

Evaluating the Commitment of South Africa to the Principles of Separation of Powers



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1 Introduction

Historically, the concentration of unchecked power in the hands of a single individual or group of people has mostly resulted in suppression and oppression of other peoples' rights. In constitutional democracies, the notion of division of powers is employed to deter the misuse of power within and among the arms of government and to ensure that there are checks and balancing of powers. The concept further ensures that everyone has equal access to civil liberties. Thus, separation of powers is a fundamental philosophy that stimulates democracy in both consolidated and emerging democracies such as South Africa. Separation of powers coupled with checks and balances is vital in democracies since they prevent the arms of governments from manipulating their constitutional authority, thereby curbing any dictatorial tendencies (Klug, 2019).

The notion of “separation of power” has multiple dimensions, and there are extensive and wide-ranging academic studies done on the subject matter concerning the concepts, theories, methods, and practices embedded in the idea (Labuschagne, 2004; Sang, 2013; Klug, 2019). Thus, much has been said about the assumptions underpinning the concept, and this chapter took a look at South Africa and the country's commitment to the principles. While the classical dimension tends to focus on safeguarding the citizenry against the tyranny of the state (Bylund & Packard, 2021), the contemporary notion is entrenched in promoting and ensuring good governance, accountability, transparency, and rule of law (Khare, 2017; Munzhedzi, 2017). Nonetheless, both tend to emphasize the same anti-authoritarianism

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predispositions which seek to prevent unlimited administrative, legislative, and judicial powers in a single individual or institution of the state. Thus, separation of power in a more general sense is the power partition of the three arms of government (Kalu, 2018).

There are varied connotations assigned to the “power” in the “separation of power,” which is a link to the functional division between the arms of government in a constitutional state despite the ambiguities underpinning the partitioning. Separation of power is a requisite condition for rule of law “*Rechtsstaat*” or “*Etat de Droit*” in a thriving constitutional democracy such as South Africa (Khare, 2017; Rehman & Khan, 2021). Besides, the present governance structure in South Africa and the constitutional guarantee to the principle of division of powers are well-suited for this type of inquiry. It will be interesting to know the extent to which each organ of government has encouraged and facilitated intergovernmental relations and provided suitable mechanisms and procedures for resolving disputes at all levels and working to ensure that all have equal rights. The next sections examined the extent to which the principles have been upheld within the governance mechanisms to ensure the independence of the judiciary and foster parliament autonomy and good governance in South Africa. The key questions that informed the analysis are as follow:

1. To what extent has the 1996 Constitution guaranteed a functional division between the branches of government?
2. To what degree is the independence of the legislature effective?
3. To what extent is the judiciary independent?

2 Emerging Insights on Constitutional Democracy and Separation of Power

South Africa inherited the country’s third constitution (the 1983 Constitution) post-apartheid and the quest to transition into a constitutional democracy ushered in the negotiation between 1994 and 1996 for a new constitution (The Constitution of the Republic of South Africa, 1996) which gave the country the first constitutional democracy. The Constitution of RSA 108 of 1996 was promulgated on February 4, 1996, which provided for a three-tier system of government-national, provincial, and local levels. It further created a clear distinction between the functions of the legislature, executive, and judicial branches of government. The Constitution devoted three chapters to the three organs of government with several clauses which further provide a clear division between the state institutions and other auxiliary agencies in the administration of the country. Besides, the concept of separation of powers is rooted in the assumption that no individual, group, or institution should become powerful to prevent abuse of power and safeguard the freedom of citizens.

The country has made a great stride in championing the letter and spirit of the constitution by upholding rule of law with great emphasis on judicial independence

and effective legislature. A long-lasting tale is that political power in the hands of a single person or a few individuals has the potential to suppress those with limited power, authority, and voice (Devenish, 2003; Mojapelo, 2013; Masinde, 2017). Thus, placing political limitations or checks and balances between and among the three organs of government continues to be a crucial practice in consolidated and emerging democracies such as South Africa. Besides, the principle of separation of power is entrenched in rule of law which is one of the cardinal tenets of constitutional democracies (Khare, 2017; Aung, 2021; Rehman & Khan, 2021). The 1996 constitution devoted keen chapters to the arms of government with specific articles that clearly state the functions and composition of the three branches of government. Section 42 of the constitution delineated the composition of the South African parliament to consist of a National Assembly (NA) and a National Council of Provinces (NCOP). Both perform their legislative roles under the 1996 Constitution of the Republic of South Africa.

Besides, the constitution also gives credence to the executive president as the head of state and leader of the national executive and further sheds light on the powers and the authority of the president. Section 85 stipulated that the authority of the executive is vested in the hands of the president. Further, the constitution granted judicial authority to the courts which consist of the constitutional court, supreme court of appeal, high courts, magistrates' courts, and other courts established by an act of parliament as stated in section 165. The subsections of section 85 of the constitution further attested to the independence of the judiciary and granted the autonomy and power the courts wield and the need for other organs of state to guard the sovereignty of the judiciary as subsection (4) states that "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."

Consequently, the independence of the judiciary is not in doubt as it is explicitly stipulated in the 1996 constitution. Figure 1 depicts the three arms of government as stated by the 1996 Constitution and with their core mandates. While these state organs are constitutionally separated, however, in practice their administrative functions tend to interlink with one another. Nonetheless, the principle is rooted in the strict partition of the functions of the arms of government (Devenish, 2003; Sang, 2013; Masinde, 2017; Pejić, 2019; Aung, 2021). Their responsibilities are allotted in such a way that each of them can check the others through another principle, called "check and balance" (Munzhedzi, 2017, 2021; Sang, 2013).

In South Africa, having conquered the apartheid regime, a new constitution (1996 Constitution) was negotiated which gave the country a constitutional democracy tied to the principle of separation of power. Besides, the constitution devoted chapters four, five, and eight to the three organs of government, the legislature (parliament), executive (president), and courts and administration of justice (judiciary) (see Fig. 1) to prevent individual, groups of people, or a single institution to becoming so powerful in the functional, structural, and procedural running of the country. Since then, the country has made significant strides in defending the letter and spirit of the constitution by upholding the bill of rights, rule of law, and supremacy of the

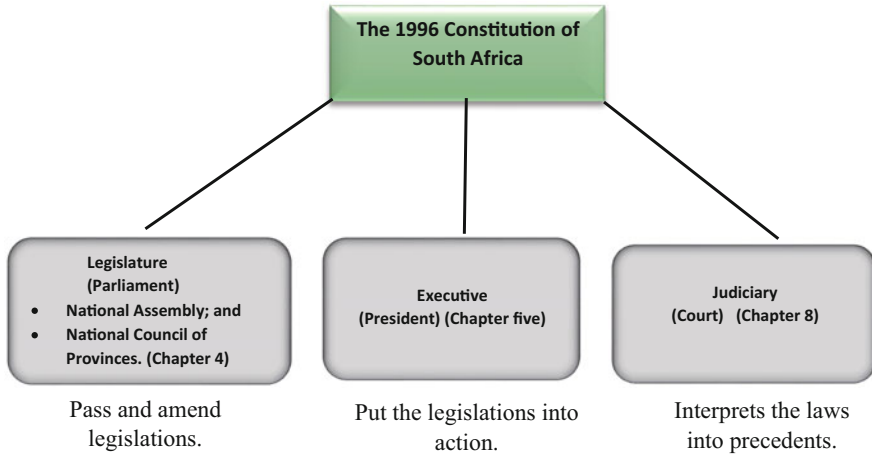


Fig. 1 The South African Constitution and three arms of government. Source: Adapted from the Republic of South Africa Constitution, 1996

constitution coupled with a functioning executive, independent judiciary, and effective parliament (Labuschagne, 2004).

The concept of separation of powers as entrenched in the 1996 Constitution has proved to be an effective mechanism for transparency, good governance, rule of law, and liberty of the people (Devenish, 2003; Mojapelo, 2013; Vilakazi & Adetiba, 2020). Besides, the delegation of powers to state institutions and other statutory bodies such as the Judicial Service Commission (JSC) is in tune with the idea of power distribution between and among the three branches of government to prevent unnecessary abuse of power and promote accountability (Devenish, 2003; Mubangizi & Siyo, 2015; Masinde, 2017; Kalu, 2018; Pejić, 2019). The independence of the judiciary in matters of political, social, and economic adjudication is not in doubt judging from recent judicial rulings in South Africa. Although the previous African Peer Review Mechanism (APRM) country reports, 2008, 2009, and 2013, touched on several issues regarding democracy and political governance in South Africa, separation of powers was not sufficiently scrutinized.

3 Conceptualization of the Principle of Separation of Power and Check and Balance

3.1 Separation of Power

The notion of separation of power is a prerequisite for every constitutional democracy. The narrative is that countries that adhere to the principle of separation of power tend to protect and safeguard the rights, liberties, and freedoms of people. The

freedom and liberty of the citizenry are entrenched in the constitution, and the courts are guaranteed their independence through the constitution to protect them. Thus, the doctrine by its operation is rooted in the assumption that individual rights are better protected when the state functions through three arms with each serving as a check on the other to prevent dictatorship, tyranny, oppression, and autocratic tendencies in the state. This could lead to an efficient political-administrative system where transparency, accountability, and citizen participation are the cornerstones of the state.

The norm underpinning the principle has long been part of ancient philosophies. Socrates and Plato highlighted the essence of the concept in their writings although the terminology was not apparent. Plato perceived the state as a social institution that operated within communal patterns divided into three: the Guardians (philosopher-king), the auxiliaries (soldier) and commoners (artisans, farmers etc) where the philosopher-king rules the city; the auxiliaries guard the city; and the farmers, artisans inter alia are the producers (Bertrand, 1981: 125). While the doctrine was fairly uttered during the Socratic and Platonic eras, but the nomenclature was keenly articulated by a French Enlightenment political philosopher called Baron De Montesquieu. Montesquieu argued that the powers vested in every state should be partitioned into three with distinct administrative organs operating separately without one overriding the functions and duties of the other.

Montesquieu elaborated on the significance of the concept in constitutional systems. To him, this term describes the division of political power into the executive, the legislative, and the judiciary. Montesquieu's philosophy was based on the British constitutional system where the philosopher opined that there should be a clear separation of power among the monarch, parliament, and the courts of law. The core assumption underpinning the notion was the distribution of political powers within and among the three state institutions (executive, judiciary, and legislature) to avoid coercion, oppression, and suppression by the state and to ensure political freedom and liberty. Nonetheless, the present operation between these three arms of government permits some level of cooperation and fusion of powers which contradicts the core value of the doctrine as enunciated by Montesquieu.

Conventionally, by this doctrine, the legislature is only mandated with the responsibility to make laws without any interference, the executive implements and enforces the laws enacted by the legislature in the state, while the judiciary has the exclusive reserve to interpret the laws and punish offenders in the state. However, in presidential systems of government, there is an apparent dominance of the executive arm over the legislature and judiciary, and this has the potential for executive tyranny and authoritarianism (Bylund & Packard, 2021). Thus, strict adherence to the principle of separation of power guarantees and safeguards the rights, liberty, and freedom of individuals in the state. The freedom and liberty of individuals are safely protected since the constitution has these entrenched rights and the courts are independent to protect them.

3.2 *Check and Balance*

The principle of checks and balances is fundamental in tripartite governments, such as that of South Africa, where the state powers are separated among the three branches of government: legislature, executive, and judiciary. In constitutional governments, the doctrine of separation of power is tied to the principle of “check and balances” which allows each branch of the government to serve as a “check” on the other to prevent one from becoming too powerful. James Madison in the *Federalist Papers* opined that “If men were angels, no government would be necessary,” and thus, argued for the need to be checks and balances such that those who are the ‘Guardians’ as perceived by Montesquieu governed the auxiliaries and producers but the Guardians must have a system in place to control itself. Thus, most constitutional governments including South Africa have several checks and balances embedded into the constitution. The branches of government are enjoined to function per the constitutional provisions outlined for the partition.

Conventionally, the legislature is tasked to enact laws and control the purse of the executive, the executive implements and enforces the law and formulates other national policies to be implemented under the law, and the judiciary interprets the law and administers justice to ensure that the people’s rights, freedom, and liberty are protected (Labuschagne, 2004). However, the principle of checks and balances goes beyond the conventional understanding of the concept. While the boundaries may seem watertight in theory, they are porous in practice (Labuschagne, 2004; Bylund & Packard, 2021). The purpose of the principle is to diffuse any unduly concentrated power in one branch to prevent arbitrary government (Cranenburgh, 2009; Khare, 2017) and promote good governance, accountability, and transparency (Persson et al., 1997; Cranenburgh, 2009; Vyas-Doorgapersad & Aktan, 2017).

The contemporary connotations of both concepts are rooted in values such as transparency, accountability, and liberty of citizens in the execution of the laws enacted by the state. Checks and balances are entrenched in the constitution and demonstrated by the arms of government in the performance of their duties to ensure good governance. Moreover, the parliament has oversight responsibilities over the executive and judiciary despite some power limitations either by procedural or substantive laws (National Treasury Legislative Oversight through Annual Reports, 2005).

4 Separation of Powers and Checks and Balances in Action

4.1 *Good Governance*

The principle of separation of power and checks and balances has explicitly impetus for governance in democratic countries. These principles are core in democracies since they encourage state institutions to produce results to the satisfaction of the

society by utilizing the public resources entrusted to them by the people. The proponents of both principles have confidence in a governance system that shares power between the three branches of government—legislative, executive, and judicial with in-built checks and controls on their powers. Besides, the concept of good governance in the context of separation of powers also covers the adherence to other ideas such as the rule of law, citizens’ participation, transparency, government responsiveness, consensus building, equity and inclusivity, effectiveness and efficiency and accountability (UNESCAP, 2021, p. 3).

Moreover, both concepts in part hold that government institutions, agencies, and departments who are entrusted with public affairs must manage that in genuineness to ensure that the public resources are utilized efficiently, the rights and liberties of the citizens are protected, and the rule of law is upheld at all time (Cranenburgh, 2009; Khare, 2017). Despite the traditional rationale embedded in both principles in curbing the threat of arbitrary government, practically, the 1996 constitution of South Africa has several entrenched clauses as well as vertical and horizontal institutions and agencies inter alia with authorities to ensure strict adherence to the tenets of the principle of separation of power and checks and balances. The term limits for the executive, the veto powers of the executive over the legislature, the authority of the judiciary to declare legislation null and void, and the media “fourth estate” power to hold the branches of government accountable to the citizenry are all rooted in the principle of separation of powers and by extension good governance. Despite the executive having the dominant power, it is also guided by the constitution to follow a code of ethics delineated by the legislature per Section 96(1).

The 1996 Constitution of South Africa coupled with other national legislations informed the national, provincial, and local institutional arrangement, oversights, and accountable mechanisms as stated in section 40(1) of the constitution that “. . . government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.” The connexion among the three branches of government is explicitly stated per section 40 of the 1996 constitution as distinctive, interdependent, and interrelated. Therefore, the governing and administrative mechanisms in South Africa are to execute their duties per the fundamental principle embedded in cooperative government which is deeply rooted in the concept of separation and balancing of powers.

The Constitution encourages mutual and friendly relationships between and among the three spheres of government as stated in section 41(1)(g) that the three branches are to “co-operate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another, and informing one another off and consulting one another on matters of common interest.” Nonetheless, the same section stipulates what the organs of government need to do when there is an intergovernmental dispute. The subsection further tasks the organs to settle disputes using appropriate mechanisms and procedures that can remedy the impasse before going to court to request the resolution of a dispute. The court is permitted to refer a disputed matter back to the organ involved if not satisfied.

The Constitution stipulated for an act of parliament to establish structures inter alia to encourage and facilitate intergovernmental relations and provide suitable

mechanisms and procedures to resolve national, providential, and local level inter-governmental disputes. The passage of the Intergovernmental Relations Framework (IRF) Act of 2005 establishes a framework to facilitate intergovernmental relations and the settlement of disputes. The preamble of the aforementioned act reads as follows: “To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes, and to provide for matters connected therewith.” Besides, the promulgation of the IRF Act, 2005 further provided a suitable mechanism for collaboration and accountability as well as other procedures to resolve national, provincial, and local level governance issues.

4.2 Accountability

The core justification for every democracy is political accountability on the part of public officials (Persson et al., 1997; Agyepong & Adjei, 2008; Fabbrini, 2021). In constitutional democracies such as South Africa, those who have been given the political power to govern with the expectation that the authority given is used to efficiently deliver public goods and services. These elected public officials are held accountable to the office given (Chang et al., 2010), and the three branches of government are no exception. Thus, the governed expects those who govern to do so per the constitutional provision(s). Accountability mechanisms could either be vertical or horizontal where the former concerns itself with using democratic procedures such as elections to restrain the executive from acting out of its political ambit (Ping & Wang, 2022). The latter horizontal accountability is where state institutions such as the legislature, judiciary, the ombudsman, and others check the powers of the executive branch of government (Ping & Wang, 2022). The executive also has the same responsibility to serve as a horizontal accountable institution to constrain the powers of the legislature and other state institutions.

Both mechanisms are crucial in constitutional democracies for political control and good governance since weakness in each could lead to the abuse of power (Chang et al., 2010; Ping & Wang, 2022). For instance, the constitution made provision for the constitutional court to declare an act of parliament or the conduct of the president unconstitutional. As stated in Section 167 (5); “The Constitutional Court makes the final decision whether an act of parliament, a provincial act or conduct of the president is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, High Court, or a court of similar status before that order has any force.” This serves as a check on the executive and legislative branches of government in South Africa from acting contrary to the constitutional provision. Nonetheless, the executive president in consultation with JSC nominates judges for all courts in South Africa pending approval from the legislature. A parliamentary committee vets all the judges of the various courts in South Africa after their appointment by the president in consultation with the JSC.

In addition, the 1996 Constitution has established several horizontal accountable institutions including the Public Protector, the South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Auditor-General, Electoral Commission, and JSC inter alia that holds the executive, legislature, and judiciary accountable. As alluded to earlier, the executive powers of the country are vested in the hands of the president and the president has the mandate to dissolve the NA. This is an executive prerogative that put some level of constraints on the powers of the legislative body. Besides, legislative bills passed by the National Council can be checked by the executive through the presidential assent which is the sole prerogative of the executive president to append his or her signature to a bill to become a law.

The President has the power to refer back legislations to the NA for reassessment and deliberation. The constitution talks about the “Assent to Bills” which is the prerequisite of the executive president to sign a bill into law after it has been passed by the legislature (see section 79 (1) of the 1996 Constitution). Again, the Constitutional Court could also declare the bill passed by parliament as null and void or refer it back to the legislature for further deliberation. These executive and judicial prerogatives serve as a check on the legislative branch of government.

4.3 Legislative Oversight Responsibilities and Transparency

The legislative powers and oversight responsibilities in South Africa are vested in the legislature (National Assembly (NA) and National Council of Provinces (NCOP)) besides its classical responsibility as a lawmaking and amending body. The Constitution affirmed the legislative powers over the executive; Members of the Cabinet and Deputy Ministers appointed by the president in sections 92 and 93. Section 92 (2–3) confirmed that: “Members of the Cabinet are accountable collectively and individually to parliament for the exercise of their powers and the performance of their functions. (3) Members of the Cabinet must- (a) act per the Constitution, and (6) provide Parliament with full and regular reports concerning matters under their control. And Section 93 (2) outlined parliament’s control over Deputy Ministers appointed by the president (section 91) read: “Deputy Ministers appointed in terms of subsection (1) (6) are accountable to parliament for the exercise of their powers and the performance of their functions”.

Coupled with their traditional role, the legislative branch of government in most constitutional democracies such as South Africa is mandated to serve as the ombudsman institution. Moreover, sections 59 and 69 provide the NA and NCOP with the power to obtain further and better particulars in the performance of their oversight responsibilities. The NA or any other committees set up by the NA has the power to request further information or evidence in discharging their oversight duties as stated in sections 56 and 69 (a-d):

(a) summon any person to appear before it to give evidence on oath or affirmation, (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or to produce documents; institutions.

Again, the parliament has several oversight mechanisms and approaches to hold the executive branch of government accountable for its actions or lack thereof (Fagbadebo & Ru, 2019). In addition, the NA oversight power on the executive branch of government is also expressed in other national strategies such as the National Treasury Guideline for Legislative Oversight Annual Report (2005), as stated in section 55(2) of the report opined that the NA:

... must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise by the national executive authority, including the implementation of legislation; and any organ of the state.

Similarly, the nine provincial legislatures are provided with parallel oversight mandates as that of the NA in section 114(2) which reads: “(2) A provincial legislature must provide for mechanisms- (a) to ensure that all provincial executive organs of state in the province are accountable to it; and (b) to maintain oversight of-(i) the exercise of provincial executive authority in the province, including the implementation of legislation; and (ii) any provincial organ of state”. This provincial legislative oversight power is only over the provincial executive branches of the state and not national public institutions.

The NA is again mandated with the power of “scrutinizing and overseeing executive action” as expressly stated in section 42(3) of the constitution below. The NA serves as the ombudsman, overseeing the work of the government departments, national ministries and institutions, watchdogging departmental budgets, and considering international and regional treaties and agreements.

The NA 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 scrutinizing and overseeing executive action (section 43 (3)).

Also, coupled with the conventional role, the NA has other several committees that play a critical role in the democratic processes such as the drafting and consideration of bills, public policies, and fiscal policy of the country. The legislative committees tend to also involve the citizenry in the processes and activities of parliament for the benefit of all. The public can petition the legislature regarding any public issues or fiscal policy challenges. The NA oversight duties could be over national and provincial institutions and other public officials as stated in the Legislative Oversight Support, 2012. The 1996 Constitution provided for a National Revenue Fund (NRF) of which funds could be used by the executive to implement government developmental projects; however, budgetary allocation for such projects requires careful consideration and scrutiny by Parliament as stated in section 213 (1 and 2) below:

There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament (2) Money may be withdrawn from the National Revenue Fund only- (a) in terms of an appropriation by an Act of Parliament; or (b) as a direct charge against the National Revenue

Moreover, parliament has several committees including the Portfolio Committee, Select Committees, Members' Legislative Proposals and Petitions Committees, Internal Committees, Joint Committees as well as other Ad hoc Committees that can be established by an act of parliament (Republic of South Africa, RSA, 2021). These committees have the power to subpoena heads of ministries, departments, agencies, and other government institutions to appear before them to present evidence or produce documents if necessary. For instance, the National Assembly Standing Committee on Public Accounts serves as the ombudsman over executive spending. Other heads of government departments, institutions, and ministries are regularly called upon by appropriate parliamentary committees to report and account for their expenditure after the Auditor-General's report.

Besides these parliamentary committees, the constitution established the office of the Public Protector (PP) to scrutinize and investigate public officials about administrative and financial misdeeds in all spheres of government. The PP has the power to take appropriate action based on its reports after an investigation into any public affairs. Section 182 (1) states that:

The Public Protector has the power, as regulated by national legislation-(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action.

The PP has the constitutional mandate to investigate corrupt public officials and submit its report to an appropriate state institution for further actions to be taken; however, it cannot scrutinize the decisions of the courts (see section 182 (3)).

In South Africa, the legislature and other statutory bodies have several oversight mechanisms to ensure that public officials in all spheres of government are accountable and transparent in their affairs with the citizens. Besides, other legislative acts such as the Money Bills Amendment Procedure and Related Matters Act No. 9 of 2009 which established the Parliamentary Budget Office also permit the legislature to augment its oversight responsibilities. For instance, section 15(1) of the immediately mentioned act reads:

... hereby established a Parliamentary Budget Office headed by a Director, the main objective of which is to provide independent, objective and professional advice and analysis to Parliament on matters related to the budget and other money bills.

Thus, the parliamentary budget office also serves as the overseer of the taxpayer's money and how it is spent by the executive. There is an annual assessment and analysis of documents submitted to parliament by the executive (Pauw, 2016). Parliament has the power to hold open hearings and call government officials and experts to give evidence to a particular budget emanating from the executive. The executive entire budget for any developmental projects could be rejected by parliament through a motion of no confidence or force the government to deliberate the

budget. However, because of the lopsided parliamentary majority in favor of the African National Congress (ANC), it is highly unlikely for a budget to be rejected or sent back for further deliberation.

The NA has other oversight mechanisms to hold the executive to account through parliamentary questions and replies (RSA, Parliament, 2021). President Cyril Ramaphosa has appeared several times before the NA on plenary sitting for oral replies to questions from Members of Parliament. Ministers of various departments have been requested to answer questions in the NA through oral reply. This is another avenue to question the actions and operations of the executive. The national and provincial legislatures are required by the constitution to maintain oversight of the executive and other organs of state within their sphere. The executive is again checked by the legislature through the presentation of the State of the Nations Address (SONA) to a joint sitting of the National Assembly (NA) and the National Council of Provinces (NCOP) which is called “the Opening of Parliament” (RSA, Parliament, 2021). Section 102 of the 1996 Constitution permits members of parliament to remove the executive president from office if the former has lost confidence in the latter governing authority as stipulated in sections 89-102 (2):

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

In the past two decades, over five drafted resolutions and motions of no confidence in the president were brought before the NA by the former leader of the Democratic Alliance (DA), Hon. Mmusi Maimane cited corruption, unemployment, economic crisis, and politicization of independent institutions among others as reasons (RSA, 2016). Despite the attempt by the opposition attempt to impeach the president as enshrined in section 89 of the 1996 constitution, these motions were, however, unsuccessful. This is not surprising because in many constitutional democracies in Africa, South Africa is no exception, and the legislature tends to be a rubber stamp of the executive especially when the majority of the members in the legislative chamber belong to the ruling political party. Thus, the question of parliament keeping the executive on its toes about the allocation, distribution, and spending of public resources has been a concern in South Africa because of the immediate issue described above.

Parliament has the power to impeach the president and controls the national budget as depicted in Fig. 2. The national legislature has the power to pass a motion of no confidence in the executive as stated in sections 102 (2) that “if the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign. The NA has the power to remove a judge from office as specified in section 177(1, a): a judge may be removed from office only if is grossly incompetent or is guilty of gross misconduct and adopted with a supporting vote of at least two thirds of its members.”

The 1996 Constitution enjoins vital state institutions to account to the NA by reporting their activities at least once a year (see section 181(5)). Moreover, there are

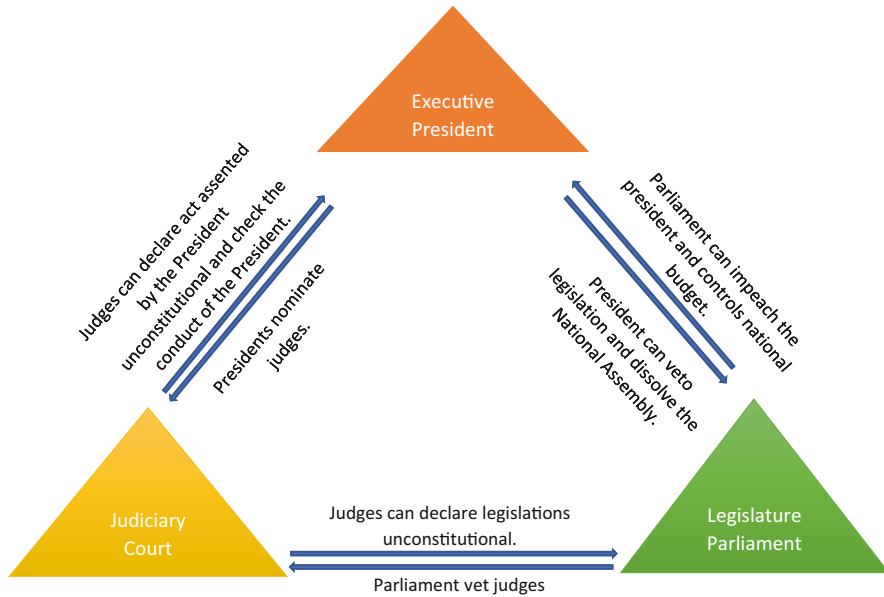


Fig. 2 The three arms of government and checks and balances in South Africa. Source: Adapted from the Republic of South Africa Constitution, 1996

other self-checking procedures embedded in the constitution which include but are not limited to chapter 9 of the 1996 constitution that continue to guide the country toward constitutional democracy. All the branches of government are required to hold the constitution in high esteem in the performance of their duties. The failure of one branch requires the others to step in to prevent any constitutional breach and abuse of power.

4.4 Veto Power and Players

In all political systems, either unicameral, bicameral, presidential, or parliamentary, the political status quo is often altered because the branches of government tend to have some philosophical reserves rooted in power dynamics. Thus, power is often shared among these state players or institutions to curb absolute control in the administration of the country. These state actors are called “veto players” (Tsebelis, 2000). Hug and Tsebelis (2002, p. 467) aver that “veto players are actors whose agreement is necessary for a change in the legislative status quo.” The immediate subsection in this chapter shed some light on the legislative oversight powers of the executive branch of government, but the executive president has also got some power and authority (veto power) granted by the constitution to the equally checked legislature. Every democracy has a certain government arrangement that reveals and

shapes the veto players, and South Africa is no exception. The individual or group of actors often retain and maintain their veto powers in the administration of the country.

Besides, several powers are in legitimate democracies such as the legislative oversight authority, judicial authority, and the veto power which is often vested in the executive president, and South Africa is no exception. The executive president in South Africa exercises some degree of control over the legislature by vetoing bills and other fiscal policies by the NA and NCOP as well as other administrative institutions under the legislature. The presidential assent is the prerogative of the executive to append or otherwise a bill passed by the NA. All bill passed by the NCOP are to be sanctioned by NA. And if the bill passed in the NA is without amendment, such a bill needs to be submitted to the president for assent as stated in section 76 (2-c) of the 1996 constitution that: "If the Assembly passes an amended bill, the amended bill must be referred to the Council, and if the Council passes the amended bill, it must be submitted to the president for assent."

Thus, in South Africa, the president has the power to veto a bill passed by the legislature. Again using the veto power, the president can refer back a bill to parliament for further deliberation and reconsideration. It is also within the ambit of the NA to refer a bill that has been rejected by the president to the Mediation Committee for further consideration. However, Mediation Committee agreed to a version of a bill needs to be further submitted to the president for assent as stated in section 79(1) that "The President must either assent to and sign a bill passed in terms of this chapter or, if the president has reservations about the constitutionality of the bill, refer it back to the NA for reconsideration. Nonetheless, if the president deems the newest version of the bill as unsatisfactory, he or she can refer it to the Constitutional Court and the decision of the court is the final as stated in section 79 (5) If the Constitutional Court decides that the bill is constitutional, the president must assent to and sign it."

The President can dissolve the NA even before its term of office expires. This veto power can even be extended to the Acting President when there is a vacancy in the office of the president as stated in section 50 (2, a and b) "The Acting President must dissolve the National Assembly if (a) there is a vacancy in the office of President; and (b) the Assembly fails to elect a new President within 30 days after the vacancy occurred". The veto power of the executive president is also specified in section 50(1) (a and b) which read: "(a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and (b) three years have passed since the Assembly was elected".

The President in South Africa appoints the Deputy President and Ministers and assigns them powers, national duties, and responsibilities and has the prerogative to dismiss any without any fear or favor as enshrined in section 91(2) of the 1996 constitution section 91(2) "the President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them." These appointed public officials including the president form the cabinet as stated in section 91(1) that "the Cabinet consists of the President, as head of the Cabinet, a Deputy President, and Ministers. Likewise, the President appoints all the Deputy Ministers from the

NA except two outside the NA to complement the work of the Cabinet as specified in section 93(1) below:

The President may appoint-(a) any number of Deputy Ministers from among the members of the National Assembly; and (b) no more than two Deputy Ministers from outside the Assembly, to assist the members of the Cabinet, and may dismiss them.

The appointment of all Deputy Ministers from the NA with no more than two Ministers from outside the Assembly could undermine the NA's oversight responsibilities over the president's other government ministries, departments, and institutions. The practice has the potential to create a conflict of interest on the part of the NA. It could also weaken its role as an ombudsman of holding the president accountable to the people. Furthermore, one could argue that the practice seemingly defeats the tenet of separation of power.

The veto power granted to the executive president in South Africa by the 1996 constitution is a vital oversight mechanism to scrutinize the legislative body's lawmaking processes and any other related activities. It gives the veto players, the opportunity to double-check any public legislation and fiscal policy passed by a lawmaking body and any other auxiliary institution to comprehend its public impact on the citizenry. Although the veto power is vastly given to the president, the Constitutional Court in bill consideration before assent plays a crucial role in ensuring that the tenets of the rule of law, good governance, transparency, and accountability are upheld at all times.

4.5 Judicial Independence and Separation of Powers

The South African judiciary has both individual and institutional independence (Devenish, 2003; Mubangizi & Siyo, 2015). Nonetheless, Aung (2021) avers that there is no definite definition for judicial independence. The 1996 Constitutional guarantees the principle of separation of powers and thus ensures institutional independence (actors and factors that protect and prevent judicial interference) of the judiciary. Judges in South Africa have the security of tenure which is linked to their "individual" independence and encourages them to act freely without any interference, fear, or favor. The Constitution enjoins the courts the power to issue orders that bind all as stipulated in section 165 (5) that "an order or decision issued by a court binds all persons to whom and organs of state to which it applies."

Besides, in dealing with the state or an individual, the independence of the court is supreme, and a decision issued by the courts must be followed accordingly. The recent brouhaha between the Concourt, former President Jacob Zuma, the Zondo Commission, and the Constitutional Court regarding the allegations of state capture between 2009 and 2018 was a cause for concern when the orders by the Concourt were defied by the former president. However, it was deemed to be contemptuous of the courts and other legislative acts and the former president has since been

imprisoned to serve a year according to the court rules. This practically attests to the independence of the courts' systems in South Africa.

In South Africa, the notion of judicial independence is deeply entangled with the doctrines of separation of power and checks and balances. Apparently, an independent judiciary is crucial for the survival of all democracies because of the inevitability of conflict between the various branches of government. The judiciary has played and continues to play a crucial role in forbidding both the executive and parliament from interfering in the functions of the courts which is embedded in the tripartite system of government. Certainly, the 1996 constitution of South Africa expressly acknowledged judicial authority in the courts as stated in section 165 (2 and 3): "The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts." The judiciary has the authority to declare bills passed and other regulations enacted by the legislature null and void if it is deemed to infringe on the rights, liberties, and freedoms of the people.

South Africa is again a signatory to various intranational and continental conventions and treaties including the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1976) (ICCPR), and the African Charter on Human and People's Rights (1981) which professed judicial independence. For instance, Article 26 of the African Charter declares that:

State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

The country has transitioned politically and legally from the legacies of apartheid rule to constitutional democracy, yet, there are broader aspects of governance including the judiciary that continue to endure some transformation (Wesson & Plessis, 2008); however, the independence of the judiciary is not in doubt. The judiciary has been immune to political meddling from the ruling and various opposition parties. The recent saga regarding the imprisonment of former President Jacob Zuma further attests to the independence of the court systems. Nonetheless, to better protect the spirit and letter of the constitution and the liberty of the citizenry, the judiciary must resist any interference. The assertion of judicial independence is a key element of constitutional democracy which is also rooted in the concept of separation of power.

The establishment of the JSC and enactment of the Remuneration and Conditions of Employment Act, 2001 (Act No 47 of 2001), and other Regulations to the Act to determine the appointment, financial remunerations, conditions, and benefits of Judges are tied to their individual independence. In South Africa, an Independent Commission for Remuneration of Public Office Bearers recommends the salaries and remuneration of judges in consultation with the executive president as depicted in Fig. 3. This further deters the executive from undue meddling in the salary and remuneration packages of judges. Again, the Office of the Chief Justice on April

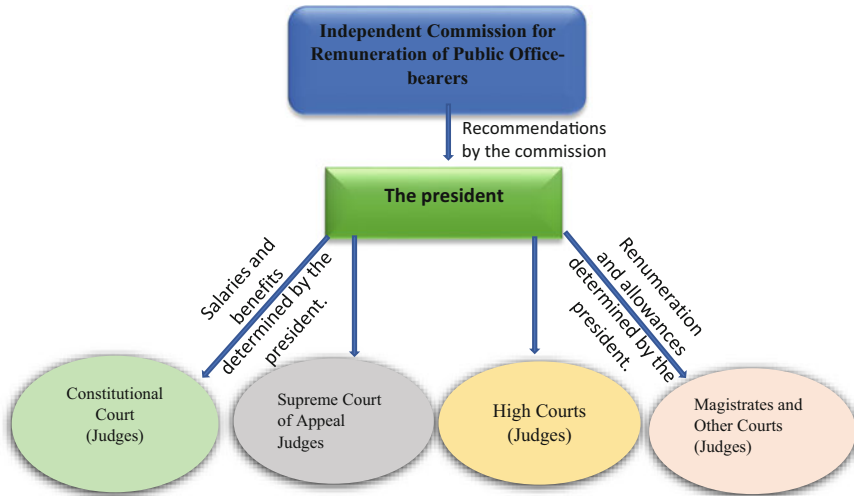


Fig. 3 Financial independence of Judges in all the courts. Source: Authors construct-adapted from Republic of South Africa Constitution and Judiciary of South Africa, booklet on the conditions and benefits of judges

1, 2015, was established as a new department with a R5.2 billion budget allocation over a medium-term period to further strengthen the independence of the judiciary. The financial security of the judges tends to maintain judges’ individual independence, thereby averting undue influence from any of the organs of government. Again, remuneration during recess is also provided for by the Superior Courts Act 10 of 2013.

The salaries, allowances, and benefits of Judges recommended by the independent commission are further gazetted which protect arbitrary reduction or suspension of judges’ salaries. The appointment of judges in South Africa could also be linked to their “individual” independence. While there may be some quasi-meddling of the executive in the affairs of the judiciary when it comes to the appointment of judges, the JSC plays a critical role in the president’s appointment. The president has the power to appoint all judges of all the courts; however, this prerogative is in consultation with the Chief Justice and JSC as stipulated in section 174 (3), reading in conjunction with (4) of the same article states

The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure: (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.

The nominees can be rejected by the president; however, the JSC has the opportunity to further add additional nominees to the list previously submitted to the president for onwards appointment if the initial nominees are rejected.

5 Recommendations

The notion of separation of power is entangled with doctrines in constitutional democracies. The South African democracy is entrenched in the principle of separation of power and rule of law. The fundamental values underpinning most democracies tend to accentuate the issue of good governance, human rights, public accountability, and transparency. Thus, the recommendations are as follows:

- *Ministerial Appointments*: The appointment of Deputy Ministers by the President from the NA with no more than two ministers from outside the Assembly should be critically looked at and reconsidered to curb any conflict of interest and ensure accountability and transparency absolute separation of powers. The practice has the potential to undermine the legislature from its oversight responsibilities over the executive and any other government ministries, departments, and institutions.
- *Judicial Appointment*: The power to appoint or not to appoint judges should be vested in the hands of a constitutional independent commission such as the JSC devoid of any influence from the executive arm of government. Thus, the judge's salary and remuneration should be determined by an independent constitutional commission to avoid executive control and influence. However, judges should still be vetted by parliament to ensure some degree of checks and balances.
- *Collaborative Governance*: Strengthen national and provincial intergovernmental partnership and collaboration by devising mechanisms for arbitration to avoid the constant confrontation between the governing majority and the opposition parties in the country. A constructive partnership between and among the arms of government at all levels to curb the persistent mutual suspicion.
- *Parliamentary Capacity Building*: Capacity building for members of parliament should be holistic and intersectoral to better position them to adequately scrutinize the bills on various issues and to serve as proper ombudsman of the public purse using their oversight responsibilities as stipulated in the 1996 Constitution.
- *Protection of the "Fourth Estate"*: The media ("the fourth estate") must be protected to ensure that there is a continuous discourse on issues of development, abuse of power, corruption, policy monitoring, accountability, transparency, and good governance.

6 Conclusion

South Africa has demonstrated the tripartite system of public administration in the performance of the three branches of government at the national and provincial levels. The country has made significant progress in the functional and structural division between the three branches of government. The principle of checks and balances is well entrenched in the constitution and has been demonstrated by the branches of government in their respective duties. The independence of the judiciary is not in doubt judging from the recent Constitutional Court rulings against the

former executive president. The oversight responsibilities of parliament over the executive and other national and provincial institutions further affirm the adherence to the doctrine of separation of power.

Besides, the quasi-rubberstamping of the legislative branch of government has often resulted in the opposition political parties holding the government and the executive president on their toes. Thus, the conventional application of the tenets of separation of power has often been given a new perspective where there is a constant confrontation between the governing majority and the opposition political parties about public spending. This could be detrimental to the public as well as the constitutional mandate of the legislature to serve as a check and an oversight body of the executive. Besides, the political reality is that the governing majority (ANC) as in the case of the current National Assembly tends to have their way despite the fierce disapproval from the two major opposition parties, the Economic Freedom Fighters (EFF) and Democratic Alliance (DA).

Moreover, in constitutional democracies such as South Africa, there are power limitations, either procedural or substantive laws that have to curb the abuse of power by any of the veto players. The delegation of powers to state institutions and other legislative bodies such as the JSC and several others is in tune with the idea of power distribution between and among the branches of government. This has also prevented unnecessary abuse of power, especially on the part of the executive. In addition, there is sustained political power and cordial relations between and among the branches of government at the national and provincial levels which further professes the cardinal tenets of separation of powers. The IRF Act, 2005, attests to the desire on the part of the three branches of government to perform their duties distinctively but collaboratively to create a situation in which the common good of the country could be advanced.

The functional, structural, and procedural division of public powers with checks and balances continues to increase the citizen's confidence in the three state organs. Again, the present structure of the national government coupled with the constitution and other legislative acts have encouraged good governance, facilitated intergovernmental relations, and provided suitable mechanisms and procedures to ensure there is transparency and accountability. Besides, the independence of the judiciary has further protected the bill of rights, which also places human rights and liberty at the center of South African society. The power of the legislature to serve as the ombudsman on the executive also limits the authority of the president. The functional and structural partitions between the branches of government are essential in promoting, safeguarding, and consolidating the emerging democracy in South Africa.

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