

NOTE ON THE IMPLEMENTATION OF DECISIONS OF
THE ALL PARTY CONFERENCE
WITH PARTICULAR REFERENCE TO THE PROVISIONS OF THE
CONSTITUTION

1. The present constitution¹ makes a distinction between "general affairs" and "own affairs". The executive power in relation to "general affairs" is vested in the State President acting "in consultation with" Ministers who are members of his Cabinet.² Executive power in relation to "own affairs" is exercised by the State President "acting on the advice of" the appropriate Minister's council.³
2. The Cabinet consists of Ministers appointed to administer Departments of State for General Affairs as well as any Minister appointed to perform other functions and who are designated by the State President as a member of the Cabinet.⁴ Any member of a Minister's council may also be designated as a member of the Cabinet.⁵
3. Ministers are appointed by the State President, but there is no limit to the number of Ministers who may be appointed by him. The State President may also appoint any number of Deputy Ministers, either to a Department of State, or for any other purpose. Once again there is no limit to the numbers of appointments that may be made.⁶
4. It is necessary for any person appointed as a Minister or a Deputy Minister to become a member of "a House" within a period of 12 months from the date of his or her appointment.⁷ Appointments are therefore subject to the racial exclusions of the tri-cameral parliament.
5. It follows that the State President has the power to appoint any number of persons to his Cabinet. Persons appointed will, however, be subject to the racial exclusions of the tri-cameral parliament, must become members of parliament within twelve months, and must also take an oath of allegiance to the Republic of South Africa in the terms set out in the constitution. These conditions

¹ Act No 110 of 1983

² Section 19(1)(b)

³ Section 19(1)(a)

⁴ Sections 20(b) and (c)

⁵ Section 20(d)

⁶ Section 27

⁷ Section 24(3)(a) and Section 27(2)(a)

will effectively prevent members of the ANC Alliance from accepting appointment as members of the Cabinet under the present constitution. Constitutional amendments will be required if members of the Alliance are to become members of the Cabinet.

6. The legislative power is vested in the State President and the tri-cameral parliament. Parliament cannot be deprived of its legislative powers without an amendment to the constitution which would require the agreement of each of the Houses of parliament.⁸ Power can, however, be vested by parliament in the State President acting on the advice of, or possibly in consultation with, his Cabinet, to make laws by proclamation. This would give the President powers which are equal in scope to the powers of parliament, but would not deprive parliament of its over-riding power to contradict Presidential proclamations, or if it subsequently chooses to do so, to deprive the President of the power given to him. If the legislature's powers are to be made subservient to the approval of an interim government, such limitation would have to be introduced as an amendment to Section 30 of the constitution, which would require the approval of each of the Houses of the tri-cameral parliament.⁹
7. To sum up, therefore, it is possible to make provision for an interim government under which control over executive as well as legislative actions would be vested in a Cabinet to be appointed in accordance with decisions taken by the APC. This would, however, require material amendments to the constitution, calling for the consent of each of the Houses of the tri-cameral parliament.
8. The simplest procedure to bring about an interim government would probably be to pass an Interim Government Act, under which decisions taken by the APC will be recorded in legal form, and which specifically provides that insofar as the Interim Government Act is inconsistent with the constitution, it must be taken to that extent to have amended the constitution. This would require the agreement of each of the Houses of the tri-cameral parliament and may possibly involve the specific repeal of certain of the provisions of the constitution.
9. An alternative procedure, which would be less effective because it would not necessarily be legally binding upon the State President or the National Party, would be to provide for the appointment of joint committees to advise the State President in regard to the functioning of each of the Departments of State, and for the State President to give an assurance that he will act in accordance with the advice of such committees. The agreement could also provide that all proposed legislation should be referred to

⁸ Section 99(3)

⁹ Section 99(3)

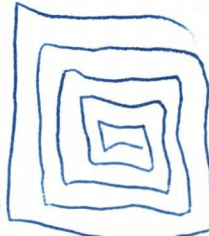
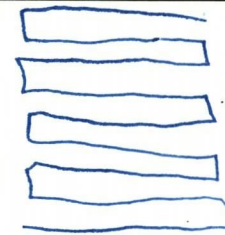
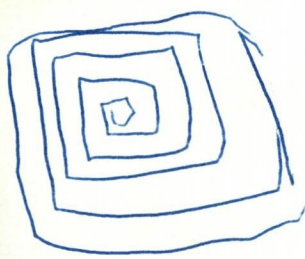
the joint committees, and be not proceeded with, unless the joint committees consent thereto. The implementation of such provisions would probably depend upon the good faith of the government which would have both the constitutional authority and the de facto control over government departments necessary to enable it to override the agreement if it chooses to do so. The only sanction would be the political sanction consequent upon such conduct.

10. The joint committees could possibly be given a legal status through legislation which, insofar as may be necessary, could be deemed to amend the present constitution. Once again, however, that would require agreement of each of the houses of the tri-cameral parliament.
11. Provisions for the control of the media, the regulation of the electoral process, the day to day supervision of the police and security forces, and the regulation of economic policy could all be introduced in legal form through the enactment of specific legislation by the tri-cameral parliament. The details of the legislation would depend upon the terms of the agreement reached at the APC. It is only in relation to executive and legislative functions that constitutional amendments would be required.
12. It must be borne in mind that as long as the legislative power remains in the tri-cameral parliament, any legislation passed, including amendments to the constitution, can subsequently be reversed by the tri-cameral parliament itself. Legislative provisions designed to block such amendments are not likely to survive the scrutiny of a court, and in the last resort, the only effective sanction would be the political consequences attaching to any attempt on the part of the government to reverse legislation enacted to give effect to agreements reached at the APC.

26 November 1991

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DRAFT AGENDA FOR NEGOTIATIONS COMMISSIONS MEETING

Date: 28 November 1991

1. Welcome and Opening Remarks - President
2. Purpose of meeting - Secretary-General
3. Briefing on APC process thusfar
4. Discussion on APC Working Groups
 - 4.1 How many and which Working groups
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