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(Theme Committee 2 - 27 February 1995)

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

THEME COMMITTEE MEETING

MONDAY
27 FEBRUARY 1995
9H00-12H00
M46

TECHNICAL COMMITTEE REPORT

1

IN-HOUSE WORKSHOP
THE EXECUTIVE

1. THE PRESIDENCY

1.1. Presentation by Professor Nico C Steytler, Technical Committee

The only Constitutional Principle relevant to the issue is Principle VI, the separation of powers on which all parties agree upon. The content of the doctrine is not, however, fixed. As a minimum it entails that different organs of state - the legislature, the executive and the judiciary - perform different functions. A more stricter version of the separation of powers doctrine is that the personnel of the different organs should also be distinct. The second part of the separation of powers doctrine is that there are clear controlling mechanisms between the three organs of state through checks and balances to ensure accountability, responsiveness and openness.

The judiciary controls the legality and constitutionality of the president's actions. The legislature exerts control on the formulation and execution of policy. The extent and nature of legislative control will depend much on the type of executive and presidency.

There are two broad models of the presidency: the president can be directly elected by the electorate (popular presidency), or indirectly elected by the legislature (parliamentary presidency). If the president is directly elected by the electorate then the following consequences usually pertain: the length of tenure is fixed; the cabinet is appointed from outside the legislature; the president has executive powers; he is dismissed through impeachment proceedings; and there are reciprocal controls over legislation, and appointments.

With a parliamentary presidency, different consequences follow: there is no fixed length of tenure; the cabinet is appointed from the legislature; the powers of the president may vary considerably (from ceremonial to executive); and the president can be dismissed through a motion of no confidence.

The interim Constitution has established a parliamentary presidency which ensures that the president will always be in harmony with the majority party in parliament.

From the political parties in their submission on the separation of powers show a clear preference for a parliamentary president emerges. On the powers of the president, there is thus some support for a split between the

positions of the head of state and head of government. The IFP proposes that the positions should be kept separate. The FF urges the consideration of the split on the grounds of the workload which a combined office entails. The IFP proposal on the Head of State is much more than a ceremonial position. The function of the head of state should be "the preservation of the constitutional order and the proper functioning of the constitutional machinery". The PAC, on the other hand, is opposed to a split office. It argues that separation of office can lead to tension and even conflict.¹

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

The PAC excludes from the power of the executive the termination of the life of parliament; the matter should be regulated exclusively by the constitution.²

1.2. Presentation by Dr Tiya Maluwa, Law of Faculty of the University of Cape Town

Dr Maluwa delivered a paper on the African experience with the executive presidency:

PRESIDENTIALISM IN AFRICA : A BRIEF SURVEY

SUMMARY OF PRESENTATION PREPARED BY DR. T. MALUWA

Introduction

All former British colonies in Africa attained independence in the early and mid 1960s on the basis of written constitutions modelled on the British idea of parliamentary government (i.e. the Westminster model). The (unwritten) British Constitution, like the United States Constitution, operates on the basis of certain constitutional principles that are captured in the doctrine of '*separation of powers*': the idea that government functions can be neatly divided into three categories which must be kept separate : executive; legislative and judicial, and that the *personnel* appointed or elected to discharge these *functions* must also be separate. But an accompanying element of this alleged separation of powers is the idea of *checks and balances* (to this may be added other constitutional concepts: bicameralism,

¹ PAC submission to TC2, 31 January 1995.

² PAC submission to TC2, separation of powers, 30 January 1995.

federalism, etc.). The idea behind this doctrine is to avoid the concentration of power in one person or body of persons, but rather to spread it over different personnel and institutions (branches); that way it is argued one avoids despotism, whether elective, hereditary or self-acquired, and the absence of despotism ensures proper democratic governance. The newly independent African countries thus inherited this constitutional idea of 'separation of powers' as the core concept of their systems of government.

But one of the fundamental questions which arose in the post-independence constitutional debates in Africa (and this is a question that constitutional lawyers continue to ask all the time) is whether there can be a complete separation, and how do we demarcate the powers? It may be easy to define legislative and judicial functions, but what are the executive functions? In other words, what does the idea of executive power entail? In most modern constitutions, this power is allocated to the 'presidency': what does presidentialism imply? What, indeed, is the nature of the executive in a *presidential system*?

Now, it is said that there are three theories which may be employed in examining these questions, and which are relevant in examining the African experience: the residual power theory: that the executive is entitled to exercise power in respect of everything that is not encompassed by judicial and legislative powers; the inherent power theory: that the executive may do anything inherently executive in nature: the specific grant theory: that the executive only executes those functions specifically granted in the constitution, in accordance with specific provisions of the law, and nothing more. All these questions that African countries have had to reflect upon in attempts to work out the relevance of the inherited idea of presidentialism. But these are questions that go to the core of the wider debates about the type of executive that is most desirable in the South African context, and to the wider definition of executive powers themselves. As such, I shall not attempt to answer these questions here, or to go into an examination of the opposing theoretical frameworks. Rather, I am concerned with briefly surveying two issues: first, certain characteristics regarding the nature of the executive in the presidential system; and secondly, the factors behind the origins and the proliferation of the presidentialism in Africa. In brief, a quick survey through the African experience with the constitutional idea of "presidentialism". From this, one may perhaps begin to work out the path that South Africa ought to follow.

The Nature of the Executive in the Presidential System:

1. *A 'single' or 'dual' executive?*

The question here has always been whether to vest executive power in a single office or person (the presidency) or a combination of offices or

persons, say president and prime minister. If the latter, how do you divide the functions between the two offices?

Now, it will be recalled that the British model is based on the idea of a separation of executive authority: *formal* executive power is vested in the *head of state*, the monarch, but *real* executive power is enjoyed and exercised by the *head of government*, the prime minister. The attempt was made in all former British African colonies to transplant this idea to the newly independent countries: the British monarch continued to be head of state, but now represented by governor-general (always a white colonial officer, except in Nigeria and Sierra Leone, where a local politician occupied the position); and a prime minister, representing the majority party in parliament, exercised real executive authority as head of government.

As is well known, in due course, within periods ranging from two to three years following independence, all former British colonies in Africa dispensed with this "executive duality" and opted for "republican" status and forms of government: the separation between head of state and head of government was removed, and both offices vested in the same person: an all-powerful president who enjoyed both *formal* and *real* executive powers. The new type of executive authority ranged from the single-party omnipotence of Kwame Nkrumah and Hastings Banda in Ghana and Malawi, respectively, to the more benign and democratic arrangements in Sir Seretse Khama and (very briefly) Kenneth Kaunda and Julius Nyerere in Botswana, Zambia and Tanzania, respectively, to give just a few examples.

2. *Executive independence*

This entailed, inter alia, independence from control by the legislature: the problem here is the same one that the drafters of the U.S. Constitution had to grapple with: avoidance of the tyranny of an all-powerful executive as well as an omnipotent legislature. The question in Africa, as elsewhere, was how to achieve and ensure such independence: should the executive also be part of the legislature or not?

3. *Executive independence and system of checks and balances*

A related question is: what constraints should be placed on the executive; here, there was always need to define not only the role of the legislature but, more importantly, that of the judiciary as well: what ought to be the limits of judicial review in relation, say, to executive acts? What discretion should the executive enjoy? And so on.

The attempt to import the Westminster model to Africa did not wholly succeed; in fact, the experiment of parliamentary democratic governance was quite short-lived in post-independence Africa and, in rapid succession,

all these countries opted for the presidential models of government. Various models of presidentialism have been tried over and over again over the last thirty years, including, for example: adaptations of the French system, with a powerful president and prime minister who was nominally head of government, but was in reality no more than "chairperson" of the cabinet, enjoying no real executive authority (Tanzania and, at various times, Lesotho, Swaziland and Zambia); attempted adaptations of the American system (at various times, in all the other countries, where the president is the sole executive authority, without even a nominal prime minister as part of the structure, etc). And, of course, the proliferation of military government also meant that even these experiments with presidentialism were not, for the most part, subjected to the test of time.

Some factors behind the origins and proliferation of Presidentialism in Africa

1. *Autochthony*

This has to do with the philosophical arguments about the source(s) from which the constitution derives its authority as law, and the content of the constitution (structure of government) itself. Presidentialism was seen as the culmination in the constitutional field of the nationalist struggle for emancipation from colonial rule; thus replacement of the Queen as head of state with a governor-general or an indigenous substitution was generally found to be a unacceptable colonial hangover. As Nkrumah observed at the inauguration of Ghana as a Republic in 1960, the idea was to "give full expression to the African personality by making the Head of State a native of the soil."

2. *"Africanism"*

One of the oft quoted arguments in favour of dispensing with the separation between a ceremonial head of state and an executive head of government was that such an arrangement was not consonant with African traditional concepts of governance: it was "un-African". It is enough merely to quote Tom Mboya, then Kenya's Minister of Constitutional Affairs, who said in 1964: "The historical process by which, in other land, Heads of State, whether Kings or Presidents, have become figureheads, are no part of our African tradition"; and, Julius Nyerere, then Prime Minister of Tanganyika, who had observed in 1962: "To us, honour and respect are accorded to a chief, monarch, or president not because of his symbolism, but because of the authority and responsibility he holds. We are not used to the division between real authority and formal authority". But, what exactly is this "Africanism" of the "African tradition" being invoked here?

3. *The Personality Factor*

Personalities count a lot in political and constitutional development: the head of state is the first citizen, elevated in dignity and prestige above all others; a symbol of majesty and power; an embodiment of the sovereignty of the nation: would the towering figures of anti-colonial struggles - Nkrumah, Nyerere, Kenyatta, Kaunda, Banda, Khama, Machel, Mugabe, and so on, have accepted the "subordinate" role of a prime minister while the dignity and prestige of head of state, "father of the nation", went to a less well-known personality after the departure of the colonial governor-general?

4. *Clash of Interest/Conflict of Authority*

This was a factor that arose out of the very idea of the duality of the executive; vesting authority in one person but allowing it to be exercised in reality by another naturally brought about, in most African countries, clashes of interest, uncertainty and complexity in governmental and political relations, especially when coupled with the fiction that the head of state was supposed to be politically neutral and above politics

1.3. Discussion

In discussions the following issues emerged:

(a) When dealing with the presidency, it is not useful to refer to Western or African traditions of democracy as both continents have experienced undemocratic governments. It is more important to ensure multi-party democracy.

(b) The advantages of split between the head of state (as ceremonial head) and head of government should be further examined.

(c) The parliamentary control over the presidency needs to be spelled out in detail.

(d) The role and powers of the vice presidency need to be examined.

2. THE CABINET

2.1. Presentation by Professor Vusiyile Dlova, Technical Committee

A Summary of Professor Dlova's paper follows:

INTRODUCTION

The Cabinet is part of the Executive arm of Government. It is defined as the core of decision makers within the Executive organ of Government. This core may be led by a President or a Prime Minister as the case may be.

The Executive is that arm of Government that executes the laws or policies of Government as set out in the main by the legislature. However, in parliamentary executive models, the Executive often initiates and guides legislation through Parliament, and in the case of secondary legislation engage in actual law-making itself, e.g. proclamations.

MODELS

Broadly speaking there are three types of executive models, namely:

1. The Parliamentary Executive or Westminster executive e.g. United Kingdom
2. The non Parliamentary or extra Parliamentary executive e.g. United States of America
3. Consociational or Constitutional prescribed coalition e.g. Switzerland.

1. PARLIAMENTARY EXECUTIVE

This type of executive is characterised by the overlap of personnel and to some degree of function between the Legislature and the Executive. Members of the Executive are also Members of Parliament. They are individually as Ministers and collectively as Cabinet accountable to the Legislature. They also initiate and shepherd legislation through Parliament and therefore chief actors in and outside Parliament.

The leader of the majority party normally becomes the Prime Minister or President and he appoints his Cabinet as he so desires. This Executive may be dissolved through a motion of no confidence.

2. EXTRA PARLIAMENTARY EXECUTIVE

The Executive in this model is independent from the Legislature in terms of mandate, responsibility and personnel. This Executive cannot be dissolved through a motion of no confidence. It can however be

impeached by the legislature in certain specified instances. In this model the President is elected directly by the people.

3. CONSOCIATIONAL MODEL

The main feature of this model is that it protects minority rights. The two models mentioned above are criticised as being majoritarian and therefore not suited for societies which are not homogeneous. There are three forms of this model:

1. Constitutionally prescribed coalition, e.g South African Interim Constitution
2. Forced coalition where a party needs a certain number in order to form a government. e.g. The coalition system in France.
3. Voluntary coalition for whatever reasons the parties may deem fit, e.g Zimbabwe.

CONCLUSION

Professor Dlova discusses at length the advantages and disadvantages of these three models. His paper will be available for further reference.

2.2. Presentation by Professor Dawid van Wyk, Technical Committee

Professor van Wyk gave a summary of the Conference on the Executive held in Pretoria on 14 February 1995. He referred to the paper presented by Professor Jean Blondel (attached as annexure "A").

He reported that although there were not many new suggestions on the executive, a number of difference between the main speakers emerged about the extent of the divisions in our society, the nature of the transitional process, and the accommodation of minority parties in the executive.

2.3. Discussion

In the discussion the following issues emerged:

- (a) Should the constitutionally mandated coalition cabinet continue and how should decision be made?
- (b) How could individual of cabinet members and collective responsibility of the cabinet be ensured?

(c) How could the cabinet be made accountable to parliament?

3. Summing up by the Chairperson

The chairperson outlined the following issues that require further exploration:

- (a) Whether the head of state should be separate from the head of government?
- (b) How the head of state should be elected? The advantages and disadvantages attached to the popularly and parliamentary elected presidents.
- (c) The powers of the president.
- (d) The length of tenure of the president.
- (e) The controlling mechanism of the legislature; the power to dismiss the president through a vote of no confidence.
- (f) The appointment of cabinet members from outside the legislature.
- (g) Constitutionally mandated coalitions.