Author: DM Davis

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THE RELATIONSHIP BETWEEN COURTS AND THE OTHER ARMS OF GOVERNMENT IN PROMOTING AND PROTECTING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: WHAT ABOUT SEPARATION OF POWERS?

DM Davis*

The model of constitutional democracy which is envisaged in the 1996 text of the *Constitution of the Republic of South Africa* (the Constitution) has been described as promoting 'a thick' conception of democracy. It is concerned with the empowerment of all citizens to participate in decisions that are crucial to the outcome of their life choices. At its most basic promise, the Constitution promotes a model of participatory democracy, by creating a series of representative institutions and enabling participation in decision making, both inside and outside of these institutions. Expressed differently, the Constitution promotes both participation through regular elections and enshrines a principle of accountability in terms of which government can be held accountable for particular aspects of its policy, particularly those which fail to pass constitutional muster. That leads to the second component of the model which introduces a substantive set of guarantees to ensure participation. The idea is that various institutions of State should work to promote and to vindicate basis democratic principles which are directed to accountable control of decision making and substantive political equality between citizens.[1]

To a considerable extent, the constitutional text encapsulates this vision in a number of provisions. In particular, section 7(2) of the Constitution creates an obligation on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. As was noted by the Constitutional Court in *Glenister v President of the Republic of South Africa*:[2]

* Mr Justice Denis Davis. LLB, LLD (Hon), M. Phil (University of Cambridge). Judge of the High Court, Cape Town and Judge President of the Competition Appeal Court. Email: dennis.davis@uct.ac.za. Keynote speech delivered on 16 November 2012 at the Konrad-Adenauer Foundation and Faculty of Law (NWU, Potchefstroom Campus) 3rd Human Rights Indaba on *The Role of International Law in Understanding and Applying the Socio-economic Rights in South Africa's Bill of Rights.*

1 See in particular Brand "Judicial Deference and Democracy".

2 *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC) para 105.

> This provision extends beyond a mere negative obligation not to act in a manner that will infringe or restrict a right. Rather it entails positive duties on the State to take deliberate reasonable measures to give effect to all the fundamental rights contained in the Bill of Rights.

In their majority judgment in *Glenister*, Moseneke DCJ and Cameron J noted that implicit in section 7(2):

> is the requirement that the steps the State takes to respect, protect, promote and fulfil the constitutional obligations must be reasonable and effective.

The two justices continue:[3]

> Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes as long as they fall within the range of possible conduct that a reasonable decision maker in the circumstances may adopt.

In this case, the Court considered that the State was required to take account of its international obligations in order to curb corruption in society and hence to ensure the creation of an independent entity which would combat corruption.[4]

The principles developed in *Glenister* followed, to a considerable extent, the approach which had previously been adopted by the Constitutional Court with regard to the enforcement of social and economic rights. In *Mazibuko v City of Johannesburg*, O'Regan J said: [5]

> Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive … indeed it is desirable as a matter of democratic accountability that they should do so for it is their programs and promises that are subjected to democratic popular choice.

I have cited these important *dicta* from the Constitutional Court to emphasise that, in seeking to remain true to the twin principles that I have outlined, our Constitution envisages a dialogical conception of constitutional democracy. The three spheres of

3 *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC) para 191.
4 See *Glenister v President of the Republic of South Africa* 2011 7 BCLR 651 (CC) para 200.
5 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61.

government are constituted as distinctive entities, but they are also interdependent and interrelated, as is evident from the *dicta* cited above. As Liebenberg notes in her important text:[6]

> What is important however is that the branches of government remain engaged with each other in a manner which is open and respectful of the institutional strength and weaknesses of each other. Through this process the limits of each branch's institutional power will be continually defined and redefined as they respond to the multifarious challenges of South Africa's evolving constitutional democracy.

Conceptually, this model , which views the promotion and protection of human rights in the country as a product of a partnership, albeit somewhat adversarial, between the courts and the other arms of government, is sourced in a particular theory of constitutional politics which is both nuanced and sometimes contradictory. For the purposes of this speech, I can do no better than seek to capture these features of this model by citing Christodoulidis:[7]

> Political power must present itself as conditioned - as giving expression to the constitutional order. The highest power in the community is thus sovereign only on condition that it is not; because on condition that its actions are valid, because imputed to the constitution that establishes the conditions by which the popular will can be expressed as sovereign. Law and democracy are reconciled only via the suppression of a paradox. Need we repeat, then, against all those who proclaim the return of the political in law, that constitutional politics is compromised politics, to the same measure that legal discourse is a compromised instance of practical discourse.

The tension between democracy and constitutional law plays out in uneven ways. Let me illustrate the most obvious problem: compliance with orders of courts. I accept that in numerous cases over the two decades of democracy the legislative arm of government has fashioned policy in terms of parameters fashioned by the courts. Similarly, specific policy which has been developed by the executive has taken account of the human rights jurisprudence developed by the courts over the past 18 years.

But there are signs of an increased and thus disturbing tension. Obviously, the most prominent of these cases relates to the difficulty which the Democratic Alliance has

6 Liebenberg *Socio-Economic Rights* 70.
7 Christodoulidis 2002 *TSAR* 123-124.

encountered in ensuring compliance with an order of the Supreme Court of Appeal in *Democratic Alliance v Acting NDPP*.[8] In this case the court ordered that the Acting NDPP produce and lodge with the registrar of the court the record of the decision of 6 April 2009 to discontinue the prosecution of Mr Zuma. That order provided that the record should exclude the written representations made on behalf of the third respondent (Mr Zuma) and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof will breach any confidentiality attached to the representations ('the reduced record'). It is about this reduced record that there is now considerable controversy, in that compliance remains no more than an expectation.

There have also been numerous other decisions, particularly involving the Department of Home Affairs which have proved to be equally problematic. In *Somalia Association of SA v Minister of Home Affairs*,[9] which dealt with a decision to close a refugee office in Port Elizabeth, Mr Justice Pickering noted that:

> It is disquieting that the second respondent (DG of Home Affairs) did not see fit to consult with the standing committee before taking the decision to close the reception office (which was in Port Elizabeth and was used by refugees).

Mr Justice Pickering went on to observe:[10]

> Second respondent was required to consult with the standing committee should he be contemplating the closure of one of the reception offices with all of the negative and prejudicial consequences to vulnerable asylum seekers which would ensue therefrom.

My understanding is that the Department petitioned the Supreme Court of Appeal unsuccessfully but has continued to act regardless of this result. There had been a number of cases in which the same conduct has manifested itself and which has further required litigation without any apparent attempt by the Department to reflect upon the implications of whether its conduct complies with the highest standards of human rights. For example in *Abdi v Minister of Home Affairs*,[11] two people, who had

8 *Democratic Alliance v Acting NDPP* 2012 6 BCLR 613 (SCA).
9 *Somalia Association of SA v Minister of Home Affairs* 2012 5 SA 634 (ECP).
10 *Somalia Association of SA v Minister of Home Affairs* 2012 5 SA 634 (ECP) para 640.
11 *Abdi v Minister of Home Affairs* 2011 3 All SA 117 (SCA).

been deported from Namibia to Somalia through OR Tambo International Airport, were held in an inadmissible facility at that airport. The Minister of Home Affairs contended that, while the applicants were in this facility they were not legally in South Africa and hence South African authorities and courts held no jurisdiction over them. This argument was firmly rejected by the Supreme Court of Appeal. Bertelsmann AJA held:[12]

> The argument that a South African court has no jurisdiction over the inadmissible facility by virtue of the fiction that it does not form part of the Republic's territory is wrong.

A legal mistake by the Department is understandable, namely, that it is possible to be given incorrect advice which is then corrected by the courts. What is much more problematic is the following observation by Bertelsmann AJA, on behalf of the Supreme Court of Appeal:[13]

> It is a matter of a comment that the respondents were parties to that matter (Lawyers for Human Rights case) and the Constitutional Court rejected a similar argument that was advanced in the court below and before us.

There are numerous similar examples that should trigger a concern.[14]

As I hope I have made clear, the relationship between courts and other arms of government should be in a process of creative tension. But the emphasis should be on *the creative*. In other words, the object of the exercise is to ensure that all policy complies with the framework of our Constitution in general and the human rights guarantees in Chapter 2 in particular.

This background is not irrelevant to the specific topic of my paper. As Rosenberg[15] observes, courts are more likely to produce significant social reform when other actors offer positive incentives to induce compliance and where those crucial to the implementation of court orders are willing to so act in co-operation.

12 *Abdi v Minister of Home Affairs* 2011 3 All SA 117 (SCA) para 28.
13 *Abdi v Minister of Home Affairs* 2011 3 All SA 117 (SCA) para 21.
14 See for example *Eisenberg v Director General of Home Affairs* (Case No 10043/2011, Western Cape High Court, 27 Nov 2012).
15 Rosenberg *Hollow Hope*.

With this observation, I turn to deal with the relationship between courts and the other arms of state within the specific area of provisioning and enforcement of socio and economic rights. Here the problem of creative tension is inherent in the distributional consequences of decisions which both lay down the scope of and enforce a socio economic constitutional provision. From the commencement of the court's engagement with socio and economic rights, there was a concern about the definition of the role and scope of courts in the development and enforcement of social and economic rights.

Thus, in the second socio-economic rights case heard by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*,[16] the Court tended to regard its role in the enforcement of socio economic rights as a secondary to the political process. To be sure, it utilised the administrative law concept of reasonableness to assess measures which a government agency had taken to give effect to the socio economic rights enshrined in the Constitution. Further, it buttressed the concept of reasonableness with a substantive principle, namely that those who are most desperately poor and in a situation of particular crisis should be attended to immediately by the relevant State agency; in the context of *Grootboom*, it meant that the government was required to provide the litigants who were very poor people with temporary shelter, pending the provision of permanent housing which, at a later date would fully ensure the vindication of their right of access to adequate housing as contained in section 26 of the Constitution.

That principle has however been deployed with greater caution in subsequent cases. Accordingly, in *Mazibuko* the court set out a very clear definition of its role:[17]

> When challenged as to its policies relating to socio and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: Its investigation and research, the alternatives considered, and the reasons why the options underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of the government. Simply put, through the institution of the courts, government can be called upon to

16 *Government of the Republic of South Africa v Grootboom* 2000 1 SA 46 (CC).
17 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 160-161.

> account as citizens for its decision. This understanding of socio and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.

Much criticism has been lodged against this approach, particularly for the failure of the Court to define and evaluate the interests at stake in the case; in other words, the evaluation of the interests of many households with insufficient water to meet their basic needs and who considered that the provision of their basic needs, as enshrined in the Constitution, had been frustrated by the policy of the City, as weighed up against the claim of the City that it had more pressing policy priorities, particularly the provision of basic water supply to informal settlements. For this reason, it has been argued that the Court in *Mazibuko* did not apply the *Grootboom* standard of substantive reasonableness satisfactorily so as to test the City's policy against a meaningful and concrete standard of review. In other words, critics of the Court have suggested that the Court should enquire as to whether the failure of the state agency, alternatively its refusal to address a particular state of affairs which flowed from a particular policy or interpretation thereof is reasonable in the circumstances. In this way, the Court would step into the shoes of the poor community faced with the particular problem which has given rise to the litigation, thereby placing the social and economic context of the litigants at the forefront of its analysis.[18]

To these criticisms, the response has been that courts have limited scope in this area, particularly because of the restraining influence of the doctrine of separation of powers. It is a point which has been made consistently by prominent political leaders over the last couple of years. To take but one example; President Zuma told Parliament on 15 March 2012 the following in answer to a question with regard to the role of courts:

> The three arms of government have very clear distinct functions. Those must be respected. The function of this Parliament is to legislate and conduct oversight… that is its job. Whilst it is the arm that makes the laws, it does not interpret the laws. That is the duty of the judiciary that must check whether this arm has taken all the necessary constitutional understanding in making the law to ensure that it is not infringing on the Constitution. Is the law constitution?

18 See in particular Williams 2010 *CCR* 141.

> That is the job of the judiciary. The executive must run the country; that is the job of the judiciary. The executive must run the country; that is its duty. In the process of all of this, these different arms respect one another. They work together, they must coordinate this, because they belong to one and the same state.

In turn, this line of argument has been used to suggest that the judiciary, because it does not 'run the country', should not intrude into core areas of social and economic policy. This observation is then invoked as a justification for an approach of extreme deference when deciding upon all aspects of government policy. From this vantage point, deference becomes the corollary to separation of powers

Fortunately, the Constitutional Court has examined the doctrine of separation of powers over some time, thereby providing far more subtle guidance to this potential problem. In particular, the Court has considered the argument that the doctrine of separation of powers will be undermined, if executive decisions are all too easily set aside and the judiciary then crosses a boundary into the executive's sphere. In *Justice Alliance of South Africa v President of RSA*,[19] the Constitutional Court emphasised the importance of the doctrine of separation of powers in ensuring that courts are able to discharge their constitutional duty with regard to ensuing the legitimate exercise of public power. It cited an earlier decision in *South African Association of Personal Injury Lawyers v Heath:*[20]

> The separation required by the Constitution between the legislature and executive on the one hand and the courts on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issue involving the division of powers between the various spheres of government, and legality of legislative and executive action measures against the Bill of Rights and other provisions of the Constitution will be undermined.

The court has consistently noted that the doctrine of separation of powers does not mean that a court is impotent when faced with a constitutional challenge to a decision of the executive or legislation from the legislature. Most recently in *Democratic Alliance v The President of the Republic of South Africa*, Yacoob ADCJ

19 *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 10 BCLR 1017 (CC).

20 *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 803 (CC) para 26.

confirmed the rule that executive decisions may be set aside only if they are irrational. He said that the rule that:[21]

> they are not ordinarily to be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of separation of powers is respected and given full effect.

He then went on to explain:[22]

> It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved then otherwise. In other words, the question whether the means adopted are rationally related to the ends and executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that the decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is *rational*. In these circumstances the principle of separation of powers is not of particular importance in this case. Either the decision is rational or it is not.

What becomes important in assessing the task of courts when faced with the invocation of the doctrine of separation of powers appears to be less an emphasis about the doctrine and more about how a court works within the confines of the doctrine to promote a better dialogue between the legislature, executive and the courts. In turn the task should be directed to improve the principle of democratic accountability of public institutions and their commitment to constitutional rights.

This particular submission is luminously highlighted in the instructive article of Williams referred to earlier, in which she compares the approach of the German and South African Constitutional Courts, the latter in *Mazibuko* and the former in a case known as *Hartz IV*. This case concerned a review of social legislation which was introduced in Germany. The court was required to evaluate social legislation which introduced new social benefits. In its judgment the German Constitutional Court, engaged in a detailed examination of the evidence regarding the legislature's

21 *Democratic Alliance v President of South Africa* CCT 122/11, [2012] ZACC 24, 5 Oct 2012 para 41.

22 *Democratic Alliance v President of South Africa* CCT 122/11, [2012] ZACC 24, 5 Oct 2012 para 44. Own emphasis.

methodology in determining various social benefits, reviewed the calculations thereof and assessed whether both the initial calculations and subsequent changes were empirically justified and therefore plausible. Without an express constitutional provision of socio and economic rights in the governing constitutional text, the court worked with the fundamental right to human dignity in Article 1(1) of the German Constitution and found that the mandate of the court was to test whether a transparent calculation of a minimum level of subsistence had been provided with the new benefits and whether these new benefits could be justified in terms of the constitutional principle of dignity as the Court articulated it.

A comparison of the decisions in *Mazibuko* and *Hartz IV* reveals that, in both cases, courts were faced with the invocation of the doctrine of separation of powers. But the doctrine is not unambiguous and does not come to the courts in a neatly creased and folded manner. In both cases, it could be argued that the court adopted some principle of deference or, alternatively, respect for the institutional competence of the other two arms of state. But even where there is recognition of the primacy of the legislature in making a particular determination, very different judicial approaches can be formulated to test whether the legislature has passed legislation or the executive implemented policy which is constitutionally compliant. In other words, the concept of reasonableness, which initially in South Africa was coupled with a substantive requirement of the primacy of treatment for the poorest of the poor, is sufficiently flexible and the doctrine of separation of powers manifestly so ambiguous and indeterminate, that courts, even if fully committed to the doctrine of separation of powers, can adopt entirely different approaches to cases involving social and economic rights. That is evident in the far more intense judicial scrutiny of the legislature's calculations in *Hartz IV* than was the case with the calculations upon which the City of Johannesburg's water policy was based in *Mazibuko*.[23]

23 I am indebted for these insights to the article by Professor Williams as cited above.

Conclusion

When courts police constitutional boundaries in which the executive or legislature operates, they must do so not in order to undermine the work of the other arms of government but rather because the Constitution is supreme and all policy formulation and the execution thereof must be constitutionally compliant. When the doctrine of separation of powers is invoked as an argument that 'policy is not for the judges', this doctrine itself has no unambiguous content that prevents the judicial function in enforcing social and economic rights.

I accept readily, as is evident from my brief discussion of non compliance with court orders, that the area of socio-economic rights and judicial interference into policy which is challenged in court is fraught with difficulty. However my argument has been, firstly that the doctrine of separation of powers does not connote a self evident meaning which automatically constrains the operation of courts in their contribution to the implementation of the thick model of democracy as promoted by our text. Further, as the Court in the *Simelane* case illustrated, the doctrine does not even prevent a court from interrogating a decision of the President for lack of rationality. How much more so, it must follow, may a court probe the reasonableness of social and economic rights provisioning, such test being grounded in the lived context faced by desperately poor litigants.

In the final analysis, only if all three arms of government work together can the ultimate product be the translation of the constitutional dreams set out in the majestic text of the 1996 Constitution into a practical reality for 51 million South Africans.

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List of abbreviations

CCR	Constitutional Court Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg