

---

**SOME THOUGHTS ON THE  
CONSTITUTIONALITY OF “INDEPENDENT”  
TRIBUNALS ESTABLISHED BY THE STATE**

An interesting question for constitutional lawyers arises around the legality of some of the so-called “independent tribunals” or forums that are established to make quasi-judicial decisions. Sometimes the tribunals are designed to only perform administrative functions and other times they are designed to perform purely judicial functions – perhaps on issues of compensation or to make decisions that resolve disputes. The point of this note is not to examine the legality of any specific tribunal but rather to discuss some general considerations that ought to drive any debate on the legality thereof.

It sometimes happens that, for reasons of control, the state envisages creating a tribunal that will be part of the executive arm of government. The consequence of this may be that decisions taken by the tribunal effectively remove the resolution of a dispute referred to that tribunal from the judiciary and place it instead in the hands of the executive.

This kind of arrangement immediately raises at least two significant constitutional concerns:

- (a) First, the separation of powers doctrine, given that the Constitution requires a functional divide between executive and judiciary; and
- (b) Second, the right of access to a court of law that all people have in terms of section 34 of the Constitution.

One often hears reference to “the separation of powers doctrine in the Constitution”. There is in fact no express reference in the Constitution to a separation of powers doctrine. At best, it is probably implied or else implicit in the text of the Constitution but it certainly does not enjoy any express mention. In *South African Association of Personal Injury Lawyers v Heath* (2001 1 SA 883 (CC)), the Constitutional Court had the following to say:

“There can be no doubt that our Constitution provides for a separation of powers, and that laws inconsistent with what the Constitution requires in that regard, are invalid.”

The implicit nature of the separation of powers doctrine has also been discussed in the context of some other cases, most notably *In re Certification of the Constitution of the RSA, 1996* (1996 4 SA 744 (CC) par 111); and *Minister of Health v Treatment Action Campaign* (2002 5 SA 721 (CC) par 96-114).

It is trite that the separation of powers requires the functions of government to be classified as either legislative, executive or judicial and that it further requires each function to be performed by separate branches of government.

---

In the context of this particular note, it is the function of the executive to execute laws whilst it is the function of the judiciary to resolve disputes through the appropriate application of law. These functions should be kept separate and in principle they should be performed by separate institutions. The theory underlying the doctrine suggests that neither organ should trespass upon the terrain of the other.

It is always important for constitutional lawyers to identify the purpose of any doctrine upon which a legal enquiry depends. The purpose of the separation of powers doctrine generally, and the purpose of keeping the executive and the judiciary divided in particular, is probably to prevent an excessive concentration of power in a single organ or body. There are some academics, in particular administrative lawyers, who have tried to argue that the separation of powers doctrine is desirable because it promotes greater governmental efficiency (see, *eg*, Carpenter "Strengths and Limitations of a New National Government" in Licht and De Villiers *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?* (1994) 168-169).

My reason for drawing attention to the distinct and very different understanding of the purpose underlying the doctrine is, in the context of this note, obvious: those who favour a strong independent judiciary keeping a firm check and balance on executive power will obviously suggest that the purpose of the doctrine is to prevent the excessive concentration of power in a single body or organ. In contrast, the argument which suggests that the doctrine can promote greater governmental efficiency is generally put forward by commentators who are concerned more with the effective carrying out of executive power rather than the judicial limits of it.

Back to the original question posed: Will the constitutionally implicit doctrine of the separation of powers be violated if issues of compensation or dispute resolution are removed from the courts where they are traditionally adjudicated and instead placed in the hands of a tribunal which is in effect an extension of the executive arm of government?

The starting point has to be that judicial independence is secured through the doctrine of separation of powers. This is because it promotes the idea that only the judiciary can discharge judicial functions and that when it does so it should be free of interference by the executive. This is the guarantee which the doctrine provides – that appropriate checks and balances will prevent an abuse of power or an inappropriate exercise of executive power on the part of the executive. I will return to this issue because the tenor of this note at this point probably seems to suggest that the doctrine will automatically be violated if a tribunal is established under the control of the executive (which also initiates policy) rather than under the control of the judiciary (which is supposed to impartially and independently adjudicate a fair outcome to a dispute).

Some academics are not completely satisfied that the separation of powers doctrine operates as rigidly as this interpretation would have us believe. In fact, the Constitutional Court has itself held that the doctrine of separation of powers is not "a fixed or rigid constitutional doctrine" and that it is given

---

expression in many different forms and made subject to checks and balances of many kinds" (*In re Certification of the Constitution of the RSA, 1996 supra* par 111).

In other words, if we are going to accept the rationale for the doctrine to be a guarantee of checks and balances in order to prevent an abuse of power by the executive then it is feasible to submit that the Constitution itself provides the necessary checks and balances. I will explain this statement in due course, but if this view is accepted then it would mean that a tribunal, even if part of the executive, would not undermine the separation of powers doctrine from a constitutional law point of view provided that these checks and balances are intact.

There is in fact no magic in this statement: increasingly we are seeing that the executive is being entrusted with creating many tribunals – one only need look at the Commission for Conciliation, Mediation and Arbitration (CCMA) which is a tribunal established to resolve disputes faster and with less expense than the courts. There are also other highly specialised areas, such as competition law, where the resolution of disputes is, once again, left to tribunals which structurally form part of the executive arm of government and can in no way be said to be a part of the judiciary. In these circumstances we do not necessarily leap to the conclusion that the separation of powers doctrine has been violated and this is usually because a system of checks and balances is in place to prevent these tribunals, even though they are part of the executive, from ignoring independent and impartial principles expected by the Constitution.

In other words, there is no reason why tribunals should not be entitled to resolve disputes by the application of law, as long as the tribunal remains independent and impartial. The necessary checks and balances are probably contained in section 34 of the Constitution which reads as follows:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

It is interesting that Ackermann J, of the Constitutional Court, recognised the relationship between the constitutional doctrine of the separation of powers and the constitutional right contained in section 34. In *Bernstein v Bester NO* (1996 2 SA 751 (CC) par 105) he said:

"The purpose is ... to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the State."

Section 34 achieves this by ensuring that courts and other tribunals that settle justiciable disputes remain independent and impartial. This is a provision fundamental to the rule of law.

As with all constitutional litigation, the analysis must begin with an interpretation of the right. The plain meaning of the words used in the text is the best place to start with the interpretation of any legislative provision, and

the Constitution is no exception. From this it will be noted that section 34 only applies when there is a *dispute* that can be resolved by *the application of law*. The point is that, whatever the intended purpose of any proposed tribunal is, such purpose may or may not include the resolution of disputes. The intended purpose may for instance be the mere determination of quantum in the context of compensation which does not necessarily imply a “dispute”. In other words, if the tribunal’s function is limited to issues of compensation in the absence of a dispute then there can be no question of the constitutional right in section 34 being violated.

Having said that, it may well be that the tribunal is in fact designed to resolve disputes, or if designed to determine issues of compensation, then it may have to adjudicate on disputes connected with such a determination. And even if it does this, it is still not certain that section 34 will automatically be violated.

The reason for this uncertainty is once again because of the literal meaning of the words in the text of the constitutional right in section 34. The words *where appropriate* seem to suggest that there may be situations where it is in fact appropriate for a tribunal other than an ordinary organ of the judiciary to perform a judicial function. The earlier example of the CCMA is a good case in point.

Currie and De Waal (*The Bill of Rights Handbook* 5ed (2005) 722-723) are of the view that it will be *appropriate* for other tribunals and forums to adjudicate on any legal dispute which is not a criminal matter. They base their view on the Constitutional Court’s dicta in *De Lange v Smuts NO* (1998 3 SA 785 (CC)). The authors go on to state as follows:

“The rationale for allowing tribunals and forums other than courts to perform judicial functions is obvious. Specialisation, expertise, the need to consider local circumstances and the need for the adoption of expeditious, informal and inexpensive procedures justifies the establishment of other independent bodies by legislation. The protection afforded by section 34 is that when a tribunal or forum decides a dispute, it must be impartial and independent and must decide the dispute in a fair and public hearing.”

The point being postulated thus far is that:

- (a) It may be permissible to allow tribunals and forums, other than the ordinary courts, to perform judicial functions even if those bodies are attached to the executive; and
- (b) Whether or not a specific arrangement will be permissible must be considered in the light of two broad constitutional principles: the separation of powers doctrine and the right of access to courts – both of which are intimately linked with one another; and
- (c) A formalistic separation of powers can be relaxed provided that there are sufficient checks and balances to effectively prevent the tribunal from being biased and impartial.

The checks and balances probably come in at least two different forms. The first is the one that has been discussed up until now, namely that section

34 of the Constitution guarantees independence and impartiality not only of the courts but also of any tribunal or forum, other than a court, which purports to perform a judicial function. This constitutional provision clearly only applies to a tribunal or forum which is in fact performing a judicial function and is involved in the settling of legal disputes.

It thus seems as though a tribunal established purely for the purposes of “dispute resolution” is capable of being established as a part of the executive and it is even capable of performing judicial functions provided that when it performs these functions it remains independent, impartial and that the rulings which it metes out are fair.

But these are quasi-judicial functions. What if the tribunal’s functions are better classified as administrative rather than judicial. Perhaps the tribunal was designed to assess and quantify claims and deal with the procedure for processing them, which may happen, more often than not, without any dispute at all.

In that case there are other constitutional safeguards to ensure that tribunals and forums acting in this capacity also comply with the broad principles of legality. In other words, where the tribunal does not perform a judicial function but rather an administrative function, it must still adhere to similar notions of impartiality in its decision-making. This time, however, the decision-maker’s discretion will not be fettered by section 34 of the Constitution but rather by section 33 (standards of fairness guaranteed by the Constitution must apply to all types of proceedings: where the proceedings are judicial, the guarantee is provided for in section 34; and where they are administrative, the guarantee is provided for in section 33 of the Constitution).

It is thus crucial to correctly characterise the nature of the action being performed in the tribunal as either judicial or administrative.

Where it is administrative, consider the right to just administrative action in section 33 of the Constitution which reads as follows:

“Every one has the right to administrative action that is lawful, reasonable and procedurally fair.

Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

National legislation must be enacted to give effect to these rights ...”

What is apparent from all of this is that even if the executive’s intention is to take the decision out of the hands of an independent judiciary and place it instead under its own control, for whatever purpose, this will not automatically mean that the tribunal will suddenly have the latitude to make decisions which are unfair or unreasonable. This is because, whether or not the tribunal is acting judicially or administratively, it will always be required to act in a manner that is both impartial and fair.

There is in fact an additional safeguard, over and above that already discussed in this note, which would provide additional procedural protection – decisions made in a tribunal or forum other than a court of law are always

---

subject to judicial review by an independent court of law. It makes no difference whether the decision being reviewed is an administrative one or a judicial one. The High Court is the court with jurisdiction to review tribunals and this procedure is regulated for the most part by Rule 53 of the Uniform Rules of Court.

The right to have any decision of a tribunal reviewed by the High Court has been held to be part of the guarantee given in section 34 of the Constitution to have access to justice. It is for this reason that ouster clauses have in a number of cases been regarded as unconstitutional – see *Hintsho v Minister of Public Service and Administration* (1996 2 SA 828 (TK) 842). An ouster clause is a legislative provision that tries to exclude or restrict the right to have a High Court review a tribunal. A typical example of an ouster clause was found in section 29(6) of the Internal Security Act 74 of 1982 which read:

“No court of law shall have any jurisdiction to pronounce on the lawfulness of any action taken under this section ...”

Clauses like this effectively prevented people from approaching the High Court if the decision in the administrative tribunal was unfair. Under the Constitution these kinds of provisions will simply not be tolerated because they have the effect of limiting the constitutional guarantee of access to court.

Thus I have attempted to demonstrate that tribunals linked to the executive are always subject to the discipline of the Constitution. The discipline comes in the form of section 33 where the function is administrative and section 34 where the function is judicial. And, as mentioned earlier, tribunals linked to the executive can act in either capacity – as demonstrated by the examples of where they have performed judicial functions, as in the case of both the CCMA and the Competition Commission.

As a final word on this issue, we should mention that there are other jurisdictions that have also had to wrestle with very similar questions in the context of “tribunals established to adjudicate on issues related to land restitution laws” – most notably Canada and Australia. The Canadian experience in particular could be helpful given that the Bill of Rights in the South African Constitution was heavily modelled on the Canadian Charter (which is their equivalent). It is interesting that the Canadian courts have held that “where the independence of a tribunal is perceived to be undermined, tribunal’s impartiality will be brought into question” – for a very interesting view on the process there is an MA thesis by Milroy (*Aboriginal Policy-making and Dispute Resolution Processes: A History of the Concept of a Tribunal for the Adjudication of Specific Land Claims in Canada* (2002) University of Victoria). A perception of impartiality may be created where the executive branch of government responsible for creating the tribunal has a direct interest in the outcome of the issue that the tribunal is supposed to determine.

Kevin Hopkins  
University of the Witwatersrand  
Member of the Johannesburg Bar