

A R NOTHNAGEL

Tygervalley

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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 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.’

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 _____ *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 any 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 principles of the ‘separation of powers between the executive and the legislative’ as laid down in Principle VI quoted above.

Article 47(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 9(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 programme of Parliament and the precedence of matters 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') and the Legislature (another 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 the 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 wants 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, Ministers and Deputy Ministers to sit in judgement, in Parliament, as member 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 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 Constitution 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

CERTIFICATION OF NEW CONSTITUTIONAL TEXT

Thank you for your submission of 27 May 1996.

I have been asked by the President of the Constitutional Court to inform you that your objections will in due course be taken into account by the Constitutional Court.

M NIENABER