

**OLIVER SCHREINER MEMORIAL LECTURE
DELIVERED BY JUSTICE DIKGANG MOSENEKE
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JOHANNESBURG**

**SEPARATION OF POWERS, DEMOCRATIC ETHOS AND
JUDICIAL FUNCTION**

Introduction

I would like to thank the Wits Law School, its Dean, Professor Angelo Pantazis, and in particular, Professor Cora Hoexter, who has shepherded all the arrangements around this kind invitation to present the Oliver Schreiner Memorial Lecture. Mr Justice Oliver Deneys Schreiner was Chancellor of this University and Wits Law School proudly bears his name. It is special to find the opportunity to pay tribute to a very worthy predecessor whose impeccable excellence, towering intellect and steadfast integrity we can only be in awe of, but hardly equal.

This lecture occurs a few months before the 15th anniversary of the inception of our constitutional democracy. Our new society is in puberty, only 15 years of age, but has already lost its innocence. Its childlike simplicity and trust are giving way to the intemperate excitement of youth, which hopefully will be

replaced by the pragmatism of adulthood. However, this loss of innocence is not to be decried. It appears not to have taken long for the hallowed promises of our Constitution to be called to incisive questioning. Multiple strands of conversation amongst all sectors of our society are increasing in volume and intensity. All this is welcome, because public disputation affords us space to inspect again the dominant and prominent features of our constitutional arrangements, and whether they are lived reality.

In that vein, this lecture presents a much appreciated opportunity to look again at defining features of our project to deepen democracy and constitutionalism in a context that draws from our collective but troubled history, and ponders what may lie ahead. This hopefully explains why the separation of powers, seen together with our evolving democratic ethos and contestations around judicial function, may be appropriate areas to explore. I propose to do this exploration by using the public law judicial pronouncements of Justice Oliver Schreiner as the leitmotif of this paper. In doing so, I hope to explore the complex and inevitably conflict-ridden exercise of public power within the context of an ambitious and supreme Constitution.

In particular, I am fascinated by the steadfast stance Oliver Schreiner took in the Trilogy Cases that gave rise to the constitutional crises of the mid 1950's.¹ This he did despite the dogged political designs of a powerful executive government and a sovereign parliament. As it is often said, Oliver Schreiner

¹ These cases being: *Minister of the Interior and Another v Harris and Others* [1952] 4 All SA 376 (A); 1952 (4) SA 769 (A); *Harris and Others v Minister of the Interior and Another* [1952] 2 All SA 400 (A); 1952 (2) SA 428 (A); *Collins v Minister of Interior and Another* [1957] 1 All SA 227 (A); 1957 (1) SA 552 (A).

had very little material to work with, and yet made so much out of it. I hope to demonstrate his deep understanding that the doctrine of checks and balances in the deployment of public power is closely related to democracy, on the one hand, and the abiding duty of judges to uphold the rule of law, on the other. That duty to safeguard the independent functioning of the judiciary should persist even in the severest of circumstances. His judicial tenacity drew the ire of Dr DF Malan who was Prime Minister and head of the government's executive branch at the time.

His occasional lone path of judicial austerity and fidelity during the 1950's echoed the confrontations, nearly 50 years earlier, between Chief Justice Kotzé of the Transvaal Republic and its President, Paul Kruger. To this I return later. For now it should be enough to remark that another 50 years after the constitutional crisis of the mid fifties, our own understanding of the separation of public power, democracy and the legitimacy of courts is a matter of great public disputation.

Before I turn to Justice Oliver Schreiner's judicial world, it may be helpful to give a brief account of the social and political choices of his time. The starting point of the account has to be his life.

The Man

Oliver Deneys Schreiner died in his 90th year of living, having been born in December 1890. Upon his death, his life was much praised.² In that very year Professor Ellison Kahn, in a ringing tribute to his life and work, wrote of him:

“It has been said of RA Butler that he was the greatest Prime Minister Britain did not have. So it may be said of Oliver Deneys Schreiner that he was the greatest Chief Justice South Africa did not have”.³

His life straddled a vital part of our history and it is not an exaggeration to say that he is an important part of our judicial history. He was the third of three children of William Philip Schreiner and his wife Fanny. His father, born of German ancestry,⁴ qualified for the LLB at the University of London after studying in Cambridge. Subsequently he was called to practise at the Cape Bar from 1882. In 1885, WP Schreiner became the Attorney General of the Cape in the Rhodes administration. In October 1898 he became Prime Minister of the Cape, a position he held for 2 years. It is said that his travels in the Ciskei and the Transkei as Prime Minister changed his belief that blacks had to be kept in their place, and he instead became a champion of the rights of black people. On the other hand, Oliver’s mother is said to have been from a long line of distinguished Afrikaner Cape stock. His maternal grandfather rose up the ranks to become a judge and later President of the Orange Free State and a champion for the advancement of the Afrikaans language.

² See, for example, E Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (Juta and Co Ltd, Johannesburg).

³ E Kahn “Oliver Deneys Schreiner: A South African” in E Kahn id.

⁴ WP Schreiner was born in 1857 and died in 1919.

The young Oliver went to Rondebosch Boys High School. Upon matriculation he proceeded to do his tertiary education at the South African College School. He had an excellent education, that included going to Oxford and later to Cambridge. On all accounts, he was a distinguished student. As would have been expected of him at the time, he was called up to an officers' training course in order to join the Great War of 1914 to 1919. He survived serious wounds sustained during combat in France.

On his return from war, he acquired his bar qualifications, both in the Cape and in England. This paved the way for his practice at the Johannesburg Bar from 1920 to 1937. In the early part of his practice he also taught Roman Law at Wits Law School. On all accounts, his practice at the bar grew in leaps and bounds and he eventually had to give up teaching. He is described with great admiration by several for having a "phenomenal knowledge of case law, and an ability, which was legendary, to rise from his desk during a consultation, take down a law report and open it at a case in point."⁵ Schreiner took silk in 1935 and two years later he was given an acting appointment at the Transvaal Provincial Division of the Supreme Court.

At the age of forty-six years he was given a permanent appointment to the bench and became the youngest member of the judiciary at the time, and this despite a number of years he had lost during the war. He served for eight years as a puisne judge before he was elevated to the Appellate Division.

⁵ E Kahn above n 3 at 19, quoting Justice H C Nicholas.

Shortly before his elevation to the Appellate Division he sat as a trial judge in the treason trial of Robey Leibbrandt and Others.⁶ The judgment ran to 70 000 words. It was said to be very carefully prepared and took seven hours to deliver, a long time for judgments of his time.⁷

The rest of his judicial life he spent in the Appellate Division. In 1957, Mr Justice Centlivres retired as Chief Justice. At the time Justice Schreiner was the next most senior judge. Up to then, on every occasion, the senior judge of appeal had succeeded to the office. Schreiner was overlooked. In his place, the third most senior judge of appeal, Justice Fagan was appointed Chief Justice. In 1959, Fagan CJ retired. Once more, Schreiner was the next most senior judge of appeal. He was overlooked in favour of Justice LC Steyn who was appointed Chief Justice. With remarkable fortitude Schreiner carried on as if nothing had happened. His career lasted for 25 years on the bench.

You would have gathered from what I have said that Oliver Schreiner had an illustrious family background. He was very much part of the ruling white elite of the Cape at the turn of the 20th century. He was privileged with the best education available at his time. He did not need a social conscience or public spiritedness. He could have lived his life without the political fall out that led to the stunting of his bright judicial career by political executive disapproval. If he had stayed within his elitist confines he would have risen to become the Chief Justice, which he never was. He is said to have had “boundless powers

⁶ *R v Leibbrandt and Others* 1994 AD 253.

⁷ E Kahn “Oliver Deneys Schreiner – The Man and His Judicial World” (1980) 97 *SALJ* 566 at 574.

of work” and “was blessed with great intelligence.”⁸ In a tribute to him, Chief Justice Rumpff said “he certainly consistently applied [d]uty as the rudder to steer his course of life so that he could serve the law in particular, and humanity in general”.⁹

Professor Kahn records the views of Oliver Schreiner on race, class and gender, which surfaced to their fullest shortly after his retirement from the bench. Professor Kahn narrates that Oliver Schreiner’s life was characterised by complete absence of racial prejudice on his part. He detested apartheid and was particularly delighted when public amenities were gradually opening up to all racial groups in the 1970’s. As a matter of principle, he refused to sit on benches marked “Europeans only” or “Whites only”. He said that he felt ashamed of the thought that he could sit but an elderly African washer woman had to stand. In 1970, he is said to have turned down a re-nomination to the presidency of the Cripple Care Foundation of the Transvaal, which had introduced racial exclusivity to its Constitution allowing only white people as members.

In an essay he wrote in 1973, he expressed deep disapproval of imperialism and had very strong words to say in favour of a non-racial worldview. He repeatedly made it clear that he rejected territorial segregation as an unworkable ideal and supported qualified franchise on a common, non-racial voters’ roll. He recognised that the economic position of those who were not

⁸ E Kahn id at 578 quoting Mr Justice F L H Rumpff.

⁹ E Kahn above n 5 at 578.

white was closely tied up with their lack of voting power and colonial exclusion.

As we know, he served on the Wits Council with great distinction for many years, and thereafter as its Chancellor. In his later years, he served several terms as the President of the South African Institute of Race Relations. He was also Chairman, for many years, of Alexandra Health Centre, a clinic run by the University.

Space will not permit any further description of a truly great South African, he has been honoured many times and that honour is properly deserved.

It is really Oliver Schreiner, the judge, who should attract the focus of today's tribute. As we will see in a moment, the time he served as a judge was marked by an exquisite tension between stability and change. He knew very well that the narrow white majority ruling class needed to alter the political and social arrangements around it, but also understood that as a judge he was an instrument for stability. This contestation between renewal and stability surfaced time without count in his judicial pronouncements. He understood that judicial function has inherent limitations. It has an episodic or casuistic character. Little steps are made by way of legal precedent but are confined within the facts pleaded and arguments made. Despite this forensic limitation, he made remarkable judicial contributions on virtually every aspect of the law. In relation to indigenous law, he appeared to be preoccupied with creating

space for customary law within the bigger framework of the law of the land.¹⁰ Time without count he refused to hold that African people should be kept out of courts only because a different system of courts had been devised to adjudicate on customary law. In family law, his dicta in *Harris v Harris*¹¹ makes clear that courts must search for a different principle which appears to provide “juster results or be more suited to the times”. He is remembered well in the area of criminal law for his search for the reformation of criminal justice.¹² He did not hesitate to adapt the common law in a variety of areas, and yet in several other instances he showed a level of hesitance in changing what appeared to be stable and effective law.¹³ For example, whilst he may have been persuaded that capital punishment was cruel and inhuman punishment, he nonetheless did impose it because he considered it his judicial obligation to do so when the circumstances required.¹⁴

For purposes of this lecture, it is his attitude on justice between the state and its subjects that I want to detain you on. Justice between the state and its subjects inevitably invokes a measure of political conviction in the broader sense of the word. It is often said that when judges are called upon to mediate in vertical conflicts between the state and its citizens, the space of discretion in the process of adjudication tends to call for normative

¹⁰ See for instance *Ex Parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A); *Umvovo v Umvovo* 1953 (1) SA 195 (A); and *Ex Parte Minister of Bantu Administration and Development: In re Jili v Duma and Another* 1960 (1) SA 1 (A).

¹¹ 1949 (1) SA 254 (A) at 266. Also see *Daniels v Daniels; Mackay v Mackay* 1958 (1) SA 513 (A) where Schreiner JA held that a court had a discretion to grant relief to a plaintiff guilty of adultery.

¹² *Rex v Khumalo and Others* 1952 (1) SA 381 (A) at 385. Also see *Rex v Sibiya* 1955 (4) SA 247 (A).

¹³ See for example *R v Sibiya*, above n 12; *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A); *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); and *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658.

¹⁴ Above n 2 at 28.

considerations premised on the political, social and economic philosophies of the judges concerned. This is certainly true of common law jurisdictions with no entrenched and justiciable fundamental rights and a normative platform that is pre-set by a higher law. Our Constitution, as do other progressive democratic constitutions, in Canada, Germany, India, recognises that law floats on a sea of morality.¹⁵ It prescribes the prime values of our constitutional democracy as human dignity, equality and freedom. Our Bill of Rights, which is the cornerstone of our democracy, does not only represent binding positive and negative duties by which all are bound, but also a statement of values that we as a people collectively hold dear. Therefore, in their work, judges, and indeed broader government and its people, may not fail to give effect to these mandatory rights and values.

Oliver Schreiner did not have the comfort of a muscular and supreme Constitution. He operated within the narrow structures of parliamentary sovereignty, completed by a subordinated common law. It is nonetheless true that at best, the common law of the time recognised the importance of underlying notions of freedom, equality and human dignity and the rule of law derived from natural law. Yet, unlike now, this normative framework was not binding on the judges. Those who sought to draw from these fundamental values of fairness had to dig deep, as Oliver Schreiner often had to do.

Much has been written about Oliver Schreiner's own socio-political predilections and his world view on race, class and gender. I have alluded to

¹⁵ See section 1 of the Republic of South Africa's Constitution, 1996.

some of these a short while ago. We have already seen that he had a relatively liberal upbringing. His father had turned his back on racism even before the turn of the 20th century. In his own youth, Oliver Schreiner would have been alive to the formation of the Union of South Africa in 1910 and that its most pernicious character was exclusion of the majority from the exercise of public power, and from representative government. He would have known of that assembly of women and men in Bloemfontein in 1912 that elected John Langalibalele Dube as the first President of the South African Native Congress, the forerunner of the African National Congress. That assembly made a claim of equal dignity, freedom, a common voters' roll and a common citizenship. It volubly rejected and resisted the near total exclusion of the majority from the legislative and other processes of government. In anticipation, it set itself firmly against the 1913 and 1936 Land Acts, which were on the verge of being adopted. These statutes consolidated and entrenched the dispossession from African people of vast tracks of land that had been underway for at least the two preceding centuries by means of forcible conquest. This too, was protested against vehemently by the African National Congress.

We often forget that these claims to dignity, equality and freedom were recorded in the Atlantic Charter,¹⁶ adopted by the African National Congress during the Second World War in 1943, well before the Universal Declaration of Human Rights in 1949.

¹⁶ Asmal, Chidester, and Lubisi (eds) *Legacy of Freedom* (Jonathan Ball 2005).

At that time, Schreiner was a judge at the Supreme Court and in the course of his duties had to try Robb**ieey** Leibbrandt and other war “rebels” for treason.¹⁷ He would have been well aware of the post-Second World War rising levels of resistance within the disenfranchised communities. The ANC Youth League adopted the 1949 programme of action with a view towards invigorating the levels of resistance against the Nationalist Government which had just come into power and had proclaimed its commitment to white supremacy and continued oppression and exclusion of the majority. On the heels of the programme of action of 1949 was the defiance campaign of 1952. This rising political militancy was matched by an armoury of legislative and policy measures that were aimed at entrenching racial, spatial and economic apartheid – the Population Registration Act of 1950;¹⁸ the Group Areas Act of 1966;¹⁹ the Reservation of Separate Amenities Act of 1953;²⁰ the Immorality Act of 1957;²¹ the Bantu Authorities Act of 1951²² – the Suppression of Communism Act 1950²³ – so the list went.

This socio-political anxiety of the 1950’s presented itself to Mr Justice Schreiner around struggles against the termination of the African and Coloured franchise. It will be remembered that the 1910 Constitution made no provision for direct representation of African people and with the passage

¹⁷ *Leibbrandt and Others v R* 1944 AD 253.

¹⁸ Act 30 of 1950.

¹⁹ Act 36 of 1966.

²⁰ Act 49 of 1953.

²¹ Act 23 of 1957.

²² Act 68 of 1951.

²³ Act 44 of 1950.

of the Statute of Westminster and the decision of *Ndlwana v Hofmeyer NO*,²⁴ entrenchment of that franchise had been removed. Justice Schreiner sat in all three of the cases on colour differentiation and representation. In *Harris v Minister of Interior*²⁵ (the Vote case) he concurred in the judgment of Centlivres CJ, which declared the legislation removing Cape Coloured and African voters from the common roll invalid because Parliament had resorted to the ordinary bicameral procedure instead of the entrenched unicameral procedure. In *Minister of the Interior v Harris*²⁶ (the High Court case) a five strong bench of the Appellate Division agreed that the High Court of Parliament Act was invalid. What distinguishes Justice Schreiner is that he emphasised the role of the Constitution in protecting the judicial system by requiring a two thirds majority unicameral procedure. He conceded that Parliament may create a court of law, but may not itself sit in a disguised form in judgment on itself. And lastly, in the case of *Collins v Minister of the Interior*,²⁷ the Appellate Division, which then had a swollen quorum of eleven members, sat to determine the validity of legislation²⁸ removing Coloured voters from the common roll, passed by the unicameral procedure which, by enlarging the Senate, gave the ruling party the requisite two thirds majority.

All the judges but Schreiner JA found that the enactment was constitutionally in order. Schreiner JA wrote a minority judgment in which he asserted that the provisions of a constitution could not be circumvented in the manner in

²⁴ *Ndlwana v Hofmeyer NO and Others* 1937 AD 229.

²⁵ *Harris and Others v Minister of Interior and Another* 1952 (2) SA 428 (A).

²⁶ *Minister of the Interior and Another v Harris* 1952 (4) SA 769 (A).

²⁷ *Collins v Minister of the Interior and Another* 1957 (1) SA 552 (A).

²⁸ South African Act Amendment Act 9 of 1956.

which the government had chosen. But what does all this mean for our current understanding of separation of powers both conceptually and in practice?

Separation of Powers

After surveying designs of separation of powers in democracies around the world, Professor JD van der Vyver²⁹ concludes that the pre-1994 constitutional system, like the British system, was not founded on the doctrine of separation of powers. He observes that the only component of the doctrine which was upheld in South Africa then, was the formal classification of political power into legislative, executive and judicial functions. In a telling audit of the apartheid constitutional structure, Prof van der Vyver shows that at the time, the system did not adequately separate power, personnel and roles. Additionally, the reality was that there were no checks and balances that ensured meaningful dispersal and curtailment of public power. He says that the absence of an effective separation of powers in apartheid South Africa, permitted the endemic invasion of fundamental rights and the political exclusion and economic impoverishment of the poor and working classes.

As a general proposition, the doctrine of *trias politica* appears to have four crucial principles (a) a formal distinction has to be made between the legislative, executive and judicial components of state authority; (b) the principle of separation of personnel, which requires that the power of

²⁹ JD van der Vyver "Separation of Powers" (1993) 8 *South Africa Public Law* 177.

legislation, administration and adjudication must be vested in three distinct organs of state authority and each one of them be staffed with different officials and employees. This means that a person serving in one organ of state is disqualified from serving in any other; (c) the principle of separation of functions which requires that every organ of state authority be entrusted with its appropriate function only. It follows that the legislature must make laws, the executive must be confined to administering the affairs of the state and the judiciary must restrict itself to the function of adjudication; (d) the principle of checks and balances requires that each organ of state authority be entrusted with special powers designed to keep a check on the exercise of the functions of others.

Having started on a patriotic note by relying on South African authority,³⁰ I will spare you the 17th century constitutional theory of John Locke³¹ or Baron Montesquieu³² and the 18th century or the later interpellations of Sir William Blackstone³³ or of Dicey³⁴ or John Stewart Mill³⁵.

What is clear, however, is that we can't look to our pre-1994 past for our present understanding of the doctrine of the separation of powers and how it would intersect with the democratic aspirations of our new constitutional state.

³⁰ For a comprehensive study of the doctrine of separation of powers as observed in America, France and Germany, see Vile *Constitutionalism and the Separation of Powers* 2nd ed 1998.

³¹ *Two Treatises of Government* (C & J Rivington, Harvard University, 1824).

³² *L'esprit des lois* 1784, (P Dodelsey, London, 1794).

³³ *Commentaries on the Laws of England: In Four Books* (J.B. Lippincott & Co Philadelphia 1867) 7th edition volume 1 at 146

³⁴ *Introduction to the Study of the Law of Constitution* 1959 (Macmillian & Co Ltd, London, 1885) at 337.

³⁵ *Considerations on Representative Government* (H Holt, 1882).

It is now well-settled that the doctrine of separation of powers is part of our constitutional architecture³⁶. It was introduced to our constitutional jurisprudence by Constitutional Principle VI, which was part of our interim Constitution and one of the principles which was to serve as a template for the drafting of our final Constitution. The Principle provided that:

“[t]here shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.”³⁷

The 1996 Constitution makes no express provision for separation of powers. In the First Certification judgment, *In re: Certification of the Constitution of the Republic of South Africa, 1996*, the Court was satisfied that the new Constitution did comply with Constitutional Principle VI. It reasoned as follows:

“There is, however, no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.”³⁸

It continued—

³⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 1; 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC); *Van Rooyen and Others v The State and Others* 2002 (8) BCLR 810 (CC); 2002 (5) 246 (CC); *Pharmaceuticals Manufacturers Association of South Africa and Others: In re Ex Parte Application of the President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC).

³⁷ See Schedule 4 to the Interim Constitution Act 200 of 1993 and *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) in Annexure 2.

³⁸ *Id* at para 108.

"[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."³⁹

Correctly so, our Courts have carved out *carte blanche* for the development of a distinctively South African design of separation of powers. It must be a design which in the first instance is authorised by our Constitution itself. In other words it must sit comfortably with the system of government we have chosen. It must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history. For instance it must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system separation of powers must give due deference to the popular will as expressed legislatively provided the laws and policies in issue are consistent with constitutional dictates.

In our constitutional democracy, all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However in the end, courts must determine whether unauthorised trespassing by one arm

³⁹ Id at para 109. In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (7) BCLR 779 (CC); 1998 SA 785 (CC), Ackermann J again observed repeated that there is no universal model of separation of powers.

of the state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.

It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.

For example, not infrequently the Court is invited by litigants to intervene in Parliamentary proceedings. That was the situation in *Doctors for Life*.⁴⁰ This was the case in which pregnancy- and abortion-related legislation was challenged on the grounds that Parliament had failed in its duty to facilitate public involvement. The purpose of this constitutional requirement is to facilitate participatory democracy. The Court had the following to say about separation of powers:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and

⁴⁰ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (1) SA 524 (CC).

separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."⁴¹ (footnotes omitted.)

Before I conclude the discussion on separation of powers it is appropriate to say a few things about the independence, and impartiality and effectiveness of the judiciary. In many senses the doctrine of separation of powers is the fountain of the independence of the judiciary. First, independence should be distinguished from impartiality. Independence relates to absence of interference at an institutional level and at the level of decision making by each judge. On the other hand, impartiality describes the required state of mind of a person who holds judicial office. Both requirements are the life blood of any judiciary worth anything at all.

In much the same way, courts must be effective. The bench must be graced by women and men who are properly qualified; who have ample capacity to deal with the issues at hand and arrive at justifiable decisions which would lead to effective relief. That means men and women who have a deep understanding of the law, who have the

⁴¹ Id at para 37.

capacity to process facts and who possess the insight to appreciate the inevitable intersection between facts and the applicable law. For good measure we have to add the indispensable requirement of impeccable integrity in the execution of ones judicial chores. Absent any of these four requirements, our constitutional democracy will falter.

And it is in this context that I want us to locate the debate in relation to transformation. A transformed judiciary is a cherished ideal of our constitution. It requires that judicial officers should not only be qualified and be fit and proper but must reflect broadly the racial and gender composition of our country. Beyond these overt requirements the Constitution imposes an entirely new transformative constitutionalism on the common law, customary law and existing legislation. The Constitution, as you have seen, introduces a new value system which imposes a new legal methodology and jurisprudence.

In my view, therefore, we must be meticulous in ensuring that our judiciary is adequately representative of our populace. Justice Oliver Schreiner did not have the comfort of a diverse bench. All were male, privileged and white. They shared a common background and embraced similar class interests. That judicial insularity of the past explains why, when it really mattered on issues of class, race and gender, Oliver Schreiner had to dissent alone. And therefore to the extent that the Constitution expressly celebrates "unity in our

diversity⁴² so should the composition of our judiciary. In that way, we will enhance the legitimacy of our judiciary, which as we know derives from the people through their collective will as expressed in the Constitution. It is thus the people who we have to persuade that we are credible. That, of course, we have to do within the confines of the Constitution.

Another important component of transformation is cultivating a judiciary that unflinchingly embraces the jurisprudence dictated by the Constitution. Many areas of our law continue to be shielded from the beneficial impact of our Constitution. Many judges opt for judicial reasoning and methodology that may be at odds with our developing constitutional jurisprudence. In my view, transformation at this level is much more pressing.

As for levels of competence and effectiveness, I am indeed proud to say that our judiciary is second to none. By and large, our benches are adorned by men and women of significant self application, insight and above all a commitment to do justice. And where appropriate skills and experience may be lacking the solution can never be to halt transformation; it is rather to intensify continuing judicial education. It is with great pleasure that I say that the Judicial Education Institute Bill has now been signed into law. We are in the process of establishing a council for the Institute. Appropriate budget allocations have been

⁴² Preamble, Constitution of the Republic of South Africa, 1996.

made and the campus of the Institute will rise on Constitution Hill very shortly.

Judicial function and democratic ethos

As it is often said, courts themselves neither have an army nor their own purse. That is why the Constitution lays down that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. It requires that no person or organ of state interfere with the functioning of the courts. And what is more, the legislature and the executive must assist and protect courts to ensure their independence and impartiality, dignity, accessibility and effectiveness.

It is often said that Justice Oliver Schreiner had so little to work with and yet he achieved so much. He understood all too well that executive and legislative incursions into the rights of others, particularly fundamental rights such as the right to vote, should be resisted by judicial means. He policed even a sovereign Parliament which was bent on discarding its manner and form obligations in the course of passing laws that were intended to savage the democratic expression of others. He understood that separation of powers without effective judicial vigilance has little or no meaning.

Unlike Mr Justice Oliver Schreiner our judiciary indeed has a lot to work with. It enjoys the patronage and protection of an exquisite and superior constitution. And its legitimacy derives from the will of the people as expressed in the Constitution and other valid laws.

The record will show that during the first decade of our democracy, the legislature and executive have by and large given effect to and obeyed orders made by our courts. Our first President, Mr Mandela, in particular took overt steps to pronounce publicly that he would abide decisions of the court even those that went against the newly sworn in government. To make the point, he personally appeared before a High Court judge in his capacity as President of the country, having been summoned thereto by the presiding judge, in circumstances which were less than palatable and which were found to be inappropriate by the Constitutional Court.⁴³ Mr Mandela explained that his act was symbolic and important because it underscored the rule of law and the principle that all are equal before the law. He also explained that it is the Constitution that requires of all of us to obey, respect and support courts, not because judges are important or entitled to some special deference but because the institution they serve in has been chosen by us collectively, in order to protect the very vital interests of all and in particular of those who are likely to fall foul of wielders of public or private power.

As we scan our surroundings, we are not unaware of executive incursions into the mandated roles of the judiciary. Some examples are indeed extreme, and a few will suffice. Nearer home, we remember too well how war veterans marched into the Chambers of Chief Justice Gubbay of Zimbabwe demanding

⁴³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 1999 (10) BCLR 1059; 2000(1) SA 1; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (Judgment on recusal application) [1999] ZACC 9; 1999 (7) BCLR 725; 1999 (4) SA 147; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) BCLR 175; 199 (2) SA 14.

that he should resign. This followed on a number of decisions which were perceived to be against the executive. The executive's response was that it was unable to guarantee the safety of the Chief Justice if he were to continue in his post. He succumbed and resigned. The Deputy Minister of Justice was appointed to replace the outgoing Chief Justice.

Again, not far from here, in Swaziland the entire Appellate Court had to resign because of a meddlesome executive monarch. In Pakistan, November last year, at least 60 judges were arrested after the executive President Musharraf had issued an emergency order. Some of the judges were jailed whilst others were placed under house arrest. Chief Justice Chaudhry and all his Supreme Court colleagues, were ousted from office and replaced by a new set of Supreme Court justices. After the removal of Musharraf, seemingly three of the Supreme Court judges have been sworn in again into their positions.

These are grotesque examples. Thankfully we have impeccable constitutional guarantees. We have a well rounded democratic ethos. Our own struggle for democracy has blessed us with an amazing level of public vigilance. The debates around the independence, and sometimes the impartiality of the judiciary must continue to take place but in a calm, fair and well-informed manner. I am happy to assure fellow citizens and all who are in our country, that our judiciary takes seriously its oath of office to act without fear, favour or prejudice. Any suggestions of political or other forms of partisanship and the part of any judge are singularly unhelpful. Because where there are facts to support an apprehension of bias, our law has an a

remedy which in appropriate cases may lead to the recusal of the judge concerned. So wild and unsubstantiated accusations of bias are inconsistent with our democratic ethos which we have established over many years of democratic struggle.

Lastly on this point, the final words are those of two eminent South African Chief Justices. Justice Chaskalson had the following to say:

“Finally, it is said that any individual and organization has the right to criticize the manner in which judges of the Constitutional Court conduct themselves. I agree that all judges, including judges of the Constitutional Court, have a duty to conduct themselves in ways befitting their office, and that criticism of judges and their judgments is not in itself inconsistent with judicial independence. However, criticism that amounts to an unwarranted attack upon the integrity of the court, made with the stridency and the intensity we have recently witnessed, is potentially harmful and destructive of our democracy. It is an insidious process, which demeans the courts, deters persons of integrity and competence from making themselves available for judicial office, undermines one of the pillars of our democracy, and if allowed to continue, can lead to irreparable harm”⁴⁴

On the other hand, our current Chief Justice, Justice Langa has said:

“The truth of course is that the victories we have achieved should never be taken for granted. Eternal vigilance is required because the principles that underlie our new democratic order are so precious, so valuable, that they should never be put at risk. Only those who have lived through, or observed the pain of the divisions, inequalities and conflicts inherent in a society based on injustice can imagine the

⁴⁴ Chaskalson *Comments Made at the Gordon Institute for Business Science Forum on the Independence of the Judiciary* delivered 20 August 2008.

importance of maintaining and strengthening the new democratic structures and institutions that we have gained through the adoption of our new Constitution. One such is an independent judiciary in a democratic state.”⁴⁵

What remains is for me to be thankful for the life of Oliver Schreiner, a very worthy South African and the powerful example he has set for a good judge who is determined to remain faithful to her or his solemn oath of office. This is singularly important because after a long struggle for democracy, we have collectively made vital choices about the way we want to live. We have crafted a Constitution with a central purpose to provide a better life for all. That will not be possible if our vital institutions, the legislature, the executive and the judiciary falter.

For my part, in the public service of our people, I know for a fact that, I am resolute like many other good South Africans, to deliver not only justice for all, but in a very real way, a better life for all of us, united in our diversity.

Thank you for listening, good night and God bless.

⁴⁵ Langa *Closing Address, Commonwealth Magistrates and Judges Association Conference on Constitutional Independence for the Magistrate and Judge with Reference to the Separation of Powers* delivered 8 October 2008.