

**"CHECKS AND BALANCES REFLECTIONS ON THE DEVELOPMENT OF
THE DOCTRINE OF SEPARATION OF POWERS UNDER THE SOUTH
AFRICAN CONSTITUTION"**

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K O'Regan*

Constitutional Principle VI, of the constitutional principles negotiated at the Multi-Party negotiating process in the early 1990s and annexed to the Interim Constitution¹, provided that:

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

When certifying the 1996 Constitution, the Constitutional Court had to consider whether the new Constitution did indeed comply with this principle. In responding to challenges raised to the text of the Constitution the Court reasoned as follows:

There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. ... While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch

* Judge of the Constitutional Court. South Africa.

1 *Constitution of the Republic of South Africa* 200 of 1993.

of government has over the other, differs from one country to another.

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjointed'.²

After a consideration of the challenge, the court held that the Constitution as drafted did comply with Constitutional Principle VI in recognising both a separation of powers and "appropriate checks and balances" between the three branches of government to "ensure accountability, responsiveness and openness".

What should be noted is the recognition in the judgment that there is no universally accepted system for achieving the separation of powers.³ The system developed in each country depends on a range of factors including the conception of democracy adopted in that country, social, political and economic forces, as well as the history of governmental institutions. Indeed, in a later case, the Constitutional Court recognised that there is:

... no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so

2 *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) at par 108-109.

3 The diversity of models incorporating the separation of powers is recognised in most academic writing on the subject. See eg Barber 2001 *Cambridge Law Journal* 59; Ackerman 2000 *Harvard LR* 633.

completely that the government is unable to take timely measures in the public interest.⁴

The focus of my talk this evening is to consider how far we have progressed in this task of developing a distinctively South African model of the separation of powers, but before I turn to that I would like to start with a brief historical overview of the doctrine itself.

A. The development of the doctrine of the separation of powers and its underlying purpose

Writing in the mid-eighteenth century, Montesquieu famously asserted the importance of the separation of powers in a democracy as follows:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.⁵

Montesquieu wrote in time to influence significantly both the drafting of the French Declaration of the Rights of Man in 1789⁶ and the framing of the Constitution of the United States of America in the 1780s. His thesis was that separating the judicial, executive and legislative powers would enhance the liberty of the subject by preventing tyranny, violence and oppression.

4 Per Ackermann j in *De Lange v Smuts* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) at par 60.

5 Montesquieu *The Spirit of the Laws* 163.

6 A 16 of the Rights of Man provides: "Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution."

In the Federalist Papers, Madison discussed Montesquieu's idea at some length. Madison agreed that:

... the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.⁷

Madison recognised that Montesquieu, who had drawn inspiration from the (unwritten) British Constitution, was mistaken in assuming that there was a watertight compartmentalisation of the three arms of government in Britain. He pointed to the fact that certain members of the upper House also performed judicial duties (as is still the case today, though this is, imminently, to be changed), that the members of the executive were drawn from the legislature and so on. Madison concluded that Montesquieu was not contending for a complete separation but for the following principle:

[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.⁸

Madison went on to conclude that that the separation of powers could serve its rightful constitutional purpose:

... by so contriving the interior structure of the government as that its several constituent parts may, be their mutual relations, be the means of keeping each other in their proper places.⁹

A central purpose of the separation of powers as conceived by Montesquieu and Madison was that it would prevent tyranny and protect liberty. A more difficult question that has been asked by political philosophers and constitutional lawyers since, is whether in promoting liberty and preventing tyranny, the separation of powers must necessarily cause inefficiency. Cass Sunstein has argued powerfully that the principle can play such a role:

7 Madison, Hamilton and Jay *The Federalist Papers* 303.

8 *Id* p 304.

9 *Id* nr 51 p 319.

The system of separation of powers ... constrains government, by making it harder for government to act; but it does far more than that. Separation of powers also helps to energise government and to make it more effective, by creating a healthy division of labor. This was a prominent argument during the framing period in America. A system in which the executive does not bear the burden of adjudication may well strengthen the executive by removing from it a task that frequently produces public disapproval. If the president does not adjudicate, he is able to pursue his task unencumbered by judicial burdens. Indeed, the entire framework enables rather than constrains democracy, not only by creating an energetic executive but more fundamentally by allowing the sovereign people to pursue a strategy against their government of divide and conquer. So long as it is understood that no branch of government is actually the "people", a system of separation of powers can allow the citizenry to monitor and constrain its inevitably imperfect agents. And a system of separated powers also proliferates the points of access to government, allowing people to succeed (for example) within the legislature even if they are blocked or unheard within the executive or judicial branches.¹⁰

It seems clear that while, perhaps the guiding principles underlying the philosophical development of the doctrine relate to the importance of preventing the abuse of power, the doctrine has come to serve other roles in many democracies. In particular, it has ensured the functional specialisation of the arms of government, not entirely, but to some significant extent. Moreover, in at least some systems, including ours, it plays a role enhancing of human rights, and of a particular vision of democracy, based on the key democratic founding values of our Constitution – accountability, responsiveness and openness.¹¹

10 Sunstein *Designing Democracy* 98-99. See also Barber cited above n 3 who suggests that the guiding principle of separation of powers is efficiency.

11 S 1 of the Constitution provides that:

The Republic of South Africa is one, sovereign, democratic state founding on the following values:

(a) ...

(b) ...

(c) ...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

To illustrate this, it is necessary first to look at the division of powers provided within the text of the Constitution; and then turn to consider how the courts have approached the issue in the last ten years.

B. The South African constitutional model

A brief review of the South African Constitution makes it plain that the various branches of government are not hermetically sealed from one another. In particular, our Constitution opted for a model of the relationship between the legislature and executive, modelled more closely on the Westminster system, than on the presidential system found in France and the United States.

Under our Constitution, the President is elected by the National Assembly (one of the two houses of Parliament) from among its members at its first sitting after an election.¹² That election is presided over by the Chief Justice.¹³ Once the President is elected she or he ceases to be a member of the National Assembly.¹⁴ Moreover it is the National Assembly who may remove the President from an office, on a vote of at least two thirds of its members and only on the grounds of: (a) a serious violation of the Constitution or the law; (b) serious misconduct; and (c) inability to perform the functions of office.¹⁵

The Deputy President too must be appointed from among the members of the National Assembly,¹⁶ as must all, save two, of the other members of Cabinet.¹⁷ Members of the Cabinet who are not members of Parliament, and the President, have right to attend and speak in the National Assembly but they do not have the right to vote.¹⁸ Members of the Cabinet are accountable

12 S 86(1) of the Constitution.

13 S 86(2) of the Constitution.

14 S 87 of the Constitution.

15 S 89 of the Constitution.

16 S 91(3)(a) of the Constitution.

17 S 91(3)(b) and (c) of the Constitution.

18 S 54 of the Constitution.

collectively and individually to Parliament for the exercise of their powers and the performance of their functions¹⁹ and must report regularly to Parliament.²⁰

It is the President that dissolves Parliament, upon a resolution of a majority in Parliament calling for dissolution, as long as three years has passed since the last election.²¹

The process of legislation-making too illustrates the intertwined relationship between legislature and executive. Members of the Cabinet prepare and initiate legislation²² which is then introduced either into the National Assembly or the National Council of Provinces for debate and passing. Once a bill has been passed by Parliament, it is presented to the President for signature.²³ The President has limited powers to refuse to assent to a bill. He may refuse to sign the bill if he has reservations about its constitutionality in which case he must refer it back to the National Assembly for reconsideration.²⁴

If once it is referred back to the President, he or she still entertains doubts about its constitutionality, the bill must be referred to the Constitutional Court.²⁵ This has only happened once since the Constitution came into force in 1997 when President Mandela referred the Liquor Bill to the Constitutional Court for consideration in March 1999.²⁶ In that case the court made it plain that the task for the court was to consider the reservations expressed by the President, not to undertake a mini-certification of the bill. It left open the question whether it could in such proceedings consider the constitutionality of provisions not referred to by the President which are in obvious conflict with the Constitution. It did, however, make plain that any finding by the court that the bill is

19 S 92(2) of the Constitution.

20 S 92(3)(b) of the Constitution.

21 S 50 of the Constitution.

22 S 85(2)(d) of the Constitution.

23 S 79 of the Constitution.

24 S 79 of the Constitution.

25 S 79(5) of the Constitution, see also s 167(4)(b) of the Constitution which makes it plain that only the Constitutional Court has jurisdiction to entertain such a referral.

26 See *Ex parte President of the Republic of South Africa: in re constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC); 2000 (1) SA 732 (CC).

constitutional does not preclude subsequent challenges on other issues once the bill is enacted.

The functions conferred on the legislature too illustrate the particular South African conception of the separation of powers. The Constitution emphasises that its powers are not only to make legislation: but to ensure government by people under the Constitution. Section 42(3) provides:

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action.

Similarly section 55(2) provides that:

The National Assembly must provide for mechanisms to –

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state.

The legislature's role in overseeing executive action and holding the executive accountable for the performance of its obligations is an important aspect of the separation of powers under our Constitution.

Another important aspect of separation of powers, but one beyond the scope of my discussion this evening, is the role of the provinces and local government as separate spheres of government, although with large areas of concurrence with national government. The principles underlying this division of powers, and their factual consequences, require separate consideration of its own.

The judiciary

The Constitution makes plain that the judicial authority of the Republic is vested in the courts and that they are ...

... independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.²⁷

Moreover, no person or organ of state may interfere with the functioning of the courts and ...

... organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.²⁸

Judges are appointed by the President “on the advice of the Judicial Service Commission”,²⁹ a body whose composition is provided for in the Constitution. It has 23 permanent members including the Chief Justice, who presides, the President of the Supreme Court of Appeal, the Minister of Justice, one Judge President, two advocates, two attorneys, a university law professor, six members of the National Assembly, at least three of whom must be members of opposition parties and four delegates from the NCOP, as well as four persons designated by the President. In addition, the Judge President and Premier, or their delegates, join the commission in respect of the appointment of judges to the High Court situated in that province.

Judges are removed by the President only if the Judicial Service Commission has found the judge to suffer from an incapacity or to be grossly incompetent or guilty of gross misconduct and if two-thirds of the members of the National Assembly call for his or her removal.

27 S 165(2) of the Constitution.

28 S 165(4) of the Constitution.

29 S174(6) of the Constitution.

In considering the role of the judiciary under our Constitution, its powers and functions must be considered. First, it is clear in our constitutional order that the judiciary must uphold the Constitution. Secondly, citizens are entitled to turn to the judiciary to protect their constitutional rights. Accordingly, section 172 of the Constitution requires a court deciding a constitutional issue within its jurisdiction to declare invalid any law or conduct inconsistent with the Constitution.³⁰ This is a powerful role given to the judiciary to ensure observance of the constitution.

It should also be noted that the Constitutional Court is given a very special role in relation to monitoring the separation of powers and holding the legislature and executive to the text of the Constitution. The closer an issue comes to the sensitive relationship between the branches of government, the more likely it is to require a decision by the Constitutional Court. So no national or provincial legislation or any conduct of the President may be declared invalid effectively without the confirmation of the Constitutional Court.³¹ In addition, no constitutional challenge to constitutional amendments may be decided by a court other than the Constitutional Court.³² Similarly, disputes between organs of state concerning their constitutional status, powers or functions may only be decided by the Constitutional Court.³³ Our Constitution clearly envisages an important role for the courts, the closer however the issues before the courts come to the sensitive area of the separation of powers, the more likely the decision will have to be made by the Constitutional Court. It is not surprising then that there are special tenure provisions for Constitutional Court judges,³⁴ and special appointment provisions.³⁵

30 Insert s 172(1) of the Constitution.

31 See s 172(2) of the Constitution.

32 S 167(4)(d) of the Constitution.

33 S 167(4)(a) of the Constitution.

34 See s 176(1) of the Constitution.

35 See s 174(4) of the Constitution.

C. Constitutional jurisprudence on the separation of powers

(a) Relationship between Legislature and Executive

One of the earliest cases considered by the Court dealt with the relationship between the legislature and the executive and, in particular, the question whether the Legislature could delegate to the executive the power to amend legislation passed by the Legislature. The case was called *Executive Council, Western Cape Legislature v President of the RSA*. It arose in the context of the transformation of local government, a complex task facing government in the mid-1990s. A key legal issue in the case concerned section 16A of the *Local Government Transition Act 209 of 1993* subsection 1 of which provided that:

The President may amend this act and any schedule thereto by proclamation in the Gazette.

Although there was a multiplicity of judgments, all members of the court held that this delegation was impermissible. There was some debate amongst the judgments as to the circumstances in which such a delegation could, if ever, be made.

The key principle underlying all the judgments is the protection of the proper sphere of the legislature – law making. This principle asserts there is good constitutional reason for preserving the power to make and amend national laws as a power peculiar to the legislature. This is an important aspect of South African separation of powers, that the separation between judicial, legislative and executive – while not monolithic – underlies a structural and functional distinction between the arms of government which in order to preserve their institutional integrity and their democratic function, needs to be preserved from intrusion.

One of the important provisions of our constitution entrenches the principles of co-operative government. Chapter 3 of the Constitution provides principles of co-operative government which requires all spheres of government and organs

of state to “co-operate with one another in mutual trust and good faith”.³⁶ Notably, section 41(1)(h)(vi) provides that spheres of government should avoid legal proceedings against one another. In at least one case, the Constitutional Court has declined to decide a matter on the basis that organs of state had not sought to resolve their differences before the institution of litigation.³⁷ This principle, too, asserts the primacy of the co-operative principles of government entrenched in the Constitution and demonstrates a reluctance to permit organs of state to avoid co-operative resolution of conflict in favour of litigation.

(b) Relationship between Legislature and Judiciary

Perhaps the most important case on the relationship between the legislature and the judiciary in the first ten years was the SCA decision concerning Parliament’s powers to discipline members: *Speaker of the National Assembly v De Lille*. The case arose from an incident in the National Assembly in which one of its opposition members, Ms Patricia De Lille, stated that she had information that 12 members of the governing party, the African National Congress, had been spies for the apartheid government. When challenged, she mentioned eight names some of whom were not members of the National Assembly. The Speaker ruled that it was unparliamentary to refer to some members of the Assembly as “spies” and ordered her to withdraw her remarks which she did. Some days later a motion was passed in the Assembly appointed an ad hoc committee to report to the Assembly on what action should be taken in view of Ms De Lille’s remarks. The committee was convened and recommended that Ms De Lille be directed to apologise and to suspend her

³⁶ S 41(1)(h) of the Constitution and see other provisions of ch 3.

³⁷ *Uthukela District Municipality v President of the Republic of South Africa* 2002 (11) BCLR 1220 (CC); 2003 (1) SA 678 (CC). S 5(1) of the *Division of Revenue Act* 1 of 2001 made no provision for revenue to be paid to municipalities which perform co-ordinating functions (in terms of s 155 of the Constitution). It was challenged by certain municipalities that perform such functions and they sought confirmation from the Constitutional Court. By the time the matter came before the court the legislation had been repealed. The court exercised its discretion not to confirm the order of invalidity, *inter alia* on the basis that the organs of state had not endeavoured to resolve their differences politically before resorting to litigation.

for 15 parliamentary working days. The National Assembly adopted this recommendation.

Ms De Lille went to court to challenge the resolution of the National Assembly. The Cape High Court upheld her challenge and set aside the resolution and the Speaker of the Assembly then appealed to the SCA. The SCA held that the question that had to be considered was whether Parliament had any "lawful authority to take any steps to suspend" one of its members in these circumstances. The Speaker argued that section 57 of the Constitution³⁸ which permits the National Assembly "to determine and control its internal arrangements" was the source of its power. Mahomed CJ reasoned as follows:

The threat that a member of the Assembly may be suspended for something said in the assembly inhibits freedom of expression in the Assembly and must therefore adversely impact on that guarantee. Section 58(2) must not be interpreted ... so as to detract from that guarantee.³⁹

The SCA accordingly set aside that portion of the Assembly's resolution which had ordered the suspension of Ms De Lille from Parliament. This judgment demonstrates a principle of the separation of powers which makes clear that the judiciary recognises that it is its role to uphold fundamental rights, and that separation of powers concerns cannot be used to render organs of state,

38 S 57 reads:

- (1) The National Assembly may-
 - (a) determine and control its internal arrangements, proceedings and procedures; and
 - (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
- (2) The rules and orders of the National Assembly must provide for-
 - (a) the establishment, composition, powers, functions, procedures and duration of its committees;
 - (b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;
 - (c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and
 - (d) the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.

39 At par 20.

including the legislature itself, immune from constitutional challenge based on the fundamental rights in our Constitution. The court is saying that the role of the courts under our constitutional order requires courts to intervene to protect rights and that, accordingly, the principle of non-intrusion with the affairs of another branch of government, an important aspect of the separation of powers must give way to the need to provide protection for individual rights which lie at the heart of our democratic order.

It is clear from the court's jurisprudence that the principle of non-intrusion is an important aspect of our doctrine of separation of powers, if not absolute. In *Pharmaceutical Manufacturers Association of SA and Others: in re: Ex parte Application of the President of the RSA and Others*, the court was concerned with the power of the President to bring legislation into force. Section 55 of the *South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998*, provided that the act would come into operation on a date to be determined by the President in the Gazette. On 30 April 1999, the President issued a proclamation purporting to bring the legislation into force. However, it subsequently became clear that the purported promulgation had been premature in that the necessary regulations to ensure that the act would function had not been prepared or issued by the Minister of Health. Accordingly, the President and the Minister of Health applied to have the proclamation bringing the legislation into force set aside. The court observed that there was a question of justiciability which arose: courts in other jurisdictions have been reluctant to review the exercise of an executive decision to bring legislation into force because it is so close to the legislative process.⁴⁰ In considering the nature of the power, Chaskalson cj reasoned as follows:

The power is derived from legislation and is close to the administrative process. In my view, however, the decisions to bring the law into operation did not constitute administrative action. When he purported to exercise the power, the President was neither making the law, nor administering it. Parliament had made the law,

40 See eg *Re Criminal Law Amendment Act, 1968-9* (1970) 10 DLR (3d) 699 (SCC) at 712; *R v Secretary of State for the Home Department ex parte Fire Brigade Union* [1995] 2 AC 513 (HL); *AK Roy v Union of India* (1982) 1 SCC 271.

and the executive would administer it once it had been brought into force. The power vested in the President thus lies between the law-making process and the administrative process. The exercise of that power requires a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. In substance the exercise of the power is closer to the legislative process than the administrative process.⁴¹

The court held that the power, even though not administrative in character, was subject to constitutional review on the grounds of lawfulness and rationality.

The court held:

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.⁴²

The court held that in the circumstances of that case the proclamation issued by the President had not been rationally related to a purpose for which the power to issue the proclamation had been given to the President and ordered that the proclamation be set aside.

Another case which has considered the relationship between Parliament and the Courts has been a case which considered the extent to which Parliament may intrude on the domain of the judiciary. In *S v Dodo* 2001 (5) BCLR 423 (CC); 2001 (3) SA 382 (CC), the question that arose was whether minimum sentence legislation enacted by the legislature was consistent with the Constitution. Section 51 of the *Criminal Law Amendment Act* 105 of 1997 makes it obligatory for a High Court to sentence an accused, convicted of certain specified offences, to imprisonment for life unless the court is satisfied that "substantial and compelling circumstances" exist justifying the imposition of a lesser sentence. Ackermann J reasoned as follows:

41 Id at par 79.

42 Id at par 85.

There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.

Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment.⁴³

He continued:

The legislature's powers are decidedly not unlimited. Legislation is by nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated, as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state.⁴⁴

Adopting the interpretive approach to the sections identified by the Supreme Court of Appeal in *S v Malgas* 2001 (2) SA 1222 (SCA), it held the provisions to be consistent with the Constitution.⁴⁵ In this case, the court accepted the

43 At par 22 and 23.

44 *Id* at par 26.

45 The relevant passage in *S v Malgas* provided as follows: "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence." (par 25 of *Malgas*, cited at par 40 of *Dodo*).

legitimacy of minimum sentences as long as the court's constitutional role of doing justice in individual cases remained possible. The minimum sentence legislation permits a court not to impose a sentence if there are "substantial and compelling circumstances" which require the imposition of a lesser sentence.⁴⁶ In *Malgas*, the SCA interpreted that provision to permit a court not to impose a minimum sentence if that sentence would be disproportionate to the crime so that injustice would be done by imposing the sentence.

(c) Relationship between Executive and Judiciary

Perhaps one of the most difficult areas of constitutional jurisprudence involves the relationship between the executive and the judiciary. The executive has a crucial and powerful role in any modern democracy. One of the key functions of the executive, recognised by both Madison and Montesquieu, is the conduct of foreign affairs.

Nevertheless, as section 172 of the Constitution suggests, under our constitutional order even the conduct closest to the pure executive, is to some extent justiciable. In a recent case, *Kaunda v President of the RSA* 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC), the court had to consider the executive's power to make diplomatic representations under international law to other states on behalf of its citizens. This power lies close to the heartland of executive power. The case concerned 69 South African citizens, who had been arrested in Zimbabwe when their plane had landed there and were being held in custody there. It was alleged that these 69 were mercenaries en route to Equatorial Guinea to overthrow the government of that country. The applicants sought a range of relief, including an order declaring that the government of South Africa was under an obligation firstly to extradite the applicants to South Africa for them to be criminally prosecuted here; secondly, to take steps to protect the applicants in relation to their conditions of imprisonment in

46 S 51(3)(a) of the *Criminal Law Amendment Act* 105 of 1997.

Zimbabwe and thirdly to make diplomatic representations on their behalf to prevent their being extradited to Equatorial Guinea where the applicants alleged they would not receive a fair trial.

The court held that the applicants could not seek in their first claim – that they be extradited to South Africa – on the ground that as it was not conceded on the papers that there was *prima facie* evidence that they were guilty of a criminal offence, and given that the state said that it had no such evidence at that stage, the jurisdictional requisites for extradition did not exist. As to the obligation of the state to make diplomatic representations on their behalf, a majority of the court (per Chaskalson cj) held that section 3 of the Constitution⁴⁷ entitles citizens to request diplomatic protection and that:

If ... citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the constitution. ... [T]here may even be a duty in extreme cases for the government to act on its own initiative. This, however, is a terrain in which courts must exercise discretion and recognise that government is better placed than they are to deal with such matters.⁴⁸

Chaskalson cj continued:

There may thus be a duty on government consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be

47 S 3 provides as follows:

- (1) There is a common South African citizenship.
- (2) All citizens are –
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

48 *Id* at par 67.

justiciable and a court could order the government to take appropriate action.⁴⁹

All the judgments in the matter recognised that the arena of making diplomatic representations is one in which the executive has a particular and special competence and that a court should be slow to dictate to the executive how to carry out that task.⁵⁰ Yet all of them also recognised that the power was to some, greater or lesser extent, justiciable despite that competence. The principles underlying *Kaunda* (and the differences in the judgments authored in the case) illustrate the court wrestling to find the appropriate balance between two powerful principles of our constitutional order, both relevant to the doctrine of the separation of powers. The first is the need to protect the executive domain from impermissible intrusion by the judiciary; and the other is the need to ensure that citizens' rights are protected where possible.

The court has on two other occasions recognised that the presidential powers conferred specifically on the President by section 84(2) of the Constitution, despite their clear executive character are under our Constitution justiciable to some extent.⁵¹ In *Hugo's* case, the court held that the power to pardon offenders was nevertheless justiciable,⁵² and in *SARFU 3*, the court held that

49 *Id* at par 69. Compare the judgment of Ngcobo j at par 191 and myself at par 238.

50 See the judgment of Chaskalson cj at par 77; Ngcobo j at par 189 and myself at par 243 ff.

51 S 84(2) provides:

The President is responsible for-

- (a) assenting to and signing Bills;
- (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
- (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
- (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
- (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
- (f) appointing commissions of inquiry;
- (g) calling a national referendum in terms of an Act of Parliament;
- (h) receiving and recognising foreign diplomatic and consular representatives;
- (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
- (j) pardoning or relieving offenders and remitting any fines, penalties or forfeitures; and
- (k) conferring honours.

52 *President of the RSA v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC).

the power to appoint commissions of inquiry was similarly justiciable on limited grounds.⁵³ The role of the courts in our constitutional democracy, as is foreshadowed by some of the provisions in the text of the Constitution, referred to earlier is clearly to protect the Constitution and to hold both the executive and legislature accountable to the provisions of the Constitution. Nevertheless, in *Kaunda*, *SARFU* and *Hugo*, the court recognised that there are clear constitutional reasons why the justiciability of purely executive decisions is far narrower than that of administrative decisions, and that it is appropriate for courts to defer to the executive's special role and expertise in purely executive matters.

The court has also spoken sharply to protect the executive, and particularly the President, from undue intrusion by the courts. In *SARFU 3*, for example, the High Court had called the President as a witness in a dispute surrounding the appointment of a commission of inquiry. The question was whether courts could call the President as a witness. In responding to this argument, the court reasoned:

A review of the law of foreign jurisdictions fails to reveal a case in which a head of State has been compelled to give oral evidence before a court in relation to the performance of official duties. Even where a head of State may be called as a witness, special arrangements are often provided for the way in which such evidence is given. There is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the same time however the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded.

We are of the view that there are two 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

53 *President of the RSA v South African Rugby Football Union (SARFU 3)* 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC).

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 the courts are not impeded in the administration of justice.⁵⁴

The court concluded that the High Court in that case had not carefully considered whether it was necessary to call the President and held that it had erred in doing so. What is clear from this discussion again is that there are countervailing considerations within the separation of powers doctrine itself which require to be resolved in the concrete circumstances of a particular case.

In areas less close to the presidential, the court has also made it plain that in constitutional adjudication it is proper to recognise the important role of the executive under the constitution and not to trample unduly on the proper terrain of the executive branch of government. The court has also emphasised the need for effective government in South Africa to ensure that the transformation of our broader society is not hampered by undue weakening of the executive arm of government's ability to pursue these goals.

For example, in *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC); 1999 (2) SA 91 (CC), the court held that:

In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in the common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.⁵⁵

54 *SARFU 3*, cited above n 50 at par 242 and 243.

55 At par 41.

Similarly, the court has recognised that it is important to protect the right of the executive to formulate and implement policy.⁵⁶ In a recent decision, it reasoned as follows:

In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.⁵⁷

Perhaps the most difficult area under our Constitution for this balance to be struck is in the area of socio-economic rights. In that area, the Constitution requires that the state take ...

... reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights.

The Court has held that it will consider whether policies adopted are reasonable, and in particular, has held that policies which ignore the plight of the most vulnerable will not be reasonable.⁵⁸ This area of our jurisprudence attracts much attention from political scientists, as well as lawyers abroad. One of the reasons for this is the recognition that holding the government to account

56 See eg *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at par 46-54 and par 104.

57 *Id* at par 48.

58 See *Government of the RSA v Grootboom* 2000 (11) BCLR 1160 (CC); 2001 (1) SA 46 (CC) at par 44.

in the field of socio-economic rights, which lie at the heart of decision about allocation and policy priorities, challenges conventional views of the role of courts in a democracy.

The separation of powers tension here lies in ensuring that the rights of citizens to have their basic daily needs met is not ignored, while also recognising that courts, in particular, are institutionally unsuited to the task of make allocative budgetary decisions and designing complex social programmes.⁵⁹

(d) The proper role of judges

The last area I wish to turn to raises the issue of the proper constitutional function of judges in our democracy. In the first case to consider this matter, *De Lange v Smuts*, the court was faced with a power given to commissioners presiding in insolvency enquiries to commit to prison witnesses who refused to answer a question satisfactorily. The court held that it would be inappropriate for such a power to be exercised by a person who was not a member of the judiciary. After a consideration of a range of foreign jurisdictions in relation to this question, Ackermann J concluded as follows:

In sum, officers in the public service, who answer to higher officials in the executive branch, do not enjoy the independence of the judiciary and therefore, cannot, without danger to liberty, commit to prison witnesses who refuse to cooperate in proceedings, such as the present.⁶⁰

This judgment asserts the peculiar institutional character and function of the judiciary in our conception of the separation of powers and asserts that the power to deprive recalcitrant witnesses of their liberty should be preserved for the judiciary.

59 See the seminal piece by Fuller 1978 *Harvard LR* 353.

60 N 4 above at par 75.

On the other hand, in *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC); 2001 (1) SA 883 (CC), the court held that again the particular institutional role of the judiciary meant that there were certain public functions which it was inappropriate for judges to perform. The case concerned the Special Investigating Unit established under the *Special Investigating Units and Special Tribunals Act* 74 of 1996, which unit came to be known as the Heath Commission. The question that arose crisply in the case was whether it was appropriate for judge Heath to head that unit. The powers of the unit involved investigation and litigation on behalf of the state to recover monies lost to the state through corruption. The court concluded that:

The functions that the head of the SIU is required to perform are far removed from “the central mission of the judiciary”. They are determined by the President who formulates and can amend the allegations to be investigated. If regard is had to all the circumstances, including the intrusive quality of the investigations that are carried out by the SIU, the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the State, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, the first respondent’s position as head of the SIU is ... incompatible with his judicial office and contrary to the separation of powers required by the Constitution.⁶¹

Of particular importance to the court’s conclusion was effect on the perceived independence of the judiciary by the public that might arise when a judge performs tasks that are executive in character at the behest of the executive. The court held that it was important that the judiciary be seen to be independent because otherwise the judiciary’s ability to properly discharge its functions under the Constitution might be threatened. This reasoning, once again, asserts a vision of the separation of powers which recognises the need to protect the institutional character of each of the three arms of government in a manner which will prevent their ability to discharge their constitutional role being undermined.

61 Par 45.

In the last case which I wish to mention, the court had to consider a series of wide-ranging challenges to the legislation regulating magistrates' courts on the grounds that it fell short of protecting the independence of the judiciary as the Constitution requires.⁶² This occurred in the case of *Van Rooyen v S* 2002 (8) BCLR 810 (CC); 2002 (5) SA 246 (CC). Time does not permit a full consideration of the issues in that case. Perhaps the most important aspect of the case was its conclusion that the protection of the independence of the judiciary, crucial as it is to our doctrine of separation of powers, requires more than preventing interference with the task of judicial decision-making. As Chaskalson cj reasoned:

Judicial officers must act independently and impartially in the discharge of their duties. In addition ... the courts in which they hold office must exhibit institutional independence. This involves an independence in the relationship between the courts and the other arms of government.⁶³

Conclusion

What is clear from the jurisprudence that has so far emerged is that the doctrine of separation of powers in our Constitution contains a variety of principles which are often in tension with one another in the circumstances of particular cases. Some of these principles can be identified: first, while clearly not absolute, the doctrine of the separation of powers rests on a functional understanding of the powers and requires that each institution's character and competence to perform these powers be protected. The role of the courts under our Constitution is to protect the Constitution, and in particular individual fundamental rights. At times, in asserting this function, courts will have to

62 The legislation challenged included provisions of the *Magistrates Act* 90 of 1993, the *Magistrates' Courts Act* 32 of 1944 and the regulations for judicial officers in the lower courts, 1993 (promulgated in GG 15524 GN R361 1994; and Complaints Procedure regulations promulgated in GG 19309 GN R1240 1998).

63 Par 31.

intrude to some extent on the terrain of the legislature and the executive, as we saw in *De Lille* and in many other cases.

In doing so, however, it is clear from the jurisprudence that is emerging that court's must remain sensible to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and legislature.

The principle of separation of powers under our constitutional order requires not only the need to protect against the abuse of power, in the Montesquieuan or Madisonian sense, but also to ensure that the efficiency and institutional integrity of each arm of government. We may not yet have achieved a fully articulated doctrine of the separation of powers, but certain ground rules have been clearly set, drawing on the overall vision of the Constitution.

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