

The doctrine of separation of powers (a South African perspective)*

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1. Introduction

This paper seeks to discuss the import and impact of the doctrine of separation of powers ('the doctrine') in South Africa. It discusses the meaning of the doctrine, its origin, historical development, its main objectives (in line with the writer's views), its place in our Constitution and its application by the Constitutional Court. The doctrine is discussed in the context of seeking to contribute towards a debate on whether there is an off-side rule in its practical application. A brief comparative overview of the some foreign constitutions on the doctrine is presented as a prelude to the conclusion proposed.

2. Meaning of separation of powers

The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, Legislative, Executive and Judiciary. Within the constitutional framework the meaning of the terms legislative, executive and judicial authority are of importance:

- (a) Legislative authority – Is the power to make, amend and repeal rules of law.
- (b) Executive authority – Is the power to execute and enforce rules of law.
- (c) Judicial authority – Is the power; if there is a dispute, to determine what the law is and how it should be applied in the disputes.¹

The doctrine of separation of powers means ordinarily that if one of the three spheres of government is responsible for the enactment of rules of law, that body *shall not* also be charged with their execution or with judicial decision about them. The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws.

Lord Mustill in *R v Home Secretary, Ex p Fine Brigades Union*² defined the doctrine of separation of powers in England as:

'It is a feature of the peculiar British conception of the Separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.'

The meaning of separation of powers in United States of America and France shows a variety of meanings. The concept may mean at least three different things:

- (a) That the same person should not form part of more than one of the three organs of government, for example, that ministers should not sit in parliament;
- (b) that one organ of government should not control or interfere with the work of another, for example, that the executive should not interfere in judicial decisions;
- (c) that one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.³

Sight should not be lost of the fact that complete separation of powers is not possible -neither in theory nor in practice. Some overlapping is unavoidable; given the fact that we talk here of spheres of what is in fact one government.

3. The origin of the doctrine of separation of powers

The modern design of the doctrine of separation of powers is to be found in the constitutional theory of John Locke (1632-1704). He wrote in his second treaties of Civil Government as follows:

'It may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage'.⁴

It is clear that he was advocating the division of government functions into legislative, executive and judicial. However it is the French philosopher (jurist) Montesquieu (1689–1755) who is usually credited with the first formulation of the doctrine of separation of powers. He based his exposition on the British Constitution. In the pertinent chapter of his well celebrated work, *L' Esprit des Lois* (1748),⁵ he purported to describe the British Constitutional system of the 18th Century⁶ so that it might serve as an example to France of a political dispensation founded on liberty, which according to him, was the supreme objective of a political society. JD van Der Vyver observed that Montesquieu was a poor observer, since the British constitutional system did not comply then, neither does it today, with the basic norms of the idea of separation of powers.⁷ Even if it were so, Montesquieu's analysis of the British system, is generally accepted as political ideal which is worth pursuing.

Montesquieu recognised the three basic pillars of state authority, which includes the executive, legislature and the judicial

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functions; and he added that these functions ought to vest in three distinct governmental organs with, in each instance, different office bearers. He supported his argument by saying:⁸

'All would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals'.

His idea eventually developed into a norm consisting of four basic principles:⁹

- (a) The principle of *trias politica*, which simply requires a *formal distinction* to be made between the legislative, executive and judiciary components of the state authority.
- (b) The principle of separation of *personnel*, which requires that the power of legislation, administration and adjudication be vested in three distinct organs of state authority and that each one of those organs be staffed with different officials and employees, that is to say, a person serving in the one organ of state authority is disqualified from serving in any of the others.
- (c) The principle of the separation of *functions* which demands that every organ of state authority be entrusted with its appropriate functions only, that is to say, the legislature ought to legislate, the executive to confine its activities to administering the affairs of the state, and the judiciary to restrict itself to the function of adjudication.
- (d) The principle of *checks and balance*, which represents the special contribution of the United States to the notion of separation of powers, and which requires that each organ of state authority be entrusted with special powers designed to keep a check on the exercise of functions by the others in order that the equilibrium in the distribution of powers may be upheld.

4. The main objectives of the doctrine of separation of powers

The main objective of the doctrine is to prevent the abuse of power within different spheres of government. In our constitutional democracy public power is subject to constitutional control. Different spheres of government should act within their boundaries. The courts are the ultimate guardian of our constitution, they are duty bound to protect it whenever it is violated. Moseneke CJ also stated that the courts are more likely to confront the question of whether to venture into the domain of other branches of government while performing their functions as entrusted by the constitution.¹⁰ Within the context of the doctrine of separation of powers the courts are duty bound to ensure that the exercise of power by other branches of government occurs within the constitutional context. The courts must also observe the limit of their own power.

Different scholars also echo their views on the purpose of the doctrine. Montesquieu said in this regard:¹¹

'When the legislative and executive powers are united in the same person, or in the same body of magistrates there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of

the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were joined to the executive power, the judge might behave with violence and oppression'.

Sir William Blackstone echoed these sentiments:¹²

'In all tyrannical government the supreme magistracy, or the right both of making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and whenever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed in quality of dispenser of justice, with all the quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislature and executive authority are in distinct hands, the former will take care not to entrust the later with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject ...'

He continued further:¹³

'In this distinct and separate existence of the judicial power, in a particular body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be in some degree separated from both the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only in their own opinions, and not by any fundamental principles of law, which, though legislatures may depart from, yet the judges are bound to observe. Were it joined with executive, this union might soon be an over balance for the legislative ...'

According to Dicey, the doctrine rests on 'the necessity...of preventing the government, the legislature and the courts from encroaching upon one another's province'.¹⁴ Only few countries are attempting to implement the doctrine of separation of powers. The United States constitutional system comes close to the theory of Montesquieuan theory. Generally speaking, the United Kingdom Constitution doesn't comply with the demands of the doctrine of separation of powers. A detailed discussion on the application of the doctrine in South Africa follows.

5. The doctrine of separation of powers in the South African Constitution

Due to the British colonial flavour, the pre-constitutional dispensation in South Africa did not favour the doctrine of the separation of powers to flourish. The text of the South African final Constitution¹⁵ does not explicitly refer to the doctrine of separation of powers. The inception of the doctrine in the current South African constitutional order can be traced back to our Constitutional Principle VI, which is one of the principles that governed the drafting of the final constitution. Schedule 4 of the Interim Constitution¹⁶ provided that:

'There shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

Section 8(1) of the final constitution lists all the elements of the structures that are bound by the Bill of Rights namely, the legislature, the executive, the judiciary and all organs of state. The question whether or not the doctrine of separation of powers forms part of the final constitution has been considered and explained in several Constitutional Court cases. It is axiomatic that the doctrine of separation of powers is part of our constitutional design.

In *Glenister v President of the Republic of South Africa*¹⁷ Langa CJ (as he then was) stated that 'the doctrine of separation of powers is part of our constitutional design.' Indeed Chapters 4 to 8 provide for a clear separation of powers between three spheres of government. Section 43 vests the legislative authority of the Republic at the national sphere in parliament and at the provincial sphere in the provincial legislatures. Sections 85 and 125 respectively vest the executive authority of the Republic in the president and of the provinces in the premiers. Section 165 vests the judicial authority in the court'.

The Constitutional Court in *South African Association of Personal Injury Lawyers v Heath*¹⁸ Chaskalson P stated as follows:

'In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. ... There can be no doubt that our Constitution provides for such a separation (of powers), and that laws inconsistent with what the Constitution requires in that regard are invalid'.

There is no doubt that the doctrine of separation of powers forms part of our constitutional system. As articulated above the Constitution doesn't only differentiate three spheres of government i.e. legislative, executive and judiciary function, it vests these functions in different organs of state. The doctrine of separation of powers may be regarded as an unexpressed provision that is implied in or implicit to the Constitution.¹⁹

6. Application of the doctrine of separation of power in South Africa

The doctrine of separation of powers in South Africa took a centre-stage in a number of Constitutional Court cases. In *South African Association of Personal Injury Lawyers v Heath*²⁰ Chaskalson CJ while comparing the constitutional dispensations of South Africa and United States of America and Australia stated that:

'In all three countries, however, there is a clear though not absolute separation between the legislature and the executive on the one hand, and the courts on the other.'

In most cases the Constitutional Court has held that the doctrine of separation of powers does not always have to be strictly applied. In the first certification judgment, *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa*,²¹ (the *First Certification* case) the court stated that:

'There is, however, no universal model of separation of powers and, in democratic system of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation of powers that is absolute ...'

The court continued at para 109 as follows:

'The principle of separation of powers, on the one hand, recognises the *functional independence* of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that *the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessity or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers ...'* (My emphasis.)

In a constitutional dispensation, the doctrine of separation of powers is not fixed or rigid. The courts are duty bound to develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.²²

7. Example of case law on the doctrine of separation of powers

The doctrine of separation of powers in South Africa since the 1994 election and our new democratic government and the final Constitution has been investigated extensively in various judgement of the Constitutional Court. The judiciary spent time developing the home-grown model of the doctrine as envisaged by the Constitution. I have already articulated earlier that there is no complete separation of powers, and that possibly there cannot be complete separation. It is thus not surprising to find some cases from the Constitutional Court applying the doctrine of separation of powers strictly (usually in those cases that involve the relationship between legislature and the executive).²³

In *De Lange v Smuts No and Others*²⁴ the Constitutional Court held that a member of the executive may not be given the power to commit an un-cooperative witness to prison. This is because the courts have such power to send someone to prison. It is a judicial function and not an executive one.

In *South African Association of Personal Injury Lawyers v Heath*²⁵ the Constitutional Court held that a judicial officer may not be appointed as the head of a criminal investigation unit. This is because the power to investigate and prosecute crimes is an executive function and not judicial function.

In *S v Dodo*²⁶ the Constitutional court held that while the legislature may determine a minimum sentence for a particular crime, it may not determine the sentence that should be imposed in a particular case. This is because the power to impose a sentence on the offender is a judicial function and not an executive function.

In *Executive Council Western Cape Legislature v President of Republic of South Africa*²⁷ the Constitutional Court held that while the legislature may not delegate plenary law-making powers to the executive, it may delegate subordinate law-making powers. The court thus confirmed reservation of plenary law making for the legislature and made it non-delegatable. This is because it is necessary for the effective law-making.

In *re Constitutionality of the Mpumalanga Petitions Bill, 2000*,²⁸ the Constitutional Court held that the legislature may delegate

the power to bring an Act into operation to a member of the executive or to some other appropriate person, for example the speaker of the legislature. The bringing into operation of an Act of parliament seems to have been assessed as not core legislative power.

8. Checks and balances on the doctrine of separation of powers

The purpose of checks and balances is to ensure that different branches of government control each other internally (checks) and serve as counter weights to the power possessed by the other branches (balances).²⁹ Simply put, the aim of separation of functions and personnel is to limit the power; the purpose of checks and balances is to make the branches of government accountable to each other. The most conspicuous example of a check is the power of the judiciary to review executive conduct and ordinary laws for the compliance with the Constitution and the Bill of Rights. Judicial review in this case constitutes neither executive nor judicial function; it is a mere check on the exercise of executive and legislative power. It is a power exercised by the judiciary to ensure constitutional compliance and not to exercise the power of another authority.

9. Relationship between the legislature and executive

The doctrine of separation of powers dictates that the same person should not be a member of both the legislature and the executive. Simply put, the executive should not make laws and the legislature should not execute laws, through the same person operating in both spheres.

It is however clear under the final Constitution, especially at the highest level, that there is no separation of personnel between the legislature and the executive. It so happens, as in almost all parliamentary systems of government, that is, where one sees an overlap because members of the executive are also members of the legislature. Part of the reason is to enable the legislative assembly to call on the Ministers, as members of the assembly, to explain and account directly for the way in which a statute is executed and other executive functions performed.

In the *First Certification* case it was argued that an overlap between the executive and legislature resulted in the final Constitution not complying with Schedule 4 of the Constitutional Principle VI, which requires Act 108 of 1996 (the Constitution) to comply with the doctrine of separation of personnel. The Court stated as follows:³⁰

‘... the separation of powers doctrine is not fixed or rigid constitutional doctrine; it is given expression in many different forms and made subject to checks and balances of many kinds’. It was also held that an overlap made the executive more directly answerable to the legislature’.

Currie and De Waal are of the view that many of the checks and balances, such as ministerial accountability and responsibility to parliament, as set out in section 92 of the final Constitution, will not work if ministers of the cabinet are not members of the Assembly.³¹ The executive is the one that drafts and introduces the Bills in the legislature. Members of the legislature will check the content, add to or amend where necessary and then pass

the statute. If there is nothing to amend the bill as introduced by the executive may simply be passed by the legislature.

10. Delegation of legislative power to the executive

There is what we call ‘non delegation doctrine’. It forms part of separation of functions between the legislature and the executive. Simply put, it states that the power to make laws, which is the function that is vested with the legislature, should not be delegated excessively to the executive.³²

It has been argued that this doctrine promotes democratic accountability and individual liberty, by ensuring that laws are made by those who are most directly accountable to the electorates and in accordance with a pre determined procedure that is deliberative in nature and which must facilitate public participation.³³ If the legislators were entitled to delegate their law-making powers to another body that was not directly accountable to the electorate or subject to the same constraints, it is argued, these values could be compromised.³⁴

The non-delegation doctrine also protects individual liberty, it is argued further, by dispersing the power to make law amongst legislators who disagree and who represent a wide range of different interests. It means that the coercive power of the law cannot be brought to bear on individuals unless a majority of legislators believed that the issue is important enough to be regulated by law and can come to an agreement on a relatively specific set of words.³⁵

It is however rare to find the doctrine being applied strictly, due to lack of expertise or time on the part of the legislature to initiate and enact hundreds, if not thousands of technical rules commonly required for the effective implementation and regulation of most statutes. In addition, the dynamic nature of modern societies frequently requires far more rapid changes in the regulatory framework than slow and cumbersome legislative process. The slow and cumbersome legislative process, furthermore, often makes it impractical for the legislature to enact the minor changes that most statutory schemes regularly require.³⁶

The Constitutional Court had occasion to apply the doctrine of ‘non delegation’ in *Executive Council, Western Cape Legislature v President of the Republic of South Africa*.³⁷ In this case the Western Cape provincial government applied for an order declaring section 16A of the Local Government Transition Act³⁸ (herein referred to as ‘LGTA’) to be unconstitutional and invalid. The provincial government based its application on the ground that section 16A, which provided that the president could amend the LGTA by publishing a Proclamation in the Government Gazette, infringed the interim Constitution.³⁹ Section 37 provided that: ‘legislative authority of the Republic shall ... vest in parliament, which shall have the power to make laws for the Republic in accordance with the Constitution’.

The Constitutional Court found that section 16A did infringe section 37 of the interim Constitution; and it was therefore declared unconstitutional and invalid.

In arriving at this conclusion, the majority of the court began its judgment by explaining that while the final Constitution grants Parliament the power to make laws, it does not expressly grant parliament the power to delegate any of its law-making power to the executive. In a modern state, however, it is important that Parliament does have the power to delegate some law-making

powers and in particular, the power to delegate subordinate law making powers.⁴⁰

With regard to the subordinate law-making power, the majority of the Constitutional Court went on to explain this by saying that it is the power to make the detailed rules that are necessary to put an Act into operation. Parliament is usually not in a position to make these rules itself. This is because it has a wide range of responsibilities and simply does not have the time to do so. In addition, Parliament is not responsible for implementing the laws it makes and cannot foresee the kinds of detailed rules that are necessary to do so.

Given the fact that there was nothing in the Constitution that prohibit Parliament from delegating subordinate law-making powers, the majority of the Constitutional Court concluded that Parliament did have the power to delegate law-making powers to the executive. It said this was implicit in Parliament's power to make laws.

After finding that Parliament does have the implicit power to delegate subordinate law-making authority to the executive, the majority of the Constitutional Court turned to consider whether Parliament also had the authority to delegate plenary law-making authority to the executive. Plenary law-making authority is the authority to pass, amend or repeal an Act of Parliament. The majority of the court held that this can only be done in state of emergency. Parliament may not delegate plenary law-making powers to the executive because this would undermine the 'manner and form' provisions of the Constitution. The 'manner and form' provisions are those sections of the Constitution which set out the procedures that parliament must follow whenever it wants to pass, repeal or amend a law.⁴¹

In the subsequent judgment, the Constitutional Court recently (2011) explained that the extent to which a legislature is entitled to delegate its powers to the executive depends largely upon the language and the context of the particular Constitutional provision. In *Justice Alliance of South Africa v President of the Republic of South Africa*⁴² the court stated that it will pay particular attention to the extent to which the values on which the Constitution is based are affected by the delegation. In this case Justice Alliance applied for an order declaring section 8(a) of the Judges' Remuneration and Conditions Act unconstitutional.⁴³ The section in question delegated the power to extend the term of office of the Chief Justice to the President. It was contended that it infringed section 176(1) of the final Constitution which provides that:

'... a Constitutional Judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional court judge'.

The Constitutional Court held that section 8(a) of the Judges' Remunerations and Conditions of Employment Act did infringe section 176(1) of the Constitution and therefore declared it invalid. The Constitutional Court, while arriving at its decision, also stated that the Constitution sometimes permits Parliament to delegate its legislative powers and that sometimes it does not. In this case it did not.

In *Executive Council of Western Cape (supra)*, the Constitutional Court found that while the Constitution permits Parliament to delegate subordinate regulatory authority it does not permit Parliament to delegate plenary regulatory authority.

11. Checks and balances: legislature over executive

The Executive derives its power from the legislation and the Constitution. The courts may declare invalid any exercise of power by the executive that is not authorised by law. Legislation is passed by the legislature and may be amended or repealed by the legislature. The Constitution may also be amended by Parliament.⁴⁴ In practice the power of the executive are determined and may be circumscribed by the legislature.

12. Checks and balances: executive over legislature

The executive is ultimately responsible for the execution and administration of all the legislation. The President must assent to and sign national Bills before they become law in terms of section 79 of the final Constitution. The premier of a province, who is head of the executive, must assent to and sign provincial legislation in terms of section 121 of the final Constitution. Provision is further made for referral of a Bill to the Constitutional Court if the president or the premier has reservations about the constitutionality of the Bill which he or she is asked to assent to and sign.⁴⁵ A typical example will be the Protection of State Information Bill which the President might take to Constitutional Court to test its validity.⁴⁶ The national and provincial legislation usually come into operation when published or on a date determined in the legislation itself. The president or the premier has the power to determine when the statute will come into operation.⁴⁷ These are instances of the executive completing what is essentially a legislative process.

13. Relationship between the executive and the judiciary

In principle, the executive should not resolve legal disputes between individuals and the judiciary should not execute laws or their own orders. In many instances the doctrine of separation of powers is the fountain of the independence of the judiciary. Independence requires that the judges should be impartial in the sense that requires absence of interference at an institutional level and at the level of decision-making by each judge.

14. Judicial functions performed by the executive

Section 165 of the final Constitution vests the judicial authority in the courts. In order to provide greater access to justice, judicial functions are increasingly entrusted to other tribunals, such as the Commission for Conciliation Mediation and Arbitration (CCMA) established in terms of the Labour Relations Act.⁴⁸ In highly specialised area of law such as Competition Law, the resolution of disputes at initial level and mostly left to the tribunals, with specialising courts exercising appellate jurisdiction. This is a way of facilitating expertise in such fields. Those tribunals still fall within the executive, though some efforts are being made to make them independent.

The Constitutional Court in *De Lange v Smuts No (supra)* had to decide on the constitutionality of section 66 (3) of the Insolvency Act (24 of 1936). The section provided that the officer presiding at a creditor's meeting may commit a summoned person who fails to produce books or documents or fails to answer fully and satisfactorily questions lawfully put to him or her. The main challenge was on the right to freedom of the person and

particularly on section 12(1) (b) of the interim Constitution right not to be detained without trial. Ackerman J stated that 'trial' as prescribed by section 12(1) (b) requires, apart from anything else, a hearing conducted by a judicial officer in the court structure established by the final Constitution.⁴⁹ The learned judge related this issue to the doctrine of separation of powers as follows:⁵⁰

'(I)t suffices to say that whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here – that is the power to commit an uncooperative witness to prison – is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers'.

Some scholars criticized this judgment by saying the Constitutional Court went too far as it endorsed a rigid and formalistic approach to separation of powers which is inappropriate in the circumstances of present-day South Africa.⁵¹

15. Judicial commissions of enquiries

The President has the power to appoint a judicial commission of enquiry in terms of the Commission Act⁵² and section 84 of the final Constitution. Recent examples are the appointment of the Marikana Judicial Commission of Enquiry to be headed by the retired Supreme Court of Appeal Judge Ian Farlam and the Arms Deal Commission of Enquiry chaired by Supreme Court of Appeal Judge Willie Seriti assisted by two other serving judges (Musi JP and Legodi J).

In terms of other legislation the president may also establish enquiries headed by judges to conduct investigations; eg, recently the President established a Board of Enquiry in terms of the South African Police Service Act 68 of 1995, to investigate two controversial leases of buildings by the police and whether Police Commissioner Bheki Cele was fit to remain in office. The board was headed by Judge Jake Moloji.

From the doctrine of separations of power perspective a judicial commission of enquiry or similar boards, may raise some problems. Firstly, they require members of the judiciary to perform the function of the executive by requiring judges to investigate matters instead of adjudicating disputes. Furthermore the judge as an investigator in terms of the Commissions Act is often armed with certain powers not often available to other investigators, such as the power to compel witnesses, to issue search warrants, and to order detention of recalcitrant witnesses. This may result in the excessive concentration of power in the one official. Secondly the power to appoint the judge for the commissions may be abused by the executive and may undermine the independence of the judiciary.⁵³ The well-known example is the appointment of Justice PJ Rabie during the apartheid era to investigate and report on security legislation in 1981⁵⁴ or the Harms Commission Report into alleged murders and other unlawful acts committed or officially authorised and funded by the state security forces prior to 1994.

Currie and De Waal stated that the criticism of the use of the judicial commission of enquiry is not without substance, but that a judicial commission may sometimes be the only feasible manner to investigate a particular issue, such as cases where no allegation of criminal conduct is made.⁵⁵ While public confidence is undeniably high when a judicial enquiry is established, as opposed to an ordinary non-judicial one, it is not always clear why

other state institutions supporting democracy, such as the public protector, human rights commission, etc, are not appropriate. This is particularly so because the report of a judicial enquiry is not even binding on anybody, unlike judgments of courts. It is debatable whether there is ever a matter which is appropriate for a judicial enquiry only and not for any other enquiry.

In *South Africa Association of Personal Injury Lawyers v Heath* (*supra*), it was held that the judge may not head the Special Investigations Unit into public and private corruption and maladministration (known as the Heath Unit) which was set up in terms of the Special Investigating Unit and Special Tribunals Act.⁵⁶ The strict and formalistic approach as adopted in *De Lange v Smuts No* (*supra*) case also dominated the *Heath* case. The court held that the following factors should be taken into account when determining whether or not it is permissible to assign non-judicial functions to a judge. They are whether the performance of a particular function:

- (a) is more usual or appropriate to another branch of government;
- (b) is subject to executive control or direction;
- (c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;
- (d) creates the risk of judicial entanglement in matters of political controversy;
- (e) involves the judge in the process of law enforcement;
- (f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.⁵⁷

The question to be asked could also be whether the functions delegated to the judiciary is appropriate to the central mission of the judiciary.

In casu the question was whether the function is incompatible with judicial office and if so, whether there are other considerations that will prevent harm to the institution of the judiciary and ensure that the independence of the judiciary is maintained.⁵⁸

The court made it clear that, in appropriate circumstances, judicial officers can preside over commissions of enquiry. Much depends on the subject matter of the commission and the legislation regulating the issue of search warrants.⁵⁹ The functions, which Judge Willem Heath was required to perform in terms of the Act and the presidential proclamation appointing him, were far removed from the central mission of the judiciary. The investigations were regarded as one of intrusive quality, involved litigation on behalf of the state⁶⁰ and required the judge to be appointed for an indefinite period of time.⁶¹ The court stated that the functions were partisan in the sense that they did not permit the judge to distance himself from the investigators. The appointment of Judge Heath to the unit was thus declared to be incompatible with the judicial office and invalid.

Currie and De Waal stated that the Constitutional Court decisions are worrying, since the primary purpose of the doctrine of separation of powers is to prevent the abuse of state power. They continue and state that it is strange in *Heath* case that the doctrine was used to disqualify a judge from investigating the abuse of power.⁶² In the case under consideration a combination of executive and judicial functions were afforded to Judge Heath, resulting in an overconcentration of power in one person

What the Constitutional Court demonstrated in the *Heath* decision is that, a court of law can indeed exercise oversight

over and if need be control the activities of a commission inquiry (headed by a judge) by invalidating the particular investigation powers, in this case, into the affairs of personal injury lawyers. It was an interesting interplay between a judiciary led investigation and the exercise of real judicial power.

16. Checks and balances: executive over judiciary

The executive is mandated to execute court orders, since the judiciary does not have the power or personnel to do so. The executive is obliged to implement court orders in terms of section 165(5) of the final Constitution. The courts are hesitant to make orders requiring constant and long-term court supervision.⁶³

The executive also forms part of the Judicial Service Commission on the appointment of judges. The question is debatable as to whether these constitute infringement by executive into the exercise of judicial authority. This has never been argued and appears to cause no particular problems in as much as the executive in fact appoints judges in most jurisdictions that one is aware of. There is at this level no interference with the functional independence of the judiciary. It is a necessary incident of overlapping which in and of itself does not affront the separation of powers.

17. Checks and balances: the judiciary over the executive

The judiciary may review the conduct of the executive either in terms of the common law or statutory law. In *President of the Republic of South Africa v Hugo*⁶⁴ and *President of the Republic of South Africa v SARFU*⁶⁵, the court held that the exercise by the president of his power to pardon offenders or to appoint a commission of enquiry is subject to review by the courts. It also applies while the president is exercising the power conferred on him by the Constitution.

The judiciary also swears in members of the executive when they assume office. This is yet another incident of overlapping of authority with no functional interference. These are checks and balances that entrench and do not weaken democratic order.

18. Relationship between the legislature and the judiciary

In principle, no one should be a member of a legislature and the judiciary. In addition, a legislature should not fulfil judicial functions and the judiciary should not make laws.⁶⁶ This does not seem to present any particular problem in South Africa. Members of the legislature are also members of the JSC that appoints judges. Their participation is accepted as part of the institution of checks and balances. What may be debatable is whether it is acceptable that they should constitute the majority of the appointed commission or be in a position to control the decisions of that body.

19. Judiciary law-making

The foundational principle is that courts apply the law and do not make it. It has been stated, however, and it is generally accepted, that courts in fact do make law. This is so notwithstanding the foundational Roman law principle of that ordained

that the function of judges is to state the law and not to make it, which is espoused in the maxim *iudicis est dicere non dare*. The law making competence of the courts is however limited. This limited competence appears to be known in common law as well as in the civil-law system. Whenever the legal principle or rules are applied to facts in order to resolve disputes, precedents are created and, in effect, new rules are formulated. The making of law in this manner has been a part of the court function for centuries.⁶⁷ This is however restricted to the interpreting function of the courts. Courts do not and should not make law in any other situation not involving adjudication of disputes and interpretation of the law as made by a competent authority.

Under our new Constitution courts have specific power to review legislation and to develop the common law in order to align it with the constitution and in the interest of justice (s 173). Courts may however not make laws outside the specific authority granted by the Constitution. Our Constitution is the supreme law and conduct inconsistent with it is invalid to the extent of inconsistency (sec 2). Courts determine the inconsistency and declare inconsistent laws and conduct invalid.

20. Parliament not to function as a court

In the 1950's the parliament had created a 'High Court of Parliament' to review court decisions invalidating Acts of Parliament. Its aim was to overturn some decision taken by the ordinary court. This was contrary to the doctrine of separation of powers. It was then invalidated by the Appellate Division in the case of *Minister of the Interior v Harris*⁶⁸, Centlivres CJ stated that 'High court of parliament was not a court of law but simply parliament functioning under another name'.

This was, probably, the most obvious attempt by the legislature to abrogate judicial function to itself and to annul judgments that it did not like.

21. Judicial deference

This principle is usually applied in our jurisdiction. It influences and is reflected in the remedy that the court will be prepared to give in constitutional case. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁶⁹ Ackerman J stated that:

'The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature'.

In *Ferreira v Levin No*⁷⁰ Chaskalson P stated that regulation of the economy and redistribution of resources in the public interest are part and parcel of a social welfare state. It is not for a court to approve or disapprove of such policies, which are essentially political questions. The function of the courts is instead to ensure that the implementation of a political decision conforms with the Constitution.⁷¹ With regard to the separation of the judicial and legislative authority the learned judge stated that:

'In a democratic society, the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate'.

The proper demarcation of the 'terrain' of the legislature and that of the court is one of the most difficult issues in constitutional law. The learned judge also stated that the court's task is to ensure that legislation conforms with the Constitution. And it is not the function of the court to interfere with issues such as the regulation of the economy and the redistribution of resources.

In *Soobramoney v Minister of Health (Kwazulu-Natal)*⁷² the Constitutional court refused to order the state to provide expensive dialysis treatment to save the life of a critically-ill patient. In the course of his judgment Chaskalson P referred with approval to an apposite English authority where it was held that '... [d]ifficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage to the maximum number of patients. This is not a judgment a court can make'.⁷³

22. Checks and balances: legislative over judiciary

If a court declares a statute invalid, in theory, parliament may amend the constitution to undo the court's decision. Within our jurisdiction this will be subject to the limitation that the amending legislation should not itself be invalid for unconstitutionality. Section 171 of the Constitution provides that the courts function in terms of national legislation and that their rules and procedures must be provided for in terms of national legislation. Currie and De Waal are of the view that Parliament may use that power to limit the court's power of judicial review and within constitutional limit and restrict their jurisdiction.⁷⁴ The courts, in order to function properly, need sufficient funds which are awarded as part of the budget by the National Assembly.

23. Checks and balances: judicial over legislative

In South Africa the courts, depending on their jurisdiction, may declare any law which is inconsistent with the Constitution invalid. In *De Lille v Speaker of the National Assembly*⁷⁵, the High Court held that courts may determine whether the internal procedures adopted by the National Assembly are consistent with the provisions of the Constitution. It was been argued on behalf of the speaker that, in so far as internal proceedings are a matter of parliamentary privilege, the court's jurisdiction to review them was excluded. The High Court rejected the argument and held that all Acts and decisions of Parliament are subject to the Constitution and therefore to the review power of the courts.

It must also be borne in mind that it is not often when we find litigants inviting the courts to intervene in parliamentary proceedings. In *Doctors for Life International v Speaker of the National Assembly*⁷⁶ the case concerned the pregnancy and abortion related legislation, which was challenged on the grounds that parliament had failed in its duty to facilitate public involvement. The court had the following to say about the doctrine of separation of powers:⁷⁷

'The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceeding. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution'.

BRIEF COMPARATIVE PERSPECTIVE

24. United States of America

The constitution of the United States is premised on the doctrine of separation of powers, according to which there is an institutional separation between the legislature and the executive, giving rise to a presidential form of government with checks and balances. This is evident by the fact that when the American Constitution was ratified, the modern understanding of the doctrine of separation of powers was established. This version may be divided into two elements of division encompassed by the principles of *trias politica*, namely, the separation of functions and the separation of personnel. The element of independence, on the other hand, encompasses the principle of checks and balances.⁷⁸

It is arguably the strictest when it comes to separation of powers between the different branches of government.⁷⁹ Likewise in South Africa there is no complete separation.⁸⁰

The drafters of the American constitution also adopted the principle of checks and balances to the doctrine of separation of powers. It requires different branches of the state to keep a check on one another in order to maintain a balance of power amongst them.⁸¹

Although the principle of checks and balances infringe the original doctrine of separation of powers, the decision to include it in the American constitution arose out of the realisation that the principle division of functions in some of the early stage constitutions had failed to prevent the legislatures in those states from accumulating more and more powers.⁸²

In order to prevent anyone of the branches accumulating power at the expenses of the others the drafters of the American constitution argued that it was necessary to write a constitution, in which the powers of government should be so divided and balanced amongst several bodies of magistracy, so that no one could transcend their legal limit, without being effectively checked and restrained by others.⁸³

25. United Kingdom

The British do not have a written constitution which states the source of the authority of government. The doctrine of separation

of powers is said to be applicable in only limited sense.⁸⁴ There is a considerable degree of overlap as far as the persons constituting government organs are concerned; the members of the cabinet are members of parliament, the Law Lords sit in the House of Lords both as judges and as legislators, the Lord Chancellor is a cabinet Minister, is the head of the judiciary and serves as a member of the House of Lords when it sits in the legislative capacity.⁸⁵

Although we find the form of separation of powers is observed we find that the House of Lords is at the same time part of the legislative branch and the highest judicial body in the United Kingdom.⁸⁶ The courts do not have power to invalidate laws of parliament.

Parliament has ultimate authority over all affairs of government, including the monarch and the courts. Although this seems to be contrary to the concept of separation of powers, the fact is that there is a considerable amount of de facto independence among agents exercising various functions, and parliament is constrained by various legal instruments, international treaties and constitutional convention.⁸⁷

26. Canada

It has been held that there is no constitutional separation of powers at either the provincial or the federal level in Canada. Thus the delegation by legislature or Parliament of part of its law-making power to executive or other agencies has been upheld. It is also apparent that the executive branch of Government can exercise judicial functions on occasion, subject to the requirement that the members of any agency exercising functions analogous to a superior, district or country must, by virtue of s 96 of the BNA 1867, be appointed by the Governor General ... It has also been held that the courts may perform non-judicial as well as judicial functions.⁸⁸

Some limitations concerning the protection of the legislative and executive authority from judicial interference have been developed. The courts would not interfere with the exercise of purely discretionary executive actions, nor would a court question the wisdom or desirability of legislation properly adopted. Nevertheless, the 'political' nature of matters does not as such deter the courts from testing government action against the Constitution.⁸⁹

The introduction of the Canadian Charter of Rights to the Constitution in 1982 represented some movement in the direction of the introduction of the separation of powers: section 24(1) (1982) affords everyone a right to recourse to the courts in the event of an infringement of a Charter right and section 11(d) guarantees 'a fair and public hearing by an independent and impartial tribunal' to any person charged with an offence.⁹⁰

As a result of the coming into force of the Charter, there is a new balance of power between the judicial, legislative and executive branches of government.⁹¹

The doctrine of separation of powers has been expanded; I deem it appropriate to consider the following dicta of Lamer CJ in 1997 which he stated that:⁹²

'What is at issue here is the character of the relationship between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that

court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is (that) the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice'.

Francois Venter also stated that depoliticisation of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as section 11 (d) of the *Charter*, must be interpreted in such a manner as to protect this principle.⁹³

27. Conclusion

The drawing of conclusions on the topic presented is a matter for discussion.

This is no more than a perspective, a proposal or contribution to the search for conclusions.

Montesquieu's eighteenth-century thinking has served as sound and brilliant practical guidelines for the prevention of concentration of power and its almost inevitable abuse in the hands of one individual or institution. It is inherently impossible to achieve an absolute separation. This is where space exists for legitimate variation in accordance with peculiar circumstances of each case.


Is there an offside rule that should apply in all cases?

It would appear that one has to depart from an acceptance that the existence of formal distinction between the three powers is a compulsory minimum for a democratic constitutional order. Functional separation also appears to be a necessity for the existence of effective checks and balances. Separation at the level of personnel is an area in which there appears to be variances even in the best democracies of the world.

In our jurisdiction the personnel that exercise judicial authority are separate from those that exercise legislative and executive power – this division is strong.

The division between those that exercise legislative and executive authority is not as strong. The overlap, like in many other jurisdictions, is often justified on the basis of the need for effective checks and balances. It is arguable whether the overlap is absolutely necessary for this purpose.

In the United Kingdom on the other hand, and from a distant observer, the divide between personnel that exercise the legislative, executive and judicial power, does not appear to be strong. I am not qualified to comment on the practical impact of the overlap or justifications for it.

There are, no doubt, many other variances in different jurisdictions. In each case one must, it seems, examine the extent of the overlap, the practical impact and the justification thereof. Where the overlap leads to actual, potential or demonstrable abuse of power that cannot be curbed by the existing rules for checks and balances, then, it seems to me, the off-side rule may be held to have been infringed. 

16 September 2012

Endnotes

- ¹ IM Rautenbach *Constitutional Law* 4 ed (2003) at p 78.
- ² [1995] 2 at 513 at 567.
- ³ AW Bradley and KD Ewing *Constitutional and Administrative Law* 13ed p 84.
- ⁴ Ch X (1), Para 143, Quoted in 'Vile Constitutionalism and the separation of powers' p 62.
- ⁵ Edition published in Parid in 1877, 11.6. The title of the chapter is 'De la constitution d' Angleterre'.
- ⁶ Visited England in 1732.
- ⁷ JD Van Der Vyver 'The Separation of Powers' 1993 (8) *South African public law* 177 at p 178.
- ⁸ Supra n 5, 11.6: 'Tout seroit perdu si le meme home, ou le mrmr corps des principaux, ou des nobles, ou du peuple, exeroient ces trios pouvourous: celui de faire des loix, celui d' executer le resolutions publiques, et celui de juger les differends des particuliers.'
- ⁹ See Ville *Constitutionalism and separation of powers* (1967) p 13.
- ¹⁰ 'Oliver Schreiner memorial lecture: separation of powers, democratic ethos and judicial function' 2008 SAJHR 341 at p 349.
- ¹¹ Supra n 2. 11.6 (translation in text by Thomas Nugent: Franz Neumann *The spirit of the laws by Montesquieu introduction* (1949) p 151-2 : 'Lorsque dans meme personne ou dans le meme corps de magistrature la puissance legislative est reunie a la puissance executrice, il n'y a point de liberte, parce qu' on peut craindre que le mme monarque ou le mme senat ne fasse de lois trynniques pour les executer tryanniquement. Il n'y point encore de liberte si la puissance de juger n' est pas separee de la puissance legislative et de l'excutrice. Si elle etait jointe a la puissance legislative, le pouvoir sur la et la liberte des citoyens serait arbitraire; car le juge serait legislature. Si elle etait jointe a la puissance executrice, le juge pourrait avoir la force d' un oppresseur.'
- ¹² *Commentaries on the Laws of England in Four Books* 7 ed (1775) Vol 1 at 146.
- ¹³ Supra n 7.
- ¹⁴ *Introduction to the study of the Constitution* (1959) p 337.
- ¹⁵ Act 108 of 1996.
- ¹⁶ Act 200 of 1993.
- ¹⁷ 2009 (1) SA 287 (CC) at p 298.
- ¹⁸ 2001 (1) BCLR 77 (CC) P86 at par 22.
- ¹⁹ Joubert LAWSA Vol 5 (2012) Part 3 par 10.
- ²⁰ Supra n 18 at par 23.
- ²¹ 1996 (4) SA 744 (CC) at p 810 para 108.
- ²² *De Lange v Smuts No and Others* 1998 (7) BCLR 779 (CC) at p 804 par 60.
- ²³ Supra n 18 par 12.
- ²⁴ Supra n 22.
- ²⁵ Supra n 18.
- ²⁶ 2001 (5) BCLR 423 (CC).
- ²⁷ 1995 (10) BCLR 1289 (CC).
- ²⁸ 2001 (11) BCLR 1126 (CC).
- ²⁹ Supra n 18 par 112.
- ³⁰ Supra n 20 par 111.
- ³¹ Currie and De Waal *The New Constitutional and Administrative Law* (2001) 1 ed p 97.
- ³² Sunstein *Design Democracy: What constitutions do* (2001) p 137.
- ³³ Werkin 2002 *Georgetown law journal* 1055; See also Joubert LAWSA Vol 5 Part 3 par 13.
- ³⁴ Supra n 28.
- ³⁵ Supra n 28 at p 1071-1073.
- ³⁶ Caroll *Constitutional and Administrative Law* 3ed (2003) p 130-132.
- ³⁷ Supra n 27.
- ³⁸ Act 209 of 1993.
- ³⁹ Supra n 16.
- ⁴⁰ See supra n 28 at par 51-62.
- ⁴¹ See supra n 28 at par 62.
- ⁴² 2011 (10) BCLR 1017 (CC).
- ⁴³ Act 41 of 2001.
- ⁴⁴ Currie and De Waal *The Bill of Rights Handbook* (2005).
- ⁴⁵ See supra n 44 at chapter 4 4.6 (e).
- ⁴⁶ See *Legalbrief* 30/08/2012 'Take secrecy Bill to Concourt-Motlanthe.'
- ⁴⁷ See supra n 44 at 4.6(f).
- ⁴⁸ Act 66 of 1995.
- ⁴⁹ Supra n 22 par 57.
- ⁵⁰ See par 61: Sachs J, in a separate judgment, agreed with this conclusion it was the view of the majority of the members of the court. At par 176. Sachs J stated: '[T]he authority to incarcerate for purposes of imposing penalties for past and continuing misconduct belongs to the judiciary, and to the judiciary alone. In my view, the doctrine of separation of powers prevents parliament from entrusting such authority to persons who are not judicial officers performing court functions as contemplated by section 165(1).'
- ⁵¹ Supra n 31 p 109.
- ⁵² Act 8 of 1947.
- ⁵³ Supra n 51 at p 111.
- ⁵⁴ See L. Boule, B Harris and C Hoexter *Constitutional and Administrative Law* (1989) p 206-7.
- ⁵⁵ Supra n 31 p 110-11.
- ⁵⁶ Act 74 of 1996.
- ⁵⁷ Supra n 22 at par 29.
- ⁵⁸ Supra n 22 par 31.
- ⁵⁹ Supra n 22 par 34.
- ⁶⁰ Litigation on behalf of the state to recover money was an 'essential part of the job' at par 39-40.
- ⁶¹ See *Heath* case. At par 43 the court stated that, while the length of the appointment is not necessarily decisive, it is relevant factor to consider whether the functions a judge is expected to perform are incompatible with the judicial office. Also relevant, the court stated at par 17, was that the judge was required to perform typically executive functions such as to appoint the staff for the unit.
- ⁶² Supra n 31 p 112.
- ⁶³ Supra n 31 p 112.
- ⁶⁴ 1997 (4) SA 1 (CC).
- ⁶⁵ 2000 (1) SA 1 (CC).
- ⁶⁶ Supra n 31 p 114.
- ⁶⁷ Supra n 31.
- ⁶⁸ 1952 (4) SA 769 (A) at 784 D.
- ⁶⁹ 2000 (2) SA 1 (CC) at p 38 at par 66.
- ⁷⁰ 1996 (1) SA 984 (CC).
- ⁷¹ Supra n 70 at par 180.
- ⁷² 1998 (1) SA 755 (CC) par 30.
- ⁷³ *R v Cambridge Health Authority, Exparte B* 1995 2 All ER 129 (CA).
- ⁷⁴ Supra n 31 at p 117.
- ⁷⁵ 1998 (3) SA 430 (C).
- ⁷⁶ 2006 (6) SA 416 (CC).
- ⁷⁷ Supra n 76 par 37.
- ⁷⁸ See Seedorf and Sibanda in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed p12-9.
- ⁷⁹ IM Rautenbach & EFJ Malherbe *Constitutional Law* 4 ed (2004) 79.
- ⁸⁰ Joubert LAWSA Vol Part 3 par 6.
- ⁸¹ Supra n 78 at 05; 06-08.
- ⁸² Supra n 81.
- ⁸³ *Jefferson Notes on the State of Virginia* (1781) Query 13.4, as quoted in Seedorf and Sibanda in Woolman et al (eds) *Constitutional Law of South African* 2 ed (05;06-08) 12-08.
- ⁸⁴ *Carpenter Introduction to South Africa Constitutional Law* (1987) p 158.
- ⁸⁵ P Langa 'The separation of powers in SA constitution' 2006 (2) SAJHR at p 8.
- ⁸⁶ Supra n 79 at p 79.
- ⁸⁷ Supra n 79. Strayer (1988) p 137 and cf Russel (1987) p 89-92
- ⁸⁸ Francois Venter *Constitutional Comparison* 1 ed (2000) p 219 quoted from Strayer (1988) p 137 and cf Russel (1987) p 89-92.
- ⁸⁹ Supra n 88 at 219.
- ⁹⁰ Supra n 88 at 46-7.
- ⁹¹ See Francois Venter *Constitutional Comparison* 1 ed (2000) p 219 fn 101.
- ⁹² Supra n 91 quote from p 220-221.
- ⁹³ Supra n 91 at p 221.

Legal Crossword Number 19 Answers

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|---|---|---|--|
| 1 | What you need in a hot court (5) [DRINK] | 1 | What the insurer does to the rights of the insured (9) [SUBROGATE] |
| 2 | Sometimes forced by prudence (10) [HESITATION] | 2 | An English delivery (10) [ATTORNEMENT] |
| 3 | Counsel's fees on attorney's bill (12) [DISBURSEMENT] | 3 | 4 Apt to generate debate (9) [POLEMICAL] |
| 4 | Things that can be bought and sold (2+9) [INCOMMERCIUM] | 4 | 5 To dishonour an undertaking (6) [RENEGE] |
| 5 | What the supporter must pay (11) [MAINTENANCE] | 5 | |