

SEPARATION OF POWERS

1. **Thank you** for inviting me here today. And I am surprised to find myself thanking you for choosing the topic on which you want me to speak. It has made me think quite a lot and I have come to see some recent political and legal developments in a new light.

2. **My views** are informed, as are all of ours, by my life experiences. Perhaps our time lines are much the same.
 - a. I started off as an interested but uninformed citizen; I was then a student; moved on to being a worker in a Black Sash advice office;
 - b. I then became an attorney in Johannesburg for some 20 years; a judge for another twenty years.
 - c. I am now retired but work as a member of commissions and enquiries and do quite a lot of arbitrations.
 - d. I remain a very interested citizen.

3. **So I learnt about separation of powers** over this time line.
 - a. First as a student I learnt about Dicey and constitutionalism and the three arms of government – the legislature, the executive and the judiciary.
 - b. Then in the practice of law I began to believe that the judiciary was not independent – it was staffed by

Apartheid apologists and apparatchniks who believed only in commercial law.

- c. Then as a judge I saw first hand a very different idea – a commitment to the Constitution and a firm belief in the independence of the judiciary.
- d. I see that now from my new viewpoint as a citizen and arbitrator. But I also see the fightback from all other arms of government and from the citizenry.

4. I have seven points which I would briefly like to make.

- a. I have some knowledge of political history and perhaps some knowledge of law and legal practice and a great and abiding interest in the relationship between law and society.
- b. But I have been greatly helped in looking at recent judicial engagement by my current clerk at the High Court – one of the bright young lawyers who can do research, tell his judge where she is wrong on the law and how she cannot write, manages a busy court and liases with the professions and bureaurocracy – Desmond Rapanyane – whom I expect I will meet as an up and coming young attorney or advocate very .

5. First, those of us who are old enough were taught about the Constitution of England – which was really the SA constitution insofar as it affected the three branches of government.

- a. The legislature which is parliament and which represents the people and makes laws and attends to the needs of the people.
 - b. The executive which implements the management of government and which carries out the will of the people with an eye on parliament and the law at all times.
 - c. And of course the judiciary which followed statutes and the common law with a rather closed eye out for principles of natural justice.
6. **Second, there was an event** when some of us here were very young and when others of us were not even born. You will not find much about it in the textbooks from which were taught law. But it is an important part of our political history.
- a. The crisis of the packing of appeal courts.
 - b. The apartheid regime wanted to remove coloured people from the voters roll;
 - c. the courts held that the legislation to do so was passed without regard for the procedures for changing entrenched provisions regarding voting rights in the 1910 Union constitution.
 - d. the Strijdom government decided to expand the membership fo the appeal court to eleven and to pack the court with its appointees so that this court could not find against the government;

- e. the Senate, then the upper house was enlarged, to give the national party a greater majority.
 - f. Then a joint sitting of parliament was convened – legislation was passed with this now manufactured majority removing the vote from coloured people;
 - g. when coloured litigants went to went to the appeal court they found this new and packed court all ready and waiting.
 - h. all but one of the apartheid judges upheld this façade. The lone dissent was that of Oliver Denys Schreiner who did not become chief justice.
 - i. The man who had advised the government on its plot - LC Steyn – was appointed chief justice.
7. So the judiciary was captured. The independence of the judiciary was publicly and unashamedly over. There was no pretense.
8. And so for the next forty years – the executive branch of government controlled the judiciary. There may have looked like separation of powers but the judiciary was a junior branch of government which did not have the power to overturn legislation as it was passed by the legislature to entrench apartheid horrors.
- 9. Third, South Africa claimed and created a written Constitution.**

- a. Section 41 of our Constitution proclaims that all spheres of government shall exercise their powers and perform their functions in a manner that does not encroach on the integrity of government in another sphere.
 - b. Section 42 onwards provides for the sphere of the legislature,
 - c. sections 83 on provides for executive authority,
 - d. while section 165 provides for judicial authority and in section 165 (2) specifically states “ the courts are independent and subject only to the Constitution and the law””.
10. So by 1994 and 1996 we all were happy and triumphant that the judiciary was independent in a functioning democracy where the other branches of government were elected by the people and were of the people and worked for the people.
 11. Then President of the Concourt, Arthur Chaskalson, wrote in the judgement concerning Judge Heath being the head of the special investigations unit:

Under our constitution the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the Bill of Rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to perform other executive functions which are not appropriate to the central mission of the judiciary. Were this to happen the public may well come to see the judiciary as being functionally

associated with the executive and consequently unable to control the executives power with the detachment and independence required by the Constitution”.

12. Fourth. But this was not to be.

- a. The legislature turned out to be a damp squib.
 - i. Members of parliament were not elected by the people and were not answerable to their constituencies. No. They were chosen by the party leaders, they were answerable to the powers that be in the party – not the people, they relied for their jobs and salaries on the party bosses.
 - ii. And so parliament sat on its thumbs. Parliament did not carry out oversight of the executive. Parliament failed to take steps when the executive was inefficient or corrupt or careless or heedless of the needs of either the people of the Constitution.
- b. And the executive, unchecked by the legislative, went on its own merry way of the gravy train.
 - i. Long cavalcades of blue light cars ferried wives and girlfriends to cocktail parties,
 - ii. members of the executive from the President downwards became millionaires without needing their official salaries,
 - iii. Contact and contracts impoverished mining communities, people needing homes in the

townships, everyone needing electricity in their businesses and homes and so on.

13. **I would suggest democracy has failed in this country.**
 - a. The people get to vote and then they are forgotten. Their have no representation in Parliament – no one to actually take up real life and death issues. So the people take to the streets.
 - b. The executive does its own thing. Sometimes we know it is hosting wedding arrivals at a military airbase. Other times we read that it is buying submarines and corvettes and planes and helicopters to protect us from attack from Lesotho. We hear that Mr Putin is going to build a nuclear power station which is secret. We learn of swimming pools being named fire pools from taxpayers money.
14. This fifth point about the failure the legislative and executive branches leads me to my to the judiciary. Which is my sixth point.
15. **I would like to suggest that the judiciary has not failed the Constitution.** The judiciary has been there whenever it has been approached by citizens, civil society, those in need or abandoned by their representatives, ignored or abused by their executive. The judiciary I do believe has stepped in and honoured its role as a third arm of government.
16. **BUT** I believe that the judiciary and its adherence to the Constitution has meant that judges have been obliged to step in and do the work which Parliament and the Executive were

meant to do. Judges have had to take the place of responsive and effective and accountable parliamentarians. Judges have had to step in and do the work which should have been done by trained and efficient and dedicated civil servants and members of the executive.

17. And I do not think this is democracy at work. Judges are not elected. Judges are not of the people -we are middle class, educated, salaried individuals. Judges are not versed in political programmes or visions. Judges are neither elected nor trained nor entitled to run the country.
18. Yet, this is have been intervening where Parliament and the Executive have been found significantly wanting.
19. This was not always the case.
20. The courts are mindful of the dangers of interfering in what is not our business. **In Minister of Home Affairs and Fourie 2006** - majority judgment found that their had been inequity in the manner in which gay persons were treated but said it would best serve those equality claims by respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter. Parliament should be given the opportunity to decide how best the equality rights at issue could be achieved".
21. So in 2006 the Concourt was mindful that the courts should not trespass on the responsibilities of Parliament. The separation of powers was respected.

22. But within ten years – look at what has happened. Look at how democracy has ended up relying on the courts and not the representatives of the people.

23. Let us quickly look at some of the cases which we all remember:...

a. **EFF v the Speaker of National Assembly and President Jacob Zuma (Nkandla matter) 2016** - court dealt with the powers of the Public Protector, examined the conduct of the President, made an order that the President had unlawfully failed to comply with the remedial action directed by the Public Protector, ordered that National Treasury to determine the reasonable costs of those measures implemented by the Dept of Public Works at the Presidents Nkandla homestead – visitors centre, cattle kraal, chicken run, amphitheatre and swimming pool, determine those portion of the costs to be paid by the President and to report back to the court within 60 days of the order, the President to personally pay within 45 days, the President to reprimand the Ministers involved, set aside the resolution passed by the National Assembly absolving the president from compliance with the report of the Public Protector,

b. **Black Sash Trust v Minister of Social Development – (2017)** - the contract for providing payment services by Cash Paymaster had been ruled invalid - the Social Security Agency was given the opportunity to award a new tender – it did not do so - so the courts had to step in. The court found that the Minister and SASSA had disregarded the courts order, placed the countrys social

assistance programme in jeopardy, the court had to extend the existing contract and ultimately appointed an oversight body to sort out the mess.

c. **Public Protector v Reserve Bank (2019)** - majority found that the Public Protector had acted in bad faith and she was not honest about her engagements during her investigation – in fact she had put forward “a number of falsehoods”.

d. **Corruption Watch v Arms Procurement Commission (2019)** - the Commission failed to conduct the task assigned to it .

24. So the courts, in the past few years, have had to do the work of Parliament and the Executive. This is not healthy for a democracy as I have explained.

25. And it may be feared that the courts are now seen as a favourite shortcut for political parties and civil society to resolve what are often intensely political differences. So we have commissions of enquiry into SARS, state capture, disciplinary enquiries and more. Political battles are fought in the courts and not in Parliament.

26. And I fear the result is my seventh point.

27. **My seventh point is that we now see the response to the judiciary** taking an active role in guarding the Constitution when the legislative and the executive have failed to do their jobs.

28. The judiciary is criticized. There is nothing wrong with this. We are all subject to scrutiny. It is why we write judgments so that they can be read and analysed and discussed and debated. Where wrong they are taken on appeal. And again and again.
29. To its credit the executive arm of government has not disobeyed or refused to follow court orders. We all remember Mr Mandela, when President, going into the witness box to give evidence on the SARFU commission. And the current president is approaching the courts to stay the requirement that he perform certain actions as a result of findings made by the public protector.
30. But some members of the media, some disgruntled persons, some politicians, some parliamentarians and some members of the executive seem to be participating in a campaign to discredit and demonise the judiciary.
31. I repeat criticism and debate is justified and it is what we need in a democracy. But an apparently orchestrated campaign of vilification is very worrying. Perhaps it is part of the so-called fightback against recent political developments.
32. So we see and read:
 - a. Public Protector on Wednesday 21 August – SAFM interview – questions need to be asked about the independence of the judiciary.
 - b. Julius Malema said on womens day “education must be free of charge so a girl child can be educated and become a confident judge tomorrow so we can get rid of incompetent judges who are threatened by politicians

who appear before them” and he said some judges were “traumatized old people”

- c. Chatter on social media and interview with mr Raymond chalom to the effect that judges were paid or bought or part of an untransformed system that hasn't changed since apartheid.

33. Whatever it is – it is a sign that the judiciary has been doing its job – protecting the law and the Constitution. If we do that – there will always be those who are deeply unhappy and who will do their best to discredit us. We must expect that tension between legislature and executive and the judiciary.

34. But when it becomes an active campaign to downgrade the judiciary our democracy has problems.

- a. When you have reduced salaries and no increases and appalling working conditions – then you don't get experienced legal practitioners wanting to be judges.
- b. When you have a workload that impedes scholarly, thoughtful development of the law – then you don't get a fully functioning third arm of government.
- c. When you don't have leaders standing up for individual judges and speaking to unjustified criticism and vilification – then you have vulnerable individual judges who have neither trade union nor the carapace of institutional protection.

35. Criticism of judgments and rulings is expected. We must have a judiciary open to scrutiny. We must expect debate and engagement with the law. But judges speak through their judgments. We do not defend ourselves or our work in the public arena.
36. When judges personally are criticized or vilified or attacked. When the institution as a whole is challenged for being against the democratic project because it has held Parliament or the Executive and its officials to account – then we are in a dangerous place.
37. It is not only the socialists and democrats and homosexuals and gypsies and jews of Germany in the 1930's who have seen what a failure of judicial authority can mean. It is us as South Africans. We have seen in the past twenty years why this democracy needs a strong, independent, well resourced, active, intelligent and outspoken judiciary.
38. So a democracy needs a judiciary. But the judiciary should have one role only. The legislature should do its job. The executive should do its job. The judiciary should look to facts and disputes and the law and the Constitution and make decisions. The judiciary should not be seen as the sole bulwark against the loss of democracy.

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