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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2 STRUCTURE OF GOVERNMENT

**CORE GROUP/THEME COMMITTEE
MEETINGS (18-21 APRIL 1995)**

**STRUCTURE AND FUNCTIONING OF
GOVERNMENT (NATIONAL LEVEL)**

**TECHNICAL COMMITTEE'S DRAFT
REPORT: THE CABINET**

THEME COMMITTEE 2

DRAFT REPORT ON BLOCKS 2 AND 3

THE CABINET

1 Introduction

This part of the report should be read with the section on the presidency and the legislature. It deals with the cabinet under the following headings, which were identified on the basis of relevant Constitutional Principles and submissions received:

- 1.1 Two compelling Constitutional Principles
- 1.2 Nomenclature
- 1.3 Composition and size
 - 1.3.1 President part of Cabinet?
 - 1.3.2 Deputy Ministers?
 - 1.3.3 Size
- 1.4 Appointment, term of office and dismissal
 - 1.4.1 Appointment by President
 - 1.4.2 Ministers appointed from legislature
 - 1.4.3 Appointment of Deputy President/Prime Minister
 - 1.4.4 Term of office and dismissal
- 1.5 Accountability
 - 1.5.1 Accountability to Parliament
 - 1.5.2 Vote of no-confidence in Executive
- 1.6 Role of minority parties
- 1.7 Code of conduct
- 1.8 Internal cabinet relations and decision-making
 - 1.8.1 Minister to be responsible to President
 - 1.8.2 Consultation between President and Cabinet
 - 1.8.3 Decision-making
- 1.9 Countersigning by minister
- 1.10 Other matters

2 Submissions

Submissions were received from -

- 1 Parliamentary political parties
- 2 Other organisations (including non-parliamentary parties)
- 3 Individuals

[NOTE TO THE THEME COMMITTEE: for purposes of reference, discussion and substantiation, submissions will be referred to.

The following documentation was available to the Technical Advisors:

- a. Constitutional Assembly Submissions (undated), quoted as 'CA Submissions'
- b. TC 2 Traditional Authorities (Special Edition) as at 1 March 1995, quoted as 'Traditional Authorities'
- c. TC 2 Structure of Government (vol 2) as at 30 January 1995, referred to as 'vol 2'
- d. TC 2 Structure of Government (vol 3) as at 2 March 1995, quoted as 'vol 3'
- e. TC 2 Structure of Government (vol 4) as at 6 March 1995, referred to as 'vol 4'
- f. TC 2 Structure of Government (vol 5) as at 10 March 1995, quoted as 'vol 5'
- g. TC 2 Structure of Government (Political Parties Submissions Block 2/3 (composite edition)) as at 28 March 1995, referred to as '28.3'
- h. TC 2 Structure of Government (Political Parties Submissions Block 2/3 (composite edition) Addendum 'A', referred to as 'Addendum "A"'.]

3 Constitutional Principles

The following Constitutional Principles have a direct or indirect bearing on the aspects of the Cabinet dealt with in this report: IV (Constitution supreme law of the land, binding all organs of state at all levels of government; VI (separation of powers and checks and balances to ensure accountability, responsiveness and openness); VIII (representative government and proportional representation in general); XVI (government to be structured at national, provincial and local levels); XVII (democratic representation at each level of government); XX (each level of government to have adequate legislative and executive powers and functions to enable it to function effectively); XXII (national government not to exercise powers so as encroach on integrity of provinces); XXVI (each level of government entitled to equitable share of revenue to enable it to provide basic services and execute functions allocated to it); XXXII (Constitution to provide that until 30 April 1999 the national executive should be composed and should function substantially in the manner provided for in Chapter 6 of the Interim Constitution); XXXIII (Constitution to provide that, unless Parliament is dissolved as a result of a vote of no-confidence in the Cabinet, no national election to be held before 30 April 1999).

4 Discussion of the various aspects relating to the Cabinet

In the following discussion, an indication will be given of areas of agreement and disagreement, as they would appear to emerge from all the submissions received (i e not only from those of political parties).

4.1 Two compelling Constitutional Principles

Regardless of what else goes into the final constitutional text on the Cabinet, Constitutional Principles XXXII and XXXIII direct that until 30 April 1999 the executive at national level should

remain substantially the same as under the Interim Constitution, and further that, as long as there is no vote of no-confidence in the Cabinet, there may not be a national election. The final text will have to contain provisions to this effect, probably in a chapter on general provisions.

4.2 Nomenclature

The following political parties referred to 'the Cabinet' in their submissions: ANC [28.3 at 10; CA Submissions]; DP [28.3 at 18; CA Submissions]; IFP [28.3 at 23, 24, 26; CA Submissions]; FF [28.3 at 43; CA Submissions]. The NP [28.3 at 29] expressed itself in favour the structures created by the Interim Constitution; in other submissions [Addendum 'A' at various places; CA Submissions], reference is made to the cabinet. The PAC and the ACDP have not used the term 'cabinet' in their references to the executive. 'Minister' and 'Deputy Minister' would also appear to be non-contentious terms; likewise 'President' for the head of state/government, and 'Deputy President'. The DP [28.3 at 17-18] and the IFP [CA Submissions at 17] proposed a 'Prime Minister', and the FF either a Deputy President or a Prime Minister (28.3 at 43).

Individual submission: RM Longden-Thurgood [vol 5] proposed a Prime Minister.

The conclusion is that structure, not terminology, is contentious.

4.3 Composition and size

Three aspects are at issue here: first, whether the President should be part of the Cabinet; second, whether Deputy Ministers should be included in the Cabinet; and third, the size of the Cabinet.

4.3.1 The President as part of the Cabinet: ANC submissions are not explicit on this score, but could be read either way: [CA Submissions; 28.3 at 10-12]. The DP referred to the President and the Cabinet in one place [28.3 at 17], stating explicitly in another that the Cabinet would include the President [28.3 at 18]. The IFP excluded the President from the Cabinet, presumably as a result of its distinction between head of state (President) and head of government (Prime Minister) [28.3 at 23, 24, 26]. The NP supported the structure under the Interim Constitution [28.3 at 32 read with Addendum 'A' at 12-18], which suggests, on the one hand, that the President is separate from the Cabinet, but on the other states that the President is part of the Cabinet (section 75 read with section 82(3) and 88(1)). The FF submission contained a similar ambivalence [28.3 at 43].

Clarity on this issue important for the formulation of the provision on the seat of executive power (President, Cabinet or President and Cabinet), and on executive accountability to the legislature.

4.3.2 Deputy Ministers: No party explicitly proposed that deputy ministers should be part of the Cabinet, but an ANC submission is open to such an interpretation [28.3, par 22 at 10].

4.3.3 Size: The FF proposed that the number of ministers should be limited to 24 [28.3 at 43].

Individual submission: JW Conroy [vol 5] proposed a cabinet of not more than 10; JM Vosloo [vol 3] 11. J Luus [vol 3] merely said structures have too many members.

4.4 *Appointment, term of office and dismissal*

4.4.1 Most political parties agreed that *ministers* of the Cabinet should be appointed by the President. The IFP proposed that they should be appointed by the head of government (Prime Minister), subject to ratification by Parliament. This aspect is contentious.

Among the parties supporting appointment by the President, the exact procedure is also contentious: the ANC [28.3 at 10], the DP [28.3 at 18], the PAC [28.3 at 35], and the FF [28.3 at 43] favoured appointment by the President in his/her discretion. The NP favoured a multi-party cabinet, requiring a different method of appointment [see in general Addendum 'A' at 15-19, read with 28.3 at 29].

GJ Selikow [vol 3] proposed that Parliament should elect the cabinet by single transferable vote (STV). RM Longden-Thurgood was in favour of a Prime Minister appointing ministers [vol 5]. The Free Africa Foundation (Washington) [vol 5] and RA Griggs [Traditional Authorities at 23] proposed a cabinet chosen by the President/head of state. O Bothma [CA Submissions] supported a cabinet appointed by the President. O Bothma [CA Submissions] suggested that deputy ministers should be proportionally from the two largest parties. PI du Preez [vol 4] supported the idea of the President appointing, with approval by both houses of Parliament.

There would appear to be agreement that ministers should be drawn from the legislature (the NP was prepared to support limited appointment from outside the ranks of MPs [Addendum 'A' at 18; vol 2]), clarity should be had on the question whether they may be from both houses of the legislature (if there are more than one). The DP [28.3 at 18], the PAC [28.3 at 35] and the FF [28.3 at 43] left room for appointment from both.

Other submissions: K Gottschalk [vol 2] and RM Longden-Thurgood [vol 5] proposed that ministers should only come from the Legislature. Contralesa [Traditional Authorities at 68] supported this and

would include traditional leaders. MC D'arcy [vol 4] was in favour of the most capable persons, drawn from the broad population as well. JS du Plessis [vol 3] proposed that a Council of Ministers should form the Senate.

- 4.4.3 Appointment of the *Deputy President(s)* or Prime Minister is also contentious. The ANC proposed an elected Deputy President [28.3 at 11]; the NP favoured one or more Deputy Presidents, involving other parties as well [Addendum 'A' at 14]; the DP supported a Deputy President nominated by the President and endorsed by Parliament [28.3 at 17]; while the FF would also like to see one or two Deputy Presidents (or a Prime Minister), apparently from the ranks of Parliament [28.3 at 43].

Individual submission: O Bothma [CA Submissions] proposed that two Vice-President be chosen from the largest parties.

- 4.4.4 Term of office and dismissal: There would appear to be agreement among political parties that the following factors would determine the term of office of a member of the Cabinet (excluding the President):

- a. membership of parliament
- b. discretion of President (head of government in the case of the IFP) - the position of the NP on the multi-party nature of the Cabinet [28.3 at 32 and Addendum 'A' at 15-18], may render this aspect contentious
- c. vote of no-confidence by Parliament in the Cabinet or in the President.

4.5 *Accountability to Parliament*

- 4.5.1 All parliamentary parties support accountability of the executive to Parliament: ANC [28.3 at 3; vol 2]; DP [28.3 at 15, 18, 19; vol 2]; IFP, albeit in the somewhat different language of the cabinet being in a 'fiduciary' relationship with parliament and collegially responsible [28.3 at 23, 26; vol 2]; CA Submissions at 17, 23]; NP [28.3 at 29-30; addendum at 17, 18; vol 2]; PAC (the President to be a member of the NA and accountable to Parliament [28.3 at 35; submission dated 31 Jan 1995 at 2]; ministers responsible to the NA [ibid]; control over the executive through budget [vol 2]; FF (accountable in terms of current provisions, and ministers to be drawn from NA (or senate)) [28.3 at 44; see also vol 2].

Submissions from organisations and individuals supporting accountability to the Legislature, were received from the following: Contralesa [Traditional Authorities at 68], proposing that the Executive comes from the legislature, implying accountability; Organisation Development Institute of Southern Africa

[vol 2]. In a useful analysis LB Hill [vol 4] argued for an interpretation of Constitutional Principle VI (separation of powers), which would allow for parliamentary government and cabinet responsibility.

- 4.5.2 Vote of no confidence in the Executive: The following parties expressed an opinion on this aspect: ANC - President may reconstitute Cabinet or call an election [28.3 at 12]; DP - in the event of a vote of no confidence, a new Prime Minister and Cabinet have to be appointed, or the NA has to be dissolved [28.3 at 18, 20; see also vol 2 for a somewhat different elaboration]; IFP - Parliament should be free to adopt votes of no confidence without having to be dissolved [28.3 at 23, 26; vol 2]; NP - motion of no-confidence [Addendum 'A' at 8] and impeachment [Addendum 'A' at 18]; FF - would retain sec 93 of Interim Constitution [28.3 at 44].

4.6 Role of minority parties

The role of minority parties in the Cabinet is contentious. The NP [28.3 at 32; Addendum 'A' at 9-10; 14-18] supported a constitutionally provided multi-party cabinet. Other parties are either silent on this issue (FF [28.3 at 42-44]; DP [28.3 at 18]) or against the idea (ANC [28.3 at 10]; IFP [28.3 at 24]; PAC [28.3 at 35]). This does not rule out voluntary coalitions. (The PAC expressed itself in favour of concept of government of national unity in principle, but on voluntary basis [submission of 31.1]).

Individual submissions: PJ Knock [vol 5] would like to see measures to oblige the largest party to form coalition administrations; M Seal [vol 3] and R Shea [vol 3] supported the notion of a government of national unity; RM Longden-Thurgood [vol 5] and R Martin [vol 5] were in favour of a majority party executive. BS Hiddleston [vol 3] proposed power-sharing as permanent feature of the Constitution.

4.7 Code of conduct

The ANC referred to this aspect: no other paid employment or activities inconsistent with the position of minister [28.3 at 11]; NP in terms of stated approach also in favour. (See Interim Constitution sec 88(8) and (9)).

Individual submission: JW Conroy proposed that Ministers should submit a statement of gross assets and liabilities to an ombudsman at the beginning and the end of their term of office.

4.8 Internal cabinet relations and decision-making

- 4.8.1 Ministers to be responsible to the President: ANC [28.3 at 11]; DP [28.3 at 18, 19; vol 2]; NP, in terms of stated approach, also in favour, possibly in qualified sense [see Addendum 'A' at 17]; FF [vol 2].

Individual submission: Pupils from the Motse Maria High School [vol 5] suggested that ministers should have the power to criticize the President on behalf of the people.

4.8.2 Consultation between President and Cabinet: ANC proposed consultation by President when taking important decisions, and Cabinet to advise President [28.3 at 11]; NP, in terms of stated approach, in favour of President acting 'in consultation with' ministers (Interim Constitution sec 82(3) read with sec 233(3) [Addendum 'A' at 11]). The DP proposed that the President should act 'on the advice' of the Cabinet [28.3 at 17]. The conventional constitutional meaning of this phrase in South Africa used to be synonymous to the Interim Constitution's 'in consultation' with. Clarity is needed on the question whether the same is meant by the various parties.

4.8.3 Decision-making: NP, for multi-party Cabinet and in terms of stated approach, consensus-seeking spirit underlying the concept of a government of national unity and the need for effective government (Interim Constitution sec 89(2), subject to qualifications [Addendum 'A' at 10, 17, 18]).

Individual submission: BS Hiddleston [vol 3] proposed at least 75% majority of power-sharing executive.

4.9 *Countersigning by ministers*: The IFP expressed itself in favour of this [28.3 at 26]; it is assumed that the NP also support countersigning of the Presidential action. The DP is by implication in favour of this by endorsing sec 75 of the Interim Constitution [vol 2].

4.10 *Other aspects*

4.10.1 Oath/affirmation (Interim Constitution sec 88(7))

4.10.2 Remuneration (sec 88(10))

4.10.3 Temporary assignment of powers/functions to another minister (sec 90; see FF [28.3 at 44])

4.10.4 Transfer of minister's powers/functions to another minister (sec 91; see FF [28.3 at 44]).

4.10.5 Qualifications: the Organisation Development Institute of Southern Africa proposed that executive staff need to be appointed on the basis of ability [vol 2]. PS Clark [vol 5] suggested that all members of the executive should be tertiary graduates and at least 30 years of age. UA Naicker [Traditional Authorities at 38] proposed along similar lines and felt that ministers earned too much. MC D'arcy [vol 4] felt that ministers should only be appointed to portfolios for which they are qualified, and was also in favour of a

delcaration of assets.

- 4.10.6 BAL Hellyrd [vol 4] proposed the institution of 'independent central agencies' to perform actual state administration, while ministers should deal with policy and parliamentary matters (including legislation).
- 4.10.7 The House of Royal and the Conservative Party [both vol 4] also made submissions which were fundamentally different from the overwhelming trend of all other submissions, and which might be dealt with under traditional authorities and the volkstaat respectively.
- 4.10.8 JJ Steenkamp [vol 3] proposed a non-parliamentary executive.
- 4.11.9 In two identical submissions [P Dickerson, G du Toit, vol 3] it was proposed that taxes should be used for purposes listed in the Constitution.
- 4.12.10 RJ Thompson and JM Vosloo [both vol 3] proposed a Prime Minister in addition to the President.