

# SEPARATION OF POWERS IN BOTSWANA

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BY

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## **SEPARATION OF POWERS IN BOTSWANA**

*“ ... None of the various arms of government: the Executive, the Legislature and the Judiciary, comes to life or lives in a hermetically sealed enclave” (Botswana Railway’s Organization v Setsogo & Others 1996 BLR, p804 per Amissah J.P.)*

### **Introduction**

Scholars and commentators of various shades have written and spoken about separation of powers for centuries. Academic disagreements have often arisen as to whether it was John Locke, the Englishman or the French philosopher Montesquieu who came up with the concept of separation of powers. For our purposes and without taking sides, it is sufficient to remind ourselves of the elementary wisdom posited by the French philosopher Montesquieu (1689-1755), in his acclaimed treatise *L’Esprit de Lois*, when he discussed the doctrine of separation of powers. His central argument was that the separation of powers amongst the executive, the legislature and the judiciary was the condition precedent for liberty. According to Montesquieu, if one authority exercises executive, legislative, and judicial powers that will be the very definition of tyranny.

My former Professor likes giving an example that, in a way, validates the theory of separation of powers as espoused by Montesquieu. He says that in

1934, the Resident Commissioner passed a law whose purpose was to change the nature and procedures in the customary courts<sup>1</sup>. The chiefs were seriously opposed to these changes and sought to challenge the Resident Commissioner's powers to single handedly change customary law. In no time two obstacles presented themselves. Firstly, the chiefs needed the permission of the Court to sue the Resident Commissioner. Secondly, there was no judge to hear the application for leave to sue the Resident Commissioner since the Resident Judge was at the time acting as the High Commissioner of the Cape<sup>2</sup>. The story goes on to say that in the absence of the judge the Court was constituted by the Resident Commissioner!

In brief, for the chiefs to challenge the Resident Commissioner's powers, they needed permission from the Resident Commissioner to sue the Resident Commissioner!

Perhaps to avoid a repeat of what happened in 1934, the Constitution of Botswana has divided State power into three spheres: the executive, the legislature, and the judiciary. Each of these organs of the State has its own constitutional mandate to carry out. The legislature's main function is to enact laws; whilst the primary duty of the executive is to take charge of the conduct of state affairs. The function of the judiciary is to adjudicate on disputes that may arise and to have final word on the interpretation of the law.

In interpreting the law, judges must not usurp parliament's legislative functions. Separation of powers in Botswana is loose. Over the years, the three

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<sup>1</sup> *Native Courts Proclamation No 75 of 1934*

<sup>2</sup> *Bojosi Otlhogile, Separation of Powers in Botswana, (1995) unpublished paper*

organs of the State have exhibited respect to each other's sphere of operation and have avoided overstepping their legitimate boundaries.

Whilst within the British system the separation of powers has been reported to be approached with casualness, the same cannot be said to be true of Botswana.

Writing about the British Constitution, Prof Robert Stevens quotes the Lord Chancellor's office as having noted that:

*“Nothing underlines the ... nature of the British Constitution more than the casualness with which it approaches the separation of powers.”*<sup>3</sup>

Botswana, unlike the United Kingdom, is not a parliamentary democracy, but a constitutional democracy. It follows therefore that the centre piece of our democracy is not a sovereign parliament but a supreme law, in the form of a constitution<sup>4</sup>.

### **An aerial view of separation of powers in Botswana**

The phrase “separation of powers” appears nowhere in the Constitution of Botswana. However, that the Constitution apportions powers to the three organs of the State, being the executive, the legislature, and the judiciary is incontrovertible. Section 47(1) provides that the executive power of Botswana shall vest in the President, which power may be exercised by him either

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<sup>3</sup> Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (1993)

<sup>4</sup> For similar remarks see also: *Smith v Mutasa No and Another* 1989(3) ZLR 183(SC) at 219 and *Biti and Another v The Minister of Justice, Legal and Parliamentary Affairs*(2002) AHRLR(Zw SC2002), paragraph 34

directly or through officers subordinate to him, whilst section 86 provides that parliament shall have power to make laws for the peace, order and good government of Botswana. Section 95(1) on the other hand establishes the High Court which shall have unlimited original jurisdiction to hear and determine any civil and criminal proceedings under any law and such other jurisdiction and powers as may be conferred upon it by the Constitution or any other law.

In addition, the Constitution, guarantees fundamental human rights, and entrusts protection of these rights to an independent judiciary. At the risk of perhaps overstating the matter, it could be said that the judiciary is the organ of State that is entrusted with saying “no” to the majority’s will and that of their elected representatives. It is the judiciary, which, by virtue of the learning and integrity of its members, acts as the fulcrum that balances the will of the majority against the constitutional limits on public action.

Unlike the South African Constitution<sup>5</sup>, the Botswana Constitution, does not have any express provision requiring that each organ of the State respect and support each other.

The President, in whom the executive power of the State is vested, is not elected directly. He/she is a member of the National Assembly. The two highest judicial officers of the State, namely, the Chief Justice and the President of the Court of Appeal, are by specific constitutional provisions

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<sup>5</sup> See for example s 41 (1) of the Constitution of the Republic of South Africa, 1996 (“ All spheres of government and all organs of the state within each sphere must...(e) respect the Constitutional status, institutions, powers and functions of government in the other spheres;...(h) cooperate with one another in mutual trust and good faith...” ) and s 165(3)(“ No person or organ of the state may interfere with the functioning of the courts”) and s165(4)( “ Organs of the state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts’).

appointed by the President alone without the intervention of the Judicial Service Commission.

Outside the Constitution, the presiding officers of the customary courts are not appointed on the advice of the Judicial Service Commission. In the case of the Customary Court of Appeal, its President is appointed by the relevant Minister. These courts, like the common law courts exercise substantial judicial powers.

In the case of *Botswana Railways' Organization v Setsogo*<sup>6</sup>, the Court commented as follows with respect to the doctrine of separation of powers in the context of the Constitution of Botswana:

*“But the Constitution did not establish that theory in this country in its rigid form. None of the various arms of government; the Executive, the Legislature and the Judiciary comes to life or lives in a hermetically sealed enclave. The President, in whom the executive power of the State is vested by Section 47 of the Constitution is not elected directly by the people, but through the elected members of the National Assembly. Parliament which exercises the legislative power of the State consists, according to Section 57, of the President, who is the person who wields executive power, and the National Assembly.”*<sup>7</sup>

The other reason why the separation of powers in Botswana is loose is that the cabinet is drawn from the National Assembly. This, notwithstanding,

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<sup>6</sup> 1996 BLR, 763

<sup>7</sup> *Ibid*, p 804, B - C

parliament is still expected to play its role as the watchdog and restrain executive excesses.

It is also true that even in the sphere of law making, legislation is not the sole prerogative of the National Assembly as ministers are also empowered by legislation to promulgate subsidiary legislation in certain cases without reference to the National Assembly. Some scholars have argued that delegated legislation undermines the principle of separation of powers to the extent that it excludes open and public debate about legislation before it is enacted into law. In Zimbabwe for instance, the Zimbabwe Electoral Commission is by section 192 of the Electoral Act, empowered to amend or bypass the Electoral law which the Constitution has entrusted to parliament to make, with the result that the Commission can amend or override parliament's own statute.

In a constitutional democracy parliament cannot delegate its essential legislative functions. As stated in the case of *Executive Council Western Cape*<sup>8</sup> :

*“ (the) authority of Parliament to delegate its law making functions is subject to the constitution, and the authority to make subordinate legislation must be exercised within the framework of the statute under which the authority is delegated.”*

In the case of *Field*<sup>9</sup> the United States of America's Supreme Court took a restrictive view of the extent to which Congress may delegate its functions to the Executive. The Court observed that:

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<sup>8</sup> *Executive Council Western Cape v Minister of Provincial Affairs and Constitutional Development 2000(1) SA 661(CC) para 122-123*

*“ That Congress cannot delegate legislative powers to the President is a principle universally recognized as vital to the integrity and maintenance of the system of governance ordered by the Constitution.”*

In another US case of *Panama*, Hughes CJ said:

*“ Congress manifestly is not permitted to abdicate, or to transfer to others the essential legislative functions with which it is vested.”*<sup>10</sup>

The reality of Botswana’s constitutional arrangement is that the three organs of the State are interdependent. Each of the three organs of the State provides the necessary checks and balances on each other. The legislature’s law making powers can serve to keep the judiciary and the executive in check. The judiciary’s power to interpret the law can also provide the necessary checks on the powers of the executive and the legislature. The executive’s “power of the purse” can be an effective tool to keep the other organs within their constitutional boundaries.

That separation of powers in Botswana is not water tight is not unique to Botswana. Other countries such as South Africa, Namibia, and Zimbabwe have more or less similar arrangements as Botswana when it comes to separation of powers.

The fact that separation of powers is loose means that it is inevitable that the respective functions of the three organs of the State will overlap. The

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<sup>9</sup> *Field v Clark* 143 US 649(1892) at p 692;36 L.Ed 294 at page 310

<sup>10</sup> *Panama Refining Co. v Ryan* 293 US 388 (1935); 79 l Ed 446 at page 459

overlapping of functions has manifested itself in such areas as constitutional interpretation and sentencing.

In a constitutional democracy such as Botswana where judges have the power to declare legislation to be invalid if it is in conflict with the Constitution, it is inevitable that the judges would, to put it minimally, exercise some residual law making powers. As I indicated earlier, the Courts notwithstanding that they have a final say on what the Constitution means have been very restrained and have only invalidated legislation when it was absolutely necessary to do so. At the end of the day, no matter how ingenious its design, a country's constitution is work in progress and is only workable as its leaders wish it to be; and as long as the judges are prepared to breath life into its provisions.

### **Botswana case law on separation of powers**

#### ***Petrus and Another v The State*<sup>11</sup>**

The case of *Petrus* is one of the early cases where the judiciary pronounced in clear terms the legitimate constitutional boundaries of the legislature and the judiciary. In this case, two accused persons were convicted by a magistrate court of house breaking and theft contrary to Section 305 (1) (a) of the Penal Code as amended by the Penal Code (Amendment) Act, 1982.<sup>12</sup> Each of the accused persons was sentenced to three years imprisonment and to corporal punishment as provided by the Criminal Procedure and Evidence Act.<sup>13</sup> The matter came before the High Court for review and was eventually referred to

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<sup>11</sup> 1982 BLR 14

<sup>12</sup> Act No. 20 of 1982

<sup>13</sup> As amended by the Criminal Procedure (Amendment) Act 1982, Act No.21 of 1982.

the Court of Appeal, where one of the central questions was whether corporal punishment as prescribed in Section 301(3) of the Criminal Procedure and Evidence Act was unconstitutional as being in conflict with Section 7 of the Constitution. The Court held that repeated and delayed infliction of corporal punishment is unconstitutional.

During the course of argument before the Court of Appeal, the State sought to dissuade the Court from striking out the offensive sections of the Criminal Procedure and Evidence Act, on the basis that the National Assembly was supreme and the Court should not interfere with a law it passed. The Court's response was crisp and to the point:

*“Under a written Constitution such as we have in the Republic of Botswana, the National Assembly is supreme only in the exercise of legislative powers. It is not supreme in the sense that it can pass any legislation even if it is ultra vires any provision of the Constitution. I believe it is clear, and this point must be strongly made, that every piece of legislation is subject to the scrutiny of the courts at the instance of any citizen...who has the necessary locus to challenge the Constitutionality of the legislation.”<sup>14</sup>*

### ***Dow v The Attorney General*<sup>15</sup>**

Judges have enormous powers in a constitutional democracy to say what the law is. That authority has been asserted in ways that have often, dramatically

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<sup>14</sup> Note 11, p 33

<sup>15</sup> *Attorney General v Dow* 1992 BLR 119

shifted political and social paradigms, and has often elicited disquiet, even, public outcry. One such case is the *Dow* case.

The case of *Dow* is now well-known amongst lawyers in the SADC region. Some commentators have suggested that the case is an example of judges making law and not interpreting it. A reading of the dissenting judgment of Puckrin JA seems to suggest that judges must tread with extreme care in interpreting the Constitution.

I will return to that dissenting judgment in due course.

The above case concerned a challenge by a female citizen of Botswana, to certain provisions of the Citizenship Act, which she considered discriminatory against women. The Citizenship Act of 1984, provided that children born to a male citizen married to a female non-citizen were citizens, whilst those born to female citizen married to a male non-citizen were not granted citizenship.

This challenge must be understood in the context of section 15 of the Constitution that prohibits discrimination on the grounds of race, tribe, and place of origin, political opinions, colour, or creed. The ground of sex is not mentioned. The absence of the specific ground of sex led the Attorney General, who argued on behalf of the State in that case, to submit that the framers of the Constitution intended to discriminate on the basis of sex, otherwise they would have included sex as a prohibited ground.

The Court, however, took the view that it cannot accept that the word sex was left in order to permit sex discrimination<sup>16</sup>. The Court placed reliance on international legal instruments such as the Organization of African Unity's Convention on non-discrimination and pointed out that Botswana as a signatory to that convention is bound by its terms, notwithstanding that the said convention had not been incorporated into national law. It is significant that the Court held that the Courts in Botswana are obliged to interpret the Constitution in manner that is consistent with Botswana's obligations under international law, unless such an approach is expressly prohibited or impossible. It was the Court's view that it finds it difficult to accept that Botswana would deliberately discriminate against women in its legislation whilst at the same time internationally support non-discrimination against females. Earlier, the High Court had made the same point, with more devastating clarity when it said, per Martin Horwitz Ag J:

*“ I do not think I would be losing sight of my functions or exceeding them sitting as a Judge in the High Court, If I say that the time when women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex.”*<sup>17</sup>

It is a matter of debate whether the Courts overstepped their mark when they invalidated Section 5 of the Citizenship Act of 1984, as being in conflict with

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<sup>16</sup> Note 15, p 181

<sup>17</sup> *Dow v Attorney General* 1991 BLR 244-245

Section 15 of the Constitution. Whatever, the debate the dissenting judgment of Puckrin JA is worth-taking note of. He said:

*“In my view, therefore, and applying a purposive construction to the Constitution and attempting to "map out piece by piece the parameters of the fence", I am of the view that the Constitution, and particularly section 15 thereof, does not preclude the legislature from enacting a statute which provides that citizenship shall pass in a patrilineal but not matrilineal fashion. In my view, for the reasons set out in my brother Schreiner J.A.'s judgment, the provisions of section 15 of the Constitution are clear and it is not necessary to invoke such extraneous aids to interpretation as Botswana's international obligations under various conventions and the like, I should emphasize that the opinion of the Chief Justice of Pakistan quoted by my learned brother Aguda J.A. in his judgment herein, emphasizes that in the event of doubt the national law is to be interpreted in accordance with a State's international obligations. Where there is no such doubt there is no room for an invocation of statements flowing from international conventions and the like. It is, in my respectful view, a dangerous precedent to allow a court free reference to international declarations where no "doubt exists" (i.e. where the Constitution sought to be interpreted is unambiguous) for this would ultimately lead to an abandonment of sovereignty which would be wholly at variance with the entire purpose of the Constitution of Botswana.”*<sup>18</sup>

Botswana is generally a conservative society. To come to the conclusion that citizenship can follow the female line was alien to the views of the majority of people. The decision caused public outcry in some circles. Molokomme

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<sup>18</sup> Note 15, p 195

observes that there were complaints from politicians following the Court decision that: “... *the courts were now taking over the responsibilities of duly elected representatives who could better judge the pulse of the nation on such sensitive matters as culture and tradition.*”<sup>19</sup>

***Peloewetse v The Permanent Secretary to the President and Others***<sup>20</sup>

This case is perhaps notable for reminding all of us that the Courts are prepared in an appropriate case, and in the interest of good governance to quash implemented decisions of government.

The above case involved a challenge to the decision of the Permanent Secretary to the President, in terms of which, the appellant had unsuccessfully applied to be the Director of Sports. He sought to review and set aside the appointment of Shaw Kgathi, who was the successful candidate on the basis that his appointment did not meet all the requirements set out in the advertisement for the job that was issued to the public. The Court intervened and quashed the decision of the Permanent Secretary to the President to appoint Kgathi. In the course of its judgment, the Court made the following pertinent remark:

*“It would, in my opinion, be wrong and dangerous to uphold a principle to the effect that implemented decisions of government should never be disturbed because the consequences of disturbance are invariably prejudicial to good*

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<sup>19</sup> Dr Athaliah Molokomme, “ *Some Thoughts on Separation of Powers: A Botswana Perspective (2005); A Presentation made the Workshop on the Transformation of The Judiciary*”, Johannesburg, South Africa, 14-16 April 2005.

<sup>20</sup> 2000 1BLR 79

*administration. We have, in this case, heard submissions which seem to be predicated on the belief that whatever government does must be right. Such submissions are contrary to modern thinking on governance, and should be rejected”.*

The Court emphasized the point that judicial review of executive action contributes to promotion of good government, noting that it is the duty of the Courts to scrutinize government actions to ensure that when government acts, it acts correctly. Although the right to just administrative action is not entrenched in the Constitution or any statutes, our Courts as demonstrated in the above action have always used their review power to ensure administrative justice.

On sentencing, the Courts have often resented the legislature’s attempt to prescribe minimum sentences because of the belief that sentencing is a matter that must be left to the Courts to assess having regard to the circumstances of the offender, the gravity of the offence and the interests of the public.

***Badisa Moatshe v The State,***<sup>21</sup>

In the above case, a question arose whether the mandatory sentences laid down in the Motor Vehicle Theft Act, under which the appellants had been convicted amounted to inhuman and degrading treatment as contemplated by Section 7(1) of the Constitution.

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<sup>21</sup> 2004 (1) BLR 1

The Court concluded that a statutory minimum sentence of imprisonment is not *per se unconstitutional*, but that it would be unconstitutional if the sentence is grossly disproportionate that no reasonable man would have imposed it.

As a matter of principle, the Court held that although the legislature is empowered to prescribe mandatory minimum sentences, it cannot enact penalties that would amount to cruel, inhuman, or degrading punishment, in conflict with the Constitution; and that whether a prescribed punishment is in conflict is a matter of the Courts to decide.

As a general rule, the Courts accept that it is the responsibility of the legislature to prescribe penal consequences for the commission of an offence. This is so because the prevention of crime is a matter of acute concern in many countries around the world; and prescribing appropriate punishment is an important task of the legislature – the repository of the will of the people. To this extent, the task of the Courts is to give full and fair effect to the penal laws which the legislature has enacted.

Commenting on the need for the Courts to respect the separation of powers, Tebbutt JP, in the *Moatshe* case, cited *supra*, stated that:

*‘At this juncture I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of the government – the Legislative, the Executive and the Judiciary – must strive to make it remain so except to any extent as may be prohibited by the Constitution in clear terms’.*

The need for the judiciary to respect the separation of powers is anchored on the realization that the legislature represents the will of the people, and that the Courts, not being elected should not unduly frustrate the will of the people as represented by parliament unless such will conflicts with the Constitution.

### **Case Law on Separation of Powers in Comparative Perspective**

The remarkable power of a written constitution, with separation of powers is demonstrated aptly by the case law earlier discussed. Using a written constitution, the Courts have upheld rights of individuals across the globe. An early example is a US (United States of America) case decided in Massachusetts, following the adoption of the Massachusetts Constitution of 1780. The Massachusetts Constitution was adopted at a time when slavery was still rampant. Three years after the Constitution of Massachusetts was adopted a case was brought before its Supreme Judicial Court, by Quock Walker, who sued Nathaniel Jennison, a white man, for assaulting him. Mr. Jennison's defence was that his assault was lawful because he had assaulted his "property".

The question before the Court was whether Mr. Jennison could rightfully claim that Walker was his "property"? The Court repudiated the notion of Walker being "property" as such notion is inconsistent with the principle enshrined in the Massachusetts Constitution that "that all men are born free and equal, and that every subject is entitled to liberty.."<sup>22</sup>

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<sup>22</sup> See *Proceedings of Massachusetts Historical Society Vol 1873-1875 294(1875)*

Mr. Walker's case was the first case in the United States to abolish slavery by judicial decision. It constituted a radical re-ordering of society by the judiciary, and quite pleasantly it caused no outcry. In a way, by upholding the rights of Mr. Walker, the Court gave meaning to public values as encapsulated in the Constitution. As Professor Owen Fiss correctly observed, the function of a judge is "to give meaning to public values."<sup>23</sup> On occasions, in giving meaning to public values as reflected in the Constitution, the Courts have angered the executive or the legislature or even members of the public.

In the case of *United States v Nixon*<sup>24</sup>, the Court ordered a sitting President, notwithstanding his objections on the ground of executive privilege to hand over the most intimate of his conversations with his aides and advisors. This case annoyed some members of the executive who considered the courts as going overboard. Similarly, the Court's decision prohibiting racial segregation in the celebrated case of *Brown v Board of Education*<sup>25</sup> was greeted with disquiet by some.

As a matter a matter of policy, the Courts are cautious not to encroach into the functions of other organs of the State. In the South African case of *Soobramoney v Minister of Health, KwaZulu-Natal*<sup>26</sup>, the Constitutional Court, in dealing with the question of the right to health as provided in the South African constitution, refrained from giving orders that the State should provide expensive dialysis treatment to keep a critically sick patient alive. The Court reasoned that the situation of a person suffering from chronic renal

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<sup>23</sup> OM Fiss, "The Supreme Court, 1978 Term – Foreword: The Forms of Justice" (1979) 93 *Harvard LRI*, 30

<sup>24</sup> (1974) 418 US 683

<sup>25</sup> *Brown v Board of Education of Topeka* (1954) 347 US 483

<sup>26</sup> 1998 (1) SA 756 (CC)

failure requiring dialysis several days in a week in order to keep a patient alive was not an emergency as contemplated by Section 27(3) of the South African constitution, which provides that: *no one may be refused emergency medical treatment*".

However, in the case of *Grootboom*<sup>27</sup>, which dealt with the right to housing, the Court appeared quite prepared to declare that the measures adopted by government to provide housing were unreasonable, since they made no provision for temporary shelter for homeless people.

The question of separation of powers also featured prominently in the South African case of *Mohamed v President of the Republic of South Africa*<sup>28</sup>. The facts of the case were that the applicant, Mohamed was handed over to the agents of FBI by the South African authorities. He had been sentenced to life imprisonment by a Court in the United States of America for allegedly taking part in the bombing of the country's embassies in Nairobi and Dar es Salaam in 1998. It was argued on behalf of the applicant in Court that the removal of the applicant from South Africa amounted, in effect, to unlawful extradition. It was argued by the respondent that an order by the Court declaring the arrest and eventual removal of the applicant from South Africa as unlawful will amount to an encroachment into the sphere of the executive in that it was not for the judiciary to issue instructions to the executive since the applicant had already been handed over to the authorities in the United States of America. The Court rejected the Respondent's arguments and issued an order declaring the handing over of the applicant to United States authorities unlawful. The

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<sup>27</sup> *Government of the Republic of South Africa v Grootboom* (11) 1169 (CC)

<sup>28</sup> 2001 7 BCLR 685(CC)

Court in upholding the supremacy of the Constitution also found that the removal was unlawful as it violated the applicant's rights to human dignity and not to be treated in a cruel, inhuman and degrading manner.

In the South African case of *South African Association of Personal Injury Lawyers v Heath*<sup>29</sup>, certain legislation required the president to appoint a judge to head the Special Investigations Unit. The Court held that certain of the functions of the head of the unit were executive in nature and inconsistent with the functions of a judge. Consequently, the Court held that a judge may not head the Special Investigations Unit into public and private corruption and maladministration. At paragraph 46 of its judgment, the Court pronounced itself as follows:

*“Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the “central mission of the judiciary”. Were this to happen, the public any well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive’s power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision,*

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<sup>29</sup> 2000(1)BCLR 77

*therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order.”*

## **Separation of Powers and Workings of Government**

In the era of a welfare state, the functions of government are numerous and pervasive. Everywhere you turn there is government. Governments all over the world are increasingly involved in issues of social welfare such as providing food rations, school fees, houses, pensions, employment and health facilities.

As a result of the growth in the functions of a modern state, the judiciary often finds itself deciding cases with social policy implication. For instance, does the right to life, liberty mean that a brain dead individual has a right to remain on life support for decades? Should state workers be entitled to a cost of living adjustment every year? Do workers in the private sector have a legitimate expectation to share in the profits of the employer where it is shown that their productivity contributed immensely to the profits reached? Are these matters not best resolved through democratic debates, negotiation and compromise? Is it proper for the judges to be involved in matters of social policy? Do they have the capacity to do so? When the judges find themselves entangled in matters of policy, does that not amount to trespassing into the province of the legislature?

These questions are real. I am sure I speak for some that quite often, a judge may find himself/herself wondering whether to intervene in a particular dispute is to undermine the other branch of the State or not. When such a question arises, we often try our best to seek the right balance. We may often

not get the balance right, and when that happens it is legitimate for the elected representatives to let us know and they can be assured that we will always listen very carefully. What all these shows is that invariably the functions of the various arms of government overlap, and that all of us, in these three organs of the State need to cooperate and to be cautious to ensure that we do not undermine each other. We owe it to the public to do so. It is important that the public have confidence in the three organs of the State, that they are faithful to their constitutional mandate. For the judiciary, public confidence is its life blood. As it is often said the value of the judiciary lies in its member's intellectual insight, impartiality and integrity.

## **Conclusion**

Separation of powers is very important for any country. It ensures, among other things, that the rights of people are best secured by a written constitution that entrenches fundamental human rights and freedoms and enforced by a judiciary composed of men and women of learning and integrity. In the course of executing their constitutional mandate, there is bound, on occasions, to be friction and tension amongst the three organs of the State. When such tensions arise, they must be addressed soberly and mutually so that the great prize that the Constitution sought to secure for everybody, being liberty, does not become a casualty.