

**TITLE:**

**THE LIMITS OF JUDICIAL REVIEW OF EXECUTIVE ACTION- THE  
SOUTH AFRICAN PERSPECTIVE**

**MINI-DISSERTATION IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF  
THE DEGREE LL.M CONSUMER PROTECTION LAW AT THE UNIVERSITY OF  
PRETORIA**

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**Degree: LL.M Course Work (Mercantile Law)**

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**February 2016**

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## CHAPTER 1

### 1.1 Objectives of the Study

The study is borne out of the need to explore the nature of the endemic conflict that characterises the relationship between the executive and the judiciary arms of government in a constitutional democracy. In this study I seek to establish whether the constitutional framework that operates in South Africa, in particular, the oversight role of the courts impedes the executive from implementing policy that is necessary to bring about social and economic transformation for the majority of the citizens.

I further explore the pre-1994 constitutional era of judicial review to locate the role played by the courts within a system of parliamentary sovereignty and white minority rule in apartheid South Africa. In particular, the 'testing right' of the courts is examined to show that through a system of parliamentary sovereignty the courts were simply emasculated and could not make any legislation invalid.

I examine the executive's function to develop and implement policy in the context of establishing an understanding of the nature of the restraint that the courts ought to exercise so as not to interfere in the sphere of executive competence, with reference to applicable case law. The Constitutional demand for the lawful exercise of all powers is examined to establish whether it is apposite for the courts, acting as bulwarks against executive excesses, to grant orders that may jeopardise the security of the state.

Ultimately I recommend changes with a particular focus on the importance to sustain public confidence in the judiciary and suggest that a code or principles of conduct must be developed to guide the interaction between the executive and the judiciary.

## 1.2 Statement of the Problem

For some time, there have been murmurs of discontentment, mostly from the executive arm of government about the exercise of powers by the judiciary. Exactly, what the appropriate level of judicial review must be when the courts review executive conduct has not been adequately addressed. Recently, the South Gauteng High Court issued what could be described as a ground-breaking judgement when it ordered that the government must prevent President of Sudan, Omar Al Bashir from leaving the country.

It is no exaggeration to state that the relationship between the executive and the judiciary can be described as strained and only tied together by the respect for, and supremacy of, the Constitution. The bitterness felt by the executive towards the courts poses a real threat to the constitutional democracy and concomitantly, unbridled exercise of judicial review of executive action could pose a legal conundrum for the government.

The fact that the African National Congress (ANC) led government was responsible for the negotiation of a democratic dispensation and in the process agreed to a number of constitutional compromises makes it a palpable reality that the executive may seek to interfere and change the Constitution to achieve a compliant judiciary. The result would be calamitous for everyone.

Some of the comments made by the ANC and its tripartite alliance partners underscore this point. Kruger<sup>1</sup> penned an opinion piece in which he pointed out that the ANC Secretary General, Gwede Mantashe has accused the judiciary of “overreaching” and

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<sup>1</sup> Johan Kruger, article titled “judiciary under attack-CFCR”. accessed on website [www.politicsweb.co.za](http://www.politicsweb.co.za) on 16 September 2015.

“contradicting the interest of the state versus judiciary”. The ANC has been particularly peeved but what it considers to be an affront to its mandate to govern coming from the courts.

The SACP, an alliance partner of the ANC also joined in the attack against the judiciary and described it as “a super institution that accounts to no one...not alive to the context of and interests of the country...interpreting the law as if they are operating from an island outside the country”.<sup>2</sup>

### **1.3 Significance of the Study**

The importance of the study lies in finding ways to ensure that the constitutional democracy is maintained and the rule of law becomes the cornerstone of exercise of all power. The ‘checks and balance’ functions exercised by the courts must be aligned so that it embraces and enforces the principles of the new order to change lives and promote democracy. If the executive is not allowed to implement policies that are meant to bring about social and economic changes there is a likelihood of civil unrest that may undermine the constitutional landscape.

That the executive perceives the judiciary in negative light does not bode well for the proper functioning of a democratic state. There has to be a proper assessment of the role of the judiciary within the constitutional framework that whilst it guarantees the independence of the judiciary it does not undermine the legitimate function of the executive to transform the society.

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<sup>2</sup> Ibid

## **1.4 Research Methodology**

The methodology followed in this study is a combined methodology that resembles traits of consideration of the law and analysis of published articles, literature and case law on the subject.

The study entails a critical review of case law and literature study that analyse information, which review and analysis is aimed at the identification of the areas that contribute to the conflict between the executive and the judicial arms of government. I seek to locate this conflict both within the structural design of the current state of government that struggles to achieve social and economic change and the constitution that serves as the bedrock for peace and civility.



## CHAPTER 2

### HISTORICAL BACKGROUND AND IMPACT OF THE CONSTITUTION

#### 2.1 Pre- democracy era of judicial review

The South African administrative law of pre-democratic era has been aptly described as ‘a pale reflection of the English law of a bygone age’.<sup>3</sup> Hoexter makes the point that in addition to being inherited from the English the nightmare of apartheid made everything worse. According to Hoexter, ‘the unrepresentative legislature used its sovereign power to impose on South Africans a system of institutionalised racial discrimination, routinely conferring tremendously wide and invasive discretionary powers on government officials’.<sup>4</sup>

The Parliamentary sovereignty system of government dictated that Parliament was supreme. In this way, Parliament was able to pass discriminatory laws to deprive the black majority of meaningful economic and political participation without recourse to the courts. The parliamentary sovereignty system of government ensured that parliament could do as it pleased as long as proper procedures were followed in enacting the law, regardless of whether such law was good or evil.

Hoexter explains that ‘since original legislation could not be attacked on any but the narrowest procedural grounds, administrative law review was virtually the only method for challenging the invasion of rights’.<sup>5</sup> It was not for the courts to decide whether the law was good or bad. The function of the courts was to interpret the legislation and not to make it. The response of the courts was generally feeble.

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<sup>3</sup> Hoexter, Cora “The principle of legality in South African Administrative Law” (2004) 4 *Maquarie Law Journal* 165

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

In South Africa, it was believed that the people had granted the Parliament the power to make laws, therefore the courts had no right to intervene and set aside laws made by the people. However, the electoral system that operated was predicated on the exercise of white minority suffrage and excluded the black majority from participation in public elections.

Judicial review of legislation was difficult if not impossible. Whenever there was a challenge against legislation and the courts attempted to intervene, Parliament was quick to respond and emasculated the courts from exercising any judicial review function. Heinz Klug in reference to the case in *Brown v Leyds NO* reflects on the futile attempt by the judiciary to review legislation against the Constitution as all that President Kruger had to do was 'to secure an emergency resolution of the legislature declaring that judges had not and never had the testing right'.<sup>6</sup> The disdain in which President Kruger held the courts went as far as to the dismissal of the then Chief Justice and at the swearing-in ceremony of the new Chief Justice he warned the judges 'not to follow the devil's way as the testing right is a principle of the devil, which the devil had introduced into paradise to test God's word'.<sup>7</sup> In other words, in Paul Kruger's mind, the sacrosanctity of Parliament was equal to that of the Almighty and dared not to be questioned.

Pierre de Vos makes reference to Stratford ACJ who made the following statement about the nature of parliamentary sovereignty in South Africa in rejecting the challenge to the banning order brought against the Minister of Justice<sup>8</sup>:

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<sup>6</sup> Heinz Klug 'Constitutional Law of South Africa Review Service'

<sup>7</sup> Ibid

<sup>8</sup> Extract taken from article by Pierre de Vos titled 'An unambiguous attack on constitutional democracy from the website: constitutionallyspeaking.co.za dated 2012 February 14, website accessed on 15 November 2015.

*[O]nce we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a Court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its away, and that it is the function of the courts of law to enforce its will.*

There are no prizes to win to guess that the system of Parliamentary sovereignty was abused to pass unjust and unfair laws. During this period, Parliament could undo any administrative action by subsequent legislation, cure invalid administrative action by retrospective legislation and pass discriminatory or unreasonable statutes, provided they were procedurally correct. No court could declare legislation invalid.<sup>9</sup>

## 2.2 Constitutional Democracy

In 1994<sup>10</sup> South Africa became a constitutional democracy after decades of white minority rule founded on the deprivation of voter's rights and racial oppression of black people who were the majority of the population. This development heralded a new constitutional order in terms of which the Constitution became the supreme law of the land. Most importantly, as Hoexter puts it, South Africans 'acquired rights to administrative justice in terms of our first democratic and supreme Constitution'.<sup>11</sup>

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<sup>9</sup> Yvonne Burns 'Administrative Law under the 1996 Constitution', p 6

<sup>10</sup> On 27 April 1994, South Africa held elections in which the citizens of all races were allowed to participate and Nelson Mandela became the first black President of RSA.

<sup>11</sup> Note 2 above.

Democracy is defined generally as a system of government of the people by the people for the people.<sup>12</sup> Quite evidently, the concept is far more complex than the simplistic definition offered above. The Constitution does not define democracy but refers to principles of democracy. Section 1 of the Constitution provides that the Republic of South Africa is a sovereign, *democratic* state founded on, amongst others, the values of universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Brand<sup>13</sup> conceptualises democracy as underpinned by two important characteristics. First, and most basically, the Constitution envisages a representative/participatory democracy and secondly a substantive rather than only a procedural conception of participatory democracy. It appears that there is consensus that democracy postulates active participation by the people in decisions that affect them.

The 1993 Constitution initiated a constitutional revolution in South Africa.<sup>14</sup> It is worth to mention that this dispensation was preceded by a lot of uncertainty and unrest as political parties could not agree during the Codesa negotiations<sup>15</sup> on the proper constitutional order that must define South Africa. One of the most important achievements of the Codesa negotiations was the inclusion of the supremacy of the Constitution doctrine and the creation of a justiciable Bill of Rights in the Constitution. It was clear that all parties were agreed that the past dispensation where the exercise

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<sup>12</sup> This now-iconic phrase was introduced by President Abraham Lincoln of the United States almost 152 years ago when he examined the founding principles of the United States in the context of the Civil War.

<sup>13</sup> Danie Brand Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa.

<sup>14</sup> Ibid, p55.

<sup>15</sup> Convention for a democratic South Africa ( Codesa) was a multiparty negotiations forum that has as its object the dismantling of apartheid and ushering in new constitutional reforms in South Africa.

of power was unfettered could not be carried over in the new South Africa. Every exercise of power had to conform to the Constitution. This requirement underscores the respect that all functionaries must accord to the Constitution and this was aptly described by Mureinik as “the replacement of the old culture of authority with a new culture of justification - a culture in which every exercise of power is expected to be justified”.<sup>16</sup>

The exercise of discretionary power by the executive often creates the unenviable task for the courts to grapple whether to interfere with or to refrain from interference with the executive conduct. This dichotomy created by the Constitution in this regard is complex. The 1996 Constitution contained several provision of significance to administrative law. But most important of all are the rights to just administrative action contained in s 33 of the Constitution which the Constitutional Court has described as lying at the heart of our transition to a constitutional democracy.<sup>17</sup>

### 2.3 Just administrative action

The Constitution sets the tone for state accountability when it demanded that the exercise of administrative action must be justified. In this regard, the Constitution dealt a fatal blow to a system that concentrated ‘enormous powers in the hands of the executive...’<sup>18</sup> The Constitution changed the landscape and created three centres of power, each separate but interdependent. In the exercise of its powers, each centre also played a ‘check and balance’ function over the other.

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<sup>16</sup> Mureinik E ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 SAJHR 31 LJ 484.

<sup>17</sup> Hoexter C ‘Administrative Law in South Africa’ 2nd Edition 2012, Juta.

<sup>18</sup> Ibid.

Section 33 of the Constitution states that:

- 33.(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The impact of the section 33 provision was 'to entrench administrative law and administrative justice within the framework of the Constitution'<sup>19</sup>. In order to fortify the right to administrative action, the legislature ensured that administrative law rights 'apply to all law and bind all organs of state' and should not be capable of being changed and must 'require a two-thirds majority for their amendment and may be limited only in terms of section 36 of the Constitution'.<sup>20</sup>

#### 2.4 The role of the courts to act as gate-keepers of the Constitution

Section 2 of the Constitution lays the foundation for the control of public power.<sup>21</sup> It provides:

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid

<sup>21</sup> see fn 16 above.

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

Chakalson P provided a succinct historical development of South African judicial review, which justifies the control of public power by the courts.<sup>22</sup> Chakalson alluded to the difficult period that prevailed prior to the adoption of the interim Constitution and reflected that this period was characterised by the control of public power by the courts through the application of common-law constitutional principles. However, the adoption of the interim Constitution changed the landscape to require that such control has to regulated by the Constitution.

The Constitution deliberately located judicial authority in the courts and created a firewall in asserting its independence as it subjected the courts only to the whim of the Constitution.<sup>23</sup> Section 65 states that:

- (1) ...
- (2) The courts are independent and 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 functioning of the courts
- (4) .....
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

The courts are the gatekeepers as they demand authority for the exercise of all powers by other spheres of government. To this extent, ‘judicial review usually means the

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<sup>22</sup> Ibid

<sup>23</sup> Section 65 of the Constitution.

power of the courts to scrutinise and declare unconstitutional any type of legislation, original or delegated, or state conduct that infringes on the rights in the Bill of Rights (such as the right to equality or the right to privacy) or otherwise offends against provisions of the Constitution'.<sup>24</sup> Davis succinctly describes judicial review 'as an important means to the attainment of transparent and accountable government'.<sup>25</sup>

In proper context, judicial review can be seen as a function of the separation of powers doctrine. McHugh points out that 'under the separation of powers doctrine, the principal function of the judiciary is to uphold the law'<sup>26</sup>. It implies that judges must not be beholden to interests other than to apply the law without fear or prejudice. If it means that the courts must send a king to serve a term in prison for having committed offences against his community, the courts must be bold to do so.<sup>27</sup> Similarly, if it is found that President Zuma must stand trial for corruption, the courts must not shrink from their duty but must be firm and apply the law. It is charged that in terms of the doctrine of separation of powers 'the judiciary cannot be deterred from exercising that function by criticism of the Executive branch even if the Executive's criticisms have the support of the general public'<sup>28</sup>.

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<sup>24</sup> Hoexter 113

<sup>25</sup> Dennis M Davis 'To Defer and then When? Administrative Law and Constitutional Democracy' *Acta Juridica* (2006) 23.

<sup>26</sup> Mc Hugh AC 'Tensions between the executive and the judiciary' Austrian Bar Association Conference.

<sup>27</sup> *Dalindyebo v The State* [2015] 4 All SA 689 (SCA).

<sup>28</sup> *Ibid*



## CHAPTER 3

### LOCATING THE EXECUTIVE AND EXERCISE OF ITS POWERS WITHIN THE CONSTITUTIONAL FRAMEWORK

#### 3.1 The functions and Duties of the Executive

The administration is that part of government which is primarily concerned with the implementation of policy and legislation.<sup>29</sup> In the national sphere, ensuring that the administration implements legislation is one of the responsibilities of the President and Cabinet. Their responsibilities are set out in s 85(2) of the Constitution and provide that:

‘The President exercises the executive authority, together with the other members of the Cabinet, by –

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy
- (c) co-ordinating the functions of State departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.’

There is no magic formula to determine when conduct of the executive will constitute administrative action and therefore be susceptible to the review of the courts. Determining whether an action should be characterised as the implementation of

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<sup>29</sup> Note 24 above.

legislation or the formulation of policy may be difficult.<sup>30</sup> Hoexter provides a useful distinction between conduct that constitutes administrative and executive conduct. The characterisation of the nature of the power is seen from a point of view of whether the exercise of power is concerned with ‘the implementation of legislation which is ordinarily carried out by the public service’ or whether it is concerned with ‘the formulation of policy which falls within the competence of the executive’<sup>31</sup>.

In *Minister of Defence and Military Veterans v Motau & Others*<sup>32</sup> the court concluded that the Minister’s decision constituted the exercise of public power but the nature of the decision was executive rather than administrative. In arriving at this conclusion, the Court reasoned that the formulation of defence procurement policy and the appointment and dismissal of people who will supervise the implementation of that policy are closely linked. The court found that while the appointment and dismissal of board members are not the formulation of policy as such, it is the means by which the minister gives direction in the vital area of military procurement, and is therefore an adjunct to her executive policy-formulation.

The distinction between the public service and the executive in determining whether the conduct is reviewable as administrative action is not entirely fool proof. Hoexter alludes to ‘the position adopted by the court in SARFU that membership of the executive branch of government is not an entirely reliable way of identifying the authors of administrative action’<sup>33</sup>.

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<sup>30</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

<sup>31</sup> Note 24 above.

<sup>32</sup> *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

<sup>33</sup> *Idem*.

In SARFU<sup>34</sup>, the court pointed out that a purely institutional test is insufficient and remarked that:

*‘What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be...that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.’<sup>35</sup>*

The court’s assessment means the fact that the President is the functionary does not preclude the courts from enquiring whether the conduct constitutes administrative action. As it was shown in the SARFU case the appointment of the commission of inquiry by the President in terms of s 84(2)(f) was not accepted at face value as an exercise of executive powers and therefore outside of the review powers of the courts. The court interrogated the nature of the President’s power to appoint a commission and concluded that the President’s act in appointing a commission under s 84(2)(f) of the Constitution did not constitute administrative action, that the *audi alteram partem* principle had no application to such appointment, whatever the source may have been from which the obligation to observe it might otherwise have arisen.

If the court had found that despite the power to appoint a commission being of an executive nature, the requirement to afford the respondents an opportunity to be heard may have brought about different results. This is so because the Constitution requires

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<sup>34</sup> President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999(10) BCLR 1059 (CC).

<sup>35</sup> Ibid.

that everyone must be afforded the opportunity to be heard if adverse decision will be taken and their rights are affected. The court concluded that the imposition of an obligation to hear affected parties prior to conferring powers under the Commissions Act upon a commission may well have unnecessarily hampered the Executive in performing the task of government. More telling, the court concluded that the vesting of such powers in a commission did not, in itself, infringe rights.

### 3.2 Policy-making functions and Judicial Review

The area of policy making and whether the courts can second-guess decisions made by the executive in this regard is a rather complex and difficult domain. In the *President of the RSA v SARFU*<sup>36</sup> the court considered the manner in which the Constitution regulated public power and, in particular, administrative action as contemplated by s 33 of the Constitution. Hoexter contends that ‘the constitutional meaning given to ‘administrative action’ by the courts has been closely informed by the separation of powers doctrine and the Constitutional Court set the path to fence off action that is associated with the political process and to distinguish administrative action from legislative, executive and judicial action’.<sup>37</sup>

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<sup>36</sup> *President of the RSA v SARFU* 2000 (1) SA 1 (CC)

<sup>37</sup> Note 24 above.

### 3.3 The Executive function beyond the purview of the courts

In the *Minister of Defence and Military Veterans v Motau*<sup>38</sup>, the minister's view was that she believed that the removal of General Motau and Ms Mokoena was 'not a legal matter' but a political matter.... informed by her experience'.<sup>39</sup> This construction of her powers was founded on a wrong conception of the institutional test as being sufficient. That is, the minister was of the view that by virtue of the office she held as an executive, her conduct to dismiss General Motau and Ms Mokoena's services constituted executive action beyond the purview of the courts.

But she was not alone in this view. The majority judgement in the Constitutional Court also found that the minister's decision was not administrative action as concluded by *Legodi J* in the favour of General Motau and Ms Mokoena in the High Court application. In the High Court judgement *Legodi J* had concluded that the minister's decision was administrative rather than executive action because the decision met the positive requirements of the definition of administrative action and because it was not expressly excluded from the ambit of the PAJA, as are some other forms of conduct by members of the national executive. In this regard, *Legodi J* found the support of the minority judges in the Constitutional Court on appeal.

The conclusion that the minister's decision constituted administrative action was based on the fact that the minister did not afford General Motau and Ms Mokoena a hearing before she terminated their services. The argument before court was that the impugned decision violated the right to be heard located in section 33 of the

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<sup>38</sup> Note 30 above.

<sup>39</sup> *Ibid.*

Constitution as given effect by PAJA and therefore it fell to be regarded as administrative action. The interesting point between the majority and minority decision is that they both agree that General Motau and Ms Mokoena were entitled to a pre-decision hearing but they disagree on the location of the legal right supporting their respective conclusion. The point of disjuncture lies in that the majority located the right to be heard in s 71 of the Companies Act which supported their conclusion that the minister's decision constituted executive action whilst the minority located the right to be heard in s 33 of the Constitution and PAJA.

The problem is that there is no standard established test to determine whether a particular decision constitutes administrative or executive action. The Court<sup>40</sup> held that it is the function rather than the functionary that is important in assessing the nature of the action in question. The mere fact that a power is exercised by a member of the executive is not in itself determinative.

The Court<sup>41</sup> provided some formula to assist in the distinction between executive and administrative action. Khampepe J, writing for the majority, stated that:

'Executive powers are, in essence, high-policy or broad direction giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, '(a) administrative action is....the conduct of bureaucracy ( whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct

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<sup>40</sup> Ibid at par 36

<sup>41</sup> Ibid at par 37

and immediate consequences for the individuals or groups of individuals. Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example’.

The Court stated that ‘in determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and conversely, one closely related to its application is likely to be administrative’.<sup>42</sup>

### 3.4 The Source of the power test in Administrative law

In the case of *Minister of Defence and Military Veterans v Motua and Others*, Khampepe J held that ‘where a power flows directly from the Constitution, this could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation’.<sup>43</sup>

In the case of *Masetlha v President of the Republic of South Africa*<sup>44</sup>, the Court held that Section 209(2) provides for the President’s power to appoint a head of each intelligence service. It is also noteworthy that section 209 is silent on the power of the President to suspend or dismiss a head of an intelligence service. Mr Masetlha challenged his dismissal by the President and contended that it was made in terms of

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<sup>42</sup> Ibid at par 38

<sup>43</sup> ibid at par 39

<sup>44</sup> *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

section 12(2) of the PSA and in the result it constituted administrative action and thus fell to be reviewed and set aside under PAJA as procedurally unfair.<sup>45</sup>

The Court found that the power to dismiss Mr Masetlha was executive action and not administrative action as the source of the power was the Constitution and only reviewable on narrow grounds. But it found that the right of Mr Masetlha to be heard before the President could dismiss him could not constrain the exercise of executive powers as the powers to appoint and to dismiss are conferred specially upon the President for the effective business of government, and in this particular case, for the effective pursuit of national security.<sup>46</sup>

The Court qualified the apparent trampling of the procedural fairness requirement by the executive by stating that the authority conferred on the executive must still be exercised lawfully, rationally and in a manner consistent with the Constitution.<sup>47</sup>

Khampepe J cautioned against placing reliance on this factor without exercising care. The Court found that while administrative powers more commonly flow from legislation, PAJA's definition of 'administrative action' expressly contemplates that the administrative power of organs of state may derive from a number of sources, including the Constitution.<sup>48</sup>

In *Albutt v Centre for the Study of Violence and Reconciliation*,<sup>49</sup> a case dealing with special presidential pardons within the context of the Truth and Reconciliation

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<sup>45</sup> Masetlha v President of the Republic of South Africa, par 43

<sup>46</sup> Ibid par 77

<sup>47</sup> Ibid par 78

<sup>48</sup> supra 25 above par 40

<sup>49</sup> Albutt v Centre for the Study of Violence and Reconciliation 2010(3) SA 293 (CC )



Commission (TRC), a challenge was brought in the High Court to compel the President to hear the victims of the crime prior to the exercise of the power to grant the offenders the pardon. The power to grant the pardon was located in s 84(2)(j) of the Constitution. The High Court found that the power of the President to pardon offenders under s 84(2)(j) constituted administrative action as defined in PAJA and therefore the President was subject to the procedural-fairness requirements imposed by PAJA.<sup>50</sup>

However, Ngcobo J on appeal took an unusual step and avoided to address the question whether the exercise of the power to grant a pardon constituted administrative action. The Court reasoned that the applications for pardon were brought under the special dispensation and the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation and in particular its objectives of national unity and national reconciliation.<sup>51</sup> In this way the court side-stepped the issue and we were left none the wiser as confusion reigned.

Perhaps it is not entirely surprising that the Court did not wish to decide the issue as argued in the High Court. It has been said<sup>52</sup> that the characterisation of a particular decision as being of an administrative nature is indeed “something of a puzzle” and the Court did not feel enthusiastic enough to venture into the space. The Court cautioned against a return to the classification of functions approach and said that in determining whether a particular conduct constitutes administrative action, the focus must be on the nature of the power exercised rather than upon the functionary.

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa [2013] ZACC 13 at par 41.

## CHAPTER 4

### THE OVERARCHING PRINCIPLES THAT REGULATE THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE EXECUTIVE

#### 4.1 The principle of the rule of law

Not since the Al Bashir saga has the concept of the rule of law gained such prominence in the public discourse to define what constitutes acceptable conduct of the government machinery and it is difficult to say whether the concept has lost its meaning in the translation. For the lay person it appears that the concept of the rule of law simply denotes that there should be orderly fashion to the discharge of governmental duties coupled with accountability on those who make decisions.

In a democracy like South Africa the concept of the rule of law means that “the law is elevated above politics and judges are independent and impartial arbiters protecting citizens’ rights and guarding against tyranny and arbitrariness in government”.<sup>53</sup> In Rautenbach’s view ‘the rule of law is a constitutional value that requires that the exercise of all government power must be rationally related to a legitimate government purpose and that the judiciary exercises control in this regard’.<sup>54</sup>

When there is no rule of law decisions may be taken by the executive functionaries under the guise of prerogative powers that are essentially inconsistent with the values and principles of the Constitution. Hoexter explains that under the rule of law theory,

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<sup>53</sup> Hoexter (note 21 above) 140.

<sup>54</sup> IM Rautenbach ‘Policy and judicial review- political questions, margins of appreciation and the South African Constitution’ TSAR 2012

‘the courts are there to keep the state and its officials within the bounds of their powers and to protect citizens from excesses of power’.<sup>55</sup>

Hoexter alludes to “the ‘red-light’ or ‘watchdog’ model of the judicial role.”<sup>56</sup> In this regard the proper application of the oversight duty by the courts is ‘to review only the legality of governmental decisions, not the merits, so as not to encroach on the preserve of the executive’.<sup>57</sup> However it is doubtful that a review of the legality of governmental decisions could occur without a consideration of the merits. A case in point is that of *Democratic Alliance v President of the Republic of South Africa and Others*<sup>58</sup>, in which the Constitutional Court was required to make a decision whether the appointment of Mr Menzi Simelane as the National Director of Public Prosecutions was within the bounds of the Constitution. The case will be discussed further to illustrate the problems encountered when the executives believes it has the powers to do as it pleases but the courts differ and demand accountability for the decisions made.

#### 4.2 The principle of Rationality

Van der Westhuizen J in *Merafong Demarcation Forum v President of the Republic of South Africa*<sup>59</sup> set the standard of rationality and stated that the exercise of public power has to be rational. In a constitutional state arbitrariness or the exercise of public power on the basis of naked preferences cannot pass muster. As if Van der Westhuizen was being prophetic, in the Simelane matter, consistent with the worrying pattern of dubious decisions taken by President Zuma as head of the executive to appoint people to key state institutions on the basis of patronage or other unknown considerations, the opposition party, the Democratic Alliance, challenged the decision

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<sup>55</sup> Idem.

<sup>56</sup> Idem.

<sup>57</sup> Idem.

<sup>58</sup> *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC).

<sup>59</sup> *Merafong Demarcation Forum v President of the Republic of South Africa* (2008) ZACC 10

of the President to appoint Simelane as the National Director of Public Prosecutions in the courts.

The appointment was made by the President as head of the National Executive in terms of the Constitution, which requires national legislation to ensure that the National Director is a person who is fit and proper for the job. It was common knowledge that President Zuma simply expressed a naked preference for Simelane despite objections to his appointment by sections of the opposition parties and civil society.

The Constitutional Court was seized with the matter when the Supreme Court of Appeal ruled that the President's decision was invalid for lack of rationality. Alistair Price contends that because 'the President's decision to appoint Mr Simelane was an exercise of executive power, governed by s 179(1)(a) of the Constitution and ss 9 and 10 of the National Prosecuting Authority Act 32 of 1998, the decision had to be rational'.<sup>60</sup> This being so it simply meant that the President's decision had to be a good decision, objectively seen.

Price contends and in my view correctly so that 'the constitutional requirement of rationality now has to be understood as extending beyond merely the merits of any impugned decision'.<sup>61</sup> This position according to Price was adopted following the decisions of the Constitutional Court in *Minister of Justice and Constitutional Development v Chonco*<sup>62</sup> and *Albutt v Centre for the Study of Violence and Reconciliation*<sup>63</sup>. In both cases the court clarified that rationality review also encompasses the process or procedure by which an impugned decision is reached, provided that the process is assessed as a whole.

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<sup>60</sup> Alistair Price "The Evolution of the Rule of Law" SALJ Vol 130 2013

<sup>61</sup> Ibid.

<sup>62</sup> *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC).

<sup>63</sup> Note 46 above.

The case advanced on behalf of the President in the court was that neither the Constitution nor the Act prescribes any procedure for the appointment of the National Director and this being so, it was for the President to determine the process. The submission made amounted to that the rationality requirement was not onerous, and that the test applied by the court a quo, amounted to an unauthorised intrusion into presidential and executive territory. The nub of the submission on behalf of the President was articulated in the contention that the President has a wide, subjective discretion in making the appointment and that it should be understood that the National Director is a political appointee who has a substantial policy-related role as distinct from other Directors of Public Prosecutions.

Unfortunately, it appears that these kinds of submissions inform most of the unthinkable decisions that President Zuma has made in the last few years of his term in office.<sup>64</sup> These decisions are made under the mistaken but honest belief that the powers of the President are beyond review and can be made to suit himself even when they are at the expense of the citizens. The Court clarified that the starting point is the Constitution itself. The Constitution did not leave the determination of appropriately qualified to the President but required that national legislation must determine the qualification of the National Director in detail. That determination is not left to the President's view of who is a fit and proper person but the construction of the legislation renders the determination of the qualification criteria to be objective.

The Court held that if the President is the sole determinant of fitness and propriety, then the spectre is raised of President "A" appointing someone as National Director

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<sup>64</sup> The example of the appointment Minister of Communications, Ms Faith Muthambi was came from a local municipality without any track record, the appointment of the Minister of Minerals and Mining, Mr Musebenzi Zwane who was plucked out of nowhere and lately the Minister of Finance, Mr David van Rooyen, whose term lasted only four days after Zuma was forced to retract his thoughtless decision to remove a competent Minister Nene.

on the subjective belief that the person concerned is indeed fit and proper and President “B” suspending or removing that person from office in the subjective belief, equally genuine, that the incumbent is neither fit nor proper. Surely, that would be laughable, but in reality such prospects have visited us a number of times under the Presidency of Zuma and were it not for the courts it could be worse.

If the executive did not misread the Constitution like it often does there would not be a tension that characterises the relationship between the courts and the executive. The problem is simply that often-times the executive wants to make irrational decisions and resist being held accountable for such decisions.

In the *Pharmaceutical case*<sup>65</sup>, the Court explained that it is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. The Court found that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. Importantly, the court pointed out that the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. The court optimistically remarked that a decision that is objectively irrational is likely to be made only rarely but, if it does occur, a Court has the power to intervene and set aside the irrational decision.<sup>66</sup>

#### 4.3 The principle of Reasonableness and Rationality

In *Pharmaceuticals case*, the court differentiated between the reasonableness test and that of rationality. Whilst the court admitted to a possible conflation between reasonableness and rationality evaluations, it is submitted that these tools are best

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<sup>65</sup> *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).

<sup>66</sup> this case was decided in 2006 before the watershed Polokwane Conference of 2007 that ushered a tsunami of unthinking executive decision-making and catastrophic leadership under President Zuma.

understood as being conceptually different. Reasonableness is generally concerned with the decision itself. Hoexter<sup>67</sup> subjects the meaning of reasonable to an ordinary grammar meaning and concludes that the standard dictionaries reveal that 'reasonable' means 'in accordance with reason' or 'within the limits of reason'. It is however important to consider that in Hoexter's opinion, 'a decision is not reasonable only when it is correct and to require more- to require correctness or perfection- would be to allow the courts to substitute their own views for those of the administrator'<sup>68</sup>.

Hoexter contends that 'there is a correlation between reasonableness and rationality and in particular since the concept of reasonableness includes rationality but it is not entirely confined to it'<sup>69</sup>. In order to understand reasonableness, one must consider that 'a reasonable decision is rational in the sense that it is supported by the evidence and information before the decision-maker and the reasons given for it; and in the sense that it is rationally connected to its purpose, or objectively capable of furthering that purpose'.<sup>70</sup>

Most of the impugned decisions taken by President Zuma have been found to lack rationality in so far as the actions of the President could not rationally be connected to the following test:

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or

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<sup>67</sup> Note 24 above.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

(dd) the reasons given for it by the administrator.

Hoexter contends that ‘despite the close and sometimes intimate relationship between reasonableness and rationality, they should be regarded as separate and more or less independent grounds of review under PAJA’<sup>71</sup>. This is because ‘reasonableness goes beyond mere rationality’. Du Plessis and Scott contends that ‘reasonableness review introduces the notion of proportionality akin to the limitations analysis in terms of s 36 of the Constitution- that is, an enquiry as to whether there are less restrictive means of achieving the same result’.<sup>72</sup>

The authors contend that rationality as argued by Professor Etienne Mureinik means that ‘the decision-maker needs to take a number of steps for the decision to be justifiable’. In this regard the authors contend that the court must ask whether the decision-maker:

- (1) considered all serious objections to the decision taken and has answers that plausibly meet them;
- (2) considered all serious alternatives to the decision taken and discarded them for plausible reasons; and
- (3) whether there is a rational connection between the premises and conclusion: i.e between the information ( the evidence and argument) before the decision-maker and the decision he/she reached.

Du Plessis et al contend that with ‘rationality review all that is required is that the option selected has a rational link to the purpose sought to be achieved’; in other words, that

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<sup>71</sup> Ibid.

<sup>72</sup> Max Du Plessis and Stuart Scott “ The variable standard of rationality Review: Suggestions for Improved Legality Jurisprudence” (2013) SALJ 130



'the option selected brings the state close to its purpose'.<sup>73</sup> The authors draw on a simplified version of the facts from Merafong case to illustrate the contrast between reasonableness and rationality review test:

*“The Merafong case essentially dealt with a cross-boundary municipality. The purpose of getting rid of cross-boundary municipalities was to achieve better service delivery. The question that had to be decided was whether to include Merafong, a cross-boundary municipality, in Gauteng or the North West Province. For the purpose of the example, assume that the only government purpose involved was to achieve better service delivery. The test would then be whether there was a rational connection between the decision and the purpose of better service delivery. Assume that it could be shown that including Merafong in the Gauteng Province would potentially increase service delivery by 200 percent, but including it in the North West Province would only increase service delivery by 15 percent. Using the standard of reasonableness, it seems clear that Merafong would have to be included in Gauteng, since, if service delivery were the only factor to be considered, then the difference of 185 percent would make including Merafong in North West a decision no reasonable decision-maker could reach. However, if the court were applying the rationality standard, then the vast difference in the improvement in service delivery would be legally irrelevant. All that is required is evidence that there would be some objective improvement. Therefore, in our hypothetical example, including Merafong in the North West rather than the Gauteng Province would pass rationality test.*

*In order to demonstrate that the decision was irrational, it would be necessary to show that transferring Merafong to North West would not actually improve service delivery*

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<sup>73</sup> Note 67.

*at all. Thus, the state does not need to produce any evidence to show that any alternatives were even considered, as Mureinik's rationality standard requires. What the state must do is point to some evidence backing up the decision in its own right."*

It would appear that the authors contend that 'a rational decision need not be reasonable but on the other hand, a reasonable decision must be rational in the sense that it is supported by the evidence and information before the decision-maker and the reasons given for it'.<sup>74</sup> The authors contend that such 'an approach ensures that the courts do not overstep the bounds of its role and enter the policymaking domain of the executive and the legislature'.<sup>75</sup>

#### 4.4 The principle of Institutional Competence

Du Plessis et al contends that 'the principle of institutional competence is trite in our law and this principle which can be traced back to the influential works of Lon Fuller, acknowledges that the courts are not best placed to handle certain kinds of decisions, since adjudication cannot encompass and take into account the complex repercussions that may result from polycentric decisions'.<sup>76</sup> The authors contend further that 'polycentric decisions are decisions that are many-centred as they involve subject matter that is not legal in nature but which is essentially political and is therefore non-justiciable'.<sup>77</sup>

It is difficult again to follow this logic because if you consider the example used by the authors in the *Merafong* case where rationality only required that the state must show that its decision would *not actually improve service delivery at all* for the court to find it to be irrational. The decision whether to incorporate Merafong into North West or

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<sup>74</sup> Idem.

<sup>75</sup> Idem.

<sup>76</sup> Idem.

<sup>77</sup> Idem.

Gauteng is arguably a political decision which is taken to pursue political interests of the ruling party. When such decisions are taken and clearly at odds with reasons given what is the basis for the retreat of the courts? The fact that there is a difference of 175% between the service experience that the residents of Merafong would receive shows that the decision is unreasonable where Merafong would be incorporated into the poorer province.

The authors refer to Skweyiya J's separate concurring judgment in Merafong as a prime example of the court deferring to the legislature due to the purported polycentric nature of the decision. Skweyiya J stated that

*“it is not the function of this court to decide whether it is more appropriate for the Merafong City Local Municipality to be in Gauteng or North West. That is not an exercise that any of the judges in this court is qualified to undertake. The determination of provincial boundaries and the interrelated issue of the demarcation of municipal boundaries within each province are complex issues requiring expertise in the fields of town planning, provincial planning, sociology, political science and geography, at the very least. It is impossible for me to tell at this stage which course is better for the people of Merafong, the province of Gauteng, the province of North West and the country as a whole. I must say frankly to the community that it is not ours to decide where Merafong should be located. That is a political decision which must be made elsewhere.”*

The courts are the gate-keepers of the Constitution and people must be able to assert their rights when the state acts in a manner that infringes the citizens' rights. It is inexcusable for the courts to show deference where the decision of the state is irrational. I align with the views of O'Regan J in *Bato Star* in which she cautioned that

the respect shown to the other branches of government does not mean that where the decision is which will not reasonably result in the achievement of the goal, or which is not supported on the facts or nor reasonable in the light of the reasons given for it, a court must not review that decision.

O'Regan J went further to explain that a court should not rubber stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker. More appropriately, the authors refers to the decision in *Doctors for Life International v Speaker of the National Assembly*<sup>78</sup>, where Ngcobo J noted that the doctrine of separation of powers should not be used to avoid the judiciary's obligation to prevent the violation of the Constitution.

Du Plessis et al contend that 'there should be at least a minimum threshold in the level of scrutiny adopted by the courts when applying the rationality standard'.<sup>79</sup> The authors acknowledge that there is a problem with the current application of the test in that 'a deferential approach is often applied to an already deferential standard'.<sup>80</sup> It is axiomatic that if the courts fail to hold government to account when public power is exercised, it would amount to abdication of their gate-keeping role. The authors contend that the courts must not 'let an already low-level standard drop below the floor by applying the test in a deferential manner'.<sup>81</sup> The authors contend that 'any complaint by the government of an increased burden is tempered by the low standard the government has to meet in order to satisfy the test'.<sup>82</sup> In order to achieve accountability, the government is required to justify that its 'actions are rational by

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<sup>78</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

<sup>79</sup> *Idem*.

<sup>80</sup> *Idem*.

<sup>81</sup> Note 67 above.

<sup>82</sup> *Idem*.

ensuring that it tenders evidence when irrationality has been alleged and that the state is prevented from providing reasons that are perfunctory'.<sup>83</sup>

#### 4.5 The principle of legality

The state functionary is daily involved with making decisions that affirm or restrict certain rights of the citizens. Whereas in the past too much power was concentrated in the hands of the executive with little oversight by the courts, the 'principle of legality provides a general justification for the review of exercises of public power and operates as a residual source of review jurisdiction'.<sup>84</sup> It therefore implies that the executive arm of government is not immune from judicial review despite that the action is not administrative in nature. In other words, even executive decisions are reviewable under the legality principle. This is so because 'non-administrative action is also catered for by the Constitution in general, and more particularly by the broad principle of legality identified by the Constitutional Court as an aspect of the rule of law- a foundational value of our constitutional order'.<sup>85</sup>

The executive is often annoyed by the courts for placing executive decisions under the microscope of judicial review on the basis that the constitution requires that the exercise of all powers must be lawful. The courts serve to remind the executive that it does not have a free hand to do as it pleases without regard to the constitution and that is the nub of the conflict between the two arms of government. The courts have a constitutional duty to prevent excesses by government and the requirements of legality places a duty on the executive to play by the rules. There is no such a thing as a

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<sup>83</sup> Idem.

<sup>84</sup> Idem.

<sup>85</sup> Idem.

powerful executive under the Constitution. There is an executive functionary that must operate within the confines of the law for the good of all the people.

The words of Etienne Mureinik<sup>86</sup> find resonance with the position adopted by the courts:

*“If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification- a culture in which every exercise of power is expected to be justified; in which leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.”*

It is no coincidence that the courts in the decision of *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*<sup>87</sup> showed no deference to the executive. The court grappled with the question whether a Cabinet Resolution coupled with a Ministerial Notice are capable of suspending this country’s duty to arrest a head of state against whom the International Criminal Court (“ICC) has issued an arrest warrant for war crimes, crimes against humanity and genocide. In short, the South African government ignored a court order which prohibited President Al Bashir of Sudan from leaving the shores of South Africa.

The court was scathing in its rebuke of the conduct of government to allow President Al Bashir to leave when there was an express order prohibiting his departure. The court reasoned:

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<sup>86</sup> Etienne Mureinik ‘ A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 SAJHR 31

<sup>87</sup> *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Case Number 27740/2015, 23 June 2015.

*'A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.'*

The conduct of government in the handling of the Al Bashir matter was met with fierce criticism, least because it offended the principle of separation of powers. The courts are vested with judicial authority and the constitution is clear that court orders must be complied with by state organs. There was round condemnation of the government's deliberate non-compliance with the court order in the Al Bashir matter.

The political ramification emanating from the arrest of Al Bashir is regarded by some commentators as being of a secondary nature to the upholding of the rule of law by the government. In as much as there could have been ructions caused by the arrest of Al Bashir on South African soil, it is charged that in anticipating that the arrival of Al Bashir would require the government to comply with its international commitments, the South African government could have 'indicated politely to Al Bashir that it would not be in his best interest to attend the AU Summit because our courts may order his arrest'.<sup>88</sup>

The scope of executive authority is circumscribed by the constitution and it would amount to exceeding its authority where the government could ignore laws of the country. Even under the guise of exercise of discretionary powers, the constitution reigns supreme, and government action must conform to the law. The rule of law is

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<sup>88</sup> Pierre De Vos 'Rule of law: Democracy snuffed out by arbitrary decisions made in self-interest' taken from the website [www.dailymaverick.co.za](http://www.dailymaverick.co.za) accessed on 1 February 2016

important for a constitutional democracy to function and government must comply with court orders. If the government is not satisfied with a court order it must pursue the matter through the courts instead of stepping into the shoes of the legislature and attempt to effect changes to the law.

Chaskalson P said in the *Pharmaceutical Manufacturers Association* case<sup>89</sup>:

*'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'*

#### 4.6 The principle of separation of powers doctrine

The 1996 Constitution does not specifically provide for the separation of powers but such can be inferred from the text of the Constitution. Constitutional Principle VI required the 1996 Constitution to have *a separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*<sup>90</sup>

The Constitutional Court has determined that the doctrine of the separation of powers is 'implied in or implicit to the Constitution'.<sup>91</sup> The court recognised that the separation of powers doctrine is novel to the South African system and could impede government

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<sup>89</sup> Note 62

<sup>90</sup> Ian Currie & Johan de Waal 'The Bill of Rights' Fifth Edition.

<sup>91</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883.



decision-making. In order to counter this problem, it was charged that ‘over time our courts will develop a distinctively South African model of separation of powers, 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’.<sup>92</sup>

The doctrine of separation of powers requires the functions of government to be classified as legislative, executive or judicial and requires each function to be performed by separate branches of government.<sup>93</sup> The “executive” can be taken to refer to the party-political appointees who collectively head the government, whether it be at the national, provincial or local government.<sup>94</sup>

The fact that the “executive” is constituted ‘of political appointments creates the erroneous impression that all decisions taken by these functionaries are of a political nature and therefore insulated from judicial scrutiny’.<sup>95</sup> At the national level of government, for example, the executive consists of the President, the Deputy President, the Ministers and the Deputy Ministers.<sup>96</sup>

The separation of powers doctrine does not operate in isolation as it is ‘intertwined with the deference principle’<sup>97</sup>. In turn, the deference principle is ‘tied to the notion of variability - the fairly simple idea that the grounds of review need not be applied in an

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<sup>92</sup> Note 58 above.

<sup>93</sup> Note 73 above.

<sup>94</sup> Ibid.

<sup>95</sup> Idem.

<sup>96</sup> Idem.

all or nothing fashion, and that the intensity of judicial scrutiny may vary according to context'.<sup>98</sup> The tension that often arises between the executive and the judiciary is mirrored in a proper application of the deference principle.

Hoexter asserts that 'the proper meaning of judicial review is one that should not be confused with submissiveness to the other branches of government or the abdication of judicial responsibilities'<sup>99</sup>. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*<sup>100</sup>, O'Regan J eloquently described the nature of deference, emphasising that in treating administrative decisions with respect a court is not expressing servility but simply recognising the proper role of the executive within the Constitution.

There is a raging debate in South Africa about the role of the judiciary seen against those of the other spheres of government. There is a view that South Africa is being ruled by the courts and in the opinion of Blade Nzimande<sup>101</sup>, there is a need for a national debate on the separation of powers and the role of each arm of the state. Nzimande refers to sections of the judiciary, which he describes as an important but in many respects a still largely untransformed pillar of our constitutional democracy, seem to be deliberately overreaching into the spheres of the other arms of the state.

#### 4.7 The principle of Deference and Respect

The Constitution requires that the three branches of government must operate with deference and respect of each other's powers and must not intrude into the terrain for which they are not permitted by law. However, there have been perennial complaints that the judiciary is in the habit to interfere with the exercise of power by the other two

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<sup>98</sup> Idem.

<sup>99</sup> Idem.

<sup>100</sup> *Bato Star Fishing ( Pty) Ltd v Minister of Environmental Affairs* [2004] ( 4) SA 490 (CC)

<sup>101</sup> Blade Nzimande is SACP General Secretary, and he made a speech to Popcru National Congress on June 15 2015, titled "It's time for a debate on the separation of powers". taken from [www.politicsweb.co.za](http://www.politicsweb.co.za) website on 17/06/2015.

arms of government and there have hardly been complaints worth attention that the parliamentary arm of government would like to wrestle power from the judiciary.

It has almost always been the judiciary which was seen as not paying adequate deference and respect to the executive arm of government.

Hoexter provides context to this problem by alluding to the fact that 'given that no action seems to be entirely beyond judicial review, and given the wide (and constantly expanding) range of grounds of review at the disposal of the courts, it is essential that the courts be able to justify their intervention or non-intervention in administrative matters'.<sup>102</sup> The courts must not be seen as the evil as they derive their existence and powers from the Constitution. In her public lecture, Kate O'Regan reflected that 'the Constitution makes plain that the judicial authority of the Republic is vested in the courts and that they are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.<sup>103</sup>

O'Regan J alludes to 'the difficult area of constitutional jurisprudence that involves the relationship between the executive and the judiciary'<sup>104</sup>. But it would appear that the courts are the arbiters of the question when to pay deference and under which circumstances. The other arms cannot second-guess the decision-making of the courts in this regard. It creates the impression that the courts are not equal to the other arms of government and when they make mistakes, there are no consequences. O'Regan J reflected on two occasions when the courts recognised that the presidential powers conferred specifically on the President by section 84(2) of the Constitution,

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<sup>102</sup> Note 24 above.

<sup>103</sup> Kate O' Regan 'Checks and Balances Reflections On the Development of the Doctrine of Separation of Powers Under the South Africa Constitution' FW De Klerk Memorial Lecture Delivered at Potchefstroom 10 October 2005.

<sup>104</sup> Ibid.

despite their clear executive character under our Constitution justiciable to some extent.

It was pointed out that in Hugo's case, 'the court held that the power to pardon offenders was nevertheless justiciable, and in SARFU 3, the court held that the power to appoint commissions of inquiry was similarly justiciable on limited grounds'<sup>105</sup>. There can never be any doubt that the court had intruded into the executive terrain and there was nothing that the executive could do about it. It is sometimes left to the higher courts to rein in the lower courts for going beyond their scope of review.

O'Regan J refers to the SARFU 3 case to support the foregoing submission. In SARFU 3, 'the High Court had called the President as a witness in a dispute surrounding the appointment of a commission of inquiry'<sup>106</sup>. At the time, there was a huge uproar about the demeaning effect that such a summons would have on the first black President, Nelson Mandela and the judiciary came under severe attack as a bastion of apartheid and white superiority. The court responded rather bluntly to the question whether courts could call the President as a witness and reasoned:

'A review of the law of foreign jurisdictions fails to reveal a case in which a head of State has been compelled to give oral evidence before a court in relation to the performance of official duties. Even where a head of State may be called as a witness, special arrangements are often provided for the way in which such evidence is given. There is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid

time however the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded'.

The logic of the court in this case is rather startling. The court acknowledged that there was no precedent to follow in our law and then it also could not find any authority in foreign jurisdictions on the question. That did not stop the court from hauling President Mandela before the courts and responding like no other statesman in the world, Mandela obliged and appeared before the courts. That Mandela did not consider himself to be above the law does not justify the disrespect accorded to the office of the President. O'Regan J reminded the courts to be sensible to the legitimate constitutional interests of the other arms of government and ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and legislature.

Hoexter draws 'the parallel between the justification for intervention of the courts during apartheid and in the democratic state and points that the red-approach justification for the courts to intervene served well enough during the long years of political and legal oppression, but it is surely out of step with a democratic constitutional order and the heightened political role which the courts are required to play in a climate of constitutional justification'<sup>107</sup>. There are views that express the changed role of the courts as arbiters of disputes between parties or as the custodian of good governance to being political umpires between the ruling party and the opposition parties. This changed role underscores the concern expressed by Hoexter<sup>108</sup> in which 'the heightened political role cautions against the courts assuming an activist role to intervene at whim'. However, a proper application of deference must

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<sup>107</sup> Note 24 Above.

<sup>108</sup> Ibid.

not result in ‘abstentionism or total submissiveness to the other branches of government, evoking old South African nightmares of judicial prostration to the dictates of the executive’.<sup>109</sup>

Hoexter in reference to the decision of O’Regan J in *Bato Star* points that ‘the court found that the nature of deference does not entail servility as much as it is about recognising the proper role of the executive within the Constitution’.<sup>110</sup> O’Regan clarified that respect in the context of the separation of powers doctrine entails that:

‘ a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field...A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker’.

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

## CHAPTER 5

### GENERAL CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Develop a Code or Principles of Conduct to guide relations between the Executive and the Judiciary.

In relative terms South Africa's constitutional democracy is still young and the new ethos have not filtered through the systems of governance. There is general mistrust about the motives of each functionary. On the one hand, the judiciary perceives the executive as being all too powerful and arrogant to the point of ignoring court orders whilst on the other hand, the executive perceives the judiciary as a know-it-all unelected functionary whose duty is to impede government in its mandate to govern.

In the context of a history of apartheid, the tensions between the executive and the judiciary is heightened than it would be the case elsewhere in the world. In his address to the Australian Bar Association Conference, Justice McHugh AC had this to say about the tension between the executive and the judiciary:

'Tension between the Executive and the Judiciary is inevitable. It is unrealistic to think that it can be eliminated. But it can be reduced, if the Executive and the Judiciary recognise that each has a role to perform and that each is better equipped to carry it out than the other'<sup>111</sup>.

The epoch meeting that took place between the heads of the judiciary and the executive could be the starting point for an establishment of a working group to develop a code or principles of conduct that must guide the relations between the

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<sup>111</sup> Note 23 above.

executive and the judiciary. Neither the executive nor the judiciary can claim high moral ground as they can learn from one another and cultivate better relationships for the good of the country. It would be important to acknowledge that each functionary has genuine concerns about the exercise of power by the other but the manner in which these concerns are articulated must reflect the constitutional value of a social justice and human rights.

The Code or Principles must also incorporate compulsory training in constitutional and administrative law for both the executive and the judiciary. The role of each arm of government must be set out clearly in the Code and efficient redress mechanism must be established to address complaints. The concept of the rule of law and separation of powers need to be distilled in the minds of the executive for an informed engagement with the judiciary. In the same vein similar initiatives are required for judges to understand and support the transformative trajectory of the government of the day and tread carefully so as not to set aside legitimate government policies aimed at transformation of the society.

## 5.2 Sustaining Public Confidence in the Judiciary

For our democracy to thrive and become alive to the ordinary citizens, public confidence in the judiciary system is sacrosanct. In the words of the former Chief Justice Ngcobo<sup>112</sup>, and in answering why public confidence is important, he stated that 'it is because public confidence is necessary for the effective performance of judicial functions'. But a question does arise and it is who is responsible for the attacks on the judiciary and what is the role of the judiciary in the whole scheme of things?

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<sup>112</sup> S Sandile Ngcobo 'Sustaining public confidence in the judiciary: An essential condition for realising the judicial role' SALJ Vol 128 (Part 1) 2011



In the opinion of Justice Ngcobo public confidence can be fostered through respectful acceptance of court decisions. In this regard Ngcobo J reasoned that ‘the rule of law depends upon peaceful acceptance of those decisions, and compliance with court orders, even if they are strongly resented’<sup>113</sup>. In this regard, what Ngcobo J proposes is that once a court order has been issued, it must be complied with without question, unless it is set aside or stayed.

Justice Ngcobo reflects on the public trust issue in the judiciary and quotes Justice Barak who observed that trust in the judiciary:

‘means confidence in judicial independence, fairness, and impartiality. It means public confidence in the ethical standards of the judge. It means public confidence that judges are not interested parties to the legal struggle and that they are not fighting for their own power but to protect the constitution and democracy. It means public confidence that the judges do not express his or her own personal views but rather fundamental beliefs of the nation’<sup>114</sup>

Much as we may like to portray the judiciary as a righteous and conscientious arm of government guided by the desire to enforce the rule of law and prevent abuses of power by the executive, judges do err and it is those mistakes that may create perceptions of travesty of justice and in turn, contribute to the loss of public confidence in the judiciary. In reference to Justice Barak, Justice Ngcobo offers the following ways as being critical to the maintenance of public confidence in the judiciary:

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<sup>113</sup> Idem.

<sup>114</sup> Idem.

- '(a) The judge ought to be aware of his or her power and its limits. Due to the greater power that is reposed in a judge in a democracy, there is potential for abuse of power by judges.
- (b) A judge must admit his or her mistakes. We are human and therefore fallible. Judges must have the humility and courage to accept and correct their mistakes.
- (c) Judges must display modesty and absence of arrogance in their writing and thinking.
- (d) Judges must be honest. If they have created a new law they must admit it. Honesty builds confidence.

Only if judges could indeed avail themselves to read the wise words of Justice Barak we may begin to see a mature engagement between the executive and the judiciary.

### 5.3 Concluding Remarks

The South African dream must belong to all people and the courts must ensure that the lives of ordinary people are transformed by paying adequate attention to their role whilst at the same time holding the executive arm of government to accountability. There has to be mutual respect fostered by the respective heads of the two arms of government and filtered down to functionaries within those spheres.

The rule of law is sacrosanct and must mean the same thing to everyone. The judges must clearly avoid playing politics and apply the law in a manner that achieves the good for the country. The executive must clearly educate itself on the proper scope of its powers to understand that there are no unbridled powers in a constitutional

democracy. The exercise of all powers must conform to the Constitution. Reckless statements from the executive that conflates the duty to the country and his political party does not assist in fostering conducive relations between the executive and the judiciary. South Africa's constitutional democracy is still young and many lives and hopes are predicated on the ideals of the Constitution. It is incumbent upon the executive and the judiciary to conduct their affairs in a manner that promotes cooperation and good governance.

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