

# The Role of Separation of Powers in Ensuring Public Accountability in South Africa: Policy Versus Practice

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**Abstract:** The *Constitution of the Republic of South Africa of 1996* (1996 *Constitution*) makes a provision that there shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. This constitutional provision is adopted from a century old principle of *trias politica* which stipulates that power of the state must be divided amongst the three existing arms. This policy position makes a sound pronouncement that each arm of the state must be held accountable in the performance of their public functions. However, more focus of this paper is on the legislative arm in that it is the one responsible for ensuring that the executive arm accounts for all functions vested upon it by the 1996 *Constitution*. This conceptual paper seeks to explore the nature of the relationship between these three arms of the state, and identify challenges confronting the legislature in holding the executive to account so as to propose possible solutions to the challenges. It is recommended the legislative arm must be beefed-up to ensure that the executive arm is held accountable at all times so as to curtail maladministration, corruption and the abuse of state resources.

**Keywords:** Separation of Powers, Public Accountability, Oversight and Parliament

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## 1. Introduction

It is provided for in the *Constitution of the Republic of South Africa of 1996* (hereafter referred to as 1996 *Constitution*) 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 (RSA, 1996; O'Regan, 2005:120; Mojapelo, 2013:39). It is argued however that there's no universal model of separation of powers basically meaning that "all should not be put in one basket" which emphasises that all power cannot be concentrated in one arm or person to prevent abuse of such power (Kohn, 2013:6).

French philosopher named Charles Montesquieu is well known for articulating the theory of *trias politica*, which is implemented in many of the constitutions around the world particularly in developed world including but not limited to that of the United States of America as far back as the 1780's (O'Regan, 2005; Venter & Landsberg, 2011; Mojapelo, 2013:37). *Trias politica* basically refers to the separation of state powers. Montesquieu is also associated with an assertion that says:

"... the accumulation of all powers, legislative,

*executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny"* (O'Regan, 2005:123).

It is safe to note that the first philosopher to propagate the principle of separation of powers is John Locke (1632-1704) who lived way before Montesquieu. However, it is Montesquieu who is regarded as the architect of the doctrine of separation of powers (Mojapelo, 2013:37).

The principle of the separation of powers underscores that the specific powers and functions are allocated to each arm of the state, and each with its own duties and responsibilities. The importance of the separation of powers is that each arm of the state serves as a "check and balance" over one another (Dube, 2017). As posited by Mangu (1998:2), separation of powers is one of the core elements of constitutionalism and democracy all over the world. The doctrine of separation of powers is essentially a flagship of many constitutional democracies in the world which often provides for the three arms of the state which seeks to ensure that there's checks and balances in each other's operations and functions (Mojapelo, 2013:39). This doctrine continues

to evolve particularly with the identification of need for further amendment in the legislative framework. The traditional notion as propagated by Locke and Montesquieu posits that there are separate and distinct roles for the executive, legislative, and judicial branches of the state which should remain unaltered has changed over time to reflect the growing interrelationship among the said arms (Hicks, Myeni & Buccus, 2017:62). Separation of powers doctrine as advocated by Mangu (1998) and Mojapelo (2013:40) is based on the notion that each arm of the state has its own unique set of powers and that these powers are exclusive and not to be exercised by another arm so as to prevent the concentration of too much power in the same hands and also ensure that there's checks and balances in all the respective branches of the state (Dube, 2017). However, as discussed below, the application of this principle in practice overlaps from one arm to the other.

## 2. Separation of Powers in South Africa

Yamamoto (2007:9) states that in John Locke's model of the separation of powers who is one of the propagators of this principle, the legislative and executive powers are to be separated. In terms of John Locke's philosophy, law-making which is the preserve of the legislature, is to prescribe rules and the power of execution, and the executive is subordinate and accountable to the legislature (Madue, 2012:438). Important in separation of powers analysis is an understanding of the nature of the powers of each separate branch of the state. The traditional characterisation of these powers is that the legislative power is the power to make, alter, and repeal laws of the republic; the executive power is the power to execute the laws; and the judicial power is the power to construe and interpret the Constitution and law, and to apply them and decide controversies (O'Regan, 2005:134). A key limit on the legislature's authority is the executive branch's ability to approve or disapprove legislation passed by the legislature prior to the legislation becoming law (Mojapelo, 2013). This crucial and special role is performed by the president of the Republic who signs bills of parliament into law. The three arms of the state are elaborated on below particularly in the context of South Africa. It must however be stated that the existence of the three arms of the state is to ensure that there's an element of checks and balances which seeks to hold each other accountable.

### 2.1 The Legislature

Section 42(3) of the 1996 *Constitution* stipulates that the National Assembly which is the main house of parliament is elected to represent the aspirations of the people and to ensure government represent the people under the Constitution (RSA, 1996; South African Catholic Bishops' Conference, 2013). The National Assembly realises this objective of the Constitution by electing the President, as well as considering national public issues, passing national legislation and scrutinising and overseeing the implementation of such law by the executive (O'Regan, 2005:127). Holding the executive arm to account by parliament and overseeing the performance of its functions is one of the pillars of separation of powers. In fact, it is what separation of powers is about.

The 1996 *Constitution* which is the foundation of separation of powers in South Africa state that the President of the Republic is elected by the National Assembly from among its members at its first sitting after an election (RSA, 1996; O'Regan, 2005:125). Such election is presided over by the head of judiciary who is the Chief Justice. Noteworthy is that President ceases to be a member of parliament once elected by the National Assembly. However, the National Assembly may still remove the President from an office several occasions including on a vote of at least two thirds of its members and only on the grounds of a serious violation of the Constitution or the law; serious misconduct; and inability to perform the functions of office even when he's not a member of the National Assembly anymore (RSA, 1996; Venter & Landsberg, 2011). The inevitable relationship between the legislative and the executive arm is intertwined particularly the process of law-making. A practical example is that cabinet members as members of the executive initiate, craft and prepare different legislative frameworks which are then proposed either into the National Assembly or the National Council of Provinces for debate and passing. Once a particular bill has been passed by legislature, it is presented to the President to assent (Jolobe & Graham, 2017). As stated elsewhere in this paper that the legislature makes laws, the executive implements or executes and the judiciary adjudicates or interprets the said law (Mojapelo, 2013:37). But most importantly, the legislative arm holds the executive to account including but not limited to implementation of laws and budgets passed by parliament.

## 2.2 The Executive

The cabinet of South Africa which is constituted by the President, Deputy President as well as the national ministers represent the executive arm at the national sphere. To this effect, section 92(2) of the 1996 *Constitution* stipulate that members of the cabinet are accountable collectively and individually to Parliament for the performance of their functions as well as implementation of executive programmes (RSA, 1996; Maserumule, 2007:148). Deputy President, cabinet ministers and deputies are the nominated from the National Assembly by the President after his election by the same. However, the 1996 *Constitution* affords the President to include at least two ministers from outside the National Assembly. These ministers nominated to head government departments continue to be members of parliament in South Africa which is the legislative arm while they are members of cabinet which is the executive arm (Jolobe & Graham, 2017). Furthermore, even when ordinary members of parliament may introduce a new bill in parliament, ministers are the ones who often initiate, craft and introduce bills in parliament with the assistance of the bureaucratic machinery for deliberation and passing by parliament. It is also possible that the legislature may just approve a bill without having amended as introduced by the executive.

## 2.3 The Judiciary

The 1996 *Constitution* states that the judiciary in South Africa is vested in the hierarchical courts and that these courts ought to be "independent and subject only to the Constitution and the law" (RSA, 1996; Venter, 2017), and that it must apply this law impartially and without fear, favour or prejudice (Venter, 2017). Furthermore, the 1996 *Constitution* posits that no one including the state may interfere with the functioning of the courts including the executive and the legislative arm. Of paramount importance that section 172 of the 1996 *Constitution* empowers the judiciary to decide on the constitutionality of any law before it, and it may declare invalid any law or conduct inconsistent with the *constitution* (Munzhedzi, 2016). Additionally, the 1996 *Constitution* mandates the judiciary with the most critical role of monitoring the application of the separation of powers. Montesquieu correctly asserts that "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" (O'Regan, 2005; Kohn, 2013:6; Mojapelo, 2013). Mojapelo (2013:37) also correctly postulates a view held in this paper that complete application of the separation of powers is not possible particularly in practice than in theory.

One of the contributing factors to the sad impossibility are weakness and lack of capacity by the legislative arm to hold the executive arm to account. The South African Catholic Bishops' Conference (2013) highlights the fact that the executive has a substantial influence in parliament in that more often than not most members of the executive come from the same political party as the majority of members in parliament. Whenever members of the executive have to account in the legislature, the opposition parties often argue that there's an element of bias and protection. It is often alleged (De Vos, 2017) that the chairperson of the portfolio committee who is often the member of the ruling party often "shield" the members of the executive from answering difficult questions. It therefore means that the accountability of the executive to the legislative arm is often made difficult because of that challenge. However, at times it is argued that by Legal and Public Administration scholars alike that while the principle of separation of powers is effective with regard to prevention of tyranny, oppression and violence, it may cause inefficiency (O'Regan, 2005:124; Kohn, 2013:6) by having to wait for the approval of the other arm of the state. A perfect example is when the executive has to wait for the approval of the budget and most legislative framework by the legislative arm. It is however the view of this author that even if there may be challenges associated with the principle of separation of powers, there are more good than bad including the fact that with the separation of powers comes functional specialisation in the respective arms of the state. The South African Catholic Bishops' Conference (2013) contends this argument that the legislative arm has a shortfall regarding the human resource capacity by alluding to the fact that where shortcomings are identified, parliamentary content advisors and researchers are provided as supplements to capacities parliamentarians (Jolobe & Graham, 2017). It is argued that this capacitation is not sufficient to address the shielding and protection of the executive from accounting in parliament. It is mostly in instances like this where the judiciary comes into the picture to ensure that the legislative arm plays its constitutional mandate.

### 3. The Role of Parliament in Ensuring Public Accountability

It is assumed that parliament in the context of South Africa represents the aspirations and interests of the people through the regular contest and elections (Sisulu, 2013:25). Parliament has also been mandated by the 1996 *Constitution* to represent the people and to ensure government of the people by the people under the Constitution. Madue (2012:431) correctly posits that the legislative arm of the state is responsible for law making, exercising oversight over the executive, facilitating public participation and promoting cooperative governance. Legislatures are in fact mandated to ensure that laws of the republic passed are properly implemented so as to achieve the political objectives particularly of the ruling party. It basically serves as a platform where issues of national interest receive public consideration through various debates that takes place in parliament. One of the fundamental roles of the South African democratic parliament is that of holding the executive arm of the state to account for all executive actions (Jolobe & Graham, 2017). Munzhedzi (2016:1) posits that public accountability in South Africa has its origin in the 1996 Constitution. It is for this reasons that all officials of government as well as public institutions are in one way or the other accountable to some kind of a higher authority. Minnaar (2010:17) concur and state that public officials account to political executive office-bearers and political executive office-bearers account to parliament or municipal councils in the context of municipalities. Municipal councils are also a representation of a legislative authority at the local sphere of government. These legislative authorities at all spheres of government are composed of elected office-bearers (members of parliament, members of provincial legislatures as well as municipal councils) who account to the electorate (Munzhedzi, 2016:1).

Johnson (2005:7) posits the most important question that the degree of separation or unity between the legislature and executive branches is perhaps the major factor in determining legislative strength and independence. Madue (2012) postulates that, the 1996 *Constitution* and standing rules generally grant legislatures more power than they ever use effectively. This analogy was proved right when the Constitutional Court which is the highest court in South Africa made a finding that the National Assembly which is the main house of parliament

failed in its responsibility to hold the executive to account regarding the Nkandla case of building security futures in the house of the President (Mogoeng, 2015). The Court found that the legislature should have exercised its obligation of ensuring that the president accounts to the legislature as stipulated by the policy framework including but not limited to the 1996 *Constitution*. The said Constitution provides that the executive arm of the state should be accountable to the legislative arm for all their actions including implementation of all legislative approved programmes. Such programmes include but not limited to the budget. It must however be said that holding the executive to account by parliament at times causes animosity between the two arms of the state. This assertion is supported by Madue (2012:438) who posits that the power relations between the executive and the legislature are at times not that smooth and as such call for the balancing of power between these two arms of the state. Jolobe and Graham (2017) are of the view that an underlying challenge particularly in the developing world is that their legislatures are usually much weaker than the executive. This is also applicable in South Africa. Some of the contributing factors to this challenge is that the executive yields a lot of power through the budget and the state resources they control. In addition to that, most of the members of the executive which is inclusive of the President, Deputy President and ministers are most often than not senior leaders of the ruling party who are members of the national executive committee of the African National Congress (ANC). The opposite is the case when it comes to the members of the legislature. In that, even though it has senior leaders of the ruling party, most of its members are junior members who occupy lower positions in the structures of the ANC as well as the South African Communist Party. Such dynamics puts the legislative arm at a weaker advantage which results in it failing to effectively and efficiently holding the executive to account. Junior members of the party respects the seniors to the point of unable to hold them to account regarding their executive actions and implementation functions.

### 4. Practical Cases of Accountability of the Executive by Parliament

There are several cases where parliament was found wanting in as far as holding the executive to account for the implementation of government programmes and activities (Dube, 2017; De Vos,

2017). As stipulated earlier, parliament is mandated by the *Constitution* to hold the executive to account for all the executive functions. One of the most talked about case of lack of accountability in the post-apartheid South Africa is the case between the Economic Freedom Fighters and Speaker of the National Assembly and others at the Constitutional Court of South Africa. The Constitutional Court pronounced as follows:

*"The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside"* (Mogoeng, 2015).

In this case the National Assembly is found to have failed in holding the executive to account as required by law. Due to the said failure of parliament to hold executive accountable, the judiciary which is the third leg of the state had to "remind" the legislative arm of its constitutional responsibility hence the Constitutional Court judgement on Nkandla security upgrades. Section 165 of the 1996 Constitution vests the judicial authority in the courts and they are accountable to the Constitution and the law (Dube, 2017). In the build-up of the same case the Minister of Police and Public Works respectively could not be held to account the way it is required by the Constitution and the law (Mogoeng, 2015). It is for this reason that Dube (2017) correctly argues that absolving the President from any responsibility in spite of evidence suggesting he unduly benefited from upgrades in his Nkandla residence is arguably a dereliction of duty on the part of Parliament.

The Minister of Social Development was also criticised for not appearing before the portfolio committee meetings in parliament during and in the wake of the grants crisis in South Africa (Corruption Watch, 2017). The Corruption Watch (2017) further notes the "shoddy" role played by the President's legal adviser, Mr Michael Hulley as a "strategic advisor" to SASSA in the adjudication of the multi-billion-rand contract, because the Minister had failed to provide answers to parliament through the portfolio committee on the contract between Mr Hulley and SASSA. The question on who is he representing in the whole matter keeps coming. Unfortunately, the accountability by the Minister of Social Development has not been forthcoming

as well which leaves parliament at an untenable state. De Vos (2017) reemphasised Froneman's (2017) judgement between Black Sash Trust and the Minister of Social Development and Others that the Minister bears the primary responsibility to ensure that SASSA fulfils its functions and that she appoints its chief executive officer (CEO). It is in these kind of cases and more where parliament is found wanting regarding its oversight role over the executive

## **5. Conclusion and Recommendations**

It is concluded that an oversight over the executive by the legislative arm is indeed the most fundamental role of parliament in South Africa. This said oversight involves monitoring the performance and implementations of programmes and projects by the executive so as to ensure that the said programmes, projects and policies are carried out as approved by the legislature. As discussed in the forgoing paragraphs, the legislature uses various means of holding the executive to account including but not limited to standing committee on public accounts (SCOPA), different parliamentary portfolio committees, debates on the National Assembly as well as the National Council of Provinces (Madue, 2012). This is done with the purpose of ensuring that the executive arm of the state accounts to the legislative arm as provided for by the 1996 *Constitution*. However, in exercising this enormous responsibility, the legislative arm is confronted with multifaceted challenges of ensuring that the executive accounts with ease and without difficulty (Jolobe & Graham, 2017). Amongst other challenges as discussed is that most members of the executive are more senior to most members of the legislature in their respective political parties. In essence, most members of the legislature are more often than not junior in standing in their political parties as compared to those of the executive arm. This is also applicable in the African National Congress as the ruling party in South African national government and most provincial governments.

For example, the President of the country in South Africa is also the president of the African National Congress which makes him the most senior person in the party. President Jacob Zuma for example has been a leader of the party for decades (including as deputy and other capacities). It then makes it difficult for junior members of the party who may have only 10 years' membership (or even less) in the party to hold the President with so many years

of membership and leadership experience in the party to account. Similarly, there are other members of the executive with many years of experience as members and leaders of the party than those of the legislative arm. This definitely plays a pivotal role in trying to ensure public accountability. The effectiveness and efficiency of public accountability plays a pivotal role in curtailing maladministration, fraud and corruption. Members of the executive including their bureaucrats should perform their functions with a belief that at one stage or the other they will be required to account for their actions. As clearly stipulated by Minnaar (2010) that every official or political with an inch of authority of power should account elsewhere to ensure continuous account of programmes implementation to avoid abuse of state power and resources, maladministration and endemic corruption. In essence, the policy framework including the 1996 *Constitution* clearly stipulates that there should be a separation of powers to ensure checks and balances between the three arms of the state. In practice, this poses a challenge particularly between the executive arm and the legislative arm (O'Regan, 2005; Kohn, 2013:6; Mojapelo, 2013). The said seniority of politicians in the two arms also play a contributing role. The Constitutional Court through the Chief Justice ruled that on the case between the Economic Freedom Fighters and Speaker of the National Assembly and the President Jacob Zuma that the National Assembly failed to hold the President of the Republic to account on the "Nkandla case" that was investigated and recommended by the Public Protector. This confirms that at times the legislative arm is found wanting with regard to holding the executive to account on their activities and functions. This at times even overlaps to cabinet ministers, for example, the case of the Minister of Social Development leaving the SCOPA meeting in the middle for something less paramount. However, it is important to note that for separation of powers in the three arms of the state to be practiced in the purest form propagated by Locke and Montesquieu is almost impossible hence the continuous challenge of holding the executive to account by parliament. However, it is recommended that the legislative arm is beefed-up to ensure that accountability of the executive by the legislature is enhanced (Munzhedzi, 2016). This may be done through instilling a sense of understanding of the supremacy of the Constitution. The 1996 *Constitution* underscore the paramountcy of the principle of accountability through different means discussed above as well as separation of powers.

It is also recommended that the different portfolio committees in parliament are comprised of a mix of senior and junior politicians with requisite skills and capacity. Those without public finance knowledge should be capacitated through various methods including, but not limited to workshops, a year's training at university and in-house training by trained professional. The ruling party (whichever it is at the time) at all spheres of government should ensure that capable and capacitated politicians are deployed in the legislative arm of the state.

The same way that parliament can call for a motion of no confidence on the President of the state in the case of South Africa, the electorate must be empowered by law to recall or put a motion of no confidence against parliament at all spheres of government for failure to perform responsibilities assigned to it by the Constitution. This endeavour may be used as a mechanism of ensuring that parliament does its mandated responsibility with a caution that it might be dissolved if it doesn't.

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