

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT CONSTITUTIONAL HILL (BRAAMFONTEIN)

CASE CCT: 245/21

In the application of:

FORUM 4 SERVICE DELIVERY

INTERVENING PARTY

In re:

ELECTORAL COMMISSION OF SOUTH AFRICA (IEC)

APPLICANT

And

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS (COGTA)**

FIRST RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF EASTERN CAPE**

SECOND RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF THE FREE STATE**

THIRD RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL**

FOURTH RESPONDENT

GOVERNMENT OF GAUTENG

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF KWAZULU-NATAL**

FIFTH RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF LIMPOPO**

SIXTH RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF MPUMALANGA**

SEVENTH RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF THE NORTHERN CAPE**

EIGHTH RESPONDENT

**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF THE NORTH WEST**

NINTH RESPONDENT

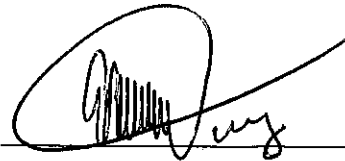
**MEC RESPONSIBLE FOR COOPERATIVE
GOVERNANCE IN THE PROVINCIAL
GOVERNMENT OF THE WESTERN CAPE**

TENTH RESPONDENT

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Dated at SANDTON this 10TH day of AUGUST 2021.



RANTHO & ASSOCIATES INC.
INTERVENING PARTY'S ATTORNEYS
133 VALLEY STREET
SUNNYSIDE
DOCEX 71, PRETORIA

TEL: 012 343 0713

CELL: 065 835 2166

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TEL: 011 333 1892

FAX: 086 5123 724

EMAIL: gideon@rantho.co.za

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT

Constitutional Hill

1 Hospital Street

Johannesburg, 2017

Tel: 011 359 7400

AND TO: APPLICANT'S ATTORNEYS

Moeti Kanyane Incorporated

First Floor, Block D

Corporate 66 Office Park

269 Von Willich Street

Die Hoewes

Centurion

Tel: 012 003 6471

EMAIL: moeti@kanyane.co.za / mashudu@kanayane.co.za

AND TO: MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

First Respondent

87 Hamilton Street
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**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE
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Second Respondent
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**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE
PROVINCIAL GOVERNMENT FOR FREE STATE**

Third Respondent
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**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR GAUTENG**

Fourth Respondent

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/ zukiswa.ncunyana@gauteng.gov.za / [simon.masisi-](mailto:simon.masisi-letele@gauteng.gov.za)

letele@gauteng.gov.za

Anthony.moonsamy@gauteng.gov.za

**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR KWAZULU-NATAL**

Fifth Respondent

330 Langalibalele Street

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Nokwanda.mchunu@kzncogta.gov.za / sanele.zondi@kzncogta.gov.za

**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR LIMPOPO**

Sixth Respondent

Hensa Tower Building

28 Market Street

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Email: ngobenidd@coghsta.limpopo.gov.za /

dumisile@coghsta.limpopo.gov.za /

mathyem@coghsta.limpopo.gov.za

**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR MPUMALANGA**

Seventh Respondent

Samora Machel Building

Ext 2, 7 Government Boulevard

Riverside Park

Mbombela

Email: lydswalt@mpg.gov.za / mvdmerwe@mpg.gov.za /

sam@mpg.gov.za / skunene@mpg.gov.za / mkhwanzizf@mpg.gov.za

**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR KIMBERLEY**

Eighth Respondent

JS du Plooy Building

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Kimberley

Email: byass@ncpg.gov.za / bslenkoe@ncpg.gov.za /

mmadayo@ncpg.gov.za / pseane@ncpg.gov.za

**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR NORTH WEST**

Nineth Respondent

Telkom Building

2266 Bessemmer Street

Industrial Site

Mafikeng

Email: mmotlogelwa@nwpg.gov.za / tlerefolo@nwpg.gov.za

**AND TO: MEC RESPONSIBLE FOR COOPERATIVE GOVERNANCE IN THE PROVINCIAL
GOVERNMENT FOR THE WESTERN CAPE**

Tenth Respondent

9 Wale Street

Cape Town

Email: graham.paulse@westerncape.gov.za

AND TO: SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

Eleventh Respondent

Block B, Corporate Park

175 Corobay Avenue

Waterkloof Glen

Pretoria

Email: ugopichund@salga.org.za

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**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION (SALGA)**

ELEVENTH RESPONDENT

NOTICE OF MOTION

TAKE NOTICE THAT the **FORUM 4 SERVICE DELIVERY** hereby makes application to the Constitutional Court for an order in the following terms:

1. That the **FORUM 4 SERVICE DELIVERY** is granted leave to intervene as the Twelfth Respondent in these proceedings, in terms of **Rule 8** of this Court's Rules.
2. That the **FORUM 4 SERVICE DELIVERY** is granted the right to present all the necessary written submissions in advance of the hearing of this matter.
3. That any party opposing this application is ordered to pay the **FORUM 4 SERVICE DELIVERY** costs.
4. Further and/or alternative relief.

[Handwritten signature]

[Handwritten initials]

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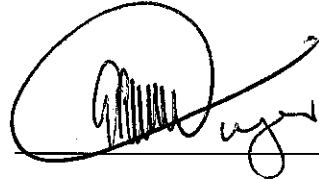
TAKE NOTICE FURTHER THAT the accompanying founding affidavit of **FORUM 4 SERVICE DELIVERY** deposed to by its President, **Mr MBAHARE J KEKANA** is attached hereto, to set forth a basis for intervention.

TAKE NOTICE FURTHER THAT the intervening party, **FORUM 4 SERVICE DELIVERY** has appointed **RANTHO AND ASSOCIATES INC. C/O MA MPHULOANE ATTORNEYS, 13th FLOOR MARBLE TOWERS, 208 JEPPE STREET, JOHANNESBURG** as the address at which delivery and service of all the processes and documents in these proceedings will be accepted.

TAKE NOTICE FURTHER THAT the intervening party is also willing to accept all documentation and communication via email to save costs and expedite the matter. This includes any directive from the Honourable Court's Registrar or Chief Justice. The email address is: gideon@rantho.co.za

TAKE NOTICE FURTHER THAT any party wishing to oppose this intervention application must file its Notice of Opposition together with their Answering Affidavit by end of business on **Wednesday 11th August 2021.**

Dated at SANDTON this 10TH day of AUGUST 2021.



RANTHO & ASSOCIATES INC.

INTERVENING PARTY'S ATTORNEYS

133 VALLEY STREET

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DOCEX 71, PRETORIA

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First Respondent

87 Hamilton Street

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Pretoria

c/o THE STATE ATTORNEY

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/sivuyisiwe.mayoyo@eccogta.gov.za

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TENTH RESPONDENT

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION (SALGA)**

ELEVENTH RESPONDENT



FOUNDING AFFIDAVIT: APPLICATION FOR LEAVE TO INTERVENE

I, the undersigned,

MBAHARE JOHANNES KEKANA

do hereby take oath and declare that:

INTRODUCTION

1. I am an adult male and duly elected President of the intervening party, **FORUM 4 SERVICE DELIVERY**. I am duly authorized to oppose these proceedings on behalf of the **FORUM 4 SERVICE DELIVERY**. I attach hereto a copy of the resolution authorising me to bring this application and to oppose the main application on behalf of the **FORUM 4 SERVICE DELIVERY** marked as annexure "MJK 1".
2. The facts contained in this affidavit are, save where the context indicates otherwise, within my personal knowledge and are, true and correct.
3. Where I rely on facts not within my personal knowledge, I do so on the basis of documents reviewed and information provided to me.

Where I make legal averments, I do so on the basis of legal advice by legal representatives of the **Forum 4 Service Delivery**, which advice I accept as correct.

4. I have read the founding affidavit of **VUMA GLENTON MASHININI** on behalf of the Applicant, together with the necessary annexures and the confirmatory affidavits.
5. I am informed that, I am entitled to bring this application by virtue of the invocation of **Section 38 (c), (d) and (e)** of the **Constitution of the Republic of South Africa, 1996**. This is with regard to the intervening party's standing, in bringing this application and in opposing the main application.

THE FORUM 4 SERVICE DELIVERY'S (F4SD) INTEREST

6. The intervening party is a political party registered with the Independent Electoral Commission of South Africa (**IEC**), the Applicant in the main application. In this regard, I attach hereto, the intervening party's registration certificate marked annexure "**MJK 2**".
7. I am advised that anyone who wishes to intervene in Court proceedings before this Honourable Court must pass the *litmus test* established by **Rule 8** of the Rules of this Honourable Court. The Rule requires that a party may at any stage of litigation, may apply for leave to intervene as a party. The requirement is that it should be in the interest of justice for such intervening party to be so admitted.

8. I am advised that over-and-above the aforesaid, the intervening party must demonstrate that they have a **direct and substantial legal interest** in the matter. I am accordingly advised that the **FORUM 4 SERVICE DELIVERY** has a direct and substantial legal interest in the matter because it is a political party which has an interest in participating in the elections.
9. The **FORUM 4 SERVICE DELIVERY** is a political party which has about 50 000 members throughout the length and breadth of South Africa. The party has **28 Councillors** in **13** South African municipal councils whose term of tenure will end on the **1st November 2021** in accordance with **Section 159** of the Constitution of South Africa.
10. Its members have an interest in participating in the voting process during elections and to partake in contesting the elections. The **FORUM 4 SERVICE DELIVERY** also has a direct and substantial legal interest in the outcome of the matter, especially to influence such outcome by actively participating in the main application by virtue of intervention in the case.
11. I am advised further that the intervening party is enjoined to demonstrate that it will be in the **interest of justice** for them to intervene in the proceedings.



12. I am also advised that the provisions of **Rule 12** of the Uniform Rules is also applicable in this regard.
13. In the event the application is granted, the **FORUM 4 SERVICE DELIVERY** intents to canvass the following legal *points in limine* regarding the salient Constitutional Principles which are at the vortex of the main application:
- 13.1 JURISDICTION
- 13.2 LACK OF URGENCY
- 13.3 NON-JOINDER
- 13.4 SUPREMACY OF THE CONSTITUTION
- 13.5 SEPARATION OF POWERS
- 13.6 DIRECT ACCESS
- 13.7 RIPENESS
14. I am advised that some of the abovementioned issues are extensively discussed in the LLM, dissertation examined in 2006 written by PJ NGANDWE from North West University, Mahikeng. Campus. The

dissertation covers extensive research of the relevant case law and academic research which finds relevance in the main application. I am advised that the blending of the rigorous academic research and the case law will immensely assist the court in this matter. I attach a copy of the dissertation for ease of reference marked annexure "MJK 3".

15. I am also advised that in the event the **FORUM 4 SERVICE DELIVERY** is joined in the proceedings, it will also make submissions regarding other constitutional principles found in the Constitution *inter alia*, under **Sections 1, 2, 19, 36** and **159**.
16. It should be noted that on the **5th August 2021**, the **FORUM 4 SERVICE DELIVERY** transmitted correspondence to the Applicants in the main application indicating the desire to be joined in the proceedings. The Applicant replied in a letter dated the **5th August 2021** indicating that the **FORUM 4 SERVICE DELIVERY** is entitled to bring this application. I attach hereto, copies of the said correspondences marked as annexure "MJK 4".
17. I am therefore advised that it is not anticipated that any of the parties litigant in the main application will be opposed to this application.
18. I am advised that there has not been a delay in bringing this application because the **FORUM 4 SERVICE DELIVERY** only got the

founding papers of the main application on the **4 August 2021**. I am also advised that the intervention of the **FORUM 4 SERVICE DELIVERY** will not occasion any delays to the main application.

19. In light of this application, I implore the Acting Honourable Chief Justice of the Republic of South Africa and the Registrar of this Honourable Court to reconsider the directives issued on the **6th August 2021**.

CONCLUSION

20. I am therefore advised that the intervening party does have direct and substantial legal interest in the main application, with the result that it will be in the interest of justice to grant the leave to intervene.

WHEREFORE, the Applicant has made out a proper case for the relief sought in the notice of motion. I therefore pray that the application is granted.

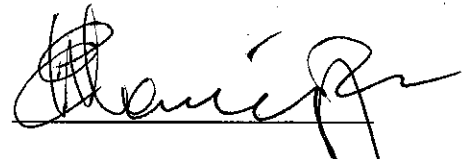


DEPONENT

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH HAS BEEN SIGNED AND SWORN TO IN MY PRESENCE AT PRETORIA ON THIS 10 AUGUST 2021 AND THAT THE PROVISIONS OF THE REGULATIONS CONTAINED IN THE



GOVERNMENT NOTICE R.1258 OF 21 JULY 1972 (AS AMENDED) HAVE BEEN COMPLIED WITH.



Handwritten signature of Masipa Ntlai Eunice.

COMMISSIONER OF OATH

Commissioner of Oaths

Masipa Ntlai Eunice

Ex Officio

Practising Attorney RSA

Suite 506 + 507, Van Erkom Building

217 Pretorius Street, Pretoria, 0001

Date: _____

"MK1"

000001



NEW COMMUNITY VOICE

RESOLUTION TAKEN BY FORUM 4 SERVICE DELIVERY (F4SD)

A political party registered as such in terms of Section 15 of the Electoral Commission Act 51 of 1996;

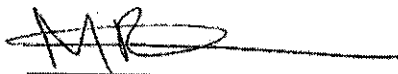
At a meeting of the National Forum Executive Council (NFEC) held at Pretoria F4SD National Head Office on this 06th day of October 2020.

It was resolved that:

THAT MBAHARE JOHANNES KEKANA in his capacity as National Leader of FORUM 4 SERVICE DELIVERY (F4SD) hereby duly authorized to sign, endorse and execute all documents for and on behalf of the F4SD to give effect to this Resolution with such modification as they in their sole discretion shall deemfit, their signature to be conclusive proof that the documents which bear it are authorized in terms hereof;

FURTHER THAT MBAHARE JOHANNES KEKANA authorised hereto to sign any and all documentation in order to institute and/or defend legal action on behalf of the F4SD.

FURTHER THAT MBAHARE JOHANNES KEKANA authorised to instruct Rantho & Associates, depose to affidavits and to do all things necessary in order to institute and/or defend the necessary legal action on behalf of F4SD.



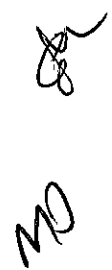
2020-10-06

Mtswaledi Rankapole

Date

F4SD PRESIDER

Physical Address: 3rd Floor Steven House, Brooklyn Bridge Office Park, 570 Fehrsen Street Brooklyn, Pretoria, 0181 Email: info@forum4sd.org Website; www.forum4sd.org Tel:0124336527



"MJK 2"

000002



Certificate of Registration as a Party

IT IS HEREBY CERTIFIED THAT THE PARTY OF WHICH THE DETAILS ARE FURNISHED BELOW HAS BEEN REGISTERED AS A PARTY IN TERMS OF THE ELECTORAL COMMISSION ACT, 1996 (ACT NO.51 OF 1996).

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CANDIDATE'S DECLARATION

I DECLARE THAT THIS DISSERTATION FOR THE DEGREE OF MASTER OF LAWS AT THE UNIVERSITY OF NORTH WEST HEREBY SUBMITTED, HAS NOT PREVIOUSLY BEEN SUBMITTED BY ME FOR A DEGREE AT THIS OR OTHER UNIVERSITY, THAT IT IS MY OWN WORK IN DESIGN AND EXECUTION AND THAT ALL MATERIAL CONTAINED HEREIN HAS BEEN DULY ACKNOWLEDGED.



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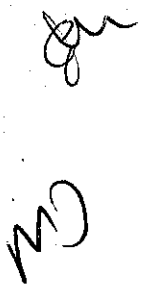
STATUTORY DECLARATION

I, Professor Melvin L.M Mbao, hereby declare that this dissertation by Phazha Jimmy Ngandwe for the Degree of Master of Laws (LLM) be accepted for examination.



Professor M.L.M Mbao

NOVEMBER 2006



ABSTRACT

There exists a lacuna in our legal system, the role of the judiciary in the law-making process is not well defined. 'Historically, the judiciary has always claimed that its duty was merely to interpret and apply the law and that it was not within its province to legislate.'

Custom and practice on the other hand has revealed that, to some extent, this is not entirely true. Because through precedents and pronouncements of statutes unconstitutional and therefore, null and void, the former in that sense makes laws and is practically involved in the law-making process. "Judicial discretion is another means at the disposal of the judiciary by which the latter legislates."

Therefore, the notion that the province of the judiciary is only confined to the interpretation and application of the law is overwhelmingly misleading. The role of the judiciary in the law making process has to be clearly defined and not just to be inferred so that there is left no middle ground or grey area between its involvement and non-involvement. Once this is done, the problem of uncertainty and inconsistency in so far as the judicial process is concerned will be remedied.

Since it is indeed the judiciary that decides the cases before them, from these cases it is respectfully submitted that the interpretative process they adopt in

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arriving at their decision itself amounts to law-making. It is trite law that when courts interpret the law, they also make the law in that process. This reasoning has long been accepted in our legal order and in foreign jurisdictions. The former President of the United States of America, Roosevelt, precisely pointed out in his message to the Congress of the United States on the 8th December 1908, thus:

The Chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of the law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions. ¹

Even though the above quote was said in the last century, it is still applicable today because judges still do the job of interpreting and applying the law. In doing so they are involved in the law-making process. It has become manifest, as this study will reveal, that the judiciary is involved in the law-making process even though this has proven somewhat irksome to

¹ President Theodore Roosevelt, Message to the Congress of the United States, 8th December 1908, 43rd Congressional Record, Part 1, p.21.

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accept and appreciate, bearing in mind the overriding democratic principles such as separation of powers and the independence of the judiciary..

Therefore this study endeavours to interrogate the manner by which the South African judiciary has been involved in the law-making process both during the previous apartheid regime and in the present democratic dispensation. Futhermore, this study also attempts to answer the question as to how the judiciary will continue to legislate in the present judicial transformation process without upsetting the imperatives of the doctrine of separation of powers and the independence of the judiciary.

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17. Omar and Others v Minister of Law and Order and Others 1987 (3) SA 859 (A).
18. Pharmaceutical Manufacturers Association of South Africa – in re: Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC).
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20. R v Pretoria Timber Co (PTY) Ltd and Another 1950(3) SA 163 (A).
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26. South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC).
27. Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA).
28. State President and Others v Bill 1987 (3) SA 859 (A).

THE UNITED STATES OF AMERICA

1. Marbury v Madison 5 US (1 Cranch), 137 (1803).

TABLE OF ACTS/STATUTES**South African statutes**

<u>NUMBER</u>	<u>YEAR</u>	<u>Short Title</u>
	1909	South Africa Act
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49	1951	Separate Representation of Voters Act
3	1953	Public Safety Act
32	1961	Republic of South Africa Constitution
37	1963	General Law Amendment Act
51	1977	Criminal Procedure Act
74	1982	Internal Security Act
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Thanks to Donald Murray Minchin at Minchin & Kelly Inc. for all the support in this work. I also thank the staff at my new job at the Directorate of Public Prosecutions in Botswana, for being supportive at the critical and final stages of this work especially Mrs Susan Mangori.

I would also like to thank my entire family for the long and difficult journey we have travelled thus far and the unwavering support they gave me, may we continue to soldier on. My late father Jimmy Ngandwe, it was your words of wisdom that kept me going when you said to me shortly after completing at High School that; "You should consider this the beginning of your studies". Now I understand exactly what you meant.

I also thank my mother Bontle Elizabeth Ngandwe, for believing in me during the trying times and may you continue to hold on because you are the centre, but not for you, by now we would have succumbed to pressure and collapsed.

To my lovely wife Dilafa Phetwe and our son Tjadiwa, thank you for being a source of my strength and inspiration and for understanding that I had to study for long hours.

I thank all my brothers and sisters and their families respectively, Monametsi and Tswelelo Ngandwe, Maungo, Pelonomi, Babusi and Bogadi as well as all my cousins. My nephew and nieces Toto, Dodo, Tonono and Wame. My brothers in-law Mr Kitso Thobo Kitso and Mr Ricardo Mbakile.

Of course it will be a terrible mistake not to mention my grandmother Johanna Mosinki and my ever supportive uncle William Mosinki and his family. Lastly my Aunt Esther Mabedza and family particularly my cousin Wedu Mabedza. And all those I could not mention, may you continue to inspire me in your own ways.

May God bless all of you.



DEDICATION

This dissertation is dedicated to my lovely wife Dilalammogo Ngandwe and our son Tjadiwa Ngandwe as well as my late father Jimmy Dickson Ngandwe.

PHAZHA JIMMY NGANDWE

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CHAPTER ONE: INTRODUCTION

1.0 INTRODUCTION

This chapter deals with the introductory part of this work and is aimed at serving as a preamble to this dissertation. The dissertation is concerned with the role and impact of the judiciary in the law making process under a democratic system of governance, founded on the supremacy of the Constitution.

The dissertation is centred on the South African jurisprudence but foreign authority is also cited as persuasive authority and corroborative of the arguments advanced in this study.

1.1 STATEMENT OF THE PROBLEM

There exists a lacuna in our legal system, the role of the judiciary in the law-making process is not well defined. 'Historically, the judiciary has always claimed that its duty was merely to interpret and apply the law and that it was not within its province to legislate.'¹

¹ Pickard, C. J. In Bongqopi v Chairman of The Council of State, Ciskei, and Others 1992 (3) SA 250 (CK) at 265. Cf. Cardozo B: The Nature of the Judicial Process. New Haven: Yale University Press, 1921 pg 3.

Jurisprudence (custom and practice) on the other hand has revealed that, to some extent, this is not entirely true. Because through precedents and pronouncement of statutes unconstitutional and therefore, null and void, the former, in that sense, makes laws and is practically involved in the law-making process. It is incontrovertible that the Constitutional Court made law when it invalidated the death penalty in the face of overwhelming public opinion for its retention in the landmark case of S v Makwenyane.² Judicial discretion is another means at the disposal of the judiciary by which the latter legislates.³

However, the creative role of the judiciary in interpreting and applying the Constitution and other statutory law must be exercised within clearly defined parameters.⁴ This involves limits of a policy nature since the courts are invariably influenced by the underlying socio-political milieu of a particular nation as to the appropriate limits of the law-making functions of a non-elected judiciary.⁵

Therefore, the notion that the province of the judiciary is only confined to the interpretation and application of the law is overwhelmingly misleading. The words of the late Chief Justice John Marshall of the Supreme Court of the

² 1995 (3) SA 391 (CC).

³ Cardozo, *op cit* pg 4.

⁴ Devenish GE: A Commentary on the South African Constitution, Durban: Butterworths 1998 at 16-17.

⁵ Lord Diplock in Geelong Harbor Trust Commissioners v Gibbs Bright & Co 1974 (2) ALR 362 369.

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United States of America in the landmark case of Marbury v Madison⁶ by implication, bears testimony to this assertion. In that case, Marshall made this often quoted observation:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rules to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each.⁷

Even though the Chief Justice was not theoretically correct in so asserting at the time, because the Constitution of the United States of America⁸ in no way vested legislative powers in the judiciary, his statement was and still is practically correct. Even though it has become trite that the judiciary also makes laws, there are grey areas in the law in this regard in that our statute books in no way expressly and unequivocally vest the judiciary with legislative powers.

The Constitution of the Republic of South Africa, Act 108 of 1996 expressly provides under section 43 that:⁹

In the Republic, legislative authority-

⁶ 5 US (1 Cranch). 137(1803).

⁷ Marshal J(CJ):In Marbury v Madison 5 US (1 Cranch). 137(1803)

⁸ Article 1 of the Constitution of the United States of America 1788.

⁹ The Constitution of the Republic of South Africa Act 108 of 1996, section 43.

- (a) of the national sphere of government is vested in Parliament, as set out in section 44;
- (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
- (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.'

The Constitution does not in any way expressly vest the legislative powers on the judiciary. Section 165 vests the judicial powers on the judiciary as follows:¹⁰

'165 (1) The judicial authority of the Republic is vested in the courts.'

This "mischief" has to be remedied by delimiting the scope and province of the judiciary in the law-making process. There could not have been a more appropriate time to do so but now, especially given the current impetus and imperatives of judicial transformation. The issue of judicial transformation has raised a lot of controversy and heated debate in both the professional and academic domains in South Africa.¹¹

The substratum of the debates is the million dollar question as to what the notion of transformation means, what it entails and what its implications will be to the much-fought-for freedom. The recent quagmire that befell the

¹⁰ Constitution of South Africa Section 165 (1)

¹¹ Mpati L. "Transformation In The Judiciary-A Constitutional Imperative", Paper presented at the Inaugural Lecture, University of the Free State, 6th October 2004 (unpublished). See also <http://wwwserver.law.wits.ac.za/sca/speeches/mpati.pdf>



South African democracy as elaborated below¹², is a perfect example of what could happen if there is not much interaction and collaboration between these arms of government.

The government of South Africa has made an endeavour to amend the Constitution and do away with the judiciary's right to administer its own affairs.¹³ This proposal immediately poses the danger that the proposed constitutional amendment will impact negatively on the independence of the judiciary. The question that follows therefore is how the government can introduce much needed reforms relating to the administration of the judiciary as a whole without necessarily impeaching on its independence.

These issues are dealt with fully below for the sake of chronology and coherence. The idea that the courts also legislate *prima facie* impacts negatively on the ideals of democracy and militates against the doctrines of separation of powers, majoritarianism and constitutional supremacy, which are the pillars or building blocks of our democracy.¹⁴

The role of the judiciary in the law-making process has to be clearly defined and not just to be inferred so that there is left no middle ground or grey area between its involvement and non-involvement. Once this is done, the

¹² Mpati *ibid* at pg 6.

¹³ Republic of South Africa, Constitution Fourteenth Amendment Bill 2005.

¹⁴ See Devenish, n 4 above, at page 16-17.

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problem of uncertainty and inconsistency in so far as the judicial process is concerned will be remedied.

As pointed out earlier, Section 43 of the South African Constitution, in no uncertain terms vests legislative authority on the national parliament, provincial legislatures and the municipal councils respectively and not on the judiciary.¹⁵ However, the case of Pharmaceutical Manufacturers Association of South Africa – in re: Ex parte President of the Republic of South Africa demonstrates that the judiciary also makes laws.¹⁶

Taking cognisance of the above, then the burning issue is how then can the judiciary perform this newly found role without violating the principles of democracy; the supremacy of the constitution; separation of powers and eventually culminating in the dilemma of counter-majoritarianism? It is incidental to the judicial process that occasionally, judicial discretion be exercised, laws or legislation be pronounced null and void or unconstitutional but without compromising and undermining the democratic values articulated above.

The delicate nature of the relationship between the judiciary and the legislature has to be stabilised. The extent to which the judiciary can

¹⁵ The Constitution of The Republic of South Africa, Act 108 of 1996 at section 43.

¹⁶ 2000 (2) SA 674 (CC).

legislate has to be marked so as to do away with the prevalent uncertainties.

It has become manifest, as this study will reveal, that the judiciary is involved in the law-making process even though this has proven somewhat irksome to accept and appreciate, bearing in mind the overriding democratic principles cited above.

Therefore this study endeavours to interrogate the manner by which the South African judiciary has been involved in the law-making process both during the previous apartheid regime and in the present democratic dispensation. Furthermore, this study also attempts to answer the question as to how the judiciary will continue to legislate in the present judicial transformation process without upsetting the imperatives of the doctrine of separation of powers and the independence of the judiciary.

1.2 AIMS AND RATIONALE OF THE STUDY

This dissertation is intended to benefit the judiciary, parliamentarians, other policy makers, law students and law lecturers especially in this era of judicial transformation. This is because it is not only the judiciary that is being challenged to transform but the intellect and mind set of all role players in the legal fraternity as well.

Moreover, this study endeavours to step into the unexplored territory of transforming the relationship between the legislature and the judiciary in so far as law-making is concerned, from a rigid and formal one to a harmonious and pragmatic one. In the Namibian case of Kausea v Minister of Home Affairs, Namibia,¹⁷ it was held that due to the delicate nature of the transformative process, constitutional law had to be developed cautiously, judiciously and pragmatically. This research adopts this approach as opposed to a radical one.¹⁸

This work will go a step towards assisting the judiciary, policy makers, law students and parliamentarians to not only appreciate that law-making also falls squarely within the province and ambit of the judiciary but also that such is one of the imperatives of the process of judicial transformation.

1.3 LITERATURE REVIEW

Previous research by some of the prominent writers such as Devenish on this subject, save for appreciating the legislative role of the judiciary, has not been able to shed light as to what the possible solutions could be.¹⁹ Of course one has to treat this subject with the sensitivity it deserves, considering the traditional principle of separation of powers and its imperatives.

¹⁷ 1995 (11) BCLR1540 (NmS).

¹⁸ Kausea *ibid* at 1549.

¹⁹ See Devenish *op cit.* at pages 4-16.

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This principle has been strictly and robustly applied and it manifests itself in the relations between the judiciary and the legislature and it is in this terrain that it has been religiously followed. Therefore the first confession will be to appreciate that it is not going to be easy for most lawyers to comprehend and understand this work, especially conservatives and conventionalists who feel enjoined to safeguard the old and deeply entrenched legal traditions.

Academics may find it intellectually provocative while the judiciary in particular will, without doubt, find it threatening to their cloistered virtue of judicial independence. But all that this work is aimed at is to encourage and aid the process of transforming the relations between the arms of government mentioned above.²⁰

1.4 DATA COLLECTION AND RESEARCH METHODOLOGY

The method of research employed in this work was based on analysis of related work by other authors with a richer scholarship than mine. Library research came in handy because it provided the researcher with most of the primary sources needed for this work. Throughout this work it has been the most accessible means of acquiring information especially the use of secondary sources, decided cases and text books.

²⁰ Bosielo J, "Transforming the South African Judiciary: Jurisprudential Paradigm Shift". Paper presented at a jurisprudential Conference at the North-West University, Mafikeng Campus on the 23rd September 2005 (unpublished).

Collection of data by attendance at academic seminars and symposia was without any doubt of crucial importance. It afforded the researcher the opportunity to actively interact with some of the personnel in the legal fraternity. A thorough interrogation of articles in journals has also been an important source of information as well as newspapers.

The most modern and efficient research tool has been the internet, through much of which undeniably this work has been developed. Through this tool I have had access to works of foreign writers and philosophers alike with ease. This work is entirely based on a qualitative method of data collection as opposed to a quantitative one. By this method, every endeavour was made to make use of only necessary information from the sources cited above.²¹

The qualitative method has been described as 'the non-numerical examination and interpretation of observations for the purpose of discovering underlying meanings and patterns of relationships. On the other hand, the quantitative method is defined as 'the numerical representation and manipulation of observations for the purpose of describing and explaining the phenomena that those observations reflect.'²²

²¹ www.hc.sc.gc.ca/p-mcc/18-/d-e.html <http://dqspsp/publicat.cde>

²² Msaule P.R. The Constitutional Protection of Freedom of Speech and the Prohibition of Hate Speech in South Africa: Promises and Pitfalls. 2004, LLM Dissertation, North West University (unpublished).

1.5 SCOPE AND LIMITATIONS OF THE STUDY

This dissertation is concerned with the role and impact of the judiciary in the law-making process in South Africa. The research also focuses on the evolution of this role of the judiciary from the period before 1994 and after. The change in constitutional fundamental or the Grundnorm and how that change affected the role of the judiciary in the "new" Constitutional dispensation are also articulated in this study.

To achieve this, the study is divided into five co-related and integrated chapters. Each chapter deals with specific aspects and they are corroborative in order to achieve internal logical, cohesion and easily intelligible flow of argument.

The first chapter deals with the introductory part of this work and is aimed at identifying the problem under investigation...

The second chapter deals with the historical background to the law-making role of the judiciary in South Africa during the apartheid era. It interrogates the role of the judiciary under the system of sovereignty of parliament. The Chapter discusses some of the challenges that the judiciary of the time faced. Even more importantly, the judicial mind set of that time is also brought into light.

In the third chapter, the focus of inquiry is shifted to the post 1994 era or the democratic dispensation epoch. This chapter focuses on the fundamental changes that came with the advent of the democratic government. The imperatives of the Interim Constitution²³ and the final Constitution²⁴ are discussed with specific reference to the (Constitutional) role of the judiciary in relation to the democratic principles, inter alia, the supremacy of the constitution, separation of powers and the independence of the judiciary.

The fourth chapter is aimed at assessing and evaluating the role of the judiciary in relation to the current phase of judicial transformation and defining the new role of the judiciary. This includes issues concerning judicial legitimacy and the involvement of the judiciary in the legislative process. In this chapter, the current political debate and the issues incidental thereto, on the proposed efforts to transform the judiciary by the government are also discussed.

The fifth chapter is the final one and it carries the findings, recommendations and conclusions of this work.

²³ Constitution of the Republic of South Africa, Act 200 of 1993.

²⁴ The Constitution of the Republic of South Africa Act 108 of 1996.

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CHAPTER TWO: THE ROLE OF THE JUDICIARY IN THE LAW MAKING PROCESS

2.0 INTRODUCTION

This chapter deals with the historical background of the law-making role of the judiciary in South Africa during the apartheid era. It interrogates this role of the judiciary in the system of government anchored on sovereignty of Parliament and explicates some of the challenges that the judiciary of the time faced. Moreover, the judicial mind set of that time is also discussed.

Due to the historical foundations of the South African legal system, an appreciation of the role of the judiciary in the law-making process can only be better achieved by an historical and comparative methodology. This is because the system has developed differently in accordance with and in line with the respective political milieu in each era.

As the system of government changed with each era, so did the legal system and the underlying values. For instance, during the apartheid era, parliament reigned supreme and in the post apartheid era, the tables turned and we now have a system of constitutional supremacy taking over.²⁷ All this has had different implications for the province of the judiciary in the

²⁷ See also qu ch 22. See also Section 2 of the 1996 Constitution.

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different epochs and inform the challenges facing the judiciary in South Africa as we find it today.

Most importantly, this chapter goes on to demonstrate the involvement of the judiciary in the law-making process. The point of departure is the apartheid era. More on this discussion follows immediately below.

2.1 HISTORICAL BACKGROUND OF THE JUDICIARY IN THE 'OLD' SOUTH AFRICA

From the introductory chapter it is evident that the use of the Roman maxim "ius decere non facere" by the judiciary in the past has turned out to be fallacious. Directly translated, the maxim means or implies that the duty of the judge is to state the law and not to make it.²⁶ The orthodox view with regard to law-finding is that law has always existed as a complete body of rules. The judge, therefore, is not required to create law. The role of the judges has previously been narrowly perceived to be merely to interpret the law and apply it as it is (and not the contrary).²⁷

This interpretation was also apparent in the case of Bongopi v Chairman of The Council of State, Ciskei, and Others²⁸ per Pickard, C J, as follows;

²⁶ Hosten et al: Introduction To South African Law And Legal Theory; Durban: Butterworths, 1980 at p 238-240.

²⁷ Hosten ibid p 238.

²⁸ 1992 (3) SA 250 (Ck).

Regrettably it seems to me that a social syndrome has developed in recent years to elevate popular social values, slogans and clichés to holy cows and to attempt to promote them at all costs into enforceable norms. Anything which can be titled a 'Bill of Rights' or 'Fundamental Rights' is presumed to have the power and enforceability that the promoters of these principles would like it to have. This Court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the correct public attitudes or standards in regard to those policies is not its function.²⁹

This excuse was especially useful during the previous apartheid regime in South Africa when judges found themselves in an invidious position of having to dance to the tunes of their master, the then apartheid government.³⁰ Regrettably, there were very few Judges, who were willing to risk their careers and comfortable pensions by questioning the underlying ideology of such laws and refusing to apply the racist laws of the apartheid regime.³¹

Surprisingly, this misconception was not only useful to judges who were rather insecure about the legitimacy of their positions but an overwhelming

²⁹ Pickard, C J, *supra* 1992 (3) SA 250 (Ck) pg 265.

³⁰ Dugard J, Racial Legislation and Rights in Conflict and Progress, Johannesburg, Macmillan 1979, p.79-97.

³¹ Cameron E, "Legal Chauvinism, Executive-Mindedness and Justice-L.C Steyn's Impact on South African Law" (1982) 99 South African Law Journal 38 at p.74-5.

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majority of academics also harboured this misconception.³² As opposed to the current system of constitutional democracy, the old system of government in South Africa was based on the Westminster model.³³ This system as developed from Britain followed the principle of parliamentary sovereignty. AV Dicey authoritatively defined this system as follows;

The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.³⁴

However the historical background and purpose for which parliamentary sovereignty came about in Britain was different from that in South Africa. In English constitutional history, the principle was informed by popular struggles against feudal absolutism. Parliament was seen as an avenue of public representation and parliamentary sovereignty was therefore associated with popular sovereignty or the will of the people.³⁵

In South Africa, this was not the case. This is because the principle did not serve the same purpose as the majority of the people were excluded from the political process. It is axiomatic that in South Africa the vast majority

³² Dugard *op.cit* at 79.

³³ Carpenter G: Introduction to South African Constitutional Law. Pretoria 1987.

³⁴ Dicey AV: Introduction to the study of the law of the constitution, London: Macmillan and Co. Ltd 1959 at 39-40.

³⁵ Carpenter, *ibid* at pg 80-81.

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most people were deprived of genuine representation in parliament and parliament did very little, if any, to prevent abuse of power by the executive.³⁶

This system of governance in South Africa was entrenched by the Union Constitution, otherwise known as The South Africa Act of 1909. This Constitution was itself passed by the British Parliament and it received Royal assent on the 20 September 1909.³⁷ It incorporated the doctrine of parliamentary sovereignty and the Union Parliament was empowered to amend the Constitution by ordinary legislation with the exception of several entrenched provisions such as those entrenching the limited franchise accorded the "Cape Coloureds" and the Equality of English and Afrikaans as official languages.

Parliamentary sovereignty was a dominant theme of the South African constitutional history from 1910 until it was replaced by constitutional supremacy in 1993.³⁸ Section 59(1) of the Union Constitution provided that: 'Parliament is the sovereign legislative authority in and over the Union.' Section 152 provided that: 'Parliament may by law repeal or alter any of the provisions of this Act.'³⁹

³⁶ Carpenter *op cit* at p 149-155.

³⁷ The South Africa Act of 1909.

³⁸ Andrews P. and Ellman S.; The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law. Johannesburg: Sachs A., "Instruments of Domination in South Africa" [1975] 3 SALJ 223. Wits University Press, 2000.

³⁹ The South Africa Act of 1909, at sections 59(1) and 152.

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The Westminster system, created a unitary state that entrenched white political power, turning a deaf ear to opinions expressed by indigenous Africans.⁴⁰ The virtues and vices of this system on which South Africa was based until 1993, meant quite a number of things to the manner of governance and the political milieu of the then South African society.⁴¹

The system of parliamentary sovereignty, *inter alia*, meant that parliament, "ostensibly" consisting of the elected representatives of the people, was the sovereign law-making authority in the country. As Dicey has expounded above, Parliament was omniscient and could legislate on any subject matter and in any terms it chose. It was only subject to the British Parliament until 1934. No court could declare an Act of Parliament to be invalid because of its subject matter.⁴²

Despite the powerful position occupied by the executive, Cabinet remained accountable to Parliament and the judiciary had no power to invalidate parliamentary legislation.⁴³ In other words, the courts could not therefore pronounce on the validity of Acts of parliament.⁴⁴ The South African jurisprudence is replete with clear examples of instances where the courts

⁴⁰ Carpenter *op cit* at 199.

⁴¹ Andrews, *op cit* 25.

⁴² Andrews, *ibid* 25.

⁴³ Boule L, Harris B and Hoexter C; Constitutional and Administrative Law: Basic Principles Cape Town: Juta, 1989.

⁴⁴ Boule, *ibid* at pg 12.

could not test the validity of parliamentary legislation. Some of these cases are discussed below.⁴⁵

There were instances where, regrettably, the judiciary, under the guise of legal positivism, allowed itself to be used as an important tool in the ruthless implementation of racist laws which were intended to promote and preserve the tenure of the apartheid government.

A perfect example is the famous contentious coloured voters' cases or the Harris cases in the 1950s, when coloured people of the Cape were deprived of their limited political franchise and removed from the common voters roll.⁴⁶ This disenfranchisement was largely made possible by the system of parliamentary sovereignty because through it, the apartheid government easily manipulated the legislature to enact laws which were detrimental to the coloured voters.

This caused an unprecedented constitutional crisis when parliament, at the instigation of the National Party led by D.F. Malan, attempted to set up a High Court of Parliament to set aside a decision of the erstwhile Appellate Division of the Supreme Court in the second Harris case.⁴⁷ The creation of the High Court of Parliament was the government's response to an earlier decision of the Appellate Division in the first Harris case.

⁴⁵ See Hosten et al., *op cit* at 202.

⁴⁶ Harris and Others v Minister of the Interior and Another, 1952 (2) SA, 428 (A).

⁴⁷ Minister of the Interior and Another v Harris and Others, 1952 (4) SA, 769 AD.

In this case, the court declared the Separate Representation of Voters Act⁴⁸ unconstitutional. This decision was made on the grounds that the special two-thirds majority procedure for amending the entrenched franchise rights of the coloured voters, set out in the then constitution of South Africa had not been followed. Ultimately the Appellate Division found that the High Court of Parliament was no court of law, but merely parliament acting in a different guise.⁴⁹

In the second Harris case, it was successfully argued that parliament was endeavouring to assume the role and functions of a court of law and thereby attempting to act as judge, jury and executioner in its own cause. The learned Schreiner JA (as he then was) opined as follows:

And indeed I do not in the least degree dissent from the view that, assuming that one has to decide whether the High Court of Parliament as set up by Act 35 of 1952 is or is not a court of Law, the proper conclusion is that it is not, but is only Parliament wearing some of the trappings of a Court. If that is so, and Parliament has simply itself assumed the role of watchman over its own actions, Act 35 of 1952 constitutes an encroachment on the judicial power, which in the narrow field covered by the provisos to section 152 is fully separate from the legislative power.⁵⁰

⁴⁸ Separate Representation of Voters Act 46 Of 1951

⁴⁹ First Harris case op cit at 432.

⁵⁰ Schreiner A J.:In Minister of the Interior and Another v Harris and Others, 1952 (4) SA, 769 AD 788.

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The National Party's government surreptitiously obtained its way largely due to Parliamentary sovereignty by enacting the Senate Act, using legislation to create an artificially enlarged senate.

Although challenged, this legislation was found to be constitutional in a majority judgment in the case of Collins v Minister of the Interior and Another,⁵¹ with Judge Oliver D. Schreiner's boldly dissenting. The majority judgment, delivered by Justice De Villiers, clearly epitomised the judicial self restraint syndrome of that time. This is because of his religious application and interpretation of the doctrine of parliamentary sovereignty thus:

The fact that the motive of the legislature in passing the Senate Act and its indirect result was to make provision for a two-thirds majority in favour of the legislation removing coloured persons from the voter's roll is immaterial as regards the validity of the Act, the pith and substance of which falls within the competence of parliament as ordinarily constituted.⁵²

There was not much that the court could do because parliament was at that time the sovereign law-maker and law made by it was immune from judicial scrutiny and critique, thereby ensuring judicial minimalism.⁵³ Not even the meticulous judgment of Justice Schreiner could make any difference since

⁵¹ 1956 (3) SA 511 (C).

⁵² De Villiers J. op cit 515.

⁵³ See the second Harris case above. See also Dugard J.: Racial Legislation and Rights, in Conflict and Progress, Ellen Hellman and Henry Lever (editors), Johannesburg: Macmillan 1979, p.79-97.

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the majority had already chosen to be loyal to the letter of the law. In his brave dissenting judgment, he correctly held that:

I hold accordingly that on the proper construction of the South Africa Act, a Senate constituted ad hoc for the purpose of securing, by nomination or its equivalent two-thirds majority in a contemplated joint sitting is not a House of Parliament within the meaning of the proviso. The application of this conclusion to the facts creates no difficulty. It is clear that the Senate set up under the Senate Act was as certain to provide the requisite two-thirds majority as if the names of its members had been scheduled to the Act or the government had been empowered to nominate all of them. The history of the legislation proclaims that the Senate Act was part of a legislative plan to create a Senate that would in that way provide the two-thirds majority required to removing the appellant from the common voters' roll, and it was enacted only for that purpose.⁵⁴

In 1961 a successor to the 1909 constitution, The Republic of South Africa Constitution, was promulgated and came to be known as The Republican Constitution.⁵⁵ This Constitution did not bring much change as compared to its predecessors. Section 118 thereof still empowered Parliament to amend the Constitution by ordinary enactment.⁵⁶ The most important section of this

⁵⁴ Schreiner A J. *op cit* 1956 (3) SA 511 (C) 517.

⁵⁵ The Republic of South Africa Constitution, Act 32 of 1961.

⁵⁶ See The Republican Constitution, section 118.

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Constitution for the purpose of this work was sections 59(2) which re-stated that;

No court of law shall be competent to inquire into or pronounce upon the validity of any Act passed by parliament.⁵⁷

From the foregoing explanation of the system of parliamentary sovereignty, it is then obvious that under this system, the judiciary struggled to operate efficiently as an instrument of checks and balances on other arms of government, especially the legislature, hence, the invidious position the judiciary found itself in, for instance in the Harris cases above. This culminated in parliament passing legislation that ousted the courts' jurisdiction to review executive and administrative acts of certain functionaries of government.⁵⁸

The courts were consequently faced with a situation where they had to declare themselves unauthorised to test the legality of certain acts of government.⁵⁹ This situation caused a lot of confusion in the judiciary to the extent that the latter handed down contradictory and inconsistent judgments from one case to another.⁶⁰

⁵⁷ See section 59(2)-(4) of the Constitution, 1969.

⁵⁸ Suppression of Communism Act of 1950, Public Safety Act 3 of 1953, General Law Amendment Act 37 of 1963 and the Internal Security Act 74 of 1982.

⁵⁹ Dugard *op cit* at 80.

⁶⁰ Cf. Schermbucker v Klindt NO 1985 (4) SA 606 (A) and Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568 (A).

While some judges strongly felt constrained to uphold some indefensible pieces of legislation, others felt that by so doing they would have been in actual fact rendering their office useless.⁶¹ Amid this confusion and uncertainty on the bench, judge-made law emerged.⁶² The analysis below explains the difficult situation the judiciary endured as a result of the system of parliamentary sovereignty and how judges legislated in some cases.

A number of nefarious security legislations were passed by parliament such as the Suppression of Communism Act of 1950, the Public Safety Act 3 of 1953 and the General Law (Amendment) Act 37 of 1963 and later the Internal Security Act 74 of 1982. These Acts were ostensibly passed to protect and safeguard national security but had the effect of legitimising certain acts by government functionaries and insulating them from judicial scrutiny as will be evident from the cases immediately below.

In Schermbucker v Klindt NO,⁶³ at issue was whether the court had jurisdiction to hear a matter regarding a person who was indefinitely detained in terms of section 17 of the General Law (Amendment) Act and the legality thereof.

⁶¹ <http://wwwserver.law.wits.ac.za/sca/speeches/mpati.pdf>

⁶² Mpati *ibid* at pg 22.

⁶³ 1965 (4) SA 606 (A).

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Section 17 provided, inter alia, as follows:

(1) Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section 1 of the Police Act 7 of 1958, may from time to time without warrant arrest or cause to be arrested any person whom he suspects upon reasonable grounds of having committed or intending or having intended to commit any offence under the Suppression of Communism Act of 1950-, or the offence of sabotage...and detain such person or cause him to be detained in custody for interrogation.....

(2) No person shall, except with the consent of the Minister of Justice or a commissioned officer as aforesaid, have access to any person detained under subsection (1)...

(3) No court shall have the jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody.⁶⁴

The court decided by a majority vote that it did not have jurisdiction to make an order in terms of section 17(3). Even though this sub-section explicitly ousted the jurisdiction of the courts from reviewing certain administrative acts, the dissenting minority judgment of Trollip, AJA, goes to show that part of the judiciary did not religiously abide by the apartheid system. He held, inter alia, at p 613A-D:

⁶⁴ General Law Amendment Act 37 of 1963 at section 17.

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Section 17 of Act 37 of 1963 does not impair the court's jurisdiction in any case affecting a detainee except to the extent mentioned in subsection (3); that is, it cannot order the release from custody of any person so detained; otherwise it retains full jurisdiction; thus it can order his release if he has been unlawfully arrested or is being unlawfully detained, and it can restrain any unlawful conduct which is being committed upon him during his detention.⁶⁵

From the foregoing reasons given by the judge, it is quite evident that the judge departed from the literal stipulations of the Act in so far as the ouster clause was concerned. This is because while the ouster clause plainly, did not even afford the court an opportunity to even test the lawfulness of the arrest itself,⁶⁶ the judge came up with a rather different interpretation and meaning of that clause. The generous interpretation by the judge demonstrated his innovativeness.

Even though the Act in no ambiguous terms purported to oust the court's jurisdiction, the honourable judge was able to circumvent the said ouster clause and came up with a dissenting judgment favourable to the subject, thereby, making-law. By interpreting the statute in a manner that could not be said to have been the intention of the law maker, the judge was

⁶⁵ Trollip AJA (as he then was), in Schermbucker v Klindt NO 1965 (4) SA 606 (A), pp 613A-D.
⁶⁶ See Act 37 of 1963 at section 17(13).

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undoubtedly legislating. But unfortunately he was in the minority at that material time.

These laws and policies which explicitly denied the courts the requisite jurisdiction to entertain certain administrative acts were some of the reasons that led the judiciary into finding comfort in the maxim "ius decere non facere" because it was pointless and suicidal to try to interpret the law in a manner that was incompatible with the apartheid ideology.⁶⁷

However the shift in the attitude of the Appellate Division which is attributable to the likes of Steyn CJ and Rumpff JA and Trollip AJA must be seen as militating against the political fabric of the time. The judgment in the case of Minister of Law and Order and Others v Hurley and Another⁶⁸ also shows that there were some members of the bench who realised that the integrity of their work superseded mere political loyalty.

In this case, the Appellate Division unequivocally and unanimously ruled against the appellants who happened to be functionaries of the then government. It found that the court was not precluded from considering a matter of an arrest in terms of Sections 29(1) and (6) of the Internal Security Act 74 of 1982, that even subjectively worded, discretionary powers were not beyond the purview of the courts, the very thought processes of the

⁶⁷ Sedumedi J.S; The Acceptance of the International Human Rights Norms in the South African Legal System, 2000. PHD Thesis University of the North West (unpublished).

⁶⁸ 1986(3) SA 568 (A).

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detaining authorities were subject to review.⁶⁹ This judgment therefore endorsed the minority judgment of Trollip AJA(as he then was) in the Schernbrucker v Klindt NO⁷⁰ case.

Section 29(1) and (6) provided respectively that a police officer of a rank of Lieutenant General and above could arrest and detain a person if such officer had reason to believe that such person was a threat to internal security. It was a further provision of the Act that if the arrest had been effected as such, the courts were precluded from entertaining matters challenging such arrest.⁷¹

The Appellate Division, per Rabie J, by analogy cited the ratio decidendi formulated by Trollip, AJA, in Schernbrucker v Klindt NO 1965 (4) SA 606 (A) that:

Section 17 of Act 37 of 1963 does not impair the court's jurisdiction in any case affecting a detainee except to the extent mentioned in ss(3); that is, it cannot order 'the release from custody of any person so detained; otherwise it retains full jurisdiction; thus it can order his release if he has been unlawfully arrested or is being unlawfully detained, and it can restrain any unlawful conduct which is being committed upon him during his detention.....The court still retains its jurisdiction to determine whether or not a

⁶⁹ 1986 (3) SA 568 (A) op cit at pg 575.

⁷⁰ See 1965 (4) SA 606 (A), pp 613A-D above.

⁷¹ Internal Security Act 74 of 1982 at Sections 29(1) and (6).

detainee has been lawfully arrested or is being lawfully detained under s 17(1).⁷²

The two cases immediately cited above, Schermbrucker and Hurley, demonstrate a typical scenario in which judges made law. In the first case, the minority judgment found that the court had the jurisdiction to entertain the matter. Even though the minority judgment did not have any effect on the outcome of the matter, it demonstrates that judges too made the law. The minority judgment became conventional wisdom in the later decisions.⁷³

In the Hurley case, that same minority judgment was endorsed by the majority and the Court held that it had jurisdiction to entertain the matter, thereby finding against the ouster clauses. It is therefore, respectfully submitted that the honourable justices did not actually find the law but made it as it is clear that they made a ruling that was not literally and expressly contemplated by the legislature.

However in the appeal cases of Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill,⁷⁴ the Appellate Division succumbed to the idea of merely applying the law as it was. This is because even though it became manifest to the Court that the regulations were violative of the audi alteram partem rule, the Court could not find the regulations unreasonable or ultra vires. However the dissenting minority judgment of Hoexter J which I refer to below with approval, goes a long way in showing that indeed judges did legislate even during the dark days of apartheid.

⁷² Rabie CJ (as he then was) in Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568 (A) at p585.

⁷³ See for instance the decision of Minister of Law and Order and Others v Hurley and Another 1986(3) SA 568 (A) at p585.

⁷⁴ 1987 (3) SA 859 (A).

All three of these cases were concerned with the detention of persons in pursuance of regulations promulgated by the State President in terms of the Public Safety Act 3 of 1953. At issue in these cases was the validity of regulations 3(1) and rule 5(1) to the Public Safety Act which respectively provided as follows:

3(1) A member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or that person himself or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain or cause to be detained, any such person in custody or in prison.⁷⁵

5(1) No person detained under the regulations shall during his detention be visited by any person, except with the permission of the person in command of the person in question, acting with the concurrence of the Commissioner of the South African Police or any person acting on his authority: Provided that if a legal representative desires to visit such detainee, the permission of the Minister of Law and Order or the Commissioner of the South African Police shall be obtained for such a visit.⁷⁶

⁷⁵ Regulation 3(1) to the Public Safety Act 3 of 1953.

⁷⁶ Rule 5(1) of Regulation 3 to the Public Safety Act 3 of 1953 published in Government Notice 2483 of 26 October 1985.

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In the latter appeals, the court ruled in the majority and dismissed both the Omar and the Fani appeals and upheld the State President's appeal.⁷⁷ Hoexter JA (as he then was) in his minority judgment quoted the oft-cited obiter dictum of Van den Heever, JA, in R v Pretoria Timber Co (PTY) Ltd and Another.⁷⁸

Where Parliament has conferred vast power of legislation upon the Executive, the Courts should not in my opinion be astute to divest themselves of their judicial powers and duties, namely to serve as buttresses between the Executive and the subjects. A point may arise where a regulation made pursuant to such powers is so unreasonable that the Courts will say Parliament could, although it used the widest language, never have contemplated that such a measure be countenanced.⁷⁹

It is a truism that during the apartheid regime, the majority of judicial officers in both the Supreme Courts and the Magistrate's Courts were predominantly whites and males. To compound this problem even further, the majority of such judicial officers were conservative Afrikaners with strong affinity and

⁷⁷ Per Rabie ACJ (as he then was) in Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987 (3) SA 859 (A) at p904.

⁷⁷ Regulation 3(1) to the Public Safety Act 3 of 1953.

⁷⁸ Hoexter JA(as he then was) in Omar above at p909 and the dictum of Van den Heever JA (as he then was) in R v Pretoria Timber Co (PTY) Ltd and Another 1950(3) SA 163 (A) at 181F-G.

⁷⁹ 1950(3) SA 163 (A) at 181F-G.

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sympathy, if not unwavering support, for the National Party and its apartheid ideology.⁸⁰

These white judicial officers would invariably apply laws which were the products of an exclusively white parliament in which other groups of the society such as Blacks, Coloureds and Indians were not represented. Inevitably this engendered a sense of hostility among the latter groups towards the then judiciary. It is hardly surprising that these groups perceived the entire judicial system as being illegitimate and oppressive.⁸¹

This view was also succinctly captured by the iconic former President of the Republic of South Africa, Nelson Mandela in the Old Synagogue, Pretoria in 1962 when he, whilst charged in a magistrate court, expressed grave misgivings about the propriety of the court which was to try him in the following famous words:

I want to apply for your worship's recusal from this case. I challenge the right of this court to hear my case on two grounds. Firstly, I challenge it because I fear that I will not be given a fair and proper trial. Secondly, I consider myself neither legally nor morally bound to obey laws made by a parliament in which I have no representation. In a political trial such as this one, which involves a clash of the aspirations of the African people and those of whites, the

⁸⁰ Bosielo op cit at p 5.

⁸¹ Bosielo ibid.

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country's courts as presently constituted, cannot be impartial and fair. In such cases, whites are interested parties.

To have a white judicial officer presiding, however high his esteem and however strong his sense of fairness and justice, is to make whites judges in their own case. Why is it that in this court room I am faced with a White magistrate, confronted by a White prosecutor and escorted into the dock by a White orderly? Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin? I detest violently the set-up that surrounds me here.

It makes me feel that I am a Black man in a White man's court. It is improper and against the elementary principles of justice to entrust whites with cases involving the denial by them of the basic human rights to the African people. What sort of justice is this that enables the aggrieved to sit in judgment over those against whom they have laid a charge? A judiciary controlled entirely by whites and enforcing laws enacted by a white parliament in which Africans have no representation, laws which in most cases are passed in the face of unanimous opposition from Africans.⁸²

⁸² Mandela R.N; "The Struggle is My Life", London; IDAF 1986 pp.134-138 and also Little et al; Mandela, Long Walk to Freedom. Great Britain; Abacus Publishers, 1994.

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In response to the above application for recusal by Mr Mandela the magistrate, epitomising the mind set of the white judiciary of the time responded as follows:

I am wondering whether I should not interfere with you at this stage, Mr Mandela. Aren't we going beyond the scope of the proceedings? After all is said and done, there is only one court today and that is the White man's court. There is no other court. What purpose does it serve you to make an application when there is only one court, as you know yourself? What court do you wish to be tried in?⁸³

The foregoing exposition goes to explain the nature and position of the then South African judicial system and shows that it was in no way independent especially from the executive organ of government but was only a functionary thereof. It was instrumental in enforcing racially discriminatory laws. Therefore its legitimacy was questionable to other racial groups to whom these laws were prejudicial.

Even though the 1983 Constitution⁸⁴ created the three separate houses of Parliament, created separate voters' roll for each social group participating therein and attempted to reform apartheid, it still left the judiciary in an invidious position of playing lip service to the ideals of justice and

⁸³ Op cit 134.

⁸⁴ The Constitution of South Africa Act 110 of 1983, (The Tricameral Constitution).

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independence of the judiciary. Most members of the judiciary found themselves saddled with a conflict of interest in that on the one hand they had to be true to their profession and deliver justice to the people and on the other hand, having a self-restraint and remaining loyal to the then government. The latter course has always triumphed over the former.⁸⁵

Moreover in the apartheid era, with the government's tendency of interfering with judicial independence, the judiciary did not have much latitude to exercise judicial discretion, save where it was in the interest of the government. Indeed the words of Lord Atkin in the case of Liversidge v Anderson⁸⁶ befit the mind-set of the judiciary of the time:

I view with apprehension the attitude of judges, who on a mere question of construction, when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive.⁸⁷

Even though the noble Law Lord made this observation during the Second World War in England, it could adequately describe the situation in the apartheid South Africa.

⁸⁵ Sedumedi op cit at 89.

⁸⁶ Liversidge v Anderson [1942] AC 206.

⁸⁷ Lord Atkin op cit at 244.

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2.2 SUMMARY

From the foregoing, it is evident that the judiciary in the past was in most instances like a "dog in a manger". It was in most instances acting as an agent of the National Party government, hence, most of judicial pronouncements were pro-government. The judiciary had a very negligible role to play, if any at all, towards acting as a bulwark of individual freedom and an instrument of mutual checks and balances on the other arms of government.

All this is attributable to the system of apartheid in which parliament was sovereign. At the same time it is instructive that some bold judgments such as these in *Schermbrucker*⁸⁸ and *Hurley*⁸⁹ altered the course of this country's legal history. Despite the adversities of the system of the parliamentary sovereignty, the judiciary was nonetheless involved in the law-making process.

In the chapter that follows, the role of the judiciary in the contemporary era is discussed. Most importantly the chapter explores the role of the judiciary in laying down new norms of behaviour and, in the process, making law. It will also become clear that the role of the judiciary is better defined in the

⁸⁸ *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A), pp 613A-D.

⁸⁹ *Minister of Law and Order and Others v Hurley and Another* 1986(3) SA 568 (A).

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democratic dispensation than it was in the previous regime, courtesy of the
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CHAPTER THREE: THE IMPACT OF THE INVOLVEMENT OF THE JUDICIARY IN THE LAW-MAKING PROCESS ON THE DEMOCRATIC PRINCIPLES: THE POST APARTHEID ERA

3.0 INTRODUCTION

This chapter focuses on the fundamental changes that came with the advent of a democratic government in 1994. The imperatives of the Interim Constitution⁹⁰ and the final Constitution⁹¹ are discussed with specific reference to the role of the judiciary. Furthermore, the role of the judiciary is discussed in relation to the democratic principles of, inter alia, supremacy of the constitution, separation of powers and the independence of the judiciary.

This chapter also focuses on the shift in the constitutional paradigm under the new system of constitutional supremacy and a new role of the judiciary is articulated.

But in this chapter it will become clear that the imperatives of the present democratic dispensation and the socio-political milieu warrant a new role for the judiciary. This is because the constitutional democracy era, as it is also known, is based on the dictates of constitutionalism.⁹²

⁹⁰ Constitution of the Republic of South Africa, Act 200 of 1993.

⁹¹ The Constitution of the Republic of South Africa of 1996.

⁹² Hoexter C: The New Constitutional And Administrative Law, Lansdowne: Juta 2002 at 16-23.
See also Carpenter G: Introduction to South African Law, Pretoria, Butterworth 1987 at p9.

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Constitutionalism is a process rather than a principle and entails, inter alia, the idea that governance is based on the democratic principles enunciated in the constitution.⁹³ The powers of all the three arms of government are delineated by the terms of the Constitution and are limited and arise from it. It is a method of asserting in the present certain fundamental rules or principles by which a democratic polity itself elects to regulate its present and guide its future.⁹⁴

It is sometimes referred to as government by law or limited government. Today, unlike in the past, the Constitution is the Grundnorm upon which the judicial process, administrative process, as well as the executive process, are anchored.⁹⁵

3.1 THE SUPREMACY OF THE CONSTITUTION

The adoption of the interim Constitution which came into effect in 1994 signalled the demise of apartheid in South Africa.⁹⁶ The document was proclaimed as follows:

A historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and

⁹³ McIlwain C: Constitutionalism and the Changing World 1939 at 290.

⁹⁴ Bailyn, 1967:187-4. See also, Carpenter G: Introduction to South African Law, Pretoria, Butterworth 1987 at p 9.

⁹⁵ See Speaker of the National Assembly v De Lille and Another and 1999 SA 863.

⁹⁶ Constitution of the Republic of South Africa, Act 200 of 1993.

injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.⁹⁷

The Interim Constitution brought about three fundamental changes that signalled a turning point in the South African constitutional order:

First and foremost, the political franchise and other political and civil rights were accorded to all citizens without racial qualification. Consequently, this marked the demise of the racially-inclined constitutional order of the apartheid era that was characterised by entrenched racial segregation.

The doctrine of parliamentary sovereignty was replaced by that of constitutional supremacy under Section 4 as follows,⁹⁸

- (1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
- (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

⁹⁷ Post-amble to Act 200 of 1993 above. See also Murenik E; "A Bridge to where?: Introducing the Interim Bill of Rights", (1994) 10 SAJHR 31.

⁹⁸ Interim Constitution op cit, Section 4 (1) and (2).

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The Bill of Rights was entrenched deliberately to enshrine human rights. This had the salutary effect of broadening the jurisdiction of the courts in the constitutional milieu in that they were now empowered to, unlike in the past, declare law and conduct inconsistent with the Bill of Rights and the Constitution invalid.⁹⁹ This was of course achievable by using the Bill of Rights and the Constitution itself as the yardstick against which to determine if such law or conduct passed constitutional muster.¹⁰⁰

The strong central government of the past was replaced by a system of government with federal elements. Significant powers were devolved to the provinces and local government. This manner of decentralisation of power from one organ of government to other organs was founded on the doctrine of separation of powers and its concomitant system of mutual checks and balances.¹⁰¹

After the 1994 elections, a new Parliament and Government of National Unity were established and began to function in accordance with the Interim Constitution, hence, it was termed the Transitional Constitution. Despite its transitional status, the Interim Constitution was nevertheless binding, the supreme law and fully justiciable.¹⁰² Because the Bill of Rights in the Interim Constitution was for the most part similar to that in the 1996 Constitution,

⁹⁹ Final Constitution op cit Section 172 (1)(a).

¹⁰⁰ S v Makwanyane 1995 (3) SA 391 (CC) at 398.

¹⁰¹ Final Constitution op cit at Chapters 4,5,6,7 and 8; See also Sedumedi op cit at 12.

¹⁰² Sedumedi op cit at 16-18.

most of the judicial decisions on human rights litigation handed down under the Interim Constitution remain binding.

In the case of Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others,¹⁰³ the Court opined that the Interim Constitution was a legal watershed because it shifted constitutionalism and with it, all aspects of public law from the realm of common law to the prescripts of a written constitution which is the supreme law.¹⁰⁴

One of the first of the line of cases which upheld the principle of constitutional supremacy and decided under the Interim Constitution was that of the Fedsure Life Assurance Ltd. V Greater Johannesburg Transitional Metropolitan Council.¹⁰⁵ In this matter the Constitutional Court had to decide on the lawfulness of the substantial increase in the property rates imposed by the Johannesburg Transitional Metropolitan Council.

Even though the Court held that the exercise of legislative powers by an elected local government or council did not constitute administrative action per se, it however emphasised that local government was not beyond constitutional control. Local government had to act within the powers

¹⁰³ 2000 (2) SA 674 (CC).

¹⁰⁴ Chaskalson P, op cit at pg 721.

¹⁰⁵ 1999 (1) SA 374 (CC).

conferred on it. Its conduct must be authorised by the Constitution and the law in accordance with the 'four corners' principle.¹⁰⁶

The Interim Constitution represents a momentous mile-stone towards a democratic South Africa. It introduced a new system of constitutional democracy under which the Constitution was to become the highest law in the land, the Grundnom before which everyone, regardless of race and political affiliation, are equal and subject to as demonstrated by the above case. The Preamble to that Constitution clearly summarises the new dispensation as follows:

Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.....¹⁰⁷

These aspirations are now entrenched in the "final" Constitution of South Africa which superseded the Interim Constitution.¹⁰⁸ The Preamble to this Constitution unequivocally lays down the objectives and aims thereof as follows:

¹⁰⁶ Per Chaskalson ibid p 393.

¹⁰⁷ Preamble to Act 200 of 1993 above.

¹⁰⁸ The Constitution of the Republic of South Africa of 1996.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.¹⁰⁹

Chapter one of this Constitution outlines the founding provisions which state, inter alia, that 'The Republic of South Africa is one sovereign democratic state founded on the values of human dignity, equality and a system of democratic government to ensure accountability, responsiveness and openness.'¹¹⁰

Some of the practical implications of the values articulated in the Constitution became manifest in the cases of S v Makwenyane¹¹¹ and that of Carmichele v Minister of Safety and Security and Another.¹¹² In both cases, the courts' approach was that these values call for the adherence to the aspirations enshrined in the Constitution despite opposing popular views. The learned Deputy Judge President Mahomed opined as follows with regard to these values:



All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises

¹⁰⁹ Preamble to the Constitution of 1996 above.

¹¹⁰ See supra section 1.

¹¹¹ 1995 (3) SA 391 (CC).

¹¹² 2001 (1) SA 489 (SCA).

upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future.

In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalised and legitimised racism.....¹¹³

Section 2 of the Final Constitution subsequently reiterates the supremacy of the constitution and goes further to prescribe sanction on law or conduct inconsistent with it as follows;

¹¹³ Mahomed DP: In S v Makwanyane 1995 (3) SA 391 (CC) pg 487.

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This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.¹¹⁴

What the doctrine of supremacy of the Constitution means then is that the Constitution binds everyone including all the organs of government namely, the executive, legislature and the judiciary.¹¹⁵ According to Philip Blair,¹¹⁶ constitutional supremacy means that the Constitution provides the yardstick against which to measure the validity of the products of the legislative process and the actions of the executive branch of government.¹¹⁷

Secondly, the concept emphasises the fundamental importance of constitutionalism with all its elements such as legality and adherence to the rule of law.¹¹⁸

Under the South African jurisprudence, Blair's definition of this concept became apparent in the case of Speaker of the National Assembly v De Lille and Another.¹¹⁹ De Lille, a member of the National Assembly was suspended for making a speech in the Assembly which was objectionable to the members of the African National Congress. In this case, the issue was whether the suspension of a member of the Assembly by the Speaker of the

¹¹⁴ Section 2; Cf Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA) para 14.

¹¹⁵ Section 8 of the Constitution of 1996.

¹¹⁶ Blair P: German Federalism Today; London: Leicester University Press, 1991.

¹¹⁷ Cf. with De Lille's case 1999 (4) SA 863 (SCA).

¹¹⁸ Blair op cit at 23.

¹¹⁹ Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA).

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Assembly for making a speech which did not obstruct or disrupt proceedings in the Assembly was justified under the Constitution and the rules of the National Assembly.

Section 58(1) of the final Constitution expressly guarantees freedom of speech in the National Assembly by providing that Cabinet Ministers and members of the National Assembly have the freedom of speech in the Assembly and in its committees, subject to its rules and orders and that they are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they may say during parliamentary sessions.¹²⁰

After a review of the authorities, the Supreme Court of Appeal came to a decision that since no national legislation or the rules or orders of Parliament provided for such a suspension, the suspension had no constitutional authority and was therefore void.

The court asserted the supremacy of the Constitution as follows:

This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official,

¹²⁰ See Section 58(1) of the final Constitution.



however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.¹²¹

This ruling then corroborates Blair's observation that the principle of constitutional supremacy means that the constitution is the ultimate source of all lawful authority and provides the yardstick against which to measure the validity of the products of the legislative process and the actions of the executive branch of government.¹²²

The judiciary is therefore saddled with the task of adjudicating whether a statutory provision or administrative action accords with the Constitution. In effect the judiciary is the ultimate authority that has authority to say what the law is, in line with the famous words of Chief Justice Marshall in Marbury v

¹²¹ Mahomed DP; In Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA) 868 par 14. See also Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289) at paras [61] - [62]. Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC) (1996 (4) BCLR 518) at para 22.

¹²² Blair, op cit at 6.

Madison¹²³. This then means that whether or not an impugned act or legislation passes Constitutional muster depends almost entirely on the judiciary's understanding of the Constitution itself and its sense of justice.

Therefore one will almost certainly be correct to submit that in the post 1994 era, the latitude of the judiciary in the law-making process goes as far as the judiciary's ability to justify the impugned conduct or law under the Constitution. In the case of S v Schietekat,¹²⁴ the Constitutional Court, per Kriegler, J, quashed the lower court's finding that the legislature's promulgation of Section 60 of the Criminal Procedure Act¹²⁵ was tantamount to the usurpation of duties by the latter.

The learned judge also held that the said section 60 was not to be read in isolation. Because without regard to the Constitution, it could be understood as a mandatory injunction to the judicial officer to conclude that something is or is not in the interest of justice, irrespective of the officer's own conclusion. As a result this unanimous judgment upheld the appeal in this case.¹²⁶ This case is discussed more fully in relation to the separation of powers principle later in this chapter.

¹²³ 5 US (1 Cranch), 137 (1803).

¹²⁴ S v Schietekat 1999 (4) SA 623 (CC).

¹²⁵ Criminal Procedure Act 51 of 1977 at section 60.

¹²⁶ Kriegler J in S v Schietekat 1999 (4) SA 623 (CC) at 654.

The above scenario shows that when judges interpret the law they will differ according to their understanding of the law involved and the surrounding socio-political milieu. The possible danger that immediately becomes eminent is that the provisions of the Constitution may become over-stretched in order to justify certain undesirable acts passing the constitutional muster and vice versa.

This is made possible by the fact that the constitutionality test is dependent on judicial interpretation which is a product of the particular inarticulate, major premise of a particular judicial officer. This situation unavoidably leads to a difference of opinion and subsequently different judicial findings on the application of the constitutionality test.¹²⁷

In the De Lille's case¹²⁸, the fact that there existed no constitutional provision to the effect that a member of parliament could be suspended under the circumstances of that case, meant that the court had no hesitation in coming to the conclusion that the suspension militated against the members' right to freedom of speech and expression in the National Assembly as provided for in the Constitution.

The member in casu benefited from the Constitutional panoply while the action by the Speaker of the National Assembly did not pass Constitutional

¹²⁷ Griffiths J; The Politics of the Judiciary, London: Fontana Paperbacks, 1977.

¹²⁸ 1999 (4) SA 863 (SCA).

muster. Most importantly this case demonstrated that the Honourable Member had to be given the benefit of doubt since her right to freedom of expression was enshrined in the Bill of Rights as opposed to the Speaker's action which was not traceable to the Constitution.

The latter section 58, read with section 74, explicitly points out the inviolability of the Constitution, so that the Constitution cannot be tempered with willy-nilly. Section 74 lays down stringent procedures when amending the Constitution, particularly subsection 1 and 2 of the latter section. This section requires the National Assembly to amend the sections on the affirmative vote of a qualified majority as follows:

- 74 (1) Section 1 and this subsection may be amended by a Bill passed by-
- (a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.
- (2) Chapter 2 may be amended by a Bill passed by-
- (a) the National Assembly, with a supporting vote of at least two thirds of its members; and
 - (b) the National Council of Provinces, with a supporting vote of at least six provinces.¹²⁹

¹²⁹ Section 74 of the final Constitution.

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Therefore, this clearly shows that the final Constitution as opposed to its apartheid era predecessors is a rigid one. This marks the fundamental difference between these constitutions since not only a simple majority vote suffices to amend the final constitution but a qualified one.

Under the South African Constitution, section 8 provides that the Bill of Rights, binds all law, the legislature, the executive, the judiciary and all organs of the state. In the relatively recent case of the Pharmaceutical Manufacturers Association of South Africa: in re: Ex parte President of the Republic of South Africa,¹³⁰ it became clear that even the highest authority must adhere to the Constitution.¹³¹

In this case the President of The Republic of South Africa was ill-advised into prematurely promulgating a proclamation that purported to bring into operation an Act to regulate and control medicines and drugs for human and animal consumption. Realising that the Act was unworkable, the President, the Minister of Health and others sought the assistance of the Pretoria High Court and the Supreme Court of Appeal respectively to set aside the proclamation. The matter subsequently ended in the Constitutional Court which confirmed the decision of the Pretoria High Court.

¹³⁰ Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC).

¹³¹ Op cit p704.

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In the more recent case of Kaunda and Others v The President of the Republic of South Africa,¹³² even though the Constitutional Court did not find in favour of the applicants, the Court vehemently reiterated the supremacy of the Constitution and most importantly the precise reach of the Constitution.¹³³ The applicants in the matter were 69 South African citizens who were incarcerated in Zimbabwe at Chikurubi prison on a variety of charges.

The applicants initially approached the High Court and sought an order directing the government of South Africa to, inter alia, as a matter of extreme urgency, seek their release from Zimbabwe, to seek an assurance that they would not be extradited to Equatorial Guinea, where they were allegedly heading and where they were going to commit mercenary acts.

They also sought the court's declaration that the South African government was, as a matter of law, obliged to request their release from Zimbabwe. The legal issue was to what extent the South African government could go in as far as discharging its obligations and affording its citizens the protection of the Constitution in accordance with sections 3(2) and 7(2).¹³⁴

The Constitutional Court in this case had to determine the reach of the Constitution, whether these obligations had extra-territorial application. On

¹³² 2005 SA (4) 235 CC.

¹³³ Op cit 301.

¹³⁴ Act 108 of 1996, section 3 (2) and 7 (2).

the one hand the contention was whether South Africa had an obligation to extend diplomatic protection to its citizens having committed offences in a foreign jurisdiction.

It was the view of the majority that decisions as to whether, and if so, what protection was given, were an aspect of foreign policy which was essentially within the domain or prerogative of the executive. They also held that, that was so because these were matters of great sensitivity, calling for the executive's careful evaluation and expertise.

On the other hand the well-marshalled and articulate dissenting judgment of O'Regan J held that there was a duty in terms of Section 3(2) read with Section 7(2) of the Constitution, for the State to provide diplomatic protection to its nationals in order to prevent the violation of their fundamental human rights under International law.¹³⁵

According to O'Regan, because the duty of diplomatic protection could only be carried out by the government in its conduct in foreign relations, it had to be afforded a wide degree of latitude to determine how the duty ought to be discharged.¹³⁶ Even though the applicants could not make out a claim based on the State's obligation to provide them with diplomatic protection, that the South African government should seek assurances from the

¹³⁵ O'Regan J: 2004 SA (4) 235 CC at p301-302.

¹³⁶ O'Regan *ibid* pg 305

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Zimbabwean and Equatorial Guinean governments in respect of the death penalty, however, there was a clear obligation upon government to take some appropriate steps to provide diplomatic protection to the applicants under Section 3 of the Constitution.¹³⁷

The Honourable Justice also held further that it was appropriate to issue a declaration order holding that the government was under a duty to afford diplomatic protection to the applicants to protect them from egregious violations of international law.¹³⁸ The main contention here was that South Africans abroad still deserved the protection of the Bill of Rights afforded to them by their government because they did not cease to be South African citizens when in foreign countries.

The learned Justice observed:

There is nothing in our Constitution that suggests that, insofar as it relates to the powers afforded and obligations imposed by the Constitution upon the Executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed the contrary is the case. The Executive is bound by the four corners of the Constitution. It has no powers other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act...As a general principle,

¹³⁷ O'Regan ibid pg 315; See also Section 3 of Act 108 of 1996.

¹³⁸ O'Regan ibid at para 88.

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however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another State.¹³⁹

From the majority judgment it is manifest that the attitude of the bench was not to generously interpret the provisions of section 3 of the Constitution. This is because the majority judgment in this case failed to acknowledge and appreciate at the very least, the fact that government is indebted to the cause of making the rights in the Bill of Rights enjoyable by its citizens by virtue of the fact that human rights are universal.

Moreover it is my humble submission that the applicants in this case sought not to request government to perform an illegal act in international relations that could jeopardise its international relations but only requested what the government could do within the legal means available to it to come to their aid. It is respectfully submitted that the majority's view that the application was brought prematurely is somewhat suspect because in essence it required the applicants to wait until the last minute before they could request for diplomatic protection.

The principle of constitutional supremacy therefore requires the judiciary and other arms of government to conduct themselves in accordance with the letter and spirit of the constitution in carrying out their duties and

¹³⁹ O'Regan *supra* pg 301 para 228.

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obligations. With reference to the judiciary, it also means that the judiciary's role flows from the constitution.

Consequently, the judiciary is able to "legislate" under the constitutional dispensation as long as in so doing it does not exceed the express and implied provisions of the Constitution. As long as this proviso is taken heed of, it cannot be said that the judiciary's involvement in the law making process militates against the principle of constitutional supremacy.

3.2 SEPARATION OF POWERS

The doctrine of separation of powers is usually attributed to the French philosopher, Montesquieu, but in fact his work, *L'Esprit des Lois*, which appeared in 1748, was based largely on the ideas of the English philosopher, John Locke.¹⁴⁰ But Aristotle and Plato were the first to speculate about the idea of limited government. The concept of separation of powers may be traced as far back as Aristotle's *Politics*.¹⁴¹

Locke originally classified the functions of government as legislation, executive action, including the enforcement of the law by means of criminal sanctions and the conduct of foreign relations.¹⁴² Montesquieu formulated

¹⁴⁰ Locke J; Second Treatise of Civil Government (1690) ch 12.

¹⁴¹ Carpenter G; Introduction to South African Constitutional Law, Butterworth, Pretoria 1987.

¹⁴² Locke op cit at 18.

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the principle into the form we know it today by duly separating the functions into three or entrusting the functions to three branches of government..

This doctrine has been adopted and incorporated into national Constitutions by many countries that follow the constitutional supremacy model. This has resulted in the doctrine developing to become one of the salient and defining features of the constitutional supremacy model of governance. Based on this doctrine and its rationale, Madison observed that:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself.¹⁴³

The above quote shows that the fundamental reason behind Moutesquieu's maxim is that whenever legislative, executive or judicial powers are concentrated in the same hands, the lives and liberties of the subjects would be exposed to arbitrary control, the judge would then be the legislator.¹⁴⁴ This doctrine requires that governmental power should be decentralised and divided among the executive, legislature and judiciary.

¹⁴³ Madison J & Jay J: The Federalist Papers (Carl van Doren edition. (1945) The Heritage Press, New York-NO 47.322.

¹⁴⁴ Madison J & Jay J Ibid NO 47-324

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Montesquieu is pleaded for an absolute separation between these three branches of government. The *raison d'être* of this principle is that of abuse of power usually associated with absolute power.

For as Lord Acton observed in his famous words that; "absolute power corrupts absolutely, it corrupts even the best of men".¹⁴⁵ Separation of powers was therefore aimed at preventing an over-concentration of power in one person or branch to the detriment of others.¹⁴⁶ However it has been suggested that Montesquieu knew perfectly well that:

There is not, and never has been, a strict separation of powers in the English constitution in the sense that the legislative, executive and judicial powers are assigned respectively to different organs.¹⁴⁷

This view was also shared by an American scholar Mathews who observed that the phrase "separation of powers" is not a particularly accurate description of the doctrine as it functions in the American Constitution. He observed that it could be more precisely defined as a "government of separated institutions sharing power".¹⁴⁸

¹⁴⁵ Michel Tropers: 'The Development of the Notion of Separation of Powers'. Winter 1992- Israel Law Review at 58.

¹⁴⁶ Devenish GE: A Commentary on the South African Constitution. Butterworths, Durban 1998.

¹⁴⁷ Hood O Phillips: Constitutional and Administrative Law 6 ed (1978) at 31.

¹⁴⁸ Mathews P, The Darker Reaches of Government (1978). The phrase originally comes from Neutradt Presidential Power: The Politics of Leadership (1980) 33-37.

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The principle of separation of powers is articulated in the final Constitution¹⁴⁹ by delimiting the functions of the executive, legislature and the judiciary respectively. As pointed out earlier, section 43 vests the legislative authority of the Republic in the National Parliament, Provincial legislature and Municipal Councils respectively.¹⁵⁰ On the other hand, the judicial authority is vested in the courts of law.¹⁵¹ The executive authority of the Republic is vested in the President and the Members of the Cabinet, Premiers of Provinces and Members of the Executive Councils respectively.¹⁵²

In the first Certification judgment in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, the Constitutional Court held that the provisions of the Constitution were structured in a way that made provision for a separation of powers.¹⁵³ Similarly in the case of Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others,¹⁵⁴ the Court enforced the principle.

¹⁴⁹ South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC).

¹⁵⁰ Section 43 of Act 108 of 1996.

¹⁵¹ Section 165 (1) supra.

¹⁵² Section 85(1) and (2) and Section 125(1) and (2).

¹⁵³ 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253) at paras [106] - [113]. The issue was whether the Constitution met the requirements of Constitutional Principle VI in Schedule 4 of the Interim Constitution, which required that there be 'a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

¹⁵⁴ 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289).

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It set aside a Proclamation of the President on the grounds that the provision of the Local Government Transition Act,¹⁵⁵ under which the President had purported to act in promulgating the proclamation, was inconsistent with the separation of powers doctrine required by the Constitution and accordingly invalid.

The Court has also commented on the separation of powers in other decisions¹⁵⁶ in the following words: "There can be no doubt that the Constitution provides for such a separation and that laws inconsistent with what the Constitution requires in that regard are invalid as there is overwhelming authority to that effect."¹⁵⁷

This being the case, prima facie, it appears as if the Constitution envisages absolute separation between these organs of government, but that is not the case. In De Lange v Smuts NO,¹⁵⁸ Ackermann, J., had this to say with regard to the development of the principle of separation of powers in South Africa:

I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers,

¹⁵⁵ Local Government Transition Act 209 of 1993.

¹⁵⁶ 1998 (3) SA 785 (CC) (1998 (7) BCLR 779); Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) at para [45]; Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449) at para [105].

¹⁵⁷ Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) (1996 (10) BCLR 1253) at pg 763.

¹⁵⁸ 1998 (3) SA 785 (CC).

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one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.

This is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that, whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here - i.e. the power to commit an uncooperative witness to prison - is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.¹⁵⁹

The assertion that the functions of these arms of government overlap was confirmed by the Constitutional Court in the cases of South African Association of Personal Injury Lawyers v Heath and Others¹⁶⁰ and Minister of Health and Others v Treatment Action Campaign and Others.¹⁶¹

In the latter case, the Court made a finding that:

¹⁵⁹ Ackermann J, in De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at p 791.

¹⁶⁰ 2001 (1) SA 883 (CC) at p 899.

¹⁶¹ 2002 (5) SA 721 (CC).

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South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may and, if need be, must use their wide powers to make orders that affect policy as well as legislation.

A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the Executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the Executive should therefore not be formulated in ways that preclude the Executive from making such legitimate choices.¹⁶²

The above finding shows that while courts can use their wide powers to direct the Executive or the Legislature to act or refrain from acting in a certain manner, the courts are at the same time precluded from exercising that power arbitrarily. This reciprocal and overlapping relationship is in essence, what is referred to as checks and balances.

¹⁶² 2002 (5) SA 721 (CC) p760 para 113-114.

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This means that the principle of separation of powers is not necessarily compromised whenever a particular judge is required to perform non-judicial functions. But on the other hand it is conceivable that the performance of functions incompatible with the judicial office would not be permissible.¹⁶³

This is consistent with what the Constitutional Court said in President of the Republic of South Africa and Others v South African Rugby Football Union and Others,¹⁶⁴ where it stated that 'judicial officers may, from time to time, carry out administrative tasks' but noted and acknowledged that 'there may be circumstances in which the performance of administrative functions by judicial officers may infringe the doctrine of separation of powers'.¹⁶⁵

The above reasoning was subsequently followed in the case of South African Association of Personal Injury Lawyers v Heath and Others.¹⁶⁶

In March 1997 the President, acting under the provisions of the Special Investigating Units and Special Tribunals Act 74 of 1996 and Proclamation R24 of 1997, established a Special Investigating Unit (SIU), which was the second respondent in this appeal.¹⁶⁷ The head of the SIU was a Judge of

¹⁶³ 2001 (1) SA 883 (CC) p899 para 27.

¹⁶⁴ President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059).

¹⁶⁵ Op cit n 141.

¹⁶⁶ 2001 (1) SA 883 (CC)

¹⁶⁷ Special Investigating Units and Special Tribunals Act 74 of 1996 and Proclamation R24 of 1997.

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the High Court and was appointed by the President in terms of section 3(1) of the Act and was the first respondent in this case.

The case was concerned not with the intrusion of the Executive into the judicial domain, but with the assignment to a member of the Judiciary by the Executive, with the concurrence of the Legislature, of functions close to the 'heartland' of executive power.¹⁶⁸ The appellant was a voluntary association whose members were attorneys and advocates whose practices involved personal injury litigation.

Three separate issues were raised by the appellant in the appeal but only the first issue is relevant for the purpose of this study. It was contended that:

(a) Section 3(1) of the Act and the appointment of the first respondent as head of the SIU were inconsistent with the Constitution because they undermined the independence of the Judiciary and the separation of powers that the Constitution required;

(b) The Proclamation referring the allegation concerning the conduct of attorneys dealing with Road Accident Fund claims was in any event beyond the scope of the Act and accordingly invalid; and

¹⁶⁸ Op.cit 899.

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(c) The powers of search vested in the second respondent by the Act were contrary to the right to privacy which everyone has under s 14 of the Constitution and were accordingly invalid.

The application was dismissed by Coetzee A, J.; in the High Court.¹⁶⁹ The learned judge held, inter alia, that the functions that the first respondent was required to perform under the Act as head of the SIU were not inconsistent with the independence of the Judiciary. He further held that under the Constitution there was an express provision dealing with the separation of powers and that it was not competent for a court to set aside a legislative provision on the basis that it violated what, at best for the appellant, was more than a 'tacit' principle of the Constitution.

The Constitutional Court upheld the appeal and held, per Chaskalson P, (as he then was) that,¹⁷⁰

The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive

¹⁶⁹ South African Association of Personal Injury Lawyers v Heath and Others 2000 (10) BCLR 1131 (T).

¹⁷⁰ Op cit, Chaskalson P. at pg 899.

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action measured against the Bill of Rights and other provisions of the Constitution, will be undermined.

The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.¹⁷¹

In the appeal case of *S v Schietekat*,¹⁷² this principle was in contention. In this case, the Constitutional Court was concerned with the constitutional validity of the provisions of the South African law relating to bail. In particular section 60(4) and (5)¹⁷³ which sought to prescribe to the courts what factors were to be taken into consideration in order to determine what was in the interests of justice when deciding whether or not to grant bail to an accused person in custody.

The lower court had held that by enacting section 60, Parliament prescribed to the courts what was or not in the interests of justice, thus usurping the judiciary's constitutionally entrenched power to decide that question. In the

¹⁷¹ See also Section 165(4) of the Constitution.

¹⁷² Kriegler J in *S v Schietekat* 1999 (4) SA 623 (CC) at 654.

¹⁷³ Criminal Procedure Act 51 of 1977, section 60 (4) and (5).

Constitution Court the learned Kriegler J; held that the legislature's patent intention was not only to provide in meticulous detail how bail proceedings were to be conducted, but to provide judicial officers with clearly demarcated guidelines to be observed in the exercise of their adjudicative functions in relation to bail.¹⁷⁴

Even though the learned judge did not acknowledge that the functions of the organs of government overlapped to some extent in this judgment, this case is a typical instance where the functions of the organs of government converged. It is clear from the facts of the case and the arguments that indeed to a certain extent, the legislature, by so providing guidelines within which the judiciary could operate was, in a way, involving itself in the judicial process.

In another case of Soobramoney v Minister of Health, Kwazulu-Natal,¹⁷⁵ the Constitutional Court faced another constitutional litigation but in relation to socio-economic rights and involving the principle of separation of powers. The appellant in this case was an unemployed diabetic who suffered from ischemic heart disease and cerebro-vascular disease which caused him to have a stroke.

¹⁷⁴ Kriegler J, op cit at p 660.

¹⁷⁵ 1998(1) SA 765 (CC).




His life could be prolonged by regular renal dialysis but the government hospital turned him away because it could only provide such treatment to a limited number of patients who were not yet in the final stages of the chronic renal failure, due to scarcity of resources. The appellant initially brought the matter to the Durban and Coast Local Division of the High Court where it was dismissed.¹⁷⁶

The appellant claimed that in terms of the 1996 Constitution, the hospital was obliged to make dialysis treatment available to him. He based his claim on Section 11 and 27(3) of the Constitution¹⁷⁷ which respectively provide that;

'Everyone has the right to life.' and
section 27(3) which stipulates that;

'No one may be refused emergency medical treatment.'

In a unanimous judgment the court dismissed the appeal and confirmed the court a quo's decision.¹⁷⁸ In his decision, Chaskalson P, followed the principle of separation of powers and decided that the executive branch was better placed to deal with issues involving budgetary matters and not the judiciary. The Court opined that;

¹⁷⁶ 1998(1) SA 430 (D).

¹⁷⁷ Sections 11 and 27(3) of the final Constitution.

¹⁷⁸ Chaskalson P in Soobramoney v Minister of Health, Kwazulu-Natal 1998(1) SA 765 (CC) at 22.

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The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.¹⁷⁹

From the above quote, it is clear that the judiciary treats these matters with caution in order not to upset the delicate constitutional balance. But one should not lose sight of the possibility that the judiciary may make similar findings not on the conviction of observing the principle of separation of powers but due to judicial self-restraint. In this case the judiciary sounded rather too executive-minded.¹⁸⁰ Instead of deciding the matter and giving due weight to the fact that the appellant was in a state of life and death, the Court found that the latter should have based his argument on the provisions of sections 27(1) and (2) and not only on section 27(3).¹⁸¹

Based on the evidence before the court, the court then found that the appellant's state was not an emergency and therefore did not fall under the matters envisaged by section 27(3). In some cases the judiciary can direct

⁷⁹ Supra Chaskelson P at 13.

⁸⁰ Lord Atkins: In Liversidge v Anderson [1942] AC 206 at 244.

⁸¹ Section 27 of the final Constitution.

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that government must, within its available resources, make the rights enjoyable to its citizens.¹⁸² This can be done without the judiciary necessarily usurping the functions of the executive but in the spirit of providing the mutual checks and balances on the latter organ of government.

This was indeed the cases in Government of the Republic of South Africa and Others v Grootboom and Others¹⁸³ and Minister of Health and Others v Treatment Action Campaign and Others.¹⁸⁴

In the former, Mrs Irene Grootboom and the other respondents lived in appalling conditions and decided to move out and illegally occupied private land earmarked for formal low-cost housing. They were evicted and left homeless. The root cause of their problems was the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.

They applied to the Cape of Good Hope Division for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.

¹⁸² See Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC).

¹⁸³ 2001 (1) SA 46 (CC).

¹⁸⁴ 2002 (5) SA 721 (CC).

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The key constitutional provisions at issue in this case were sections 26 and 28(1) (c). Section 26 provides:¹⁸⁵

'(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Section 28(1) (c) provides:

'(1) Every child has the right

.....

(c) to basic nutrition, shelter, basic health care services and social services.'

The appellants were ordered to provide the respondents who were children and their parents with shelter. The appellants who represented all spheres of government responsible for housing challenged the correctness of that order in the Constitutional Court.

¹⁸⁵ See final Constitution of South Africa, section 26 and 28.

The Court unanimously found that the government had not done enough in discharging its obligations under the Constitution. The learned Yacoob J held as follows:¹⁸⁶

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.

This principle was also followed in the case of Minister of Health and Others v Treatment Action Campaign and Others¹⁸⁷ in relation to section 27 of the Constitution. The case started as an application in the Pretoria High Court in August 2001. The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections. The principal actor among them was the Treatment Action Campaign (TAC).

¹⁸⁶ Yacoob J in Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) p 88.

¹⁸⁷ 2002 (5) SA 721 (CC).

The respondents were the national Minister of Health and the respective Members of the Executive Councils (MECs) responsible for health. The matter was decided in favour of the applicants and subsequently, the respondents appealed to the Constitutional Court.

The appeal was directed at reversing orders made in the High Court against the government, because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge. The Court found that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that government had acted unreasonably in:

(a) refusing to make an antiretroviral drug called Nevirapine¹⁸⁸ available in the public health sector where the attending doctor considered it medically indicated, and in

(b) not setting out a time frame for a national programme to prevent mother-to-child transmission of HIV.

Government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified Nevirapine as its drug of choice for this purpose. The

¹⁸⁸ Nevirapine is a fast-acting and potent antiretroviral drug used worldwide in the treatment of HIV/AIDS and registered in South Africa since 1998. In January 2001 it was approved by the World Health Organization for use against intrapartum mother-to-child transmission of HIV, ie transmission of the virus from mother to child at birth. It was also approved for such use in South Africa.

programme imposed restrictions on the availability of Nevirapine in the public health sector.

This is where the first of two main issues in the case arose. The respondents contended that these restrictions were unreasonable when measured against the Constitution of the Republic of South Africa, Act 108 of 1996,¹⁸⁹ which commands the State and all its organs to give effect to the rights guaranteed by the Bill of Rights. This duty is put thus by section 7(2) and section 8(1) of the Constitution respectively:

'7(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.

8(1) The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.'

At issue was the right given to everyone to have access to public health care services and the right of children to be afforded special protection. These rights are expressed in the following terms in the Bill of Rights:

'27(1) Everyone has the right to have access to-

- (a) health care services, including reproductive healthcare;
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

¹⁸⁹ Constitution of the Republic of South Africa Act 108 of 1996, sections 27 and 28.

28(1) Every child has the right -

(c) to basic nutrition, shelter, basic health care services
and social services.'

The second main issue also arose out of the provisions of sections 27 and 28 of the Constitution. It was argued whether government was constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.

The Court ordered the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV.¹⁹⁰

This finding is analogous to the one in the case of Grootboom¹⁹¹ and these cases were concerned with socio-economic rights. This is a revelation that our courts' decisions change on a case by case basis, largely due to the approach adopted in the interpretation of the statute in question; the generous approach, literalistic approach or formalistic approach.¹⁹²

¹⁹⁰ 2002 (5) SA 721 (CC) p.764 n 135.

¹⁹¹ 2001 (1) SA 46 (CC).

¹⁹² Kellaway E.A; Principles of Legal Interpretation, Statutes, Contracts and Wills, Durban, Butterworths 1995 p 13-17.

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Since it is indeed the judiciary that decides the cases before them, from these cases it is respectfully submitted that the interpretative process or approach they adopt in arriving at their decision itself amounts to law-making. It is trite law that when courts interpret the law, they also make the law in that process. This reasoning has long been accepted in our legal order and in foreign jurisdictions. The former President of the United States of America, Roosevelt precisely pointed out in his message to the Congress of the United States on the 8th December 1908, that:

The Chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of the law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.¹⁸³

While it may be enough to state, correctly so, that indeed judges also do legislate, the question that naturally follows is when do they legislate and

¹⁸³ President Theodore Roosevelt, Message to the Congress of the United States, 8th December 1908, 43rd Congressional Record, part 1, p.21.

how? It goes without saying that when judges interpret and apply the law, they are confronted with an avalanche of obstacles to overcome. The obvious obstacle is that the law is not fixed and stereotyped. It is dynamic and is not moulded into a code and is capable of being expanded and enlarged to meet the demands of the trade.¹⁹⁴

Furthermore, the law which they have to interpret and apply is sometimes equivocal and ambiguous. The difficulty of interpretation arises due to these ambiguities because then the object and intent of the law-maker becomes blurred, if not totally incomprehensible. Therefore, under these circumstances, the intention of the legislature is unknown to the judge who has to make a ruling and whose guidance the litigating parties are highly indebted to.

Sometimes the statute provides no answer to the judge. This is because in some cases the question was never envisaged by the legislature when the law was made or sometimes because the legislature never had any intention of covering that aspect of the impugned law. Benjamin Cardozo observed that statutes do not render the judge superfluous, nor his work perfunctory and mechanical. He also observed that;

We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be

⁹⁴ Lord Cockburn CJ: In Goodwin v. Roberts, 1944 L. R. 10 Exch. 346.

conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.¹⁹⁵

There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and discovery of a meaning which, however obscured and latent, had nonetheless a real and ascertainable pre-existence in the legislature's mind.¹⁹⁶

In some instances, the judges not only have to determine what the legislature intended on a particular point of law present to its mind but to guess what it would have intended on a point of law had it been present to its mind. In all these instances, the judges not only engage their academic skills but, a whole lot of factors known as the inarticulate major premise come into play. Justice Holmes observed as follows;

If we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what...courts are likely to do in fact. I am much of his mind. The prophecies of

¹⁹⁵ Cardozo B: The Nature of the Judicial Process. New Haven; Yale University Press, 1921 p 3.
¹⁹⁶ Cardozo op cit p 3.

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what the courts will do in fact, nothing more pretentious, are what I mean by the law.¹⁹⁷

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This is a stream of tendencies found in everyone which gives coherence and direction to thought and action. These factors include, inter alia, traditional beliefs, inherited instincts, acquired convictions and the judge's acquired experience over the years. Judicial decision making is therefore a product of a determination by means of the subjective sense of justice inherent in the judge. Geny authoritatively observed that;

My duty as a judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotions are with a time that is past. We shall never be able to flatter ourselves, in any system of judicial interpretation, that we have eliminated altogether the personal measure of the interpreter. In the moral sciences, there is no method or procedure which entirely supplants subjective reason.¹⁹⁸

This determination is guided by an effective weighing up of the interests of parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. It therefore follows that the differing sense of justice within judges and differing perceptions of what

¹⁹⁷ Holmes O. W; "The Common Law"; Harvard Law Journal: 1882-1920:172-3.

¹⁹⁸ Geny; "Methode d'Interpretation et Sources en droit prive positif," Vol. 11,p 180, sec 176, ed. 1919;transl. 9 Modern Legal Philosophy Series, p. 45.

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justice ought to be in different communities bring about disparities as to what justice is from one community to the other.

In the Pharmaceutical Manufacturers case,¹⁹⁹ it was held that in interpreting the law, courts have to develop the common law, in so far as it has any application, consistently with the Constitution and subject to constitutional control.²⁰⁰ The fact that the courts can develop the law is evident enough that indeed the judiciary is involved in the law-making process. Perhaps what is only lacking is an unequivocal express provision in the Constitution or a statutory provision which will delimit the extent to which the judiciary can legislate.

This construction was also consistently adopted in the case of Bato Star Fishing v The Minister of Environmental Affairs and Tourism²⁰¹ in which it was held that the extent to which the common law remains relevant to administrative law review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Constitution.

In conclusion, the involvement of the judiciary in the law-making process is permissible in so far as it is in conformity with a pragmatic approach to separation of powers. In other words an acknowledgement that no absolute

¹⁹⁹ Supra at 152.

²⁰⁰ 2000 (2) SA 674 (CC) at pg 696.

²⁰¹ Bato Star Fishing (PTY) LTD v The Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC).

separation of powers is attainable therefore allows for an encroachment that is permissible in law, one that does not preclude other organs from performing their legitimate constitutional obligations.²⁰²

3.3 INDEPENDENCE OF THE JUDICIARY

From the onset it is respectively conceded that the notion of independence of the judiciary flows from the principle of separation of powers. Therefore this is a continuation of the foregoing discussion at 3.2 above. Most of the issues relating to the topic under discussion have already been discussed including the relevant case law. Hence this discussion is only meant to supplement what has been stated above.

The emphasis is that the functions of these organs, to a certain extent, overlap, hence they operate as checks and balances on each other without necessarily usurping each other's functions.

The judiciary in South Africa has its present shape by virtue of a negotiated political settlement to which the ruling African National Congress (ANC) was a signatory.²⁰³ The final Constitution, which affirms the separation of powers and the independence of the judiciary,²⁰⁴ has been universally applauded

²⁰² TAC case 2002 (5) SA 721 (CC) p 760 para 113-114.

²⁰⁴ See final Constitution, Section 165

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as one of the world's finest constitutions, even ahead of some of the ones of the world's mature democracies.²⁰⁵

Section 165 of the final Constitution articulates the independence of the judiciary as follows:²⁰⁶

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and are subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the function of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

A proper analysis of this section shows that without doubt the section envisages an independent judicial system.²⁰⁷ It unequivocally vests judicial authority of the Republic in the courts and no other organ.²⁰⁸ The section subsequently bars any person, including organs of state from interfering

²⁰⁵ <http://www.abanel.org/govaffairs/judiciary/rhistory.html>

²⁰⁶ Constitution of South Africa Act 108 of 1996, Section 165.

²⁰⁷ Supra Act 108 of 1996 section 165(2).

²⁰⁸ Ibid section 165(1).

with the functioning of the courts, thereby further entrenching the idea of an independent judiciary.

The talking point of this section is subsection (4), which enjoins other organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.²⁰⁹ The controversy that this subsection raises is that whilst the other state organs are barred from interfering with the functions of the courts, they are on the other hand enjoined to assist the courts, through legislative and other measures to, inter alia, ensure the courts' independence.

The difficulty that emanates from the latter provision is, what will then constitute an interference with the court process and what will be permissible as the duty of organs of state under this subsection? This subsection therefore has a propensity to legitimise an interference with the judicial process by the organs of State.

It goes without saying that if organs of state are enjoined to assist the courts through legislative and other measures, there will inevitably be a likelihood that the same judiciary may not be able to exercise its independence and impartiality properly when faced with issues involving the said organs of state.

²⁰⁹ ibid section 165(4).

This is because by getting assistance from organs of State, the courts may feel that they are indebted or that they owe allegiance and patronage to such organs of State. This has a bearing on both institutional and decisional independence because the primary purpose of the independence of the judiciary is firstly to enable the judiciary to make impartial decisions and secondly, to keep the political branches in check.²¹⁰

If the judiciary as an institution receives assistance from the same political organs it is supposed to keep in check, it therefore becomes dependent on such organs and will consequently no longer be an independent institution. It is also my humble submission that this also compromises decisional independence because with the knowledge that they are supported by other arms of government in many ways, judges may find it difficult to exercise their much needed impartiality in cases involving the other organs of state thereby, defeating the purpose of judicial independence.

But at the same time, despite its independence, the judiciary has to be seen as an organ of state whose purpose is in synch or in harmony with the other state organs. By this it is meant that the judiciary is not totally divorced from the functional fabric of the state. As a consequence, the other state functionaries have to assist the judiciary in discharging its functions and carrying out its duties.

²¹⁰ <http://www.abanel.org/govaffairs/judiciary/mistory.html>.

An effective, functional and stable judiciary in South Africa, as compared to most developing countries, is a precious asset and is seen as one of the most successful aspects of the South African transition to democracy. Of greater concern now should be to protect it and tread carefully when there is a danger it could be disrupted.²¹¹

Even though judicial independence is seen as sacrosanct, the application of the *trias politica* principle today follows a more functionalist and pragmatic approach. In Berstein v Bester NO, the Constitutional Court, per Ackermann J, explained in relation to Section 22 of the Interim Constitution,²¹² which dealt with access to the courts, that its purpose was to protect the separation of powers, particularly the separation of the judiciary from other arms of the state in order to protect the individual.

Therefore, its purpose was fundamental to the upholding of the rule of law and of a State premised on the philosophy of constitutionalism by preventing legislatures from converting themselves into courts.²¹³ The late Chief Justice of South Africa, Mahomed also made a remarkable address on the independence of the judiciary and its legitimacy as follows;

Some credible body must be vested with the power to blow the whistle when the parameters of the constitutional covenant are transgressed. Without such power that covenant has no teeth. The body armed with that power cannot be the alleged transgressor itself. It cannot be the State agency accused of the transgression. In a credible democracy it can therefore only be the judiciary. It, and it

²¹¹ Bosielo *op cit* p 6.

²¹² Constitution of the Republic of South Africa, Act 200 of 1993 at section 22.

²¹³ Ackermann J, in Berstein v Bester NO (1996) BCLR 449, 1996 (2) SA 75 (CC).

alone must have the final power to decide whether the impugned enactment or decree of a powerful legislature, or the action of an equally powerful executive or administration, has transgressed the constitutional covenant.²¹⁴

The late Chief Justice's observation is correct as it demonstrates the legitimacy of the courts of law. Even though he was correct to point out that the courts derive this power from the mechanism of judicial review, it is still not enough to justify this enormous power of the courts. This is so because in a democracy, one would naturally think that since government is of the people by the people for the people, the judiciary will earn its legitimacy by popular approval.

This should naturally be analogous to the case with the executive and the legislature whose members are elected. This is known as the dilemma of counter-majoritarianism.²¹⁵ But since members of the judiciary are appointed and not elected, the democratic legitimacy of judges in setting aside legislation of a democratically elected legislature by judicial review process is very contentious.

²¹⁴ Mahomed CJ: Independence of the Judiciary, paper presented at the International Commission of Jurists in Cape Town on the 21st of July 1998.

²¹⁵ Davis, Chaskalson and De Waal; "Democracy and Constitutionalism: The Role of Constitutional Interpretation" in Chaskalson et al 6th edition 1994.

In the case of South African Association of Personal Injury Lawyers v Heath and Others,²¹⁶ Chaskalson, P. emphasised the independence of the judiciary as a consequence of the principle of separation of powers as follows:

Under our Constitution, the Judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the Bill of Rights. It is important that the Judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a Judge into the executive domain is permissible, the way would be open for Judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions which are not appropriate to the central mission of the Judiciary.

Were this to happen the public may well come to see the Judiciary as being functionally associated with the Executive and consequently unable to control the Executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the Judiciary, crucial for the proper discharge of functions assigned to the Judiciary by our Constitution.²¹⁷

²¹⁶ South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC).

²¹⁷ Chaskalson P, op cit 890.

The independence of the judicial system is better described by the dictum of Lord Atkin in Liversidge v Anderson,²¹⁸ during the war times as follows:

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.²¹⁹

The independence of the judiciary from external influence and pressure exerted by either the legislature or the executive is a cardinal feature of the doctrine of separation of powers. In the monumental judgment of the Constitutional Court in S v Makwanyane,²²⁰ the Court demonstrated its unwavering conviction for upholding the principle of judicial independence in carrying out its duties.

The court unequivocally declared in its judgment, that the death sentence was unconstitutional. This was against the public opinion in favour of the retention of the death penalty. The court stated that it would not allow itself to be diverted from its duty to act as an independent arbiter of the Constitution. It also declared that public opinion per se was no substitute for

²¹⁸ [1942] AC 206.

²¹⁹ Lord Atkin op cit at p 23. and see also Bowditch v Balchun (1950) 5 Ex 378.

²²⁰ S v Makwanyane 1996 (3) SA 391.

the duty vested in the courts to interpret the Constitution and uphold its provisions without fear or favour.²²¹ Chaskalson, P, opined:

The very reason for vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include social outcasts and marginalised people in our society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secured that our rights will be protected.²²²

The South African law which stipulates mandatory minimum sentences of imprisonment for a range of serious offences has brought a lot of controversy with regard to the independence of the judiciary. The Criminal Law Amendment Act²²³ prescribes, inter alia, that for mandatory minimum sentences ranging from 15-25 years imprisonment for offences such as murder, rape and robbery.²²⁴

This legislation therefore does not afford the judiciary the much needed discretion when it comes to sentencing, hence the criticism it received as it is perceived as the executive's effort to usurp the judiciary's functions.²²⁵

²²¹ Chaskalson P, *op cit* 409.

²²² Chaskalson P *op cit* par 88.

²²³ Criminal Law Amendment Act 105 of 1997.

²²⁴ Act 105 of 1997 Section 15.

²²⁵ <http://www.justice.gc.ca/en/ps/rs/rep/2005/r05-10/p6.html>

The Act also provides that where the judicial officers depart from it and give a sentence lesser than the minimum sentence prescribed, they must furnish reasons that show that there exist substantial and compelling reasons that warranted a lesser sentence.²²⁶ This provision clearly suggests that the independence of the judiciary is compromised but nonetheless, the judiciary is still able to circumvent this law.²²⁷

In the case of S v Malgas,²²⁸ the Supreme Court of Appeal decided that, if the prescribed sentence would result in an injustice, this would amount to a substantial and compelling circumstance, and the sentencing court would then impose an appropriate sentence. The deviation itself from the provisions of the Act therefore is proof enough that the judiciary is in this way involved in the legislative process.

The independence of the South African judiciary was once again tested in the much politicized Jacob Zuma trial. It had to be seen whether the Johannesburg High Court was going to fall prey to the popular public opinion calling for Zuma's acquittal.²²⁹ The so called Friends of Zuma Movement on the one hand were lobbying for the acquittal of their compatriot who was the accused in this case. Their lobbying was

²²⁶ Act 105 of 1997, Section 15 (3)(a).

²²⁷ Terreblanche S.S; Mandatory and Minimum Sentences; Considering Section 51 of the Criminal Law Amendment Act 105 of 1997. Acta Juridica (2003) 248-283.

²²⁸ S v Malgas 2001(1) SACR 469 (SCA).

²²⁹ S v Zuma 2006(not yet unreported).

unprecedented in that since the commencement of the trial they were ever present inside and outside court and their solicitude had been amazing.²³⁰

Among other things they demonstrated outside court and chanted pro-Zuma slogans and their unwavering support for their icon. On the other hand there were those who stood by the complainant in that case who was a female HIV/AIDS activist. AIDS activists and Women Movements alike put their weight behind the victim inspite of the intimidation they allegedly faced from the accused's supporters.

The former argued that those who were pro-Zuma were actually against the idea of women and gender equity. Amid this tag of war what was at stake was the independence of the judiciary. Whether the court was going to be intimidated by the masses outside the court house calling for the acquittal of the accused. But in this instance the court was able to make its finding based on the facts before it and acquitted the accused on the basis of the facts before it and specifically, the unreliability of the complainant.

3.4 SUMMARY

The system of constitutional supremacy elaborated above is the framework within which the South African judiciary is premised in this era of constitutional democracy. Whether or not the judiciary makes law can only

²³⁰ Sunday Times News Paper published of the 17th April 2005

be determined by and within the provisions of the Constitution as it is the Grundnorm.²² The judiciary is therefore able to exercise its full powers, including making law where necessary, by using the Constitution as the *raison d'être* of such powers. The yard stick thereof is the Constitution itself.

Now that the judiciary is independent, more and more judicial discretion has become a useful way by which the judiciary has arrived at their decisions. As opposed to the old regime where parliamentary sovereignty overshadowed the independence of the judiciary and therefore rendered the latter a useful tool in the hands of the executive, this is no longer the case today.

This therefore reiterates the submission that judicial discretion is one of the ways by which the judiciary makes laws. In the foregoing chapter it has been demonstrated that the functions of the three organs of government overlap therefore a permissible encroachment is not tantamount to usurpation of another's functions. This includes situations where the judiciary "makes" laws as demonstrated in this chapter.

The democratic dispensation in South Africa does not mean that there has been a total makeover of all the three State organs. This is so because the democratic government has inherited some of the legacies of the apartheid regime. This happened for various reasons because obviously things were

Speaker of the National Assembly v De Lille and Another 1999 (4) SA 863 (SCA) 870.

not going to change overnight. Some of the reasons are that the skilled personnel who served under the previous regime had to be retained for the purpose of continuity or else the state machinery was going to be paralysed.

This applied to the judiciary itself; hence a good portion of the judiciary that served under the previous regime was retained. This meant that some of the members of the judiciary who were proponents of the apartheid governance were also retained. However it must be mentioned that not all members of the judiciary who served under the previous regime were opposed to the ideals of the democratic régime.

Therefore after about twelve years of the reign of democracy in South Africa it is imperative that the judiciary must transform to meet the demands of a democratic society premised on the values of human dignity, freedom and equality. In the following chapter, the involvement of the judiciary in the law-making process is discussed in so far as it is relevant to the current transformation debate.

CHAPTER FOUR: JUDICIAL TRANSFORMATION AND THE NEW ROLE OF THE JUDICIARY

4.0 INTRODUCTION

This chapter aims at assessing and evaluating the role of the judiciary in relation to the current phase of judicial transformation and defining the new role of the judiciary. This includes issues concerning judicial legitimacy and the involvement of the judiciary in the legislative process. In this chapter, the current political debate and the issues incidental thereto, on the proposed efforts to transform the judiciary by the government are at the heart of the discussion.

4.1 JUDICIAL TRANSFORMATION AND ITS IMPLICATIONS FOR THE JUDICIARY

The South African judiciary today is faced with the mammoth task of transformation. In the new Constitutional order, judicial officers are challenged to realise that the judiciary is an integral part of society that made sacrifices to liberate this country from minority domination. They have to appreciate that they owe it to the society as a whole in the performance of their judicial functions.



Judicial transformation as a term has proven difficult to define. This is because it is a complex if not multi-dimensional process that connotes different things. Judicial transformation, inter alia, means that the judiciary should broadly reflect the gender and racial demographics of the South African society.²³²

Transformation also embraces the requirement that the judiciary should espouse and promote the values, norms and ethos enshrined as fundamental rights in the Bill of Rights and to assimilate the aspirations of a society premised on constitutional democracy. In order to earn its legitimacy, the judiciary is enjoined to discard the old judicial mentality of the apartheid era and to rid itself of racism and sexism. Lastly, the process envisages a paradigm shift in the collective judicial intellect, accessibility of the courts and the judicial process.²³³

The courts have a seminal role to play in the process of transformation occurring in South Africa, particularly in relation to the interpretation and application of the justiciable rights encapsulated in Chapter 2 of the Constitution.²³⁴

²³² See Section 174 (2) of the final Constitution.

²³³ Hlophe J, "The Role of Judges In A Transformed South Africa: Problems, Challenges and Prospects" 1995 South African Law Journal 35. See also Report of the Judicial Service Commission 2005, and also Omega Intelligence Consulting, www.omegainvest.co.za

²³⁴ See final Constitution, Chapter 2-The Bill of Rights.

The process creates the jurisprudential framework and philosophy for judicial independence and legitimacy as well as the potential for judicial activism, thereby allowing the judiciary to facilitate the socio-economic upliftment of disadvantaged communities. The courts must also contribute to making the law accessible to the community and ensuring that it is a tool for social justice, rather than one that in effect denies rights to disadvantaged and indigent persons.

Judicial officers are enjoined to discard the old and discredited norms, ethos and values which underpinned the racist and apartheid regime and adopt and assimilate the progressive and enlightened values and norms articulated by the constitution.²³⁵ By this, surely the judiciary is not only requested to transform structurally but most importantly, the judicial mind-set has to transform as well.

The learned late Chief Justice of Zimbabwe, the Honourable Justice Enoch Dumbutshena expressed himself eloquently as follows on the same issue:

It is up to judges to make the legal system legitimate. Judges too must prove their legitimacy. In order to be legitimate, judges should see through their own eyes the conditions of the ordinary people. When sitting on their high benches in the splendour of their robes, judges should look

²³⁵ Mpati L, "Transformation In The Judiciary- A Constitutional Imperative", paper presented at an Inauguration Lecture, University of the Free State 6 October 2004. See also at <http://wwwserver.law.wits.ac.za/sca/speeches/mpati.pdf>.

out through the window in order to see what is going on outside there, where their judgments have an effect.²³⁶

Besides the judicial legitimacy echoed in the above quote, judicial transformation also requires that if the judiciary is to inspire confidence among ordinary citizens, it has to become more racially representative. This means that when judicial appointments are contemplated the appointing authority must take heed of the need for the judiciary to be racially representative.

With regard to the issue of eligibility for appointment to judicial office, the final constitution brought about a lot of changes in that section 174 provides that;

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders

²³⁶ Dumbuntshena C J: at the Judges Symposium held at Benoni on the 16th July 2003.



of parties represented in the National Assembly, appoints the Chief Justice and Deputy Chief Justice.²³⁷

It remains a sad reality of the South African history that as at 27 April 1994, out of a total of 166 judges of the Supreme Court of South Africa (High Court), only three were black males, two white females and no black females while 160 were white males. Faced by this patent anomaly and in a bold and courageous effort to abide by its clear constitutional mandate to transform the judiciary,²³⁸ the Judicial Service Commission (JSC) undertook the daunting task of identifying and recommending for judicial appointment to the Bench suitable and competent black males and females to redress this imbalance.

In order to achieve this goal, the Judicial Service Commission has had to broaden its pool by looking for suitable candidates from both the advocate and attorneys professions as well as the academic world. Due to the restrictive pool from which the Judicial Service Commission could draw candidates from, it cast its net even much wider to include the magistracy.²³⁹

This is contrary to the old and established norms and criteria operative during the apartheid era when male, senior white advocates from the

²³⁷ See Section 174 (1) and (2) of the final Constitution.

²³⁸ Op cit 174 (3).

²³⁹ Omega Intelligence Consulting, www.omegainvest.co.za.

advocates' profession were the only candidates who constituted the exclusive pool from which potential judges were drawn. Of course this radical departure came about as a result of Section 174. It is hardly surprising that this bold and innovative initiative engendered fierce opposition and criticism from those opposed to transformation.²⁴⁰

It is now vivid that because of Section 174(1), our judiciary boasts a considerable number of judges both from the practitioners' profession and academic world. Furthermore, and as a result of the diligent efforts by the Judicial Service Commission and its unwavering commitment to giving effect to section 174 (2), the statistics have changed considerably.

As at May 2006, out of 198 judges in the High Court of South Africa, 96 are white males whilst 50 are black African males, with 8 coloured and 16 Indian male judges. Of the total of 28 female judges, 12 are white, 8 African, 3 Coloured and 5 Indians.²⁴¹ This improvement in the statistics of course was largely due to the the Judicial Service Commission's efforts to hasten the racial mix of the bench (transformation process).

The Commission is a body of designated persons, presided over by the Chief Justice. The Minister of Justice is also a member of the Commission. This is unlike in the past when the Minister of Justice simply made a

²⁴⁰ Report of the Judicial Service Commission 2001-2002.

²⁴¹ Report of the Judicial Service Commission 2005.

recommendation to the State President that a particular person be appointed as a judge without the vacancy having been advertised.

Today the procedure has changed because the Judicial Service Commission calls for nominations whenever a vacancy occurs. The candidates are then interviewed, whereafter the Commission makes recommendations to the President who must make the appointment on the advice of the Commission.²⁴²

In other comparable jurisdictions such as the United States of American, the criterion for appointment of judges is that, the President has the power to nominate judges of the Supreme Court and the Judicial Service Committee of Senate confirms. Article 3, Section 1 of the American Constitution grants to the President the power to appoint Judges of the Supreme Court and all other Officers of the United States, by and with the advice and consent of the Senate.²⁴³ Under the same section Congress is empowered to constitute Tribunals inferior to the Supreme Court by electing judicial officers thereof.²⁴⁴

The difference that is manifest is that in the American system the President only nominates judges and the Senate confirms the appointment whereas in the South African system, the President appoints judges of the High Court

²⁴² Section 174 (6) of the final Constitution.

²⁴³ Constitution of the United States of America 1788, Article 3, Section 1.

²⁴⁴ American Constitution supra Article 3, Section 1.

and the Constitutional Court with the recommendation and advice of the Judicial Service Commission. Moreover in the American system, the judges of inferior courts are elected and constituted by Congress²⁴⁵ while in the South African system, the President appoints the judges of all other courts on the advice of the Judicial Service Commission.²⁴⁶

In the American system federal judges in terms of Article three of the American Constitution, hold their office during good behaviour, which assures them life tenure. In the South African system on the other hand, judges may retire upon attaining the age of seventy years and having completed a twelve year term of office.²⁴⁷

The South African system is commendable on the point that judges are not elected unlike in the American system because this deals away with the fear that the judiciary may be politicised by the effect of the voting procedure. This may temper with the independence of the judiciary in that the judiciary will inevitably become loyal to the Congress.

President Thabo Mbeki correctly pointed out the challenges associated with the transformation process at the Judges' Symposium held at Benoni on the 16th day of July 2003, as follows:

²⁴⁵ <http://www.abanet.org/govaffairs/judiciary/rhistory.html>

²⁴⁶ South African Constitution Act 108 of 1996, Section 174(6).

²⁴⁷ Judges' Remuneration and Conditions of Employment Act 47 of 2001.

Transformation is the time when corporals leave the secure walls of the castle and step into unexplored territory. Though the dynamics of success may eventually lead to elation, it is not much fun in the initial stages. There are walls of reluctance and denial to break through, old values to discard, and new ones to assimilate. And that is usually painful, because the ramparts are thick, and they are made of human emotions and prejudices.²⁴⁸

In similar vein, Maduna, the former Minister for Justice and Constitutional Development remarked on the transition as follows:

The symposium will give the judiciary an opportunity to reflect upon and discuss the many questions relating to its place and role in a changing political, social and economic scenario. It will afford us all an opportunity to reflect dispassionately on whether we now have a judiciary that, at all levels, is in synch with the society that we all proclaim we want to be.

And not one that still has elements which may legitimately compel some in our midst to conclude that there are ardent defenders of the old order who, in the course of performing the judicial function, find all manner of excuses, guises, pretexts and ruses to undermine the new order. When we, as a people, jettisoned apartheid, we resolved to establish a

²⁴⁸ Mbeki T M, "Judicial Transformatio in South Africa", paper presented at the Judges' Symposium held at Birchwood Hotel, Binoni on the 16th July 2003.

new polity. A polity that is predicated upon new values and one that would distinguish us from the *ancien regime*.²⁴⁹

In this era of judicial transformation, it is imperative to afford the judiciary a leeway in as far as the legislative process is concerned. The most crucial issue then is how this can be done without necessarily impinging upon the principles of constitutional supremacy and separation of powers? Another hurdle in the way of this course is that the judiciary will stand to be criticised for judicial tyranny or judicial maximisation.²⁵⁰

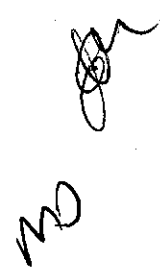
But like in any transformation process, there is bound to be uncertainty because the human instinct prefers routine as opposed to change. Due to the obvious fact that this work challenges certain deeply entrenched values, norms and perceptions, it understandably stands to receive a lot of criticism.

The recent quagmire that befell the South African democracy which is referred to below, is a perfect example of what could happen if there is not much interaction and collaboration between these arms of government. The government of South Africa has made an endeavour to amend the constitution and do away with the judiciary's right to administer its own affairs.²⁵¹

²⁴⁹ Maduna P M. "Constitutional Development in South Africa", paper presented at the Judges' Symposium on 16th July 2003, Birchwood Hotel.

²⁵⁰ <http://www.abanel.org/govaffairs/judiciary/rhistory.html>.

²⁵¹ Republic of South Africa, Constitution fourteenth Amendment Bill 2005.

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The amendment will pave the way for the government to implement several controversial laws such as the Judicial Conduct Tribunals Bill, the South African National Justice College Draft Bill and the Superior Courts Bill allowing it to 'educate' and 'discipline' judges. The Constitution Fourteenth Amendment Bill 2005, inter alia, amends Section 165 of the Constitution by adding that;

"...The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.

...The Cabinet Member responsible for the administration of justice exercises authority over the administration and budget of all courts."²⁵²

Clause 1 of the Bill²⁵³ gives the responsibility for the administration of the judiciary to the Minister. In doing so Clause 1 purports to separate "judicial functions" from "administrative functions". In practice however, it is difficult to distinguish between "judicial" and "administrative" functions. In De Lange v Smuts NO and Others,²⁵⁴ the Constitutional Court drew attention to administrative functions that bear directly on judicial functions and noted

²⁵² Constitution Fourteenth Amendment Bill, Clause 1.

²⁵³ Constitution Fourteenth Amendment Bill, 2005.

²⁵⁴ 1998 (3) SA 785(CC).

that these functions were part and parcel of the institutional independence of the courts.²⁵⁵

The amendment in Clause 1 confers authority over administration and budget in the Minister without qualification and does not cater for the need of the judiciary to control administrative functions that bear directly and immediately on the exercise of judicial functions. Without such distinction, the vague language used in the Clause could result in executive intrusion into the judicial function, and thereby threaten the independence of the judiciary and separation of powers.²⁵⁶ Similarly, in respect of the budget, Clause 1 has the potential to undermine the influence and input the judiciary should have on budgetary matters concerning the courts.

The Bill is also aimed at removing from the judiciary the right to make rules on processes in court and giving that power to parliament. It will also introduce a system in which judges will be micro-managed and unable to be absent without the written permission of the Chief Justice.²⁵⁷ Moreover, under the proposed piece of legislation, judges will be 'tried' and 'trained' at an institution owned, run and managed by the government.²⁵⁸

²⁵⁵ Ackermann J; In *De Lange v Smuts*, op cit 70.

²⁵⁶ The Institute for Democracy in South Africa, www.idasa.org.za

²⁵⁷ See Clause 7 of the Constitution Fourteenth Amendment Bill, 2005.

²⁵⁸ Carmel R; *Leave us alone!* Sunday Times News Paper published on the 17th April 2005.

This proposed piece of legislation has also attracted immense political debate because the Democratic Alliance has campaigned vehemently against the draft Bills.²⁵⁹ This development understandably has been perceived as an endeavour by the ruling African National Congress to cement its hegemony and monopoly of all state power. For in the recent past, the governing party has launched a series of sharp attacks on the South African judiciary.²⁶⁰

Another of the objectives of these attacks could be to promote a bench that is more sympathetic to the government's ideology and policy programme of 'transformation', and to exert implicit pressure on judges to make rulings that accord with the government's policy and political agenda.²⁶¹

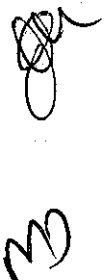
Some of these attacks took place at the ANC's 93rd anniversary celebrations in Umtata in January 2005. The Party released a statement asserting that the bench should be brought into "consonance with the vision and aspirations of the millions who engaged in the struggle", and that judges should undergo a shift in their "collective mindset" so as to be "accountable" to the electoral "masses".²⁶²

²⁵⁹ Democratic Alliance's Judicial Review, Final Document of 2005.

²⁶⁰ Angel Q, Draft laws to change judiciary 'not cast in stone' Pretoria News, 18 April 2005.

²⁶¹ Democratic Alliance's Judicial Review op cit at p 5.

²⁶² Democratic Alliance's Judicial Review ibid.



This statement was also perceived as a political attempt to soften up judges ahead of the "Pharmaceutical case".²⁶³ Therefore politically these perceptions came as no surprise because the opposition parties have aligned themselves with the judiciary, seeing the government's call for judicial transformation as aimed at benefiting the ruling party more than anything else.

Through its statements and actions, it would appear that the ANC is increasingly pressurizing the judiciary to 'transform' beyond the constitutional imperative of establishing a bench that broadly reflects the racial and gender composition of the South African populace as envisaged by the Constitution.²⁶⁴ Ironically the President of the Republic of South Africa in a recent interview simply dismissed these allegations when asked about the judiciary's fear of the government encroaching on its powers as follows:

I know for a fact that the government has not as yet taken any position which seeks to undermine the independence of the judiciary. I am certain about that. I thought that we needed to slow down this process because it may very well be that the phrasing of a particular paragraph might suggest an intention to compromise that independence. I would like to understand what the fear means because all we want to do is to ensure that electricity bills are paid and judges have

²⁶³ Democratic Alliance's Judicial Review *ibid.*

²⁶⁴ See final constitution at Section 174 (2)

computers and laptops. Why would doing that result in undermining the judiciary?²⁶⁵

The President's statement seems to suggest that the Bill's are not intended to impact negatively on the independence of the judiciary *per se* but merely to improve the working environment of the judges. This statement is not convincing because on the other hand there is a Justice College that has already been there for a long time which has been rendering training to the magistracy and prosecutors and the same institution will be used to train judges.²⁶⁶

The proposals contained in the South African National Justice College Bill,²⁶⁷ limits the role of the judiciary in the training of judges.²⁶⁸ The judiciary quiet correctly raised concerns about this. In line with with other jurisdictions, jdges must play a prominent role in the training of their own. However, that does not mean that the government has no role at all to play in the training of judges. Its role should be limited to ensuring that the training institute is properly resourced and that the selection procedures advance the national policies on affirmative action.

A traditional view has always been that training of judges was both unnecessary and a threat to judicial independence. However, this view is

²⁶⁵ Sunday Times News Paper's interview with Thabo Mbeki. 26th February 2006.

²⁶⁶ De Reebus edition of January/February 2006 at page 13.

²⁶⁷ South African National Justice College Draft Bill, 2005.

²⁶⁸ See Clause 5, 6, 7, 9 and 10 of the Draft Bill, 2005.

fast changing.²⁶⁹ In England it was only in 1979 that formal training of judges was started by the Judicial Studies Board. In the United States of America, training started in the 1950s.²⁷⁰ There is therefore no doubt that there is a need in South Africa, for judicial training that will be carried out in a manner that does not compromise the independence of the judiciary as illustrated above.

4.2 SUMMARY

With the ongoing debate on the issue of judicial transformation in South Africa, I respectfully submit that it is good for democracy because it is only through open discussion and robust debate that State organs can improve their relations. Even though the way the judiciary is constituted must be reflective of the racial fabric of the South African society, most importantly, both academic qualifications and practical experience must be of paramount importance when judicial officers are appointed.


The process of judicial transformation is a very sensitive one that has to be carried out in a consultative process with all the role players involved in order to ensure coherence and consensus between the executive and the judiciary. Much of the debate that has ensued thus far has been largely a result of lack of consultation by the executive.

²⁶⁹ Hufstедler F. 'New Blocks for Old Pyramids: Reshaping the Judicial Systems', Southern California Law Review 44:900-19.

²⁷⁰ Hufstедler F. op cit at 915.

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Lastly, the process of judicial transformation should include the issue of judicial law-making so that the judicial officers are made aware of their duties in so far as legislating over and above merely interpreting the law. It is crucial that whatever mechanisms are proposed should be transparent and examined carefully, to ensure that they do not intrude upon judicial independence.



CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This chapter is the final one and it captures the findings, broad conclusions and recommendations of this study.

5.1 FINDINGS AND CONCLUSIONS

It is now clear that an absolute separation of powers is unattainable, it therefore follows that it is best that these three organs of government function from a more pluralistic approach. A satisfactory account of the separation of powers principle holds that the courts, legislature and the executive are not best viewed as engaged in a struggle with each other for sovereign power, but rather as engaged in a collaborative enterprise whose common aim is to live up to and develop the fundamental values of legal order.²⁷²

The organs of State are now equal and co-ordinate branches and enjoy a relationship in so far as acting as checks and balances on each other are concerned. A rigid and formalist approach is in a way incompatible with the practical way of doing things for the simple reason that instead of being

²⁷² Altar T.S. "Constitutional Foundations of Judicial Review", Cambridge Law Journal 2002 at pg 88-108.

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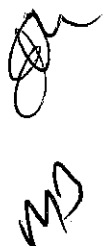
pragmatic, it is idealist. Idealism itself is desirable but because it is unattainable, we can only strive to achieve it even though we are aware that such is an impossible dream. In striving to achieve an idealist state, we must be as pragmatic as we possibly can be.

Pluralism *per se* does not mean that the principles of constitutional supremacy and separation of powers should be violated but only that they should be applied to the extent that they do not impede progress. For instance, if the legislature and the judiciary are to collaborate on a power-sharing exercise, that will encourage a smooth and harmonious relationship *inter se* but one that is not seen as usurpation of functions *per se* but as collaborative governance.²⁷²

This arrangement on the other hand, will avoid a situation whereby the legislature will promulgate laws that are purportedly aimed at gaining control over the other arms of government. This is clearly an indication that the manner by which these organs have been operating has to be revisited and revised especially in this eminent phase of judicial transformation that is taking place.

What the government is hoping for should not be seen as a total takeover but a starting point towards consultation and negotiations to transform the

²⁷² Allan T.S. "Constitutional Foundations of Judicial Review", Cambridge Law Journal 2002 at 93.

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judiciary. The perception that the judiciary is not involved in the legislative process but only in interpreting the law should be jettisoned for a more pluralistic approach.

Under the given circumstances my humble submission is that because we are still developing as a democracy, we should learn from some of the mature democracies of the world such as the United Kingdom and the United States of America where the judiciary can participate in the legislative process as far as advising on proposed Bills and other legislative matters but are insulated from political pressure.²⁷³

1.2 RECOMMENDATIONS

As it is now, the legislature legislates and leaves some matters to judicial discretion but the Constitution does not expressly acknowledge that in unequivocal terms. This actually marks grey areas in our system and brings about uncertainty and controversy.

In conclusion, I therefore make a humble submission that it is time that we break away from religiously following some of the entrenched traditional principles of law, some of which are evidently becoming irrelevant to our present circumstances. Our politics today are different from those of the

²⁷³ De Smith, Constitutional and Administrative Law London: Leicester University Press. 4 Edition 19 at 32-33.

past and so are the laws. Therefore we should re-examine these deeply entrenched traditional principles so that they are in harmony with the changing times and concomitantly develop new ones.

This has been seen as one of the imperatives of judicial transformation so that the judge who applies the law should not hide behind the aphorism "ius decere non facere". But once again this has to be done in a manner that is in harmony with the principle of separation of powers so as to guard against judicial tyranny and judicial maximisation.

As this research has shown that the principle of separation of powers allows for mutual checks and balances, the three arms of government have to use that opportunity in order to complement each other but not to usurp each other's functions.

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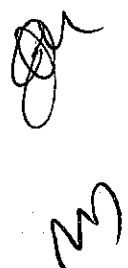


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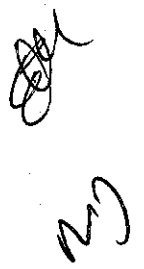
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2. De Reebus edition of January/February 2006 at page 13.
3. Sunday Times News Paper published of the 17th April 2005.
4. Sunday Times News Paper's interview with Thabo Mbeki, 26th February 2006.

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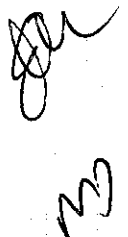
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PAPERS PRESENTED AT CONFERENCES AND SYMPOSIA

1. Bosielo J. "Transforming the South African Judiciary: Jurisprudential Paradigm Shift". Paper presented at a jurisprudential Conference at the North-West University, Mafikeng Campus on the 23rd September 2005.
2. Maduna P M: "Constitutional Development in South Africa", paper presented at the Judges' Symposium on 16th July 2003, Birchwood Hotel.
3. Mbeki T M, "Judicial Transformation in South Africa", paper presented at the Judges' Symposium held at Birchwood Hotel, Binoni on the 16th July 2003.
4. Mahomed CJ: "Independence of the Judiciary", paper presented at the International Commission of Jurists in Cape Town on the 21ST of July 1998.
5. Mpati L; Transformation In The Judiciary- A Constitutional Imperative, paper presented at an Inauguration Lecture, University of the Free State 6 October 2004.

INTERVIEWS

1. Adv. Lawrence Lever of the Mafikeng Bar, 18 September 2006.
2. Adv. Senatle of the Mafikeng Bar 28 August 2006.
3. Landman, J. Judge of the High Court of South Africa, Mafikeng Provincial Division, 31 October 2006.

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INTERNET WEBSITES ADDRESSES

1. <http://www.constitution.org/cmt/cardoza/jud-proc.htm>.
2. www.hc.sc.gc.ca/p-mcc/18/d-e.htm phb-dqspsp/publicat/cdic.
3. www.polity.gov.za/publicat/cdic.
4. <http://www.abanet.org/govaffairs/judiciary/rhistory.html>
5. <http://www.justice.gc.ca/en/ps/rs/rep/2005/rr05-10/p6.html>

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"MJK4"

FORUM 4 SERVICE DELIVERY



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Our Ref: F4SD. Your Ref: IEC

Date: 05 August 2021

To: Mr Sy Mamabolo - Chief Electoral Officer
INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA (IEC)
Per email: MamaboloS@elections.org.za

Copied to: Mr Nilan Rampershad
IEC LEGAL DEPARTMENT
Per email: RampershadN@elections.org.za

And to: Geldenhuys Malatji Inc
ATTORNEYS TO THE IEC
Per email: MKanyane@gminc.co.za

Copied to: Moeti Kanyane Attorneys
Per email: moeti@kanyane.co.za / mashudu@kanyane.co.za

Dear Sirs,

LEGAL PROCEEDINGS - LOCAL GOVERNMENT ELECTIONS 2021

1. We refer you to the above and the announced intention to approach the courts for relief in respect of the recommendations of what has now become commonly known as the Moseneke report.
2. As you are aware our organisation is a registered political party that have a vested interest in the Local Government Elections by virtue of any adverse decisions or proceedings that may lead there and that may intrude upon, limit or suspend our political rights in terms section 19 of the Constitution and the specific rights of our duly elected public representatives.

Page 1

National Office
Telephone: 012 433 6527 email: info@forum4sd.org e-Fax: 086 601 6364
Address: 3rd Floor Stevens House, Brooklyn Bridge Office Park, 574 Fehrsen Street, Brooklyn, PRETORIA

Facebook: Forum 4 Service Delivery | Twitter: @F4S_Delivery | Instagram: Forum4sd

FORUM 4 SERVICE DELIVERY



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3. We must accordingly insist that our rights as an interested and affected party must be recognised by siting as a party to any envisaged legal proceedings and affording us the opportunity to formally respond thereto, if necessary, and upon considering the nature of the relief or the grounds upon which same will be sought.
4. We further confirm that should our request not receive favourable consideration, we will have no option to launch an application to intervene for amongst others, the reasons already stated.
5. All court correspondence and papers citing Forum 4 Service Delivery as an interested party can be served physically at F4SD National Office:
 - a. **3rd Floor Stevens House, Brooklyn Bridge Office Park, 574 Ferhsen Street, Brooklyn, Pretoria**
 - b. And via email: info@forum4sd.org , and copy to mbaharekekana@gmail.com
6. We trust that we may expect that our request will enjoy favourable consideration.

Mbahare J Kekana (Signed electronically)
F4SD President
Pretoria

Page 2

National Office
Telephone: 012 433 6527 email: info@forum4sd.org e-Fax: 086 601 6364
Address: 3rd Floor Stevens House, Brooklyn Bridge Office Park, 574 Fehrsen Street, Brooklyn, PRETORIA

Facebook: Forum 4 Service Delivery | Twitter: @F4S_Delivery | Instagram: Forum4sd

[Handwritten signature]
[Handwritten initials]

MK MOETI KANYANE

ATTORNEYS

Advisory • Litigation • Forensics

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www.kanyane.co.za

Our Ref: TM Kanyane/BC/M00232

Email: moeti@kanyane.co.za

Your Ref: F4SD

Date: 05 August 2021

FORUM 4 SERVICE DELIVERY
3RD FLOOR, STEVENS HOUSE
BROOKLYN BRIDGE OFFICE PARK
574 FEHRSEN STREET
BROOKLYN

By Email : mbaharekekana@gmail.com / infor@forum4sd.org

Dear Mr Kekana,

CCT 245/21: ELECTORAL COMMISSION // MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS & 10 OTHERS

- 1 We act on instructions of the Electoral Commission.
- 2 Your letter dated 5 August 2021 addressed to our client's chief electoral officer has been handed to us for an appropriate response.

The reasons why none of the registered political parties have been specifically cited as respondents to the application have been fully explained in the founding affidavit accompanying the application launched in the Constitutional Court yesterday. If you have not already received a copy of the papers, this can be accessed at <https://www.dropbox.com/sh/socf54n857if3t4/AADKrSh6ExwFh6JHDmCqbGoha?dl=0>.

- 3 Your party is of course entitled to apply to the Constitutional Court for leave to intervene should it be so advised.
- 4 Our client's rights are and remain strictly reserved. Please address any further correspondence intended for our client in relation to this matter to us.

Yours faithfully,

TM Kanyane
Director
Moeti Kanyane Inc.

(Transmitted electronically and thus not signed)

Moeti Kanyane Incorporated
Director: Thlouyatiba Moeti Kanyane B Proc., LLB (UNIN); Cert Competition Law (UP)
Senior Associate: Mashudu Rambau, BA (Law), LLB (UP)
Associate: Mashoto Phala LLB (UP)
Candidate Attorney: Keletso Bolani LLB (NWU), LLM (UJ)
Practice Manager: Magobatho Bridget Chilwane
Registration No: 2018/284752/21 | VAT No: 4340282393

MK MOETI KANYANE
ATTORNEYS