

A E NOTHNAGEL - SUPPLEMENTARY ARGUMENT

FIRST SUBMISSION DATED 27 MAY 1996

SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND THE LEGISLATURE

My submission is that the Constitution proposed and adopted by the Constitutional Assembly violates Principle VI of the 34 Constitutional Principles contained in Schedule 4 of the 1993 Constitution.

Principle VI says more than just 'There shall be a separation of powers between the Legislature, Executive and Judiciary'. It prescribes the necessity and the reasons for this separation of the powers.

It enhances the meaning of separation by adding how it should be done, namely 'with appropriate' 'checks and balances'. It further enhances the separation, by adding reasons for the separation with the aim to 'ensure accountability, responsiveness and openness.'

If it was not the intention of Principle VI to separate the Executive from the Legislature why, were the words 'with appropriate' 'checks and balances' together with 'ensure accountability, responsiveness and openness' added?

To my view, Principle VI rightly implies that the separation of the powers of the Executive and the Legislature is sine qua non to 'accountability, responsiveness and openness'.

Therefore it could be argued that the non separation of powers, in the context of the word 'appropriate' implies less 'accountability, less responsiveness and less openness' if the powers are not separated.

Principle VI does not distinguish between the said three powers. It clearly says that only one of these three powers should be separated from any other of the three powers.

How and Where does the New Constitution Violate Principle VI of the Schedule

Article 47(1)(a)(i) of the Constitution, Article 91(3)(a), Article 91(3)(b), 91(3)(c) and 91(4) of the adopted Constitution clearly violates the principle of the 'separation of powers between the executive and the legislative' as laid down in Principle VI quoted above.

Article 47(1)(a)(i) makes provision for the President, the Deputy President, Ministers and Deputy Ministers to remain members of the National Assembly once they have been elected and appointed to such executive positions.

Article 91(3)(a) goes further and lays down that the President must select the Deputy President from among the members of the National Assembly. The President and the Deputy

President, the most influential members of the Executive, then remain members of the Legislature.

Article 91(3)(b): The President may select any number of Ministers from among the members of the Assembly. This enhances the influence of the Executive in the Legislature because these members remain members of Parliament, their influence is being underlined further by article 91(3)(c): The President may select no more than two ministers from outside the Assembly.

Article 91(4): The President must appoint a member of the Cabinet to be the leader of Government Business in the National Assembly. In this regard the Executive (to a certain degree) takes control of the functioning of Parliament.

This leader of Parliament, along with the Speaker and the chief whip of the majority Party and other ships, organizes the program of Parliament and the precedence of matter to be dealt with by Parliament.

Conclusion

There can simply be no separation of powers if people are allowed to be members of the Executive (one of the 'Powers') simultaneously.

Proposal

It is therefore my submission that the Constitutional Court should rule that the Constitutional Assembly and/or Parliament should amend the proposed constitution in order to bring it in line with the said Principle VI of the 34 Principles. This should ensure a separation of the Executive and Legislature.

The President, the Deputy President, Ministers and Deputy Ministers should, by the Constitution, be excluded from being allowed to be members of the Parliament, or to serve in any position of Parliamentary power in Parliament.

The only exception is that they may be present in Parliament to attend debates, to address parliament in general political debates., when introducing legislation, when proposing their Department's budget, when answering questions in Parliament, or when required by Parliament to discuss any matter.

If the President want to address Parliament he should be afforded that opportunity whenever he wishes.

Parliament, or any Committee of Parliament, should literally have the power vested in the Constitution to summons a Minister to appear before Parliament, or any committee of Parliament, to give account of matters pertaining to his/her own or their Department's activities.

The Executive, the President, the Deputy President, Ministers and Deputy Ministers should not be allowed to vote on any matter before Parliament.

In Germany and France a 'caretaker member of Parliament' is appointed in the place of a member of Parliament when such member is appointed as member of the Executive i.e. cabinet Minister or appointed Deputy Minister.

If the Minister or Deputy Minister ceases to be a Minister or Deputy minister they can regain their seat in Parliament and the caretaker parliamentarian then leaves Parliament.

Why should the Executive and the Legislature be Separated?

It is fundamentally wrong for the President, the Deputy President, Minister and Deputy Ministers to sit in judgment, in Parliament, as members of such Parliament, on their own management and that of their Departments.

They should be allowed to participate in the work of the Legislature concerning the general running of the Country i.e. Votes of confidence in the Government etc. However, they should not be allowed to vote.

As members of Parliament cabinet Ministers and Deputy ministers also attend the influential caucus meetings of their own Party. Here they can exert pressure on non Executive members of their own party to sway the opinion of the caucus, or to discipline members to vote to and to speak up in Parliament, in accordance with the Executive's view, i.e. the 'party line'.

The present system where Ministers and Deputy Ministers are also members of Parliament actually forces 'aspirant' (members of Parliament) to constantly 'tow the line' in order not to be eliminated from any future promotion.

I request the opportunity to address the Constitutional Court further on this matter in person.

I have had 20 years of personal experience on these matters, firstly as an elected member of the 'old Provincial Council of the Transvaal' (1970-1974) and thereafter, as member of the old South African Parliament (1974-89).

I also had the privilege as SA Ambassador to the Netherlands (1989 to 1993) to observe how democracy functions in Europe, where the Executive and Parliament is indeed separated.

ALBERT E. NOTHNAGEL

Belville

27 May 1996

SECOND SUBMISSION

ADDITIONAL ARGUMENTS ON THE SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND THE LEGISLATURE, AS REQUESTED

Principle VI of the 34 Constitution Principles, contained in Schedule 4 of the 1993 Constitution, reads as follows:

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

Provincial and Local Government

All the arguments in my first submission, as well as in this second submission, applies mutatis mutandis to the mentioned and all other articles in the proposed Constitution that deals with the other two tiers of Government, namely the second tier (the Provinces) and the third tier (Local Authorities).

My submission therefore also applies to all those provisions in the Constitution that allows or provides for the Provincial Premiers and Executive members of the Provinces to be members of the Provincial Parliaments simultaneously.

It therefore also addresses those articles that allows the Executive Members of Local Authorities to be members of the Executive and the Legislative Authorities simultaneously.

What does Separation Mean?

Separation clearly means that members of the one arm of government namely the Executive should not be allowed to sit in judgment, as members, on decisions to be taken by another arm of power namely the Legislative arm.

If a member of the Executive on any of the three levels of Government (Central, Provincial or Local) could sit in the Legislature simultaneously, with the right to make decisions, to vote, to serve in a committee of the legislature as a member or to organize the precedence of work in such legislative body, one clearly cannot speak of separation.

How can members of the Cabinet be members of Parliament, in judgment of their own decisions, in the administration of their own Departments, or their cabinet colleagues' departments.

What did the Constitutional Assembly have in Mind with Principle VI - The Separation Principle?

The Constitutional Assembly clearly acknowledged the need for separation as a method for 'appropriate checks and balances to ensure accountability, responsiveness and openness.'

If then however allows the members of the Executive to take decisions in the very body that have to check on them, namely Parliament!

The Constitutional Assembly acknowledges the need for separation but then it proposes the integration of the executive and the Legislature by way of dual membership for Cabinet Ministers and Deputy Ministers of Parliament, for the new constitution.

To my view, the real reason could be to give more power to the ruling party over Parliament. If that was not the intention with this conflict of the Principle VI and the proposals in the constitution, it will certainly result in an unhealthy power dominance for the majority party in the affairs of Parliament and the running of government.

During the Constitution making process I approached several members of the Constitutional Assembly to lobby for the separation of powers between the Cabinet and Parliament. I also discussed it briefly, in person, with the Chairman of the Constitutional Assembly.

I understand that three of the political parties actually argued in favour of the separation of the powers of the Executive and the Legislature in the Constitution.

The integration of the Executive and the Legislature as it stands in the Constitution now, actually came about through bilateral discussions between parties.

NB: To now ignore, possibly forever, the necessity of the separation of the two powers in South Africa, as a result of a bilateral agreement between two parties (both in power during the discussions, with vested interests), is to punish the population of South Africa forever, on such a vital aspect of it's future constitution.

The Relation between the Executive and Parliament

Who has the Power?

In the proposed Constitution that violates the accepted principle of the separation between the Executive and the Legislature, most power is now, unfortunately, once again, vested in the hands of the Executive, via dual membership of members of the Cabinet in Parliament.

In practice it also means more power in the hands of the Executive President, who in turn appoints and dismisses members of the cabinet.

Members of his Executive body, his Cabinet, serve in the Legislature as members. They control the procedures of Parliament, they vote, they can serve as members of Parliamentary Committees and most of all, and sadly, they exert a tremendous caucus disciplinary pressure on their party members in Parliament.

They are firmly, like in the old apartheid days back in power, to govern as they like.

Legislation: A Process

In almost all of the democracies of the world, where the powers of the Executive and the Legislature is separated, legislation becomes a process of negotiation between the Executive and Parliament.

Parliament could not on its own pass legislation of which the Executive does not approve. On the other hand the Executive cannot force the hand of Parliament to adopt legislation that Parliament does not approve.

In this process the media and members of the public participate in proposed legislation in many ways: by giving evidence, by debating, by criticizing, promoting and putting their own views across.

In this way the Legislature becomes a custodian of the democracy for the people by making sure that attention is being paid to the submissions of the public, without ministers, the Executive calling the tune.

In practice it means that even the members of the governing party are allowed, and in fact do, in many countries where the powers are separated, vote against their own majority party.

Lobbying between the Executive and the Legislature

In all the democracies where the Executive and the Legislative powers are separated, both groups lobby and try to persuade one another. This process is not only healthy but inevitable.

Where the Executive on all three levels therefore does not have membership of the Legislature, where they are not allowed to vote on decisions of the Legislature or where they are not allowed to serve on any committee in the Legislature, they can still communicate with all and any members of Parliament and try to influence any decision of the Legislature.

The Executive should not Govern Uncontrolled

In a democracy the public does not elect a party or any members to parliament (Legislature) for five years to take any decision that they as elected majority Party deem fit.

Of course we, the public, may nowadays go to the Constitutional Court, the Human Rights Committee, the Public Protector, the Auditor General If the matter of our concern falls within the ambit of their responsibilities.

But if Parliament has members of the Cabinet and Deputy ministers in it's midst, the public may rightly feel that Parliament is just a rubber stamp of the Cabinet, and often of incompetent government.

When Should the President, the Deputy President, Ministers, and Deputy Ministers attend Parliament?

When the President addresses Parliament

When they listen to debates

Whenever they (Ministers) would like to make a statement of public importance

When Ministers introduce Legislation

When answering questions

When introducing the budget of their specific Department

When summonsed to appear before Parliament

When they want to testify before a committee of Parliament

Cabinet Members and Deputy Ministers as Members of Parliament Leads to the Manipulation of Parliament

Members of the Executive, that also serve as members of Parliament, tend to manipulate parliament in various ways:

The Caucus System:

Via the caucus system the members of Parliament can be 'forced' to support the Executive's decisions.

I attended many caucus meetings where it was said explicitly to the caucus members of the ruling Party: The caucus does not make policy, the caucus merely expresses it's views and then votes for the Cabinet's decisions.

I have no reason to think that it will not be the same under the proposed constitution, if there is not a proper separation of powers.

Members of the majority party that do not agree with the cabinet, or differ in public, face disciplinary action from the Party hierarchy.

The caucus lays down strict disciplinary rules for it's members.

The majority Party then becomes more important and powerful than Parliament itself.

Party Membership

The proposed Constitution further disallows a member of the Legislature to switch from the one party to the other.

Members of the ruling Party in Parliament therefore have little choice but to 'listen' and to 'obey' the decisions of the Cabinet, their fellow colleagues in Parliament.

Future Candidacy

A disagreeing member discredits himself easily in his party if he should speak up. The Party could for instance eliminate him from future Party lists.

Portfolio Committees

Up to now we had a fairly good demonstration of the power of the Portfolio Committees. Their meetings are open and they are performing much better than in the old Parliament, but this will not last for very long.

The fact remains that Ministers can be appointed as members and even as chairpersons of Parliamentary Portfolio Committees.

My submission is that the quoted clauses in my first submission make a mockery of the so-called separation of the powers between the Executive and the Legislature.

It administers exactly the old sort of medicine, where the Governing Party in Parliament is controlled by the Cabinet and thus makes a virtual dictator of the President, if it should be in his nature to act as a dictator.

Who Checks the Administrative Authority of the Country?

Billions of rands of taxpayers money is used by Government Departments. When it is misused or where and when corruption occurs, Parliament sits with those politically responsible, in their midst, as voting members.

What is more, members of the governing party in Parliament are being hamstrung by the caucus discipline when they criticize the mismanagement in a State Department. They are virtually obliged to protect the politically responsible Minister or Deputy Minister! The system requires them to say 'Innocent'!

My Submission Entails the Following Suggested Changes in the Proposed Constitution

Members of the Executive should not simultaneously be members of the Legislature. Once a member of Parliament is elected as Minister or Deputy Minister his right to be a member of Parliament automatically terminates.

The Party then appoints a caretaker MP in his place. If he should resign as a member of the Executive or is 'sacked', he can return to Parliament as member in the place of such caretaker member.

Parliament should not be 'forced' to select or accept any person for any position in Parliament from among the members of the Executive.

Parliament should be allowed to elect the leader of the Assembly who should not be a Minister.

The program of Parliament should not be organized or influenced by the Cabinet.

It is therefore my submission that the Constitutional Court should rule that the Constitutional Assembly and/or Parliament should amend the proposed constitution in order to bring it in line with the Principle VI of the 34 Principles.

This will ensure a true and full separation of the Executive and the Legislature.

Powers of Parliament

Parliament is the forum where the people of the country should be represented by the people whom they elected.

The Executive is the forum where the elected members take decisions and run the country on a day to day basis.

The people don't elect the cabinet. The decisions of the cabinet can greatly influence the lives of the people.

Members of Parliament are there to serve the interests of the people and to protect their rights and not to 'cover up' for the Executive.

Parliament should therefore, publicly and via the portfolio Committees, guard against mismanagement of government Departments.

Democracy and Power

Democracy was, from the beginning, meant to give Power to the people (the demos). With the non separation of the Executive and the Legislature in our new Constitution the people of South Africa lose a lot of their say in matters and the Executive retain their dominant and powerful position, as in the past.

We are now back to the old South Africa where the Executive 'runs' Parliament and once again entrenches its grip on Parliament.

Instead of Parliament becoming a custodian for the rights of the people, the Executive are actually fully in charge.

I feel saddened by this infringement of 'checks and balances' in our new constitution.

Where do Members of the Cabinet Find Time to Sit in Parliament?

Ministers and Deputy Ministers' presence and functions in Parliament, as members of Parliament, is a time consuming task.

Where in a modern day democracy is it a part time job to run a Government Department and to attend to Cabinet matters?

REQUEST TO ADDRESS THE CONSTITUTIONAL COURT

I, therefore, once again, request the opportunity to address the Constitutional Court on the violation in the proposed Constitution, by the Constitutional Assembly of Principle VI of the 34 Constitutional Principles contained in Schedule 4 of the 1993 Constitution.

There are several other aspects on this issue that I would like to bring to the attention of the Court. Here I specifically refer to examples of what happened where Cabinet Ministers and Deputy Ministers wrongly influenced Parliament in the past because of their presence and powers in Parliament.

ALBERT E. NOTHNAGEL

11 June, 1996