



RESPONSE

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A Slap in the Face of the Constitution

The framers of the South African Constitution had the foresight to include an innovative set of institutions that effectively add a fourth arm to the usual three-way division of government into Legislature, Executive and Judiciary. The modern state reaches into almost all areas of life; and modern citizens expect it to be responsive to a wide variety of their rights and needs. The institutions in question are mostly intended to facilitate that responsiveness (the Commission for Gender Equality, the Commission for Language, Culture and Religious Communities) and/or to guard against over-reaching by the state (the Public Protector, the Auditor General).

Most of these so-called Chapter 9 institutions (C9s¹) carry out their duties in the space between the Executive and the Judiciary. They are independent of the former (reporting and accounting financially to Parliament) but subject to the jurisdiction of the latter. Thus, for example, the government cannot instruct the Independent Electoral Commission how it should run an election; but the High Court can review and set aside an IEC decision. Likewise, Parliament can demand an account from the Human Rights Commission on how it has spent its budget, but neither it nor a government department can prevent the HRC from investigating a human rights abuse.

The great strength of the separation of powers is that it creates vital checks and balances between the arms of government. Our C9s fit comfortably into this scheme, providing a useful additional set of checks (via the intended political independence of their activities) and a further assurance of balance between state power and citizen's rights.

The great weakness of the separation of powers, however, is that only one arm of government – the Executive – has actual muscle. Neither Parliament nor the Judiciary control the ultimate weapons of state power: the security forces, including the police and the intelligence service. If a Minister simply refuses to account to Parliament, or a government department continually ignores court orders, there is not much that can be done about it. In this sense, the authority of Parliament and the writ of the Judiciary depend very largely for their efficacy on the goodwill and acquiescence of the executive. To put it another way, for the separation of powers to work, mutual respect is required between the three – in our case, four – arms of government.

We have seen recently, in the Omar al-Bashir incident, and in various verbal attacks on the judiciary by senior government figures, clear indications that the respect due by the executive arm to the judicial arm is lacking. In an unusually outspoken manner, Chief Justice Mogoeng has himself drawn

¹ They are formally termed 'State Institutions Supporting Constitutional Democracy', and they are dealt with in Chapter 9 of the Constitution.

attention to this, and has requested a meeting – itself unprecedented in our history – with the President in order to address the problem.

Yesterday, by voting to accept the police minister’s report on Nkandla, Parliament signalled its disrespect for the Public Protector by effectively and, from a legal point of view, incompetently, overruling her findings regarding President Zuma’s financial liabilities in the matter. That everyone knew that this would happen – the *ad hoc* committee dealing with the matter did not even afford Adv Madonsela the courtesy of an opportunity to explain and defend her findings to it – does not mitigate the damage that this has done to our constitutional scheme.

Executives all over the world try to extend the boundaries of their power; it is in their nature to do so. In the best examples of democracies, Members of Parliament, conscious of their role as public representatives, push back against this, and thereby maintain the proper balance. When, on the contrary, MPs align themselves with abuses of executive power and assist in encouraging such dangerous tendencies, the balance is lost; and once lost, it is very difficult to restore it.

South Africa’s delicate four-way separation of powers is under serious threat. The contempt shown recently to the courts, and now to the Public Protector, must be regarded not just as an attack on these institutions, but as an assault on a key element of our constitutional framework.

Mike Pothier
Research Co-ordinator