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VOX POPULI? VOX HUMBUG! – RISING TENSION BETWEEN THE SOUTH AFRICAN EXECUTIVE AND JUDICIARY CONSIDERED IN HISTORICAL CONTEXT – PART ONE[1]

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1 Introduction

As the guardian of the constitution, the high court from time to time disappoints the ambitions of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.[2]

Towards the end of 2011 a public controversy erupted in South Africa when it was announced that the government intended to conduct an assessment of the decisions of the South African Constitutional Court. The proposal was later amended to include the Supreme Court of Appeal, as well as the Constitutional Court. At the time of writing this article, the precise nature of the review to be conducted is not entirely clear. What is clear, however, is the deep sense of unease being experienced by South African lawyers and academics at the prospect of a possible clash between the executive and the judiciary on an issue which goes to the heart of South Africa's post-apartheid constitutional democracy. That issue is the nature and extent of the powers of the judiciary *vis-a-vis* the legislature and the executive, which concerns the doctrine of the separation of powers. It is not difficult to understand the depth of the unease being experienced at present. After all, it is becoming increasingly clear that the key role players within South Africa's democracy lack a common

1 The phrase '*Vox Populi? Vox Humbug!'* used in the title of this article is borrowed from William Tecumseh Sherman, the American Civil War general who used it in relation to press reporting. It is adapted from the ancient adage '*Vox populi, vox Dei*' - 'The voice of the people [is] the voice of God', the origins of which are uncertain. However, an early example of its use was by Alcuin in 798 AD (Wikiquotes Date Unknown en.wikipedia.org).

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2 Former Chief Justice of Australia, Murray Gleeson, as quoted by former Chief Justice of South Africa, Arthur Chaskalson (Chaskalson 2012 www.timeslive.co.za).

understanding of the implications of the key doctrine of the separation of powers, which spells rough weather ahead for constitutional democracy in the country.

In Part One of this article the continuing furore around the South African government's proposal to review the performance of the judiciary will be discussed and analysed. The looming clash between the South African executive and judiciary will then be compared to a similar clash which took place in 17th century England, at a time when the doctrine of the separation of powers - in what may be termed its 'modern' sense at least - was in its infancy. Although far removed from present-day South Africa in both space and time, the clash between the executive, represented by King James I, and the judiciary, represented by Chief Justice Edward Coke, in 17th century England, serves to illustrate that the rising tensions between the South African executive and judiciary over the separation of powers are by no means unusual. In fact, such clashes appear to be fairly common, particularly in young democracies in which democratic institutions are yet to be properly consolidated. Furthermore, the English example illustrates the serious consequences which may flow from such a clash. The clash between the executive and the judiciary in England is indicative of the ideological gulf which existed at the time between the Stuart monarchs and the other organs of governance. This was to cause the country to descend into a brutal civil war, followed by a military dictatorship. This lamentable outcome lends a degree of urgency to the lessons which may be learned by examining the current tensions in South Africa through this particular legal and historical lens.

In Part Two of this article attention will be focused on two specific cases which arose out of the clash between James and Coke - *Prohibitions Del Roy* and *The Case of Proclamations*. The article will then turn to a discussion of the lessons which can be drawn from these cases. The respective arguments which were raised in the cases will be contrasted and compared with more contemporary arguments raised in the context of the present looming conflict between the South African executive and judiciary. The views of Ronald Dworkin, a leading exponent of the doctrine of the separation of powers, will be closely examined in this section of the article. Dworkin's arguments against 'majoritarian' conceptions of democracy will be discussed in particular detail, together with the implications of these arguments for the central

issues under the spotlight in this article. Tentative conclusions will then be drawn and warnings issued of the negative consequences for South Africa if the potential conflict between the executive and the judiciary is not properly resolved.

2 Rising tensions – the origins of the controversy between the South African executive and the judiciary

On 24 November 2011 the cabinet of South African President Jacob Zuma released a statement which included the following sub-heading: 'Assessment on the transformation of the judicial system and the role of the judiciary in a developmental state to be carried out with a reputable research institution.'[3] Under this sub-heading it was announced, *inter alia*, that the Cabinet had:[4]

> …agreed to the following approach to the transformation of the judicial system: That the assessment of the decisions of the Constitutional Court be undertaken by a research institution to establish how the decisions of the court have impacted on the lives of ordinary citizens and how these decisions have influenced socio-economic transformation and the reform of the law.

The fact that an 'assessment of the decisions of the Constitutional Court' had been decided upon by the cabinet set alarm bells ringing.[5] This was the start of a public controversy which was to endure and increase in intensity for many months following the announcement.[6]

An important factor to be taken into account in assessing the rising tension between the executive and the judiciary is the fact that the government had lost a number of

3 GCIS 2011 www.info.gov.za.
4 GCIS 2011 www.info.gov.za.
5 Early reaction from members of civil society within South Africa was characterised by deep concern. For example, the civil society organisation Council for the Advancement of the South African Constitution (CASAC) released a statement which read, *inter alia*: "While we should not shy away from any credible and non-partisan evaluation of the social and economic trajectory of the country since 1994, any notion that the executive has the right to review or oversee the jurisprudential performance of the courts and especially the Constitutional Court – which is the ultimate guardian of the Constitution – should be strongly resisted. Otherwise we would be inverting the principle that South Africa is a *constitutional* democracy rather than a *parliamentary* democracy – a principle that was at the forefront of the struggle for liberation and one which guided the Constitutional Assembly in its tasks … Any attempts to diagnose the Constitution and the Constitutional Court as the 'scapegoat' for the shortcomings of the transformation of South African society should also be opposed. Such endeavours would be mischievous and self-serving." (CASAC 2011 www.casac.org.za).
6 At the time of writing, the controversy still shows no sign of abating.

high profile and politically sensitive court cases in the months leading up to the controversy. Among these may be counted the politically highly sensitive case of *National Director of Public Prosecutions v Zuma*.[7] In this matter the Supreme Court of Appeal decided to overturn a decision of the High Court not to allow the prosecution of Jacob Zuma on charges of corruption related to South Africa's notorious multi-billion rand 'arms deal'.[8] Although this case ostensibly had nothing to do with the executive itself - since it involved Jacob Zuma in his personal capacity - it is clear that legally opening the way to a potential future prosecution of the current president of South Africa is unlikely to have endeared the Supreme Court of Appeal or the judiciary as a whole to the present executive.

Another case which seems to have led to increased tension between the executive and judiciary, and which is linked to the above saga, revolved around a decision taken on 6 April 2009 by the Acting Director of Public Prosecutions, Mokotedi Mpshe, not to prosecute the charges of corruption against Jacob Zuma. Mpshe's decision cleared the way for Zuma to be elected president by the National Assembly after the 2009 election.[9] The decision not to prosecute led to legal action on the part of the Democratic Alliance against the National Prosecuting Authority. As a preliminary step to challenging the decision itself, the Democratic Alliance brought an application to obtain the records on which the National Prosecuting Authority had based its decision not to prosecute Zuma. The application was rejected in the North Gauteng High Court, but this judgment of the High Court was overturned by the Supreme Court of Appeal in March 2012.[10] Jackson Mthembu, the African National Congress National Spokesperson, characterised the Democratic Alliance's approach to the courts as a 'continued attempt by the DA to use the Courts to undermine and

7 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA).

8 What is today commonly referred to by South Africans as 'The Arms Deal' was a complex series of contracts, finalised in 1999, for the purchase of weaponry to the value of around R30 billion. The decision which the Supreme Court of Appeal overturned was that of Nicholson J in *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N). In that case, Nicholson J had set aside a decision by the National Director of Public Prosecutions to indict President Zuma on charges of corruption related to the arms deal.

9 For comment see Maluleke 2009 www.unisa.ac.za.

10 *Democratic Alliance v The Acting National Director of Public Prosecutions* (288/11) 2012 ZASCA 15 (20 March 2012). Ironically, the Supreme Court of Appeal in this case took the court *a quo* to task, *inter alia* for failing to limit itself to the judicial sphere, failing to take into account only the issues that are before it, and transgressing the boundaries between the judicial, executive and legislative functions (see paras [15] and [16] at 287I-288D).

paralyse government.'[11] Clearly, cases such as this could not but help heighten tensions between the executive and the judiciary.

Yet another recent high-profile court judgment which seems to have contributed to rising tension between the executive and the judiciary is the well-known *Glenister* case, in which a businessman by the name of Hugh Glenister launched a successful Constitutional Court challenge questioning the independence of the elite crime-fighting unit known as 'The Hawks'.[12] This unit had been set up to replace a former elite crime-fighting unit known as 'The Scorpions', which had been disbanded in 2008 amid much public controversy.[13] The reason for the controversy surrounding the demise of the Scorpions was a fairly widespread belief that the unit had been disbanded in order to protect corrupt members of the political elite.[14] The unit had been involved in a number of high-profile criminal investigations into the activities of high-ranking politicians and their associates, as well as the subsequent prosecution of these individuals. For example, the unit was involved in investigating Jackie Selebi, the National Commissioner of Police and the President of Interpol, on charges of corruption - leading to his eventual conviction and sentence to a term of 15 years' imprisonment. The unit had also played a role in the investigation and successful prosecution of both Tony Yengeni (a former Parliamentary Chief Whip of the African National Congress) and Schabir Shaik (a businessman with close links to Jacob Zuma, current president of South Africa) on charges of corruption related to

11 Mthembu stated, *inter alia*, as follows: "[W]e … want to highlight the following: [1] The continued attempt by the DA to use the Courts to undermine and paralyse government. [2] The granting of blanket permission to political parties to review any State decisions, using Courts. [3] How the DA will conduct a review of the case when it can't have access to all the information which informed the NDPP's decision to withdraw the charges … Given these facts, it is clear that democracy can be undermined by simply approaching courts to reverse any decision arrived at by a qualified organ of State … The ANC is of the view that this matter should not go unchallenged as it might have huge implications for effective governance, including current and future decisions of any organ of State." (statement issued on 20th March 2012, by Jackson Mthembu, ANC National Spokesperson: Mthembu 2012 www.politicsweb.co.za).

12 See *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

13 The official name of 'The Scorpions' was the Directorate of Special Operations. It was a multi-disciplinary agency which fell under the National Prosecuting Authority (NPA), and was set up to investigate and prosecute organised crime and corruption. It came into operation on 12 January 2001 and ceased to operate on 23 October 2008.

14 See for instance Anon 2008a www.bdlive.co.za; Anon 2008b www.bdlive.co.za; Zille 2008 www.da.org.za; Hoffman 2009 www.bdlive.co.za; Anon 2011 www.bdlive.co.za; Zille 2010 www.da.org.za.

South Africa's notorious multi-billion rand arms deal referred to above.[15] Furthermore, the unit was involved in investigating the charges of corruption - referred to earlier in this article - against Jacob Zuma himself. Indeed, the unit had conducted raids on Zuma's Johannesburg residence, as well as on the offices of his attorney in Durban, to search for evidence.[16] As said previously, the charges of corruption were dropped before Zuma was sworn in as president.[17] After the Scorpions had been disbanded and replaced by the Hawks the investigation that the Scorpions had been conducting into allegations of corruption connected to the arms deal was effectively closed.[18] Without commenting on the validity or otherwise of the allegations and counter-allegations surrounding the disbanding of the Scorpions and the establishment of the Hawks, it seems clear that the judgment delivered by the Constitutional Court in the *Glenister* case would have been disappointing to both the president and his political allies.

A final high-profile court judgment which may be mentioned as possibly contributing to the rising tension between the executive and the judiciary is that concerning the appointment by President Jacob Zuma of Advocate Menzies Similane as National Director of Public Prosecutions. On 1 December 2011 a panel of five judges of the Supreme Court of Appeal declared this appointment to be unlawful. It would be surprising if this judgment was not of concern to both the president and the rest of the executive. Both the high-profile nature of the appointment and the politics surrounding it would have added to the resentment and, perhaps, a growing sense that the courts were setting themselves up as an alternative centre of power by 'interfering' in this way.

An indication of the rising tension between the executive and the judiciary is to be found in various pronouncements of high-profile political figures within the executive. For example, on 1 September 2011, Ngoako Ramatlhodi, a member of the National Executive Committee of the African National Congress, the chairperson of the National Elections' Committee of the party, and the Deputy Minister of Correctional

15 See *S v Shaik* 2007 1 SACR 142; *S v Shaik* 2007 1 SA 240 (SCA); *S v Shaik* 2008 2 SA 208 (CC).
16 See Sapa 2005 www.iol.co.za.
17 Although, following the case of *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA), such charges may be reinstated at some point in the future.
18 See Staff Reporter 2010 www.mg.co.za; Ensor 2009 www.armsdeal-vpo.co.za.

Services, launched an attack on South Africa's democratic Constitution. Adopting a rather crude instrumentalist neo-Marxist analysis, he claimed that the liberation movement had 'made fatal concessions' during the negotiations which had ended apartheid.[19] In his view this had resulted in a constitution which reflected 'a compromise tilted heavily in favour of forces against change.'[20] He clearly viewed the Constitution as a poisoned chalice deliberately designed to keep real power away from South Africa's black majority: [21]

> Apartheid forces sought to and succeeded in retaining white domination under a black government. This they achieved by emptying the legislature and executive of real political power ... [T]he black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society ... The old order has built a fortified front line in the mentioned forums. Given massive resources deriving from ownership of the economy, forces against change are able to finance their programmes and projects aimed at defending the status quo. As a result, formal political rights conferred on blacks can be exercised only within the parameters of the old apartheid economic relations ... This imbalance is reflected across the length and breadth of the country in economic, social and even political terms to some extent ... The objective of protecting white economic interests, having been achieved with the adoption of the new Constitution, a grand and total strategy to entrench it for all times, was rolled out. In this regard, power was systematically taken out of the legislature and the executive to curtail efforts and initiatives aimed at inducing fundamental changes. In this way, elections would be regular rituals handing empty victories to the ruling party.

Just over nine months later Ramatlhodi followed up his attack in a memorial lecture which he delivered in honour of the late African National Congress President AB Xuma. Thabo Mokone of *Times Live* reported on this lecture, *inter alia*, as follows: [22]

19 Ramatlhodi 2011 www.timeslive.co.za.

20 Ramatlhodi 2011 www.timeslive.co.za.

21 Ramatlhodi 2011 www.timeslive.co.za. As was to be expected, Ramatlhodi's views met with stiff opposition. For example, on 1 September 2011 in a blog entitled 'Why Ramatlhodi promotes an autocratic kleptocracy', legal academic and constitutional law commentator Professor Pierre de Vos responded, *inter alia*, as follows: 'Mr Ramatlhodi probably knows that the credibility of the ANC and the government it leads is being eroded by lavish and wasteful spending on the perks of party leaders and by the constant revelations of government corruption in our media and by the Public Protector … It is therefore not surprising that he is now using the South African Constitution and our independent constitutional institutions as scapegoats to try and divert attention from the failures of the government. Our government is failing to address the most basic needs of the poor while government and party leaders live lavish lifestyles at the expense of taxpayers and of the poor … These views are not only uninformed and demonstrably wrong; they are also callous and dangerous. Blaming the Constitution, the courts and chapter 9 institutions for the failures of the government sufficiently to change the lives of ordinary citizens who suffered under apartheid is like a man blaming an umbrella for making him wet or a white South African blaming black citizens for apartheid …' See De Vos 2011 constitutionallyspeaking.co.za.

22 Mokone 2012 m.thetimes.co.za. Not surprisingly, once again Ramatlhodi's comments elicited strong opposition. Dene Smuts, the Democratic Alliance Shadow Minister of Justice and Constitutional Development, issued a statement on 7 June 2012, in which she stated, *inter alia*:

> ANC national executive committee member Ngoako Ramatlhodi has launched a fresh attack on the judiciary, saying it was being used by a 'minority tyranny' out to undermine the executive ... 'I have seen now in our country the courts are being used to replace the executive ... There is a tyranny, a minority tyranny, that is using state institutions to undermine democratic processes at this juncture in our country,' he said in reference to court outcomes that did not favour the government.

The forthright and somewhat crude nature of Ramatlhodi's attacks on the judiciary and the Constitution are particularly interesting in that they reveal at least one (although not perhaps the only) strand of thinking on the broad issue of the separation of powers within the executive at this time.

Another indication of the executive's general attitude towards the judiciary and the Constitution is to be found in the views of President Jacob Zuma himself. On 1 November 2011, for example, the president delivered an address to a joint sitting of parliament to bid farewell to former Chief Justice Sandile Ngcobo and to welcome the new Chief Justice Mogoeng Mogoeng. While affirming his belief in the principles of the rule of law, the separation of powers and judicial independence, President Zuma stated that there was 'a need to distinguish the areas of responsibility, between the judiciary and the elected branches of the State, especially with regards (sic) to policy formulation.'[23] Significantly, he then went on pointedly to make the following statement: [24]

> Our view is that the Executive, as elected officials, has the sole discretion to decide policies for government ... We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation. The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular

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'Adv Ngoako Ramatlhodi, in his latest attack on the judiciary, is descending to dirty tactics ... His remarks are framed as an attack on a political party but in fact he attacks the impartiality of the judges, suggesting they are partisan and thereby discrediting them. He calls the DA the leader of a "new tyranny". Higher Education Minister Blade Nzimande recently said much the same thing, accusing the print media of conducting a huge liberal offensive against our democracy. The clear implication was that the press is in cahoots with the DA ... Both Ramatlhodi and Nzimande are democratic centralists and therefore believe in the tyranny of the majority: every institution must be controlled by the one party which runs the state. It is therefore unthinkable to them that the courts or the press should be able to rule or write against the government ... The courts are under a constitutionally imposed duty to review executive action for such reasonableness. And the DA has a duty to take irrational decisions on review whenever it is in a position to do so.' (Smuts 2012 www.politicsweb.co.za).

23 Zuma 2011 www.info.gov.za.

24 Zuma 2011 www.info.gov.za.

> vote. We also reiterate that in order to provide support to the judiciary and free our courts to do their work, it would help if political disputes were resolved politically. We must not get a sense that there are those who wish to co-govern the country through the courts, when they have not won the popular vote during elections.

As the tension rose, prominent figures within the legal system began to speak out. For example, on 9 December 2011, Advocate George Bizos SC delivered an address on being presented with an honorary doctorate by the University of Pretoria, which was entitled 'Blame neither the Constitution nor the Courts'.[25] He began by pointing out that there had been many criticisms levelled against the Constitution and the courts, most of which, in his view, were 'unfair, unjustified and uninformed'.[26] He quoted a range of examples in which high-ranking members of the ruling party had complained about the attitude of the judiciary, including the Secretary-General of the African National Congress, Mr Gwede Mantashe, who had been quoted as saying that the judiciary was 'consolidating opposition to government' and that there was 'a great deal of hostility that came through from the judiciary towards the Executive and Parliament', and that 'judges were reversing the gains of transformation through precedents'.[27] He pointed, *inter alia*, to a speech delivered on 8 July 2011 by President Zuma during the Third Annual Access to Justice Conference in Pretoria. In that speech, the president had stated that: [28]

> Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel [that] other arms of the State are avenues to help them co-govern the country.

In support of his view that the extensive criticism on the part of members of the executive against the judiciary and the Constitution was unfair, unjustified and uninformed, Bizos cited two examples from South African legal history, in which the executive and judiciary had clashed over the question of the separation of powers. The first example was the 1897 case of *Brown v Leyds*, in which Chief Justice Kotz of the Zuid Afrikaanse Republiek clashed with Paul Kruger, the president of that

25 George Bizos had, of course, famously defended Nelson Mandela at his treason trial in the 1960s.
26 Bizos "Public Address".
27 Bizos "Public Address".
28 Bizos "Public Address".

Republic, over the so-called 'right of testing' of the courts.[29] The second example cited by Bizos was the notorious 1951 case of *Harris v Minister of the Interior*, in which the Appellate Division clashed with a racist National Party government intent on disenfranchising so called 'coloured' voters in the Cape.[30] Both these battles resulted in eventual defeat for the judiciary at the hands of the executive, and Bizos expressed the hope that 'our current ruling party does not intend to follow either the [apartheid] regime's example or that of President Kruger.'[31]

In words that indicate clearly the alarming size of the rift developing between the executive and the judiciary, Bizos expressed deep concern at the fact that: 'The courts, as well as the individuals and organizations that bring human rights cases against the executive, to whom some impute false motives, have been subject to severe criticisms bordering on demonization.'[32] He bemoaned the fact that certain of President Nelson Mandela's successors in government had not followed the first democratic president's example of deep respect for the decisions of South Africa's Constitutional Court. He pointed out that: 'Many current government office holders have spoken out against the Courts role in ensuring that the government acts consistently with the Constitution.'[33] Referring to the *Similane* case discussed previously, Bizos argued that the decision in that case 'serves as a reminder to the President that he is not above the law'.[34] Significantly for the purposes of this article, he then went on to comment on the proposed 'assessment' of the decisions of the Constitutional Court, which had been announced by the cabinet: [35]

> There is no reason to establish a new oversight body not provided for in the Constitution. Nobody likes losing cases but this idea of assessing the decisions of the Constitutional Court, or any other court for that matter, is neither prudent nor

29 Kotze was eventually dismissed by Kruger in a demonstration of executive power. Dugard notes poignantly that: 'The final word on the judicial crisis belongs to President Kruger. At the swearing-in ceremony of the new Chief Justice, R. Gregorowski, he enunciated a biblical-trekker legal philosophy which still haunts the minds of South African judges and lawyers. The testing right is a principle of the Devil, he warned. The Devil had introduced the testing right into Paradise and tested God's word. Judges accordingly were advised not to follow the Devil's way, as Kotze C.J. had done!' (Dugard *Human Rights* 24).

30 Once again, although the judiciary won a few battles, it was the executive which won the war, and the 'coloured' voters in the Cape were eventually removed from the voters roll.

31 Bizos "Public Address".

32 Bizos "Public Address".

33 Bizos "Public Address".

34 Bizos "Public Address".

35 Bizos "Public Address".

> wise. Any such assessment body would take the people of South Africa down a road that is unconstitutional, unreasonable, unsustainable, and that must be construed as nothing less than a resurgence of the methods of the apartheid regime. How ironic that the very party that fought so hard against apartheid is now considering adopting one of the regimes most devious methods. The idea of assessing the courts is completely contradictory to the spirit, purpose and object of the Constitution and to the legacy of Nelson Mandela.

The dawn of a new year was to see the above controversy develop into a full-blown furore.[36]

3 The controversy deepens

In late January 2012 former South African Chief Justice Arthur Chaskalson delivered a speech at a workshop held at the University of Cape Town in which he commented on the growing anger of politicians directed against the Constitution. He pointed out that a degree of tension between politicians and judges was inevitable in a constitutional democracy characterised by the rule of law with an independent judiciary tasked with the judicial review of legislative and executive action. According to Chaskalson such tension was inherent in all systems which respected the doctrine of the separation of powers. Significantly for the purposes of this article, he then alluded to the possible reasons for the rising sense of frustration among the executive, as well as the negative consequences for the country as a whole: [37]

> The executive has no doubt been frustrated by a number of high-profile cases that it has lost before the courts, and this may be the reason for complaints by political leaders about the judiciary. Unsuccessful litigants are inclined to blame the court rather than themselves and politicians are no exception to this ... Such attacks, coming from senior politicians, undermine the constitutional order and pose a threat to our democracy.

Chaskalson went on to dispute the argument being raised with increasing frequency by members of the ruling elite that the Constitution was an obstacle to the transformation of South African society - away from the inequalities of apartheid. Referring to the 'canard raised by critics that the Constitution is a bar to transformation', Chaskalson pointed out that the Constitution contained an unequivocal commitment to the transformation of South African society, in that: 'It

36 This will be discussed in detail in the next section of this article.
37 Chaskalson 2012 www.timeslive.co.za.

calls for positive action to confront the apartheid legacy of poverty and dis-empowerment, and for building a truly nonracial society committed to social justice.'[38] He then disputed arguments that the South African judiciary was 'untransformed'[39] and cited extracts from a string of Constitutional Court decisions, which clearly demonstrated a deep commitment on the part of the Court to the fundamental transformation of South African society at all levels, so as to reflect 'a democratic, universalistic, caring and aspirationally egalitarian ethos' - in the words of Justice Ismail Mahomed.[40] He concluded that any lack of transformation within South African society could not be laid at the door of the courts, and ended with the following stinging rebuke of those within the ruling party who blamed the Constitution for a lack of transformation: [41]

> The preamble and the founding values of the Constitution assert human dignity, the achievement of equality, and the advancement of human rights and freedoms. These were not values forced on those who negotiated the Constitution on behalf of the ANC; nor was an entrenched Bill of Rights. They were demands made by the ANC which had been enshrined in the Harare Declaration of 1989. Do those who blame the Constitution for lack of transformation want a legal order in which human rights are not entrenched, and parliament is supreme, where, as a former South African chief justice of those times observed in 1934: 'Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway ... and it is the function of the courts of law to enforce its will.' If this is what they want, they should say so.

In February 2012 fuel was added to the fire already burning on the issue of the proposed assessment of the decisions of the Constitutional Court. During an interview with *The Star* newspaper on 13 February, President Jacob Zuma confirmed that he saw a need to 'review the Constitutional Court's powers.'[42] He was also reported to have stated that the matter was 'a general societal issue that is being raised', and that it was a 'growing view' (presumably within South African society at large).[43] Significantly, he was also alleged to have stated that the judges were 'influenced by what's happening and influenced by you guys (the media)', and was

38 Chaskalson 2012 www.timeslive.co.za.
39 Chaskalson pointed out that comparatively few judges from the apartheid era still held office, and that about 60 percent of the judiciary were black, including the Chief Justice, the Deputy Chief Justice, the President of the Supreme Court of Appeal, the Deputy President of the Supreme Court of Appeal, and all of the judges president of the high court, as well as eight of the eleven Constitutional Court justices. See Chaskalson 2012 www.timeslive.co.za.
40 Chaskalson 2012 www.timeslive.co.za.
41 Chaskalson 2012 www.timeslive.co.za.
42 Monare 2012 www.iol.co.za.
43 Monare 2012 www.iol.co.za.

reported to have expressed the following specific concerns about the manner in which Constitutional Court judgments are reached: [44]

> We don't want to review the Constitutional Court, we want to review its powers. It is after experience that some of the decisions are not decisions that every other judge in the Constitutional Court agrees with ... There are dissenting judgments which we read. You will find that the dissenting one has more logic than the one that enjoyed the majority. What do you do in that case? That's what has made the issue to become the issue of concern.

These somewhat confusing remarks were clarified when The Presidency released a statement to the media on the same day they were made, which read, *inter alia*, as follows: [45]

> The President's comments must be viewed in the context of the decision of Cabinet of November 2011, in terms of which the Minister of Justice and Constitutional Development has been directed to conduct an assessment of the impact of the judgments of the Constitutional Court on the transformation of society in the 17 years of democracy ... The exercise is with a view to assess the transformative nature of jurisprudence from the highest court in the land in promoting an equal, non-racial, non-sexist and prosperous society envisioned by the Constitution within the context of a developmental state. This exercise is not unusual, but occurs all the time ... Often scholars and writers give their own perspectives on decisions of the courts and court decisions are not immune from public scrutiny provided of course that this is done within permissible limits. This must therefore not be viewed as an attempt by government to undermine the independence of the judiciary and the rule of law which are entrenched in our Constitution. This is an exercise that falls within the mandate of the Executive of formulating and reviewing policies of government which seek to advance the transformative character of our Constitution.

Predictably, reaction to the proposed 'review' was negative. For example, a spokesperson for the Democratic Alliance called on the president to clarify his remarks, stating that: 'President Zuma will find that he is on the path to a full-blown confrontation with the Constitutional Court if his remarks really mean what they seem to mean, because the court itself decides the constitutionality of constitutional amendments'.[46] The spokesperson further expressed concern that at the root of the president's desire for a review of the powers of the Constitutional Court lay his irritation with previous judgments of the Court. A spokesperson for the Black Lawyers Association was reported to have said that the president's decision to

44 Monare 2012 www.iol.co.za.
45 The Presidency 2012 www.info.gov.za.
46 *Legalbrief Today* 14 February 2012 legalbrief@legalbrief.co.za.

review the powers of the Constitutional Court lacked appreciation of the 'basic tenets underlying the doctrine of the separation of powers'.[47]

On 28 February 2012, despite all the concerns that had been expressed, it became clear that the South African government wished to give practical content to the proposed 'assessment' of the decisions of the Constitutional Court - when the Minister of Justice, Jeff Radebe, announced that the government would commission a study of the manner in which Constitutional Court rulings had impacted on the law, the state and the lives of citizens.[48] The Minister stated that the project was not aimed at curtailing the powers of the court, but formed part of overall efforts to transform the judiciary.[49]

This, then, is the state-of-play in South Africa at the time of writing this article. Clashes between the executive and judiciary over the question of the separation of powers are certainly not new. As pointed out by George Bizos in his article discussed above, there are some interesting examples of such clashes to be found in South Africa's legal history. In a search for further instructive examples, however, we wish to cast our net wider than the shores of this country and go back much further in legal history than the examples cited by Bizos. We turn now to an examination of a clash between the executive and judiciary which took place over 400 years ago in England, at a time when the doctrine of the separation of powers in its modern form was still in its infancy.

47 Rabkin 2012 www.businessday.co.za.

48 Ferreira 2012 mg.co.za.

49 The statement read, *inter alia*, as follows: 'We have alluded to the fact that the kind of assessment we set to embark upon is not unusual. It occurs all the time and as research will show, universities undertake this form of research to evaluate the social-rights jurisprudence on the lives of peoples … [T]he assessment should not be seen in isolation but as part of a holistic approach to the transformation of the judicial system in line with the values of the Constitution. These recommendations, including the assessment of the decisions of the Constitutional Court, are with a view to developing clear and concise recommendations that are necessary to unlock challenges that have the potential to undermine the transformation goals that are intended to nourish our constitutional democracy.' (Radebe 2012 www.justice.gov.za).

4 Lessons from English history – The clash between King James I of England and Chief Justice Edward Coke

One of the earliest examples of a clash between the executive and the judiciary on the question of the separation of powers took place in the 17th century between King James I of England and his Chief Justice, Edward Coke. There are a number of reasons for why we believe this particular clash is significant**.** Firstly, the fact that this clash took place over 400 years ago in England shows that the current tensions between the executive and judiciary in South Africa are by no means novel. Secondly, the example chosen illustrates that clashes of this nature are particularly likely to take place during the early years of a young democracy, when there is still contestation as to the basic ground rules around which that democracy is being formed.[50] Thirdly, it is submitted that the clash between James and Coke took place at a particularly significant time, when the modern doctrine of separation of powers was in the process of formation. Fourthly, the example chosen illustrates the dire consequences which may result from such clashes. After all, contestation over issues involving the separation of powers eventually led to a brutal civil war in England, resulting in the destruction of the executive and its replacement with what amounted to a military dictatorship. This may serve as a warning to South Africans today.

It is useful to begin with a brief overview of the period during which the clash between James and Coke took place. The 17th century in England was profoundly significant in the development of constitutional democracy. It has been called England's 'Century of Revolution', and was to witness protracted and widespread civil and political conflict epitomised by the vicious civil war of 1641 to 1651; the beheading of King Charles I and the victory of parliament; the 'Commonwealth' of Oliver Cromwell; the restoration of the monarchy; the final demise of the notion of absolutism following the so-called 'Glorious Revolution' of 1688; and the confirmation of parliament's gains entrenched in the 'Bill of Rights' of 1689. The clash between

50 It is submitted that the contestation in 17th century England between the doctrine of the 'divine right of kings' on the one hand and the 'social contract' on the other may serve to shed light on the contestation between 'majoritarian' and 'liberal' (or 'constitutional') conceptions of democracy in South Africa today.

King James I on the one hand and the judiciary on the other took place during the early part of this century of revolution.

James I was the first of the 'Stuart' kings, who came to power in 1602 upon the death of the last of the Tudor monarchs, Elizabeth I, who had died childless.[51] By this stage in England's political and legal development political power did not lie solely in the hands of the monarchy but was divided, not entirely precisely, between the king, parliament, and the judiciary. Parliament, particularly the elected House of Commons, was the prime source of statutory law.[52] It was an entrenched institution, having no real equivalent in continental Europe.[53] The courts were in a somewhat more ambiguous position. The monarch was not directly involved in the conduct of judicial matters, particularly those involving the common law. While two of the three 'common law' courts (the 'King's Bench' and the 'Court of Common Pleas') functioned almost entirely as judicial forums, the other 'common law' court (the 'Exchequer'), as well as many other English courts at the time, had administrative as well as judicial functions. In some cases the administrative functions of courts exceeded their judicial functions, the most obvious example being the Exchequer. Conversely, executive institutions such as the Chancery and Admiralty had judicial functions in addition to their administrative functions.[54] As far as judges were concerned, the administrative duties of many of the judicial officials involved certain members of the judiciary acting as officials of the executive, with the concomitant

51 The Stuarts were a Scottish dynasty. The last Tudor monarch was Elizabeth I, who died childless. Her cousin was Mary Queen of Scots, who had a son, James. He was James VI of Scotland, but was invited by parliament to become James I of England in 1602. From this time on the two realms were ruled jointly, with formal union between the two countries being instituted about a century later in 1707. Schama *History of Britain* 395. See also 'the Acts of Union': the Union with Scotland Act 1706 passed by the English parliament, and the Union with England Act 1707 passed by the Scottish parliament.

52 Parliament itself began as a 'great council' of all the leading churchmen and aristocracy in order to fulfil the requirement in articles 12 and 14 of *Magna Carta*, that the monarch could not raise any taxes without the 'consent of the realm'. This body, which became the House of Lords, was supplemented in 1265 by the institution introduced by Simon de Montfort, which was intended to represent the 'commons' or more accurately, the 'communities' of England. This became the House of Commons. With a qualified franchise it tended to be elected by the lower orders of the nobility, in other words the gentry, as well as the wealthy merchant class. See Prosser and Sharp *Short Constitutional History* 66-80.

53 For instance, the States General in France bore no real resemblance, neither did it have anything approaching comparable authority. See Britannica Date Unknown www.britannica.com.

54 This could result in officials being in a position of what would today be considered an unacceptable conflict of interest. For example, the Admiralty adjudicated over prizes and piracy confiscations, from which officials profited. According to Jones, this amounted to a 'private concern making a profit out of the public'. See Jones *Politics and the Bench* 17.

dangers of executive-mindedness in the performance of their judicial function. Indeed, judges were appointed by the king as royal officials, with only *Magna Carta* as a safeguard to ensure that suitable persons were appointed.[55] The law tended to be interpreted in line with the political beliefs of the judges, which might explain why certain judges showed remarkable independence, while others were inclined to side with the executive.[56] As tensions rose in the period immediately preceding the Civil War, for example, several judges were indicted by parliament, since they had been drawn into its conflict with the crown.[57] It is clear, therefore, that the separation of powers in seventeenth century England was somewhat different from the position in most constitutional democracies today.

In general terms, it is fair to say that whereas the Tudor monarchs had been successful in exercising authority in such a way as to maintain some sort of balance between the different centres of power (or at least to maintain the appearance of such a balance while manipulating matters in such a way as to achieve their ends), the same was not true of the Stuart kings.[58] The Stuarts were not nearly as subtle as the Tudors in dealing with parliament, and at various junctures the courts were drawn into ongoing disputes between these two centres of power. In part, however, the continuing conflict was due to factors which were beyond the control of the Stuarts. Social, political and economic conditions had changed since Tudor times. Spanish gold from the New World had caused economic inflation in Europe, which in turn resulted in a growing fiscal crisis in England. The Stuart monarchy was not free to deal with this issue as it wished, since the power to levy taxes did not lie within the hands of the monarchy but in the hands of parliament. Indeed, the original reason for parliament's existence and the main source of parliamentary power was control over

55 *Magna Carta* article 45: 'We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well'. See also Jones *Politics and the Bench* 147.

56 It is also clear that the judges tended to adhere to precedent. Persons aggrieved by a decision would frequently overlook this, however, and instead of declaring a law to be wrong, would blame the judge supervising the law unjustly, for adopting a political stance. See Jones *Politics and the Bench* 1.

57 Jones *Politics and the Bench* 137-143.

58 The Tudor success in ensuring the cooperation of parliament was achieved partially by their acquisition of support from the gentry in the Commons, which they used against the power of the great Lords. Fundamentally, however, the Tudors were obliged to work with parliament, even though they were adept at having their way. Parliament had its area of authority enlarged, whilst the Tudors avoided using the royal prerogative in such a manner as to cause a clash. See Keir *Constitutional History* 151-154; Prosser and Sharp *Short Constitutional History* 107-109.

law providing for taxation.[59] The frustration that must have been felt by the Stuart monarchs is mirrored, perhaps, in the growing frustration felt by the current South African executive leadership.

The Stuarts were also the authors of their own eventual downfall. One element which led to their demise was the Stuarts' adherence to the doctrine of the 'Divine Right of Kings', which did not enjoy universal acceptance in England at the time.[60] The Stuarts' preoccupation with the doctrine placed them on a political collision course with parliament. This was to lead to ongoing crises, complicated by religious differences - eventually resulting in civil war between king and parliament.[61] It is clear that James I, in particular, was a firm believer in the doctrine of the 'Divine Right of Kings'. This is evidenced by his authorship in 1598 of a paper entitled 'The Trew Law of Free Monarchies; or, The Reciprocal and Mutual Duty Betwixt a Free King and His Natural Subjects'.[62] The attitude of James I toward his duties, the duties of his subjects, the role of the courts, and the legislature is indicated both expressly and implicitly in this paper. He commences by arguing that there is biblical authority for

59 Winston Churchill states as follows: 'Who was to have the last word in the matter of taxation? Hitherto everyone had accepted the medieval doctrine that "The King may not rule his people by other laws than they assent unto, and therefore he may set upon them no imposition [i.e. tax] without their assent." But no one had analysed it, or traced out its implications in any detail. If this were the fundamental law of England, did it come from the mists of antiquity or from the indulgence of former kings? Was it the inalienable birth-right of Englishmen, or a concession which might be revoked? Was the King beneath the law or was he not? And who was to say what that law was? The greater part of the seventeenth century was to be spent in trying to find answers, historical, legal theoretical, and practical, to such questions.' (Churchill *History of the English-speaking Peoples* 2; Jones *Politics and the Bench* 30).

60 This was probably due to the existence of parliament, despite the fact that the servile parliaments of the Tudor period may have given the impression that the doctrine was alive and well. Although many kinds of pre-modern forms of monarchy involved some aspect of divine blessing, feudal kingship did not involve the concept of the divine right in the fashion that was to develop in Europe during the Reformation. The 'divine right of kings', as a doctrine, arose due to several factors. These included the decline in the power of the nobility and the centralisation of state authority, the rediscovery and investigation of Roman concepts of imperial semi-divine authority during the Renaissance, and a Protestant preoccupation with reducing the power of the Catholic Church. See Prosser and Sharp *Short Constitutional History* 108-109.

61 Society in Britain at this time was predominantly Protestant, with the practice of Catholicism outlawed in England, Wales and Scotland. See Schama *History of Britain* 329.

62 This was written when James was still only king of Scotland, and before he acceded to the throne of England. However, he reissued the 'Trew Law' upon his becoming king of England in 1603. James continued to 'stick to his guns' and republished 'Trew Law' in 1616, together with other works he had written, including poetry and political theory. As might be clear from his publication of this and other works, apart from any political philosophies or office, James had pretentions at scholarship. The most memorable piece of scholarship to bear James' name was commissioned rather than written by him, however - namely the 'Authorised' or King James version of the Bible of 1611. This remains the most influential version of the Bible ever to be written in English, and is one of the foremost works of English literature. See, generally Bragg *Book of Books*.

royal absolutism, and then deals with the consequences of this divine mandate in these terms: [63]

> Shortly then, to take up in two or three sentences grounded upon all these arguments, out of the law of God, the duty and allegiance of the people unto their lawful king, their obedience, I say, ought to be to him as to God's lieutenant in earth, obeying his commands in all things except directly against God as the commands of God's minister, acknowledging him a judge set by God over them, having power to judge them but to be judged only by God, to whom only he must give count of his judgment, fearing him as their judge, loving him as their father, praying for him as their protector, for his continuance, if he be good, for his amendment, if he be wicked, following and obeying his lawful commands, eschewing and flying his fury in his unlawful, without resistance but by sobs and tears to God.

This passage provides *prima facie* indication of James' attitude to the courts, which, to follow his reasoning, ought to feature only as extensions of James' personal divine mandate, using authority delegated from James to deal with matters to which he did not have the opportunity to attend.[64] However, James' firm belief in the divine right of kings did not fit well in 17th century England. For example, on travelling towards London in 1602, having newly become King of England, James is said to have ordered the summary execution of a pickpocket. This order was not complied with since the offender was entitled to a trial before an English court.[65]

It was probably inevitable that James would eventually clash with the English courts. The clash, when it came, was part of a process which was to lead, eventually, to the English Civil War. This illustrates the potential dangers of such contestations over the separation of powers, which weaken the constitutional norms underpinning democracy. The English Civil War, of course, was to lead to the eventual execution of James I's successor, Charles I - for treason against 'the present Parliament, and the people therein represented'.[66] Anyone brought up to believe in the ideas

63 The spelling in this passage has been modernised to facilitate ease of reading, and has been sourced from The Norton Anthology of English Literature – Norton Topics Online Date Unknown www.wwnorton.com. A fuller version featuring the original spelling may be found at Perseus Digital Library Date Unknown www.perseus.tufts.edu.

64 '... acknowledging him a judge set by God over them, having power to judge them but to be judged only by God, to whom only he must give count of his judgment, fearing him as their judge ...'

65 Churchill *History of the English-speaking Peoples* 1.

66 Excerpts from "The Charge against the King": "That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by and according to the laws of the land, and not otherwise; and by his trust, oath, and office, being obliged to use the power committed to him for the good and benefit of the people, and for the preservation of their rights

expressed in 'Trew Laws' would struggle with the concept that treason could be committed against anyone other than the monarch.[67] The present South African executive seems to be struggling with the idea that the power conferred upon it by the electorate can be limited by an unelected judiciary which acts in terms of a constitution as the final source of authority. Of course, this view is predicated upon a simple 'majoritarian' as opposed to a 'liberal' (or 'constitutional') concept of democracy.[68] This will be discussed in greater detail in Part Two of this article.

5 Conclusion

Part One of this article has traced two examples of a clash between the executive and the judiciary in a developing democracy. Although far removed from each other in space and time, a constitutional and legal dialogue may be said to exist between 17th century England and present-day South Africa. In each case, the executive and judiciary seem to be in fundamental disagreement over the source of political authority and legitimacy. In the case of seventeenth century England, it was the doctrine of 'the divine right of kings' versus that of the 'social contract', whereas in the case of present-day South Africa it is 'majoritarian' versus a 'liberal' (or 'constitutional') conception of democracy. Fundamental disagreements of this kind inevitably result in tension and instability. Compromise on such foundational issues is often impossible. The conflict must be resolved in favour of one side or the other, with profound implications for the society in question. This, at least, is the lesson of history.

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and liberties; yet, nevertheless, out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people, yea, to take away and make void the foundations thereof, and of all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the right and power of frequent and successive Parliaments … [H]e, the said Charles Stuart, for accomplishment of such his designs, and for the protecting of himself and his adherents in his and their wicked practices, to the same ends hath traitorously and maliciously levied war against the present Parliament, and the people therein represented ...' See Gardiner *Constitutional Documents.*

67 By contrast, across the channel, Louis IV of France had begun his long reign and was to consolidate absolute monarchical rule in France - which persisted until the French Revolution. In England, however, the 'Restoration of the Monarchy' in 1660, together with the 'Glorious Revolution' of 1688, was to see the consolidation of a constitutional monarchy.

68 There is, of course, much historical precedent for this clash of ideas, including for example the competing notions of John Locke and Jean-Jacques Rousseau on the nature of the social contract.

In Part Two of this article the clash between James and Coke in 17th-century England will be examined in greater detail. Possible lessons will be drawn for 21st century South Africa. In particular, the arguments of Ronald Dworkin against majoritarian conceptions of democracy will be discussed and applied to the current dispute between the South African executive and the judiciary.

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List of abbreviations

CASAC	Council for the Advancement of the South African Constitution
GCIS	Government Communications and Information Systems
NPA	National Prosecuting Authority

VOX POPULI? VOX HUMBUG! – RISING TENSION BETWEEN THE SOUTH AFRICAN EXECUTIVE AND JUDICIARY CONSIDERED IN HISTORICAL CONTEXT – PART ONE[1]

D Hulme*

S Peté**

SUMMARY

This article takes as its starting point a controversy which has arisen around a proposed assessment by the South African government of the decisions of the Constitutional Court, giving rise to concerns that this will constitute undue interference with the independence of the judiciary. Part One of this article traces and analyses the developing controversy. It then compares the current clash between the South African Executive and Judiciary to a similar clash which took place in seventeenth century England, between King James I and Chief Justice Edward Coke. Such clashes appear to be fairly common, particularly in young democracies in which democratic institutions are yet to be properly consolidated. Although not immediately apparent, the similarities between the situation which existed in seventeenth England at the time of James I and that in present-day South Africa are instructive. In tracing the development of these two clashes between the executive and judiciary, Part One of this article lays the foundation for a more in-depth comparison in Part Two.

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1 The phrase '*Vox Populi? Vox Humbug!'* used in the title of this article is borrowed from William Tecumseh Sherman, the American Civil War general who used it in relation to press reporting. It is adapted from the ancient adage '*Vox populi, vox Dei*' - 'The voice of the people [is] the voice of God', the origins of which are uncertain. However, an early example of its use was by Alcuin in 798 AD (Wikiquotes Date Unknown en.wikipedia.org).

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