary, the fact that the executive is drawn from the majority party means that the relationship will generally be a supportive one. However, the approach does emphasize the autonomy of Parliament and its particular role in a system of representative government.

3.2.2 Parliament as a deliberative body - measures to achieve this

The nature of the relationship between the executive or government and parliament in a parliamentary system, the fact that the government is drawn from Parliament, and the operation of the party system makes it very difficult to ensure that parliament will perform a deliberative and checking function rigorously. Thorough scrutiny and careful

deliberation is made additionally difficult by the very technical nature of most modern legislation and by its volume.

(i) *A description of Parliament's role*

A constitution can clearly not prescribe detailed rules for the operation of Parliament, nor can it ensure that parliamentarians will take the deliberative role of parliament seriously. What it could do, however, is establish the principle of a deliberative role for Parliament. Such a principle would seldom, if ever, provide the basis for a legal challenge to the way in which Parliament functions but it could establish clearly a commitment to an active role for Parliament and to the constant scrutiny of government action.

A strong reason for including the basic principles of the broad deliberative and scrutinizing role for Parliament in the Constitution is that we need to break the traditional assumptions of systems styled on the Westminster form of government.

In our suggested wording, section 39A is inserted to assert clearly a deliberative role for Parliament.

(ii) *The committee system*

We propose developing the provision on the committee system (clause 50 of the draft) to secure the role of parliamentary committees in assisting Parliament in the process of holding the executive to account and in ensuring that issues are fully discussed before legislative decisions are made.

At present clause 50(1) simply mentions committees as bodies that Parliament could establish. This is a power that Parliament has in any event by virtue of its power to control its own procedures. The only legally significant

provision relating to committees at present is clause 50(3) which permits committees to summon people to give evidence.

We suggest:

- (i) making the committee system obligatory; and
- (ii) describing the purpose of the committee system.

In addition, it appears that at present committees may summons people to give evidence but their power to enforce this is uncertain. This matter should be re-examined.

4 ISSUES CONCERNING THE EXECUTIVE THAT MAY NEED CONSIDERATION

4.1 Membership of Cabinet:

At present no provision is made for Cabinet appointments from outside Parliament. There are three options:

- (i) (A certain number of) non-parliamentarians be permitted to serve as members of the Cabinet
- (ii) Non-parliamentarians may be appointed but must become members of Parliament within a certain period (position in past).
- (iii) Only parliamentarians are eligible. (This seems unnecessarily rigid and open to manipulation.)

4.2 Should the President be able to hold a Cabinet portfolio?

Under the interim constitution the President is not able to hold a portfolio. This seems to be the case under the present draft as well.
