

THE EXECUTIVE IN THE 1996 CONSTITUTION: AN ANALYSIS AND A COMMENT

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INTRODUCTION

The Cabinet of South Africa presides over an annual budget in excess of R180 billion, a Police Force of 120 000 officers, a Defence Force of 80 000 soldiers, and a National Public Service of about 80 000 officials. It manages the macro economic policies of an economy with a gross domestic product of around R650 billion per year. The Cabinet is responsible for deciding how to allocate money between various state departments, not forgetting that the single largest item in the post apartheid budget is repayment of the public debt, around R30 billion per annum in 1997/1998. Ministers are the political heads of around 25 state departments that include everything from Forestry and Water Affairs, to Foreign Affairs, Defence, Safety and Security, Health Services, Prisons, Road, Rail and Air Transportation, Social Services and many others. The Cabinet is responsible and answerable to the voters of South Africa for a highly complex state administration. It has to provide political leadership, co-ordinate state administration, initiate and pilot in excess of 50 complex laws through Parliament each year. It faces truly gigantic challenges in managing and transforming South African society from an authoritarian to a democratic political order. All this and much more is the political responsibility of no more than 28 ordinary men and women who have chosen to make politics and public service their career if not evocation in life.²

A cabinet is the link between the public interests of the country at large, the public service and Parliament, where policy and administration is co-ordinated to promote the improvement of the conditions of life of society. Cabinet ministers have to promote the interests of their party, the general public and special interest groups in their daily tasks. Moreover, cabinet ministers have to supervise the work of their senior public officials and advisers, budget for

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2 All the figures refer to the 1997/98 fiscal year.

expenses and account for money spent in their departments to Parliament and in general provide political direction and leadership to their party in power. Cabinet ministers have a difficult task in providing political and managerial impetus to a department. Almost no major initiative can be undertaken in a department unless enabling legislation is first approved by Parliament. Ministers work with public money and Parliament has to approve the principles of projects or expenditure before it can be executed at departmental level. Having said that, one should also remember that state departments are complex affairs and that Parliament has fairly limited resources to control them. Therefore it is also true to say that ministers have a wide discretion in using funds in fulfilling their obligations to Parliament and the electorate who put them in office. In this article the formal as well as informal and managerial and administrative functions and structures of South Africa's National Executive are explored. The purpose is to introduce the student to the formal constitutional provisions regarding the South African Executive and its powers, as well as its more informal and political functions in the day to day management of public affairs.

THE FORMAL PROVISIONS OF THE CONSTITUTION

Before presenting the formal provisions of the Constitution regarding the Executive, a few words regarding its constitutional context are in order. The Constitution of 1996 is "the supreme law of the Republic" (section 2). The Constitution provides for a bicameral Parliament, a National Assembly of between 350 and 400 members and a National Council of Provinces of 90 members, constituted of 10 representatives from each Province. It provides for universal franchise for all adult South Africans, a Bill of Fundamental Rights, equality before the law, a Constitutional Court and nine Provincial governments.

The 1996 Constitution continues the practice of the interim Constitution by writing into law rules regarding the Executive in order to facilitate certainty regarding executive governance. These will be addressed in the article as the need arises. The formal provisions of the Constitution regarding the President and Executive are expressed in section 5 of the Constitution and the diligent student should carefully study these as well.

THE SALIENT FEATURES OF THE EXECUTIVE

THE PRESIDENT

ELECTION AND TERM OF OFFICE

The Constitution vests executive power in the President who is both head of state and of government (sections 84, 85). The President is elected by the National Assembly with the President of the Constitutional Court presiding. Only members of the National Assembly are eligible for election to the Presidency, however immediately upon election the President has to vacate his/her seat. This seat can then be filled from the electoral list of the President's party. The President may only serve two five year terms of office, except when s/he fills a vacancy left by a previous incumbent. The President can be removed from office (impeached) on the grounds of serious misconduct or incapacity by a vote supported by two thirds of the members of the National Assembly (section 89). The President also has to resign if a majority of the members of the National Assembly passes a vote of no confidence in him/her (section 103). This is a political act of the National Assembly, while impeachment is a legal instrument to remove a President on the grounds of criminal misconduct or general incapacity, such as dementia or a serious illness.

POWERS OF THE PRESIDENT

In terms of section 84 of the Constitution, the President has powers entrusted by the Constitution and by legislation to perform the functions of head of state and head of the National Executive. This comes down to the President having statutory powers to assent to, sign and promulgate bills passed by Parliament; refer bills back to Parliament in case of reservations about the constitutionality of a Bill (section 79(1)); confer honours; convene meetings of Cabinet; appoint and accredit diplomatic personnel; appoint commissions of inquiry; make appointments authorised by the Constitution; negotiate and sign international agreements; proclaim referenda and plebiscites and to pardon and reprieve offenders (cf. section 84(2) (a-k)). In distinction to other parliamentary executives, South Africa does not have a nominal head of state and these powers can be exercised by the President without necessarily getting approval of Cabinet. However, in the political dynamics of cabinet government, the President would be unwise to act without the political approval of the members of Cabinet as well as the support of his/her party in the National Assembly.

The President chairs meetings of the Cabinet. In his/her absence, the Deputy President takes the chair. When both the President and the Deputy President are unavailable, the acting President, usually a senior member of Cabinet designated by the President, takes the chair at a Cabinet meeting. When acting as head of the National Executive (Cabinet) the President has to exercise these powers "together with other members of the Cabinet" (section 85(2)). This means that the President takes decisions together with the Cabinet at Cabinet meetings. There is no legal prescription as to how the Cabinet should take decisions: by consensus, relative majority or absolute majority (50 % + 1) vote. In the new Constitution, the South African Cabinet functions under the principle of consensus, logically derived from the constitutional provision that the Cabinet is collectively responsible to Parliament (section 92(2)). In practice the Cabinet has followed the convention of most other cabinets in parliamentary systems to try its utmost to reach decisions by consensus. When strong disagreements arise in Cabinet, this usually means that the decision is controversial and should be held over until a compromise can be struck. Should the President ignore the opinions of powerful members of Cabinet, and have these overridden by his influence, it could put his position at risk in the political sense. Cabinets are collective bodies and a President cannot ignore influential members' opinions and interests.

The President can also exercise powers as head of the National Executive without the consent of Cabinet, similarly to the powers that ministers exercise in their official capacity. He is, however, collectively responsible, with Cabinet, to Parliament for the exercise of these powers. Some examples of the exercise of these powers are the following: the appointment of the President of the Constitutional Court and four members of the Judicial Services Commission. He also exercises powers on the recommendation, advice or proposal of different bodies and offices, e.g. the appointment of judges, the Public Protector and the Auditor General (cf. Rautenbach and Malherbe 1996:179).

The President, while usually seen as the head of government, and therefore exercising executive powers, indeed also exercises legislative and judicial powers. The President must assent to all laws passed by Parliament and has the power to promulgate regulations in terms of statutes. These are technically legislative powers. Moreover, the President has the power to reprieve imprisoned offenders, which is a judicial power (section 84(2)(j)). The President does not have a veto power of legislation, i.e. s/he cannot refuse to accept a bill passed by both Houses of Parliament. The President can refer a bill back to

Parliament if s/he has reservations on the constitutionality of the bill. If Parliament refuses to accommodate the President's reservations, the President can refer the bill to the Constitutional Court for a decision on its constitutionality. Should the Court rule that the bill is constitutional, the President must assent to the bill and sign it into law (Cf. section 79).

LIMITATIONS ON THE POWERS OF THE PRESIDENT AND CABINET

FORMAL LIMITATIONS

The new Constitution places formal limitations on the authority and powers of the Executive. The most important new principle introduced by the Constitution in South African constitutional law is the Bill of Fundamental Rights and the Constitutional Court. South Africa has moved away from the conception of the sovereignty of Parliament and the inherent advantage that a strong parliamentary executive enjoys under such an arrangement. The new Constitution authorises the Constitutional Court as well as ordinary courts of law to adjudicate on the constitutionality of all actions of the Executive as well as acts of Parliament (section 34). Moreover, the Offices of the independent Auditor General, the Public Protector (Ombudsman), the Human Rights Commission, the Commission on Gender Equality, and the Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities could and should in practice turn out to limit the powers of Cabinet (cf. section 181) - if only to the extent that abuses of power are brought into the open and, if necessary, lead to some form of penalty for the Ministers concerned.

In addition Cabinet power is limited by common law jurisdictions vested in ordinary courts of law such as the right of revision of administrative decisions, including the right to seek a court interdict, appeal to administrative bodies and a writ of mandamus. Sections 167(5) and 172 render further powers to the Constitutional Court to declare invalid existing laws that are inconsistent with the Constitution. The Court may also require Parliament in the interests of good government to correct such defects in the law within a specified period.

LESS FORMAL LIMITATIONS

The powers of the President and Cabinet in the new Constitution are limited by the usual factors that affect a parliamentary executive. First, the Executive's powers are limited by its need to maintain a majority in Parliament.

The usual concomitant Parliamentary controls are exercised over the Executive, such as question time in the Houses of Parliament during which the President and Ministers are obliged to answer question from members. Parliamentary Committees, particularly the Standing Committee on Finance, the Standing Committee on Public Accounts and the Committee on Defence, exercise control over financial and defence matters. As is customary for a parliamentary executive, Cabinet needs parliamentary approval for its budget and individual Ministers' budget votes are ratified by Parliament. Departments and statutory bodies under control of the Executive are, in terms of existing statutes, obliged to table reports in Parliament. These controls are relatively weak, similar to those in other democratic Parliaments, since the ruling party caucus is in solidarity against opposition in Parliament.

Second, the Executive is sensitive to public opinion and of necessity relies on its party organisation to retain enough public support to win general elections. Cabinet will bow to popular passions should these prove to be detrimental to its continued survival as a majority party in Parliament. Lastly, the President does not have the same power as the British Prime Minister or previous South African Prime Ministers had with regard to the dissolution of Parliament. Parliament is in continuous session and the President can only dissolve Parliament under specific constitutionally prescribed circumstances (section 50(2)). Parliament itself decides on the timing of its sittings (section 51) and the President has no powers like the British Executive to summon or dissolve Parliament at will.

The above exposition suggests that the new Executive has substantially less formal powers than that of the previous Executive, and that an "imperial" president in the style of PW Botha is unlikely to emerge. However, there is some flexibility in the Constitution on the powers of the President and Cabinet. The President retains some powers such as the enacted prerogatives³ and the discretion of dismissal and reshuffling of ministers' portfolios. The President exercises executive leadership and sets both the Cabinet and national political agendas.

DEPUTY PRESIDENT

The President, at his own discretion, appoints the Deputy President from

3 Only a few prerogatives remain: to issue passports and "acts of state" with regard to foreign relations, cf. Rautenbach and Malherbe 1996:37-40.

among the members of the National Assembly. The Deputy President must assist the President in the execution of the functions of government and is responsible to the President for the dispatch of such functions. The Deputy President is a member of Cabinet just like any other member, sharing collectively the responsibilities of Cabinet to Parliament. The Deputy President serves as Acting President in his/her absence or incapacitation (section 90).

CABINET

The Cabinet consists of the President, the Deputy Presidents and Ministers. The President appoints ministers from members of the National Assembly to administer designated portfolios and they are individually accountable to the President as well as Parliament for their actions. The President, at discretion, can also dismiss ministers or assign them different portfolios. The President may appoint up to two members from outside the National Assembly to Cabinet. No member of the Cabinet, including the President and the Deputy Presidents, may take up other paid employment, or expose themselves to situations of conflict of interest and may not misuse their positions in order to enrich themselves or any other persons (sections 91-96).

All members of Cabinet are collectively and individually responsible to Parliament "for the performance of the functions of the national government and for its policies" (section 92(1)). Ministers must administer their departments in accordance with policy determined by the Cabinet. A Minister who fails to carry out Cabinet policy may be required by the President to bring the portfolio into conformity with agreed directive(s). Failure to do so can result in the Minister being dismissed by the President. The President has a completely free hand to discharge a Minister, who constitutionally cannot refuse to be dismissed. The Constitution makes no formal provision for the impeachment of individual Ministers.

CRITERIA OF APPOINTMENT, THE COMPOSITION OF CABINET

Only members of the National Assembly can be appointed as Ministers (section 91(3)). The South African tradition prior to 1980 of using appointed Senators and since then indirectly elected MP's, to fulfil the need for technocratic expertise has been continued by the provision that no more than two members from outside the National Assembly may be appointed to Cabinet

(section 91(3)(c)). This continues the British and South African practice of the lay politician rather than the technical and administrative expert as political head of state departments. One can therefore expect the careers of Ministers to approximate those of contemporary Britain and the "old" South Africa (cf. Venter 1992). Politicians rather than professional managers and administrators will continue to dominate cabinet appointments. If more than two technocrats are needed in future, they will have to be brought into party politics as the need arises. The party list system of parliamentary representation could facilitate this practice.

The first Mandela Cabinets were structured partially to be representative of the population. However, the representation is highly skewed in favour of men, 20 out of 28 members (including the President) of the 1997 Cabinet are men. As far as race and ethnic diversity is concerned, half the members are African men, four are African women. Other racial groups represented *inter alia* are two white men, five Indian men, and three "coloureds". Minority ethnic groups in the African population, such as the Venda, are represented as well. Ironically, ethnic white Afrikaners lost their position in high politics entirely with the withdrawal of the National Party from the GNU in May 1996. There are no Afrikaners in the 1996/97 Mandela Cabinet. Mandela advisedly, and in line with the ANC policy of non-racialism, did not openly try to accommodate the ethnic diversity of the country in his Cabinet. What ethnic diversity there is, is covert rather than overt. However, in 1996 he did react to criticism from the Cape Coloured Community that the "ANC had left them in the lurch in the post apartheid era", by pointing out that three members of his Cabinet were "Coloured".

SIZE OF CABINET

The size of the Cabinet is not prescribed by the 1996 Constitution and will vary according to the needs of the President. The size of the first Cabinet of National Unity was set by the 1993 Constitution at 27 and was constituted proportionally according to party representation in Parliament. This number will be continued until 1999, when the provisions of the 1996 Constitution in this regard will come into force. This is somewhat large for a modern cabinet. Post-war European parliamentary executives have tended to vary between 18 and 20 members. Blondel's research demonstrates empirically that this number is deemed to be optimal in practice (Blondel 1988:3). Margaret Thatcher has been quoted as saying that a cabinet substantially bigger than 18 to 20 members

becomes unwieldy. By illustration, a tour de table, even if a rare occurrence, at a Cabinet meeting of 30 that gives each member a mere three minutes each to speak their minds, will clearly result in extremely long sessions. This could result in decision by exhaustion, an unacceptable practice if one takes effective governance seriously. However it is not a point of constitutional principle and has to be decided practically and with circumspection. The 1996 Constitution gives the President a free hand in deciding on the number of ministers in the Cabinet.

VOTES OF NO CONFIDENCE IN THE EXECUTIVE

Section 102 of the Constitution makes specific provision for two categories of votes of no confidence. First, the National Assembly may pass a vote of no confidence in the Cabinet, excluding the President, in which event the President must reconstitute Cabinet. Second, the National Assembly may pass a vote of no confidence in the President alone, in which case the President and Cabinet must resign. The National Assembly then has to elect a new President who has to try and form a new government. Failure to constitute a new government within 30 days with majority support implies that fresh elections will have to be held. In such an event Parliament is dissolved and the government goes "to the country" for a fresh electoral mandate. On the occasion that the President resigns or the National Assembly is dissolved, the Cabinet continues in office as caretaker until a successor government has been formed in terms of the Constitution.

DEPUTY MINISTERS

The President may appoint deputy ministers from among the members of the National Assembly to assist members of Cabinet. Ministers can delegate powers to their deputy minister, subject to the directions of the President and the policy of Cabinet. The President can dismiss deputy ministers (section 93). Deputy ministers are not members of the Cabinet, and at most can be depicted as members of "the government".

DISCUSSION

THE STRUCTURE OF THE EXECUTIVE

The formal structure of the Executive as provided for in the Constitution is clearly hierarchical. The pre-eminence of the President, who is elected by the

National Assembly, not merely by the caucus of the majority group or party, is evident. The Constitution moves closer to the German model of Chancellor government, in which the National Assembly gives its imprimatur to the leader of the Executive. The hierarchy of President, Deputy President, Cabinet Ministers and Deputy Ministers is unambiguous. In addition, the President has appointed to Cabinet party leaders of standing who have a higher informal status in Cabinet than ordinary members. In the first post April 1994 Cabinets, members such as Zola Skweyiya, Kader Asmal, Thabo Mbeki, Stella Sigcau and Dullah Omar were clearly more influential than say Geraldine Fraser-Moleketi or Chris Fisser. In conformity with English and South African Cabinet traditions, there is a seniority list of members of Cabinet. The Ministers of Defence, Foreign Affairs, Finance, Law and Order and Home Affairs are accorded the (informal) status of "high offices of state", confirming the hierarchical structure of Cabinet and reminiscent of the typical seniority system which prevails at Westminster.

The office of an executive Deputy President is new in South African constitutional law and Cabinet government. In the 1961 Constitution, as amended in 1980, there was a Vice State President, but this officeholder had only nominal powers. However the appointment of Vice or Deputy Premier is not uncommon in European parliamentary executives. Coalition governments such as those in Italy and Belgium have exercised the practice for many years (cf. Cotta 1988 and Frogner 1988). While an unequivocal hierarchy is established by the Constitution, it simultaneously limits the competencies of the President. The President is clearly no longer a *primus inter pares* in the 19th century British tradition but has less powers than the British Prime Minister. While the Constitution formally bestows the apex of the Cabinet hierarchy on the President, it also formally takes away some of the discretions which the typical British premier has, the most important being the right of dissolution of the National Assembly. The President cannot bring a recalcitrant National Assembly to heel by the threat of dissolution - the Assembly is in permanent session for its full term of office. The National Assembly can dissolve itself only by adopting a resolution supported by a majority of its members to that effect, after at least three years have passed since the Assembly was elected. Alternatively the Assembly must be dissolved by the Acting President if there is a vacancy in the office of the President and the Assembly has failed to elect a new President within 30 days of such a vacancy occurring (section 50). In practice this means that the Assembly could dissolve itself by passing a vote of joint no confidence in the President and Cabinet and failing to elect a successor presi-

dent within 30 days. This would clearly only happen in the event of serious dissension in the ruling party or parties.

The Executive is parliamentary dependent on the confidence of a majority in the National Assembly. The President as well as Ministers are required to be elected members of the National Assembly and are constitutionally accountable for their actions to that body. However, the Executive cannot be deemed a hybrid between "presidential" (really "non-parliamentary") and "parliamentary" executives, like that of France. The French President is popularly elected and cannot be removed from office by a vote of no confidence. The new South African Executive is a formalised, enacted parliamentary executive. By contrast in Britain, "(s)ave for the occasional allusion, as in the Ministers of the Crown Act of 1937, neither Prime Minister nor Cabinet is known to law" (Mackintosh 1968:1). Its existence depends in the main on conventions and customary practice.

THE TRIPARTITE DIVISION OF POWERS, TRIAS POLITICA

Constitutional principle III states: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." The provisions of the Constitution clearly do not conform to the classical Lockean conception of the separation of powers. While legislative authority is formally vested in Parliament, executive authority in the President (and Cabinet) and judicial authority in the Courts, this separation is not "neat". The President is elected by the National Assembly, which can dismiss him/her for misconduct. The Executive, as provided for in the present constitution, has both judicial and legislative powers and is not systematically separated from the legislature. The President, Deputy President and members of Cabinet need the confidence of the National Assembly to remain in office and are accountable to Parliament for their actions. The President has no veto power and has to assent to laws passed in Parliament. In terms of present South African laws the President also has legal powers to promulgate regulations with the force of law, thus giving him/her legislative competence. The President has powers in respect of the judiciary through the competence to appoint judges and to pardon and reprieve offenders. While the separation of powers is somewhat more explicit than in Britain, the present constitution does not in actuality conform to the classic, United States derived notion of the separation and balance of powers.

THE RELATIONSHIP BETWEEN PARLIAMENT AND THE EXECUTIVE

The new Constitution continues the essential relationship between the Executive and Parliament, based on English and South African constitutional law traditions. Section 85 states that "the executive power of the Republic vests in the President...". As in Westminster, the President, as well as Cabinet, needs the confidence of Parliament to continue in office. The President cannot dissolve Parliament and call for fresh elections if Parliament loses confidence in the Executive. Section 50 alludes to such an occasion, as explained above. The Executive controls the proceedings of Parliament, as in Westminster and similar parliaments such as Canada, Australia and New Zealand.

The party system, the nature of the capitalist political economy and the expeditious processing of legislation to cater for the needs of the bureaucracy and the public it serves have not changed substantially after the April 1994 elections. Government and economic interest groups, both labour and business, require the certainty of legislation to sustain the conditions of profit needed in a capitalist economy. The executive-centric state is being continued, where Parliament is essentially a reactive institution which serves to legitimise the formulative and initiating role of the Executive and the bureaucracy that serves it.

While politicians pay lip service to populist conceptions of democracy, constitutional principle VIII explicitly states that Parliament and the Executive will continue the principle of *representative* government. The parliamentary tradition inherited from Britain as well as its truncated *old South African* version, has been continued as a mechanism where Parliament transmits the opinions of the political nation to the Executive. To paraphrase John S Mill, "Parliament is not to be expected to originate taxation or expenditure. Parliament will instead be counted on to decide which of the parties will furnish the executive to govern the country. The functions of Parliament are deliberation, legitimation of the government's business and representation of the electorate" (Mill 1910:228,237). South Africa, as Britain, experiences government through Parliament, not by Parliament.

The Executive is not a committee of Parliament, as many authors used to characterise the relationship between Parliament and Cabinet. Parliament can criticise, contain and dismiss the Executive. It cannot form a new executive, barring that it elects, or in fact really only legitimises the leader of the majority

group in the National Assembly as the President.⁴ It is the President that initiates and appoints the Cabinet, and dissolves Parliament subject to sections 49 and 50. Under such circumstances the Cabinet can hardly be designated an "executive committee" of Parliament.

COLLECTIVE AND INDIVIDUAL MINISTERIAL RESPONSIBILITY

The Constitution enacts conventions regarding Ministerial and Cabinet accountability to Parliament (section 92). The Constitution sanctions the doctrine that the Minister as political head of a civil service department is answerable to Parliament. It builds on the British convention that "the minister alone is in some sense responsible for the performance of an administrative department" (Judge 1993:135). In order to elucidate the enacted convention of individual and collective ministerial responsibility in the new Constitution, a short excursion regarding British practice is necessary. The doctrine of ministerial responsibility is customarily separated into individual and collective responsibility.

COLLECTIVE RESPONSIBILITY

Collective political responsibility in British constitutional law signifies that Cabinet acts as a unit vis-à-vis the Crown and Parliament. Its views are laid before Parliament and the sovereign as though they were the views of one person. This in turn signifies that Cabinet faces Parliament with one voice, and stands or falls together. The principle of collective responsibility also holds that Ministers who cannot in good conscience accept decisions of Cabinet should resign their office. Lastly Cabinet discussions and debates are secret by law and convention and are not made public. Lord Salisbury's formulation of Cabinet responsibility is a locus classicus: "For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to compromise, while in another he was persuaded by his colleagues... It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who,

4 The leader of the majority group in the National Assembly is assured of election to the Presidency. In my view the election of the President is a formal vote of confidence in the leader of the majority group in Parliament. In essence it is no different to the British Premier who faces the confidence of the House of Commons after an election. If he is leader of the strongest party this confidence need not be expressed explicitly. In the absence of a head of state that can ask a premier to form a government this technique cannot apply to South Africa, therefore the "election" of the President.

after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the essential principles of Parliamentary responsibility established." (Hansard, 8 April 1878, col. 833-4.)

INDIVIDUAL MINISTERIAL RESPONSIBILITY

The notion of individual political responsibility conveys three duties on the Minister concerned. The first is an explanatory responsibility, an obligation to justify the work of his/her department to Parliament and therefore to submit to the scrutiny of Parliament the handling of the portfolio entrusted to him/her by the Prime Minister. The second is an amendatory responsibility, which can be described as the duty of a Minister to acknowledge that something has gone wrong in the department and a promise that the matter is being attended to and rectified.

The third is the so called resignatory obligation of a Minister in which s/he accepts responsibility for misconduct or errors of judgement of his/her own, or on the part of officials in the department (Turpin 1989). It is a complex obligation and surrounded by much controversy in British literature (cf. Judge 1993:136). It can be subdivided into three categories, to wit personal role responsibility, vicarious responsibility for the actions of departmental civil servants and responsibility for personal moral probity.

Personal role responsibility for policies executed at the behest of the Minister is uncontroversial. When personal culpability is clear, British Ministers do resign their offices. This does not happen frequently, but well-known recent examples are that of Sir Thomas Dugdale (1952), Lord Peter Carrington (1982) and Sir Leon Brittan (1986) (cf. Pyper 1991). Vicarious responsibility for the actions of civil servants is more controversial. Whilst the Minister is in principle responsible for the actions of his/her civil servants, personal punishment for their delinquencies is not necessarily required. If civil servants commit errors, Parliament has a right to know about them and through the principle of amendatory responsibility receive assurance from the Minister that the errors are being rectified. It does not mean that all actions of civil servants are defended: mistakes can be admitted through the practice of explanatory responsibility. The Minister only defends those actions that are Cabinet and departmental policy. A long list of vicarious responsibilities of Ministers that did not lead to resignation can be compiled. Authors like Birch 1980, Finer 1956, Marshall 1989 and Pyper 1991 have come to the conclusion that post-war

ministers almost never accept vicarious responsibility for the actions of their departmental officers. Some personal culpability is required.

In practice censure of a Minister in Westminster has shifted from Parliament to the ruling party. At Westminster Parliament no longer impeaches nor accepts motions of no confidence in a Minister. The notion of individual and collective Cabinet responsibility has been replaced with collective solidarity against the Opposition in Parliament. The fall of a Minister is determined by the flow of events in and surrounding the ruling party. The actions of the Prime Minister and the ruling party determine appropriate "punishment", which could well be loss of office (Judge 1993:135,147). The idea of individual ministerial responsibility and its implicit sanction of culpability is subverted in the modern party-based parliament. In the Commons the relationship between the ruling party and the Opposition is adversarial. It is neither in the interest of ministers nor their civil servants to make public too much of the failings of their departments; a practice which has led to a culture of secrecy and defensiveness. In the words of former Prime Minister James Callaghan: "We are not going to tell MP's anything more than we can about what is going to discredit us" (Callaghan 1972). In a review of ministerial departures in Britain in the period 1964-1990, Pyper comes to the conclusion that individual ministerial responsibility is a complex affair and that it is almost never clear-cut that the Minister concerned departed from the relevant ministry solely due to vicarious or individual responsibility for objectionable actions in the department (Pyper 1991:235-6).

Thus, ideally at Westminster a Minister is preferred to follow the amendatory route. Parliament is forgiving to a Minister who keeps it informed and accepts blame. It does not forgive ministers who evade its authority (Morrison 1954). The Minister is obliged first to give account of his/her department's activities, second to answer questions on this account and only thirdly to be judged on this account (Gray and Jenkins 1993:431).

Resignatory responsibility as far as personal mores is concerned is uncontroversial. Post-war examples sustain the principle that unacceptable personal moral rectitude is usually punished by loss of office (Pyper 1991). The list of ministers who resigned on the grounds of personal moral failure is substantial: Profumo, Lords Jellicoe and Lambton, Cecil Parkinson and David Mellor are well known examples (cf. Doig 1993).

THE PRACTICE IN SOUTH AFRICA

The above exposition is obviously not a complete review of British practice and conventions. The constitution-makers tried to imbue the new South African state with a more explicit enactment of these conventions. However, in my view the practical limitations experienced in British as well as South African constitutional history will endure. It was not followed in the old South Africa. Experience in the first Mandela Cabinet illustrated quite clearly that individual ministerial responsibility for ill-conceived policies does not lead to resignation - the protestations of the press and the opposition notwithstanding. The so called Sarafina 2 affair is a good illustration. In this instance the Minister of Health authorised the spending of R14 million on a play against AIDS without following proper state expenditure procedures. Despite a negative report on the matter from the Public Protector as well as the Auditor-General, and demands from the press and opposition parties that she should resign, Mandela expressed his confidence in Dr Zuma, the Minister of Health on numerous occasions and she remained in her post as Minister of Health. However, Minister Abe Williams, a National Party member of the first Cabinet of National Unity, resigned forthwith when allegations of personal fraudulent behaviour were made against his handling of social pension payouts in February 1996.⁵ This affirmed the British practice that personal ministerial misbehaviour is not tolerated.

THE RELATIONSHIP BETWEEN PARLIAMENT AND THE EXECUTIVE

The new Constitution continues the essential relationship between the Executive and Parliament, based on English and South African constitutional law traditions. Section 75 states that "the executive power of the Republic ... regarding matters falling within the legislative power of Parliament shall vest in the President...". The Constitution enacts the conventions regarding Ministerial and Cabinet accountability to Parliament (section 92). The doctrine of individual and collective responsibility to Parliament, as set out above, is continued by constitutional confirmation. The new Constitution sanctions the doctrine that the Minister as political head of a civil service department is answerable to Parliament. It builds on the British convention that "the minister alone is in some sense responsible for the performance of an administrative department" (Judge 1993:135). By law, in South Africa, the Minister is

5 At the time of writing, June 1997, the criminal case against Williams had not been tried in court.

responsible for the actions of the department and civil servants. His/her administrative powers are statutory and are conferred by Parliament in his/her own name. Although the Minister is a member of the Cabinet, his/her powers and duties under an Act are his/hers alone in law. The actions of civil servants within a department are for legal purposes treated as those of the Minister. In terms of Act 20 of 1957, The Act on State Liability, ministers are "organs of the state" and have *locus standi in iudicio*. Therefore a Minister can be subpoenaed in Court, but in terms of South African legislation, s/he is cited by official title and not in a personal capacity. The Cabinet cannot *ex officio* be held liable in civil or criminal actions, only the relevant minister can. The legal responsibility clearly places the Minister in a strong hierarchical position vis-à-vis civil servants in the department.

In the Westminster variety of parliamentary executive this link between the Minister, Parliament and the civil service department gives rise to a contradiction. Ministerial openness to Parliamentary scrutiny is postulated on the need for private and closed decision-making processes between the Minister and the civil servants. Since all decisions are taken in the name of the Minister, there clearly is no need for civil servants to be publicly identified with the decisions nor is there any need for them to be *directly* accountable to Parliament. The corollary of ministerial responsibility is civil service anonymity and the concomitant absence of public accountability (cf. Judge 1993:152). This convention in effect draws a neat distinction, at least in theory, between *policy* (the Minister's brief) and *administration* (the permanent head of the relevant department's brief).

In practice the head of the department and senior officers play important roles in policy formulation, but the Minister alone is responsible to Parliament. While parliamentary select or standing committees can interview the head of the department and senior colleagues, these officials do not defend political policy, but merely explain the Minister's/department's position. In terms of the famous "Osmotherly" rules: "The general principle to be followed is to be as helpful as possible to committees and that information should only be withheld in the interests of good government to safeguard national security" (cf. Judge 1993:136). This precludes officials from providing evidence about advice given to ministers, interdepartmental exchanges on policy issues, the level at which decisions were taken or the manner in which the Minister has consulted with his colleagues, cabinet committees and their decisions, as well as questions in the field of political controversy. Officials are subject to the instructions of the

Minister and remain bound to their duty to observe confidentiality to ministers. Thus it is in the interest of the Minister and the official not to go too deeply into departmental "crud" (Judge 1993:152-5).

This practice/doctrine has the potential of being overthrown in the new rules of the South African Parliament. Directors-General of civil service departments are now interrogated *publicly* in standing committees of Parliament. An example of this custom is the interview of Mr Mike Louw, Director-General of the National Intelligence Service, by the Joint Standing Committee on Finance on Monday 27 June 1994. Among other things he was publicly questioned on the size of his departmental budget (R4 000 million). In a leading article **The Star** of 29 June 1994 states that Mr Louw was called upon to "defend" the size of his department's budget.

It is unclear at this stage whether ministers would make their departmental directors-general scapegoats for departmental failures. But it clearly would be tempting, since the dividing line between the responsibility of the Director-General as accounting officer of the Department (administration), and the political responsibility of the Minister (policy) for his department is thin. In times of distrust between the Minister and his senior civil servants, the Director-General would clearly be a tempting proxy to be blamed and named. The controversy between Police Commissioner Fivaz and Minister of Safety and Security Mufamadi during early April 1997 is a clear example in which a Minister can name and blame a senior civil servant without accepting responsibility himself for the shortcomings in the department. A further example of the problematics of this relationship was the "resignation" of Billy Cobbet, Director-General of Housing, in May 1997. He was to all practical intentions forced by his Minister to leave the post.

Another example of the relationship between the Minister and civil servants in the new Constitution is to be found in the controversy regarding Minister of Safety and Security Sydney Mufamadi and Democratic Party MP Tony Leon. According to Leon, Mufamadi had misled Parliament regarding the "Shell House shooting incident" on 28 March 1994. Leon alleged in Parliament that Mufamadi had altered a police memorandum of 23 June 1994 and that he relayed a different set of facts to Parliament. According to Leon there was a vast difference between the facts as reported in the police memorandum, and the explanation offered by Mufamadi to Parliament (**The Star** 2 July 1994). The merits of the accusation will not concern us here. On Wednesday 6 July

Mufamadi explained that he had changed the parliamentary answer drafted by regional police commissioner, Lt.-General Calitz, in line with the principle "that he carried the political responsibility" for Police matters and that the "civilian ministry" was ultimately in control of the South African Police Service (*The Star* 7 July 1994). This statement by Mufamadi confirms the standard parliamentary executive convention that the Minister is responsible for *policy*, the department for *administration*.

THE RELATIONSHIP BETWEEN PARTIES IN PARLIAMENT AND THEIR CONGRESSES OUTSIDE PARLIAMENT

A further principle regarding ministerial responsibility that needs canvassing is the relationship between the parliamentary party and its national party conferences. In principle two distinct types of relationship between a political party in Parliament and its National Executive Committee and party conference are possible. These can best be illustrated by the Labour and Conservative Parties in Britain. The "Conservative Party in the Country" is organisationally separate and subservient to the Parliamentary Conservative Party. In the case of the Tories, the party in the country serves the party in Parliament. By contrast, the Labour Party, at least traditionally, saw the party in Parliament as the delegates of the constituencies and of its conference decisions.

The relationship between the Parliamentary Labour Party (PLP) and Congress is dialectical. The PLP provides the leadership and Congress sets the limits to policy initiatives that can be undertaken by the PLP leadership. However there is a final systematic constraint on the Labour Party Congress: the sovereignty of Parliament. Parliament cannot be bound by any organisation other than itself. Moreover, British constitutional practice subscribes to the Burkean doctrine of the free mandate of representation. According to this doctrine MPs are elected by their constituencies and have the right to exercise their judgement regarding votes in Parliament. MPs are not mandated party delegates: individually they represent the electorate that returned them to Parliament. All Labour leaders have refused to accept extra-parliamentary direction by taking the position that they will not accept outside direction from Labour Congress decisions unless they agree with them (cf. Judge 1993:98-100).

The South African Constitution provides that Parliament will establish its own rules and orders and manner of conduct (section 57) and that all questions will be determined by a majority of votes, except questions relating to provinces

and the changing of the Constitution, which will be determined by special majorities. The proportional system of representation makes provision for party lists, thus placing enormous power in the hands of the party management in deciding the lists of candidates. Also, members who leave their party may no longer remain in Parliament, in other words the Constitution subscribes to the principle of the imperative mandate (section 47, read with annexure A, item 13). It also provides that this provision can be amended after 1999 by ordinary legislation. In my judgement, the imperative mandate curtails the freedom of MPs followed in previous South African Parliaments and inherited from the British tradition. In effect this means that MPs become party delegates that have to follow the *diktat* of the leadership. Clearly, in the free mandate theory of representation, an MP can, if s/he votes against the wishes of the whips and leadership, be expelled from the party, but retain his/her membership of Parliament. Thus in the final analysis an MP can follow the dictates of conscience. However, with the South African party list system, recalcitrant MPs lose their seats upon expulsion, consequently there is no direct reward for following one's conscience. This change has important consequences for the relationship between a parliamentary party and the party congresses in South Africa. The new Constitution provides for a party list system of representation, putting much more power in the hands of the party executive over the ordinary members of Parliament. Thus party congresses and their executive committees have a very strong hold on party members in Parliament.

The relationship between the party in the country and the party in Parliament is an unresolved question in the ANC at present. It is clear from utterances made by former ANC Secretary-General Ramaphosa in 1994 and ANC MP Jeremy Cronin that they represent a constituency in the ANC that prefers the British Labour Party route. Ramaphosa said in Kimberley on the weekend of 26 June 1994 that a clear distinction must be made between the ANC in government and the ANC in the country (Beeld 27 June 1994). Ramaphosa claimed that the party in the country will not hesitate to criticise the ANC-led GNU. Moreover, the working committee of the National Executive Committee (NEC) of the ANC meets weekly to discuss the general political agenda. Many ANC cabinet members including President Mandela are members of the NEC. Ramaphosa preferred the relationship between the ANC caucus and party outside Parliament to be non-adversarial with the GNU (cf. **Business Day** July 1994). Subsequent practice has in my view not resolved the issue completely. On the one hand, under Acting Secretary-General Carolus, the "ANC-in-the country" has complained that the government takes decisions

without involving the party and "ignores Shell House" - the party headquarters (*Mail and Guardian* 4-10 October 1996:8). On the other hand, the NEC's redeployment of former SABC Chairperson Ivy Matsepe Casaburri to the Free State premiership, the enforced resignation of Patrick Lekota from that office and his subsequent redeployment to chair the National Council of Provinces are evidence of the powerful position of the NEC versus lesser party structures and leaders. Moreover this points to executive-centric tendencies in the ANC, not to popular influence on the policies of the government via the "party in the country".

THE CABINET AS GOVERNMENT

The post-1994 Cabinets of President Mandela operated along conventional cabinet government lines. At first it was an enforced grand coalition between the ANC, National Party and Inkatha Freedom Party. Decisions were taken on the basis of consensus where possible, but some decisions were taken by majority vote - obviously in cases in which the majority party, the ANC, wanted their will to prevail. The Cabinet had its share of usual problems, such as the resignation of Mr Abe Williams on 21 February 1996 on alleged fraudulent awarding of contracts for payments of social pensions in the Western Cape. The cabinet reshuffle of 29 March 1996 following his resignation as well as that of Chris Liebenberg as Minister of Finance, saw Dr Pallo Jordan of the ANC lose his position as Minister of Posts and Communication to Jay Naidoo. The reshuffle was organised mostly by Deputy President Thabo Mbeki who emerged as the country's de facto Prime Minister (head of government) in the day to day affairs of governance in South Africa. Other prominent government reshuffles in the first three years of the new order included the sacking of Deputy Ministers Winnie Madikizela-Mandela and ex-General Bantu Holomisa. These dismissals are not strictly speaking cabinet reshuffles since deputy ministers are not members of Cabinet. For convenience sake one can characterise deputy ministers as members of "Government".

Another typical cabinet government phenomenon which manifested itself during the course of the first term of office of the new Cabinet was the emergence of a private group of advisers to Deputy President Thabo Mbeki. Dubbed his "think tank", but better known as the "Consultative Council", these advisers included inter alia ministers Joe Modise, Sydney Mufamadi and Deputy Minister Asiz Pahad (cf. *Mail and Guardian* July 19-25 1996:4). The Council cannot really be conceptualised as a kitchen cabinet or inner group of cabinet

members, but is rather "a forum that can offer the Deputy President useful advice".

President Mandela's style of management has been that of a Reaganesque chairman of the board type of president. His huge popularity among all people in South Africa, his personal commitment towards nation-building and reconciliation and his age have shaped his presidency. Mandela does not actively follow a dynamic hands-on style of rule - such as the Thatcher premiership in Britain. Deputy President Mbeki clearly emerged as the real source of governance in the Cabinet by middle 1996 and is expected to succeed President Mandela after the 1999 general elections. The Cabinet continued to function as government of national unity after the National Party's ill-considered withdrawal from the GNU in May 1996. The IFP kept on playing a constructive role in the GNU, while the National Party floundered on trying to seek a new political opposition movement to counter the dominance of the ANC. The usual tensions in a large governing party also developed between the ANC-in-Government and its backbenchers in Parliament. ANC MPs have been reported to be "peevied" at the new style of executive governance in which the Cabinet takes decisions unilaterally and simply confronts the caucus with a *fait accompli*. Well-known examples of alleged governmental unilateralism are the announcement of President Mandela in May 1996 that privatisation is official and irrevocable government policy, the announcement of the Gear macro economic strategy as well as the sacking and disciplining of Deputy Minister Bantu Holomisa (cf. *Mail and Guardian* October 4-10 1996:8).

Moreover, the Mandela Cabinet faced huge challenges in its first years in power. No member of the ANC had ever participated in governing the huge and complex South African state machinery. All ANC ministers had to learn their trade afresh. The legacy of the past had to be put to rest and a complete restructuring of the whole Public Service was undertaken. This was probably the most fundamental restructuring ever undertaken in South Africa since its inception as a state in 1910 - a daunting task indeed. The Cabinet faced enormous structural constraints. It inherited an economy which had been in a decade-long international isolation and decline, there were mammoth disparities in social expenditure, widespread poverty, unemployment, violent crime and so on. Likewise it faced a thoroughly capitalist oriented international political economy in which the philosophy of private enterprise and free marketism was rampant. Therefore it could not follow policies strongly opposed by the business community - both locally and globally. Any government fiscal and economic

policy that is perceived as inflationary, oriented toward expropriation of private assets, or in other ways unfriendly toward business, would almost immediately cause a run on the currency, a restriction of employment, a capital flight and even an "investment stayaway". The Mandela Cabinet had to tread a narrow path between satisfying demands of its mostly black and poor constituency on the one hand, and the pressure of the global business community who seek investment opportunities in states that are decidedly committed to free enterprise.

The cautious approach to governance as well as the long ANC tradition of participative and consultative decision-making resulted in the parliamentary caucus of the ANC as well as some committee chairs gaining considerable influence. Endless public consultation at times seemed to paralyse the process of effective governance, especially in education and health services. The pact-driven style of decision-making turned out to be cumbersome, but has the advantage of bringing about a wider social consensus on public policy issues. The *immobilism* of such a style of decision-making is typical of deeply divided societies. One should not forget that the ANC itself is not a monolithic party, but an umbrella movement, a coalition of disparate interests held together by the symbolism of nation-building and African liberation and empowerment. As such it cannot move swiftly and "efficiently", failing to bring aboard different interest groups when making important socio-economic decisions. However, on balance the last two years saw an assertion of executive centrism in the ANC as pointed out above in the discussion on the relationship between party in the country and the parliamentary ANC.

SECRETARIAT

The Cabinet has a formal secretariat to draw up and circulate an agenda, keep and circulate minutes and attend to general administrative affairs. The Cabinet meets regularly throughout the year, usually on Wednesdays. In the interest of open governance the Cabinet Secretariat regularly issues press statements of Cabinet decisions and gives the electorate a glimpse of the President's schedule of activities.

Two typical examples of these statements are as follows:

FIRST CABINET MEETING HELD AFTER EASTER RECESS**Issued by: Office of the President****CABINET MEETING - 16 APRIL 1997**

The Cabinet held its first meeting after the Easter recess this morning in Tuynhuys, Cape Town. The meeting received in the main reports from the Cabinet Committees.

The meeting received a report on the Draft Basic Conditions of Employment Bill from the Minister of Labour who would announce the decision arrived at by the Cabinet tomorrow (17 April 1997).

The Cabinet received a report on the construction of a new Constitutional Court and approved the procurement of the Old Fort Site, Braamfontein for this purpose.

The Cabinet received a report on the White Paper on South African Land Reform and approved that it be released.

The Cabinet approved that the following Bills be introduced to Parliament:

1. The Amendment of the Compensation for Occupational Injuries and Diseases Act, 1993.
2. Natural Fathers of Children born out of Wedlock Bill, 1997.
3. State of Emergency Bill, 1997.
4. Public Service Laws Amendment Bill, 1997.
5. Public Service Commission Bill, 1997.
6. Permanent Delegates Vacancies Bill, 1997.

Secretary of the Cabinet

16 April 1997

CABINET MEETING - 30 APRIL 1997**Issued by: Office of the President**

In addition to the matters raised by the Ministers at this press briefing the Cabinet discussed and decided on a number of other matters. These are detailed below.

The Cabinet received a report on a National Industrial Participation (Offset) policy as an instrument to be used by Government to leverage economic benefits from suppliers when the state or parastatals purchase/lease high value products from foreign suppliers and approved the policy.

The Cabinet approved persons proposed by the Minister of Finance to serve on the Public Accountant's and Auditor's Board.

The Cabinet approved the White Paper on a National Water Policy for South Africa.

The Cabinet approved a number of Bills and two protocols emanating from a number of departments. These are listed below:-

- 1. Accession to the 1992 Protocols to Amend the International Convention on civil liability for oil pollution damage, 1969 and the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.**
- 2. Unauthorised Post Office Expenditure Bill, 1997.**
- 3. Overvaal Resorts Limited Amendment Bill, 1997.**
- 4. Water Services Bill, 1997.**
- 5. Extension of Security of Tenure Bill, 1997.**
- 6. Amendment to the Marketing of Agricultural Products Act, 1996.**
- 7. Judges Remuneration and Conditions of Employment Amendment Bill, 1997.**
- 8. Promotion of National Unity and Reconciliation Amendment Bill, 1997.**
- 9. Magistrates' Courts Amendment Bill, 1997.**
- 10. Housing Bill, 1997.**
- 11. Promotion of Multi-Party Democracy Bill, 1997.**
- 12. First Amendment to the Constitution of the Republic of South Africa Bill, 1997.**
- 13. Foreign Military Assistance Bill, 1997.**

More information may be obtained from the appropriate Ministry and/or Department.

SECRETARY OF THE CABINET

30 APRIL 1997

ITINERARY OF PRESIDENT MANDELA

Issued by: Office of the President 1 May 1997

Thursday, 1 May 1997

*** President Nelson Mandela will address a May Day Rally at the Independence stadium, Umtata. He will speak at 14h00.**

Friday, 2 May 1997

*** The President will meet President Ernesto Samper Pizano of Colombia at Mahlamba-Ndlopfu Pretoria. The meeting will commence at 11h30 and be followed by a photo opportunity and luncheon at 12h30.**

Saturday, 3 May 1997

*** The President will address an ANC rally at Impendle in KwaZulu-Natal. He will speak at 12h15.**

Sunday, 4 May 1997

*** 12h00, the President will arrive at Kasane Airport, Botswana, to attend the "First Southern Africa International Dialogue on Smart Partnership for the Generation of Wealth". The summit will take place at the Cresta Mowana Lodge. He will return to South Africa later in the day.**

Monday, 5 May 1997

*** Vacant**

Tuesday, 6 May 1997

*** The President will return to Kasane to attend the closing session of the "International Dialogue" summit. He will arrive at Cresta Mowana Lodge at 12h30, and return to South Africa in the evening.**

Wednesday, 7 May 1997

*** The President will host a luncheon and a decoration ceremony for Prime Minister Mohamed Mahathir of the Kingdom of Malaysia at Genadendal.**

Issued by the Office of the President

30 April 1997

CONCLUSION

This article explained, analysed and evaluated the Executive in the 1996 Constitution of South Africa and pointed to some of the practices that have been developed since the elections of 1994. Some of the continuities and discontinuities between the South African and British constitutional law traditions were highlighted. A few of the weaknesses of the formal provisions of the relationship between the Executive and Parliament were noted, particularly the inadequate practices of ministerial responsibility. The new Constitution enacts a number of conventions and prerogatives and places constitutional controls on the powers of the Executive that are to be welcomed. The success of the elite accommodation between the various power blocs in South Africa will be determined by the politicians who occupy executive positions in the years ahead.

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