

Chapter 18

The President and the National Executive

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18.1 Introduction*

The President, who is elected by the National Assembly, is both Head of State and head of the national executive. In exercising powers as Head of State, the President acts alone.¹ However, when the President exercises 'executive authority'² he or she must do so together with the other members of Cabinet.³ The Cabinet consists of the President, the Deputy President and Ministers,⁴ all but two of whom must be drawn from the National Assembly. It is the Cabinet that governs the country, and all members of Cabinet are accountable to Parliament for the exercise of their powers.⁵

These apparently simple provisions frame a complicated, and sometimes unclear, set of legal and political relationships. The relationships between Cabinet and the President when 'Head of State' powers are exercised and between the President and the incumbents of positions established by the Final Constitution, for instance, are particularly unclear. Secondly, the relationship between Cabinet and Parliament, briefly sketched in the Final Constitution, must be understood in the context of a complex matrix of constitutional, political and administrative arrangements that characterise the modern state. Thirdly, as government itself changes, and the influence of the New Public Management is felt in public administration in South Africa, relationships between Ministers, parastatals, privatised institutions providing public services and Parliament, are changing. Difficult questions of accountability are thrown up by these changes.

1 FC s 84(2).

2 Under FC s 85(1) the executive authority of South Africa is vested in the President.

3 FC s 85(2).

4 FC s 91(1).

5 FC s 92.

This chapter considers these issues. Its focus, like Chapter 5 of the Final Constitution, is the national executive. It is not concerned with what the Final Constitution terms the 'public administration' (often referred to as the public service and dealt with elsewhere in this work).⁶ Instead it covers the constitutional arrangements that relate to the politicians who are collectively responsible for government in South Africa: the President and Ministers who form the national executive, as well as Deputy Ministers. Thus, following the Final Constitution, it uses the term 'the executive' more narrowly than many commentators who might include under it the Presidency, departmental Directors General and others.⁷

The way in which what the Final Constitution terms 'executive authority' is exercised is a central concern of the chapter. The Final Constitution uses the term 'executive authority' to describe the power vested in the National Executive

* We would like to thank Jeremy Raizon for excellent research assistance.

but does not define it. Instead, FC s 85(2) explains how executive authority may be exercised. The list the section provides — which includes developing policy, coordinating the functions of government departments and implementing legislation — describes the familiar role of government: the national executive is responsible for implementing laws. But, more broadly, it also has the power to carry out the political agenda of the governing party provided that it acts within the constraints of the Final Constitution and has the support of Parliament.

(a) A parliamentary system

Political scientists often divide systems of government into three broad categories: parliamentary, presidential and 'hybrid'.⁸ Usually, a purely presidential system has (i) a directly elected president,⁹ who (ii) serves a fixed term; (iii) is both head of state and head of the national executive; (iv) is not accountable to the legislature; and (v) is subject to removal by the legislature only in special circumstances. On the other hand, a parliamentary system is characterised by a separate head of state and chief executive officer (usually called a Prime Minister) and an executive that (i) is comprised of members of the legislature; (ii) serves terms that are not fixed; and (iii) is accountable to Parliament. In parliamentary systems accountability to Parliament means that the executive must retain the confidence of Parliament to govern and can, usually, be dismissed by a simple majority. Most democratic systems, and almost all of those in Africa, now fall somewhere between these two models. The French system is, of course, the most famous hybrid, and many African jurisdictions

6 See A Bodasing 'Public Administration' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 23A.

7 See, for example, A Butler *Contemporary South Africa* (2004) 92-95.

8 This characterization risks oversimplification. Many studies propose more categories. See, for instance, A Siaroff 'Comparative Presidencies: The Inadequacy of the Presidential, Semi-presidential and Parliamentary Distinction' (2003) 42 *European Journal of Political Research* 287; A Siaroff 'Varieties of Parliamentarism in the Advanced Industrial Democracies' (2003) 24 *International Political Science Review* 445. However, for the purposes of understanding the South African system, the key differences are captured by the traditional tripartite division used here.

9 In other words, such a president is elected by the people on a ballot that is separate from the election and the ballot for the national legislature.

have emulated it. There is a large number of variations. In Africa, elements of a presidential system tend to dominate political structures, and South Africa is one of just seven sub-Saharan countries that can be said to have a parliamentary system.¹⁰

Of course, no two systems of government are identical and South Africa's departs in a number of ways from the Westminster model of parliamentary democracy from which it was derived. First, in South Africa, the President is both Head of State and head of the executive and, although he or she must be elected from amongst the members of the National Assembly, once elected, the President

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relinquishes his or her seat in the Assembly.¹¹ Second, two Cabinet Ministers may be chosen from outside the National Assembly.¹² Third, the term of Parliament is fixed to the extent that usually the National Assembly may not be dissolved within three years of an election.¹³ These features distinguish South Africa's system from many in the Commonwealth. In particular, the fusion of head of state and head of executive in a single 'president' who is not a member of Parliament prompts the idea that the system is a presidential one. This deviation from the traditional parliamentary model may affect the manner of political leadership, but it has very little impact on the formal constitutional or legal operation of government. It is likely that the restriction on the National Assembly's power to call early elections is the more meaningful departure from the usual parliamentary arrangements. It is intended to introduce stability into the system by stopping opportunistic elections. But even this change to the system is not absolute. If the National Assembly does not elect a new President after a vote of no confidence under FC 102(2), the Acting President must call an election even if fewer than three years have elapsed since the last national election.¹⁴

Currently, three political, rather than constitutional, considerations distinguish South Africa from the parliamentary systems on which it is modelled: (1) dominance of the governing African National Congress Party (leading to South Africa's

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- 10 The other parliamentary systems in Africa are in Botswana, Lesotho, Mauritius, Eritrea, Ethiopia and, depending on one's definition, Swaziland.
- 11 FC s 83. The Constitution Eighteenth Amendment Bill introduced in the National Assembly as a private member's Bill in June 2007 proposed the substitution of the President as Head of State and head of the national executive by a President as Head of State and a Prime Minister as head of the national executive. The preamble and the explanatory memorandum to the Bill argue that an executive Head of State is besmirched by ordinary politics while a Head of State 'above . . . political influence' can better fulfil his or her role as guarantor of the Constitution and institutional integrity. Similarly, an executive Prime Minister is able to carry out executive and policy responsibilities of government without concerning him- or herself with matters of State. For discussions of the roles of Presidents and Prime Ministers, see R Rose 'Presidents and Prime Ministers' (1988) 25/2 *Society* 61 and M Shugart & J Carey *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (1992) 28ff
- 12 FC s 91(3)(c). Ministers may be appointed from outside Parliament in other parliamentary systems. Such appointments occur occasionally in the UK and Canada but then arrangements will be made to secure a seat for that person as soon as possible. On Canada, see P Hogg *Constitutional Law of Canada* (2001-1) 9.7. Australia allows ministers to be chosen from outside Parliament but they must secure a seat in Parliament within three months. Constitution of Australia s 64.
- 13 FC s 50(1).
- 14 FC s 50(2).

classification as a one-party-dominant state);¹⁵ (2) the absence of parliamentary practices such as a regular and robust 'question time' in which the President as head of the executive and other Cabinet members must defend government policy;¹⁶ and (3) the very limited chance of a change of government in the foreseeable future. These differences mean that government in South Africa often

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looks very different from that in other parliamentary systems in the Commonwealth. Nevertheless, while South Africa develops its own practices, it is helpful to understand the way in which the systems with which it has most in common operate. Accordingly, we refer to practice in other parliamentary democracies where that is appropriate.

18.2 The president as head of state and head of the national executive

FC s 83 opens Chapter 5 of the Final Constitution with the emphatic statement that '[t]he President . . . is the Head of State and head of the national executive'.¹⁷ It continues that the President must 'uphold, defend and respect the Constitution as the supreme law of the Republic',¹⁸ and, somewhat more generally, 'promote[] the unity of the nation and that which will advance the Republic'.¹⁹ As the Final Constitution is the only source of power, the President may exercise only those powers conferred on him or her by the Final Constitution or by law that is consistent with the Final Constitution.²⁰ Where the President acts ultra vires, his or her actions are inconsistent with the Final Constitution and invalid.²¹

15 On the governing dominance of the ANC and South Africa's classification as a one-party dominant state, see H Gillomee and C Simkins (eds) *The Awkward Embrace: One Party-Domination and Democracy* (1999).

16 For criticism of the question-time practices in the National Assembly and the NCOP, see C Murray and L Nijzink *Building Representative Democracy: South Africa's legislatures and the Constitution* (2002) 92-96; J February 'More than a Law-Making Production Line? Parliament and its Oversight Role' in S Buhlungu, J Daniel, R Southall and J Lutchman (eds) *South Africa 2005-2006: State of the Nation* (2006) 137-138; L Nijzink 'Opposition in the New South African Parliament' (2001) 8 *Democratization* 53.

17 FC s 202(1) establishes the President as Commander-in-Chief of the defence force but stipulates clearly that this power is an incident of the President's position as head of the executive.

18 FC s 83(2)(b).

19 FC s 83(2)(c).

20 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers') at paras 17-20. See further I Currie & J De Waal *The New Constitutional & Administrative Law Volume 1: Constitutional Law* (2001) 235-237 (On the position of presidential powers not enumerated in the Constitution or national legislation.)

21 FC s 2.

These constitutional arrangements mean that whenever the President acts, he or she must do so either as Head of State or as head of the national executive. FC ss 84 and 85 set out the powers of the two positions. The Constitutional Court has accepted that the powers and functions listed in FC s 84(2) are incidences of the President's role as Head of State, while those listed in FC s 85(2) are incidences of the President's role as head of the national executive:²² even though the Final Constitution itself is not explicit in this regard. Indeed, the only explicit difference between the powers and functions of the President under FC ss 84 and 85 is the requirement of collective action in the latter section. The President exercises or performs the powers and functions set out in FC s 85(2) 'together with the other members of the Cabinet', while the President alone 'is responsible for' the functions set out in FC s 84(2). The exercise of executive authority in terms of FC s 85(2) is thus 'a collaborative venture in terms of which the President acts together with the other members of Cabinet'.²³ As

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Head of State, however, the President need consult no one when exercising a power or performing a function.²⁴

(a) Distinguishing the President as Head of State and as head of the national executive

FC s 84(2) provides a precise list of the functions that the President performs as Head of State while FC s 85(2) describes broadly the ambit of executive authority that must be exercised by the President together with Cabinet. These constitutional provisions suggest that when the President merely formalises a decision made elsewhere, he or she usually acts as Head of State. But, where the exercise of a power involves some element of political discretion, that power usually falls within the President's capacity as head of the national executive and triggers the requirement that Cabinet support the decision.²⁵

The presidential power of appointment provides a useful platform from which to distinguish the President's powers as Head of State and as head of the national executive because the President makes appointments in each of these roles. FC s 84(2)(e) empowers the President to make 'any appointments that the Constitution or legislation requires [him or her] to make, other than as head of the national executive'. FC s 85(2)(e), in turn, contemplates that the President will exercise any power and perform any function provided for in the Constitution or in national legislation together with the Cabinet, which may include appointments. FC ss 173(3) and (4), for example, empower the President, 'as head of the national executive', to appoint the Chief Justice, Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal, and the remaining judges of the Constitutional Court.

22 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) ('SARFU III') at para 144. See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('Hugo') at paras 5-7 and § 18.2 (a), (b) and (c) *infra*.

23 *SARFU III* (*supra*) at para 41. See § 18.3 (d) *infra*.

24 But see the discussion of FC s 101, § 18.2 (d) *infra*.

25 This requirement is captured in the South African system by the words 'together with the other members' in FC s 85(2).

Similarly, FC s 209(2) requires the President 'as head of the national executive' to appoint the heads of the national intelligence agencies. On the other hand, using the language of Westminster, FC s 174(6) states that the President must make other judicial appointments 'on the advice of the Judicial Service Commission' (JSC). No mention is made of the capacity in which the President acts in this section, but the absence of the qualification 'as head of the national executive' and the language of the provision (indicating that the President has no discretion and is bound to appoint the candidates that the JSC selects), support the view that the President acts as Head of State under FC s 84(2)(e) in such cases.²⁶ Similarly, FC s 193(4) requires the President to appoint members of the Chapter 9 institutions 'on the recommendation of the National

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Assembly'. No discretion can be exercised here and the President acts as Head of State, formalising decisions made in the National Assembly.

This interpretation of the different roles of the President, which categorises those functions which are formalities as Head of State functions and those which require discretion to be exercised as head of executive functions is supported by practice. The *Manual of Executive Acts of the President* states that '[t]he Office of the President interprets . . . Head of State appointments to be those appointments that the President makes for ceremonial or similar reasons such as when he is required to merely confirm candidates selected by another body or when he appoints persons under his powers listed under section 84(2) of the Constitution'.²⁷

However, the division of the President's position into Head of State and head of the national executive with the power to act alone only in the first role and an obligation to act 'together with' Cabinet in the second, is not as clear cut as the opening words of Chapter 5 of the Final Constitution may suggest. First, FC s 84(1) is ambiguous: 'The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.' This section cannot be read to mean that the President has powers other than those that fall under one or other of the two named roles. The language of FC s 83, the absence of any other indication in the Final Constitution that the President has some other functions, and the fact that such a grant of authority would be a significant departure from usual understandings of the functions of the head of executive in both parliamentary and presidential systems, do not admit this interpretation. Instead, the better interpretation is that FC s 83 is a catch-all provision inserted to ensure that the President has all the power necessary to carry out the functions that he or she is given under the Final Constitution or legislation.²⁸

A second question linked to the constitutional division of presidential powers between those exercised as Head of State and those exercised as head of the national executive is whether or not the list in s 84(2) is exhaustive of the powers of the president as Head of State. It is clear that none of the old common-law

26 The term 'on the advice of' means 'on the instruction of' and leaves no discretion. See C Murray 'Who Chooses Constitutional Court Judges?' (1999) 116 *SALJ* 865, 865; H Corder 'Judicial Authority in a Changing South Africa' (2004) 24 *Legal Studies* 253, 263; Currie & De Waal *New Constitutional and Administrative Law* (supra) at 304.

27 Executive and Legal Services: Office of the President *Manual of Executive Acts of the President of the Republic of South Africa* (March 1999) at para 3.10.

prerogative powers (that are not listed) continue to exist.²⁹ But the fact that the prerogative no longer exists is not conclusive of the question of whether all the powers that the President may exercise as Head of State are listed in FC s 84(2). Although the structure of the Final Constitution and the

tenor of the Court's judgments in *Hugo*, *SARFU III* and *Mohamed* make it clear that additional 'Head of State' powers should not be readily assumed, a couple of constitutional functions of the President that are not listed in FC s 84(2) seem to be best categorised as functions exercised as Head of State. For instance, FC s 177 requires the President to suspend and remove judges under certain circumstances. Here the decision is made by Parliament and the President has no discretion. It is not a function in which the Cabinet has any role and to require the President to act together with Cabinet in such cases would be meaningless. Such an action is thus best categorised as falling under the President's power as Head of State. Similarly, FC s 50 requires the President to dissolve the National Assembly if a majority of its members support such a motion and three years have passed since the last election. Again, here the President merely fulfils a formal role and presumably acts as Head of State. On the other hand, following the principle that where the Final Constitution is silent on the role in which the President fulfils a function, but discretion is to be exercised, the President must act together with the rest of Cabinet, the choice of the national anthem (FC s 4) and calling and setting dates for elections (FC s 49) are decisions taken as head of the national executive.³⁰

A third ambiguity in the dual roles of the President is that some functions that seem most appropriately classified as 'head of the national executive functions' are not exercised 'together with' Cabinet. These intensely political functions relate to the formation of government and allocation of Cabinet responsibilities. Thus, the President acts alone in selecting, appointing and dismissing the Deputy President, the other members of Cabinet,³¹ and Deputy Ministers, in allocating their portfolios, and in designating a Cabinet member as leader of government business in the National Assembly. In addition, the power to reallocate Cabinet portfolios must be

28 In a careful interpretation of this provision, Currie & De Waal argue similarly, pointing to the distinction between 'powers' and 'functions'. They contend that the subsection ensures that the President has the powers necessary to carry out his functions or legal responsibilities. See I Currie & J De Waal *New Constitutional and Administrative Law* (supra) at 235-236. Of course, FC s 84(1) reflects a 'belts and braces' approach to drafting typical of the tradition of statutory drafting in South Africa but not particularly appropriate to a constitution which necessarily includes broad provisions that must be interpreted in context.

29 For a brief discussion of prerogative powers, see § 18.2 infra.

30 Many of the sections in the Final Constitution that confer a power on the President state expressly that the power is to be exercised by the President as head of the national executive. See, for example, FC s 173(3) and (4) empowering the President, 'as head of the national executive', to appoint the Chief Justice, Deputy Chief Justice, the President and Deputy President of the Supreme Court of Appeal, and the remaining judges of the Constitutional Court, and FC s 209(2) requiring the President 'as head of the national executive' to appoint persons as heads of the national intelligence agencies.

31 See FC s 91(2); *Mphele v Government of the Republic of South Africa* 1996 (7) BCLR 921 (Ck)(For the view that the power to appoint and dismiss includes a power to suspend.) See, further, § 18.3 (a) infra.

one which the President may exercise alone — although it too is best understood as an aspect of his or her role as head of the National Executive.³²

Often the distinction between the President's roles as Head of State and head of the national executive will not matter. However, as we discuss below, the President must exercise the powers in FC s 84(2) him or herself. On the other hand, when acting as head of the national executive, the President must have the support of his or her Cabinet colleagues.

(b) The President as Head of State³³

These powers exercised by the President as Head of State are, in general, different in nature to the powers and functions conferred on the President as head of the national executive and can usually be distinguished from decisions as head of the national executive by a lack of political discretion. Some of the President's powers as Head of State cast him or her as 'overseer' of the democratic process, such as the powers relating to abstract review of Bills in FC ss 84(2)(a), (b) and (c).³⁴ Others anticipate him or her activating mechanisms to resolve political problems, such as the power to summon extraordinary sittings of Parliament (FC s 84(2)(d))³⁵ or to call a referendum (FC s 84(2)(g)). Some of the powers and functions are, in essence, ceremonial: the receiving and recognising of foreign diplomatic and consular representatives (FC s 84(2)(h)), and conferring honours (FC s 84(2)(k)). Other powers of appointment require the President merely to confirm decisions taken elsewhere in the political process (FC s 84(2)(e)). The FC s 84 power to appoint judges other than Constitutional Court judges and the President and Deputy President of the Supreme Court of Appeal is just such an example.

Under FC s 79, President must assent to a bill passed by Parliament for it to become law. The exercise of this Head of State power, covered in FC ss 84(a), (b) and (c), is not a formality. FC s 79(1) contemplates that if the President has concerns about the constitutionality of a Bill he or she can refer it back to the National Assembly for reconsideration. If, after the National Assembly has reconsidered a Bill, the President is still concerned about its constitutionality he or she 'must either (a)

32 The Presidency treats the reallocation of responsibility for specific Acts under FC s 97 as actions taken by the President as head of the executive as they are signed '[b]y order of the President-in-Cabinet'. Currie & De Waal classify the appointment of the Deputy President, other members of the Cabinet, Deputy Ministers and the leader of government business as acts which the President performs as Head of State. Currie & De Waal *New Constitutional and Administrative Law* (supra) at 241. Certainly, these actions could fall under the appointment power in FC s 84(2). However, that provision does not cover the power to assign portfolios. Moreover, although the classification does not appear to have any practical consequences, the suggestion that these functions are Head of State functions seems to undermine the constitutional intention to create some distinction between those activities that are political, and thus appropriately partisan, and those that should not be so.

33 For a review of the principal powers as Head of State, see Currie & De Waal *New Constitutional and Administrative Law* (supra) at 239-245.

34 C Murray 'Who Chooses Constitutional Court Judges?' (supra) at 866.

35 President Thabo Mbeki summoned an extraordinary sitting of both Houses of Parliament in June 2005 when he dismissed Deputy President Jacob Zuma. See 'Deputy President Sacked' *Mail & Guardian Online* (14 June 2005) available at http://www.mg.co.za/articlePage.aspx?articleid=243121&area=/breaking_news/breaking_news__national (accessed 20 June 2007).

assent to and sign the Bill; or (b) refer it to the Constitutional Court for a decision on its constitutionality' (FC s 79(4)).³⁶ Importantly, in deciding whether or not to assent to a bill, the President may raise 'constitutional' reservations only,

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and not political ones.³⁷ And, where the National Assembly accommodates the President's concerns following a referral in terms of FC s 79(4), the President must assent to and sign the Bill. Similarly, where the Constitutional Court decides that a Bill referred to it by the President is constitutional, he or she must assent to and sign the Bill (FC s 79(5)). As with other obligations borne by the President as Head of State, failure to perform these functions would amount to a failure to perform a constitutional obligation and would be justiciable before the Constitutional Court (FC s 167(4)(e)).

It would overstate the matter to claim that no Head of State functions have a potentially partisan element. In particular, the pardoning power is a powerful

36 On the Constitutional Court's powers of abstract review see S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17. See also *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC).

37 See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 240-241. This section was used three times under Mandela's five year presidency and once since 1999 (Broadcasting Bill B94F-98, Tobacco Products Control Amendment Bill B117F-98, Liquor Bill B131B-98, Independent Communications Authority of South Africa Amendment Bill B32D-2005). The Liquor Bill was the first bill to be sent to the Constitutional Court by the President, pursuant to his powers under FC ss 84(2)(c)/79(1). The Liquor Bill was passed by Parliament in November 1998. The President referred it back to the National Assembly for reconsideration but the National Assembly returned it to the President without amendments. The President then referred it to the Constitutional Court for a decision on its constitutionality. See *Ex Parte President of the Republic of South Africa NO: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1. . In April 2006, President Mbeki sent the Independent Communications Authority of South Africa Amendment Bill back to the National Assembly under FC s 84. Parliament approved changes and the President assented to the Bill (now the Independent Communications Authority of South Africa Amendment Act 3 of 2006). See Parliament of the Republic of South Africa *Announcements, Tablings and Committee Reports* 44 -2006 (26 April 2006) 562; L Gedye 'Mbeki Bounces Icasa Bill' *Mail & Guardian Online* 21 April 2006 available at www.mg.co.za/articlePage.aspx?articleid=269702&area=/insight/insight__national/ (accessed 5 February 2008) and South African Associated Press, 'Committee Approves Draft Changes to Icasa Bill' *Mail & Guardian Online* 26 May 2006 available at http://www.mg.co.za/articlePage.aspx?articleid=272820&area=/breaking_news/breaking_news__national/ (accessed 5 February 2008).

political tool — as its use since 1994 demonstrates.³⁸ Similarly, a decision to constitute

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a commission of enquiry and the choice of its members may serve partisan political purposes even if the commission itself operates within a legal framework that protects its independence.

What is clear is that if the President allows the powers in FC s 84(2) to be exercised by another person, as a result of an abdication, a delegation or what is referred to in administrative law as unlawful referral or dictation,³⁹ that election would be inconsistent with FC s 84(2) and invalid.⁴⁰ Nevertheless, although the President must make the final decision when acting as Head of State, the Constitutional Court has held that 'it is not inappropriate for him or her to act upon the advice of the Cabinet and advisers.'⁴¹

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As the Constitutional Court has noted on a number of occasions, the powers of the Head of State, listed in FC s 84(2), 'have their origins in the prerogative powers exercised under former constitutions by heads of state'.⁴² Indeed, they are often referred to as 'prerogative powers'. But their status changed fundamentally by their express inclusion in the Final Constitution. Before 1994, following the Westminster model, the 'prerogative' was a source of power for South African Heads of State, derived not from the Constitution or other statutes, but from the common law. Over time, in Britain, most of the once immense prerogative powers of the Crown (or

38 On 27 June 1994, acting pursuant to his powers under IC s 82(1)(k), President Mandela and the Executive Deputy Presidents De Klerk and Mbeki signed a document styled Presidential Act No. 17, in terms of which special remission of sentences was granted to certain categories of prisoners. The category of direct relevance to the *Hugo* proceedings was 'all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years'. The Presidential Act provided, inter alia, that:

In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), I hereby grant special remission of the remainder of their sentences to:

- all persons under the age of eighteen (18) years who were or would have been incarcerated on 10 May 1994; (except those who has escaped and are still at large)
- all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years;
- all disabled prisoners in prison on 10 May 1994 certified as disabled by a district surgeon.

Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence:

- murder; culpable homicide; robbery with aggravating circumstances; assault with intent to do grievous bodily harm; child abuse; rape; any other crimes of a sexual nature; and trading in or cultivating dependence producing substances.'

See *Hugo* (supra) at para 2, fn 3.

In 1999 Allen Boesak, who at the time charges were laid was chairperson of the Western Cape branch of the ANC, was convicted on four counts of fraud and sentenced to prison (<http://www.sahistory.org.za/pages/people/bios/boesak-a.htm>). Boesak applied for a pardon twice. On 15 January 2005, acting pursuant to his powers under FC s 84(2)(j), the President granted Boesak a pardon and his criminal record was expunged. See statement of the Department of Justice and Constitutional Development; 'The Process for Presidential Pardon in terms of section 84(2) (j) of the Constitution of the Republic of South Africa, 1996 to expunge criminal records a special reference to Dr Allan Aubrey Boesak's case' 18 January 2005, available at <http://www.info.gov.za/speeches/2005/05011815151001.htm> (accessed 3 February 2008).

Head of State) were brought under the control of Parliament. Nevertheless, some remained outside parliamentary control. Thus Dicey states that '[t]he prerogative is the name for the remaining portion of the Crown's original authority. . . . Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.'⁴³ More recently, in Britain, South Africa and elsewhere, the view that courts could not examine the way in which the remaining prerogative powers were exercised was challenged and gradually eroded.⁴⁴ The Interim Constitution brought the debate to an end in South Africa. The Constitutional Court has said emphatically that the Head of State has none of the old

On 21 November 2007, pursuant to FC s 84(2)(j), the President, announced a process for the consideration of pardon requests from 'people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC'. He stated that Government was 'in possession of at least 1062 applications for presidential pardons by people who have been found guilty of offences which were allegedly committed with a political motive, arising from the conflicts of the past'. Relying on the Constitutional Court decision in *Hugo* the President stated; 'I believe that the sum total of all this is that the President has an obligation to consider all requests made to him or her to pardon or relieve offenders and remit any fines, penalties or forfeitures. At the same time, having thus applied his or her mind, the President is under no obligation to accede to the requests made to him or her, provided that she or he proceeds in a rational manner.' The President established a Parliamentary Reference Group made up of representatives of each political party represented in the National Assembly to assist him in properly discharging his constitutional responsibility to consider the requests made to the President to pardon those who have been convicted of the crimes in issue. The President noted, however, that the Reference Group would 'not in any way subtract from the obligation placed by the Constitution on the President, and described by the Constitutional Court, for the President to grant pardons, etc. In other words, the constitutional task to grant pardons and so on will remain with the President'. The cut off date for applications for pardon under these arrangements is 15 April 2008. 'Address of the President of South Africa, Thabo Mbeki, to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons — Cape Town' (21 November 2007) available at <http://www.thepresidency.gov.za/main.asp?include=president/sp/2007/sp11211540.htm> (accessed 3 February 2008). The pardoning power is discussed in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* (supra) at paras 114-117.

- 39 See C Hoexter *Administrative Law in South Africa* (2007) 243-46. See also *Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at para 20; *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C), 117.
- 40 *SARFU III* (supra) at para 38. See also FC s 2.
- 41 *SARFU III* (supra) at para 41. However, many functions listed in FC s 84 give the President no discretion. FC ss 101(1) and (2) require any decision by the President taken in terms of legislation or with legal consequences to be in writing and countersigned by the member of Cabinet whose functions the decision concerns. See § 18.2 (a)(ii)(aa) infra.
- 42 *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) para 31. See also *SARFU III* (supra) at para 144 and, for the same proposition in relation to IC s 82(1), *Hugo* (supra) at para 8. In keeping with a constitutional democracy in which all power is derived from the Constitution, neither the Interim Constitution nor the Final Constitution uses the language of the royal prerogative. Under the South Africa Constitution Act 32 of 1961, the President 'as Head of the State' was expressly authorised to exercise the powers that the Queen was entitled to exercise 'by way of prerogative' prior to the commencement of the Act (s 7(4)). The South Africa Constitution Act 110 of 1983 contained a similar provision, again referring expressly to prerogative powers. The Interim Constitution made no reference to the prerogative powers, but the powers of the President as Head of State which originated from the royal prerogative were to be found in IC s 82(1). This approach is followed in FC s 84(2). See *Hugo*

prerogative powers other than those listed in FC 84(2)⁴⁵ and that these powers are subject to review under both the Interim Constitution and the Final Constitution.⁴⁶

The critical question is what level of review applies to such action. The broad distinction between administrative action and other exercises of state power needs to be kept in mind. Administrative action is subject to a more searching form of review than 'executive action'.

President of the Republic of South Africa v Hugo was the first case concerning the review of the President's powers as Head of State and settled the initial question by finding that such actions are reviewable. However, the context and circumstances of *Hugo* limit the extent of the finding. The question in *Hugo* was whether a decision by the President to pardon female prisoners with children below the age of 12 was inconsistent with the equality provisions of the Interim Constitution because it discriminated against male prisoners in the same position. The basis of the complaint was that the President's conduct was invalid in light of IC s 4, which, like FC s 2, stated that the Constitution 'is the supreme law of the Republic' and 'conduct inconsistent with it is invalid'. The Court held that where the substance of a presidential decision is inconsistent with a provision of the Final Constitution, or the effect of the decision is to violate a right in the Bill of Rights, the decision will be found invalid. *Hugo* did not deal with the question of whether courts are able to regulate the exercise of presidential power on grounds other than the substance or effect of the action.

The question in *President of the Republic of South Africa v South African Rugby Football Union (SARFU III)*⁴⁷ was whether the President's decision in terms of FC s 84(2)(f) to appoint a commission of inquiry into the functions of the South African

(supra) at para 7. Although derived from the prerogative powers traditionally exercised by the English Monarch, these powers are not identical in all respects to the royal prerogatives. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 116.

43 A Dicey *The Law of the Constitution* (10th ed 1959) 424-5 as quoted in C Turpin *British Government and the Constitution Text, Cases and Materials* (5th ed 2005) 420. For role of English law relating to the prerogative in South Africa, see *Pharmaceutical Manufacturers Association of South Africa In re: The Ex Parte Application of the President of the RSA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 36.

44 See Hoexter *Administrative Law* (supra) at 32-34 especially fn 183.

45 *SARFU III* (supra) para 144; *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 31. See also *Hugo* (supra) at para 8 for the same proposition in relation to IC s 82(1).

46 *Hugo* (supra) at para 13. The position is the same under the Final Constitution. FC s 8(1) states that the Bill of Rights applies to all law and binds the executive. Further, while IC s 75 required the President to exercise and perform his or her powers and functions subject to and in accordance with this Constitution', FC s 83(b) states that the President 'must uphold, defend and respect the Constitution as the supreme law of the Republic'. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 116.

47 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC).

Rugby Football Union (*SARFU*) amounted to an administrative action for the purposes of FC s 33(1). If it did, the President would have had to comply with the requirements of lawfulness, reasonableness and procedural fairness imposed by FC s 33(1).⁴⁸ In considering this question the Court made several important

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observations as to the rest of the powers listed in FC s 84(2). It held that the powers in FC s 84(2)(a)-(c) are 'directly related to the legislative process', and in exercising these functions 'the President is clearly not performing administrative acts within the meaning of s 33'.⁴⁹ FC s 84(2)(d) and (e) are 'similarly narrow constitutional responsibilities which are not related to the administration of legislation but to the execution of provisions of the Constitution'.⁵⁰ The remaining powers in FC s 84(2), the *SARFU III* Court held, are closely related to policy and are not concerned with the implementation of legislation.⁵¹ These powers too, are not within the ambit of FC s 33. The appointment of a commission of inquiry, the *SARFU III* Court concluded, is 'an adjunct to the policy formulation responsibility of the President', and cannot be described as administrative in character.⁵²

However, *SARFU III* also stated that presidential action in terms of FC s 84(2) is subject to a range of constraints⁵³ and can be scrutinised by the courts on the basis of any of these constraints:

48 FC s 33(1) and (2) reads:

'(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

In terms of Item 23(2)(b) of Schedule 6 to the Constitution, FC s 33(1) and (2) were, until the enactment of national legislation required by FC s 33(3) to 'give effect to' these rights, deemed to read as follows:

Every person has the right to -

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

At the time *SARFU III* was decided the provisions of Item 23(2)(b) of Schedule 6 were still operative but the Court was nevertheless called on to decide whether the President's decision constituted administrative action or not.

49 *SARFU III* (supra) at para 145.

50 Ibid.

51 Ibid at para 146.

52 Ibid at para 147.

[T]he President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; . . . the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.⁵⁴

Of these constraints on presidential power, the requirement to act consistently with the doctrine of legality has proved most important. In *New National Party of SA v Government of the Republic of South Africa and others*,⁵⁵ the Constitutional Court held that '[a]rbitrariness is inconsistent with the rule of law', and that legislation not rationally connected to a legitimate government purpose is arbitrary and therefore unconstitutional.⁵⁶ In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others*,⁵⁷ this aspect of the rule of law was held to apply equally to exercises of public power, generally, and presidential power, in particular:

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It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.⁵⁸

The *Pharmaceutical Manufacturers* Court did go on to note the limitations of this doctrine:

The setting of this standard [of rationality] does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.

53 *SARFU III* drew on *Hugo and Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council*. 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). In *Fedsure*, the Constitutional Court introduced the concept of the doctrine of legality. South Africa is a democratic state founded on the supremacy of the Constitution and the rule of law (FC s 1(c)). As a result, every exercise of public power must conform to the principles of the rule of law. The doctrine of legality is implicit in these principles, and it requires every act of public power to be lawful. The executive 'may exercise no power and perform no function beyond that conferred upon them by law' *Ibid* at para 58. Every exercise of a public power must be rooted in law, and can be scrutinised by a court for compliance with the terms of the empowering law. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

54 *SARFU III* (supra) at para 148 (footnotes omitted).

55 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*NNP*').

56 *Ibid* at para 24.

57 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*').

58 *Pharmaceutical Manufacturers* (supra) at para 85.

The conclusions of the Court in the *SARFU III* and *Pharmaceutical Manufacturers* cases are to a large extent codified in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). A decision or action must fit the definition of 'administrative action' in s 1 of PAJA before it can be reviewed by a court or tribunal against the grounds of review listed in s 6 of the Act.⁵⁹ Importantly, a number of specific actions and decisions are excluded from the definition of 'administrative action', putting them beyond the scope of PAJA and FC s 33.⁶⁰ Among the exclusions are responsibilities of the President acting as Head of State including assent to legislation under FC s 79(1) and (4) and all but two of the s 84(2) functions. Consistent with the reasoning of *SARFU III*, the presidential power to appoint commissions of inquiry in FC s 84(2)(f) is excluded from the definition of administrative action. The two 'Head of State' powers that are conspicuously absent from the list of exclusions are the powers listed in FC s 84(2)(e) (appointments) and (j) (pardons and related matters).

Despite this omission, the reasoning of *SARFU III* is that where a power is closely related to policy rather than to the implementation of legislation, the

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exercise of that power should not be treated as an administrative action. Applying the same reasoning to the omitted powers suggests that they do not constitute administrative action — they are all more closely related to policy than the implementation of legislation.⁶¹ However, the omission of certain and specific executive powers from the list of exclusions in PAJA, alongside the inclusion of others, cannot be overlooked.⁶²

There are differences in the nature of the various executive powers listed in the Final Constitution. This difference has to do with the extent of the discretion exercised by members of the executive when exercising executive powers. The broad extent of the discretion conferred by FC s 84(2)(j)'s power to grant pardons suggests that the power is policy-laden rather than administrative in nature and does not constitute administrative action in terms of FC s 33.

59 See J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 63.

60 The possibility that the meaning given to 'administrative action' in PAJA is not consistent with the understanding of the term contemplated in FC s 33 has been raised in a number of forums. See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 97 (per Chaskalson CJ) and para 423 (per Ngcobo J); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA); C Hoexter *Administrative Law in South Africa* (supra) at 216-17, R Stacey, 'Substantive Protection of Legitimate Expectations in the Promotion of Administrative Justice Act – *Tirfu Raiders Rugby Club v SA Rugby Union*' (2006) 22 *SAJHR* 664, 664. A court would be entitled to engage with the constitutionality of the definition in PAJA only where a litigant directly challenged PAJA's definition of administrative action as under-inclusive and inconsistent with FC s 33 (for cases setting out the principle that legislation can be declared unconstitutional only consequent upon a direct challenge to that effect, see *Ingledeu v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC) at paras 20 and 22; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC) at paras 61-2; and *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29).

61 Hoexter argues that the powers 'to appoint ambassadors, to recognise diplomatic representatives, to confer honours and pardon offenders all refer to policy-laden activities likely to bear little or no relation to the implementation of legislation.' Hoexter *Administrative Law in South Africa* (supra) at 34.

In this light it is hard to make sense of the omission of FC s 84(2)(j) from the list of exclusions in the definition of administrative action in PAJA. The intention of the legislature in pointedly enumerating specific executive powers to be excluded from the definition of administrative action seems clear: the executive powers set out in s 84(2) not excluded from the definition are to be considered administrative action if their exercise meets the other requirements of the definition of administrative action in s 1 of PAJA. A possible explanation of this apparent contradiction is that, by implicitly including the FC s 84 pardoning power, the scope of the definition of 'administrative action' in section 1 of PAJA simply exceeds the scope that FC s 33 contemplates for the term, and that section 1 of PAJA is unconstitutional to the extent of this inconsistency. A more productive approach is to notice that those executive powers not excluded from the definition of PAJA do not for that reason alone constitute administrative action. An action must still, in terms of PAJA, be 'a decision of an administrative nature' (see the definition of 'decision' in section 1 of PAJA). The determining characteristic is thus whether the decision is of an administrative nature. When it omitted FC s 84(2)(j) from the list of exclusions in PAJA, the legislature has anticipated that a decision to pardon or reprieve prisoners will on occasion be 'administrative in nature'.

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The omission from the list of executive actions excluded from the definition of administrative action of FC s 84(2)(e), conferring on the President the power to make appointments as Head of State, should be seen in the same light. It must be assumed that the legislature envisaged that certain appointments made by the President as Head of State will be 'administrative in nature'. Where the President is required to make appointments as Head of State, however, the exercise of the power is usually purely formal. Where the President appoints judges to courts other than the Constitutional Court in terms of FC s 174(6), he or she is afforded no discretion, and 'must' make the appointment recommended by the Judicial Service Commission. The 'mechanical' nature of this power does not itself imply that it is not 'administrative'.⁶³ Even so, where the President exercises the power in FC s 176(4), there will be little to review. If the President failed to discharge the obligation to make the appointments recommended by the Judicial Service Commission, then he or she would have 'failed to fulfil a constitutional obligation'.⁶⁴

In short, it seems unlikely that an FC s 84(2) power will ever fall within the definition of administrative action. But where the exercise of presidential power does not satisfy the requirements of the definition, it can nonetheless be reviewed against the less exacting standards of lawfulness and rationality inherent in the doctrine of

62 *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 126. Chaskalson CJ concluded on the basis of this reasoning that regulations made by the Minister of Health constituted administrative action and were reviewable as such (para 135). Four members of the Court concurred (Langa DCJ, Ngcobo J, O'Regan J and Van der Westhuizen J), while five judges found the question of PAJA's applicability need not be decided (Madala J, Mokgoro J, Skweyiya J and Yacoob J concurring in the judgment of Moseneke J). No clear authority in this regard has yet been established, and courts continue to struggle with whether ministerial regulation-making is subject to review in terms of PAJA. See *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 (C) at para 25.

63 See Hoexter *Administrative Law in South Africa* (supra) at 45-6.

64 FC s 167(4)(e). A complaint is justiciable before the Constitutional Court alone.

legality. All presidential actions and decisions are thus subject to some form of regulation by the courts.

(c) The President as head of the national executive

As noted above, national executive authority is vested in the President but is exercised by the President 'together with the other members of the Cabinet'. This wording reflects the collaborative nature of a Cabinet in a parliamentary system and means, among other things, that Cabinet members are collectively responsible for decisions that are made in the exercise of national executive authority, whether or not they were party to the decision. This matter is discussed more fully below. Here we consider the functions of the President as head of the Cabinet.

Currently the Cabinet has 30 members — the President and Deputy President and 28 Ministers, all of whom are members of Parliament. As head of Cabinet, the President chairs Cabinet, may manage its agenda and determines its committee system. Currently, the President also appoints directors general (the bureaucratic heads of national departments). Taken together with the power to appoint and dismiss Ministers, these powers are considerable and have led observers of the British system, in which the Prime Minister wields similar powers, to argue that 'Cabinet government' has given way to 'prime ministerial government'.⁶⁵ However,

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studies in Britain suggest that the power of the head of the executive in parliamentary systems is in large part dependent on the political support that he or she commands and his or her particular style of leadership.

The short history of South Africa's new Cabinet system tells us little about the degree to which practice here will mirror that elsewhere. On the one hand, one might expect the electoral system of closed-list proportional representation through which all politicians are heavily dependent on their political party for their positions, rather than the electorate, to increase the power of the President over Cabinet. Individual Cabinet members have less incentive to promote the views of the electorate. On the other hand, the ANC's constitution requires its politicians to 'carry out loyally decisions of the majority and decisions of [ANC] higher bodies'.⁶⁶ When, as is currently the case, the party is controlled by a group that is different from that supporting the President, this schism may reduce the control of the President over his Cabinet colleagues.

We do know that during Mandela's presidency, the business of government was largely under the control of his deputy, Thabo Mbeki, and that Mbeki had some influence over the President's selection of ministers and deputy ministers.⁶⁷ Generally it is believed that since Mbeki became President, he has managed Cabinet firmly. And there is some speculation about whether the president's advisers in the Presidency are more powerful than ministers.⁶⁸ But the AIDS controversy shows how even a very powerful President, who may desire to exercise considerable control

65 See C Turpin *British Government and the Constitution: Text, Cases and Materials* (2005) 222ff; Butler *Contemporary South Africa* (supra) at 94-95.

66 Clause 5.2 (g) African National Congress Constitution (As amended by and adopted at the 51st National Conference, December 2002) available at <http://www.anc.org.za/show.php?doc=./anccdocs/history/const/const2002.htm> (accessed 11 February 2008).

67 M Gevisser *Thabo Mbeki: The Dream Deferred* (2007) 659.

over government, must be responsive to political pressures. So, in 2002, in the face of the pressure of his Cabinet colleagues and the National Executive Committee of the ANC and despite his strong views on the subject, President Mbeki largely withdrew from the HIV/Aids debate and the government embarked on a major treatment programme with which he disagreed.⁶⁹

(i) Specific powers allocated by the Constitution to the President as head of the national executive

The Final Constitution allocates some specific responsibilities to the President acting in his or her role as head of the national executive. These responsibilities encompass the appointment of the judges of the Constitutional Court, the President and Deputy President of the Supreme Court of Appeal,⁷⁰ four members of

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the Judicial Service Commission,⁷¹ the National Director of Public Prosecutions,⁷² the 'military command' of the defence force,⁷³ the National Commissioner of the police force,⁷⁴ heads to any intelligence services that may be established,⁷⁵ an inspector responsible for monitoring any intelligence services,⁷⁶ and members of the Financial and Fiscal Commission;⁷⁷ authorisation of the use of the defence force 'in co-operation with the police service; . . . in defence of the Republic; or . . . in fulfilment of an international obligation';⁷⁸ the declaration of a 'state of national defence';⁷⁹ and

68 R Calland *Anatomy of South Africa* (2006) 27ff, 61-62; N de Jager 'The ANC Government, Co-optive Power and the Perpetuation of Party Dominance' *Konrad-Adenauer Stiftung Seminar Report No 17* Johannesburg (October 2006) *Challenges to Democracy by One-Party Dominance: A Comparative Assessment* 19-20.

69 Gevisser (supra) at 755-761; Butler (supra) at 95.

70 FC s 174(3) and (4).

71 FC s 178(1)(j).

72 FC s 179(1)(a).

73 FC s 202(1).

74 FC s 207(1).

75 FC s 209(2).

76 FC s 210(b).

77 FC s 221(1).

78 FC s 201(2).

79 FC s 203.

the establishment of any intelligence services.⁸⁰ In addition, in terms of FC s 202(1), the President is Commander-in-Chief of the defence force. Of course, although the Final Constitution states that the President must make the appointments noted above and fulfil various responsibilities relating to the security services, he or she must always act 'together with the other members of Cabinet'. This requirement means that he or she must have the support of the Cabinet.

In *Masetlha v President of the Republic of South Africa*,⁸¹ the power to appoint heads of the intelligence services under FC s 209(2) was held to include the power to dismiss:

[T]he power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people.⁸²

But the power to dismiss is *not* an automatic ancillary to the power of appointment.⁸³ The exercise of this power turns on the constitutional role of the office concerned⁸⁴ and the language of the relevant provisions. The *Masetlha* argument does apply

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to the appointment of the military command of the defence force and the National Commissioner of Police because the primary responsibility of the incumbents of these positions is to execute government policy. Although the wording changes slightly in each case, the constitutional provisions under which the positions are established clearly stipulate that incumbents are directly responsible to Cabinet.⁸⁵ On the other hand, the power to appoint certain judges does not encompass a power to dismiss them because, to secure the independence of the judiciary, the Final Constitution sets out a special procedure for the removal of judges.⁸⁶ FC s 221(3)

80 FC s 209(1).

81 2008 (1) BCLR 1 (CC).

82 *Ibid* para 68.

83 See, further, O Ampofo-Anti, K Robinson & S Woolman 'Security Services' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B.

84 In *Masetlha*, Moseneke DCJ notes the importance of the 'operative constitutional and legislative scheme' (para 31) and Sachs J concurring notes the particular relationship that the Constitution envisages between the President and the head of the National Intelligence Agency in contrast, for instance, to that between the President and Ministers. *Masetlha* (*supra*) at para 228.

85 Under FC s 202(2) the defence force is 'directed' by a member of Cabinet. A Cabinet member must be 'responsible for' policing (FC s 206(1)) although the police are under the 'control' of the National Commissioner and not the Minister.

86 FC s 177. It could also not be argued that the President could 'demote' judges by removing them from the specific positions to which he or she has appointed them without infringing their independence.

deals expressly with removal of members of the Financial and Fiscal Commission, permitting it on grounds of 'misconduct, incapacity or incompetence' only. Similarly, the role of the National Assembly in the appointment of the inspector of intelligence services suggests that the President could not dismiss that person without at least the involvement of the National Assembly.⁸⁷ The removal of those members of the Judicial Service Commission chosen by the President should also follow the appointment process. FC s 178(1)(j) requires the President to consult 'leaders of all the parties in the National Assembly' when making the appointments and thus he or she would need to consult similarly when removing them.⁸⁸

The situation in relation to the removal of the National Director of Public Prosecutions (NDPP) is not spelt out but is evident from the broader constitutional role of the NDPP. First, unlike the head of an intelligence service, the military command of the defence force and the National Commissioner of the Police, each of whom must implement policy determined by Cabinet, the NDPP and the relevant Minister jointly determine prosecuting policy.⁸⁹ Second, FC s 179(4) states that national legislation 'must ensure' that the prosecuting authority can exercise its functions 'without fear, favour or prejudice'. Together these provisions point

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to a level of independence in the prosecuting authority not shared by members of the security forces. It would be impossible for the NDPP to act 'without fear, favour or prejudice' if he or she were subject to dismissal on the same terms as the National Commissioner of Police. The legislation enacted under FC s 179(4) is the National Prosecuting Authority Act.⁹⁰ The most significant protection it offers the prosecutorial service is to limit the grounds on which the NDPP may be dismissed.⁹¹ The grounds are limited to 'misconduct; . . . continued ill health; . . . incapacity to carry out his or her duties of office efficiently; or . . . [a finding that] he or she is no longer considered a fit and proper person to hold the office concerned'.⁹²

87 Section 7 of the Intelligence Services Oversight Act 40 of 1994 limits grounds of removal to 'misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence'.

88 IC s 105 (1)(i) provided for presidential nominees on the Judicial Service Commission. The Judicial Services Commission Act 9 of 1994 was promulgated to give effect to IC s 105. It has not been amended to bring it in line with FC s 178. On the removal of JSC members, section 2 states:

(1) The members of the Commission designated as such in terms of section 105(1)(c), (e), (f), (g), (h) and (i) of the Constitution shall hold office for a term not exceeding five years: Provided that

—

(a) the President shall remove any such member from office at any time if the designator who or which designated such member, so requests; or

(b) any such member may resign from office by giving at least one month's written notice thereof to the chairperson.

89 FC s 179(5)(a).

90 Act 32 of 1998.

91 FC s 179(4) also means that one cannot argue that the Act unconstitutionally limits a power (the power to dismiss) that the President may exercise under the Constitution.

(ii) Allocating portfolios, transferring functions under FC s 97 and temporary assignment of functions under FC s 98

FC s 91(2) states the President must assign powers and functions to the Deputy President and Ministers. This is commonly referred to as the allocation of portfolios. The only constitutional formality is FC s 101's requirement that decisions taken by the President that have legal consequences must be in writing. Nevertheless, following the practice in other parliamentary systems, until June 1999 Cabinet appointments and changes in the allocation of portfolios were reported by a general notice in the *Government Gazette*.⁹³

Acts of Parliament commonly specify the Cabinet member who should be responsible for their administration. Thus, legislation dealing with immigration will usually identify the Minister of Home Affairs as the responsible minister; legislation on courts, the Minister of Justice and so on.⁹⁴ FC s 97 anticipates that, in managing the allocation of responsibilities, the President may, nevertheless, wish to allocate the responsibility for a particular Act to another minister by proclamation.⁹⁵ This process allows the President to arrange Cabinet responsibilities in the way that he or she thinks will work best.⁹⁶

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FC s 98 serves a different purpose. It allows the President to assign the powers and functions of a member 'who is absent from office or is unable to exercise that power or function' to another member on a temporary basis. In such cases, no proclamation is necessary.⁹⁷

(iii) Review of executive decisions taken by the President as head of the national executive

92 Section 12(6)(a).

93 See, for example, GN 1065 *Government Gazette* 15792 3 June 1994; GN 1792 *Government Gazette* 16027 21 October 1994; GN 213 *Government Gazette* 16263 17 February 1995; and GN 1392 *Government Gazette* 20261 2 July 1999. There appear to be no similar Notices since July 1999.

94 A problem with this approach is that the titles of ministerial portfolios may change. Some recent Acts are more sophisticated. Thus, the National Forests Act 84 of 1998 s 1 states that "'Minister" means the Minister to whom the President assigns responsibility for forests in terms of section 91 (2) of the Constitution'.

95 See, for example, GN 21 *Government Gazette* 26164 26 March 2004 transferring responsibility for the National Key Points Act 102 of 1980 from the Minister of Defence to the Minister of Safety and Security and GN 27 *Government Gazette* 17875 27 March 1997 transferring responsibility for the Administration of the Land Bank Act 13 of 1944 from the Minister of Finance to the Minister of Agriculture.

96 FC s 97, of course, limits the power of Parliament to regulate the allocation of responsibilities amongst Cabinet members. It also implies that Ministers may not reallocate functions amongst themselves. Only the President may do this. As we discuss below, at § 18.3(a), FC s 99 is concerned with the assignment of functions between spheres of government and is not concerned with the allocation of responsibilities amongst Cabinet members.

97 There is some debate about the meaning of the word 'assign' in this and other constitutional contexts. See § 18.3(l) infra.

Action by the President that falls within the definition of administrative action will be subject to review under PAJA and FC s 33. Those actions that are not classified as administrative action must nonetheless comply with the principle of legality and can be reviewed against the standards of lawfulness and rationality.⁹⁸ The President therefore does not have an entirely unfettered or 'personal' discretion.⁹⁹

(d) Formalities and executive decision making by the President — FC s 101

According to FC s 101, decisions of the President taken in terms of legislation or which have legal consequences must be in writing.¹⁰⁰ A written decision of the President must be countersigned by another Cabinet member 'if that decision concerns a function assigned to that other Cabinet member'.¹⁰¹ Many presidential decisions, whether taken as Head of State or head of the national executive have legal consequences.¹⁰² However, because FC s 101 is headed 'Executive decisions', it has been argued that the provisions of ss (1) and (2) do not apply to 'Head of State' decisions. This argument runs counter to the Constitutional Court's view of executive powers in *Hugo*. There, speaking for the majority, Goldstone J asserts unambiguously that actions of the President are always 'executive':

There are only three branches of government viz. legislative, executive and judicial. The powers of the President, other than those set out in section 82(1), are without question executive powers. The question is whether those referred to in section 82(1) fall within a different category. In my opinion they do not. Whether the President is exercising constitutional powers as head of the executive (ie the Cabinet) or as head of state, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government.¹⁰³

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The *Hugo* Court decided this matter under the Interim Constitution. But, as the Constitutional Court confirmed in *SARFU III*,¹⁰⁴ the provisions of the Interim Constitution and Final Constitution relating to the dual role of the President as Head of State and head of the National Executive are similar.

98 See § 18.2 (b) *supra*; Klaaren & Penfold (*supra*) at Chapter 63.

99 See also IM Rautenbach & EFJ Malherbe *Constitutional Law* (4th Edition, 2004) 190.

100 FC s 101(1).

101 FC s 101(2).

102 *Manual of Executive Acts of the President* (*supra*) at para 1.6 (Notes that decisions that do not have legal consequences would be 'purely political or policy decisions relating to the administration of the Cabinet which do not themselves constitute legal authority of the exercise of any Executive powers. A decision, for example, to host a banquet or to attend a function need not be reduced to writing.')

103 *Hugo* (*supra*) at para 11.

104 *Hugo* (*supra*) at para 144.

This interpretation of FC s 101 — that it covers all presidential decisions that have legal consequences or are taken in terms of legislation — seems right even if it were to be argued that the Constitutional Court was too hasty in deciding that all head of state functions are 'executive'. The wording of the provision is clear. Moreover, it is entirely appropriate that, in a system in which lawful government action is the central principle, the decisions described in FC s 101(1) should be reduced to writing. Nevertheless, this reading creates a puzzle. Why should decisions that are taken by the President acting in his or her capacity as Head of State, and thus unconstrained by the requirement that Cabinet support the decision, be countersigned by a minister? And, what role does the ministerial signature play? What are the consequences of a failure to secure the countersignature? When the President takes decisions as head of the executive, the requirement of the countersignature of the relevant minister imposed by FC s 101(2) is entirely consistent with the notion of collective Cabinet responsibility. In making decisions that affect the portfolio of a Cabinet colleague, the President must confer with that Cabinet member. If he or she refuses to sign, the absence of Cabinet support is apparent and the decision of the President cannot take effect.¹⁰⁵ But this argument cannot apply to the requirement of a countersignature when the President exercises his powers as Head of State. The best way of interpreting the FC s 101(2) requirement in such cases is that it ensures that the relevant Cabinet member is aware of the exercise of a power that affects that Cabinet member's portfolio.¹⁰⁶ Here the provision simply promotes coordination and transparent government. Thus, for example, appointments of ambassadors, plenipotentiaries and diplomatic and consular representatives,¹⁰⁷ the exercise of the power to pardon and the appointment of a commission of inquiry would have to be countersigned by the responsible minister. And, because the signature of the minister in such cases merely confirms that he or she has been informed of the President's act, it would not be appropriate for the Cabinet member to refuse to sign: there is no Cabinet veto right.¹⁰⁸ Despite the absence of such a veto, such a presidential decision will be

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incomplete and thus ineffective until it is countersigned as the Final Constitution requires.

Presidential decisions are recorded by means of two instruments: President's Minutes and President's Acts. President's Minutes are recorded when the instrument

105 See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 246. The *Manual of Executive Acts of the President* asserts that a countersignature will be considered proof that appropriate Cabinet consultation has taken place. *Manual* (supra) at para 2.14.

106 See *Manual* (supra) at para 2.6, which, citing L Baxter *Administrative Law* (1984), notes that before 1983, by convention, the Governor General or President was required to have decisions countersigned. Section 23 of the 1983 Constitution and IC s 83(1) expressly required countersignatures.

107 See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 243.

108 Currie & De Waal argue that a failure to obtain a countersignature where a presidential power as Head of State is exercised will result in invalidity only where the President deliberately withholds information from the relevant Cabinet member or acts in a grossly negligent fashion. *Ibid* at 240). A better approach, one less likely to lead to uncertainty about the validity of presidential decisions and avoiding the need to interrogate the behaviour of the President, may be to argue that the Minister concerned may be ordered to sign. If he or she does not sign it, then the President may replace the Minister.

recording the decision of the President must be countersigned by a Cabinet member. President's Acts, on the other hand, are recorded when the President exercises his powers and functions without consulting the Cabinet and without obtaining the countersignature of a Minister.¹⁰⁹ Such Acts are not common as most decisions with legal consequences concern the functions of another Cabinet member.

(e) Appointment, end of term and removal

The National Assembly must elect a President from amongst its members at its first sitting after its election or at another time if the presidency is vacant.¹¹⁰ A person elected as President by the National Assembly ceases to be a member of the National Assembly.¹¹¹

The President's term of office begins when he or she is sworn into office by the Chief Justice or another judge, and expires either when the next person elected President by the National Assembly assumes office¹¹² or if the term is ended for another reason such as resignation or death. The President's term of office is thus usually tied to the duration of the National Assembly: five years.¹¹³

The President may leave office before the expiry of his or her term if a motion of no confidence is passed by the National Assembly under FC s 102(2), if the National Assembly removes him or her,¹¹⁴ or if he or she resigns or dies. When a vacancy occurs in the office of the President, an acting President must be appointed,¹¹⁵ and the National Assembly must elect a new President. If a new President is not elected within 30 days, the acting President must dissolve the National Assembly and elections must be held.¹¹⁶

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109 See *Manual* (supra) at para 1.5. The term Executive Act covers both President's Minutes and President's Acts.

110 FC s 86(1). The Chief Justice or a judge designated by the Chief Justice presides over the election of the President. FC s 86(2). Part A of Schedule 3 to the Final Constitution contains the procedure for the election of the President.

111 FC s 87. The President is not directly elected by the electorate. There have been suggestions that the method by which the President is appointed should be changed and that an individual should be directly elected as President by the electorate. See for a criticism of these views, J Kane-Berman 'Presidents should be elected by the people' *Business Day* (26 April 2007), available at <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A447515> (accessed 19 June 2007).

112 FC ss 87(1) and 88(1) as well as Schedule 2. The President may be sworn in by oath or solemn affirmation.

113 FC s 49(1).

114 FC s 89(1). See § 18.2(a)(iv) infra.

115 FC s 90.

116 FC ss 50(2) and 49(2).

Two sets of constitutional provisions allow the National Assembly to remove the President. First, under FC s 89, the President may be removed from office by a resolution adopted in the National Assembly with a supporting vote of at least two thirds of its members.¹¹⁷ This process of impeachment may be used for the removal of the President only if the President is responsible for a serious violation of the Final Constitution or the law, has engaged in serious misconduct or is unable to perform the functions of office.¹¹⁸ A person removed from the office of President on either of the first two of these three grounds may not receive any benefits of the office, and may not again serve in any public office.¹¹⁹

Secondly, as in other parliamentary systems, the Final Constitution requires the President and Cabinet to have the support of the National Assembly. Thus, FC s 102(2) requires the President, the rest of Cabinet and any Deputy Ministers to resign if the National Assembly, by a vote supported by a simple majority of all its members, passes a motion of no confidence in the President.¹²⁰ In parliamentary systems, a vote of no confidence removing the government of the day will usually occur only after floor-crossing or if a substantial number of the governing party backbenchers fear the party's electoral prospects under the current leader. The electoral system of closed list proportional representation, which gives the party considerable control over individual members of Parliament and the limited opportunities for floor-crossing, may suggest that a successful vote of no confidence in the President is very unlikely. However, in the current context of ANC governance — in which the party is controlled not by its public representatives in the National Assembly but by its National Executive Committee — another situation in which a vote of no confidence may occur suggests itself: a change of leadership in the party or a significant shift in party policy that is not supported by the national President and Cabinet may trigger efforts to remove the President by MPs whose membership of the party requires that they promote party policy.¹²¹

No person may serve more than two terms as President. However, when someone fills a vacancy between national elections, the period served as President until the next national elections is not regarded as a term.¹²²

117 FC s 89(1).

118 FC s 89(1)(a), (b) and (c).

119 FC s 89(2). The question whether courts may review parliamentary decisions to impeach has exercised Nigerian courts. See, for instance, *Abaribe v The Speaker of the Abia* [2000] FWLR (Pt. 9) 1558; *Inakoju v Adeleke* [2007] All FWLR (Pt. 353) 3; *Ekpenkhio v Egbadon* [1993] 7 NWLR (Pt. 308) 717; and *Asogwa v Chukwu* [2004] FWLR (Pt. 189) 1204. See, generally, E Nwauche 'Is the End Near for the Political Question Doctrine in Nigeria' (Paper presented at the African Network of Constitutional Lawyers Conference, Nairobi, April 2007).

120 FC s 102(2).

121 Clause 5.2 of the ANC Constitution (African National Congress Constitution (As amended by and adopted at the 51st National Conference, December 2002)) available at <http://www.anc.org.za/show.php?doc=../ancdocs/history/const/const2002.html> (accessed 11 February 2008)), requires ANC members who hold elective office to abide by the decisions of the ANC. See also T Lodge 'The Future of South Africa's Party System' (2006) 17 *Journal of Democracy* 152, 159 (A Code of Conduct stipulates that ANC MPs are subordinate to the ANC National Executive Committee).

(f) The President in court

The fundamental constitutional principle that every exercise of power must be according to law raises the question of how the lawfulness of presidential acts may be tested. President Mandela gave evidence in person in the Transvaal High Court in *South African Rugby Football Union & Others v President of the Republic of South Africa & Others*.¹²³ The case engaged the question of whether the President had exercised his power to establish a commission under FC s 84(2) improperly. The decision to order the President to give evidence was challenged in the Constitutional Court. The *SARFU III* Court held that while the President is a competent and compellable witness,¹²⁴ he or she should be compelled to testify in exceptional circumstances only:

[T]wo aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.¹²⁵

In *SARFU III*, the Constitutional Court commented that there was no evidence that 'the administration of justice would have been injured in any way if the President had not been ordered to submit himself to cross-examination'.¹²⁶ Accordingly the court a quo was wrong to have ordered the President to testify. The 'special dignity and status of the President together with his busy schedule and the importance of this work' also mean that usually it will be appropriate to make special arrangements for taking testimony.¹²⁷

Different considerations may arise if the President is not a witness but an accused. The Final Constitution does not grant a President immunity from

122 FC s 88(2).

123 1999 (4) SA 147 (CC), 1998 (10) BCLR 1256 (CC).

124 *SARFU III* (supra) at paras 240-245. See also PJ Schwikkard and SE van der Merwe *Principles of Evidence* (2002) 400; DT Zeffertt, A Paizes and A St Q Skeen *The South African Law of Evidence* (2003) 682. See, for a discussion of American Presidents giving testimony, RD Rotunda 'Presidents and ex-Presidents as Witnesses: A Brief Historical note' (1975) *University of Illinois Law Forum* 1. For the head of state immunity doctrine in the United States see MJ Rozell 'The Law: Executive Privilege: Definition and Standards of Application' (1999) 29 *Presidential Studies Quarterly* 918 and J Isenbergh 'Impeachment and Presidential Immunity from Judicial Process' (2000) 18 *Yale Law and Policy Review* 53.

125 *SARFU III* (supra) at para 243.

126 *Ibid* at para 244.

127 *Ibid* at paras 242 and 245.

criminal suits. The US Constitution also does not contain any express presidential immunity from criminal prosecution and the question whether the President is, nonetheless, immune from prosecution has engaged Americans. An implied immunity from civil proceedings was urged in *Mississippi v Johnson*,¹²⁸ but the Court found it unnecessary to reach this question. In *United States v Nixon*¹²⁹ it was argued that respect for the doctrine of the separation of powers implies immunity from criminal prosecution. The Supreme Court held that the doctrine of separation of powers cannot sustain an absolute and unqualified immunity from judicial process. In another case, the Supreme Court said:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.¹³⁰

The arguments usually made in favour of a presidential immunity in the United States are 'functionalist'. Their proponents urge that prosecution of the president would immobilise the executive branch and '[put] the entire executive branch at the mercy of the judiciary'.¹³¹ The US Supreme Court was unconvinced by this argument.¹³² In South Africa, where executive authority is to be exercised by the President 'together with the other members of the Cabinet', this argument is even less compelling. Moreover, the focus of the inquiry should not be whether a President subject to criminal prosecution is able to exercise executive authority, but whether, in the words of *SARFU III*, the 'interests of justice clearly demand' that the President appear in court. The absence of express presidential immunity

128 71 US (4 Wall) 475 (1866).

129 418 US 683 (1974).

130 *United States v Lee* 106 US 196 (1882), 220.

131 AR Amar & BC Kalt 'The Presidential Privilege against Prosecution' (1997) 2 *Nexus* 11, 17. See also AR Amar 'On Prosecuting Presidents' (1999) 27 *Hofstra Law Review* 671. See, further., the testimony of Professors Amar and Bloch before the US Senate hearings into the prosecution of incumbent American Presidents: *Is a sitting President subject to compulsory criminal process?: Hearings before the Subcommittee on Constitutionalism, Federalism, and Property Rights of the Senate Judiciary Committee on S105-964, 'Indictment or Impeachment of the President'*, 105th Congress 23 (9 September 1998), quoted by J Turley "'From Pillar to Post": The Prosecution of American Presidents' (2000) 37 *American Criminal Law Review* 1049, 1076-7.

132 In *Clinton v Jones*, the US Supreme Court, dealing with the question of immunity from civil suit, held that President Clinton

errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions. . . . As Madison explained, separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *control* over, the acts of each other.' The fact that a federal court's exercise of its traditional . . . jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution.

520 US 681, 702-703 (1997).

from criminal prosecution in the South African Constitution, the unpersuasiveness of the functionalist argument, and the requirement that courts are not impeded in the administration of justice urge the conclusion in the South African context that the President is not immune to criminal prosecution.

18.3 Cabinet

As in other modern democracies, the executive is the dominant branch of government in South Africa. It controls policy-making, Parliament's legislative agenda and the implementation of both laws and policy. Although FC s 85(1) states that '[t]he executive authority of the Republic is vested in the President', this authority is exercised 'together with the other members of the Cabinet'. This section first describes the way in which Cabinet is constituted and the assignment of portfolios to ministers. Secondly, it considers the current institutional arrangements for the management of Cabinet affairs. Thirdly, it sets out the powers of the executive. Fourthly, it considers the principle of collective Cabinet responsibility and Cabinet decision making. The fifth part deals with individual ministerial responsibility and the rest of the section covers accountability for outsourced and privatised functions, votes of no confidence, ethics, the Minister of Finance, the control of the defence force, foreign affairs and assignment and delegation of executive functions.

(a) Appointment and dismissal of Cabinet members and deputy ministers and assignment of portfolios

Cabinet, FC s 91(1) tells us, 'consists of the President, . . . a Deputy President and Ministers'. As we note above, the President appoints the members of Cabinet. He may choose as many Cabinet members as he or she wishes, but the Deputy President and all but two Ministers must be drawn from the National Assembly. The Final Constitution specifically empowers the President to appoint Deputy Ministers.¹³³ Although Deputy Ministers now attend Cabinet meetings, they are not members of Cabinet.

The President assigns powers and functions to the members of Cabinet with few constitutional constraints. The Final Constitution requires one Cabinet member to be appointed leader of government business in the National Assembly.¹³⁴ It also anticipates that individual members of the Cabinet will be identified as responsible for finance, local government affairs, the administration of justice, defence and policing.¹³⁵

Provisions of the Interim and Final Constitutions relating to the Government of National Unity, which applied until 30 April 1999, put certain constraints on the

133 FC s 93. Only two deputy ministers may be drawn from outside Parliament. There are currently 20 deputy ministers.

134 FC s 91(4).

135 See FC s 224 (2) (Cabinet member responsible for national financial matters); FC s 139 (2)(a) (i) (Cabinet member responsible for local government affairs); FC s 175(2)(Cabinet member responsible for the administration of justice); FC s 201(1)(Cabinet member responsible for defence); FC s 206(1)(Cabinet member responsible for policing).

President's choice of Cabinet members and his or her power to dismiss them. In the case of reallocation of portfolios or dismissal, the President was required to consult the leader of the political party to which an affected Cabinet member belonged and was permitted to make such changes only if they 'become necessary for the Constitution or in the interests of good government'.¹³⁶ No such constraints exist now. Under the Final Constitution, the choice of members, reallocation of Cabinet portfolios and dismissal of members is entirely at the discretion of the President. Improving government and political interests, such as ensuring that an influential political constituency is adequately represented in Cabinet or avoiding dissent amongst Cabinet members, dominate these decisions. Because Cabinet members hold office at the discretion of the President and the choice of Cabinet members is a highly political decision, Ministers do not have a right to a hearing prior to dismissal or suspension.¹³⁷ However, political parties may impose some restraints on the discretion of the President to compose a Cabinet. Thus, the British Labour Party requires Cabinet positions for members of its Parliamentary Committee¹³⁸ and a similar practice prevailed in the Australian Labour Party until the 2007 elections. This does not appear to be the practice in South Africa.

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Moreover, although the vertical division of the state into national, provincial and local spheres of government shapes the practice of government, it has had no obvious impression on the composition of cabinet and the allocation of portfolios. Unlike Canada, in South Africa no expectation exists that provinces will be

136 IC ss 88(4)(d) and (e).

137 On 27 March 1995, President Mandela dismissed Winnie Mandela from the post of Deputy Minister of Arts, Culture, Science and Technology. No reasons were given for the dismissal but the media cited grounds of continued insubordination which included an unauthorized trip abroad, clashes with other black leaders, and repeated jibes at the government. On 12 April 1995, Mrs Mandela applied to court for her reinstatement, arguing, among other things, that President Mandela failed to write her letter of dismissal on stationery bearing the government seal and did not consult with all of his partners in the coalition government. Acting President Thabo Mbeki revoked the dismissal 'to spare the government and the nation the uncertainties which might follow protracted litigation on this issue'. However, upon the return of President Mandela, Mrs Mandela was dismissed again, in compliance with technicalities raised (presumably consultation with partners in the government of national unity as required by the IC). See B Keller 'Winnie Mandela out of Cabinet for defying presidential orders' *The New York Times* (28 March 1995); World News Briefs 'Winnie Mandela sues to get her job back' *The New York Times* 12 April 1995; B Keller 'Winnie Mandela is Reinstated on Technicality' *The New York Times* (13 April 1995). See also ANC Press Statement 'Reinstatement of Winnie Mandela' (12 April 1995) and ANC Press Statement 'Statement by the African National Congress on the dismissal of Mrs Winnie Mandela from her Deputy Ministerial Post' (14 April 1995), both available from <http://www.anc.org.za/ancdocs/pr/1995/index.html> (accessed 6 February 2008). The power to suspend a Minister (or Deputy Minister) is an incident of the power to dismiss. See *Mpehle v Government of the Republic of South Africa*, 1996 (7) BCLR 921 (Ck). In *Mpehle*, an MEC suspended by the Premier of the Eastern Cape argued that he had a right to a hearing. Because this was conceded by the respondent the matter was not decided. Insofar as *Mpehle* might be read to suggest that there should be consultation before dismissal, the decision must be read to apply to the special circumstances under the IC and not to the FC. *Ibid* at 943G. Nevertheless, it appears that President Mbeki did consult former Deputy President Jacob Zuma before dismissing him in June 2005. Usually such consultation is intended to give the person concerned an opportunity to resign. The former Deputy President declined to resign. See 'Zuma Axed' *The Star* (14 June 2005) available at http://www.iol.co.za/index.php?set_id=1&click_id=2976&art_id=vn20050614071051531C805432, (accessed 21 June 2007)). Note Sachs J's distinction between Ministers and officials such as the Director of Public Prosecutions in *Masetlha*. *Masetlha v President of the Republic of South Africa* 2008 (1) BCLR 1 (CC) at para 228.

138 Turpin *British Government* (supra) at 227.

'represented' in the Cabinet. Similarly, no Cabinet members have responsibility for different regions.

FC s 219 requires Parliament to pass an Act that provides a framework for determining the salaries of Cabinet members (including the President) and deputy ministers. Salaries and limits on other forms of remuneration are discussed in Chapter 20: Provincial Executive Authority.¹³⁹

(b) The President, the Presidency and Cabinet committees

Modern Cabinets rely on Cabinet (or ministerial) committees to enable them to handle the large volume of work they must do, to facilitate coordination amongst government departments and to give ministers who must work together, but who may disagree, an opportunity to resolve their disagreements properly. In 1998, the Report of the Presidential Review Commission identified poor coordination of government activities and policy as a significant problem.¹⁴⁰ In response to this report, the existing, relatively small Cabinet committee system was transformed into what is now commonly referred to as the system of 'Cabinet clusters'. The clusters consist of six Cabinet committees that draw together related departments and parallel clusters of departmental directors general. According to the Presidency, 'Cabinet Committees meet to discuss areas of work, facilitate collaborative decision-making, and make recommendations to Cabinet'.¹⁴¹ The Cabinet committees are chaired by the President or the Deputy President. They are large — for instance the Committee for the Social Sector has twenty members — and many ministers serve on a number of the committees: the Minister of Education serves on five of the six committees.

The British Ministerial Code of 2001 stated that an effective system of ministerial committees means that few appeals may be made to the full Cabinet. Most

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matters must be settled in the committees.¹⁴² There is little information about how successful the South African Cabinet committees are when assessed in terms of this

139 See C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20, 20.3(g).

140 'Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa' (27 February 1998) para 2.4.1.1 available at <http://www.info.gov.za/otherdocs/1998/prc98/index.html> (accessed 4 February 2008).

141 'Presidency Annual Report 2004-5' para 3.2 available at <http://www.thepresidency.gov.za/main.asp?include=docs/reports/annual/2005/index.htm> (accessed 30 January 2008). The six Cabinet Committees are the Cabinet Committee for the Economic Sector (ES); the Cabinet Committee for Investment and Employment (IE); the Cabinet Committee for Justice, Crime-Prevention and Security (JCPS); the Cabinet Committee for the Social Sector (SS); the Cabinet Committee for Governance and Administration (G&A); and the Cabinet Committee for International Relations, Peace and Security (IRPS).

142 See Turpin *British Government* (supra) at 233. The Code has been revised three times since 2001. The latest Code (Cabinet Office *Ministerial Code* (July 2007) available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/propriety_and_ethics/ministerial_code_current.pdf (accessed 19 February 2008)) is much briefer and does not explain the purposes of Cabinet practices. However, it appears that the purpose of Cabinet committees remains unchanged.

criterion. What is clear is that proposed legislation and major policy initiatives are considered by the full Cabinet at its weekly meetings. Generally, it appears that Cabinet does not vote — although voting has occurred on occasion.

Administrative support for Cabinet and the Cabinet committees is supplied by the Cabinet Office in the Presidency. According to the *2004-2005 Annual Report of the Presidency*, the Cabinet Office:

implements administrative systems and processes to ensure the overall optimal functioning of the Cabinet and its committees. It facilitates the management of decision-making processes of the Cabinet and its Committees, and ensures that the decisions of the Cabinet are acted upon through mechanisms that enable the Cabinet to monitor itself. It maintains the integrity of the decisions of the Cabinet, and acts as custodian of such decisions. It also promotes the integrated decision-making system and co-operative approach to governance.

This role is clearly not merely administrative. It anticipates that, through the Cabinet Office, the Presidency will maintain control over Cabinet.¹⁴³

(c) Powers of Cabinet

The Final Constitution does not list the powers of Cabinet. Instead, FC s 82(2) describes the way in which executive authority is exercised. Executive authority is exercised by —

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrators;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.

This list sets out the usual functions of an executive in a parliamentary system and ends with a broadly worded provision which ensures that the executive will be able to fulfil any functions that are legally authorised. Thus, the national executive has those powers that the Final Constitution and legislation grant it.

Paragraph (a) sets out the main function of the executive — to implement laws. It also recognises that not all national laws will be implemented by the national

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government. First, in terms of FC s 125(2)(b), it is provinces and not the national executive that will ordinarily be responsible for the implementation of national acts that fall under Schedule 4 and thus within the concurrent competence of provinces and the national sphere of government. Secondly, in modern states much law is implemented not by government but by other agencies ranging from parastatals over which the executive has considerable control to institutions such as the Stock Exchange which act independently within a framework provided by law.

FC s 85(2)(d) captures another central function of the executive: preparing (ie drafting) and initiating legislation (ie, introducing it in either the National Assembly

143 N de Jager (supra) at 19 — 20.

or the NCOP). Despite the fact that Parliament is designated the 'law-making' authority, executives actually drive the law-making process in parliamentary systems. Very few laws are initiated by parliaments. In fact, paragraph (b), which asserts the role of the executive in 'developing and implementing national policy', is more controversial in South Africa. Members of the executive and bureaucrats have used paragraph (b) to resist attempts by Parliament to question government policies. They assert that Parliament has no role (or at best a limited role) in relation to government policy: its functions are to consider bills and oversee the executive in its implementation of the law. Although Parliament has resisted this claim, in practice its engagement with new policy has been relatively weak.

Finally, paragraph (e) is a catch-all provision that ensures that the executive will be able to carry out functions not covered by the preceding paragraphs. The critical limitation here is the word 'executive'. In an implicit recognition of the separation of powers, paragraph (e) puts judicial and legislative functions outside the ambit of executive authority.¹⁴⁴

Cabinet members 'are responsible for powers and functions of the executive assigned to them by the President'.¹⁴⁵ In practice, the President allocates portfolios, while the extent of the portfolio is usually largely determined by Acts of Parliament that allocate responsibility for particular laws to specific ministers.¹⁴⁶ In *Magidimisi NO v Premier of the Eastern Cape*, Froneman J considers the responsibility that provincial Premiers and MECs bear as members of provincial Executive Councils. His findings apply equally to members of the national Cabinet. Thus,

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following Froneman J, the President 'bears the ultimate responsibility' to ensure that the national government fulfils the law and other Cabinet members bear responsibility for the operation of their departments.¹⁴⁷

(d) A collaborative venture – Cabinet decision making

(i) Cabinet solidarity

144 See S Seedorf & S Sibanda 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.

145 FC s 92(1).

146 The Constitutional Court has held that this provision indicates that where ministers perform other ministerial duties in terms of legislation, they 'exercise no more than subordinate, delegated authority'. *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC), 2001 (11) BCLR 1168 (CC) para 13. This holding must not be read to mean that ministers are not accountable in terms of FC s 92(2) for ministerial duties performed in terms of legislation. Indeed, FC s 85(2)(e) provides that executive authority, the exercise of which Cabinet is undoubtedly accountable for, includes any other executive function provided for in national legislation. The Court in *Liebenberg* was seized with the question of whether regulations made by a minister in terms of legislation constituted an Act of Parliament for purposes of a declaration of invalidity by a High Court in terms of FC s 172(2)(a). The judgment offers no clear statement about the limits or extent of ministerial accountability.

147 Eastern Cape High Court, Case No 2180/04, Unreported (Decided 25 April 2006) at paras 20-23. See also C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20, § 20.3.

As already noted, the Constitutional Court has described the exercise of executive authority in South Africa as 'a collaborative venture in terms of which the President acts together with the other members of Cabinet'.¹⁴⁸ Three constitutional provisions provide the basis of this understanding: FC s 85(2), from which the Court quotes, states that '[t]he President exercises the executive authority, together with the other members of the Cabinet'; FC s 92, which stipulates that members of Cabinet are 'accountable collectively and individually to Parliament'; and FC s 102, which gives the National Assembly the power to pass a vote of no confidence in the Cabinet as a whole and thus forcing it to resign.

The idea that members of Cabinet must act together and share responsibility for their actions is often referred to as 'Cabinet solidarity' or collective Cabinet responsibility. Although the exact parameters of the doctrine are not fixed, as Marshall describes, '[t]here are three traditional branches to the collective responsibility convention: the confidence rule, the unanimity rule and the confidentiality rule.'¹⁴⁹The 'confidence rule', which requires the Cabinet to retain the support (or confidence) of Parliament to remain in power, is constitutionalised in South Africa in the provision concerning a vote of no confidence. The 'unanimity rule' is implied in FC ss 85(2) and 92: in the references to Cabinet acting 'together' and its collective accountability to Parliament. The 'confidentiality rule', which protects the confidentiality of discussions in Cabinet, is not specified in the Final Constitution but is applied in practice.

The convention was developed in Britain as politicians sought to assert greater control of government. Of 19th century British practices, Pares writes:

The king did nearly all business with the ministers in the room called his closet. He normally saw them one by one. . . . The business of the closet does not appear, at first sight, to have afforded the ministers much opportunity for collective action. But they know how to counteract the tendency to separate and confine them. On any question of general political importance, they would agree beforehand what to say, and then go into the closet, one by one, and repeat the identical story.¹⁵⁰

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Over the two centuries since the practice developed, the reasons for the retention of the principle of collective responsibility have changed. In most of the countries in which it currently applies, it has become both less rigid and more controversial. Now, governments usually rely on it to 'present a united front against the Opposition'.¹⁵¹ But it also contributes to effective and democratic government. In this regard, collective Cabinet responsibility or Cabinet solidarity performs two broad functions. First, the practice ensures government cohesion, and enables the government to administer public affairs in a coherent way and to implement policies relatively consistently over a reasonable period. Second, together with its counterpart,

148 SARFU III (supra) at para 41.

149 G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (1989) 55.

150 R Pares *King George III and the Politicians* (1953) 148-149 cited in House of Commons Research Paper 04/82 *The Collective Responsibility of Ministers — An Outline of the Issues* (15 November 2004) at 7 available at <http://www.parliament.uk/commons/lib/research/rp2004/rp04-082.pdf> (accessed 11 February 2008).

151 See Turpin *British Government* (supra) at 215 (Offers a description of practice in Britain which is generally applicable to parliamentary systems in the Commonwealth.)

individual accountability, the convention strengthens Parliament's ability to hold the government to account.¹⁵² At the same time, critics note that it contributes to secrecy in government.

The *Ministerial Code* issued by the British Cabinet Office in 2007 describes the principle as follows:

Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. . . . Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees should be maintained.¹⁵³

There is no similar statement of the doctrine in South Africa¹⁵⁴ but the British formulation appears to reflect practice in South Africa. Moreover, the confidentiality of Cabinet discussions is protected by PAIA¹⁵⁵ and its importance has been acknowledged by the Constitutional Court.¹⁵⁶

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As noted above, collective Cabinet responsibility is usually assumed to mean that a Cabinet member may not vote or speak out against government policy. If a Cabinet member is unable to support a policy, he or she should resign. Secondly, decisions by individual members of Cabinet are regarded as decisions of the whole government whether or not other members are party to them. Thirdly, as the statement of the principle quoted above indicates, it requires confidentiality. In other words, Ministers should not reveal the content of discussions in Cabinet nor should former Cabinet ministers reveal Cabinet secrets.¹⁵⁷

152 For a useful summary of the history of the development of ministerial government in England in the 19th Century which emphasises these two strands, see M Flinders *The Politics of Accountability in the Modern State* (2001) 2-9.

153 Cabinet Office *Ministerial Code: A code of Conduct and Guidance on Procedures for Ministers* July 2007 available at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/propriety_and_ethics/ministerial_code_current.pdf (accessed 19 February 2008). The Australian *Cabinet Handbook* issued by the Department of the Prime Minister and Cabinet (5th edition updated 2005) 4ff and the Irish *Cabinet Handbook* issued by the Department of the Taoiseach (1998) para 1.1 — 1.5 describe the convention of collective responsibility in similar terms but the Irish *Handbook* provides more detail.

154 The *Manual on Executive Acts of the President* (1999) presents the government's understanding of the requirements of FC s 85(2). See § 18(3)(d)(ii) *infra*. See also *Egan v Willis* (1998) 195 CLR 424, 451 (Australian High Court said that '[i]t should not be assumed that the characteristics of a system of responsible government are fixed in time or that the principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster'.) The same might be said for South Africa. However, just as the Australian court nonetheless consulted practice in Britain in *Egan*, at least until practices are better established in South Africa, an understanding of the way in which Cabinet solidarity and ministerial responsibility function in other parliamentary systems is useful to understanding the South African constitutional framework.

155 Section 12 (a) of the Promotion of Access to Information Act 2 of 2000 exempts the provisions of the Act from applying to records of 'the Cabinet and its Committees'.

156 *SARFU III* (*supra*) at para 243.

In most modern systems, practice is a great deal more nuanced than the description above allows. Thus, although there are examples in other parliamentary systems (but not post-apartheid South Africa) of members of Cabinet resigning in the face of policies that they cannot support,¹⁵⁸ other 'safety valves' are used to allow Ministers to remain in government while indicating that they hold views that differ from government policy on a particular matter. Brazier describes the 'unattributable leak' as the 'life-saver of collective responsibility'.¹⁵⁹ An 'unattributable leak' ensures that the views of the dissenting Cabinet member are known to the public whose support he or she wishes to maintain — usually without jeopardising his or her membership of Cabinet. At the same time, the head of Cabinet does not have to contend with open dissent. Moreover, as Brazier and others note, the unattributable leak 'has another general and beneficial side effect. Ministerial solidarity involves the stifling of open dissent: it thereby contributes to secrecy in government. . . . The leak will . . . occasionally draw that screen to one side.'¹⁶⁰ British practice also shows that not all leaks will reflect dissent in Cabinet. They may be used strategically by Cabinet to test proposed policies. If the policy receives strong public opposition, it can then be abandoned with a claim by government that it had, in fact, never intended to pursue such a course of action.¹⁶¹

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Two other safety valves are seen at work when the public statements of Cabinet ministers fall just short of open dissent with government policy, but nonetheless signal likely disagreement, and when ministers develop policy without prior Cabinet support. Whether or not Cabinet members will do engage in such behaviour turns, to a large extent, on whether or not they will be reprimanded or dismissed will depend greatly on the issue and on the style of the President. The response of the head of the Cabinet will be a matter of political strategy. A weak leader may be unable to act against such behaviour. A strong leader may not need to respond. Thus far, South

157 See British Cabinet Office *Ministerial Code* para 18. In Britain the question of ministerial memoirs has been controversial. See House of Commons Research Paper *The collective responsibility of Ministers* 36 and *Attorney-General v Jonathan Cape* [1976] 1 QB 752 concerning the publication of Crossman's diaries. The present formulation in the Cabinet Office *Code* incorporates recommendations made by a Committee of Privy counsellors under Lord Radcliffe after Crossman.

158 For example, on 17 March 2003 Robin Cook resigned his Cabinet post as Leader of the British House of Commons in opposition to the Cabinet position on the war in Iraq. In announcing his resignation Cook said 'It is with regret I have today resigned from the cabinet . . . I can't accept collective responsibility for the decision to commit Britain now to military action in Iraq without international agreement or domestic support' ('Cook Quits over Iraq Crisis' *BBC Online* (17 March 2003), available at http://news.bbc.co.uk/1/hi/uk_politics/2857637.stm (accessed 11 February 2008)). Brazier cites earlier British examples of Ministers of all ranks resigning or being required to resign because they could not accept collective responsibility for some decision or other including the resignations of Mr Heseltine as Secretary of State for Defence in 1986, Mr Nigel Lawson as Chancellor of the Exchequer in 1989 and Sir Geoffrey Howe as Leader of the House of Commons, Lord President of the Council and Deputy Prime Minister in 1990. See R Brazier *Constitutional Practice* (2nd Ed, 1994) 140-141, esp. fns 71-74. For further examples of Cabinet resignations in the United Kingdom between 1945 and 1986, see Marshall *Constitutional Conventions* (supra) at 62-66.

159 Brazier *Constitutional Practice* (supra) at 141.

160 Ibid at 141-2.

161 AP Tant "'Leaks" and the Nature of the British Government' (1995) 66 *Political Quarterly* 197 cited in Turpin *British Government* (supra) at 220.

Africa has little experience of open Cabinet dissent since 1994. That said, it appears that some Cabinet reshuffles that cost ministers their jobs may have been triggered by dissent within Cabinet.

In Britain, a final safety valve that may soften the effect of a rigid application of the principle of collective Cabinet responsibility is 'an agreement to differ'. As the name suggests, an agreement to differ allows individual Cabinet members to speak against government policy.¹⁶² It is controversial in Britain and is used infrequently but, in the case of the 1975 decision to remain a member of the European Community, it held the government together. In a system of single member constituencies, in which Ministers need to look to their individual electoral support as well as the concerns of their party, it provides a useful, if drastic, way of dealing with hotly contested policies. In a system of closed-list proportional representation, with its even greater emphasis on the positions of the governing party, it may be unnecessary.

The practice of collective Cabinet responsibility need not freeze all debate. For instance, Cabinet members have been relatively open in the debate about proposals to introduce a 'Basic Income Grant'. It is well known that the Minister of Finance, Trevor Manuel, is opposed to such a grant, while the Minister of Social Development, Zola Skweyiya supports it.¹⁶³

In coalition Cabinets collective responsibility or Cabinet solidarity may operate in a very different way. Most commonly, coalition partners will be bound by Cabinet solidarity on certain matters, usually set out in the agreement on which the Cabinet is based. On other matters, Cabinet members will be able to express divergent views openly.

(ii) Executive decision making

Collective Cabinet responsibility or Cabinet solidarity does not dictate a decision-making process.¹⁶⁴ It does not mean that all or even certain executive decisions must be made by the entire Cabinet. Nor does it mean that every Cabinet member

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need be aware of all executive decisions for which they are collectively responsible. Certainly, as Turpin notes, the principle of collective responsibility makes most sense when executive decisions are indeed made collectively.¹⁶⁵ Nowadays, however, collective decision making is necessarily limited. As we have described above, many significant policy decisions are made in Cabinet committees rather than the full Cabinet. Yet others are made outside Cabinet structures altogether. These practices do not mean that the principle does not apply to such decisions.¹⁶⁶ The modern functions of collective responsibility are to ensure coherent government and avoid

162 See Brazier *Constitutional Practice* (supra) at 143; Commons Research Paper *The Collective Responsibility of Ministers* (supra) at 24.

163 C Terreblanche 'Basic Income Grant on the Cards' IOL (11 February 2007), available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20070211081742198C653630, accessed 5 April 2008.

164 For a discussion of some of the ways in which Cabinets operate, see E McLeay 'Buckle, Board, team or Network? Understanding Cabinet' (2006) 4 *NZJ Pub & Int'l L* 37.

165 See Turpin *British Government* (supra) at 215.

competing policies within government through an insistence that the government presents a unified face, and to secure the ability of Parliament to hold the executive to account. As a result, the principle must apply to all executive decision-making. A Cabinet member could not disown a government policy or refuse to answer questions about a policy merely because he or she was not present when the policy was agreed to or because the policy or decision was not brought to Cabinet by the responsible Minister or Cabinet committee.¹⁶⁷

How the Cabinet operates will depend largely on the style of the President and the political context. The President is at liberty to decide what matters should be discussed by Cabinet as a whole, what can be dealt with in Cabinet committees and what matters need not come to Cabinet at all. The South African *Manual on Executive Acts of the President* captures this well. It says that the requirement that the President must act 'together with the Cabinet'

implies that the president takes his decisions in accordance with the 'way of working together' that the Cabinet and President have determined. . . . [The] phrase captures the idea of collective responsibility but allows the Cabinet and the President to determine the way and procedure by which they work together, including leaving certain matters or kinds of matters to be dealt with by a single member of the Cabinet.¹⁶⁸

The *Manual* states that the current way of working in the Cabinet is that consultation is not needed on all matters but that

matters of substance — whether ministerial or Presidential should be brought to Cabinet. Accordingly, if a matter is not routine . . . it must first be referred to Cabinet as must all matters that Cabinet itself has decided should come to it. . . . Whether a matter was routine or not is a question for the Minister's judgement. . . . [B]oth the President and individual Ministers are duty-bound to take to the Cabinet issues of policy, significant decisions, decisions with financial consequences outside a department's approved budget and any matter the Cabinet has referred to it.¹⁶⁹

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The *Manual* suggests that a failure to take such decisions to Cabinet could undermine their validity. But, as we have already noted, the Final Constitution does not specify what procedures are necessary for the 'collaborative' exercise of Cabinet government in South Africa. This omission is surely deliberate. Different Presidents may run their cabinets in different ways while complying with the constitutional imperative that executive decisions should be made together with Cabinet. This view is consistent with the framework of parliamentary government with which FC s 85

166 Cf Currie & De Waal who suggest that members of Cabinet are collectively accountable to Parliament only for those decisions taken collectively. Currie & De Waal *New Constitutional and Administrative Law* (supra) at 256. This view, which implies that it is consistent with the idea of collective Cabinet accountability for a Cabinet member to disagree in Parliament with the position adopted by a Cabinet colleague, is simply wrong.

167 Of course, there will be situations in which it would be reasonable for a member of Cabinet may say that he or she does not have the information necessary to answer a question. Under such circumstances, the responsible minister should attend Parliament. If that minister were not to attend it would be reasonable for Parliament to expect his or her colleagues to deal with the issue.

168 *Manual of Executive Acts of the President* (1999) para 2.9.

169 *Ibid* at 2.10 — 12.

must be read. The appropriate remedy for the President when he or she believes that a Minister is not pursuing the government's policy or has failed to consult Cabinet when he or she ought to have done so is to dismiss that Minister.¹⁷⁰ Thus the decision in *Eisenberg* is wrong. There HJ Erasmus J set aside regulations made by the Minister of Home Affairs under the Immigration Act 13 of 2002 in part because he found that making such regulations, involving matters of national policy, was a matter of collective responsibility and thus required Cabinet approval, which had not been secured.¹⁷¹ Again it misunderstands parliamentary government to read the Final Constitution as identifying which decisions must be taken to Cabinet and which may be taken without a full meeting of Cabinet.

Currie and De Waal also misunderstand the doctrine when they state that:

[i]n principle, the President and the other members of the Cabinet are individually responsible to Parliament for powers exercised individually, and collectively responsible for powers exercised collectively. . . . [T]his means that the Cabinet is collectively responsible for major policy decisions. The President is individually responsible for the exercise of head of State powers and powers conferred to the President in terms of ordinary legislation. Ministers are individually responsible for the exercise of powers conferred on them by ordinary legislation, which is not of a nature where the approval of Cabinet is necessary.¹⁷²

This gloss on the doctrine suggests far too rigid an approach. Cabinet members cannot escape responsibility for major policy decisions by absenting themselves from the decision-making process. The notion of Cabinet solidarity implicates all Cabinet members in the policy of the government. Certainly, in practice, a

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government is unlikely to fall if a single minister mismanages his or her department or is responsible for a failed or unpopular policy initiative. Similarly, Parliament is unlikely to expect a minister to account for matters that fall within the portfolio of a colleague. But, as described above, ministers are expected to defend government policies and the application of the doctrine of collective accountability is not limited by a distinction between those powers that may be exercised only with the approval of Cabinet and others that can be exercised independently by individual ministers. If legislation requires a particular minister to act or make a decision, then that too is

170 The reciprocal remedy for ministers who believe that the FC s 85(2) principle of Cabinet solidarity is not being honoured by the President is to resign or to refuse to countersign presidential decisions.

171 See *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C), 264. *Eisenberg* was not wrong because it did not apply the understanding of FC s 85(2) adopted in the *Manual on Executive Acts of the President* (1999). It is courts, not politicians or bureaucrats, who provide authoritative interpretations of the constitution. It is wrong because it misunderstood the constitutional provision. Currie & De Waal assert that in certain circumstances, such as where the President's decision affects government 'as a whole' or has 'real political importance', the approval of Cabinet must be obtained. See Currie & De Waal *New Constitutional and Administrative Law* (supra) at 245-246. Again, their position seems wrong, as does their suggestion that Cabinet can delegate decision making powers to individual members under FC s 238. This argument seems to be derived from the fact that IC 82(3) expressly allowed Cabinet to delegate particular functions to particular ministers. However, that provision was necessitated by the power sharing arrangements in Cabinet under the government of national unity. The FC does not provide for a government of national unity and so such a provision become redundant. If South Africa were to have a coalition government, then it is possible that a similar provision might be included in the agreement establishing the coalition.

172 Currie & De Waal *New Constitutional and Administrative Law* (supra) at 256.

considered a decision of Cabinet for which members are collectively accountable to Parliament.¹⁷³

(iii) Accountability and responsibility

FC s 92 is headed 'accountability and responsibilities' and states:

- (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
- (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
- (3) Members of the Cabinet must-
 - (a) act in accordance with the Constitution; and
 - (b) provide Parliament with full and regular reports concerning matters under their control.

Subsections (1) and (2) suggest a distinction between 'responsibility' and 'accountability'. Cabinet members are *responsible* to the President and *accountable* to Parliament for the performance of their functions. Sometimes accountability is defined as the obligation 'to give a reckoning or account' while 'responsibility' is said to include 'liability to be blamed for loss or failure'.¹⁷⁴ This definition provides an adequate initial description of the relationship between Parliament and the executive. Members of Cabinet, including the President, must provide an account to Parliament of matters that fall within their responsibility. Still, FC s 102 confirms that Cabinet members also owe political responsibility to the National Assembly for decisions that they make and the performance of the departments under their control. Should they fail, they may be dismissed collectively in a vote of no confidence.

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Although only the National Assembly may dismiss Cabinet in a vote of no confidence, Cabinet members are accountable to both the National Assembly and the NCOP.¹⁷⁵ That they are accountable to the National Assembly is unremarkable. The National Assembly provides their budget and represents the electorate in matters of concern to the national sphere of government. The accountability of Cabinet members to the NCOP requires more explanation. The NCOP is a house of

173 See P Hogg *Constitutional Law of Canada* (2003 — Rel 1) at 9.9 ('Where a statute requires that a decision be made by a particular minister, then the cabinet will make the decision, and the relevant minister will formally authenticate the decision. Of course a cabinet will be content to delegate many matters to individual ministers, but each minister recognises the supreme authority of the cabinet should the cabinet seek to exercise it.'). But there may be exceptions. For instance, in Britain '[b]y convention some kinds of decision are taken on the personal responsibility of the minister concerned, without engaging the collective responsibility of ministerial colleagues. This applies, for instance, to decisions of the home Secretary in extradition cases.' Turpin (*supra*) at 212.

174 For a discussion of the debate on this matter in Britain, see G Drewry 'The Executive: Towards Accountable Government and Effective Governance?' in J Jowell & D Oliver (eds) *The Changing Constitution* (5th Edition 2004) 280, 294ff. For a discussion of the position in South Africa in relation to parastatals and other similar organs of state, see § 18.3 (f) below.

175 FC s 92(2) holds Cabinet members accountable to Parliament.

the provinces in which provincial governments and legislatures are represented. Cabinet members are not drawn from the NCOP nor are they directly responsible for government in the provinces. However, the system of shared powers established by the Final Constitution means that the implementation of law and policy often involves close cooperation between the national and provincial spheres of government.¹⁷⁶ The power of the NCOP to call Cabinet members to account ensures that provincial governments can engage with the national government on its responsibilities in the provinces.¹⁷⁷

FC s 92(3) adds the specific obligation to provide Parliament, and thus the public, with regular reports but Parliament's power to hold Cabinet members to account extends beyond receiving periodic reports. FC ss 56 and 69 back up Parliament's power to call Cabinet members to account under s 92 by specifying the power of the National Assembly and NCOP to summons people and demand reporting.¹⁷⁸

(iv) Who is bound by Cabinet solidarity and for what are Cabinet members accountable?

FC ss 85(2) and 92 address members of Cabinet only. They exclude Deputy Ministers. The focus of FC s 92 is understandable. It identifies those members who are accountable to Parliament for managing government. However, because the principle of collective responsibility is concerned not only with accountability to Parliament, but is also a mechanism to secure party cohesion, it is likely that political leaders will expect Deputy Ministers to adhere to it as well. Practice in

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South Africa since 1994 bears out this understanding. In 2007, in dismissing the Deputy Minister of Health, President Mbeki referred to her constitutional obligation to 'work collectively to develop and implement national policies', an obligation, he implied, she had not fulfilled.¹⁷⁹ As Turpin notes, 'collective responsibility, if strictly observed, exacts its price. By stifling open dissent it contributes to secrecy in government.'¹⁸⁰ The competing interests are apparent. Politicians depend on the President for executive positions and thus will seldom be inclined to gainsay

176 On shared legislative competence, see V Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 15. On shared powers and co-operative government, see S Woolman, T Roux and B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

177 For further discussion of the role of the NCOP in holding the national Cabinet to account, see C Murray, D Bezrui, L Ferrell, J Hughes, Y Hoffman-Wanderer and K Saller *Speeding Transformation — The Oversight Role of the NCOP: A Report for NDI and the South African National Council of Provinces* (2004).

178 See *Egan v Willis* (1998) 195 CLR 424. The High Court of Australia confirmed that the upper house of the New South Wales legislature could punish a minister for his failure to comply with a resolution that he should table certain papers in the house. However, a subsequent case, *Egan v Chadwick*, held that Parliament could not demand the presentation of Cabinet papers. [1999] NSWCA 176. See C Mantziaris 'Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege' Parliament of Australia Parliament Library Research Paper 12 1999-2000, available at <http://www.aph.gov.au/library/Pubs/rp/1999-2000/2000rp12.htm> (accessed 20 February 2008).

179 C Terreblanche and F Kockott *Sunday Independent* (August 12, 2007) 1.

mainstream policy. Presidents and Prime Ministers often take advantage of this indebtedness.¹⁸¹ Nevertheless, in selecting Ministers and, particularly, Deputy Ministers, the President may also need to include people from different sectors of the governing party. These Ministers and Deputy Ministers may not be willing to forego the right to express views that are not shared by their Cabinet colleagues.

The more important, related question is how far the accountability of Cabinet members extends. This concern has grown recently: in part triggered by the rise of big government, and, in part, by the increasing tendency to establish parastatals to carry out government functions and the privatisation of many others. Under these circumstances, one must ask how a Cabinet member can reasonably be held responsible for actions of public servants and institutions over whom he or she has no direct control. Accordingly, in the UK, when confronted with embarrassing examples of government failure, ministers have argued that while they are responsible for policy matters, they are not responsible (or accountable) for operational matters in their departments or in government agencies and parastatals. This question is considered in section (f) below.

(e) Individual ministerial accountability

FC s 92(2) holds Cabinet members accountable — both collectively and individually — to Parliament. While collective accountability requires Cabinet members to act in a collaborative way, individual accountability ensures that Parliament can identify the Cabinet member who is responsible for a particular matter and can call that person to explain the government's actions. The traditional, text book definition of individual ministerial responsibility would have ministers responsible for everything that is done in the departments under their control — with an obligation to resign if things go seriously wrong. It is not clear that this view ever had purchase outside the classroom. Both its components are contested. First, as

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already noted, many argue that it is unreasonable to hold ministers accountable for matters of which they have no knowledge and of which, in an age of big and complex government, they could not be expected to know. Second, resignation is an extreme sanction and there is little evidence to substantiate assertions that it is a firm convention of parliamentary government.¹⁸² Resignations seem more often to

180 *British Government and the Constitution* 217.

181 Burnell talks of the 'payroll vote' in Zambia where, in 2002, 68 ministers and deputy ministers were appointed from a 158-seat Parliament. See P Burnell 'Legislative-Executive Relations in Zambia: Parliamentary Reform on the Agenda' (2003) 21 *Journal of Contemporary African Studies* 47, 58. In Namibia 'almost all Swapo [governing party] MPs are members of Cabinet or tasked to attend Cabinet meetings on behalf of their ministers.' H Melber 'People, Party, Politics and Parliament: Government and Governance in Namibia' in MA Mohammed Salih (ed) *Between Governance and Government: African Parliaments* (2005) 142, 151. In Britain, Parliament controls this practice to some extent by limiting the number of ministerial salaries that can be paid (Ministerial and Other Salaries Act 1975). The Indian constitution restricts the number of ministers to 15% of the members of the legislature. Indian Constitution Section 75 (1-A)(Inserted in 2003).

182 The Final Report of the Ad-Hoc Committee on Ministerial Accountability of the Gauteng Legislature states that '[a]n Executive Council member could be required/or expected to resign on four counts' (see 'Final Report' 8 December 2003) 6.2.9.2. Only one of these falls within the usual ambit of individual accountability — inept or corrupt policies. The others (embarrassment in his or her personal life; disagreement with the government; and lying to the legislature) seem to demand resignation for the member's personal unsuitability for the position.

be a response to public pressure by the party in power, used by the party to demonstrate accountability for the mismanagement or the misjudgement in question. British practice suggests that Cabinet members can survive even serious problems if their colleagues are prepared to ride the storm.¹⁸³

The best explanation of what Cabinet members are accountable for takes into account both the size and complexity of government and the importance of having elected representatives bearing responsibility for the actions of government. As Turpin comments, there 'should be a limit to the ability of ministers to escape responsibility by attributing blame to their officials'.¹⁸⁴ Thus, Parliament can at least expect a Cabinet minister to explain what measures have been taken to ensure that the department under his or her control is properly run and, in case of mismanagement, what steps have been taken to rectify the maladministration.¹⁸⁵ This view, which insists that the accountability of Cabinet members covers more than matters of policy, is consistent with the FC's strong, overall commitment to accountable government. Nevertheless, the line between matters for which officials bear responsibility and matters for which the minister must shoulder the blame, is difficult to draw in practice. Following British practice, the Public Finance Management Act (PFMA)¹⁸⁶ acknowledges this difficulty in stipulating, in s 64, that

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a departmental accounting officer is responsible for unauthorised expenditure that he or she has been directed to incur by a minister unless that accounting officer has informed the minister in writing that the expenditure is unauthorised and, nonetheless, been directed, in writing, to proceed. This procedure ensures that the responsibility lies with the minister.

Yet more complicated questions of accountability arise in the case of parastatals and other, privatised or partially privatised government functions. The general

183 See Turpin (supra) at 453ff.

184 See Turpin (supra) at 461

185 This principle may be thought to be compromised by the present practice that the bureaucratic heads of departments (Directors General) are appointed by the President. However, the doctrine of collective responsibility means that a minister cannot avoid accounting to Parliament by claiming a lack of control over the choice of Director General.

186 Act 1 of 1999. The PFMA is legislation required by FC s 216. The relevant part of FC s 216 provides:

Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing-

- (a) generally recognised accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

The object of the Act is to ensure transparency, accountability and sound financial management in the institutions to which it applies (Preamble read with section 2).

position is that Cabinet members are accountable to Parliament for all matters that fall within their portfolios, including public entities operating as companies.¹⁸⁷

The question of what sanctions Parliament can impose when Cabinet members fail to fulfil their responsibilities adequately is a vexed one. As already noted, resignations are rare — and there have been none in South Africa since 1994. In a system in which the balance of power between government and opposition is fine, Cabinet members are constantly aware of the need to retain the confidence of their parliamentary colleagues. This peer pressure encourages them to take their accountability to Parliament seriously. Parliament also has other mechanisms to enforce accountability. FC s 92(3) requires Cabinet members to report to Parliament regularly. This requirement is supplemented by parliamentary practices such as question time. Nevertheless, the dominance of government business in Parliament, and the ability of the majority party to control proceedings and the agenda, reduce the effectiveness of the convention of individual accountability of Cabinet members.

Interesting questions arise here: Could the opposition rely on the (unusual) fact that Cabinet accountability is spelt out in the Final Constitution to insist that Cabinet members attend Parliament and answer questions even if the Speaker and programme committee of the National Assembly does not require this? Is it a matter that is appropriately adjudicated by a court or is it a matter of internal proceedings of Parliament? As the Constitutional Court recognised in *Doctors for Life International v Speaker of the National Assembly and others*,¹⁸⁸ although the 'constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings . . . [c]ourts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations.'¹⁸⁹ Moreover, following *Doctors for Life*, a

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failure by Parliament to hold Cabinet members to account would touch upon a matter central to the model of democracy established by the Final Constitution.¹⁹⁰ *Doctors for Life* suggests that such a failure may, in a proper case, be justiciable.¹⁹¹

(f) Outsourcing, privatisation and Cabinet accountability

187 The Gauteng Legislature's Report classifies the responsibility of members of the executive to account to the legislature under five headings. One of these is 'redirectory responsibility'. This responsibility, according to the Report, requires the member of the Executive to 'redirect questions from members [of the legislature] to the relevant quasi-government or parastatal agency for which she/he is accountable' (6.2.9.2.1). However, the Report does not take this matter further instead recommending that the question of accountability for public entities receive further attention (7.1). Note that the British Cabinet Office *Ministerial Code* (2007) states that 'ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and *agencies*' (emphasis added) (para 1.2(b)).

188 2006 (6) SA 416 (CC), 2006 (12) BCLR (CC).

189 *Ibid* at paras 37 and 38.

190 *Ibid* at para 32. In the context of FC s 92 the principle would be accountable government, enshrined in FC s 1 and elsewhere.

191 See T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, July 2006) Chapter 10.

In South Africa, as in many parts of the world, functions that have been performed by government in the past fifty or so years are increasingly being performed by corporate entities at some remove from government.¹⁹² The trend of privatising and outsourcing government services and government functions is often considered from the perspective of administrative law. These measures raise questions of the extent to which courts can review powers exercised by non-governmental entities.¹⁹³ But consideration must also be given to whether members of Cabinet are accountable to Parliament for the performance of governance functions delegated to non-governmental entities. At least part of the justification for delegated governance is the replacement of sometimes ineffective methods of political accountability with accountability to shareholders.¹⁹⁴ However, in Britain, some argue that the delegation of functions to organisations with some degree of autonomy from direct ministerial control has 'challenged constitutional processes of accountability' and reduced individual ministerial accountability to Parliament.¹⁹⁵ In the United States, delegated governance has been accompanied by a shift in attitude from legal process to performance, wherein accountability to Congress is sometimes seen as a hindrance to performance and a nuisance to be avoided.¹⁹⁶ Although managers are thus institutionally insulated from political accountability, the idea is that they remain accountable for the achievement of 'real results'.¹⁹⁷

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There are arguments, however, that these institutions are, ultimately, totally unaccountable. The relevant question in the context of this section is the extent to which the national executive remains responsible or accountable for governance functions once they have been delegated.

In South Africa, the transfer of governmental functions usually takes one of two forms. An outsourcing arrangement involves the conclusion of a contract between government and a corporate entity in terms of which the entity undertakes to

192 See Y Burns 'Government Contracts and the Public/Private Divide' (1998) 13 *SA Public Law* 234; R Malherbe 'Privatisation and the Constitution: Some Exploratory Observations' (2001) *Tydskrif vir die Suid Afrikaanse Reg* 1. In relation to Britain, see generally, G Drewry 'The executive: Towards accountable government and effective governance?' in Jowell & Oliver *The changing constitution* 280; M Flinders 'MPs and Icebergs: Parliament and Delegated Governance' (2004) 57 *Parliamentary Affairs* 767. In relation to the United States, see R C Moe 'The Emerging Federal Quasi Government: Issues of Management and Accountability' (2001) 61 *Public Administration Review* 290.

193 See, for example, Hoexter *Administrative Law* (supra) at 147-150; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, February 2005) Chapter 31; J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

194 JF Handler *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (1996) 3; Hoexter *Administrative Law* (supra) at 148.

195 Flinders 'MPs and Icebergs' (supra) at 767.

196 Moe 'The Emerging Federal Quasi-government' (supra) at 306; Flinders 'MPs and Icebergs' (supra) at 774.

197 Moe (supra) at 305-306.

perform certain traditionally governmental functions.¹⁹⁸ Privatisation involves the formation of a corporate entity with its own legal personality distinct from government to which responsibility for the performance of a function or provision of a service is transferred.

(i) Outsourcing arrangements

Outsourcing involves the 'contracting out' of specific state functions to the private sector, wherein a person, group, company or entity other than the state is enlisted by means of a contract to provide services directly to the public.¹⁹⁹ Before the constitutional era the power to enter into contracts was an element of the executive's common-law authority derived from English prerogative powers.²⁰⁰ While the Final Constitution does not expressly mention an executive power to contract, Floyd argues that, in light of item 2(1) of Schedule 6 to the Final Constitution, providing that all law in force at the time the Constitution took effect continues in force to the extent of its consistency with the Final Constitution,²⁰¹ the common-law empowerment of the state to conclude contracts remains valid.²⁰² Public contracts may also be expressly authorised by statute.²⁰³

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A frequently voiced concern is that widespread 'contracting out' of services impedes parliamentary oversight and supervision, and allows the executive body as well as the non-governmental entity to escape scrutiny for the provision of services outsourced in terms of a contract.²⁰⁴ Saunders and Yam explain the problem:

Representative democracy assumes the accountability of elected representatives to the people for the exercise of public power. Parliament is accountable directly, through its public procedures and through the electoral process. Governments are accountable to Parliaments between elections. . . . Theoretically, governments are also responsible to

198 See Burns (supra) at 235-236.

199 See Burns (supra) at 236. See also C Turpin *Government Contracts* (1972); ACL Davies *Accountability: A Public Law Analysis of Government by Contract* (2001); C Saunders & K Yam 'Government Regulation by Contract: Implications for the Rule of Law' (2004) 15 *Public Law Review* 51; JB Auby 'Comparative Approaches to the Rise of Contract in the Public Sphere' (2007) *Public Law* 40, 43-44; and J Freeman 'The Contracting State' (2000) 28 *Florida State University Law Review* 155, 164-165.

200 See *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 (1) SA 257 (A); *Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South Africa and Others* 1989 (2) SA 685 (C).

201 See M Chaskalson 'Transitional Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 28.

202 T Floyd 'The Capacity of Government to Conclude Contracts: Still an Unlimited Power?' (2005) 20 *South African Public Law* 378, 387. See also P Bolton *The Law of Government Procurement in South Africa* (2007) 73ff. The FC s 82(2) power to implement legislation and policy may also be interpreted to authorise state contracts.

203 On the power of local government executives to contract, see s 10C(7)(a) of the Local Government Transition Act 209 of 1993 and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) at para 18. On the power of provincial governments to contract. See Provincial Tender Board Act (Eastern Cape) 2 of 1994 and *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (CKH).

Parliament for action that they take pursuant to statute and in the course of administration. However, the consistency of this in practice is open to question. The difficulties of enforcing the responsibility of government to Parliament are further augmented by any departure from the traditional governance model.²⁰⁵

Responsibility for the fulfilment of the governmental functions of service provision remains with the executive even where the executive outsources the actual provision of services through contract. Accordingly, the executive remains accountable to Parliament for these outsourced functions. Unlike the case of privatisation, in which national legislation makes provision for the formal delegation of responsibility to a non-government entity, a contract regulates only who performs a particular service and not who bears ultimate political responsibility for the provision of that service. In this context, the most crucial difference between privatisation and outsourcing arrangements is that Parliament is involved when a privatisation scheme delegates responsibility for a service previously provided by the government, while an outsourcing arrangement can be concluded by a contract to which Parliament is not privy.²⁰⁶ Where a national department seeks to outsource the provision of a service or performance of a function for which it is responsible by means of a contract, without parliamentary involvement, it is clear that the Cabinet member in charge of that department and, indeed Cabinet as a whole, remain accountable to Parliament for the provision of that service or the performance of that function. As we discuss below, where Parliament is involved in the delegation of a function or power, as in the case of a privatisation, the situation is more complicated.

The difficulty created by outsourcing arrangements is not one of mere theory. It does not present conceptual problems of where accountability does or ought to

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fall. Rather, the difficulty is a practical one inherent in parliamentary oversight of executive functions performed in fact by entities other than the executive.²⁰⁷

(ii) Privatisation

Privatisation has been succinctly described and promoted by its supporters as 'the systematic transfer of appropriate functions, activities or property from the public to the private sector, where services, production and consumption can be regulated more efficiently by the market and price mechanisms'.²⁰⁸ The corporations to which functions are transferred are sometimes referred to as quasi-autonomous non-

204 Auby writes: 'Contractual public policies are often conducted in such a way that they are largely out of the reach of any parliamentary supervision.' Auby (supra) at 54. Freeman echoes this concern and indicates that the weakening of executive and legislative oversight places a greater burden on the judiciary. Freeman (supra) at 201.

205 Saunders & Yam (supra) at 58 (footnotes omitted).

206 Although the authority of an executive organ to enter into a contract may be conferred by legislation, the conferral of an authority to contract does not amount to a delegation of responsibility for the subject-matter of the contract. On the differences between delegation and contracting out, see Saunders and Yam (supra) at 62-64.

207 This section does not consider how these practical problems may be resolved. See Saunders and Yam (supra) at 61-67; Freeman (supra) at 201-207; and SL Schooner 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government' (2005) 16 *Stanford Law and Policy Review* 549, 571-572.

governmental organisations or 'quangos', non-departmental public bodies or institutions of the New Public Management in Britain, and as hybrid organisations in the United States.

In South Africa, the Public Finance Management Act (PFMA)²⁰⁹ regulates the financial management of various government and non-governmental bodies. The PFMA captures privatised institutions within a range of institutions that fulfil public functions with varying degrees of independence from government. It establishes lines of financial accountability for government and provincial departments as well as corporations that perform public functions, and refers to these corporations as national or provincial 'public entities'. Public entities are defined in section 1 of the PFMA to include national and provincial 'government business enterprise[s]'. The latter are in turn defined as juristic persons under the

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control and ownership of the national or provincial executive, which have been assigned financial and operational authority to carry on a business activity. Quangos, institutions of the New Public Management and hybrids will be referred to in this section in accordance with the nomenclature of the PFMA.

In the case of 'formal privatisation', where the entity to which a function is transferred remains wholly or mainly state-owned, private accountability to shareholders for the achievement of results seems to offer no justification for the transfer or delegation of the function. On the contrary, formal privatisation may be seen to be a cunning way of avoiding both the direct political accountability that members of the national executive owe to Parliament and the private commercial accountability that directors of companies owe to shareholders. In South Africa, there are a number of commercial entities performing public or governmental functions that are wholly or mostly owned by the state.²¹⁰

While dilution or attenuation of accountability seems an inevitable consequence of privatisation, executive accountability is maintained to some degree by statutory

208 N Kusi 'The Fiscal Impact of Privatisation in South Africa' *South African Network for Economic Research Working Paper 18* (November 1998) 4 cited in Malherbe 'Privatisation and the Constitution' (*supra*) at 1. For a discussion of the extent to which privatisation and outsourcing out to permit a government entity to insulate itself from constitutional scrutiny see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, February 2005) Chapter 31.

209 Act 1 of 1999. The PFMA is legislation required by FC s 216. The relevant part of FC s 216 provides:

Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing-

- (a) generally recognised accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

The object of the Act is to ensure transparency, accountability and sound financial management in the institutions to which it applies (Preamble read with section 2).

structures. FC s 92(2) means that Ministers remain accountable for institutions that fall within their policy portfolios. The PFMA establishes mechanisms by which financial accountability is maintained, designating Cabinet members as executive authorities in relation to national public entities.²¹¹ The respective

legislative frameworks establishing public entities supplement this broad requirement. Nevertheless, the statutory framework is not absolutely clear.

The PFMA's definition of national public entities embraces national government business enterprises, but also recognises a class of public entities that are not government business enterprises. This category of public entity is defined as any board, commission, company, corporation, fund or other entity other than a national government business enterprise that is established in terms of national legislation and accountable to Parliament.²¹² The definition of this second class of national

210 For example, section 3(1) of the Post Office Act 44 of 1958 (as amended) contemplates the incorporation of two public companies to conduct postal and telecommunications services. These companies have since been incorporated as the SA Post Office Limited and Telkom SA Limited. Shares in the companies are in terms of sections 3(4)(a) and 5(1) issued to the state, and the powers and duties of the state as shareholder are exercised and performed by the Minister (section 3(6)). Similar structures are in place in regard to the South African Broadcasting Corporation Limited (Broadcasting Act 4 of 1999, section 8(1)-(2)), Transnet Limited (Legal Succession to the SA Transport Services Act 9 of 1989, section 2(1)), the Armaments Corporation of South Africa Limited (Armaments Corporation of South Africa Limited Act 51 of 2003, section 2(2)), the Airports Company of South Africa (Airports Company Act 44 of 1993, section 3(3)) and Eskom Holdings Limited (Eskom Conversion Act 13 of 2001, section 2). The Central Energy Fund holds funds for the financing and promotion of fossil-fuel energy resources, and is controlled by a proprietary company, CEF (Pty) Ltd, established in terms of the Central Energy Fund Act 38 of 1977. While the legislation establishing the other entities mentioned so far contemplates that the state may transfer its shares to any other person, usually subject to some form of ministerial approval, the Central Energy Fund Act provides that shares in CEF (Pty) Ltd are to be taken up the state only and cannot be transferred (section 1D(2) and (5)).

211 In terms of section 1 of the PFMA, each member of Cabinet accountable to Parliament for a national department is designated as the 'executive authority' for that department for the purposes of the PFMA. Various duties and functions of 'executive authorities' are provided for in the PFMA. The executive authority must, for example, receive the annual report, the audited financial statements and the Auditor-General's report in relation to the national department for which he or she is responsible (s 40(1)(d)) and must table these reports in the National Assembly (s 65(1)(a)). The 'executive authority' of a national public entity is defined in the PFMA as 'the Cabinet member who is accountable to Parliament for that public entity *or* in whose portfolio it falls'. (our italics) The PFMA thus seems to contemplate two situations: one where a Cabinet member is accountable to Parliament for a national public entity and another where the Cabinet member is not accountable for the public entity but is responsible for the field of activity in which the entity's activities fall. However, this distinction does not appear to be sustained in the PFMA which refers directly to Ministers 'responsible for' public entities and which, in section 65(1)(a) provides that a Cabinet member is responsible, as the executive authority of a public entity, for tabling reports.

212 The definition states:

"national public entity" means —

(a) a national government business enterprise; or

(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is —

(i) established in terms of national legislation;

(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

public entities suggests that its member entities are *directly* accountable to Parliament. Such direct accountability may be read to displace the accountability of the relevant Minister. But Parliament cannot by legislation remove accountability which the Final Constitution demands of members of Cabinet. Under the Final Constitution, Cabinet remains responsible for the exercise of the executive authority of the state.

As already indicated, under the PFMA, national government business enterprises are a subcategory of public entities. The PFMA defines national government business enterprises as juristic persons under the 'ownership control of the national executive'. An entity in which the state is the sole or majority shareholder is, if it meets the other criteria set in the definition, a national government business enterprise.²¹³ In the case of the South African Broadcasting Corporation, a major public entity listed in Schedule 2 of the PFMA, the state is the sole shareholder.²¹⁴ The situation is the same for Transnet Limited,²¹⁵ the Central Energy Fund (Pty) Ltd,²¹⁶

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Eskom Holdings Limited,²¹⁷ the Airports Company,²¹⁸ Telkom SA Limited and the SA Post Office Limited.²¹⁹ In the case of Transnet, the Airports Company, Telkom and the

(iii) accountable to Parliament.

213 The definition in its entirety reads:

"national government business enterprise" means an entity which —

(a) is a juristic person under the ownership control of the national executive;

(b) has been assigned financial and operational authority to carry on a business activity;

(c) as its principal business, provides goods or services in accordance with ordinary business principles; and

(d) is financed fully or substantially from sources other than —

(i) the National Revenue Fund; or

(ii) by way of a tax, levy or other statutory money.

214 Section 8A(2) of the Broadcasting Act 4 of 1999 reads: 'The Corporation must have a share capital as contemplated in section 19 of the Companies Act [61 of 1973] with the State as its sole shareholder.'

215 Legal Succession to the SA Transport Services Act 9 of 1989, section 2(1). The Act does contemplate, though, that at some point the state may cease to hold all the shares of the company.

216 Central Energy Fund Act 38 of 1977, section 1D(2).

217 Eskom Conversion Act 13 of 2001, section 2. Section 4(2) does contemplate that, as with Transnet, the state may cease to be the sole or majority shareholder of the company.

218 Airports Company Act 44 of 1993, section 3(3).

219 Post Office Act 44 of 1958, sections 3(4)(d) and 5(1).

Post Office, the relevant ministers exercise the state's rights as member and shareholder of each company on behalf of the state.²²⁰ Each minister is responsible for these functions and powers as shareholder, and is in terms of FC s 92(2) accountable to Parliament for their performance and exercise.²²¹

Parliament may be able to hold national government business enterprises directly accountable in terms of FC s 55(2)(a). The section requires the National Assembly to provide for mechanisms to ensure that all 'executive organs of state in the national sphere of government are accountable to it'. Most of the entities referred to above fit the definitional requirements of organ of state set in FC s 239.²²² If these public entities are executive organs of state, rather than merely organs of state, they will be accountable to the National Assembly. What an executive organ of state is remains an open question. However, FC s 238 also refers to an 'executive organ of state' and grants executive organs of state the power to delegate executive authority and enter into agency agreements. This wording suggests that an 'executive organ of state' is an organ of state that exercises some executive authority, or forms part of 'the executive'. One possible reading of FC s 55(2)(a) is that it is the counterpart of FC 92: it confirms Parliament's obligation to oversee members of Cabinet who in terms of s 92 are accountable to it.²²³ On this view, a member of Cabinet who exercises rights as a shareholder in a national government business enterprise that is wholly or mostly owned by the state would

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be accountable to Parliament for the operation of that entity.²²⁴ Another view is that these entities are directly accountable to the National Assembly. But, it is unclear what direct accountability to Parliament would mean in such cases. Parliament may insist that the entity concerned itself accounts for its activities but has little power to act when things are amiss. Thus, the concomitant accountability of Cabinet is essential.

In this regard, Cabinet's response to the 2007 outcry concerning Eskom, a major public entity which is established as a company, is instructive. President Mbeki

220 See the relevant Acts of Parliament referred to above at sections 2(3); 3(3) and (4); and 3(6) respectively.

221 One of these powers is the removal of directors. Section 220 of the Companies Act 61 of 1973 confers the power to remove directors before the expiry of their term on the general meeting of the members of a company. As the sole or majority shareholding member of a company, the executive, acting through the relevant Minister, is empowered to remove directors. In May 2007, the Minister of Communications dismissed the CEO of the SA Post Office Limited. See SAPA 'Post Office Boss Dismissal Confirmed' available at <http://business.iafrica.com> (accessed 6 June 2007)). In 2003 the Minister of Transport dismissed the chairman of the Airports Company. See J Sikhakhane 'Johncom's Mashudu Ramano Tries to Crack the BEE Nut' *Business Report* (5 July 2006) available at <http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=3323722> (accessed 6 June 2007)).

222 See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA); *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA); *Chirwa v Transnet Ltd* CCT 78/06 (Decided 28 November 2007).

223 Stuart Weir talks of 'executive quangos' in the UK, but uses the term to describe bodies which have been created or pressed into service to 'perform public functions or deliver public services.' s Weir 'Quangos: Questions of Democratic Accountability' (1995) 48 *Parliamentary Affairs* 306. This description is of no assistance in South Africa in defining executive organs of state, since all organs of state perform public functions or exercise public powers.

himself accepted the government's responsibility for Eskom's inability to maintain an adequate supply of power to the country.²²⁵

The situation is a great deal more complicated in the case of a substantial privatisation where the state ceases to be the sole or majority shareholder. Presumably Cabinet ceases to be fully accountable to Parliament for the exercise or performance of powers and functions as a shareholder. Similarly, directors of such a company cease to be directly accountable to Parliament as the company ceases to be an executive organ of state. The mechanisms of price and market and accountability to private shareholders take over. In such cases, the activities of private companies performing traditionally governmental functions and providing public services can be regulated effectively even in the absence of direct ministerial accountability. The National Assembly exercises oversight by holding regulating bodies to account. In terms of FC s 55(2)(b)(ii), however, the Assembly must establish mechanisms 'to maintain oversight' of any organ of state.²²⁶

(g) Votes of no confidence under FC s 102

FC 102 states:

- (1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

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- (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

This provision constitutionalises the central element of a parliamentary democracy: the executive must retain the confidence of Parliament to remain in office. Successful votes of no confidence are likely to be rare. First, in all parliamentary systems, members of the legislature depend on the support of the party for their continued careers as politicians: members of the majority party rarely vote their

224 See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC). The Constitutional Court held that a private not for profit organisation established to regulate the micro finance industry in terms of the now-repealed Usury Act 73 of 1968 was an organ of state within the meaning of FC s 239. Although not owned or operated by the executive, the Usury Act contemplated that the minister of Trade and Industry would exercise significant oversight of the Council. This oversight role would have constituted an executive function provided for in national legislation within the meaning of FC s 85(2)(e), and is a role for which the Minister would have been accountable to Parliament. The mechanisms in the Usury Act by which the Minister remained involved in and accountable for the affairs of the Council follow the reading of FC s 55(2)(a) as referring to Cabinet. On this view it is not clear the FC s 55(2)(a) contemplates direct accountability of executive organs of state to Parliament.

225 'Government to blame for South Africa blackouts: Mbeki' 11 December 2007 <http://www.haaba.com/tags/electricity?q=node/65918> (accessed 19 February 2008) and 'State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament' 8 February 2008 <http://www.info.gov.za/speeches/2008/08020811021001.htm> (accessed 19 February 2008).

226 Flinders points out that status as a non-departmental public body 'does not provide protection from forms of parliamentary scrutiny, such as parliamentary questions.' Flinders (supra) at 779. Cole suggests that the contribution to accountability of parliamentary questions put to ministers about public entities within their portfolios is relatively small. M Cole 'Accountability and Quasi-government: The Role of Parliamentary Questions' (1999) 5 *The Journal of Legislative Studies* 77.

leadership out of government. In an the electoral system of closed list proportional representation, the dependence of MPs on the party is even greater because bank-benchers are not subject to pressure from members of a constituency. Thus, for a vote of no-confidence to be carried by a majority of MPs requires a major political upheaval. Secondly, although a vote of no confidence does not require the dissolution of the National Assembly, unless another leader who carries the support of the majority is lined up, dissolution of the Assembly and a national election is a likely consequence. MPs will not readily embark on a process which threatens their seats and requires them to fight an election.

(h) Ethics

Cabinet members are expected to conduct themselves in an ethical way. FC s 96(2) outlines the basic principles that are applicable in this regard. It states that:

Members of the Cabinet and Deputy Ministers may not-

- (a) undertake any other paid work;
- (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

This section is not intended to be comprehensive. FC s 96(1) anticipates a more extensive code of ethics for Cabinet members stating that '[m]embers of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation'.

The national legislation envisaged in FC s 96(1) was passed in 1998 in the form of the Executive Members Ethics Act (Ethics Act).²²⁷ Section 2 of the Ethics Act requires the President, in consultation with Parliament, to publish a code of ethics to govern the behaviour of all national Cabinet Ministers and deputy Ministers. The Executive Ethics Code was eventually published in July of 2000.²²⁸ The standards outlined in the Code elaborate upon the provisions of FC s 96(2). The Code requires Cabinet members to submit a list of their financial interests to the Secretary of Cabinet. The Secretary then maintains a register of financial interests.

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Breaches of the Ethics Code are to be investigated by the Public Protector,²²⁹ who on receipt of a complaint,²³⁰ must complete an investigation and submit a report within 30 days. If the complaint was laid against a Cabinet Member or Deputy Minister, the report must be submitted to the President. The President must, within

227 Act 82 of 1998.

228 GG No 21366 of 28 July 2000.

229 Section 3 of the Ethics Act.

230 In terms of s 4(1) of the Ethics Act an investigation must be initiated if a complaint is lodged by:

- (a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or

14 days of receipt, submit a copy of the report together with his or her comments to the National Assembly.²³¹ A 'Cabinet member' includes the President²³² and the same procedure applies to complaints against the President. In practice the President would receive the report on an investigation into his or her actions, have the opportunity to comment and then submit it to the National Assembly. The National Assembly could then avail itself of the power to impeach, to investigate or to question the President.

(i) The Minister of Finance

As in other parliamentary systems, the Minister of Finance has a distinct constitutional role and is central to the system of public finance that the Final Constitution established. Ross Kriel and Mona Monadjem discuss the constitutional and statutory framework in more detail in their chapter on Public Finance.²³³ In the context of this chapter, however, it is important to note the exclusive power that the Minister of Finance has under FC s 73 to introduce money bills (which are defined in FC s 77). As the National Assembly currently believes (mistakenly) that it may not amend a money bill until the Act regulating the procedure for such amendments anticipated by FC s 77 is passed, the Minister now possesses absolute control over money bills — subject only to the principle of Cabinet solidarity and the remote threat of a vote of no confidence.

The responsibility that the Minister of Finance has for public expenditure necessarily means that he or she has an interest in the policies of all government departments. The combination of the definition of a money bill as any bill that raises a tax and the provision that bills raising taxes may contain no other matters ensure that the Minister of Finance is in control of all tax bills before Parliament.

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This consolidation of responsibility (and power) is intended to ensure that the national Treasury can control the national tax burden and that other departments do not increase it by adding ad hoc tax measure to legislation that they initiate.²³⁴

(j) Executive control of the defence force²³⁵

The President is the Commander-in-Chief of the defence force.²³⁶ In addition, a member of Cabinet must be politically responsible for defence.²³⁷ While both the President and the Cabinet member responsible for defence are politically

(b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.

In terms of s 4(3) members of the public may also lodge complaints. However, such complaints must be lodged in terms of the relevant sections of the Public Protector Act 23 of 1994.

231 Ethics Act s 3.

232 Section 1 (ii) of the Ethics Act.

233 See R Kriel and M Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, OS, March 2007) Chapter 27.

234 Here the troublesome distinction between taxes and user charges arises. 'User charges' are not taxes and can be imposed in ordinary bills. .

accountable to Parliament under FC 92(2), executive control of the defence force rests directly with the President.²³⁸ Under FC s 201 only the President may authorise the employment of the defence force '(a) in co-operation with the police service; (b) in defence of the Republic; or (c) in fulfilment of an international obligation'.²³⁹ The President must appoint the military command of the defence force²⁴⁰ and command of the defence force 'must be exercised in accordance with the directions of the Cabinet member responsible for defence'. However, this direction occurs 'under the authority of the President'.²⁴¹ In addition, under FC s 203(1) the President may, as head of the national executive, declare a state of 'national defence'.²⁴²

Parliament has significant oversight powers in regard to any decision the President makes to employ the defence force. This is consistent with the statement in FC s 198(d) that national security is 'subject to the authority of Parliament and the national executive'. The strongest of these powers is the requirement that a state of national defence must be approved by Parliament.²⁴³ The Final Constitution

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does not explain what a state of national defence is nor does it give the President any particular powers once a state of national defence is declared. But the fact that a state of defence lapses unless it is approved by Parliament suggests that it is in fact a state of armed conflict (or, to use the old fashioned word, war). This reading of the provision is adopted by the Defence Act: the declaration of a state of national

235 See, further, O Ampofo-Anti, K Robinson & S Woolman 'Security Forces' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 23B.

236 FC s 202(1).

237 FC s 201(1). As the President is a member of Cabinet this position could presumably be assumed by the President.

238 In terms of FC s 101, any exercise of these powers by the President would nevertheless need to be in writing and countersigned by the Cabinet member responsible for defence.

239 FC s 201(2).

240 FC s 202(1). This function is performed as head of the national executive.

241 FC s 202(2).

242 For a brief summary of the distinction between a 'state of emergency' and a 'state of national defense', see N Fritz 'States of Emergency' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61. See also J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

243 FC s 203(3). Although the Constitution does not explicitly empower Parliament to conditionally approve a declaration of a state of national defence or attach terms to such approval, political reality as well as FC s 198(d) and the review powers of s 18(5) of the Defence Act suggest that Parliament can amend a declaration before approving it. See S Ellmann 'War Powers under the South African Constitution' (Unpublished paper on file with the authors) 9.

defence allows the President to draft civilians into the Defence Force, impose certain limits on freedom of movement in the country and regulate the 'control and use of transport systems, air traffic and use of the territorial waters' inter alia.²⁴⁴ In addition, the President must inform Parliament 'promptly and in appropriate detail' when the defence force is employed in terms of FC s 201(2).²⁴⁵

The Final Constitution does not require the declaration of a state of national defence whenever the President involves South Africa in military action. Although the Defence Act extends the requirement that the President inform Parliament of the use of the Defence Force beyond the list in FC s 201, neither the Final Constitution nor the Act expressly require the notification of Parliament when the Defence Force is used outside the borders of South Africa. One presumes, however, that activity by the defence force outside South Africa's borders would either be in defence of the country or be in terms of an international agreement and thus fall under FC s 201(2).²⁴⁶ If it were not it would be construed as an act of aggression, and outlawed by FC s 198(c).

However, s 18(5) of the Defence Act 42 of 2002 grants Parliament a review power over the President's exercise of military powers in terms of FC s 201(2). This provision allows Parliament, by resolution within seven days of receiving information from the President about the authorisation of the employment of the defence force, to confirm or order the amendment, substitution or termination of that authorisation. If Parliament takes no action in terms of s 18(5) of the Defence Act, a decision under FC s 201(2) stands.

The most difficult legal question that arises in relation to the deployment of the defence force is whether or not courts can review it and, if so, what the scope of

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such review would be. Motala and Ramaphosa suggest that presidential decisions as Commander-in-Chief of the defence force are not justiciable.²⁴⁷ They rely on the American political question doctrine for this submission, arguing that there are 'no manageable judicial standards' against which decisions on defence can be tested, and that the judiciary is consequently poorly-placed to 'second-guess' the political branch's use of military resources.²⁴⁸ Judicial intervention could also embarrass the executive abroad where, for example, a commitment to employ the defence force in

244 Act 42 of 2002 ss 90 and 91.

245 FC s 201(3) which requires the president to provide details of '(a) the reasons for the employment . . .; (b) any place where the force is being employed; (c) the number of people involved; and (d) the period for which the force is expected to be employed'. FC s 201(4) provides that if Parliament does not sit within seven days after the employment of the defence force the President must provide the required information to the appropriate oversight committee.

246 South Africa's decision to send troops into Lesotho in 1998 was a decision in terms of FC s 201(2), and thus although the Constitution required Parliament to be informed, the action did not need to be confirmed or approved by Parliament See s Ellmann 'War Powers under the South African Constitution' (supra) 4-5.

247 Z Motala & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 218.

248 Ibid at 220.

combat is overruled by the courts.²⁴⁹ However, the constitutional insistence that all executive action is subject to the law, reiterated in FC s 198(c), suggests that decisions taken by the President as Commander-in-Chief are reviewable.²⁵⁰ Of course, as O'Regan J implies in *Kaunda v President of the Republic*, provided that the action is procedurally lawful, courts are likely to be deferential.²⁵¹ But courts can insist that the President acts in good faith when exercising these powers.²⁵² *De Lille v Speaker of the National Assembly* suggests that since Parliament too must act in good faith,²⁵³ Parliament's oversight power of executive military powers is subject to review on the same ground.

(k) Foreign affairs

The conduct of foreign affairs or foreign relations and the formulation of foreign policy are matters falling within the domain of the executive and for which Cabinet is collectively responsible.²⁵⁴ The clearest statement of this principle is to be

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found in FC s 231 which states that the 'negotiation and signing of international agreements is the responsibility of the national executive'. Currently agreements which must be ratified by Parliament under FC s 231 are first submitted to Cabinet for its consent. Once Parliament has ratified the agreement (by a resolution in both the National Assembly and NCOP), the Minister of Foreign Affairs signs an instrument of ratification and deposits it with the relevant body.²⁵⁵ International agreements, for which parliamentary ratification is not required, are dealt with by President's Minutes (which require the signature of the President and the relevant Minister). As with

249 Ibid. See also *Baker v Carr* 369 US 186, 217 (1962) (Adumbrates factors American courts have considered relevant to determining whether a question before a court is a non-justiciable political question.)

250 FC s 198(d) states that '[n]ational security is subject to the authority of Parliament and the national executive'. This section cannot be interpreted as ousting the jurisdiction of the courts.

251 2005(4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) at paras 224 and 225.

252 *SARFU III* (supra) para at 148.

253 1998 (3) SA 430 (C), 445. The decision was confirmed on appeal by the SCA, but on a quite different basis. See *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA).

254 *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) per Chaskalson CJ at 77, Ngcobo J at para 172 and O'Regan J at para 243; *Rootman v The President of the Republic of South Africa* [2006] SCA 80 RSA, [2006] JOL 17547 (SCA)(SCA referred to the President and the Minister of Justice and Constitutional Development collectively as 'the State' in a matter concerning relations with a foreign state (see further below).) O'Regan J in *Kaunda* relied on the President's responsibilities under FC s 84(2)(h) and (i) to receive and recognise foreign diplomatic and consular representatives and to appoint ambassadors, plenipotentiaries and diplomatic an consular representatives, and the national executive's responsibility under FC s 231(1) to negotiate and to sign international agreements to conclude that foreign affairs is an executive function. It is worth noting, though, that the President's powers under FC s 84(2) are powers as Head of State, to be exercised alone without the concurrence of Cabinet. The responsibilities referred to in FC s 84(2)(h) and (i) are thus, not executive powers for which Cabinet is collectively responsible, but powers for which the President alone is responsible. See also J Dugard *International Law: A South African Perspective* (3rd Edition 2005) 70 ff.

other matters, the convention is that, if such an agreement is contentious in any way, which includes having an impact on domestic law, or has financial consequences, it must go to the Cabinet.²⁵⁶

The question that has arisen in a number of cases in the South African courts recently is whether the executive can be compelled to engage in foreign relations in order to achieve a particular objective.²⁵⁷ The source of this stream of cases is the Constitutional Court's decision in *Mohamed and Another v President of the Republic of South Africa and Others*.²⁵⁸ In that case a foreign national was extradited from South Africa to the United States to stand trial on charges relating to the bombing of a US embassy in Dar es Salaam.²⁵⁹ The applicant's complaint was that the South African authorities had infringed his constitutional rights to human dignity (FC s 10), to life (FC s 11) and not to be treated or punished in a cruel, inhuman or degrading way (FC s 12(1)(e)) by allowing the extradition to the United States to go ahead without first obtaining an assurance from the US authorities that the applicant would not face the death penalty if convicted of the crimes of which he was accused.²⁶⁰ The applicant sought and was ultimately granted declaratory relief to this effect.²⁶¹ He also sought mandatory relief directing the South African Government to pursue diplomatic routes to securing an assurance from the United States authorities that the death penalty would not be imposed, or if imposed not carried out, should the applicant be convicted on the criminal charges.²⁶² The South African government opposed this relief, submitting that 'any such order would infringe the separation of powers between the Judiciary and the Executive'.²⁶³

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The Court did not agree. It indicated that such an order is, in principle, acceptable.²⁶⁴ The *Mohamed* Court held that it would not

255 *Manual of Executive Acts of the President* (1999) 5.8-5.12.

256 *Manual of Executive Acts of the President* (1999) 5.13-5.18. It is arguable that when an international agreement impinges on the responsibility of provinces, FC chapter 3 requires provincial governments to be consulted before it is signed (see C Murray & S Nakhjavani 'South Africa' in *International Relations in Federal Countries* ed H Michelmann (2008) forthcoming). However, the *Manual of Executive Acts* simply notes that provinces do not have the power to conclude international agreements.

257 See *Operation Dismantle Inc v Canada* [1985] 1 SCR 441 (Offers for cautious support for the reviewability of executive decisions on foreign affairs.)

258 *Mohamed v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

259 *Ibid* at paras 1-7.

260 *Ibid* at paras 3-4.

261 *Ibid* at para 73(3.1.1).

262 *Ibid* at para 4.

263 *Ibid* at para 69.

necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.²⁶⁵

The kind of judicial intervention foreshadowed by *Mohamed* has not materialised in any of the matters where similar mandatory relief has been sought. Each of these matters can be distinguished from *Mohamed* on the facts, however, and they do not detract from the Court's stance in *Mohamed*.²⁶⁶ *Kaunda* concerned 69 South African citizens who were arrested in Zimbabwe and held on a variety of charges including a charge of plotting a coup against the government of Equatorial Guinea.²⁶⁷ They approached the South African courts seeking an order compelling the South African government to make diplomatic representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their rights to dignity, freedom and security of the person, and fair conditions of detention and trial were respected and protected in those countries.²⁶⁸ Chaskalson CJ, writing for the majority, dismissed the applicants' reliance on *Mohamed*. Since the South African Bill of Rights has no application beyond the borders of South Africa and applies only to people in South Africa,²⁶⁹ the South African authorities could not be said to have perpetrated any wrong against the applicants.²⁷⁰ Whereas in *Mohamed* the Court held that it would not be inappropriate to order the South African executive to engage in diplomatic relations to remedy or ameliorate the effects of a breach of a constitutional right caused by its own actions, no constitutional rights could be said to have been

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- 264 S Peté & M du Plessis 'South African Nationals Abroad and their Right to Diplomatic Protection - Lessons from the "Mercenaries Case"' (2006) 22 *SAJHR* 439, 467.
- 265 *Ibid* at para 71 (footnotes omitted). The Court did not grant the mandatory relief sought on the basis that proceedings in the United States were already at an advanced stage and was in the Court's view not the most effective means of vindicating the applicant's rights.
- 266 For a critique of *Mohamed* for not being sufficiently forceful regarding extraterritorial application of the Bill of Rights, and for an indictment of the more conservative judgments that followed — eg, *Kaunda* — see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. See also J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.
- 267 *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at paras 1-2.
- 268 *Ibid* at para 3.
- 269 *Ibid* at paras 36-7.
- 270 *Ibid* at paras 50-3 and at paras 98-100.

breached by the conduct of the South African authorities in *Kaunda*. The gloss that *Kaunda* puts on *Mohamed* in this respect is that where South African organs of state infringe the constitutional rights of any person (which can happen only in South Africa), an obligation rests on the executive to do everything in its power to remedy or ameliorate the prejudice that person suffers in another country as the result of that infringement. This obligation is justifiable.

Further, the majority said in *Kaunda* that although there is no right to diplomatic protection under the South African Constitution, South African citizens are 'entitled to request South Africa for protection under international law against wrongful acts of a foreign state'.²⁷¹ When a request is received in circumstances where South African citizens face gross abuses of international human rights, the majority went on, government bears a duty to protect its citizens.²⁷² A decision refusing such a request would be justifiable, and a court could order the government to take 'appropriate action'.²⁷³ Appropriate action, however, admits of very wide interpretation indeed. It may be that the best the courts can require the executive to do in such circumstances is consider the request for diplomatic protection. It is the executive which must ultimately decide on the appropriate course of action — and that need not include diplomatic engagement:

A decision as to whether protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the Executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than Judges, and which could be harmed by court proceedings and the attendant publicity.²⁷⁴

Any decision taken by the executive in this regard is an exercise of public power, and is as such subject to constitutional control. Although the majority in *Kaunda* carved a very wide discretion for the executive in its powers of foreign affairs, requests for diplomatic protection must nevertheless be dealt with in accordance with the rule of law.²⁷⁵ In terms of the rule of law doctrine, irrationality and bad faith are grounds upon which a court could review the executive's response to a request for diplomatic protection.²⁷⁶

271 *Kaunda* (supra) at para 60.

272 *Ibid* at para 69.

273 *Ibid*.

274 *Ibid* at para 77. See also F Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 11.

275 See §§ 18.2(b) and 18.3(j) supra.

276 *Ibid* at para 80. See also S Peté & M du Plessis 'South African Nationals Abroad' (supra) at 447-449. For a critical discussion of the tendency of courts to defer to the executive in such matters, in the context of the apartheid reparations case (*In re South African Apartheid Litigation* 346 F Supp 2nd 538 (SDNY 2002)), see M Osborne 'Apartheid and the Alien Torts Act: Global Justice meets Sovereign Equality' in M du Plessis and S Pete (eds) *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007) 231.

The minority judgments of Ngcobo J and O'Regan J take a different approach. But they do not lead to significantly different outcomes. Ngcobo J finds that there is a constitutional duty on the executive to ensure that all South African national abroad enjoy the benefits of diplomatic protection,²⁷⁷ while O'Regan J finds that a constitutional duty rests on the executive to provide diplomatic protection to its citizens to prevent or repair 'egregious breaches of international human rights norms.'²⁷⁸ Both judgments conclude that this duty finds its corollary in the right to citizenship in FC s 3(2)(a). This right encompasses the 'privilege' or 'benefit' of diplomatic protection.²⁷⁹ O'Regan J fills in the important logical step when she contends that although the Final Constitution contains no express provision to gainsay Chaskalson CJ's conclusion that the Bill of Rights has no extraterritorial application, the executive remains bound by the Bill of Rights in all its action — including its actions in the international domain.²⁸⁰ Despite these differences, the minority judgments offer little support for a more exacting standard of judicial control of executive diplomatic functions. O'Regan J proposed a declaratory order obliging the executive to take appropriate steps to provide diplomatic protection to the applicants.²⁸¹ Ngcobo J agreed with the majority that the government has a wide discretion in deciding whether to grant diplomatic protection and in what form to do so.²⁸² In addition to the rule of law requirements

277 *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)(per Ngcobo J) at para 188.

278 *Ibid* at para 238.

279 *Ibid* at paras 185-88 (Ngcobo J) and at paras 236-238 (O'Regan J). On whether diplomatic protection is a right that can be claimed by an individual or an international law right at the instance of states, see M E Olivier 'Diplomatic Protection: Right or Privilege?' *Kaunda v President of the RSA* (2004) 10 BCLR 1009 (CC)' (2005) 30 *South African Yearbook of International Law* 238; G Erasmus & L Davidson 'Do South Africans have a Right to Diplomatic Protection?' (2000) 25 *South African Yearbook of International Law* 113; K Hopkins 'Diplomatic Protection and the South African Constitution: Does a South African Citizen have an Enforceable Constitutional Claim against the Government?' (2001) 16 *South African Public Law* 387.

280 *Kaunda* (supra) at para 228. See also Woolman 'Application' (supra) at § 31.6 (Contends that where *Mohamed* took a step toward extending the extraterritorial reach of the Bill of Rights, *Kaunda* took two steps back.) A similar argument was presented in *Thatcher v Minister of Justice and Constitutional Development and Others*. 2005 (4) SA 543 (C). The matter arose from the same events as *Kaunda*. The government of Equatorial Guinea had requested the South African government to render it assistance by allowing it to question an individual whom it suspected of involvement in the alleged coup plot. The same individual, Thatcher, was however facing charges in South Africa relating to the same events, and he argued that allowing the authorities of Equatorial Guinea to question him before the conclusion of criminal proceedings against him in South Africa would violate constitutional rights to silence and protection against self incrimination contained in FC s 35(1) and (3). *Ibid* at para 85. He argued that the failure of the South African authorities to consider his constitutional rights rendered the decision to comply with Equatorial Guinea's request irrational and unconstitutional in light of the principles of the rule of law. The court held that South Africa's compliance with the request did not violate any of Thatcher's rights, and that failure to consider those rights could not have rendered the decision irrational. See also S Peté & M du Plessis 'South African Nationals Abroad' (supra) at 463.

281 *Kaunda* (supra) at para 271.

282 *Ibid* at para 191.

of rationality and good faith, however, Ngcobo J added that the government must follow a fair procedure in processing a request for diplomatic assistance and may be required to provide reasons for its decision.²⁸³

In *Rootman v The President of the Republic of South Africa*, the applicant sought the diplomatic assistance of the government of South Africa in executing a judgment debt against the government of the Democratic Republic of Congo (the 'DRC').²⁸⁴ He argued that the evasion of the DRC of its commercial debt undermined the dignity and effectiveness of the courts and the rule of law, and interfered with rights to judicial resolution of disputes in terms of FC s 34. The applicant further contended that obligations on organs of state in terms of FC s 165(4) to take steps to ensure the effectiveness of the courts and in terms of FC s 7(2) to 'respect, protect, promote and fulfil' rights in the Bill of Rights, oblige the state to intercede on his behalf.²⁸⁵ The SCA rejected this argument. It held that the DRC's conduct is no more damaging to the rule of law than that of any other commercial debtor who evades a judgment debt and in respect of whom the state has no obligation to intercede.²⁸⁶ Furthermore, the SCA followed *Kaunda* in saying that while the South African government is free to negotiate with the DRC through diplomatic channels, it cannot be ordered to do so.²⁸⁷

(I) Assignment and delegation of executive powers under FC ss 99 and 238

FC s 99 deals with the assignment of responsibilities by Cabinet members to the provincial or local sphere of government. It states that:

A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment -

- (a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
- (b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and

283 *Kaunda* (supra) at para 192. It is unclear whether Ngcobo J is of the view that such a decision must adhere to the requirements of administrative justice imposed by FC s 33. He states that '[t]he decision to extend diplomatic protection in a given case is the exercise of a public power and as such it must conform to the Constitution, in particular s 33 of the Constitution.' Ibid at para 193. The conduct of foreign affairs falls within the domain of the executive, however, and is therefore an executive function contemplated in FC s 85(2)(e). The Promotion of Administrative Justice Act 3 of 2000 explicitly excludes such executive functions from the definition of 'administrative action', and it is thus difficult to see on what basis Ngcobo J would scrutinise decisions on whether to extend diplomatic protection against constitutional standards of administrative justice such as procedural fairness.

284 [2006] SCA 80 RSA, [2006] JOL 17547 (SCA).

285 Ibid at para 12.

286 Ibid.

287 Ibid at para 13. See also *Van Zyl v Government of the RSA* [2007] SCA 109 RSA (Follows *Kaunda*, emphasising the restraint that courts ought to show in reviewing acts of foreign states.)

(c) takes effect upon proclamation by the President.'

It is common for constitutions in multilevel systems of government to attempt to establish clear boundaries between different levels of government. The norm is to avoid overlapping responsibilities and functions. The South African system is different. It is characterised by soft boundaries amongst the three spheres of government.²⁸⁸ FC s 99 is an example of this as it anticipates powers originally allocated to the national sphere of government being exercised by the provincial or local sphere. In the absence of FC s 99, it would have been appropriate to conclude that it was not permissible for a provincial executive or a municipal council to perform functions allocated to the national executive by an Act of Parliament.

The meaning of 'assignment' under FC s 99 must be understood in context.²⁸⁹ The Constitution makes a distinction between delegation, which is referred to in s 238, and assignment. Baxter provides an authoritative description of the distinction between delegation and assignment in South African public law: 'When powers are assigned the authority and duty to exercise them, and the responsibility for their exercise, is transferred in full. A less complete transfer of powers is *delegation*, in terms of which one public authority authorises another to act *in its stead*.'²⁹⁰ Some writers add a further distinction between assignment and delegation and assert that assignments can be revoked only by an Act of Parliament. This view is based, in part, on a passage in *Executive Council, Western Cape Legislature and others v President of the Republic of South Africa and others*.²⁹¹ In *Executive Council, Western Cape*, the Constitutional Court dealt with the distinction between the assignment of executive authority under IC s 235(8) and the delegation of such authority under IC 144. It wrote:

[IC s] 235(8) deals with assignment, ie the transfer to a province of the executive authority to which it is entitled in terms of the Constitution. It is not concerned with delegation. Delegation postulates revocable transmission of subsidiary authority. The assignment contemplated by [IC] s 235 relates to the formal vesting of authority derived from the Constitution.²⁹²

However, IC 235 deals with the initial transfer of functions to provinces: it sets out a process for implementing the system of government established by the Interim Constitution. In this context, an assignment under IC s 235(8) must be 'final'. There is no reason that assignments under FC s 99 should be similarly

288 See C Murray & R Simeon 'Multi-level Government in South Africa: A Progress Report' (2001) 31 *Publius: The Journal of Federalism* 65-92. See also S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

289 In other constitutional provisions the term 'assign' is used without the more technical sense of a transfer of obligations and responsibilities to mean 'allocate'. See FC ss 28(1)(h) and 35(2)(c). See also FC s 206(4). FC s 206(4) involves a tricky distinction between the assignment of responsibilities by law and the allocation of (apparently equally binding) responsibilities by policy.

290 Delegation is also easier than assignment. FC s 238 does not require a proclamation for a delegation to take effect.

291 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 ('*Executive Council, Western Cape*').

292 *Ibid* at para 173.

irrevocable. On the contrary, such an interpretation would permit the national executive to rewrite the constitutional division of powers and require the relatively onerous process of adopting an Act of Parliament to reverse it.

The practical effect of the distinction between assignment and delegation as set out by Baxter is that complete responsibility for a function is transferred through assignment whereas in the case of delegation the authority to ensure that the power is properly exercised remains with the delegating authority. FC s 238(b) captures this relationship when it states that delegation allows an organ of state to exercise a power 'for any other executive organ'.

FC s 99 constrains the power of a member of Cabinet to assign powers and functions in two ways. First, the assignee must agree. This is consistent with the principles of co-operative government which underpin the division of powers amongst the spheres of government in South Africa. To allow members of the national executive to impose functions unilaterally on their counterparts in provincial and local governments would infringe the principle of functional and institutional integrity enshrined in FC s 41(1)(g). Thus, one would expect the party to whom the assignment is to be made to take fiscal, capacity and political considerations into account in entering an agreement under FC s 99.

This understanding of assignment under FC s 99 suggests that all intergovernmental assignments should be subject to the agreement of the assignee. However, FC s 125(2), which lists the ways in which provincial executive councils exercise provincial executive authority, raises the possibility that there is a separate form of assignment that takes place in terms of an Act of Parliament: FC s 125(2)(c) states that executive authority may be exercised by 'administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament'. FC s 125(2)(g) supplements this proviso by adding to the list of activities of an executive council 'performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament'. It is possible to read paragraph (g) to include assignments under FC s 99 and paragraph (c) to permit, in addition, assignments in terms of an Act of Parliament — unconstrained by the conditions set in FC s 99. However, as we have already indicated, allowing assignments without the concurrence of the provincial executive conflicts with the basic constitutional principle of co-operative government.²⁹³ Thus, one must assume that assignment by an Act of Parliament must always be accompanied by the agreement of the governments that must assume the assigned responsibilities.²⁹⁴

The second constraint on the power to assign functions is that the assignment must 'be consistent with' the law in terms of which the power is exercised or the

293 Because FC s 125(2)(c) covers national laws that fall outside Schedules 4 and 5 not even the diluted agreement of provinces through the NCOP is secured in the national legislative process.

294 An alternative reading of FC s 125(2)(c) is to interpret it as qualifying FC s 99 by requiring, in addition to the agreement of the provincial executive, express statutory authorisation when full responsibility for administering a national Act is assigned to a province. On this reading, which is supported by FC s 125(2)(g), particular powers and functions may be assigned under FC s 99 without explicit statutory authorisation, but to assign the administration of an Act, express authorisation by Parliament is required.

function performed. A similar constraint is placed on the power to delegate under FC s 238. The common law has always placed limits on the legitimate delegation of public power: but the language of 'consistency' in FC ss 99 and 238 is unfamiliar. At the very least, it must mean that assignment and delegation cannot take place against the wishes of Parliament. However, the best interpretation is that the phrase protects the common-law position in terms of which, in the absence of express authority to assign or to delegate in the Act under which the power is exercised or the function performed, the legitimacy of assignment or delegation will depend on the nature of the power, the extent to which it is transferred, the importance of the delegatee and practical necessity.²⁹⁵

18.4 Multisphere government²⁹⁶

The decision to create a system of multisphere government — with both provincial and local powers protected in the Constitution — was a central element of the constitutional settlement in 1993.²⁹⁷ But, the Final Constitution's otherwise detailed chapter on the national executive barely mentions the responsibilities that the system of shared powers may place on the national executive.²⁹⁸ The absence of any express reference to multilevel government in the constitutional description of the responsibilities of the national executive in FC s 85 is striking because so much of what the national executive does involves provinces and local governments.²⁹⁹ Most significantly, the Final Constitution anticipates that provinces will implement national laws that fall under Schedule 4 of the Final Constitution.³⁰⁰ These laws embrace laws relating to education, health and welfare services, housing and the environment. Thus, the national government effectively determines what provinces will do and depends on provinces to implement many national laws. It also funds, monitors, supervises, and regulates them. It can take few decisions without considering their impact on provinces.

The implementation role of provinces ties national policy closely to their capacity to perform. It also demands complex coordination between national departments

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295 See Hoexter *Administrative Law* (supra) at 133-136.

296 See C Murray 'South Africa' in C Saunders and K Le Roy (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 258 — 288.

297 N Steytler 'Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy' (2001) 31 *Publius: Journal of Federalism* 93.

298 Although section 100 does provide for intervention by the national executive in the affairs of a province if the province is failing to fulfil its responsibilities.

299 See N Bamforth & P Leyland (eds) *Public law in a Multi-layered Constitution* (2003) (Discusses the implications of the distribution of power in the UK.)

300 FC s 125 (2)(b). For further discussion, see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 20.

responsible for national competences (such as justice and water) and both national and provincial departments working in related areas (such as social services and agriculture). For instance, policy relating to the detention of children awaiting trial by the national Department of Justice depends for its implementation on the provision of 'places of safety' by the nine provincial welfare departments. In theory, these programs should be coordinated by the national government through national norms and standards and properly assured intergovernmental coordination. Indeed, since the 1997 report of the Presidential Review Commission, much attention has been paid to making Cabinet more effective. Nevertheless, despite the fact that provinces are written into the plans, they remain junior partners, instructed on their responsibilities rather than consulted.

Since 1994 a special Cabinet portfolio and national department has existed to manage the relationships between the national, provincial, and local spheres of government and to build the capacity of provinces and municipalities. The role of the national Department of Provincial and Local Government is to ensure a 'capable and well integrated system of government working together to achieve sustainable development and enhanced service delivery in a developmental state'.³⁰¹

(a) FC ss 100 and 139: Interventions in provinces and municipalities

FC s 100 concerns national interventions in provinces. FC s 139 concerns provincial interventions in municipalities. These intergovernmental relations powers are considered in Chapters 14, 20, 22 and 27 of this treatise.³⁰² Here it is important to note the responsibilities that FC s 100 and FC s 139 place on the national executive. Firstly, although the national government's power to intervene in a province that it not fulfilling its responsibilities is discretionary, FC s 139 (7) imposes an obligation on the national executive to intervene in municipalities which are in financial difficulty if the provincial executive does not. Moreover, if a province assumes responsibility for a municipal function or dissolves a Municipal Council under FC s 139(1), the Cabinet member responsible for local government affairs may 'disapprove' the provincial action, bringing it to an end.

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(b) FC s 125

FC 125(3) places a responsibility on the national government to 'assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions'.

301 Department of Provincial and Local Government 'Vision', available at http://www.thedplg.gov.za/index.php?option=com_content&task=view&id=12&Itemid=29 accessed 17 February 2008.

302 See S Woolman & Theunis Roux 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14; C Murray & O Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 20; N Steytler and J de Visser 'Local Government'. See also M Chaskalson 'Transitional Provisions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 22; R Kriel & M Monadjem 'Public Finances' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 27. See also N Steytler and J de Visser *Local Government Law of South Africa* (2007) 15.5. For a discussion of the constitutionality of a national government programme to manage struggling municipalities outside the framework of FC 139, see C Murray and Y Hoffman-Wanderer 'The NCOP and Provincial Intervention in Local Government' 2007 *Stellenbosch LR* 7, 26ff.
