

Chapter 12

Separation of Powers

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12.1 Introduction

The adoption of the Interim¹ and subsequently the Final Constitution² is often lauded as the major milestone in the attainment of freedom in South Africa. As important a milestone as the adoption of these two Constitutions was, however, it is arguably the governmental structures that these Constitutions established that have been most vital in ensuring that South Africa continues to develop as a constitutional state, i.e. a state in which political power is restricted in various ways and in which the Constitution serves as the standard for the legitimate exercise of public power.

Constitutional restrictions on public power may be both procedural and substantive. The focus of substantive restrictions is an entrenched and justiciable bill of rights and a commitment to certain foundational values, such as the rule of law. The separation of powers falls on the procedural side, although its purpose is related to substantive interests: it is a means to ensure the protection of individual rights by way of the distribution of political power between different institutional actors, and includes mechanisms to ensure that such power is not unduly exercised. The idea behind separation of powers is that a concentration of power will most likely lead to self-interested action and abuse of power for personal gain. Historical experience suggests that benign dictators, who rule wisely, judge fairly and generally advance everyone's welfare, are very hard to find — if such people ever existed. The underlying idea beneath any separation of powers doctrine is thus the sceptical assessment that good governance is more likely when political power is distributed between different institutions and persons.

Separation of powers is the basis for an institutional, procedural and structural division of public power to create conditions that place human rights at the centre of society. Both from an institutional and structural point of view, such a constitutional principle is an essential aspect of promoting and securing the entrenchment of South Africa's nascent constitutional democracy. Separation of powers — as well as democracy and the rule of law — are therefore linked to the constitutional project of creating a society founded on the recognition of human rights, peaceful co-existence and development opportunities for all South Africans. The objective of separation of powers is to curtail the exercise of political power to prevent its abuse — meaning the violation of human rights. This instrumental function of separation of powers as an institutional mechanism to protect human rights is the reason why the combination of these two ideas (separation of powers and human rights) has been called the 'core of constitutionalism'.³ And it is these features that have ensured that there really has been a decisive break from the past constitutional system in South Africa.

Separation of powers means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence and

1 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

2 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

3 Jan-Erik Lane *Constitutions and Political Theory* (1996) 25. See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 8.

jurisdiction. Separation of public powers is, in short, separation of public institutions (legislature, executive and judiciary) and of public functions, i.e. the making of law, law application and execution, and dispute resolution. Functional distribution leads to specialization and this, in turn, enhances state efficiency — the second rationale for separation of powers. In US constitutional law, the argument that a proper division of public functions and their attribution to particular institutions helps government to perform better was employed to justify a strong executive with a powerful President at its helm.⁴ More generally, the underlying idea is that particular institutions are particularly well equipped to perform a particular function. In complex modern societies with numerous stakeholders and multifaceted decision-making processes, this argument takes account of the level of specialization and expertise required for the delivery of 'good governance'. When only people who know what they are talking about are involved in the decision-making process it is more likely that the outcome will be just and equitable and serve the public good. This argument thus relates to the first rationale of separation of powers, i.e. prevention of the abuse of power. On the other hand, the efficiency rationale has lost some of its force due to the fact that pure efficiency has to be limited to some degree to ensure that all relevant considerations in the decision-making process are taken into account. Unhindered technocratic rule by experts (not questioning their knowledge of the subject at all) may lead to institutional deafness and ignorance of the plight of others and, in the worst case, to exactly the kind of human rights violations and abuses of power the Constitution aims to prevent. The prevailing purpose of checks and balances as part of the separation of powers doctrine is therefore to ensure that institutions do not become too self-centred in their conduct, even if they are thus impeded in efficiently fulfilling their functions to a certain extent.

This chapter engages in a detailed analysis of the import and impact of the doctrine of separation of powers in the development of South Africa's constitutional law. Before moving to consider exactly how the doctrine has manifested itself in the South African context, the first part of the chapter will briefly consider the doctrine's origins and its profound influence on the development of the modern democratic state premised on the idea of limited government. This analysis will seek to show that the doctrine's success as a means of establishing a fairly predictable set of structured constitutional arrangements has resulted in a growing tendency to emphasize the doctrine's form over its substance.

In the second part of the chapter the focus will turn to a consideration of how the doctrine has been incorporated in the text of the Final Constitution, in spite of the fact that the constitutional text makes no reference — direct or indirect — to separation of powers. In this section it will be shown that, rather than slavishly

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following other states' interpretation of the doctrine, the drafters of the Final Constitution incorporated the idea of separation of powers in a manner that was 'distinctively' conceived to meet South Africa's peculiar needs and context. Further, this section will commence with the consideration of the Constitutional Court's jurisprudence on separation of powers. This analysis will be prefaced by a consideration of the Court's own role with respect to the development of the separation of powers as a justiciable doctrine, particularly in light of its own far-reaching powers of judicial review.

4 Geoffrey Stone, Louis Seidman, Cass Sunstein, Mark Tushnet & Pamela Karlan *Constitutional Law* (5th Edition, 2005) 363.

The final part of the chapter will engage in an analysis of the Constitutional Court's separation of powers jurisprudence and in so doing identify some important emerging features and principles. Although the development of this jurisprudence has necessarily been conducted on a case-by-case basis, a cumulative reading of the Constitutional Court's judgments illustrates that the doctrines and principles identified in this chapter have heavily influenced the Court's goal of distilling a 'distinctively South African model of separation of powers'. This section further seeks to demonstrate that, although the judgments discussed go a long way towards illuminating the separation of powers doctrine in South Africa, the Constitutional Court's conceptualization of this doctrine is, much like South Africa's overall constitutional project, an ongoing enterprise to which there are no full and final answers.

12.2 Origins and conceptual framework of the separation of powers doctrine

(a) 'Power arrests power': the historical development of the idea of separated powers

The articulation of an explicit doctrine of separation of powers as a distinct explicatory theory of governance is generally thought to have its origin in the political philosophy of the age of Enlightenment in seventeenth-century Europe, when political thinkers started to challenge the unlimited might and arbitrariness of an absolute monarch. However, its basic aim is much older, i.e. to find a structure of government that prevents the accumulation of too much power in one institution. Mitigating power by way of diffusion has been a feature common to many societies for ages, even when they have followed a strictly hierarchical system of government.

For example, in pre-colonial southern African societies, no separation of powers technically existed, because traditional leaders performed all functions of government, including dispute resolution.⁵ However, traditional leaders were always expected to consult with an advisory body (usually consisting of senior

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members of the society) or seek the approval of a popular assembly. As Tom Bennett and Christina Murray point out, even without formal constraints, no important decision could be taken without discussion in the council, giving the members of the group (or their representatives) opportunities to check self-interested action and effectively limit the power of the ruler.⁶

The idea that the accumulation of power can be (best) prevented by the introduction of distinctive institutions with defined functions, areas of competence and jurisdiction, which exercise public power in mutual co-operation, was foundational to the Roman republic of the sixth century BC. While the senate, a body of up to 600 men from (mostly) Roman nobility, engaged in general policy debates, made important decisions (such as decisions about entering into war and suing for peace) and controlled the treasury, administrative and judicial functions were transferred to annually elected officials (collectively called magistrates) with titles

5 See Tom Bennett & Christina Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26, § 26.6(c).

6 Bennett & Murray (supra) at §§ 26.2, 26.6(c)(iii).

like consul or praetor depending on their rank and responsibilities. These were elected by assemblies (the *comitias*) representing the Roman people.

Much of the theoretical groundwork for such an arrangement was laid by the Greek philosopher Aristotle, who formulated the idea of a threefold division of public power as one of the requirements of a good constitution. Aristotle saw three elements in every constitution: the deliberative element (responsible for law-making and other important decisions), the element of the magistracies (everything concerning the day-to-day 'running' of the state) and the judicial element.⁷ In his view, when the drafters of a Constitution had reached the best arrangement for each of the three elements, and they were all acting in the right 'proportion', the Constitution as a whole would work well. This background in Aristotelian theory and Roman practice was not lost and influenced the scholarly debate on how societies ought to be structured for centuries — although, in practical terms in medieval Europe, state power became increasingly concentrated in single rulers.⁸

The emergence of all-powerful, absolute rulers whose authority was not restrained, balanced and countered by other institutions led to the revitalization of separation of powers ideas in the seventeenth century. At that time, these ideas were influenced by the developing liberal notions of personal freedom and civil liberties. Aristotle had focused on the well-being of the community as a whole, the *polis*, and only indirectly on the individual. During the period of the Reformation and the Renaissance, however, a growing emphasis was placed on the fact that public power should be exercised in the interests of the governed. Absolute monarchs could not be trusted in this regard, as 'there is the danger that they will think themselves to have a distinct interest from the rest of the Community.'⁹

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Thus, the idea that public power must be distributed and controlled was developed with a view to the accountability of government to the will of the people. The basis for today's notion of separation of powers was laid with the functional understanding that democracy and the rule of law require both the division of powers and mutual checks and balances. The main proponents of this idea were John Locke (1632–1704), Charles Baron de Montesquieu (1689–1755) and James Madison (1751–1836).

Locke's work was based on his experiences with the Civil War in England around 1650 and the Revolution of 1688, when King James II of England was overthrown by a union of parliamentarians, which effectively ended absolute monarchy in Britain by circumscribing the monarch's powers. Although supportive of this development, Locke's concern was that absolute monarchical power should not just be replaced by absolute parliamentary power. In his view, the concentration of influence in any one institution entailed an inherent danger:

[I]t may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the

7 Aristotle *Politics* Book IV, Chapter 14. In modern terms, Aristotle's drew a distinction between state organs and state functions.

8 MJC Vile *Constitutionalism and the Separation of Powers* (1967) 40; Lane (supra) at 22–25.

9 John Locke *Two Treatises of Government II* (1688) Chapter XI para 138.

Laws they make, and suit the Law, both in its making and execution, to their own private advantage.¹⁰

Locke was influenced by natural law assumptions such as that all men are by nature free and equal and that legitimate governments are those which have the consent of the people. For this reason, there was a need 'to think of methods of restraining any exorbitances of those to whom [the people] had given the authority over them, and of balancing the power of government, by placing several parts of it in different hands'.¹¹ This was Locke's essential thought: separation of powers as a means to counter the power-accumulating tendencies of human nature. To prevent arbitrariness, his prescription for the executive power (in his view, the King) was that it should not be concerned with law-making, while the legislature, on the other hand, should only be concerned with the passing of general rules and, equally important, should be dissolved on a regular basis so that it would consist of different people from time to time.¹²

Although quite revolutionary for his time, Locke's understanding of separation of powers differed in important ways from later conceptions of this doctrine. First, Locke still saw the judicial function as part of the executive, as it was for him part of the implementation of abstract legal rules.¹³ Secondly, advocating the

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then emerging English model of parliamentary supremacy, he did not think of an effective *institutional* counterbalance to the legislature, but only of procedural restraints.¹⁴

The division of state power between three distinctive institutions was introduced by Montesquieu, who is generally credited with devising the modern conception of separation of powers. Montesquieu's singular contribution was to conceive the judicial power as an independent state function, thereby treating it as a form of power equivalent to legislative and executive power, and laying the theoretical basis for the independence of the judiciary.¹⁵ Montesquieu conceived his theory as an empirical study in which he examined all kinds of regimes present and past. In this endeavour, he started from a rather gloomy view of human nature, similar to that of

10 Locke (supra) at Chapter XII, para 143.

11 Locke (supra) at Chapter VIII, para 107.

12 See FA Hayek *The Constitution of Liberty* (1960) 170.

13 Locke divided state functions mainly between law making (legislative power) and law implementation, including adjudication (executive power). He nevertheless advocated three distinctive governmental powers because he distinguished between internal 'executive power' (where the executive was subject to the control of the legislature) and external 'federative power', i.e. foreign affairs, which cannot be conducted subject to predetermined abstract legal rules and in which the executive is not subject to the control of the legislator. See Vile (supra) at 66-67.

14 See Vile (supra) at 68-70.

15 Although Montesquieu did not accord the judicial branch an exactly equal status with the legislative and executive branches of government, he clearly intended the judiciary to be independent of the other two. See Vile (supra) at 96.

Locke: human beings in power have the tendency to abuse it.¹⁶ But Montesquieu thought that such tendencies need not prevail because the structure of government, as embodied in the constitution of a nation, could make a difference.

For Montesquieu, the separation of powers doctrine was foundational to any constitution that sought to prevent the abuse of power and advance personal freedom:

[There is no] liberty if the power of judging is not separate from legislative power and from executive powers. . . . All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.¹⁷

Jan-Erik Lane has noted that Locke's constitutionalism is focused on the concept of limited government, of restrained and restricted political power to ensure the liberty of the individual, while Montesquieu focused on the fact that such liberty is most likely to survive in a state where executive, legislative and judicial power are not in the same hands.¹⁸ What they had in common was that they regarded separation of powers as a means directly to prevent the accumulation of power and, even more importantly, indirectly to ensure that every member of society enjoyed individual rights and freedoms.¹⁹

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Montesquieu's point was that separation of powers was crucial for good government. He believed that only the separation of powers would create a situation in which the common good would be advanced. Some 50 years before the Jacobins in the aftermath of the French revolution would disguise their reign of terror as a reign of virtue, Montesquieu strongly emphasized that even a government with the best intentions needed to be limited: 'Is it not strange, though true, to say that virtue itself has need of limits?'²⁰

Additionally, Montesquieu realized that limitations imposed by procedural or even substantive laws would not suffice to prevent the abuse of power. Instead, such legal limitations had to be supported by alternative sources of political power, which also

16 Montesquieu *The Spirit of the Laws* (1748, translated and edited by Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone, 1989) Book XI Chapter 4 155 ('. . . it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.')

17 Montesquieu (supra) at Book XI Chapter 6 157.

18 See Lane (supra) at 39.

19 It was exactly this focus on individual liberty that persuaded writers advancing communism or socialism to reject the idea of separation of powers. A government of the working class demanded absolute accountability of every state function to the 'masses'. Mutual checks and balances are unnecessary where 'revolutionary forces' exercise all power and control all state functions. For an appraisal of the apparent mixing of state functions during the short-lived Paris Commune of 1871 by Karl Marx, see Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, A Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10, § 10.2(a).

20 Montesquieu (supra) at Book XI Chapter 4 155 ('Qui le dirait! La vertu même a besoin de limites.' Some English editions have used a different translation more congruent with the French original: 'Who would think it! Even virtue has need of limits.')

meant bringing social forces into consideration.²¹ To make separation of powers work, a Constitution would have to distribute power between the different branches of government: 'To prevent this abuse, it is necessary from the very nature of things that power arrests power.'²²

James Madison later picked up on this insight (though without explicitly referring to Montesquieu) when he outlined the structure of the US Constitution:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.²³

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Hannah Arendt has called Montesquieu's insight the 'forgotten principle underlying the whole structure of separated powers', because it realizes that power must be limited and kept intact at the same time. Separation of powers must not have a disabling, but an enabling function:

Power can be stopped *and* still be kept intact only by power, so that the principle of the separation of powers not only provides a guarantee against the monopolization of power by one part of the government, but actually provides a kind of mechanism, built into the very heart of government, through which new power is constantly generated, without, however, being able to overgrow and expand to the detriment of other centres or sources of power.²⁴

As much as Montesquieu made one of the most enduring conceptual contributions to today's understanding of the separation of powers doctrine, he did not outline institutional mechanisms to serve his ideal. The task of putting Montesquieu's ideas into practice was left to James Madison and his fellow 'founding fathers'. Drawing on their experience with the far-reaching powers of colonial governors, the framers of

21 Montesquieu placed great emphasis on the accommodation of the different strata of society, in particular the nobility, of which he himself was part. To separate powers not only according to their function, but also along social lines was of great importance to him: 'Here, therefore, is the fundamental constitution of the government of which we are speaking. As its legislative body is composed of two parts, the one will be chained by the other by their reciprocal faculty of vetoing. The two will be bound by the executive power, which will itself be bound by the legislative power. The form of these *three* powers should be rest or inaction.' Montesquieu (*supra*) at Book XI Chapter 6 164 (my emphasis). Although Montesquieu does not mention the judiciary in this context, he nevertheless speaks of *three* powers. Instead of state powers here he has social powers in mind, referring to the monarch as the head of the executive, the nobility (comprising the upper house of Parliament) and the bourgeoisie, represented in the second chamber or lower house of Parliament. This class emphasis is also visible from his argument that members of the aristocracy should not be judged in the ordinary courts of law, but in courts made up of their peers, because 'important men are always exposed to envy; and if they were judged by the people, they could be endangered . . .' Montesquieu (*supra*) at 163.

22 *Ibid* at Book XI Chapter 4, 155 ('Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.') Depending on the translation, the last part of this sentence may read 'power must be a check on power'.

23 Alexander Hamilton, James Madison & John Jay *The Federalist Papers No 51* (1788, JM Dent Edition, 1992) 266 ('*The Federalist*').

24 Hannah Arendt *On Revolution* (1963) 151-152 (emphasis in the original).

the early American constitutions ensured that the principle of separation of powers played a central role in the structures of government for the first time.²⁵ They started from the same assumption as Montesquieu, i.e. that the division of power is essential to prevent its abuse:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.²⁶

One important aspect in the American implementation of the doctrine was the distinction between a Constitution and ordinary legislation. For the majority of Americans at the time, the distinctive source of political power was the people. It was the people who constituted the state and expressed their will in the form of a written Constitution.²⁷ Against this, the legislature had only a delegated power, which needed to have limits, too. However, early experiences with some State Constitutions and their systems of separated powers had shown that a simple

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division of functions had neither sufficiently acknowledged the idea of popular sovereignty, nor restricted the legislatures to the passing of general rules. Instead, the State legislatures had slowly absorbed more and more powers.²⁸

The problem of how to place limits on the legislature was thus the background against which the drafters of the US Constitution, based on their reading of Montesquieu, concluded that a strict separation of powers would not prevent the accumulation of power.²⁹ To put the principle that 'power arrests power' into practice, it would instead be necessary to draft a Constitution 'in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.'³⁰

25 See, for example, the Constitution of Virginia of June 29, 1776 (Not to be confused with the Virginia Bill of Rights of June 12, 1776): 'The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the justices of the county courts shall be eligible to either House of Assembly.'

26 Hamilton, Madison & Jay *The Federalist No 47* (supra) at 247 (Madison placed great emphasis on the fact that a majority could abuse its power, too, and act contrary to the interests of a just society. 'It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger. . .' *The Federalist No 51* at 267-268.)

27 See Vile (supra) at 158-159.

28 See Hamilton, Madison & Jay *The Federalist No 48* (supra) at 254 ('The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.')

29 Hamilton, Madison & Jay (supra) at 257 ('[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.' In his writings, Madison pointed out several times that it was fully in line with Montesquieu's theory to allow for some mutual interference between the different branches of government.)

The idea of 'checks and balances' as a complement to the mere separation of powers was the decisive innovation. Although in a sense a breach of the doctrine, the Americans realized that checks and balances were nevertheless necessary to the successful application of the separation of powers. In the Constitutional Convention of 1787, Madison argued that the introduction of a balance of powers and interests would add a defensive power to each department to maintain the theory of separation of powers in practice.³¹ As checks and balances concerned institutions, which had to be linked in order to exercise control over each other, Madison pointed out that the emphasis in separation of powers should lie in the persons, rather than in their functions. In this way, different institutions might well have a share in the same state function (e.g. the passing of legislation by the legislature and its signing into law by the head of the executive), but the personnel of government were to be kept strictly separate.

With the ratification of the US Constitution, the modern understanding of separation of powers, including the elements of division *and* interdependence between different branches of government, was established:

The constitutional convention of 1787 is supposed to have created a government of 'separated powers'. It did nothing of the sort. Rather, it created a government of separated institutions sharing powers.³²

With this development also came a giant conceptual leap for modern constitutionalism in general — the idea that, to keep not only the government but also the legislature in check, something higher than law is needed, something that

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determines the legitimacy of all public power. This was the idea of a Constitution as a fundamental law of special rank and status superior to the ordinary law. As stated in Article 16 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789: 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.'

In the final stage of this process, the connection between the idea of constitutional supremacy and the doctrine of separation of powers led to the development of judicial review of Acts of Parliament in the US, according to the argument that the distinction between a Constitution and a law enacted by the delegated power of the legislature demanded that the judiciary should act as the final arbiter of whether the constitutional limits on the legislature had been observed.³³ Although judicial review was not originally set out in the US Constitution of 1787, and only later developed by the US Supreme Court, it is today part of the fabric of many constitutional states, such as the US, Germany, and South Africa.

30 Thomas Jefferson *Notes on the State of Virginia* (1781) Query 13, 4.

31 James Madison 'Records of the Debates in the Federal Convention of 1787' Notes of July 21, 1787.

32 Richard E Neustadt *Presidential Power: The Politics of Leadership* (1966) Chapter 3: 'The Power to Persuade' 33.

33 See Hamilton, Madison & Jay *The Federalist No 78* (supra) at 400 ('It is not . . . to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.')

(b) Constitutionalism, 'checks and balances' and the 'pure form' of separation of powers

The modern notion of separation of powers as a foundational concept in constitutional law is often said to be premised in organizational theory and therefore primarily concerned with the design of ideal structural and institutional arrangements. Fuelled, further, by the adoption of formal written constitutions encapsulating constitutional rules and arrangements as a *modus vivendi*, separation of powers is often depicted as a depoliticized, and purely formal, justificatory or descriptive theory of governance.³⁴

It is in line with such formalist notions that a 'pure form' of separation of powers has evolved. The doctrine in its 'pure form' has been described as requiring the strictest adherence to the following three principles:

- the division of governmental power into the three branches: legislative, executive and judicial, with no control or interference by one on the other;
- the separation of functions; and
- the separation of personnel.³⁵

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This pure form of separation of powers emphasizes *negative* limits on the powers of political actors in a society. The existence of several autonomous decision-making bodies with distinctive functions is considered a sufficient safeguard against the concentration and abuse of power. Simply by allocating different functions to different people, each of the branches will be a check on the others and no single group of people will be able to control the machinery of the state.³⁶ The 'pure form' of separation of powers could thus be said to represent a theoretical highpoint at which the doctrinal prescripts are achieved and governmental power is truly separated.

The problem with this negative or pure understanding of separation of powers, however, is that it does not provide for the situation when one of the branches of government (or the people who control it) nevertheless attempts to enlarge their power by encroaching upon the functions of another branch. How are they to be stopped? This inadequacy has led to the modification of the separation of powers doctrine in line with the idea of checks and balances, as described above. The introduction of checks and balances brought *positive* elements to the doctrine of

34 See Martin Loughlin 'Constitutional Law: The Third Order of the Political' in Nicholas Bamford & Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (2003) 27–51, 46–49.

35 See Vile (supra) at 14 ('A pure doctrine of separation of powers might be formulated in the following way. It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive and judicial. Each branch of government must be confined to its own function and not allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.') See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 19 (On an 'absolute' separation of powers.)

36 See Vile (supra) at 14, 19.

separation of powers, such as the right of the executive to veto legislation, the power of the legislature to impeach the (head of the) executive, or the power of the judiciary to declare both acts of the legislature and the executive to be unconstitutional and void. As MJC Vile has put it, each branch was given the power to exercise a degree of direct control over the others by authorizing it to play a part, although only a limited one, in the exercise of the others' functions.³⁷

At the same time, a system of totally separated powers may lead to a diffused and uncoordinated exercise of power. The doctrine needs 'to avoid diffusing power so completely that the government is unable to take timely measures in the public interest'.³⁸ Thus, a doctrine of separation of powers needs not only to cater for the case where one of the branches exercises its power improperly. It also has to take account of the fact that, in modern societies, government may need to be organized in a co-ordinated manner to provide for solutions to complex problems.

The aim of checks and balances, therefore, was and still is to create links between the different branches of government to make government in general and the doctrine of separation of powers in particular more efficient. It is important that this deviation from the pure form should be limited: the basic idea of a division of functions remains and is only modified by the fact that each of the branches may assert some specifically defined authority in the field of the others. For example, the executive may have a share in the legislative process through its

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right to veto legislation, but may not legislate itself.³⁹ Thus, while the introduction of mutual checks and balances inevitably brings with it some deviation from a complete *separation* of powers, it is in the overall interests of an effective balance between different centres of power. Separation of powers requires independence as much as it requires interdependence. To quote MJC Vile again:

Without a high degree of independent power in the hands of each branch, they cannot be said to be interdependent, for this requires that neither shall be subordinate to the other. At the same time a degree of interdependence does not destroy the essential independence of the branches.⁴⁰

For these reasons, it is generally well accepted that in practice there is no constitutional system that either aspires or claims to implement the 'pure form' of the separation of powers.⁴¹ Instead, the importance of the 'pure form' of separation of powers can be said to be its utility as an analytical tool, in that by comparing constitutional arrangements as manifested in a particular constitution to the abstract principles embodied in the 'pure form', the existence of different models of separation of powers, ranging from the weak to the strong, becomes more evident.⁴² Informed by an individual state's particular history and values, the division of power, functions and personnel, and provision for checks and balances, may differ

37 Ibid at 20.

38 *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 60. For further endorsement of this proposition, see *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 24; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 15.

39 Note that in South Africa this right is limited by FC s 79 to questions of constitutionality.

40 Vile (supra) at 104.

significantly, despite the fact that the different states may all claim to have incorporated the same doctrine.⁴³

Therefore, as MJC Vile has quite incisively noted, the incorporation of separation of powers in a particular constitutional system should not be seen as an end in itself.⁴⁴ Instead, the extent of the actual incorporation of the doctrine within a nation's constitutional system should rather be viewed as being reflective of that

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nation's political choices and aspirations, whilst the 'pure form' of the doctrine merely serves as a useful analytical reference point informing the choice of appropriate constitutional principles, rules, processes and institutions.

(c) The different forms of separation of powers

The emphasis in the doctrine of separation of powers, both in its classical meaning and also in contemporary constitutional discourse, falls on the division of state functions between different institutions in one sphere of government. This distinction between 'branches' of government is based on Montesquieu's division of powers: that of making the laws, that of administering and executing these laws, and that of judging crimes or disputes between individuals. But besides this 'horizontal' separation of powers between different actors in the same sphere of influence, contemporary political and constitutional theory involves several other restrictions on political power by way of separating and dividing different spheres of influence.

An obvious division in this regard is the 'vertical' separation of powers in a state between the local, provincial and national levels of government (or 'spheres of government' as it is put in FC s 40(1)).⁴⁵ The entire notion of a federal system of government is based on the separation of powers: the political power of the central government in its different branches is restricted in some areas, which are the

41 See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 108 ('There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government over another, there is no separation that is absolute.') See also EFJ Malherbe & IM Rautenbach *Constitutional Law* (4th Edition, 2004) 78-79; Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 386.

42 See Ziyad Motala 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order' (1995) 112 *SALJ* 506-07. Motala notes that there are variations in constitutional models incorporating separation of powers with the US adhering to a model that requires a strict separation of personnel, whilst the model under the South African Interim Constitution (and Final Constitution) was a weaker version premised on a parliamentary system of government that does not envisage a strict separation of personnel, except where the judiciary is concerned.

43 The prevalence of governmental power being divided up between the three primary branches of the government in national constitutions is that even countries that do not claim to subscribe to the doctrine of separation of powers divide their power up in the same way. See for example, Hogg *Canadian Constitutional Law* (3rd Edition, 1992) 184 (Points out that 'there is no general' separation of powers. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only 'its own' function.) See also *ibid* at 243-44.

44 See Vile (*supra*) at 9-11.

domain of smaller territorial entities (the provinces or states).⁴⁶ In South Africa, these matters are defined as functional areas of exclusive provincial legislative competence, as set out in Schedule 5 of the Final Constitution.⁴⁷

This division of power between different levels of government as a means to restrict the power of the centre was already present in the feudal societies of medieval Europe and in this way provided the 'bedrock' for constitutionalist ideas about how to limit royal power and the later separation of powers doctrine.⁴⁸ The idea that smaller territorial entities could form their own government and exercise their own powers independent of, and autonomous from, a national, central or federal government was also a prominent consideration in the constitutional development of the US.

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In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [ie state and federal], and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.⁴⁹

Again, the separation of powers by way of federalism is not an end in itself, but a way to protect 'justice and the general good'. The delegation of political influence to smaller entities also helps to keep decision-making in line with local and regional demands, to ensure spending of public funds in a particular region (and not only in some far away capital city), or to provide generally for some degree of self-determination for one (ethnic or cultural) group on their 'home turf'. At the same time, federalism does not only divide powers between local, provincial and central political actors, but also between the different provinces. In that way, federalism provides for a territorial separation of powers: institutions of one province cannot exercise power on another province's territory.

Of course, as checks and balances accompany the traditional horizontal notion of separation of powers between different branches of government and thus ensure that no branch trespasses onto the other's competence, and that government is not diffused completely, similar interdependencies are part and parcel of the vertical separation of powers between the national and the provincial sphere, too. First, the

45 It has been pointed out that the Constitutional Assembly deliberately used the word 'sphere' instead of 'level' to emphasize co-ordination and different responsibilities, rather than competition and hierarchy. Stu Woolman, Theunis Roux & Barry Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14, § 14.1.

46 This is particularly true for the South African context as the creation of provinces was part of the historic power-sharing compromise between the old regime and the liberation movement. See Bertus de Villiers *The Future of Provinces in South Africa — The Debate Continues* Konrad-Adenauer Foundation Policy Paper No 2 (October 2007) Chapter 2.

47 For more details, see Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17, § 17.3(a).

48 See Jan-Erik Lane *Constitutions and Political Theory* (1996) 21.

49 Hamilton, Madison & Jay *The Federalist No 51* (supra) at 267.

institutional system of provincial government mirrors that in the national sphere, since in the provinces, too, the legislature and the executive are separated and control each other.⁵⁰ In South Africa, this replication does not apply to the judiciary, as this country does not distinguish between provincial and national courts, and has no courts administered by the provinces. Secondly, the provinces participate in the national legislative process through their representation in the National Council of Provinces.⁵¹

Additionally, the constitutional institution of regular elections can be understood as a means to separate power on a time-line basis. Elections serve the goal of allocating power temporarily to a particular group of representatives. The time factor is crucial, because it guarantees the intended accountability of the elected representatives. As long ago as John Locke it was pointed out that a democratically elected Parliament may be as bad as an unelected monarch, if the legislature is 'in one lasting assembly always in being',⁵² because such representatives will lose touch with the electorate over time and pursue only their own interests. Particularly since, between elections, voters have no control over the conduct of their

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representatives, the prospect that office-holders may not be re-elected and that they govern on borrowed time ensures that power is not misused.⁵³ Given this background, the Final Constitution is based on the founding value of regular elections (among other features of democracy) for the explicit purpose of ensuring 'accountability, responsiveness and openness' (FC s 1(d)). Regular elections from this vantage point prevent the accumulation of political power and a lack of responsiveness between the elected and the electorate, as envisaged by Locke.

The same argument, of course, is true for time limits in relation to the terms of office of political office-bearers, in particular, the executive. The fact that in South Africa no person may hold office as President for more than two terms (FC s 88(2)) is based on the idea that power accumulation through unlimited rule has to be avoided, not least because historical experience world-wide has shown that rulers who do not fear the possibility of electoral defeat tend to abuse their power.

More recent conceptions of separation of powers have emphasized that the formal notion that a completely independent legislature controls an equally independent executive is to a large extent illusory, and does not mirror real avenues of political influence.⁵⁴ In modern democracies, it is political parties which form governments on the basis of their majority in Parliament. The executive not only regularly comprises members of the legislature (e g FC s 91(3) explicitly requires the President to select the majority of Ministers from among the members of the

50 For more details, see Tshepo Madlingozi & Stu Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 19; and Christina Murray & Okeyrebea Ampofo-Anti 'Provincial Executive Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 20.

51 See Budlender (supra) at § 17.1(b); Madlingozi & Woolman (supra) at § 19.8.

52 John Locke *Two Treatises of Government* 2nd Treatise (1688), Chapter XI para 138.

53 See *United Democratic Movement v President of the Republic of South Africa & Others* (2) 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) at para 49.

National Assembly). Both the government and the underlying political party (or parties) have — at least in theory — the same political agenda. The political dividing line in a parliamentary system of government does not run primarily between government and Parliament, but rather between the government and the governing party in Parliament, on the one hand, and the opposition parties, on the other. Besides the constitutional separation of power between Parliament and the executive, there is a political separation of power between the governing party and the opposition. Although there are certainly members of the governing party in Parliament who take their oversight function seriously, controlling the political power of government is generally the task of the opposition party. Opposition parties may control the majority by way of public criticism and the constant promise they hold out, however hypothetical, of being voted into power.

Furthermore, because in modern democracies real political influence has shifted from the individual members of Parliament to their parties and, in fact,

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from constitutional organs to party committees, transparency in the decision-making processes of government has declined. This lack of transparency is partly remedied by the independent media, which ideally provides information for the general public so that officials can be held accountable and self-interested actions can be exposed. This check on government by way of exposure to public criticism, and the important political and social consequences associated with press coverage and the possibility of adverse public opinion, has led to the media being referred to as the 'fourth estate'.⁵⁵

The purpose of pointing out the separation of powers dimension of these different institutions is to show that features and institutions based on the idea of separation of powers are found throughout the Final Constitution — although the phrase itself is not mentioned in the Constitution. In this fashion, other ways of dividing power may be added.⁵⁶ While not all of these ways are necessarily derived from the doctrine of separation of powers in the strict sense, they perform the common service of preventing the accumulation of too much power in one institution.

12.3 Separation of powers under the South African constitution

54 See Eberhard Schuett-Wetschky 'Gewaltenteilung zwischen Bundestag und Bundesregierung? Nach dem Scheitern des Gewaltenteilungskonzeptes des Parlamentarischen Rates: Gemeinwohl durch Parteien statt durch Staatsorgane?' in Klaus Dicke (ed) *Der Demokratische Verfassungsstaat in Deutschland* (2001) 67-117.

55 The term 'estate' here is derived from the French 'état', referring to a particular social class, such as the clergy, nobility and commons (basically ordinary citizens). The term 'fourth estate' for the press as a powerful social force is usually attributed to the eighteenth-century English theorist Edmund Burke. See Julianne Schutz *Reviving the Fourth Estate — Democracy, Accountability and the Media* (1998) 47-48.

56 For example, the German political scientist Winfried Steffani has identified a 'constitutional level' of separation of powers, which requires that some decisions need a qualified higher majority in Parliament, a 'decisionmaking level' that takes the different stakeholders of civil society in the formulation of policy decisions into account, and a social separation of powers that recognizes unequal distribution of influence between different classes or strata in society. See Winfried Steffani *Gewaltenteilung und Parteien im Wandel* (1997).

Before 1994, South African constitutionalism was based on the Westminster system that centralized political power in an elected Parliament.⁵⁷ Parliament controlled the executive, but its decisions were not in turn subject to control by any other institution — hence, Parliament was sovereign and superior to the other branches of government.⁵⁸ Some aspects of the separation of powers principle were part of the South African legal tradition at this time and, as such, still influence contemporary understandings of this doctrine.⁵⁹ For example, members

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of the executive were also members of the legislature and thus responsible to it; and the judiciary was, in theory at least, guaranteed independence from both legislative and executive interference. Nevertheless, the distinction between the three branches of government was only formal, and never amounted to a real system of mutual checks and balances. It has therefore been said that the pre-1994 South African constitutional system was not, in fact, founded on the separation of powers.⁶⁰

Furthermore, both in terms of formal constitutional law and in practice, legislative powers were increasingly transferred to the executive, mainly from 1976 onwards. The 1983 'tricameral' Constitution vested supreme power in the executive, with an exceptionally potent State President at the top, and did not contain any substantive power constraints.⁶¹ By then, the traditional concept of parliamentary supremacy had been surpassed by the power of the executive to manipulate legislation.⁶² For example, the President could categorize a matter as an 'own affair' of a particular population group and in so doing select the legislative mechanism to be applied in the enactment of statutory provisions dealing with this matter. Additionally, when the three houses of Parliament failed to reach consensus in respect of so-called 'general affairs', the President could activate a 'President's Council' as a substitute legislature.⁶³ Finally, all these institutions were reserved and limited to a tiny minority of the population and could thus never claim real democratic legitimacy.

57 See Stu Woolman & Jonathan Swanepoel 'Constitutional History' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 2 (The chapter discusses in great detail the constitutional system of government premised on the doctrine of parliamentary supremacy that had its roots in the Westminster system of government which was the bedrock of South Africa's pre-1994 Constitutions. In terms of this system, Parliament could make whatever laws it wanted, whilst the courts' role was limited solely to interpreting the law (that is establishing the will of Parliament). Parliamentary supremacy, as a model of constitutionalism, provided a permissive environment that allowed for the establishment of the apartheid legal framework, and placed governmental laws and policies beyond the review jurisdiction of the courts.)

58 For a historic account, see Hermann Robert Hahlo & Ellison Kahn *The Union of South Africa* (1960) 146-163 (Covering the period of the Union of South Africa); Marius Wiechers *Staatsreg* (2nd Edition, 1967) 249.

59 See Gretchen Carpenter *Introduction to South African Constitutional Law* (1987) 158-59.

60 See Johan van der Vyver 'The Separation of Powers' (1993) 8 *SAPR/PL* 177, 185.

61 *Ibid* (supra) at 188.

62 *Ibid* (supra) at 189.

63 See Carpenter (supra) at 363-71.

In the *First Certification Judgment*, the Constitutional Court concluded:

At the same time the Montesquieuan principle of a threefold separation of state power — often but an aspirational ideal — did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive. Multi-party democracy had always been the preserve of the white minority but even there it had languished since 1948. The rallying call of apartheid proved irresistible for a white electorate embattled by the spectre of decolonisation in Africa to the north.⁶⁴

(a) Separation of powers in the Interim Constitution and the Constitutional Principles

The end of Westminster-style constitutionalism and the subsequent transformation of South Africa from a racially divided society into a democratic, racially inclusive society brought with it a decisive break with the past and the arrival of a 'new order' based on the ideals of constitutional supremacy. The drafters of

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the Interim Constitution were faced with many challenges, of which one of the major ones was how power relations in the new South Africa would be mapped out and political power distributed.

There seems to have been consensus among the main players in the negotiations process that the new constitutional order should be based on the separation of powers doctrine.⁶⁵ For the pre-1994 South African government (and the National Party behind it), the insistence on separation of powers may have been one aspect of ensuring that the newly elected government established by the formerly disenfranchised did not use its new-found power to engage in regressive and retributive measures.⁶⁶

Nevertheless, the text of the Interim Constitution does not mention the term 'separation of powers'. In the absence of clear textual support, it is the structure of the Constitution itself, and the interplay of the different organs of state, which aim to ensure that political power is not accumulated in one centre, but mitigated and checked by other institutions. The principle of separation of powers was, however, constitutionally entrenched in the Constitutional Principles, which served as a yardstick for the Constitutional Assembly in its drafting of the Final Constitution. Constitutional Principle VI provided as follows:

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

64 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 6.

65 See, for example, Albie Sachs *Protecting Human Rights in a New South Africa* (1990) 191. Sachs was, at that time, a member of the ANC's NEC as well as its Constitutional Committee.

66 According to Allistair Sparks one of the major challenges faced during the negotiations related to allaying fears harboured by many in the white section of the population that the democratic principle of majority rule would not result in black reprisals. *Tomorrow is a Another Country* (1994) 94. Therefore, according to Sparks: '[M]uch of the new (interim) constitution was devoted to reassuring the white minority that the tables would not be turned on them in a regime of vengeance'.

As was the case in the historical development of the doctrine, the drafters of the first democratic South African Constitution regarded the separation of powers not as a goal in itself, but as a means to democracy and good governance. To prevent a government pre-occupied with its own self-interest, detached from the people and inclined to non-transparent backroom politics, the Constitution would have to distribute political power between the different branches of government. Notably, Constitutional Principle VI was silent as to the model of separation of powers to be established by the Constitutional Assembly. The structural and institutional choices made by the drafters of the Final Constitution, pursuant to this principle, were subject only to the proviso that the scheme crafted had generally to ensure the promotion and attainment of democratic principles, namely accountability, responsiveness and openness.

The moment of truth came in the *First Certification Judgment*, in which the Constitutional Court assessed whether the drafters of the Final Constitution had complied with the Constitutional Principles.⁶⁷ In this decision, the Constitutional

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Court made it clear that the silence of Constitutional Principle VI with regard to the specific model of separation of powers to be established by the Constitutional Assembly was not a problem, but allowed for a tailor-made solution:

Within the broad requirement of separation of powers and appropriate checks and balances, the Constitutional Assembly was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development.⁶⁸

The Court emphasized that there is no universal model of separation of powers and that in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government on another, there is no separation that is absolute.⁶⁹ It is notable that the text of the 1996 Constitution makes no express mention of separation of powers. In the *First Certification Judgment*, the Court did not appear to be in any way constrained by this apparent omission. Instead of looking for the phrase 'separation of powers', it considered whether both the basic structure of the (draft) Final Constitution and its detailed textual provisions were in accordance with the Constitutional Principles.

With regard to the overall thrust of the Constitution, the Constitutional Court remarked rather dryly that an examination of the draft text established that it satisfied the basic structure and premises of the new constitutional order as contemplated in the applicable Constitutional Principles.⁷⁰ It held that the principle of separation of powers was complied with through the constitutional provisions in Chapters 4 (Parliament), 5 (the President and National Executive) and 8 (Courts and

67 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*').

68 *First Certification Judgment* (supra) at para 112.

69 *Ibid* at para 108.

70 *Ibid* at para 46.

Administration of Justice) and clauses 47, 89, 92, 165 and 177 of the draft Final Constitution.⁷¹

Relying on CP VI as its review standard, the Court went on to test the provisions of the draft Final Constitution. While separation of powers concerns were raised with regard to several provisions that regulate the distribution and interplay of governmental powers and functions, as well as the designation of functionaries, the Constitutional Court engaged most thoroughly with the principle in relation to the constitutional provisions which provide for members of the executive also to be members of the legislature in all three spheres of government.⁷²

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In the end, the Constitutional Court declared that such a deviation from the principle that the persons who compose the three branches of government must be kept separate and distinct and that no individual should be allowed to be at the same time a member of more than one branch (as it is the case in the US) was in line with the separation of powers doctrine as envisaged in CP VI. The Court even found a connection between the dual membership provisions and the constitutional rationale of separation of powers: 'The overlap provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature.'⁷³

The Court held that the language of CP VI is sufficiently wide to cover the particular kind of separation that the Final Constitution provided for. In this regard, the Constitutional Court emphasized the purposive understanding of separation of powers, which had already been present during the drafting of the Constitutional Principles, i.e. to ensure accountability, responsiveness and openness: 'We find in the [draft final Constitution] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive.'⁷⁴

This purpose has survived the period of the Interim Constitution and these principles are now enshrined in FC s 1(d). Therefore, although the Constitutional Principles have lost their main function as a yardstick for the Final Constitution in light of the certification of the new constitutional text of 1996, these provisions still inform any analysis of the South African model of separation of powers.

(b) Separation of powers in the Final Constitution

71 Ibid at para 46 note 44.

72 Ibid at paras 106-113. See also the paragraphs in the *First Certification Judgment* where the Court dealt with challenges raised on the basis that CP VI had not been complied with. Ibid at para 54 (Dealing with the contention that the horizontal application of the Bill of Rights violates the separation of powers in that it allows the courts to alter legislation and thereby to encroach upon the proper terrain of the legislature); para 77 (Using the same argument against the introduction of socio-economic rights); paras 123-32 (Where it was alleged that the participation of the executive in the appointment of judges and acting judges was a breach of separation of powers); paras 185-86 (wherein it was alleged that the constitutional anti-defection clause breached separation of powers.)

73 *First Certification Judgment* (supra) at para 111.

74 Ibid at para 112.

As already indicated, the Final Constitution does not mention the principle of 'separation of powers' anywhere in the text. Hence, in the *First Certification Judgment*, the Constitutional Court pointed out that there is no fixed or rigid constitutional doctrine of separation of powers. Rather, the doctrine is to be found in the provisions outlining the functions and structure of various organs of state and their respective independence and interdependence.⁷⁵

Because the doctrine of separation of powers has developed over several centuries and because it has been given expression in many different forms and made subject to checks and balances of many kinds, it is important to understand the appropriate relation between constitutional provisions and any theoretical conception of separation of powers. As indicated with regard to the 'pure form' of the doctrine above, the relation between different branches of government should not be tested against some abstract idea of separation of powers. Instead, any conception of separation of powers has to come from the constitutional text itself and be properly aligned with the particular constitutional system one is looking at.

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Against that background, the Constitutional Court cited with approval the following remark by constitutional scholar Laurence Tribe in respect of the US Constitution:

We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not any abstract theory of separation of powers, but the actual separation of powers '*operationally defined* by the Constitution.' Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure.⁷⁶

Although the importance of starting in the text as highlighted above is self-evident, it is also important to note that this textual approach has inherent limitations in that it can never tell the entire story with regard to the operational distribution of power and functions; this story only becomes evident through the application and interpretation of the Constitution. And it is here that different conceptions of the doctrine have their significance, provided they are based on the text in the first place:

At times, text will be sufficient, without necessarily developing an overarching vision of the structure, to decide major cases. . . . Sometimes, however, it will be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole.⁷⁷

75 Ibid at paras 110-11.

76 Laurence Tribe *American Constitutional Law* Vol 1 (3rd Edition, 2000) 127. This paragraph was cited with approval in *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 17 and *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 34.

77 Tribe (*supra*) at 130 (Cited with approval by the South African Constitutional Court in *S v Dodo* (*supra*) at para 17.)

The exposition of the separation of powers doctrine in South Africa that follows therefore commences by briefly considering the text of the Final Constitution and how it conceptualizes the respective independence and interdependence of the different branches of government. In order to evaluate the extent to which the text accords with or deviates from the 'pure form' of the doctrine it is helpful to recall that the doctrine requires the separation of functions between the three branches of government, the separation of personnel (a person should not be part of more than one of the three branches of government), and generally that one branch of government should not control or interfere with the work of another.

(i) The legislature and the executive

In the co-operative government system applicable in South Africa, the Final Constitution divides legislative authority between the national, provincial and

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local spheres of government. In the following exposition, however, the focus falls solely on the national legislative authority vested in Parliament.⁷⁸ The Final Constitution does not provide a description or definition of what legislative authority is, but from FC s 44(1) it can be gleaned that the exercise of legislative authority entails the power to make laws, to amend the Constitution, and to assign or delegate legislative powers to other legislative bodies in another sphere of government. Plenary legislative competence is conferred by the Final Constitution on Parliament, although there is an important substantive constraint on the exercise of legislative authority, in that Parliament must act in accordance with, and within the limits of the Final Constitution (FC s 44(4)) — marking a clear departure from the pre-1994 Westminster system of government. To be more precise, the function of legislating is exercised primarily by Parliament, which is comprised of members of the National Assembly⁷⁹ and delegates of the National Council of Provinces.⁸⁰ That the legislature is envisaged as an autonomous, deliberative and representative body with its own constitutional power base is evident in the fact that there are constitutional provisions that empower both legislative houses to regulate their own sitting periods⁸¹ and processes,⁸² and which confer parliamentary privilege on all members and delegates for all speeches made before the house or its committees.⁸³

Executive authority, on the other hand, is vested by the Final Constitution in the President (FC s 85(1)), and is exercised by the President together with the other

78 See FC s 43(a). See also Victoria Bronstein 'Legislative Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (eds) (2nd Edition, OS, June 2004) Chapter 15; Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

79 See FC ss 46, 47 for provisions relating to the composition, election and membership of the National Assembly.

80 See FC ss 60, 61 for provisions relating to the composition and allocation of delegates to the National Council of Provinces.

81 See FC s 51.

82 See FC s 57 in respect of National Assembly and FC s 70 in respect of the National Council of Provinces.

members of Cabinet (FC s 85(2)). According to the Final Constitution, the executive function is a broad one that entails responsibility for the development, preparation and implementation of national policy and legislation, and the co-ordination of the functions of state departments and the public administration (FC s 85(2)(a)-(e)). In recognition of the immense powers enjoyed by the executive relative to the other branches, the Final Constitution enjoins the President — and by necessary extension the entire Cabinet — to uphold, respect and defend the Constitution as the supreme law (FC s 83(b)).

Notwithstanding the institutional separation of Parliament and the national executive, the Final Constitution makes provision for the involvement of the executive in the legislative function by allowing members of Cabinet to initiate and introduce legislation in Parliament.⁸⁴ In addition to this, the President enjoys the power to summon Parliament to an extraordinary sitting to discuss special business.⁸⁵ Furthermore, the legislative process is incomplete without the assent of the President, who has to sign duly passed Bills into law, provided that he or she has no constitutional reservations (FC s 79(1)).

As far as the mixing of personnel is concerned, the majority of the national executive (including the President and the Deputy President) must at the same time be members of the National Assembly. The President, as head of the national executive, is elected from the National Assembly, but ceases to be a member of it from the date of his or her election (FC ss 86(1) and 87). The President enjoys the power to appoint and dismiss Cabinet; however, the President is constrained by the Final Constitution to selecting the Deputy President and all but two members of the Cabinet from the National Assembly (FC s 91(3)). In consequence of this arrangement, the majority of members of Cabinet are simultaneously members of Parliament in similar fashion to parliamentary systems of government. As we have seen, this feature was challenged during the certification process of the Final Constitution, but was justified as a means to ensure accountability of the executive to the legislature. In this respect, therefore, the Final Constitution has adopted a hybrid system of government that combines the features of an executive presidential system (with the Cabinet chosen by the head of the executive and with its members accountable only to him or her) with a parliamentary-style Cabinet mostly drawn from the legislature.⁸⁶

83 See FC s 58 in respect of the National Assembly and FC s 71 in respect of the National Council of Provinces. See also *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) at paras 28–30 (Held that FC s 58(1) protects the right to free speech in the Assembly, as it is a fundamental right crucial to representative government in a democratic society.)

84 See FC ss 73(2), 85(2)(d).

85 FC s 42(5). See also FC ss 51(2) and 63(2) for similar provisions in respect of the National Assembly and the National Council of Provinces respectively.

86 See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 55; EFJ Malherbe & IM Rautenbach *Constitutional Law* (4th Edition, 2004) 181; Jonathan Klaaren 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3, 9.

To what extent can Parliament control or interfere with the functions of the executive and vice versa? The Final Constitution clearly places the executive under the scrutiny of the legislature. It is the constitutional duty of the legislature, especially the National Assembly, to oversee the exercise of executive authority in the implementation of legislation and more generally to hold the executive accountable to it, as envisaged in FC s 55(2). Correspondingly, the Final Constitution provides that members of Cabinet are accountable individually and collectively to Parliament (FC s 92(2)), and must provide full and regular reports concerning matters under their control (FC s 92(2)(b)). On the other hand, the President and any member of the Cabinet or any Deputy Minister who is not a

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member of the National Assembly may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote (FC s 54). The Final Constitution seems to assume that the national executive's duty to explain and justify its conduct to Parliament will ensure that the executive will perform its functions both in accordance with the Constitution and the law and in line with the political convictions of the majority of the National Assembly. As some form of ultima ratio, the National Assembly may force the President and the other members of the Cabinet and any Deputy Ministers, or just the Cabinet, to resign by a vote of no confidence supported by a majority of its members (FC s 102). Finally, according to FC s 89, the National Assembly is empowered to institute proceedings to remove the President when he or she is found to have violated the Constitution or the law, or when the President is found to have engaged in serious misconduct, or when the President is found no longer to be able to perform the functions of his or her office.

This constitutional feature of legislative control of the executive does not mean that government does not enjoy influence over Parliament. In the complex regulatory environment that is modern government the scope of the functions and powers exercised by the executive are necessarily extensive, particularly if one considers the centrality of the executive in the formulation and execution of policy and legislation. Besides the fact that the Final Constitution allows members of Cabinet to initiate and introduce legislation in Parliament, the influence that the executive has in determining the content of legislation cannot be underestimated. The executive's apparent ascendancy in its relations with the legislature may be attributed to the specialized or technical nature of modern governance that requires ever-increasing regulation. The executive's access to specialized skills by virtue of its control of the bureaucracy has positioned it as the primary initiator, drafter and implementer of both policy and legislation.⁸⁷

Of some concern is the relationship between the impeachment provisions of FC s 89 and FC s 47, which prescribe the conditions of membership of the National Assembly. It is clear from FC s 47(1)(e) that anyone who has been finally (i.e. without a further avenue of appeal) convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine cannot become a member of the National Assembly. The same applies to parliamentarians: once an MP has been convicted in this way, he or she ceases to be eligible and, therefore, automatically loses his or her membership of the National Assembly (FC s 47(3)(a)). Since the President has to be elected from among the members of the National Assembly, someone who intends to become President has to be a member of the National Assembly first — and thus must not have a criminal record of the kind contemplated.

87 See Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 386, 387-89 for a well-articulated and critical account of the 'stranglehold' that the executive has assumed over the legislature.

This constitutional feature of legislative control of the executive does not mean that government does not enjoy influence over Parliament. In the complex regulatory environment that is modern government the scope of the functions and thus the standards for continuation in the formulation and execution of no confidence and the removal procedure are the only instruments that the Final Constitution provides to force an elected President out of office.

The Final Constitution is silent on whether court proceedings may be instituted or, once instituted, proceed against a person who has been elected President. In our view, such proceedings may be pursued, because the fact that someone does not automatically cease to be President once he or she has been finally convicted and sentenced to more than 12 months' imprisonment only affects the consequences of such a conviction. There is nothing in the Final Constitution that suggests that such a conviction cannot be handed down, or that all legal proceedings have to come to a standstill once a person has been elected President. Certainly, a pending trial requiring personal attendance may be an impediment to the performance of the President's official duties. However, although the judiciary must be sensitive to the status of the head of state,⁸⁸ the involvement of an accused in court proceedings is clearly in the interests of justice, and the practical obstacles that come with such involvement do not outweigh the requirement that the President appear in Parliament. Finally, according to FC s 89, the President may only be removed from office on the grounds of serious misconduct or a serious violation of the Constitution or the law (in addition to his or her inability to perform the functions of office). It is, however, the function of the courts to establish whether a serious violation of the Constitution or the law has been committed. Therefore, if the courts were not allowed to pass judgment in a case involving an incumbent President, MPs would be left to speculate whether the law or the Constitution had been violated, and the impeachment procedure would be without foundation in the rule of law.

On the other hand, a sentence of imprisonment could hardly be executed while the President remained in office. In the light of the wide array of presidential duties and functions outlined in FC s 84, any actual confinement would prevent a President from performing his or her duties and would therefore for all practical purposes remove him or her from office. Such a *de facto* removal from office might be construed as a violation of FC s 89, which requires a resolution adopted with a supporting vote of at least two thirds of the members of the National Assembly for a removal to take effect.

(ii) The judiciary

FC s 165 vests judicial authority in the courts, which are independent and 'subject only to the Constitution and the law'. This section also stipulates that the courts

are enjoined to apply the Constitution and the law 'impartially and without fear, favour or prejudice'.⁸⁹ The importance of the functional and institutional independence of the courts finds expression in FC s 165(4), which provides that the

88 See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) ('SARFU III') at para 243.

89 See also the prescribed text of the oath or solemn affirmation of Judicial Officers in Schedule 2 of the Final Constitution.

other organs of state must take measures to 'assist and protect' the courts to ensure their 'independence, impartiality, dignity, accessibility and effectiveness'.

The Final Constitution establishes a hierarchy of courts.⁹⁰ Within this hierarchy the Constitutional Court is designated as the apex court in all constitutional matters, whilst the Supreme Court of Appeal is the apex court for all non-constitutional matters.⁹¹ The supremacy of the courts in matters of constitutional interpretation makes the judiciary an immensely powerful branch. The judiciary's constitutionally ordained role as an independent and impartial arbiter with the power to review the constitutionality of all law and conduct makes it an important check on, and counterweight to, the other two branches.⁹²

With regard to the executive, which is bound by the Constitution and the ordinary law (either in its statutory or common-law form), judicial review is a central aspect of the doctrine of legality, which in itself is part of the rule of law and a long established principle of South African law.⁹³ Today, the supremacy clause in FC s 2 binds the executive to the Constitution, subjects all Presidential action to the Constitution and leaves no room for prerogative powers outside the scope of judicial review.⁹⁴

With regard to Acts of Parliament, judicial review is part of the change in South Africa from the pre-1994 Westminster system of parliamentary supremacy to a system of constitutional supremacy. Thus, FC s 172 provides for competent courts to declare that any law inconsistent with the Constitution is invalid to the extent of its inconsistency, with the Constitutional Court making the final

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decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional (FC s 167(5)).⁹⁵

The power conferred upon the courts in this regard is irrefutably substantial, but should nevertheless not be overstated as it is in the main limited to single determinations of the constitutionality of laws made by the legislature that the executive is required to enforce. Although the courts therefore have the power to interfere with the political process, they lack the capacity to act on their own initiative. A court's power as a political actor outside of an actual dispute is rather

90 FC s 166(a)-(e) sets out the hierarchy of courts as follows: the Constitutional Court; the Supreme Court of Appeal; the High Courts; the magistrates' courts and any other courts established or recognized by an Act of Parliament. Subsequent sections of the Final Constitution set out the jurisdictional limits of the various courts.

91 FC ss 167(3) and 168(3) respectively. For more details, see Sebastian Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4.

92 But note that FC s 170 precludes the magistrates' courts and other courts of a status lower than the High Court from reviewing the constitutionality of legislation or conduct of the President.

93 See Ben Beinart *The Rule of Law* (1962) 99 and 102.

94 See *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 8, 12, 13 and 28. See also *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 20, 33, 50 and *SARFU III* (supra) at para 148.

limited compared to the other two branches. Nevertheless, the potential for dysfunctional institutional relations, or for the sort of constitutional crisis that may result from too expansive a judicial role, has often been highlighted.⁹⁶

In its relations with the other two branches of government, the judiciary enjoys independence (FC s 165(2) and (3)). Both institutional and operational independence are necessary incidents of the constitutional injunction that the courts must apply the law impartially. The Final Constitution makes provision for such independence by guaranteeing judges' security of tenure and by providing that salaries, allowances and benefits of judges may not be reduced (FC s 176).⁹⁷

Furthermore, both for the appointment of judges and their removal from office, the independent Judicial Services Commission (JSC) is inserted between the executive and the judiciary, with the process for the removal of a judge from office being rather onerous.⁹⁸ Although the most potent check available to members of the legislature or the executive against the judiciary lies in their power to

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initiate proceedings for the removal of judges via the Judicial Services Commission (JSC), this is only possible on the very limited grounds of incapacity, gross incompetence or gross misconduct. Where the JSC makes such a finding, the removal proceedings will come under consideration by the National Assembly, which may resolve by a two thirds vote of all its members to order that a judge be removed. Where such resolution is passed, the President must effect the removal of that judge. Therefore, the ability of the legislative and executive branches directly to influence the operation or composition of the courts is constitutionally limited, which is important if the overt politicization of the courts is to be avoided.

95 The immense powers enjoyed by judges in a constitutional system like South Africa's that establishes a system of constitutional review will always raise issues of counter-majoritarianism. The fact that a group of unelected judges has the power to thwart the democratic will of the majority has been the source of a great deal of controversy and will no doubt be an issue that will inform the perceived and actual role of the courts in the development of South Africa's constitutional jurisprudence. On counter-majoritarianism, see Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Dennis Davis, Matthew Chaskalson & Johan de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Dawid van Wyk, John Dugard, Bertus De Villiers & Dennis Davis (eds) *Rights and Constitutionalism* (1994) 6-11; Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 9-10; and George Devenish *The South African Constitution* (2005) 18-20.

96 See Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 158 (Currie makes the point that, although the power to have the last word on the meaning of the Constitution is an 'awesome' one, it is one which must be construed in light of the fact that the courts are not the only interpreters of the Constitution, and that the legislature is equally entitled and empowered to interpret the Constitution. In interpreting the Constitution, the court should exercise its powers in accordance with the 'salutary rule' followed in the US that requires that a court 'should never anticipate a question of constitutional law in advance of the necessity to decide it'.) See also Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544 (Lenta argues that the judiciary and the legislature can rightly be perceived as being in competition as far as the exercise of their 'discretionary' interpretive powers is concerned.)

97 These guarantees are essential for the independence of any judicial officer and crucial for maintain the separation of powers. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 128.

98 See FC s 174 for the procedure for appointments of judicial officers and FC s 177 for the procedure in respect of the removal of judges.

The Constitutional Court has placed the independence and impartiality of the judiciary at the centre of the South African constitutional system and linked it to the separation of powers principle.

An essential part of the separation of powers is that there be an independent judiciary. . . . What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.⁹⁹

And on another occasion:

The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. . . . Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.¹⁰⁰

Judicial independence manifests itself in the absence of external interference in the assessment of the facts of a case and the application of the law.¹⁰¹ But institutional and functional independence (referred to in FC s 166(3) and in the *First Certification Judgment*) are equally important. These aspects of independence require judicial control over administrative decisions that bear directly and immediately

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on the exercise of the judicial function, i.e. the budget of the institution, the human resources available to the court, and the way it conducts its business.¹⁰² This institutional independence of the judiciary was the concern of many observers, both from inside and outside the judiciary, when, in December 2005, the Department of

99 *First Certification Judgment* (supra) at para 123.

100 *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 25.

101 See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 70 (Constitutional Court quoted with approval the Canadian Supreme Court on judicial independence: '[T]he generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. . . . The ability of individual judges to make decisions on concrete cases free from external interference or influence continues . . . to be an important and necessary component of the principle.' *Canada v Beauregard* (1986) 30 DLR (4th) 481, 491.)

102 See *Valente v The Queen* (1985) 24 DLR (4th) 161, 171 ('It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.' This passage was quoted with approval in *De Lange v Smuts* (supra) at para 159.)

Justice and Constitutional Development published the Constitution Fourteenth Amendment Bill for comment.¹⁰³ The Bill, among other things, proposed placing the administration of the courts in the hands of the executive and was perceived by many as an attack on the independence of the judiciary.¹⁰⁴ It was suggested by these commentators that the proposed changes, in terms of which the government would have exercised greater control over the functioning of the judiciary, were harmful, and would reverse the evolving process of judicial independence — a view to which we fully subscribe. As at the time of writing, however, the Bill had not been tabled in Parliament, and whether the government still intends to do so, and, if so, in what form, remains to be seen.

Judicial independence is measured by an objective standard based on whether a well-informed, thoughtful and reasonable person would perceive a court to be independent.¹⁰⁵ This perception has to be based on a balanced view of all the material information, with the objective observer being sensitive to South Africa's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Final Constitution, its values and the distinction it makes between different levels of courts.¹⁰⁶

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The fact that courts operate at different levels has a direct impact on judicial independence, because the Final Constitution allows the complexity of the court system to be taken into account:

Judicial independence can be achieved in a variety of ways; the most rigorous and elaborate conditions of judicial independence need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.¹⁰⁷

The main point is that institutional independence is a constitutional principle and therefore that the constitutional protection of the core value of judicial independence is not subject to any limitations.¹⁰⁸ The specific ways in which judicial independence has manifested itself are discussed later in this chapter.

103 GN 2023 in GG 28334 of 14 December 2005. The Constitution Fourteenth Amendment Bill was introduced in conjunction with a package of Bills, comprising the Superior Courts Bill (B52-2003), the Judicial Service Commission Amendment Bill, the South African National Justice Training College Draft Bill, and the Judicial Conduct Tribunal Bill.

104 See Cathi Albertyn 'Current Developments — Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 SAJHR 126 (Contains additional references). Cf Proceedings of the General Council of the Bar Human Rights Committee Conference on the Justice Bills, Judicial Independence and the Restructuring of the Courts, Johannesburg (17 February 2006).

105 The test was originally developed with regard to judicial bias. See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) (*SARFU II*) at para 48. It was later endorsed for independence. See *Van Rooyen & Others v the State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) ('*Van Rooyen*') at paras 33-34.

106 *Van Rooyen* (supra) at paras 33-34.

107 *Van Rooyen* (supra) at paras 27-28.

108 *Ibid* at paras 22, 35.

(iii) Independent constitutional institutions

A specific feature of the Final Constitution is the establishment of constitutional bodies, which enjoy independence from all the other branches of government. This first and foremost refers to the state institutions supporting constitutional democracy provided for in Chapter 9.¹⁰⁹ These institutions are protected against all the other branches of government in that no person or organ of state may interfere with their functioning (FC s 181(4)).

Other constitutional bodies outside Chapter 9 are also expressly independent:

- the Municipal Demarcation Board, established as an independent authority in terms of FC s 155(3)(b);¹¹⁰

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- the Public Service Commission, the independence of which is provided for in FC s 196(2);
- the Independent Complaints Directorate of the South African Police Service, established in terms of FC s 206(6);
- the Financial and Fiscal Commission, the independence of which is provided for in FC s 220(2); and
- the Central Bank (South African Reserve Bank), which must perform its functions independently according to FC s 224(2).

Additionally, the Final Constitution provides for institutions that have to exercise their mandate with a degree of impartiality, although the word 'independence' is not

109 These institutions are extensively covered elsewhere in this work: See Michael Bishop & Stu Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; Stu Woolman & Yolandi Schutte 'Auditor General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; Jonathan Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 24C; Catherine Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 24D; Justine White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; Stu Woolman & Julie Soweto Aullo 'Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F; and Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2005) Chapter 29.

110 The Constitutional Court has held that the independence of the Board is crucial to South African constitutional democracy and that it should be able to perform its functions without being constrained in any way by the national or provincial governments. See *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 55; *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) ('*Matatiele I*') at para 41.

expressly used: the Judicial Service Commission (FC s 178),¹¹¹ and the National Prosecuting Authority (FC s 179).¹¹²

These institutions enjoy a somewhat hybrid status. All of them are asked to perform their duties with a degree of independence, which places them outside the usual administrative structures of government. They also all have important supervisory and watchdog functions. In performing these functions, they sometimes assist the executive in its decision-making (e.g. the Financial and Fiscal Commission), complement and support Parliament in its oversight function (e.g. the Human Rights Commission), or enhance the judiciary by ensuring professional and ethical standards in the appointment and promotion of judges (the Judicial Service Commission). The Final Constitution or the relevant legislation guarantees the key personnel in these institutions some sort of tenure security and limits the grounds for their removal. Of course, the degree of independence or impartiality of these institutions varies, but the common thread running through their governing provisions is that government may not interfere with their decisions and affairs.

The Final Constitution guarantees the independence and impartiality of the Independent Electoral Commission (IEC), the Public Protector, the Auditor-General and possibly also the Human Rights Commission to such a high degree that it mirrors the independence of the judiciary. In our view, therefore, it makes sense to regard these institutions as falling outside the traditional *trias politica*, the three-fold division of power in the classical understanding of separation of powers. Their specific constitutional status puts them beyond the legislature, executive and judiciary and creates a further dimension to the separation of powers in South Africa. This point has been most clearly emphasized with regard to the IEC:

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Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission — and the other chapter 9 bodies — was so that they should be and manifestly be seen to be outside government.¹¹³

As regards the Public Protector and the Auditor-General, the Constitutional Court remarked that these institutions perform sensitive functions that require their independence and impartiality to be beyond question, and are protected by stringent provisions in the Final Constitution.¹¹⁴ In reference to the Judicial Service Commission, the Constitutional Court used the language of separation of powers and held that the Commission provides 'a check and balance to the power of the

111 But the Constitutional Court has held that the JSC is 'an independent body'. *First Certification Judgment* (supra) at para 128.

112 See *First Certification Judgment* (supra) at para 146 ('Section 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.')

113 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*IEC v Langeberg Municipality*') at para 31.

114 *Ex Parte Chairperson of the National Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)* at para 142 ('*Second Certification Judgment*').

executive' to make judicial appointments.¹¹⁵ Of course, the IEC and the other institutions perform a public function that may even be described as governmental. But, according to the Constitutional Court, there is a distinction between the state and government, and the independence of the Chapter 9 institutions is intended to refer to independence from the government.¹¹⁶ In short, they are part of governance, but not part of government.¹¹⁷

Not all of the constitutional bodies and institutions mentioned above can be considered to be part of a 'fourth branch of government'. In fact, the majority of them were established to assist the executive in the application and execution of the law. For example, the National Prosecuting Authority has the power to institute criminal proceedings on behalf of the state and is more associated with the executive branch than the judicial branch of government, with the Minister of Justice and Constitutional Development exercising final responsibility over it in terms of FC s 179(6).¹¹⁸ In addition, the Constitutional Court has held that the functions of the Public Service Commission are materially different to those of the Public Protector and the Auditor-General.¹¹⁹ The separation of powers principle, however, does not necessarily require independent bodies to form an additional branch of government (although with regard to the IEC we do think that such a classification is warranted). Rather, the separation of powers principle in South Africa guarantees their independence, requiring all other branches of government, in particular the executive, to respect these institutions' domain of influence and not to interfere with their decisions. Both institutional and functional independence are crucial for these institutions to perform their constitutional mandate appropriately and to perform their role in good governance.

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Against this background, the Constitutional Court has held that the IEC must enjoy financial independence, administrative independence (especially relating to the institution's control over administrative decisions that bear directly and immediately on the exercise of its constitutional mandate) and independence with regard to appointments procedures and the security of tenure of appointed office-bearers.¹²⁰ Even the National Prosecuting Authority enjoys independence from the government in so far as the prosecution of individual cases is concerned.¹²¹

Of course, none of the institutions mentioned above exists in a constitutional vacuum. Their powers are checked and balanced against those of the other three branches: the heads of these institutions are usually elected by the National

115 *First Certification Judgment* (supra) at para 124.

116 See *IEC v Langeberg Municipality* (supra) at para 27.

117 Parliament of the Republic of South Africa *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions. A Report to the National Assembly of the Parliament of South Africa* (2007) 10.

118 See *First Certification Judgment* (supra) at para 141.

119 *Second Certification Judgment* (supra) at para 142.

120 See *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at paras 98–99.

Assembly; in some cases members of the commissions are also appointed by the executive. Chapter 9 institutions are also accountable to the legislature. Finally, their conduct can be challenged in the courts. But their constitutional mandate must not be impaired by any other branch. This is not only true for the executive, but also for the legislature. This was the essence of a Constitutional Court decision in which it held that Parliament could not make a law allowing the executive the discretion to reject a municipal boundary determined by the Municipal Demarcation Board.¹²² In another case, *Matatiele I*, the Court was asked whether Parliament could 'usurp' the Board by passing a constitutional amendment, effectively overriding the Board's decision. The Court did not answer this question in general terms (in theory, any of these institutions could be abolished by constitutional amendment), but held that, if Parliament could base its conduct on another constitutional power (in *Matatiele I*, its power to redefine *provincial* boundaries), such exercise of power could legitimately curtail the powers of independent bodies in so far as this was reasonably necessary.¹²³

(c) Beyond the text: separation of powers as a living doctrine

The text of the Final Constitution, as shown above, provides for the establishment of three co-equal branches of government with differing but complementary roles in the South African constitutional system. It is apparent from the text that all three branches are competent interpreters of the Constitution,¹²⁴ albeit each within its constitutionally prescribed domain.¹²⁵ Unlike the case in other jurisdictions, the inclusion of a justiciable bill of rights and express powers of judicial review has made it unnecessary to consider which branch has the power finally to decide the meaning

121 It is necessary to draw a distinction between the setting of prosecutorial policy and exercise of prosecutorial discretion in individual cases. According to FC s 179(5)(a) and s 21 National Prosecuting Authority Act 32 of 1998, the National Director of Public Prosecutions must formulate prosecutorial policy with the concurrence of the Minister of Justice. In the setting of such policy the approval of the Minister of Justice is needed and the National Director does not enjoy independence. The same applies to various duties on the National Director to provide information and submit reports to the Minister. On the other hand, although the National Director of Public Prosecutions must observe prosecutorial policy during the prosecution process and exercise his powers and perform his functions in respect of this policy, this does not affect the exercise of prosecutorial discretion. Neither the Constitution nor the Act grants any power to the Minister regarding the exercise of prosecutorial discretion in individual cases. As such, individual decisions regarding whether or not to prosecute in a particular case are not within the purview of the Minister's 'final responsibility', but rest in the exclusive independent discretion of the prosecuting authority, and ultimately the National Director. See Hannah Woolaver & Michael Bishop 'Submission to the Enquiry into the National Director of Public Prosecutions by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC)' (2008) 21:2 *Advocate* 30.

122 See *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 68.

123 *Matatiele I* (supra) at paras 48-51.

124 See Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32, § 32.2 (Supremacy clause demands that all those who are obligated by and somehow benefit from the Final Constitution — and not only (or even primarily) courts of law (with the Constitutional Court at the helm) — are authorized readers and therefore interpreters of the Final Constitution.)

of the Constitution.¹²⁶ The Constitutional Court is quite clearly the final and authoritative interpreter of the Constitution, enjoying the last word on all constitutional matters.¹²⁷

This institutional function of the Constitutional Court covers every aspect of the Final Constitution, including the constitutional powers of the three branches of government and their relationship inter se. This creates a paradox in that the Constitutional Court is authorized to regulate itself. In particular, in the field of separation of powers, the Court can and does determine its own constitutional mandate.

The Constitutional Court has addressed this paradox in two ways. On the one hand, it has employed a flexible approach to separation of powers issues on the understanding that the Final Constitution provides for a unique and distinctive model of separation of powers. On the other hand, it has ensured its exceptional position in the constitutional structure by asserting that separation of powers issues (involving the judiciary or not) are not any less subject to constitutional scrutiny than any other provision of the Constitution.

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(i) A distinctively South African model of separation of powers

When the membership of Parliament by Cabinet Ministers was challenged during the certification of the Final Constitution, the objectors based their criticism on the fact that such dual membership was in violation of the separation of powers principle as practised in other countries around the world. As indicated above, the Constitutional Court found the possibility that members of the executive could at the same time be members of Parliament constitutionally justified.¹²⁸ In so doing, the Constitutional Court rejected the objectors' argument that the manner in which the separation of powers principle is instantiated in other parts of the world is decisive for the understanding of this principle in South Africa. Instead, the Court coined the idea of a specifically South African model of separation of powers:

125 Although employing a different phraseology with respect to the three branches of government, it is quite evident that the Constitution requires all three branches to exercise their powers and fulfil their duties in a constitutional manner. See, for example, FC s 44(4) with respect to Parliament, FC s 83(b) with respect to the President (and by necessary extension Cabinet as a whole), and FC s 165(2) with respect to the judiciary. This requirement may be understood to mean that in fulfilling their functions each branch must have regard to what the Constitution permits and demands even though the interpretation of the details may vary. See also FC s 41(1)(d), which provides that '[a]ll spheres of government and all organs of state within each sphere must be loyal to the Constitution, the Republic and its people.'

126 For example, in the US Constitution, there is no provision that explicitly provides for judicial review. It was only as a result of the seminal decision of Chief Justice Marshall in *Marbury v Madison* 5 US (Cranch) 137 (1803) that the federal courts assumed the power to engage in judicial review for constitutionality of legislation. See generally Heinz Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 *SAJHR* 185.

127 FC s 167(3)(a) states that the Constitutional Court is the highest court in all constitutional matters, while FC s 167(3)(c) confers upon the Constitutional Court the final say in determining whether a matter is a constitutional matter or not. See Sebastian Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4, § 4.3.(f).

128 See § 12.3.(b)(i) supra.

Within the broad requirement of separation of powers and appropriate checks and balances, the [Constitutional Assembly] was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development. We find in the [Constitution] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive. A strict separation of powers has not always been maintained; but there is nothing to suggest that the [Constitutional Principles] imposed upon the [Constitutional Assembly] an obligation to adopt a particular form of strict separation, such as that found in the United States of America, France or the Netherlands.¹²⁹

The Court emphasized that there is no universal model of separation of powers and that the relationship between the different branches of government, and the power or influence that one branch of government has over the other, differ from one country to another.¹³⁰ In fact, the Court found that 'separation of powers' is an umbrella concept, open to all sorts of content:

[T]he separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds.¹³¹

In its 1998 decision in *De Lange v Smuts NO & Others*, the Court referred to its earlier holding in the *First Certification Judgment* and further developed the framework for interpreting separation of powers under the Final Constitution:

[O]ver 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

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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.¹³²

The notion of a 'distinctively South African model of separation of powers' introduced by Ackermann J in this passage has had an enduring influence on the way the separation of powers doctrine is understood.¹³³ Save for highlighting the point that the model must be grounded in South Africa's particular circumstances and needs, the notion of a 'distinctively South African model of separation of powers' is conceptually empty. Its importance, however, lies in its recognition of the fact that where separation of powers is concerned there are no immutable principles,

129 *First Certification Judgment* (supra) at para 112.

130 *Ibid* at para 108.

131 *Ibid* at para 111.

132 *De Lange v Smuts* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 60-61.

133 See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 24; *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 15.

predetermined answers or international precedents that *must* be followed by South African courts. Instead, the model is one that must develop over time based on interpretations of the Final Constitution as it operates in the South African politico-legal context.

This patriotic approach notwithstanding, the Constitutional Court has, in several judgments, made reference to aspects of the separation of powers doctrine in other constitutions. Any emphasis on the particular South African model of separation of powers, therefore, does not mean that the Court disregards foreign models. Rather, the Court uses the distinctiveness of the South African model to deviate from a review standard applicable in other countries where necessary. As foreign concepts are not to be slavishly followed, the Constitutional Court can deploy them according to its own institutional needs. This 'pick-and-choose' approach is particularly useful in separation of powers matters, because such matters often touch on the delicate balance between the different branches of government and thus on issues of extreme political sensitivity.

(ii) Justiciability of the separation of powers principle

There is no express reference to 'separation of powers' in the Final Constitution. Nevertheless, in a large number of cases litigants have relied upon this principle, either expressly or implicitly, to formulate their complaints. This has raised the question of what the exact basis for invoking the separation of powers doctrine as a justiciable principle is. In the *First Certification Judgment*, it was enough for the Constitutional Court to point out that the principle was implicit in the text since no one had suggested that there had not been an adequate separation of the judicial power from the legislative and executive power, or that there had not been an adequate separation of the respective functions of the legislature, the executive and the judiciary.¹³⁴

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In *Heath*,¹³⁵ however, the question arose whether a principle not expressly mentioned in the Final Constitution could be relied upon in constitutional proceedings. The High Court had answered this question in the negative, holding that a legislative provision cannot be set aside on grounds that it is inconsistent with what, at best, is no more than a 'tacit' principle of the Constitution.¹³⁶ The Constitutional Court rejected this restrictive approach, first by recognizing separation of powers as an *implicit* or *implied* provision of the Final Constitution,¹³⁷ as it had done before with other principles not expressly mentioned,¹³⁸ and then by stating that such implicit provisions are no less justiciable than express provisions:

134 See *First Certification Judgment* (supra) at paras 107 and 113.

135 *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) ('Heath').

136 *South African Association of Personal Injury Lawyers v Heath & Others* 2000 (10) BCLR 1131, 1160A (T) (Coetzee AJ).

137 *Heath* (supra) at para 19 (The Court preferred to use the words 'implicit' or 'implied' to refer to unexpressed constitutional terms rather than 'tacit' because the law of contract draws a distinction between tacit and implied terms and the making of such a distinction in the context of the Constitution may be understood as an endorsement of the doctrine of original intent, which the Court wanted to avoid.)

I cannot accept that an implicit provision of the Constitution has any less force than an express provision. . . . The Constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the Legislature, the executive authority in the Executive, and the judicial authority in the Courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different. . . . There can be no doubt that our Constitution provides for such a separation and that laws inconsistent with what the Constitution requires in that regard are invalid.¹³⁹

The effect of this dictum seems clear: separation of powers may be relied upon directly by litigants in proceedings before the courts. Like any express right or principle in the Final Constitution, the principle of separation of powers is justiciable.

Besides this unequivocal proposition, however, there is a second, more subtle, consequence that follows from the Court's holding. It is that, as in other jurisdictions, separation of powers is apparent from the detailed provisions of the Final Constitution setting out the respective powers of the legislature, the executive and

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the judiciary (as well as, one might add, the powers of local government, the provinces and other institutions under the Final Constitution, like the institutions supporting constitutional democracy). These provisions, when read and interpreted cumulatively, constitute the distinctively South African model of separation of powers:

The constitutional principle of separation of powers . . . is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers.¹⁴⁰

Since the Final Constitution is supreme law and any law or conduct inconsistent with it is unconstitutional, any of the specific provisions may obviously be relied upon in a constitutional challenge. For example, a litigant may rely on the provisions pertaining to the independence of the judiciary, such as FC s 165. Or a litigant may bring a challenge based on the alleged violation of the exclusive power vested in provincial legislatures under FC s 104 read with Schedule 5 of the Final Constitution. These are all separation of powers challenges, although their true nature lies in the underlying provisions of the Final Constitution on which they are based. These underlying provisions are express provisions. To refer to separation of powers as an

138 For the principle of legality, see *Fedsure Life Assurance & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 58.

139 *Heath* (supra) at paras 20–22 (footnotes omitted). The Court referred to several other decisions in which it had invoked the separation of powers principle. See, eg, *First Certification Judgment* (supra); *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC); *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); and *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

140 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 37.

'implicit provision', therefore, is slightly misleading, since it tends to ignore the fact that separation of powers challenges may in many cases be based on express provisions.

On the other hand, the notion of a self-standing separation of powers principle derived from these provisions allows the Constitutional Court (and of course litigants) to develop constitutional standards and rules that may not be traced back to any particular provision, but rather follow from the interplay between the different branches of government, and their respective powers and functions. The principle of separation of powers is not only a technical term for the sum of all the express provisions dealing with the powers and functions of the different branches of government. It is also the source of abstract rules and principles which re-shape these powers and functions and the way in which they may be used as checks and balances. Thus, the whole principle of separation of powers is more than the sum of its parts, i.e. the express provisions. In recognizing separation of powers as a justiciable principle, it is not necessary for the Court to determine a specific basis for a rule derived from this principle beyond what is expressed in the language of the Constitution. This is the core feature of the relationship between textual provisions and overarching principles, as formulated by Laurence Tribe and endorsed by the Constitutional Court:

At times, text will be sufficient, without necessarily developing an overarching vision of the structure, to decide major cases. . . . Sometimes, however, it will be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole.¹⁴¹

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The remainder of this chapter sets out the general principles and doctrines applicable to these organizational relationships, as derived from the principle of separation of powers, which, in turn, is derived from the text of the Final Constitution as a whole.

(d) Emerging general principles and doctrines of separation of powers

(i) Legislature, executive and judiciary between pre-eminent domains and checks and balances

As indicated in our explanation of how the Final Constitution conceptualizes the separation of powers, both in its express provisions and in the overarching structure of inter-branch relations, there is no 'absolute separation of powers'. The Constitutional Court, too, has rejected any attempt to read the Final Constitution as embodying the 'pure form' of separation of powers. Instead, the powers, functions and institutions of the legislature, executive and judiciary are interrelated. This principle notwithstanding, the way separation of powers issues have been addressed by the Constitutional Court shows that, in South African constitutional law, understanding the nature of each branch's separate (or pre-eminent) domain is as important for the theoretical and practical elaboration of the separation of powers principle as the acknowledgement of mutual checks and balances.

In fact, the Constitutional Court has recognized that the separation of powers principle guarantees the unobstructed exercise of powers and functions and the integrity of each particular branch of government in a way similar to the way in

141 Laurence Tribe *American Constitutional Law* Vol 1 (3rd Edition, 2000) 130.

which individuals enjoy rights in the Bill of Rights. In this sense, the principle of pre-eminent domain protects the core functions and powers of each branch of government against intrusions from outside, while other intrusions are treated as checks and balances. Where a particular arrangement between the legislature, executive or judiciary is challenged on the basis of an alleged breach of separation of powers, the inquiry is therefore two-fold: first, the court must establish whether the power at issue falls into the core area of the branch's pre-eminent domain and, secondly, if not, whether the power may be subject to limitations aimed at tempering its exercise and constraining its abuse.

(aa) A pre-eminent domain for each branch of government

The rejection of a strict separation between the three branches of government has, however, not prevented the Constitutional Court from acknowledging that within the separation of powers each branch has a specific mandate. The principle of pre-eminent domain signifies that there are certain functions and powers that fall squarely within the domain of one or the other branch of government. Within this domain, interference or involvement by another branch cannot be justified as 'checks and balances', but must instead be treated as unconstitutional intrusions.

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The principle of pre-eminent domain, in other words, emphasizes the separation of functions and limits the attribution of certain powers to the 'wrong' institution. In *Minister of Health & Others v Treatment Action Campaign & Others (2)*, the Court clearly made this point when it stated:

[A]lthough there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.¹⁴²

Apparently, although several powers and functions may fall into the grey area between the different branches, and are at times hard to discern ('no bright lines'), there are others which are clearly attributable to one particular branch, so that no ambiguity arises. This leads to the obvious question of what these matters that can be so unequivocally attributed to one particular branch of government are. In *Ferreira v Levin NO*, one of its earliest judgments, the Constitutional Court indicated how it perceived the general distribution of responsibilities between the three branches:

Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. . . . The protection of fundamental freedoms is pre-eminently a function of the court.¹⁴³

Although the Constitutional Court has never defined the boundaries of these domains in abstract terms, this statement shows that a 'pre-eminent domain' is a

142 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 98 (emphasis added). See also *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 199 and fn 41 (For cases cited in support of proposition.)

143 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 180, 183.

core area of exclusive competence defined from a functional point of view. When dealing with the 'domain', 'heartland', 'exclusive competence' or 'central mission' of the executive, legislature or judiciary, the Court looks at the distinctive function of that particular branch of government in its relation to the other branches.

These core areas of each branch of government are well established in other jurisdictions — and they are usually invoked as a limitation on any intrusion by another branch, in effect a limitation on checks and balances. In Germany, for example, the Bundesverfassungsgericht has held that the separation of powers principle demands that the executive has room for manoeuvre and that there be a separate domain for each branch of government:

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The Basic Law does not require separation of powers in a pure form, but mutual checks, balances and moderation between the different branches of government. Nevertheless, the distribution of power and influence between the three branches as it is set up in the Constitution must be respected. No branch may develop a predominance over another branch that is not warranted by the Constitution. No branch may be deprived of the competences it needs to fulfil its constitutional tasks and mandate. The core-area of each of the three branches is invariable.¹⁴⁴

This idea of a core area has been used by the German Federal Constitutional Court to counter demands by Parliament with regard to the publication of certain government files in a parliamentary commission of inquiry,¹⁴⁵ or to make certain politically contested decisions itself, in particular with respect to foreign policy,¹⁴⁶ but with the notable exception of military operations in foreign countries.¹⁴⁷

The South African Constitutional Court has picked up on this understanding of pre-eminent domains defined by function. A case that illustrates the point is *Doctors for Life*, where the Court made the almost trite finding that the parliamentary process falls within the exclusive domain of Parliament, and emphasized the importance of its protection:

Parliament has a very special role to play in our constitutional democracy — it is the principal legislative organ of the State. With due regard to that role, it must be free to carry out its functions without interference. To this extent, it has the power to 'determine and control its internal arrangements, proceedings and procedures'. The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the

144 BVerfGE 95, 1 ('Südumfahrung Stendal' ['Stendal Southern Beltway']) 15 ('Das Grundgesetz fordert nicht eine absolute Trennung, sondern die gegenseitige Kontrolle, Hemmung und Mäßigung der Gewalten. Allerdings muß die in der Verfassung vorgenommene Verteilung der Gewichte zwischen den drei Gewalten gewahrt bleiben. Keine Gewalt darf ein von der Verfassung nicht vorgesehenes Übergewicht über eine andere Gewalt erhalten. Keine Gewalt darf der für die Erfüllung ihrer verfassungsmäßigen Aufgaben erforderlichen Zuständigkeiten beraubt werden. Der Kernbereich der verschiedenen Gewalten ist unveränderbar.' (references omitted).)

145 See BVerfGE 67, 100 ('Flick-Untersuchungsausschuss' ['Flick-Parliamentary Commission of Inquiry']).

146 See BVerfGE 68, 1 ('NATO-Doppelbeschluss/Atomwaffenstationierung' ['NATO-Double Track Decision / Deployment of Nuclear Arms']).

147 See BVerfGE 90, 286 ('Auslandseinsätze der Bundeswehr' ['Military Out of Area Operations']).

separation of powers. The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings.¹⁴⁸

At first glance, the fact that the determination of parliamentary procedure is the prerogative of Parliament seems to be so self-evident that it needs no further explanation. The underlying purpose of this passage, however, is to point out that

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Parliament's control over its own procedure must be protected to enable Parliament to fulfil its major function: to make policy decisions and enact general rules.¹⁴⁹

This idea is further illustrated in *De Lange v Smuts NO & Others*.¹⁵⁰ This case concerned the constitutional validity of a provision in the Insolvency Act, which authorized a person presiding over a creditors' meeting to imprison a recalcitrant witness. After holding that coercive imprisonment as such may be constitutionally justified, the majority of the Constitutional Court found that the separation of powers demanded that an order for such imprisonment should only be imposed by a judicial officer. Because the power to commit an uncooperative witness to prison lies 'within the very heartland of the judicial power', it cannot be exercised by non-judicial officers.¹⁵¹ After some reference to foreign jurisdictions, Ackermann J laid out the rationale behind this pre-eminently judicial function:

Judicial officers enjoy complete independence from the prosecutorial arm of the state, and are therefore well-placed to curb possible abuse of prosecutorial power. However, were executive branch officials to be invested with the power to compel, upon pain of imprisonment, cooperation with their investigative demands, this necessary check on the prosecutorial power would vanish, because it would allow the executive to pass judgment on the lawfulness of its own prosecutorial decisions.¹⁵²

This statement shows that the ambit of pre-eminent domain is defined by the function of the branch of government concerned. The power to commit someone to prison is such a threat to personal liberty that it needs to be exercised by someone institutionally and personally independent from government influence. This power forms part of the pre-eminent domain of the judiciary because the protection of fundamental freedoms is one of the core functions of the judiciary.

The companion case to *De Lange v Smuts* is *Heath*, which involved the question of judicial independence from the executive.¹⁵³ In *Heath*, the Constitutional Court had to consider the validity of certain statutory provisions (and presidential proclamations issued in terms of these provisions) providing for the appointment of

148 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) ('*Doctors for Life*') at paras 36, 37.

149 Obviously, the ironic twist in the *Doctors for Life* decision is that after all this strong language the Constitutional Court in the end did interfere with that seemingly sacred domain, holding that Parliament had failed to comply with the constitutionally mandated law-making process and declaring the Acts adopted in violation of that procedural requirements invalid (although the declaration of invalidity was suspended).

150 *De Lange v Smuts* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) ('*De Lange*').

151 *Ibid* at para 61.

152 *Ibid* at para 63.

a High Court judge as the head of an extraordinary police organization (the so-called 'Special Investigating Unit' (SIU)) tasked with investigating serious malpractices or maladministration in, or in connection with, the public service. In particular, the question was raised whether the numerous functions the head of the

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organization was required to fulfil were consistent with his or her position as a judge or would undermine the independence of the judiciary and the separation of powers.

Chaskalson P, writing for a unanimous Court, characterized this particular issue as one 'not concerned 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'.¹⁵⁴ The performance of functions in the heartland of the executive is incompatible with the core competence of the judiciary, i.e. the impartial assessment of executive power against the laws made by the legislature.¹⁵⁵ This core competence, the Court went on, determines and shapes the skills and qualities required for the performance of judicial functions — skills and qualities such as independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information.¹⁵⁶ In contrast, the head of the SIU, the Court held, was required to perform functions incongruent with these characteristics:

[The functions that the head of the SIU has to perform] include not only the undertaking of intrusive investigations, but litigating on behalf of the state to recover losses that it has suffered as a result of corrupt or other unlawful practices. . . . By their very nature, such functions are partisan. The judge cannot distance himself or herself from the actions of the SIU's investigators.¹⁵⁷

This is the heartland of the executive: to act in a partisan, interest-driven way, not to be independent but to follow the political views of the democratically elected government and to act accordingly — of course within the limits set by the Constitution.

The main reason for keeping a judge outside the executive is not that the legitimate partisan interests of the government would be threatened by an independently minded judge. The reason for the Constitutional Court to reject such appointments is their potential effect on the judiciary itself. It is the negative perception of the judiciary that could follow if judges were to act sometimes in an interest-driven way. The *Heath* Court makes it very clear that for this reason the

153 *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC).

154 *Heath* (supra) at para 24.

155 *Ibid* at para 29 (The Court cites with approval *Mistretta v United States* 488 US 361, 388 (1989) ('Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the Judiciary' (Blackmun J).)

156 *Heath* (supra) at para 34.

157 *Ibid* at paras 39–40.

constitutional review standard is objective, and demands that it go beyond the identity of the particular judge and his or her appointment to the SIU:

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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. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order.¹⁵⁸

On the other hand, once a non-judicial function has been assigned to a judicial officer in a way consistent with the Constitution, he or she is accountable to the executive, and may not enjoy the same degree of independence in the exercise of this function as when performing a judicial function. Against this background, the Constitutional Court distinguished the function of a magistrate's court in extradition proceedings from its core judicial functions in *Geuking*.¹⁵⁹ When a foreign state requests the extradition of one of its nationals from South Africa, the process of extradition is initiated by the issue of a warrant of arrest by a magistrate. In this procedure, according to s 10(2) of the Extradition Act,¹⁶⁰ a certificate from the appropriate authorities in the foreign state must be accepted as conclusive proof that such authority has sufficient evidence to warrant the prosecution of the person concerned. It was contended that this conclusive presumption had the effect of obliging the magistrate to commit the person concerned without any individual assessment of the alleged criminal conduct. The Court rejected the argument that such 'blindfolding' interferes with the functioning of the judiciary, because there is a difference between 'ordinary domestic proceedings' (read: court proceedings) and extradition proceedings. The inquiry by a magistrate during extradition proceedings does not constitute a trial in which guilt or innocence has to be determined. Instead, it is conducted in the context of a quasi-administrative procedure aimed at determining whether or not there is reason to remove a person to a foreign country to be put on trial there.¹⁶¹ Consequently, the independence of the judiciary is not affected and the separation of powers not violated.

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Because, within these pre-eminent domains, separation of powers is absolute and no checks and balances apply, such domains are defined narrowly and the courts are

158 *Heath* (supra) at paras 46.

159 *Geuking v President of the Republic of South Africa & Others* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC) ('*Geuking*').

160 Act 67 of 1962.

161 *Geuking* (supra) at paras 49-50.

very specific in their delimitation. For example, in *Doctors for Life*, the Constitutional Court had no problem in reviewing the parliamentary process *ex post*, i.e. once the bills at issue had been enacted. In *De Lange*, the Court limited the judiciary's pre-eminent domain to committing people to prison, while not preventing the executive from, among other things, pardoning offenders, limiting the discretion of the courts through minimum and maximum sentencing legislation, or running prisons. The same analysis works for *Heath*: judges regularly chair commissions of inquiry, head the Legal Aid Board, the Rule Board and the Inspectorate of Prisons. These are all functions that are, at least slightly, legislative or executive in nature, but they may be less partisan, do not deviate from the heartland of the judicial function, and are therefore acceptable.

Finally, in some exceptional circumstances, the principle of pre-eminent domain may not apply. Again, in *Doctors for Life*, the Constitutional Court kept the door open to intervene during the parliamentary process in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have violated the constitutional rights of that person beyond repair.¹⁶² The exception, in fact, makes it debatable whether the Constitutional Court would accept the pre-eminent domain of another branch of government where this would prevent it from exercising necessary judicial review powers. In these limited circumstances, one may see a pre-eminent domain not as an absolute barrier to judicial intervention, but rather as a subject matter requiring a particularly high level of justification for judicial intervention. There may also be extreme situations — war or national emergency — where the Constitution may permit the executive to perform functions reserved for Parliament or the judiciary, at least on a temporary basis.¹⁶³

To sum up, the principle of pre-eminent domain is designed to ensure the functional separation of powers between the executive, the legislature and the judiciary. It is used when the Constitutional Court regards a contested power as being so closely related with the primary function of that particular branch of government that (almost) no interference by other branches of government may be justified.

(bb) The availability of checks and balances

In a constitutional system that does *not* follow a strict separation between the legislature, the executive and the judiciary, the principle of pre-eminent domain is necessarily limited to core areas. Beyond these heartlands, there is room for procedures that limit the unobstructed exercise of powers by each of these branches and embody the countervailing principle of checks and balances.

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In its engagement with checks and balances, the Constitutional Court has repeatedly disavowed an approach to separation of powers questions that focuses on the form of the institutional arrangements alone, preferring to examine in detail the substantive effect of these arrangements. The point about checks and balances is precisely that they do provide for interference between the branches of government. The courts are asked carefully to examine if such interference is an unwarranted intrusion into the domain and independent functioning of one branch of

162 See *Doctors for Life* (supra) at para 69.

163 See Nicole Fritz 'States of Emergency' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 61.

government or another constitutional body, or if such interference constitutes an institutional safeguard designed to prevent the abuse of power.

This issue has been discussed at some length by the Constitutional Court with regard to the appointment procedures for judicial officers, which involve the participation of the other branches of government.

An essential part of the separation of powers is that there be an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence . . . In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the executive or by Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.¹⁶⁴

This argument was later picked up in *Van Rooyen*.¹⁶⁵ In *Van Rooyen*, it was contended that magistrates' courts lacked the institutional independence required by the Final Constitution.¹⁶⁶ The question was raised whether magistrates could be independent as long as they were appointed by a commission largely dominated by the executive. The Constitutional Court, after affirming that magistrates indeed enjoy judicial independence, even if not in the same form as higher courts,¹⁶⁷ rejected this view, and held that the fact that the executive, under the relevant legislation, might have a direct or indirect influence on these matters did not *in itself* entail a breach of judicial independence. According to the Court, a strong influence on the appointment of the members of the Magistrates Commission by the executive does not mean that the magistrates' courts themselves lack institutional independence. Nor does it follow from this that the Commission 'is unlikely to take any decisions, express any views or make any recommendations which do not find favour with the Minister', as the High Court had presumed.¹⁶⁸ Instead, the Court emphasized the fact that the appointment process for magistrates is designed with a view to the functions of magistrates:

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There is . . . a difference between being nominated by the executive to perform a duty which calls for an independent decision and being chosen by the executive to perform that duty in accordance with its wishes.¹⁶⁹

164 *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 (CC) at para 123.

165 *Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) ('*Van Rooyen*').

166 The High Court had declared several provisions of the Magistrates Act 90 of 1993 and the Magistrates' Courts Act 32 of 1944 unconstitutional and referred the matter to the Constitutional Court for confirmation in terms of FC s 172(2).

167 *Van Rooyen* (supra) at paras 27-28.

168 *Ibid* at para 71.

169 *Van Rooyen* (supra) at para 93

The thread that runs through the Court's reasoning throughout the *Van Rooyen* judgment is the inquiry whether the influence (or power) of the executive over the judiciary can be abused. Checks and balances allow for interdependencies, but these must be safeguarded against abuse of the power concerned. Because judicial officers are required to act independently and impartially in dealing with cases that come before them, the Constitution at an institutional level requires structures to protect courts and judicial officers against external interference.

What eventually saved the institutions and procedures relating to magistrates and their judicial function from the separation of powers attack in *Van Rooyen* was that there were at least one or two institutional constraints on the actual encroachment on the independence of the judiciary. The powers concerned were: (a) subject to judicial control by a higher court in the form of review; and (b) subject, in certain instances, to control by the Magistrates Commission itself.¹⁷⁰ Finally, Parliament could also counter potentially undue influence on magistrates by the executive.¹⁷¹ For example, the Court regarded the fact that magistrates are required to perform administrative duties unrelated to their functions as judicial officers to be not 'ideal', because it may make them answerable to the executive, and if that happens, the separation of powers that should exist between the executive and judiciary would eventually be blurred. However, the Constitutional Court seemed to accept such non-judicial assignments as long as none of these administrative duties specifically affects the judicial independence of magistrates. This is because, on the one hand, the assignment of any duty, either by law or by executive regulation, is itself subject to constitutional control, and because such assignments may serve the legitimate goal of using administrative resources prudently, and are thus not per se unconstitutional.¹⁷²

Adopting this approach, the *Van Rooyen* Court focused on specific instances of violation rather than general allegations. It found repeatedly that there was no violation of separation of powers under the particular institutional arrangements established under the respective acts. The High Court had erred in focusing on

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the provisions at a level of generality that neglected the internal safeguards. It had preferred form over substance. By analyzing the specific provisions it was revealed that there were sufficient checks and balances to ensure that there was no infringement of separation of powers.

170 Ibid at paras 69, 73, 87, 100, 128, 133, 148, 213, 238 and 263-265.

171 Ibid at para 133.

172 Ibid at paras 228-234. Technically, the question whether administrative duties unrelated to a magistrate's judicial functions can properly be assigned to magistrates was not the basis on which the constitutionality of the statutory provisions was challenged. The Chief Justice therefore refrained from dealing with that more general question in a decisive way. But he nevertheless held that '[t]here may be reasons why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system.' Ibid at para 233.

This approach is also visible in *S v Dodo*,¹⁷³ a case in which the Constitutional Court had to decide on mandatory sentences to imprisonment for life.¹⁷⁴ The High Court had reasoned that the imposition of the most severe punishment falls within the 'exclusive prerogative and discretion' of the courts, was inconsistent with separation of powers as required by the Constitution, and had accordingly declared the statutory provisions to be invalid.¹⁷⁵ The Constitutional Court refused to follow this reasoning. Ackermann J (in a unanimous decision) firstly rejected the argument that sentencing was the pre-eminent domain of the judiciary.¹⁷⁶ Nevertheless, because the imposition of mandatory sentences was some kind of limitation on a trial court's sentencing discretion, a separation of powers concern was indeed raised. This limitation, however, could be justified because, although the separation of powers under the Final Constitution was intended as a means of controlling government by separating or diffusing power, it was never intended to be strict. Instead, according to the Constitutional Court, the South African constitutional model of separation of powers is one that

embodies a system of checks and balances to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.¹⁷⁷

The Court explicitly accepted the legislature and executive's role and interest in respect of punishments imposed by the courts. It would only be contrary to the rule of law and constitutionalism if the legislature were to oblige the judiciary to impose punishments without any regard to the circumstances of each individual case, for then the judiciary would merely 'rubber stamp' a general legislative decision or impose a sentence that was not proportional to the crime.¹⁷⁸ Therefore, despite the obvious legislative encroachment into the judicial domain, the Court

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rightly recognized that mandatory sentencing legislation does not have the effect of excluding the exercise of judicial discretion in the ultimate decision as to what sentence is appropriate in the particular case. The statutory imposition of mandatory sentences was regarded as a constitutionally justified check or balance on judicial

173 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC).

174 Criminal Law Amendment Act 105 of 1997 s 51(1) made it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s 51(3)(a), the court was satisfied that 'substantial and compelling circumstances' exist which justify the imposition of a lesser sentence. The SCA had elaborated on how this exception clause should be applied in *S v Malgas*. 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA).

175 *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) ('*Dodo*') at para 8. The decision of the High Court is reported as *S v Dodo* 2001 (3) BCLR 279 (E), 2001 (1) SACR 301 (E).

176 *Dodo* (supra) at para 13.

177 *Ibid* at para 16. Ackermann J later writes: 'There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other'. *Ibid* at para 22.

178 *Ibid* at para 26.

power. In the view of the Court, it was justified because it is 'pre-eminently the function of the legislature' to determine what conduct should be criminalized and punished, and because the legislature had pursued a legitimate objective, i.e. ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society and trying to facilitate greater consistency in sentencing.¹⁷⁹

The relationship between the inviolable domain of each branch and justified checks and balances, as well as the problem of where the one starts and the other ends, surfaces again in a summary halfway into Ackermann J's judgment:

On this part of the case I accordingly conclude as follows:

- 33.1 While our Constitution recognises a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons.
- 33.2 Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences.
- 33.3 The concomitant authority of the other branches in the field of sentencing must not, however, infringe the authority of the courts in this regard.
- 33.4 It is neither possible nor, in any event, desirable to attempt a comprehensive delineation of the legitimate authority of the courts in this regard.
- 33.5 For purposes of this case it is sufficient to hold that the legislature is not empowered to compel any court to pass a sentence which is inconsistent with the Constitution.¹⁸⁰

Thus, a limitation on a function of one branch of government may be justified under the separation of powers doctrine if that limitation does not affect the core area of that other branch, if the limitation is itself the exercise of a core function or originates in the pre-eminent domain of the 'intruding' branch, and if the limitation serves a legitimate objective.

(ii) Judicial review and the separation of powers

Most of the decisions discussed above involve the judiciary and its independence from outside interference by the other branches. There are considerably fewer Constitutional Court decisions dealing with the separation of, and interrelationship between, the legislature and the executive.¹⁸¹ Besides decisions in which the

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institutional and functional independence of the judiciary has been at stake, the principle of separation of powers has also played a prominent role in decisions in which intra-governmental relations were *not* the subject matter of the dispute. In several decisions concerning individual rights and freedoms, the Constitutional Court

179 *Dodo* (supra) at paras 23 and 25.

180 *Ibid* at para 33. Apparently, 'authority' here refers to those powers that form the pre-eminent domain of the judiciary and may not be infringed.

181 On the problem of delegated legislation, see § 12.3(d)(iii) infra.

has used separation of powers criteria to determine the scope of its own review powers, the level of scrutiny and the remedies available.

In these cases, separation of powers concerns, informed by the Court's understanding of its institutional function in the South African constitutional system, were decisive for the assessment of the rights violations at issue and the substantive claims pursued. Considerations crucial to the practical operation of the separation of powers doctrine in South Africa, in other words, have not only been developed in the face of executive or legislative intrusions into the judicial domain, but also with regard to perceived or real intrusions into the other branches' domains by the judiciary. In this context, separation of powers is connected to the general notion of the benefits and problems of judicial review.

(aa) Judicial review in the context of the supremacy of the Constitution, the political question doctrine and intergovernmental respect and courtesy

In terms of the supremacy clause in FC s 2 and its jurisdiction as set out in FC ss 167 and 172, the Constitutional Court has the power to review legislation and executive action for consistency with the Constitution, in some instances as the final arbiter, and in others as the exclusive arbiter. This in itself is one of the most radical changes to the pre-1994 system introduced by the Final Constitution:

Prior to the enactment of the interim Constitution, courts adopted a more deferential attitude to laws made by elected legislatures than they did to laws made by administrative functionaries. Judicial review was developed and applied by South African courts against the background of a legal order which recognised the supremacy of parliament. Legislation duly passed by parliament in accordance with the then existing constitution was not subject to judicial review, and the power of the courts was confined to interpreting such laws and applying them to the facts of the particular case. . . . The introduction of the interim Constitution has radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control.¹⁸²

The Constitutional Court has again and again emphasized that it understands its mandate and its own 'pre-eminent domain'¹⁸³ to be the enforcement and protection of the Constitution, to ensure that the limits on the exercise of public power are not transgressed, to control the exercise of power and to uphold the Bill of Rights:

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Where we used to have a supreme Parliament, we now have a supreme Constitution. The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values.¹⁸⁴

The very reason for the judiciary to be independent from the legislature and the executive is so that it can fulfil this guardianship role:

182 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 28 and 32.

183 See § 12.3(d)(i)(aa) supra.

184 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('SARFU II') at paras 72-73.

In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the State.¹⁸⁵

Whenever, in the years since its establishment, the question has arisen whether the Constitutional Court has the power to review a particular legal rule or conduct, the Court has affirmed its comprehensive review powers. Some of these affirmations were inevitable given the clear language of the supremacy clause, such as the Court's holding in *Pharmaceutical Manufacturers*¹⁸⁶ that the Final Constitution alone sets the review standard for executive and administrative action.¹⁸⁷ Others were, perhaps, based on a particular understanding by the Constitutional Court of its own institutional function and mandate. In *Carmichele*,¹⁸⁸ the Court held that it would supervise other courts' interpretation and application of the ordinary law in terms of the Final Constitution.¹⁸⁹ Together, these decisions have led the Court to establish that there is no executive, administrative, parliamentary or

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judicial conduct, and no law whatsoever (including amendments to the Final Constitution, which are (at least) subject to procedural review¹⁹⁰), that escape constitutional scrutiny.

The Constitutional Court's strong conception of judicial review and of its constitutional mandate is the reason why the Court has declined to adopt anything like a political question doctrine. In other jurisdictions, this doctrine has developed as a key determinant of whether a court will consider an issue or not. The approach

185 *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 16.

186 *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

187 For further insight into this judgment, see Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11, § 11.3(b); Sebastian Seedorf 'Jurisdiction' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 4, § 4.3(d)(ii).

188 *Carmichele v Minister of Safety and Security & Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

189 The Constitutional Court has assumed a supervisory function with regard to the constitutionality of the application, interpretation and development of statutory and common law by other courts. See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4(e); Seedorf 'Jurisdiction' (supra) at §4.3(d)(i) and §4.3(h)(i)(aa).

190 See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC) ('*Matatiele II*').

of the US Supreme Court was authoritatively declared in the oft-cited case of *Baker v Carr*.¹⁹¹ Justice Brennan, whilst characterizing the various formulations of the political question doctrine as 'essentially a function of separation of powers', described the doctrine as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for discovering it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for the unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹²

The doctrine as articulated in this passage has the effect of ousting the court's jurisdiction with respect to the consideration of issues characterized as political questions, as these issues are deemed for the reasons set out in the passage as being non-amenable to judicial settlement. One of the more interesting aspects of the doctrine, particularly with regard to its general ousting effect, is that the limitation on the court's jurisdiction is in essence a self-imposed one. According to Laurence Tribe, at the heart of the political question doctrine are issues of justiciability and the courts' perception of their competence and limitations.¹⁹³

The South African Constitutional Court has followed the US model to a certain extent, but on the other hand has taken a more flexible approach to political questions. At first glance, the Court has confirmed that there are questions which it cannot decide, such as political or moral questions.¹⁹⁴ In this way, the exclusion of certain matters from the realm of the judiciary reflects the Court's notion of pre-eminent domains:

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Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution.¹⁹⁵

191 369 US 186 (1962).

192 *Baker v Carr* (supra) at 217.

193 Laurence Tribe *American Constitutional Law* Vol 1 (3rd Edition, 2000) 368, 385. See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 46.

194 Other matters outside the scope of judicial review are, for example, religious questions: 'Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies. . . . Whether or not the Biblical texts support [an applicant's argument] would certainly not be a question which this Court could entertain.' *Minister of Home Affairs & Another v Fourie & Others; Lesbian & Gay Equality Project v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at paras 92-93.

195 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 180.

The crucial distinction drawn in this and other passages is between the political function of the legislature and the executive and the politicality (or controversy) of a particular question that may be presented for decision. Thus far, the Constitutional Court has followed the US model only insofar as it has accepted that its power to decide a case may be limited by a 'lack of judicially discoverable and manageable standards'. This principle has been articulated on several occasions. In the *First Certification Judgment*, for example, the Court held:

First and foremost it must be emphasised that the Court has a judicial and not a political mandate. . . . Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [Final Constitution], save to the extent that such choices may be relevant either to compliance or non-compliance with the [constitutional principles]. Subject to that qualification, the wisdom or otherwise of any provision of the [Final Constitution] is not this Court's business.¹⁹⁶

It has been recognized in academic writing that constitutional questions are inevitably political questions, and as such the mere classification of an issue as being 'political' is not determinative of whether or not a court should adjudicate it.¹⁹⁷ This view has also been articulated by some members of the Constitutional Court in their extra-curial writings.¹⁹⁸ Furthermore, the Court has held that because the Final Constitution 'by its very nature deals with the extent, limitations and exercise of political power' the fact that a particular case has political implications may be precisely what brings it into the ambit of constitutional review.

Section 167(4) . . . confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of State in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide

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whether Parliament or the President has failed to fulfil a constitutional obligation. . . .

It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences.¹⁹⁹

196 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 27.

197 On the false dichotomy between politics and (constitutional) law, see Martin Loughlin 'Constitutional Law: The Third Order of the Political' in Nicholas Bamford & Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (2003) 27-51; Bruce Ackerman 'Constitutional Politics/Constitutional Law' (1989) 17 *Yale LJ* 453.

198 Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351, 353.

199 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC)(SARFU II) at paras 72-73.

In other cases, the fact that a matter 'pre-eminently involves a "crucial political" question', far from precluding the power of judicial review, has been the basis on which the Court has assumed exclusive jurisdiction to hear the matter.²⁰⁰

The nature of political questions that fall outside the scope of judicial review becomes clearer if one does not look at the subject matter but rather at what the Court may be asked to do. As the Court put it in *UDM*:

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.²⁰¹

This dictum emphasizes the distinction between political and legal questions *not* with regard to the subject matter of the dispute but with regard to the judiciary's function to adjudicate disputes that can be resolved through the application of law. The key to judicial review — and therefore the function of the courts in contrast to other branches of government — is not what the dispute is about, but the review standard or the yardstick that is applied. Any criterion of political expediency is irrelevant in the judicial decision-making process. Instead, the Court, in applying the Final Constitution as the sole review standard, determines the constitutional framework for political decision-making. In this respect, the distinction between political and legal questions is related to the Constitution's threshold criterion for access to courts, i.e. that the dispute can be resolved by the application of law.²⁰² There is a similarity between the possibility that a dispute may be resolved by a legal standard and the idea that political questions fall outside the ambit of the Constitutional Court's review powers.²⁰³ In both cases, a legal norm (the review standard) must be able to provide a solution or answer to the question raised.²⁰⁴

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It is therefore never the particular subject matter of a case that renders it 'political' and thus outside the review powers of the judiciary in general or the Constitutional Court in particular. Political questions in South Africa are not political matters or political cases. The determining factor is rather the methodology a court can apply in giving an answer to the question. There are questions for which the

200 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 21. See Seedorf 'Jurisdiction' (supra) at § 4.3.(b).

201 *United Democratic Movement v President of the Republic of South Africa & Others* (2) 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) at para 11.

202 See Jason Brickhill & Adrian Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59, § 59.3(a)(v).

203 Currie & de Waal (supra) at 707.

204 Chuks Okpaluba writes: '[F]or a matter raising a purely political question to emerge, it must be clear that judicial intervention . . . lacks constitutional foundation. . . . It is that question that defies all constitutional and legal solutions since its resolution could not be traced to any . . . legal source. For want of a better phraseology, that is the political question over which the court cannot assume jurisdiction, entertain its cause of complaint or grant any relief in any exercise of judicial authority. 'Justiciability, Constitutional Adjudication and the Political Question in a Nascent Democracy' (2003) 18 *SAPR/PL* 331.

Final Constitution does not provide a review standard, such as whether there should be a particular law or not or whether one regulatory scheme is better than the other. The Final Constitution does not provide a review standard for criteria like what is 'better', and accordingly the judiciary cannot be asked to decide such questions.

The Constitutional Court's approach in this regard is in keeping with its constitutionally ordained role of being the 'guardian of the Constitution'. However, in spite of the clarity of the Court's position with respect to its power to decide political matters, but not policy choices, the question still remains as to how to determine where the latter category starts, i.e. at what moment the Constitution fails to provide a workable review standard.

As will become clearer in the discussion of remedies below, the Constitutional Court will usually refer a question back to the other branches of government if choices are available for which the Constitution does not provide a single answer, but rather a leeway — a set of options all within the framework of the Constitution.²⁰⁵ Once the political choice has been made, however, the Court's mandate is to see that this choice complies with the Constitution. Every final policy choice is open and subject to judicial review.

In other words, the Final Constitution makes the courts the final arbiters of the nature and extent of the powers of the other branches and institutions of state. Through the power of review, they are possessed of the power not only to set aside the unlawful exercise of power by the executive, but to strike down legislation that is inconsistent with the Constitution. The courts themselves are the final arbiters of constitutional consistency. This power is to some extent checked by the powers of Parliament to amend the Constitution and the powers of other institutions of state to ensure that the courts are staffed with qualified and responsible officers. However, these instruments of control are either indirect or cumbersome.

In such a constitutional system it is necessary that the courts themselves formulate, articulate and apply principles for guiding the limits of their *own powers* and preventing their abuse. The formulation and application of these principles is important for the actual self-constraint which the courts exhibit. However, the articulation of these principles is equally important. Since the ultimate constraint on the abuse of power by the courts is political, articulation publicizes the standards by which the exercise of the courts' powers will be measured by society and

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its elected representatives. The courts' powers, if improperly and irresponsibly exercised, may undermine the courts' institutional legitimacy and lead to a situation where other branches of government no longer respect the authority of the courts.

This is particularly important for the Constitutional Court. For one, the Constitutional Court as the highest court on constitutional matters can and does constrain the exercise of power by all other courts, through the established institutions of appeal and review. Secondly, sensitivity to the requirement of self-restraint is most acute in respect of the exercise of the Constitutional Court's powers. Although there is a danger that the legitimacy of the courts as a whole may be undermined by cumulative or systematic abuse of judicial power, the wide jurisdiction and the symbolic position that the Constitutional Court enjoys require the Court to exercise its powers with particular care. The separation of powers principle is tested most in those difficult cases, where the Court is called upon to determine

205 See § 12.3(d)(ii)(cc) *infra*.

the authority of the other branches, and by corollary, where the Court's own authority is determined. In such cases, the Constitutional Court has made it clear that it will respect the powers of the other branches of government, such as its statement in *Ferreira* that the decision whether or not there should be regulation and redistribution falls into the domain of the legislature and not the courts.²⁰⁶ It has over time developed its jurisprudence in a strategic way to ensure that its decisions are indeed respected by the government and Parliament and, to a lesser extent, by the public.²⁰⁷

Like courts in other jurisdictions, the Constitutional Court of South Africa has on frequent occasions employed the idea of judicial restraint, a conscious decision based on separation of powers concerns not to interfere with decisions by the other branches of government, provided that they are in line with the Constitution. The last part of this sentence points to the dilemma that the Constitutional Court faces: the separation of powers principle demands that the Court should respect the domains and powers of the other branches of government, while at the same time ensuring that these branches act in accordance with the Constitution.

The judges of the Constitutional Court, of course, are aware of this challenge:

[T]his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary. . . . The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity. . . . Both extremes need to be avoided.²⁰⁸

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While it is generally advisable to avoid extremes, the supremacy of the Constitution must be the starting point for any such inquiry. In *Doctors for Life*, Ngcobo J emphasized that the judiciary's terrain has been mapped out quite clearly by the constitutional supremacy clause (FC s 2):

Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution. . . . But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. . . . Courts are required by the Constitution to ensure that all branches of government act within the law and fulfill their constitutional obligations.²⁰⁹

206 See *Ferreira v Levin NO* (supra) at para 180. See also § 12.3(d)(i)(aa) supra.

207 This thesis is convincingly argued by Theunis Roux. 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming). See also Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 554-56.

208 *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 155-56 (Sachs J).

209 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) ('*Doctors for Life*') at paras 37-38.

The performance by the Court of its mandate to ensure allegiance to the Constitution necessarily manifests itself as an intrusion into the domain of the other branches. Constitutional scrutiny, however, shows no disrespect for the separation of powers, but is the very embodiment of the system of checks and balances required by the Final Constitution. This point was made by the Constitutional Court in *Treatment Action Campaign (2)*:

The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.²¹⁰

In *Doctors for Life*, too, the Constitutional Court held that it would take the most unambiguous of ouster clauses to deprive it of its power to enforce the Constitution.²¹¹ Later in this judgment, Ngcobo J pointed out that the separation of powers principle could not serve as such an ouster:

[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.²¹²

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This is the correct approach. The separation of powers doctrine is a justiciable, though not express, constitutional principle reflected in the very structure of government.²¹³ Intergovernmental relations can be reviewed against this principle. It provides, both in its express provisions and in the overarching concept to which it gives rise, the yardstick against which alleged encroachments by the different branches of government can be scrutinized and assessed. But the principle of separation of powers cannot serve as a justification for the violation of other constitutional provisions or principles, especially those in the Bill of Rights. Where there is a rights violation, the Court must ensure that the violation stops and that the victim is given a remedy.

The Constitutional Court is aware that its own powers of review necessarily require it to intrude into the domains of the other branches of government. As much as it has said that such intrusions are mandated by the Constitution, it has at the same time pointed out that its powers must, nevertheless, be exercised with respect for the legislature and the executive. In *Van Rooyen*, the Court was thus critical not only of some of the conclusions reached by the High Court, but also rebuked the High Court for the manner in which its conclusions had been reached and the ease

210 *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 99.

211 *Doctors for Life* (supra) at para 38.

212 *Ibid* at para 200.

213 *Doctors for Life* (supra) at para 37.

with which the High Court was prepared to infer improper motives on the part of other organs of state:

In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, a substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of separation of powers requires that the judiciary, in its comments about the other arms of State, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another. They should avoid gratuitous reflections on the integrity of one another.²¹⁴

Here, respect and courtesy are applied as standards to guide the manner in which the Court relates to the other branches — not as standards influencing how the judiciary exercises its review powers in the first place. The basis for and limitations of judicial review in the constitutional context are to be determined by the separation of powers principle itself:

The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.²¹⁵

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Respect and courtesy are necessary corollaries of the review powers of the judiciary, and in particular to the Constitutional Court's review powers, because of its exclusive jurisdiction in certain matters.²¹⁶ Where there is no constitutionally mandated need for review and the administration of justice is not impeded, courts should preserve the comity that exists between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other.²¹⁷

However, as argued below, the Constitutional Court has not always followed its own principle that the separation of powers doctrine should not be used to avoid the courts' obligation to prevent violations of the Constitution. In certain cases, it has used the separation of powers principle in the process of constitutional interpretation to reduce the level of review, and thus to find that there was no violation. It has also in some cases relied on the separation of powers principle in its determination of the appropriate remedy, after a finding that the Constitution had been infringed.

(bb) Separation of powers and the applicable standard of review

The Constitutional Court has used separation of powers considerations to justify reduced levels of scrutiny in Bill of Rights cases. Such reduced levels of scrutiny, or review standards, have meant that law and conduct that otherwise might have been

214 *Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 48.

215 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 46.

216 See Sebastian Seedorf 'Jurisdiction' (supra) at § 4.3(b).

217 See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) at para 29.

found to be unconstitutional has passed constitutional muster. This has occurred not only at the second stage of the two-stage process for the analysis of rights infringements,²¹⁸ but also at the first stage, where such considerations are arguably irrelevant.

The question of different levels of scrutiny or different review standards preoccupied the Constitutional Court from the very beginning of its work. The limitations clause in the Interim Constitution stipulated that all limitations of a right in the Bill of Rights needed to be reasonable and justifiable, and that limitations of certain rights had in addition to be necessary.²¹⁹ In *Makwanyane*, the Constitutional Court accepted that, under the Interim Constitution, there could be at

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least these two levels of scrutiny depending on the right.²²⁰ Half a year later, in *Ferreira v Levin NO*, the Court rejected the possibility of further flexibility in the application of its review standards:

In terms of our Constitution we are enjoined to protect the [right to freedom and security of the person] against all governmental action that cannot be justified as being necessary. . . . We cannot regulate this power by mechanisms of different levels of scrutiny as the courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of 'fundamental justice', as the Canadian courts do.²²¹

In practice, however, the Constitutional Court has not abandoned the idea of different review standards for different rights. In *Hugo*, which dealt with the granting of a presidential pardon to imprisoned mothers (but not fathers), the Court relied on the fact that mothers had been the victims of past discrimination to develop a special review standard under the equality clause in the Interim Constitution.²²² Kriegler J's dissenting judgment was even more explicit:

Although the Constitution does not establish levels of scrutiny in the manner of the American Constitution, it is nevertheless worth noting that race and sex/gender are given special mention in the Preamble and head the list of [the specifically prohibited

218 See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 21 ('[The limitation clause in the Bill of Rights] calls for a 'two-stage' approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?') For further details, see Stu Woolman & Henk Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, § 34.3.

219 IC s 33(1)(b).

220 *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 339 ('The requirement of reasonableness and justifiability which attaches to some of the section 33 rights clearly envisages a less stringent constitutional standard than does the requirement of necessity. In both cases, the enquiry concerns proportionality: to measure the purpose, effects and importance of the infringing legislation against the infringement caused. In addition, it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights. Where the constitutional standard is necessity, the considerations are similar, but the standard is more stringent.')

221 *Ferreira v Levin NO* (supra) at para 181 (Chaskalson P).

222 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 47.

bases for discrimination] categories. The drafters of the Constitution could hardly have established a presumption of unfairness [in the equality clause] only to have the burden of rebuttal under the section discharged with relative ease.²²³

The limitation clause in the Final Constitution dropped the notion of dual levels of scrutiny. Why? It may be because the drafters intended that the courts should be able to tighten or loosen the clause's justificatory requirements according to the nature and importance of the right at issue.²²⁴ Whether this proposition is true or not, the crucial question is what considerations may legitimately inform the level of review applied by the courts at both the first and the second stage of the constitutional inquiry. The full answer to this question is beyond the scope of this chapter. For purposes of this chapter, the question is whether the courts may legitimately use separation of powers considerations to adjust the review standard applicable to a case, either at the first stage, or at the second.

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When one looks at the cases, it is immediately apparent that the Constitutional Court takes separation of powers considerations into account at both the first and the second stages of the constitutional inquiry. At the first stage, in engaging with the content of the right, the Court sometimes considers that its own role and function in the constitutional system prevents it from scrutinizing the rights violation to the fullest extent. In these cases, the Court does not define the content of the right in general terms or even at all. Rather, it reduces the right to the requirement that a particular legislative or executive procedure be followed. In some cases, this approach is sufficient to substantiate a finding that the applicant's rights have been violated in a way they cannot be constitutionally justified. In others, the weaker standard of review thus applied results in a finding that the right has not been violated, and therefore that the law in question does not need to be justified under the general limitations clause, or that the conduct in question passes constitutional muster.

The reason for this approach seems to be the view that assessing law or conduct against substantive rights may sometimes result in the usurpation of the legislative or executive branch's powers. In its analysis of a particular constitutional right, the Court thus often looks at the right, not from the perspective of an independent arbiter with final decision-making powers in respect of the content of rights, but as a player in the intergovernmental relations game. On this approach, the content of rights must be defined in a way that leaves interpretive room to the other branches of government.

The most prominent example of this approach, of course, is the Constitutional Court's jurisprudence on socio-economic rights — the rights to housing, health care, food, water and social security in FC ss 26 and 27.²²⁵ The method the Court has used in its engagement with these rights — besides peppering its decisions with the 'rhetoric of restraint'²²⁶ — is to transform the legislature and executive's obligations in respect of these rights into the duty to act reasonably. The consequence of this approach is a jurisprudence that oscillates between deference and interference or, in more traditional language, between judicial restraint and activism.

OS 06-08, ch12-p62

223 Ibid at para 75.

224 Woolman and Botha defend this proposition elsewhere in this treatise. See Woolman & Botha 'Limitations' (supra) at §34.8(c)(i).

On a conceptual level, the Court has rejected the view that there is any real difference between its approach to traditional civil and political rights, on the one hand, and socio-economic rights, on the other. In the *First Certification Judgment*, the Court was explicitly faced with the objection that socio-economic rights were inconsistent with the separation of powers because the judiciary would have to encroach on the domain of the legislature and executive.²²⁷ In particular, the objectors argued that the adjudication of socio-economic rights would necessarily require the courts to dictate to government how its budget should be allocated. The Court held that these concerns were unfounded:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.²²⁸

In this dictum, the Court adopts what may be described as a 'so-be-it' approach to the consequences for separation of powers of the inclusion of justiciable socio-economic rights in the Final Constitution. In *Soobramoney*, the first socio-economic rights case to come before the Court, its approach was more cautious:

The provincial administration which is responsible for health services . . . 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.²²⁹

In this passage, the Court appeared to adopt a low-level, 'rational decisions taken in good faith' standard for the review of socio-economic rights. In *Grootboom*, the Court was slightly bolder, and articulated its now familiar reasonableness standard. For

225 For more on socio-economic rights, see Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; David Bilchitz 'Health' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 56A; Anton Kok & Malcolm Langford 'Water' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 56B; Danie Brand 'Food' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C; and Mia Swart 'Social Security' S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 56D.

226 Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544.

227 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

228 *Ibid* at para 77.

229 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) at para 29.

current purposes, the crucial point is that the *Grootboom* Court, in developing this standard, expressly took into account the institutional function of the judiciary in the separation of powers:

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. . . . A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could

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have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.²³⁰

The Court here sets the review standard for socio-economic rights in a way that ensures that the right is only violated once the challenged executive or legislative conduct has been declared to be unreasonable. The limitations and consequences of this approach are discussed elsewhere in this work,²³¹ but it is fair to say that this standard is lower than a requirement that specific social services should be provided, and thus makes it easier for the legislature and the executive to survive constitutional challenges, both to their adopted policies and to the quality of services actually delivered. For purposes of this chapter, the important point is that the Constitutional Court's entire approach in this regard starts with the assertion that giving content to socio-economic rights is not 'primarily' its mandate. To be fair, both FC ss 26 and 27 provide that the state must take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realization of socio-economic rights. These textual indicators, however, did not ineluctably determine the particular understanding of reasonableness that the Court has adopted. Instead, it has been the Court's particular conception of separation of powers that has been decisive in the development of this standard.

In *Treatment Action Campaign (2)*, the Constitutional Court confirmed its reasonableness standard of review and emphasized its connection to the judiciary's role in intergovernmental relations:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.²³²

230 *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*') at para 41.

231 See Kirsty McLean 'Housing' (supra) at §55.3(c); David Bilchitz 'Health' (supra) at §56A.3(c)-(d); Mia Swart 'Social Security' (supra) at §56D.3(c).

232 *Minister of Health & Others v Treatment Action Campaign & Others (2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) ('*Treatment Action Campaign (2)*') at para 38.

All this does not mean, of course, that the reasonableness standard may not be used to grant constitutional claimants specific benefits — after all, in *Treatment Action Campaign (2)*, the Court held that government was obliged to make a specific drug available to combat mother-to-child transmission of HIV. But the

last sentence of the quoted passage begs the question: does so indeterminate and weak a review standard as reasonableness really bring the judicial, legislative and executive functions into appropriate balance?

From a separation of powers perspective, the first problem with such a review standard is that it allows not only the executive and the legislature, but also the courts to determine the constitutionality of socio-economic rights policies and programmes according to a vague, and therefore discretionary, standard. As David Bilchitz has argued, this approach does not prevent but — on the contrary — may actually give rise to the danger that courts will overstep their mandate and trespass onto the domain of the other branches of government.²³³ This may result in an unnecessarily antagonistic relationship between the judiciary and the other branches of government, when 'ideally' the courts should be seen to be supporting the legislature and executive in their task of progressively realizing socio-economic rights.²³⁴ This criticism is certainly valid. The problem with reasonableness is that it is potentially an empty shell, one that may be filled with deference as well as with activism. On the other hand, the Constitutional Court has already suggested considerations that might help to make the reasonableness standard less discretionary. For example, in *Treatment Action Campaign (2)*, the Court held that the effect on the poor and vulnerable in society is an important factor in determining whether a particular government policy is reasonable.²³⁵ Over time, the Court will no doubt define more criteria for the assessment of reasonableness, and in this way prevent the usurpation of the other branches' powers, and provide assistance to the legislature and executive on how best to fulfil their socio-economic rights obligations.

Another, more serious problem with the Constitutional Court's application of the separation of powers doctrine in socio-economic rights cases is that the Court seems to do exactly what it vehemently denies: limiting rights by reference to separation of powers considerations, not at the second stage of the constitutional inquiry, but by way of a particular interpretation of socio-economic rights at the first stage. The Court's decision to adopt a level of scrutiny at the first stage that does not even require a minimum core content to be given to socio-economic rights reduces their potential scope considerably. Although the Court has emphasized that the Final Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights, it has rejected the idea that socio-economic rights may found claims for specific services.²³⁶ This stance appears to run counter to the Court's

233 Bilchitz (supra) at §56A.3(e).

234 Marius Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 386, 406.

235 *Treatment Action Campaign (2)* (supra) at paras 70, 72.

236 *Ibid* at paras 35 and 99.

strong statement in *Doctors for Life*²³⁷ that the doctrine of separation of powers should not be used to avoid the judiciary's obligation to prevent the violation of the Constitution.

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To be clear, the problem with taking separation of powers concerns into account at the first stage of the constitutional inquiry is that such concerns are strictly speaking irrelevant, and may actually prevent the courts from performing their constitutionally appointed task of determining the content of rights and government's corresponding obligations. Once a constitution includes a particular right, the separation of powers doctrine dictates that competent courts must determine the specific claims and entitlements flowing from the right. In so doing, the courts do not usurp the political branches' powers. On the contrary, they fulfil their constitutional mandate to close gaps in the law, solve conflicts, and make choices in the light of ambiguous legal rules. Inevitably, the courts thus make law. This shows no disrespect for the legislature, but merely amounts to the performance by the courts of their institutional function in a constitutional system in which they are given the power of judicial review.

Admittedly, in the context of socio-economic rights, the Constitutional Court has based its reasoning on a particular interpretation of the relationship between subsecs (1) and (2) of FC ss 26 and 27.²³⁸ Nothing in these provisions, however, dictates that separation of powers concerns should be factored into the process of rights interpretation (as opposed to the process of rights limitation, which occurs after the content of rights has been specified). In the context of the Bill of Rights, the separation of powers manifests itself in the fact that, beyond specific guarantees, the legislature and the executive are free to pursue their policy goals. The Final Constitution does not cover every possible aspect of life and leaves considerable leeway for a range of policy decisions, all of which may be in conformity with the Constitution.²³⁹ Nevertheless, it is a core principle of strong-form judicial review that the legislature does not have the final word on the content of human rights guarantees (as would be the case in a system of parliamentary supremacy or weak-form judicial review), but that the legislature's decisions are reviewed against the higher standard of the Constitution itself. To construe legislative and executive conduct as internal modifiers, as the Constitutional Court has done in its socio-economic rights jurisprudence, is to make a mockery of the principle that the legislature and the executive are bound by the Bill of Rights.

In the context of rights interpretation, the separation of powers doctrine requires the courts to determine the appropriate level of scrutiny on the basis of the constitutional text, in the same way as they do in relation to other constitutional provisions, i e by taking into account the purpose of the right, the purpose of the Bill of Rights in general, and the relation of the right to the founding values.²⁴⁰ It follows that the state will only enjoy a margin of appreciation

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237 Cf *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 200.

238 *Treatment Action Campaign (2)* (supra) at paras 29–30 and 39.

239 See Seedorf (supra) 'Jurisdiction' at § 4.3.(h)(ii)(bb).

or leeway in its policy decisions where the nature and purpose of the right *itself* allows the leeway. On this approach, an applicant may still have no claim to a specific benefit, not because the state may determine the content of the right, but because the *scope* of the right, properly construed, may not extend to the granting of specific benefits. In respect of such rights, the state enjoys a wide discretion and may thus decide on a range of possible measures that all meet its constitutional obligations. In respect of other rights, however, the scope of the right properly construed may give rise to a specific benefit, and to deny this benefit to the applicant on the basis of separation of powers concerns is to renege on the courts' constitutional obligations.²⁴¹

Even if the Final Constitution on a proper interpretation allows for a wide range of possible measures which could be adopted by the state to meet its obligations, the separation of powers doctrine does not mean that these obligations can not be determined. It may be that on a proper interpretation of FC s 26, for example, the right to access to housing does not confer an entitlement to claim shelter or housing immediately upon demand.²⁴² But this does not mean that separation of powers considerations prevent the courts from giving any content to this right, simply because there is no corresponding obligation to fulfil the right immediately. Budgetary or capacity considerations may be balanced against the state's constitutional obligations during the limitations exercise.

Although the intrusion of separation of powers concerns into the rights interpretation stage manifests itself most clearly in relation to socio-economic rights, the Constitutional Court has adopted this approach in other cases, too. The common thread running through these cases is that they all involved claims for positive action on the part of the state, rather than a mere negative defence of the Bill of Rights.

In the 2004 case of *Kaunda*, a matter in which alleged mercenaries imprisoned in Zimbabwe sought to compel the government to provide them with diplomatic protection, the Court acknowledged that questions of foreign policy generally fall into the domain of the executive and that the Court was ill-equipped to intervene.²⁴³ Chaskalson CJ, writing for the majority, held as follows:

A decision as to whether protection should be given, and if so, what, is an aspect of foreign policy which is essentially the function of the executive. The timing of the

240 For example, the Constitutional Court has interpreted the right to equality with a view to the underlying value of dignity and it is difficult to see why that should not be the case in the area of socio-economic rights. See Catherine Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Law of South Africa* (2nd Edition, OS, July 2007) Chapter 35, § 35.1(d)(i).

241 Chaskalson P made this the focal point of rights interpretation: 'The very reason for establishing the new legal order, and 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 the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.' *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 88.

242 See *Grootboom* (supra) at para 95.

243 *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC).

representations if they are to be made, the language in which they are to be couched, and the sanctions (if any)

which should follow if such representations are rejected are matters with which courts are ill-equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which may be harmed by court proceedings and the attendant proceedings.²⁴⁴ The fact that foreign policy has traditionally been²⁴⁵ and in many jurisdictions still is regarded as the domain of the executive²⁴⁶ is not surprising. In *Kaunda*, however, the Constitutional Court indicates exactly *why* it is prepared to grant the executive broad discretion in matters of foreign policy. In the absence of a political question doctrine, both the majority and the dissenting judgments make it clear that the Court should stick to its general rule that the exercise of *all* public power, including issues of foreign affairs, is subject to constitutional control. The majority emphasizes that foreign affairs are *not* beyond scrutiny — that if government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly.²⁴⁷ But, as O'Regan J puts it in her dissenting judgment, 'the precise scope of the justiciability will depend on . . . the nature of the power being exercised'.²⁴⁸ In the eyes of the majority, the nature of the power to conduct foreign affairs is so multi-layered and complex that a court of law should not apply a one-dimensional review standard to it. Chaskalson CJ and Ngcobo J (in a supporting judgment) both stress that a court simply cannot take all the factors into account that are necessary for the decision whether and, if so, how to provide diplomatic protection. For O'Regan J, a court should 'not presume knowledge and expertise that it does not have'.²⁴⁹ Both the majority and the minority thus feel that the Court lacks the skills necessary to evaluate comprehensively how foreign affairs should be conducted. Many of the criteria that need to be applied in such an evaluation (Chaskalson CJ states timing, language, and possible consequences) are extra-legal, and thus beyond the realm of the courts. There is simply no legal yardstick by which to judge whether the timing of a particular diplomatic approach, for example, would be appropriate. In the result, the only review standard the *Kaunda* Court

244 *Kaunda* (supra) at para 77. On the pre-eminence of the executive in the area of foreign policy see also the minority decisions of Ngcobo J at para 172 ('The conduct of the foreign relations is a matter which is within the domain of the executive.') and O'Regan J at para 243 ('It is clear . . . [that] the conduct of foreign relations is primarily the responsibility of the executive.')

245 See John Locke's notion of 'federative power', the 'power of war and peace, leagues and alliances', i.e. foreign affairs, which cannot be conducted subject to predetermined abstract legal rules and in which the executive is *not* subject to the control of the legislature. John Locke *Two Treatises of Government* 2nd Treatise (1688) Chapter XII, paras 145–48.

246 The Constitutional Court quotes decisions by German and English courts and refers to several other jurisdictions. *Kaunda* (supra) at paras 71–75.

247 *Kaunda* (supra) at paras 80 (Chaskalson CJ) and 192 (Ngcobo J).

248 *Ibid* at para 244.

249 *Ibid* at para 247.

feels competent to apply is the (rather low) standard of rationality and absence of bad faith, and a test for whether the request for diplomatic protection was dealt with at all.

The difference between the majority and the dissenting judgments is thus not the analysis of the right at issue (although there is a disagreement over the extraterritorial effect of the Final Constitution): both agree that the Final Constitution does not provide for a clear and unambiguous entitlement to diplomatic protection. (In fact, the Final Constitution does not mention any entitlements with regard to foreign policy at all.) Rather, the difference between the judgments is the consequence that should follow from this finding: what is the Constitutional Court to do when there is no clear normative framework? The majority concludes that it must adopt a low review standard and leave a wide range of options open to the government. O'Regan J, by contrast, thinks that the Court should first look to see whether it can fill an open constitutional standard by reference to other constitutional provisions:

The question [whether there is an obligation upon government to provide diplomatic protection] has to be answered in the light of the normative commitment to human rights emphasised in our Constitution, the importance accorded to international law and human rights in our Constitution and the conception of democratic government that underlies our Constitution. Most importantly, our Constitution must be interpreted in a way that will promote rather than hinder the achievement of the protection of human rights.²⁵⁰

The consequence of this approach is not that the Court may prescribe to the executive what to do in foreign affairs, but that, in light of 'a growing global commitment to the protection and promotion of fundamental human rights', the government is under an obligation to reaffirm the primacy of human rights in the South African constitutional order.²⁵¹ On this basis, O'Regan J proposes a declaratory order requiring the South African government to take appropriate steps to protect the applicants from possible egregious violations of international human rights norms.

In the eyes of the majority, the absence of any clear legal obligation indicates that the courts may only apply the review standard of lawfulness. Lawfulness is here defined as being the absence of irrationality — a contingency standard where nothing else is available. The moment the government can show that it has taken the matter seriously and that it has acted rationally in good faith, there is no violation of the Constitution and, hence, the applicants have no further claim. They may demand that the executive exercise its discretion according to this standard, but they cannot demand a specific result. In the eyes of the minority, on the other hand, the wide discretion the majority accords to the executive is reduced by the need to comply with international human rights norms. The

issuing of the minority's declaratory order may not have made much difference to the applicants' situation in *Kaunda*. But it would have suggested that, even in cases falling into the executive's pre-eminent domain, the Bill of Rights fetters the executive's discretion to a certain extent.

²⁵⁰ *Kaunda* (supra) at para 237.

²⁵¹ *Ibid* at para 270.

The relationship between rights interpretation and separation of powers is also illustrated in cases involving the right to political participation. In these cases, the Constitutional Court has often stated how important political rights are for South Africa's constitutional democracy.²⁵² But it has nevertheless adopted a deferential review standard based on considerations similar to those taken into account with regard to socio-economic rights. In *New National Party*, for example, the Court (in a majority judgment by Yacoob J) held that the requirement to register as a voter on the national voters' roll was 'a constitutional requirement of the right to vote, and not a limitation of the right'.²⁵³ Given this conceptual framework, the Court inevitably concluded that the only appropriate standard for reviewing electoral legislation was that of rationality:

It is to be emphasised that it is for Parliament to determine the means by which voters must identify themselves. This is not the function of a court. But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. There are important safeguards aimed at ensuring appropriate protection for citizens who desire to exercise this foundational right. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the [electoral] scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.²⁵⁴

The Court ironically uses strict language here to justify a fairly low standard of review. This low standard was criticized by O'Regan J, who, in a dissenting judgment, argued that the importance of the right to vote (which the majority strongly emphasized) demanded 'particular scrutiny by a court to ensure that fair participation in the political process is afforded'.²⁵⁵ In O'Regan J's view, the majority's rational basis test for determining the constitutionality of an electoral statute was far too deferential. Instead, she held, a provision in an electoral statute that has the effect of limiting the number of eligible voters needs to be reasonably related to an appropriate government purpose.²⁵⁶

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The majority in *New National Party* retorted that it was barred from adopting this higher standard by reason of the separation of powers:

Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They

252 See, for example, *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*New National Party*') at para 11 ('The importance of the right to vote is self-evident and can never be overstated. . . . [T]he right is fundamental to a democracy for without it there can be no democracy.') See also *August & Another v The Independent Electoral Commission (IEC) & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*') at para 17 (Sachs J).

253 *New National Party* (supra) at para 15.

254 *Ibid* at para 19.

255 *Ibid* at para 122.

256 *Ibid* at para 122.

will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.²⁵⁷

The majority here appears to misunderstand O'Regan J's point and fails to engage with the real separation of powers issue in this case. It is true that the Constitutional Court should not, and does not, review policy decisions by Parliament on the basis of whether there are other or better policy options available. To this extent it indeed does not use a reasonableness standard. But, of course, reasonableness is a perfectly legitimate review standard with regard to legislation, as is expressly envisaged in the limitations clause. What O'Regan J meant, and perhaps might have expressed more clearly, was that a provision in an electoral law restricting the number of eligible voters is a clear limitation on the right to vote and therefore needs to be reasonable and justifiable in an open and democratic society. The importance of the right to vote would in this way be respected by placing the onus on the government to justify any limitation. The majority's approach in *New National Party*, by contrast, means that legislative regulation of the right to vote is unlikely ever to require justification beyond the rational basis standard imposed in that case.²⁵⁸

The real separation of powers issue that the majority in *New National Party* fails to address is this: when the Final Constitution provides very little direct guidance on how a legislative scheme should be designed, does the separation of powers doctrine automatically require the Court to adopt the lowest possible review standard? O'Regan J pointed to the dilemma that the right to vote cannot be exercised in the absence of a legislative framework.²⁵⁹ Indeed, the Final Constitution often requires the Constitutional Court to test legislation against open-ended concepts and vague expressions, such as 'democracy' or the 'rule of law.' The same may be said of socio-economic rights. In all these cases, the Court has to give content to the rights concerned. As argued earlier, however, filling these open-ended concepts is an interpretative exercise in which the Court needs to engage with other constitutional provisions, the founding values and, perhaps, the structure of the Final Constitution as a whole. It does not follow from the

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separation of powers principle that merely because a standard is open a deferential approach is required.²⁶⁰

The Constitutional Court's decision in *UDM* adds even more complexity to this discussion.²⁶¹ In upholding certain constitutional amendments allowing the defection of members of parliament from one party to another ('floor crossing'), the

257 *New National Party* (supra) at para 24.

258 *Ibid* at para 24.

259 *Ibid* at para 122.

260 See Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 547 (Emphasizes that advocating judicial restraint is meaningless when it does not take into account that written Bills of Rights (by way of their open language) allow for divergent judicial approaches within the spectrum of legitimate legal reasoning, that in constitutional democracies judges wield a great deal of discretion and that they are necessarily active participants in governance.)

Constitutional Court held that the principle of democracy as set out in the Final Constitution allows for both a system of proportional representation with an anti-defection clause and for such a system without an anti-defection clause.²⁶² Because the Final Constitution left the precise form of the electoral system open, the decision taken by Parliament to abolish the anti-defection clause passed constitutional muster.

In contrast to its decision in *New National Party*, the *UDM* Court does not reason explicitly that it cannot set a higher review standard by reason of the separation of powers. On a purely technical reading, the holding that an anti-defection clause is not mandated is based entirely on the Final Constitution's democratic principle. The Court simply saw no reason to develop a more robust understanding of democracy, which would have raised the review standard the legislature had to meet.²⁶³ But this dry reasoning needs to be contrasted with the affirmed importance of democracy and the Court's willingness in other cases to adopt a value-based understanding of such concepts.²⁶⁴ As several commentators have noticed, even without explicit reference to separation of powers, the underlying rationale for the *UDM* Court's decision seems to be the deference it perceived itself to owe to the legislature in cases of this nature.²⁶⁵

Although *UDM* may not provide the full inside story of how the Court understands the meaning, relevance and function of the separation of powers principle in South Africa, it nevertheless shows that separation of powers is sometimes an

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express principle of constitutional law, while on other occasions it provides a more hidden rationale for the Court to employ other tools of constitutional interpretation to justify a deferential approach.

It is, of course, a matter of speculation what internal reasons might have motivated the Court in *UDM* to adopt an understanding of separation of powers that resulted in its ultimately allowing the floor-crossing package of legislation to go through where this was hardly the indisputable requirement of strict constitutional logic. The best explanation, in our view, is that the Constitutional Court does not always follow strict constitutional principle, but sometimes trades off principle

261 *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) ('*UDM*').

262 *Ibid* at paras 34–35.

263 *Ibid* at para 35 (Court pointed out that no authority was provided obligating a member of a legislature to resign if he or she changed party allegiance during the life of the legislature absent a clear constitutional or legislative requirement to that effect.)

264 See, for example, *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 21 (Interpretative role of the founding provisions in relation to political participation); *August* (*supra*) at para 17; and *African Christian Democratic Party v Electoral Commission & Others* 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) at para 23.

265 See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, July 2006) Chapter 10, § 10.3(b); Jason Brickhill & Ryan Babiuch 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2nd Edition, OS, March 2007) Chapter 45, § 45.5(a); Patrick Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 554.

against pragmatic considerations.²⁶⁶ Decisions like *UDM* help us to understand how the Constitutional Court has developed its jurisprudence on a strategic basis to ensure that its decisions are respected by the government and Parliament, and, to a lesser extent, by the public. To everyone familiar with the contested role of the judiciary in South Africa, it is not inconceivable that the Constitutional Court may at times take the possible reaction of other political players into account when deciding a case. Sometimes the Constitutional Court prevents the legislature from pursuing a particular policy by subjecting it to a strict constitutional standard and sometimes it defers to the legislature's policy choice — without any apparent logic or coherent legal justification connecting the two sets of cases. This is hardly surprising, however, in a country dominated by a single political party in which the Constitutional Court needs to have regard to its institutional security and sociological legitimacy.

From a separation of powers perspective, there is another interesting factor that contributes to this explanation. The fact that the Constitutional Court feels the need to safeguard its institutional security so that it will be able, over time, to widen the 'tolerance interval' of the other branches for adverse decisions, thus allowing it to enforce the Constitution even in the most difficult cases,²⁶⁷ is reminiscent of a fundamental aspect of the separation of powers: that only power arrests power.²⁶⁸ By gradually expanding its de facto political power to enforce the Constitution, the Constitutional Court apparently takes seriously a consideration of which Montesquieu and Madison were acutely aware, i.e. that it is not enough to have separation of powers on paper. A system of countervailing powers, and checks and balances, also has to be operative in fact. Separation of powers simply does not work — does not prevent 'the gradual concentration of the several powers in the same department' — if those institutions tasked with providing limitations on the concentration and abuse of power lack 'the necessary means or personal motives to resist encroachments of the others', as James Madison put it.²⁶⁹

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The Final Constitution clearly provides the Constitutional Court with the 'necessary means to resist encroachments' by the political branches, and by all accounts thus far the Constitutional Court judges have shown that they have the personal stature required to live up to this expectation. But the constitutional mandate for judicial review would be meaningless if the Constitutional Court were faced with the prospect of seeing its members replaced by more politically compliant judges or, in the worst case scenario, being closed down or having its powers significantly curtailed. It is therefore precisely because the Constitutional Court's institutional function is to prevent the executive and the legislature from accumulating too much power, that it has to ensure that it stays in the adjudication business long enough to achieve this goal. The Constitutional Court has to ensure its

266 See Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming).

267 Ibid (quoting Lee Epstein, Olga Shvetsova & Jack Knight 'The Role of Constitutional Courts in the Establishment of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117, 128–29).

268 See § 12.2(a) supra.

269 Alexander Hamilton, James Madison & John Jay *The Federalist No 51* (supra) at 266.

institutional security so that it has the capacity to check and balance the other branches of government, in accordance with its constitutional mandate.

(cc) Separation of powers and remedies

Once the Constitutional Court has found that there has been an unjustified violation of a fundamental right, separation of powers considerations may still play a role with regard to the remedy. Constitutional remedies are governed by the Constitutional Court's authority to make any order that is just and equitable (FC s 172(1)(b) in connection with orders of invalidity) and to grant appropriate relief (FC s 38 in connection with an infringement or threatened infringement of the Bill of Rights).²⁷⁰ Because the Final Constitution is not particularly detailed on remedies, the Constitutional Court has found that it has been left to the courts to decide what constitutes appropriate relief in any particular case, and that the courts' approach must be flexible,²⁷¹ provided that the remedy asked for has a sufficiently close connection to the subject matter of the case and the question put to the Court.²⁷² In essence, appropriate relief is relief that is required to protect and enforce the Constitution and the rights enshrined in it.²⁷³ The Court has

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emphasized that the legitimacy of its orders rests on the fact that they give effect to the provisions of the Constitution,²⁷⁴ are effective and can be seen to be effective.²⁷⁵

Declarations of statutory invalidity in terms of FC s 172(1) are mandatory once the Constitutional Court has decided that any law or conduct is inconsistent with the Final Constitution. However, sometimes part of the legislative scheme found to be unconstitutional serves a legitimate purpose, and the invalidation of the unconstitutional provision would complicate or even prevent the achievement of this

270 For more details on constitutional remedies, see Michael Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

271 See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 18; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 38.

272 See *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) (The Court was asked not only to extend certain benefits for married couples to partners in a permanent same-sex life partnership (who were unconstitutionally excluded from these benefits), but also to extend the benefits to non-married heterosexual partnerships. The Court rightly rejected this request: 'This Court is not at large to grant any relief under its power to grant "appropriate relief" — it cannot import matters that are remote to the case in question — otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved.' Ibid at para 33.)

273 *Fose* (supra) at para 19.

274 *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 171.

275 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 200.

legitimate goal.²⁷⁶ Furthermore, since statutory invalidity may be rectified in many possible ways, ranging from minor adjustments to a major redesign of the entire scheme, the repair of a defective statutory provision often involves (policy) decisions beyond the function and mandate of the judiciary.²⁷⁷

The task of not throwing the baby (the benign legislative scheme) out with the bath water (the unconstitutional provision) becomes particularly difficult when (similar to the cases discussed above concerning positive state obligations) the state grants a benefit or entitlement to some people, but fails to provide the same benefit or entitlement to other people, and an excluded applicant asks to be included in the benefits of the scheme. The Court is here faced with the problem that an unequal distribution of benefits may be rectified in several ways: by extending the benefit to the disadvantaged group (which is what the applicant typically asks for), by not granting the benefit to anybody (which would render the scheme equal by dint of abandoning it), or by redesigning the scheme in a different but constitutional way (so that some people may still not benefit from it, but this time for reasons that may be justified). On the one hand, the decision about which option to choose inextricably involves a policy choice. On the other hand, an unconstitutional statute must be invalidated, and therefore the Court has to choose.

Merely striking down the provision does seem to be the option that shows the most deference to the legislature. The consequence of this option will often be that the benefit is not provided to anybody. If the entitlement is required to be

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provided in terms of a constitutional right, such a decision may itself be unconstitutional, although not from an equality point of view. If the complete repeal of the benefit is constitutionally feasible, the group interested in the benefit may lobby Parliament to get its benefits back. But such a clear-cut decision may appear cruel to those who suffered from the unconstitutional distribution and unfair to those who legitimately relied on the benefit.²⁷⁸ The Constitutional Court has indicated that it will, as a general rule, rather extend benefits to disadvantaged groups than strike down the beneficial provision altogether:

Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.²⁷⁹

276 See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 107 ('There may also be situations in which it is necessary for the Court to act to avoid or control the consequences of a declaration of invalidity of post-constitutional legislation where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity.')

277 See *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) ('Fraser') at para 50; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & Others* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 12.

278 See *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 88 ('There is every reason not to delay payment of social grants any further to the applicants and those similarly situated.')

279 *National Coalition for Gay and Lesbian Equality (NCGLE) & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000(1) BCLR 39 (CC) ('NCGLE v Minister of Home Affairs') at para 75.

The solution then is that the Court should not only strike the invalid provision down, but, in the interests of a just and equitable remedy, supplement the declaration of invalidity with other remedial measures to ameliorate the negative consequences of its order. In this way, the Court effectively re-designs the law, either as an interim matter until the legislature has decided on the route it would like to take, or in a way that grants the applicant permanent and appropriate relief. In both cases, the legislative enactment is altered by the order of a court. Although more tailored to the situation than a simple invalidation, such remedies inevitably see the Court making policy choices that should ideally have been left to the legislature. The principle of separation of powers and the Court's duty to grant appropriate, just and equitable relief necessarily collide with each other in this context. Both principles have their place, but it is the judiciary's first and foremost function to protect the Constitution. This does not mean that a court may ride roughshod over legislative choices. Instead, the task is to use the least invasive remedy possible.²⁸⁰

Against this background, the Constitutional Court has emphasized that when it is faced with an unconstitutional statute it will assess whether the purpose served by the statute outweighs the constitutional violation.²⁸¹ In so doing, the Court's obligation to provide appropriate relief has to be balanced against separation of powers:

[A court must keep the principle of separation of powers in mind] and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference

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must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Final Constitution, and for good reason, to the legislature.²⁸²

When courts consider a remedy following a declaration of invalidity there is a need for 'remedial precision',²⁸³ which pays due respect to the role of the legislature but still acknowledges that the key factor in striking the appropriate balance has to be the Court's function in protecting the Constitution.²⁸⁴ Perhaps this is why the Court on another occasion held that a declaration of complete invalidity is something like a last resort, while the preferred remedy, if possible, should take the form of severance or reading in so as 'to bring the law within acceptable constitutional standards.'²⁸⁵ Ironically, the Court here referred to its earlier judgment in *NCGLE v Minister of Home Affairs* where it advocated a much more balanced approach.

280 Ibid at para 74.

281 See *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa & Others; Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 13.

282 See *NCGLE v Minister of Home Affairs* (supra) at para 66.

283 *Khosa* (supra) at para 88.

In particular, the Constitutional Court has strongly rejected any contention by the other branches of government that there may be cases in which the separation of powers principle requires the Court ipso facto not to give directions to the executive. This was the government's stance in *Mohamed*, a case in which a foreign national had illegally been arrested by South African authorities and extradited to the US without an assurance from the US government that it would not impose or carry out the death penalty on him if convicted.²⁸⁶ The Court disagreed, and insisted that after a violation of the Bill of Rights any order addressed to the

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relevant organs of state in South Africa to do whatever they could to remedy the wrong done or to ameliorate the consequences of the violation would be appropriate:

To stigmatise such an order as a breach of the separation of state power as between the executive and the judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.²⁸⁷

Finally, it makes a difference whether the statutory scheme, including the provision found to be unconstitutional, originated in the pre-1994 era or was enacted by the legislature of the new democratic state. Where the Constitutional Court finds that laws enacted before the coming into force of the Interim Constitution are inconsistent with the Bill of Rights it will more readily exercise special remedial powers to fill lacunae resulting from such inconsistencies — and thereby make quasi-legislative choices — than it will in respect of laws passed after the coming into force of the Interim Constitution.²⁸⁸ The rationale for this principle, of course, is that there

284 See *NCGLE v Minister of Home Affairs* (supra) at paras 74–75 ('In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second. In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.')

285 *Van Rooyen & Others v S & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 88.

286 *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) ('*Mohamed*'). The government had argued that it would be wrong for a South African court to issue any declaratory order expressing disapproval of the arrest, detention, interrogation and transfer of the applicant to the USA. In particular the government opposed any order requiring it to intercede with the US authorities as this would infringe the separation of powers between the judiciary and the executive. 'In substance the stance was that Mohamed had been irreversibly surrendered to the power of the United States and, in any event, it was not for this Court, or any other, to give instructions to the executive.' Ibid at para 70.

287 *Mohamed* (supra) at para 72.

is generally a lesser need to defer to the legislative choices of a Parliament that was not concerned with the protection of human rights.²⁸⁹

These affirmations notwithstanding, the 'remedial precision' required to balance the effectiveness of a remedy against the principle of separation of powers has often caused the Court problems, with the scale tipping sometimes in one and sometimes in the other direction. This balancing exercise has affected all types of remedial measures, whether explicitly provided for in the Final Constitution or developed by the Constitutional Court in terms of FC s 172(1)(b), such as 'reading in' or 'severance'.²⁹⁰ By and large, the Court has favoured providing effective relief over deference, although on some occasions the Court has compromised on the effectiveness of an order to avoid trespassing on what it perceived to be the legitimate domain of the other branches of government.

The notion of balancing is expressly provided for in FC s 172(1)(b)(ii), which authorizes the Court to suspend an order of statutory invalidity to allow the competent authority to correct the defective statute. In the interests of separation of powers, in other words, the Court may suspend the coming into effect of such

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an order — although the Court itself has recognized that often an effective remedy is one that takes effect immediately.²⁹¹ FC s 172(1)(b)(ii) not only authorizes the Court to allow the competent authority (the legislature with regard to Acts of Parliament, the executive with regard to delegated legislation) to correct the defective law. It also allows the judiciary to exert some degree of pressure on the political branches and 'to put Parliament on terms to correct the defect in an invalid law within a prescribed time'²⁹² Parliament is, however, free to decide how it is going to redesign the unconstitutional provision — provided that the new provision complies with the Final Constitution — and may decide to do nothing if it has no objection to the law being invalidated.²⁹³

The general assumption, though, is that an unconstitutional provision is invalid with immediate effect and that a party wishing the Court to suspend its order of invalidity must provide persuasive reasons for the Court to do so.²⁹⁴ If those reasons are presented to the Court, it will engage in a balancing exercise to determine

288 See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 108;

289 *NCGLE v Minister of Home Affairs* (supra) at para 74. It may be argued, though, that the difference is much less pronounced now than it was under the Interim Constitution. In 2008, it is fair to assume that, 14 years after the transition to democracy, pre-1994 statutes still on the books are there because the democratic legislature wants them to be valid.

290 On these and other remedial strategies following a finding of constitutional invalidity, see Michael Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9, § 9.4.

291 *NCGLE v Minister of Home Affairs* (supra) at para 89.

292 *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 106.

293 For the consequences of a suspension order, see Bishop 'Remedies' (supra) at §9.4(d)(i).

whether the purpose served by the challenged statute outweighs the constitutional violation effected under its provisions.²⁹⁵ In this balancing exercise, the Court considers the nature of the law in question and the character of the defect to be corrected,²⁹⁶ the potential for prejudice being suffered if an order of invalidity is not suspended, the interests of the parties as well as those of the public, and the need to promote the constitutional project and prevent chaos.²⁹⁷

The Court has not always been particularly responsive to the person(s) affected by an unconstitutional provision. In its early years, the Court tended to show greater deference to the legislature than to the need to protect the Bill of Rights. This is evident in the Court's grudging admission in *Ntuli* that the further perpetuation of the unconstitutional law in that case was 'unfortunate', but that the applicant was nevertheless required to live with it until the legislature had cured the defect.²⁹⁸ In another case it rejected an application because it regarded the consequences of invalidity to be too complex and held that the legislature

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would need to apply its mind to the problem.²⁹⁹ On yet another occasion, the Court held that if a party could establish that the suspension of its order of invalidity would cause it substantial prejudice, the party could approach the Court for a variation of the order.³⁰⁰

In recent years, however, the Constitutional Court has increasingly tried to reconcile the conflicting principles of separation of powers and the need for an effective remedy by granting interim relief to the successful litigant pending the rectification of the defective legislation. For example, the Constitutional Court has ordered the executive to apply and interpret an unconstitutional statute in a

294 See *S v Bhulwana; S v Gwadiiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 30; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 51.

295 See *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa & Others; Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 13.

296 See *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 37. The Court here sets out as a general rule, that a 'party wishing to keep an unconstitutional provision alive should at least indicate the following: what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation.'

297 See *Matatiele Municipality & Others v President of the RSA & Others* 2007 (1) BCLR 47 (CC) at para 91.

298 *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 28.

299 *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & Others* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 12.

300 *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 42.

particular way until the defect is corrected (in particular, when the statute is incomprehensible).³⁰¹

At first glance, the suspension of an order of invalidity combined with interim relief seems to be the way out of every situation in which the Court has to choose between the effective protection of a violated right (with immediate effect for the aggrieved party) and leaving it to the 'competent authority' to make the necessary (policy) decision on how to correct the defect. Such a solution allows the judiciary to have it both ways: to be a bold guardian of the Constitution and to achieve an appropriate constitutional balance between the three branches of government. One may assume, therefore, that the availability of this solution would have emboldened the Court to strike down legislation. And indeed, in *Dawood*, the Constitutional Court (in a unanimous judgment by O'Regan J) emphasized that interim relief and deference to Parliament are related:

Where . . . a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature.³⁰²

Consequently, an order of suspension married to an order for interim relief should be the preferred option for the Court. One important exception suggests itself. Where the Court (for whatever reason) is *not* able to give appropriate

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interim relief to the persons affected, the Court might wish to issue a 'stricter' order by the Court – even if such an order would require the Court to make choices 'primarily . . . suitable' for other branches of government.

But in several judgments the Court has not followed this route. Rather it has given another remedy instead, on the grounds that the combination of suspension and interim relief did not constitute a just and equitable remedy. In *Satchwell*, for example, the Constitutional Court was faced with a challenge to the constitutionality of certain provisions of the Judges Remuneration and Conditions of Services Act and the regulations promulgated under this Act, which gave benefits to the spouses of judges, but not to same-sex life partners.³⁰³ Not surprisingly, the Court found that this omission constituted an infringement of the right to non-discrimination on the grounds of sexual orientation.³⁰⁴ Turning to the question of a just and equitable

301 *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 135; *Janse van Rensburg & Another v Minister of Trade and Industry NO & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 35–36; *Moseneke & Others v Master of High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at para 27; *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board & Others* 2006 (8) BCLR 901 (CC) at paras 44–45. See also Bishop 'Remedies' (supra) at §9.4(d)(i).

302 *Dawood & Another v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas & Another v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 64.

303 *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) ('*Satchwell*').

304 *Ibid* at para 21.

remedy, the Court had to choose between a suspended declaration of invalidity (because a simple striking down would have had the effect that no-one would have been entitled to any benefits), perhaps combined with interim relief, and reading the entitlement for partners in a permanent same-sex partnership into the impugned provision. The Court decided on the latter option:

The remedy of reading in is far more preferable to an order striking down and suspending such declaration which would not afford the applicant the relief she seeks.³⁰⁵

Unfortunately, the Constitutional Court did not provide any further reasons for its choice. Perhaps the judges thought that it was a clear case. From the judges' perspective, any reduction of the benefits for fellow judges' spouses was apparently not an option.³⁰⁶ So, further extension was the only way to go. Perhaps the Court just saw no point in waiting for the extension. From this perspective, a suspended striking down would have been a mere nicety, making even less sense when combined with an interim order basically providing same-sex life partners with all that they had asked for anyway.

In *Khosa*, a case concerning the entitlement of permanent residents to social grants, the Constitutional Court (in a majority judgment by Mokgoro J) explicitly rejected the possibility of interim relief because this would have helped only the applicants, and not other persons in a similar situation.³⁰⁷ The Court wanted to

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help all other permanent residents who were excluded from the social grant scheme, and therefore resorted to reading the words 'permanent residents' into the impugned legislation as the most appropriate remedy.³⁰⁸

Just how fragile the balance between respect for the separation of powers and granting an effective remedy is, is evident in those cases in which the Constitutional Court was divided over this very question. The leading case here is *Fourie*.³⁰⁹ The Court was unanimous in finding that both the Marriage Act³¹⁰ and the common-law definition of marriage were unconstitutional to the extent that they discriminated against homosexual couples by failing to provide them with the means to enjoy the

305 Ibid at para 34.

306 Ironically, Constitutional Court judges were not included in the challenged benefits scheme, because the Constitutional Court did not exist when the provisions entered into force. This was changed by legislation in 2001 — while the *Satchwell* case was pending — and again the legislature omitted to include permanent same-sex life partners. These new provisions were challenged, too, and the Constitutional Court repeated its earlier 'reading in' order with regard to these new provisions. See *Satchwell v President of South Africa & Another* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC).

307 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 88 (Striking down without an order of suspension was not appropriate either, as it would have made the grants instantly available to all residents including visitors within South Africa who satisfy the other criteria.)

308 *Khosa* (supra) at para 89.

309 *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*').

status and the benefits, together with the responsibilities, that marriage accorded to heterosexual couples. It was, however, divided on the remedy. The majority (in a judgment by Sachs J) suspended the order of invalidity for twelve months in order to give Parliament time to remedy the defect (which it did in November 2006).³¹¹ If Parliament had failed to cure the defect within that time, the words 'or spouse' would automatically have been read into the relevant section of the Marriage Act (the common law would just have become invalid). In a dissenting judgment, O'Regan J proposed that the Court should not have suspended the order of invalidity and additionally should have made the necessary orders to permit same-sex couples to marry with immediate effect, i.e. by developing the common law and reading in the words 'or spouse' into the relevant section of the Marriage Act.

The majority and the minority judgment in *Fourie* illustrate two different approaches to the Court's relationship to the legislature in respect of violations of the Bill of Rights. In the majority judgment, Sachs J spends thirty paragraphs dismissing claims by the government and the amici that, even if the Marriage Act and the common law do discriminate against same-sex couples, the remedy against such discrimination should not be to alter the law of marriage to include same-sex couples, but rather to provide alternative forms of recognition to same-sex family relationships. The rejection of these arguments forms part of the first stage of the enquiry, because after this Sachs J goes on to engage the limitations

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stage, where again it was contended that marriage should not be extended to include same-sex couples. In this context, Sachs J makes an interesting remark about the relationship between the rights inquiry stages and the remedy (or order) stage:

The factors advanced [in support of justification] might have some relevance in the search for effective ways to provide an appropriate remedy that enjoys the widest public support, for the violation of the rights involved.³¹²

This sentence seems to indicate that the majority takes the state's concerns about the full extension of marriage to same-sex couples more seriously than it elsewhere admits — not with regard to the rights violation, but with regard to the appropriate remedy.³¹³ It is at this point that separation of powers concerns weigh heavily with the Court. It begins by acknowledging that Parliament has included same-sex partners as beneficiaries of several statutory schemes. The problem with these 'advances', however (the Court says), is that they 'continue to be episodic rather than global'.³¹⁴ This allows it to reiterate its earlier call for comprehensive legislation regularizing same-sex relationships in *J & B*.

310 Act 25 of 1961.

311 In response to *Fourie*, on 30 November 2006 (just one day short of the window period), the President signed the Civil Union Act 17 of 2006 into law. The Act introduces the new institution of a 'civil union' between persons either in the form of marriage or a civil partnership, both forms available to heterosexual as well as same-sex partners, solemnized before the state and with all legal consequences of a marriage. The Marriage Act of 1961 is still valid and still only allows heterosexual partners to conclude a marriage. For an insightful view of the drafting history behind the new Act, see Pierre de Vos 'The "Inevitability" of Same-Sex Marriage in South Africa's Post-apartheid State' (2007) 23 *SAJHR* 432, 458–63. See also David Bilchitz & Melanie Judge 'For Whom Does the Bell Toll?' — The Challenges and Possibilities the Civil Union Act Creates for Family Law in South Africa' (2007) 23 *SAJHR* 466.

312 *Fourie* (supra) at para 113.

It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation. . . . The executive and legislature are therefore obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians. Moreover, courts considering unfair discrimination cases of this sort need carefully to evaluate the context and nature of the discrimination and, where unfair discrimination is found, remedies must be carefully tailored to that context.³¹⁵

Ironically, in *J & B* (which involved a challenge to the exclusion of same-sex partners from becoming joint parents of a child born to them as a result of artificial insemination), the Constitutional Court had no problem in reading the words 'permanent same-sex life partner' into the Children's Status Act.³¹⁶ Furthermore, the Court explicitly rejected the suspension of that order: first because, after the vindication of an infringed right by way of reading in, there is no lacuna left that the legislature needs to fill; secondly, because, when the unconstitutionality is cured, there would usually be no reason to deprive the applicants of the benefit of such an order by suspending it; and, finally, because the legislature is anyway at liberty to change the law whenever it pleases.³¹⁷

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In *Fourie*, however, the majority of the Court emphasized that matters were not that simple, and referred to a pending South African Law Reform Commission (SALRC) project on the topic of Domestic Partnerships, which had outlined several alternative forms of relief to which same-sex couples might be entitled.³¹⁸ Given that different ways of accommodating the legitimate interests of such couples were already in the public domain and were soon to be considered by Parliament,³¹⁹ the Court felt that it needed to have regard to the complexity and variety of the

313 See *De Vos* (supra) at 457 ('[T]here seems to be a contradiction at the heart of the rhetoric employed by the Court.') See also *Fourie* (supra) at para 143 (Court notes that the SALRC considered it advisable from a policy point of view not to disregard the strong objections against recognition, and rather to accommodate religious sentiments to the extent possible in the development of a further proposal.)

314 *Fourie* (supra) at para 116.

315 *J & B v Director General: Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) ('*J&B*') at paras 23 and 25.

316 Act 82 of 1987.

317 *J & B* (supra) at para 22.

318 South African Law Reform Commission, Project 118, Discussion Paper 104 (August 2003). The SALRC proposed that same-sex relationships should be acknowledged by the law and identified three alternative ways of effecting legal recognition for such relationships: (a) opening up the common-law definition of marriage to same-sex couples by inserting a definition to that effect in the Marriage Act; (b) abolishing secular marriage as a legal institution and replacing it with a civil union which would produce effects similar to marriage but be available for both heterosexual and same-sex couples; and (c) providing a 'marriage-like alternative', according same-sex couples the opportunity of concluding civil unions with the same legal consequences as marriage.

319 For previous use of this argument, see *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) at para 29.

statutory and policy alternatives available to the legislature, even though a successful litigant should usually receive at least some practical relief.³²⁰

Against this background, the Court reasoned that the benefits of suspending the order of invalidity outweighed the interests of the successful litigants. The first reason given for this was that same-sex marriage is a matter of 'status' and thus requires a remedy that is 'secure', 'firmly located within the broad context of an extended search for emancipation', and part of an 'enduring and stable legislative appreciation'.³²¹ A temporary remedial measure, on the other hand, would be far less likely to achieve the enjoyment of equality promised by the Constitution.³²² Secondly, in the eyes of Sachs J, the claim by Mrs Fourie and Mrs Bonthuys to get married should not be regarded as a narrow wish 'to enter into a legal arrangement' but rather as part of a bigger picture.³²³ The validity of these arguments is debatable.³²⁴ Nevertheless they allowed the majority of the Court to show respect for the separation of powers and (particularly in the light of the progress made by the SALRC) to give Parliament an opportunity to deal appropriately with a matter 'that touches on deep public and private sensibilities'.³²⁵ The sleight of hand in the

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majority judgment was, as Theunis Roux has pointed out, that it implied that this very deference to the legislature would actually enhance the effective protection of the constitutional right at issue.³²⁶

The most interesting part of the *Fourie* judgment from a separation of powers perspective follows immediately after these considerations. Although throughout his reasoning on the remedy Sachs J emphasizes why the legislature should be free to map out what it considers to be the best way forward for same-sex marriage, the judgment ultimately defines the scope Parliament has in its deliberations on this issue rather narrowly. On the pretext that it would be 'helpful to Parliament to point to certain guiding principles of special constitutional relevance' for the prospective

320 *Fourie* (supra) at paras 133-34 (with reference to *Fraser* (supra) and *Dawood* (supra)).

321 *Ibid* at para 136.

322 *Ibid* at para 136.

323 *Ibid* at para 137 ('the comprehensive wish to be able to live openly and freely as lesbian women emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society'.)

324 The first argument begs the question why an order by the Constitutional Court should not be a 'secure' remedy. In several other judgments the Court had relied on the fact that 'reading in' does constitute such a remedy, granting to successful litigants the fruits of their constitutional efforts and providing for legal certainty. The second argument made by Sachs J seems to be a bit speculative, and assumes a very altruistic motivation on the part of the applicants for which there was no indication in the facts of the case. Maybe Mrs Fourie and Mrs Bonthuys really just wanted to get married.

325 *Fourie* (supra) at paras 138-39.

326 See Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming).

legislation,³²⁷ the Court in effect pre-determines the path the legislature has to follow if it is to avoid further constitutional challenges.³²⁸ In the process of drafting the new legislation and in academic writing, for example, it was argued that the creation of a separate institution for same-sex couples ('civil partnership') would run against the 'guidelines' in the *Fourie* judgment (even if such an option bestowed exactly the same set of legal rights on same-sex civil partners as it did on heterosexual married couples). The civil partnership option, it was said, would contravene the very clear prohibition of a 'separate but equal' remedy in the judgment.³²⁹

In our view, the deference the Constitutional Court paid to the legislature in *Fourie* was given with one hand and taken away with the other. The Court tied the legislature's hands with regard to the policy choices it could make, in a way that did not show a particularly high regard for Parliament's pre-eminent domain. This is not to suggest that the reasoning in *Fourie* was wrong from a Bill of Rights perspective. In addition, if one contrasts this case with the deference shown towards the legislature and the executive in the cases discussed above,³³⁰ the Court in *Fourie* did what we argued it should have done in cases like *UDM*: the Court closed constitutional leeways potentially open to the political branches by a process of constitutional interpretation that included reference to supporting

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constitutional principles,³³¹ the adoption of a historic perspective,³³² and resort to comparative law. In the end, the separation of powers concerns in *Fourie* were not as pressing as they first appeared to be, or, perhaps, they were experienced in a more indirect way. The genius of the decision is the way the Court was able to pass responsibility for the recognition of same-sex marriage to the legislature, shrouding its interest in avoiding blame for the 'destruction of marriage' in a resounding tribute to Parliament's greater democratic legitimacy, and a stated belief in the value of legislative choice and competence. At the same time, however, the Constitutional

327 *Fourie* (supra) at para 147.

328 See *Fourie* (supra) at paras 148-53 (The Court outlined the following principles: The objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms; the new law should not create equal disadvantage for all, i.e. it should not assume that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, nobody should; the new regime should (while on the face of it provide equal protection) in fact reproduce new forms of marginalization and would reiterate a 'separate but equal' repudiation of homosexuals; finally, the legislative remedy chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.)

329 De Vos (supra) at 458-59; Bilchitz & Judge (supra) at 481; Jaco Barnard 'Totalitarianism, (Same-Sex) Marriage and Democratic Politics in Post-Apartheid South Africa' (2007) 23 *SAJHR* 500, 516.

330 See § 12.3.(d)(ii)(bb) supra.

331 See *Fourie* (supra) at para 149 ('At the heart of these principles lies the notion that in exercising its legislative discretion Parliament will have to bear in mind that the objective of the new measure must be to promote human dignity, the achievement of equality and the advancement of human rights and freedoms.')

332 *Ibid* at para 150 (the Court refers to an apartheid-era case to illustrate that the traditional notion that separate but equal institutions are no longer permissible ('unthinkable') in the post-1994 constitutional democracy.)

Court made very sure that the legislature's choice was in fact quite limited and designed an order that put considerable pressure on the political branches not to exceed the period given for a legislative solution.

The price paid for this bit of ingenuity, of course, was that same-sex couples who wished to get married had to wait a further year. For O'Regan J in dissent, the principle that successful litigants should ordinarily obtain the relief they seek could not be strategically traded off in this way.³³³ The weak point in the majority judgment, as she pointed out, was that, even on its approach, the legislature was not left with a wide range of options from which to choose.³³⁴ This fact undermined the majority's invocation of separation of powers:

The doctrine of the separation of powers is an important one in our Constitution but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint. The exceptions to . . . [the immediate effect of invalidity orders] must arise in other circumstances, where the relief cannot properly be tailored by a court, or where even though a litigant would otherwise be successful, other interests or matters would preclude an order in his or her favour, or where an order would otherwise produce such disorder or administrative difficulties that the interests of justice served by an order in favour of a successful litigant are outweighed by the social dislocation such an order might occasion.³³⁵

She continues:

It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to

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protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.³³⁶

With these words, O'Regan counters the majority's (somewhat superficial) respect for the domain of the legislature with a reminder about the need to respect the Court's own domain, adding that no order by the Court would preclude Parliament from addressing the law of marriage in the future.

In the final analysis, both the majority and the minority's approach in *Fourie* are plausible. The Court, after all, did fulfil its major obligation to protect the Constitution. The difference between *Fourie* and those cases in which the Constitutional Court employed the separation of powers doctrine to reduce the level of review is that the substantive question of constitutional law in *Fourie* was

333 Ibid at paras 165-67.

334 Ibid at para 168.

335 Ibid at para 170.

336 *Fourie* (supra) at para 171.

undisputed. It is thus debatable whether the majority really 'shr[a]nk' from its duty to protect constitutional rights, as O'Regan J implies in the quote above. To whom does the Court owe its duty to protect the Constitution: only or primarily the litigants in the case before it, or also all affected persons and society in general? If one accepts that the Constitutional Court is just one actor in South African politics and needs to involve other players in the constitutional project (not least in order to protect its capacity to make controversial judgments), then one must also accept that the majority's decision in *Fourie* to sacrifice the applicants' interests in an immediately enforceable order in favour of the long-term health of South Africa's constitutional democracy was probably justified.³³⁷ The separation of powers doctrine in the context of remedies needs to find an appropriate balance between two conflicting domains: the judiciary's power and duty to give effect to the Constitution and the political branches' prerogative to make policy choices within the framework of the Constitution. The Final Constitution anticipates this tension by providing for just and equitable remedies, such as the suspension of orders of invalidity. Attaching greater importance to one of the two domains in the abstract does not do this careful constitutional scheme justice.

(iii) Delegation of legislative authority and subordinate legislation

The most obvious example of the performance by the executive of a legislative (ie abstract rule-making) function is the making of subordinate legislation.³³⁸ Generally

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speaking, countries within the English tradition of parliamentary supremacy are less concerned about the delegation of law-making power to the executive. In legal systems with a strong tradition of a constitutionally mandated separation of powers, on the other hand, the extent to which the legislature may transfer rule-making powers to the executive is a contested issue.

The most extreme example of the parliamentary supremacy tradition is the United Kingdom itself, where there is no formal limit on the power of Parliament to delegate legislative power to the government.³³⁹ This power extends as far as the delegation of the power to amend Acts of Parliament. However, since the Statutory Instruments Act of 1946, most delegated legislation is subject to parliamentary control, either in the form of a 'negative resolution procedure', requiring Parliament formally to veto the delegated legislation within a certain time period to prevent its coming into force, or in the form of an 'obligatory positive affirmative resolution' as a precondition for the delegated legislation's coming into force. In either case, the

337 Cf Roux 'Principle and Pragmatism' (supra) (Suggesting that, for the majority of the Constitutional Court in *Fourie*, it was important to enlist the legislature's co-operation in the enforcement of a legal change that was likely to be highly divisive, and ran the risk of further weakening public support for the Court.)

338 Subordinate legislation is also referred to as delegated legislation, gubernatorial legislation or secondary legislation. The term basically refers to law made by an executive authority under powers given to it by an empowering Act ('primary legislation') in order to implement and administer the requirements of that Act. The advantage of such legislation is that it allows rules dealing with rather technical matters to be prepared by those with the relevant expert knowledge in the governmental departments. The legislature does not need to be occupied with such details and is free to determine broader policy decisions. Finally, it can usually be changed faster than a formal Act of Parliament allowing the government to deal swiftly with changing circumstances.

339 See Anthony Bradley & Keith Ewing *Constitutional and Administrative Law* (14th Edition, 2007) 682-87.

empowering Act must state the form of parliamentary control to which the delegated legislation is subject. Parliament's control is typically limited to approving or rejecting the delegated legislation as laid before it, i.e. it can usually not amend it.

In Australia, the High Court, in a 1931 decision, followed the English tradition of allowing for wide-ranging delegation of law-making powers by Parliament to the executive.³⁴⁰ The Court explicitly rejected the argument that separation of powers considerations prevented the legislature from delegating even the widest powers to the executive, precisely because the very nature of Parliament's legislative power involves the power to confer law-making powers upon authorities other than itself. However, the High Court at the same time declared that Parliament could not 'abdicate' its legislative powers in a particular area entirely. Delegation needed to be specific, because an overbroad delegation would fall outside the legislative competence of the Commonwealth Parliament (in contrast to state parliaments in Australia, which retain all residual legislative powers):

[A] law confiding authority to the Executive will [not always] be valid, however extensive or vague the subject matter may be . . . There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.³⁴¹

A generally more critical approach to subordinate legislation exists in Germany, where delegation is possible, but only as provided for in the Constitution. According to Article 80 of the Grundgesetz, the executive at both the federal and the provincial (Länder) level may be authorized by a law to issue subordinate legislation provided that the content, purpose, and scope of the authority conferred on

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it are specified in the empowering law. The Federal Constitutional Court has on many occasions been asked to decide whether a particular empowering act was sufficiently precise in this regard. The general thrust of these decisions is restrictive and has resulted in the so-called 'theory of essentialness' ('*Wesentlichkeitstheorie*'), which emphasizes the importance of parliamentary authority for limitations of the Bill of Rights against the background of separation of powers concerns:

The principles of the rule of law and democracy impose on the legislature a duty of formulating more or less by itself those regulations that are essential for the realization of basic rights — and of not leaving this to the discretion and decision-making authority of the executive. To what extent the legislature must by itself set the necessary guidelines depends, in a given area, predominantly on the fundamental right involved. It has a duty to act in this way when competing liberty rights clash, and their boundaries are fluid and hard to discern. . . . Here, the legislature itself is obligated to determine the limits of the conflicting guarantees of liberty, at least to the extent that such limits are essential for the exercise of these liberty rights.³⁴²

According to the Court, the theory of essentialness does not only answer the question of whether a particular subject must be statutorily regulated before the executive may make any rules in relation to it. It is also decisive in determining how far such statutory regulation should go, how precise it needs to be, and how much discretion may be left to the executive in its application.³⁴³ Obviously, the question of what is essential is highly dependent on the particular subject matter, and the

340 *Victorian Stevedoring and General Contracting Co Pty Ltd & Another v Dignan Informant* (1931) 46 CLR 73.

341 *Ibid* at 101 (Dixon J).

Federal Constitutional Court's jurisprudence is accordingly quite fragmented in this respect. The involvement of Bill of Rights issues generally reduces the legislature's capacity to delegate law-making powers to the executive, but an Act of Parliament regulating complex situations or addressing potentially fast-changing facts may be given greater leeway to delegate decisions to the executive.³⁴⁴

In South Africa, the issue of whether and to what extent Parliament may empower the government to make abstract rules and thus to delegate its law-making power was first addressed under the Interim Constitution. The constitutional text provided no assistance as it did not mention subordinate legislation at all, but only stated in very general terms that Parliament had the power to make laws in accordance with the Constitution (IC s 37).

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The practice of delegating law-making power to the executive was challenged as early as 1995 in *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others*.³⁴⁵ The case concerned the validity of certain amendments to the Local Government Transition Act by presidential proclamation. The Act had explicitly empowered the President to make amendments to it in this way, provided that any such amendment should first have been approved by the relevant Parliamentary committees and that Parliament as a whole did not later disapprove of any such proclamation or any provision thereof.

The *Executive Council of the Western Cape Legislature 1995* Court began its assessment with the general observation that delegated legislation was not only allowed by the Interim Constitution, but also unavoidable in complex contemporary societies:

In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.³⁴⁶

342 *BVerfGE* 83, 130 ('Josephine Mutzenbacher') 142 ('Rechtsstaatsprinzip und Demokratiegebot verpflichten den Gesetzgeber, die für die Grundrechtsverwirklichung maßgeblichen Regelungen im wesentlichen selbst zu treffen und diese nicht dem Handeln und der Entscheidungsmacht der Exekutive zu überlassen. Wie weit der Gesetzgeber die für den fraglichen Lebensbereich erforderlichen Leitlinien selbst bestimmen muß, richtet sich maßgeblich nach dessen Grundrechtsbezug. Eine Pflicht dazu besteht, wenn miteinander konkurrierende grundrechtliche Freiheitsrechte aufeinandertreffen und deren jeweilige Grenzen fließend und nur schwer auszumachen sind. . . . Hier ist der Gesetzgeber verpflichtet, die Schranken der widerstreitenden Freiheitsgarantien jedenfalls so weit selbst zu bestimmen, wie sie für die Ausübung dieser Freiheitsrechte wesentlich sind.' (References omitted.)) This judgment was published in an English translation in *Bundesverfassungsgericht* (ed) *Decisions of the Bundesverfassungsgericht 1958-1995* Volume 2/II (1998) 474.

343 See *BVerfGE* 83, 130, 152 ('Josephine Mutzenbacher').

344 *BVerfGE* 49, 89, 133 ('Kalkar I').

345 *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) ('*Executive Council of the Western Cape Legislature 1995*').

Historically, South Africa had followed English law in terms of which it is accepted that Parliament may delegate power to the executive to amend or repeal Acts of Parliament.³⁴⁷ The Court considered, however, whether the principle of separation of powers entrenched in the Interim Constitution and the departure from the former system of parliamentary supremacy had changed this. Reasoning that the explicit description of the law-making process in the Interim Constitution³⁴⁸ guaranteed the exercise of legislative authority by Parliament, the Court held that this procedure was mandatory whenever a law was amended.³⁴⁹

There is . . . a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including . . . the power to amend the Act under which the assignment is made.³⁵⁰

The empowerment of the President formally to amend the Act by proclamation (or by any other form of subordinate legislation) was therefore held to be invalid.

The Final Constitution, in contrast to its predecessor, *does* mention subordinate legislation. FC s 239 (the definitions clause) states that national legislation includes

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'subordinate legislation made in terms of an Act of Parliament'. The only requirement that may be deduced from this definition is that all subordinate legislation must be made 'in terms of' an empowering statute. FC s 101(3) provides that '[p]roclamations, regulations and other instruments of subordinate legislation must be accessible to the public', thereby not only guaranteeing some degree of transparency, but also indicating that the meaning of 'subordinate legislation' is not limited to proclamations or regulations, but also includes by-laws and other rules made by executive bodies.³⁵¹

As with the Interim Constitution, the Final Constitution does not determine the extent to which Parliament may make use of its power to delegate legislative authority to the executive. In 1999, however, the Constitutional Court confirmed its earlier decision in *Executive Council of the Western Cape Legislature* that delegation short of 'plenary legislative power' is possible.³⁵² In the 1999 judgment, the Court emphasized that the real inquiry was whether the Constitution authorizes the delegation of the particular power in question.³⁵³

This decision leads to the more specific question, which was left open in the 1995 judgment: When does a legitimate delegation to make (subordinate) legislation

346 Ibid at para 51 (Chaskalson P).

347 See *R v Maharaj* 1950 (3) SA 187 (A) and *Binga v Cabinet for South West Africa & Others* 1988 (3) SA 155 (A).

348 IC ss 59-65; FC ss 73-82.

349 *Executive Council of the Western Cape Legislature* 1995 (supra) at para 62.

350 Ibid at para 51.

351 The content of FC s 101(3) is mirrored for the provincial sphere in FC s 140(3).

become a constitutionally prohibited delegation of 'plenary legislative power'? In *Executive Council of the Western Cape Legislature* the Constitutional Court adopted a formalist approach and relied on the fact that the Act in question provided for a formal amendment power by the President. According to the formalist approach, an Act of Parliament needs to be and remain an Act by Parliament: a set of rules created and if necessary amended in the proper legislative process. Thus, Parliament may delegate law-making authority to the executive, but not statute-making or statute-amending authority — save in exceptional circumstances, such as times of war or natural catastrophe.³⁵⁴ But the insertion of the word 'including' in the Court's dictum in *Executive Council of the Western Cape Legislature* — as quoted above³⁵⁵— seems to suggest that an unconstitutional assignment of plenary legislative power is also possible short of formal amendment powers.

In the 1999 judgment, Ngcobo J also began cautiously by suggesting a formalist approach:

The Constitution uses a range of expressions when it confers legislative power upon the national legislature in Chapter 7. Sometimes it states that 'national legislation must'; at other times it states that something will be dealt with 'as determined by national legislation'; and at other times it uses the formulation 'national legislation may'. Where one of the first two

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formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the legislature, although this will of course also depend upon context.³⁵⁶

The problem with this approach, however, is that FC s 239 makes it very clear that 'national legislation' includes subordinate legislation. This provision would be meaningless if the constitutional requirement that a particular issue should be regulated by national legislation could be construed to mean that every detail had to be determined by an Act of Parliament. Nevertheless, in its 1999 judgment, the Constitutional Court interpreted FC s 159(1), which requires the term of a municipal council to be 'determined by national legislation', to mean that such terms of office could not be determined by ministerial notice in the *Government Gazette*.³⁵⁷

However unconvincing such reasoning may be in the light of FC s 239, the outcome of the Court's decision seems right. In addition to relying on the words

352 *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) ('*Executive Council Province of the Western Cape 1999*') at para 124 (Ngcobo J) ('Although [in *Executive Council of the Western Cape Legislature 1995* (supra)] the Court was concerned with the interim Constitution, it seems to me that the same principle applies to the present Constitution.')

353 *Executive Council Province of the Western Cape 1999* (supra) at para 124.

354 *Executive Council of the Western Cape Legislature 1995* (supra) at para 62.

355 *Ibid* at para 51.

356 *Executive Council Province of the Western Cape 1999* (supra) at para 124.

357 *Ibid* at para 126.

'determined by national legislation', Ngcobo J also pointed out that the determination of the term of office of an elected legislative body such as a municipal council is a crucial aspect of the functioning of that council and of importance to the democratic political process.³⁵⁸ This factor contributed to the Court's finding that the term of office had to be decided by Parliament and could not be delegated to the executive.³⁵⁹ This argument is persuasive, since the Court here uses a substantive rather than formal criterion (importance for the democratic process) to assess whether the Final Constitution authorizes the delegation of the power in question.

In general, the use of substantive criteria is a better way of assessing whether subordinate legislation is permissible or not. Formal criteria may provide for a minimum standard, but often miss the real separation of powers concern raised by the delegation of lawmaking authority. In practice, 'plenary legislative power' may be assigned to another body without authorizing the formal amendment of a statutory provision. The crucial question, therefore, is the extent to which Parliament may delegate major policy decisions to the executive by way of an empowering provision to make subordinate legislation. To recall, subordinate legislation was traditionally supposed to cover matters of a complementary nature; technical matters that the legislature did not need to occupy itself with; and subordinate matters incidental to the subject matter of the statute, which did not need to be discussed in public, but could rather be adjusted to the overall purpose of the statute by technical experts in the administration.

There is certainly no need slavishly to look for the 'technical nature' of matters before subordinate legislation may be approved, and it would be inappropriate to reject the conferral of even the slightest discretion on the executive. Such an

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approach would just go to the opposite extreme. Nevertheless, the principle of separation of powers in the Final Constitution precludes the delegation of any power to legislate on matters of general policy. It is also incompatible with the separation of powers principle for such a wide discretion to be conferred on the executive in regulating a matter that it is impossible to know from the statutory provision the scope, content and limitations of the subordinate legislation. In English law, such an empowering statute is aptly referred to as 'skeletal' as it lacks any substantive flesh and amounts to nothing more than a licence to legislate.³⁶⁰ 'Plenary legislative power' has been assigned to the executive when an empowering statute leaves room for subordinate legislation to adopt not just one particular principle, but also its exact opposite. In such a case, in which opposing policy decisions could be taken 'in terms of' the same statutory provision, parliamentary oversight and scrutiny of executive action is substantially weakened.

Thus far, this question has not been explicitly addressed in South Africa. In the 1999 decision discussed earlier, *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa*, the Constitutional Court was asked to consider whether an empowering Act had to provide safeguards against 'abuse and arbitrary application' of the power it conferred on the executive, and whether Parliament, when delegating

358 Ibid.

359 Ibid. Ngcobo J pointed out that Parliament could easily have determined the term of office itself.

360 Bradley & Ewing (supra) at 677-78.

its law-making functions, should provide clear or adequate criteria for the exercise of the delegated power. The Court held that it was not necessary to decide either of these questions,³⁶¹ but nevertheless seemed to be quite sympathetic to answering them in the affirmative. Regarding the need for clear or adequate criteria for the exercise of the delegated power, it stated that the challenged Act prescribed the framework within which the Minister had to exercise his delegated authority with sufficient precision and therefore that the delegation did not amount to the assignment of plenary legislative power.³⁶²

This approach is in line with the Constitutional Court's later decision in *Dawood*, which concerned the exercise of discretion by officials on the basis of an Act of Parliament.³⁶³ The Court found fault with the fact that the discretion had been conferred without proper guidance on how it should be exercised. The crucial factor in this case was that the discretionary decisions that the officials were empowered to take potentially limited constitutional rights. At least in such a case, the Court held, the legislature needs to provide guidance to the executive on how to apply a discretionary norm.³⁶⁴ As the Court put it: 'Affording the executive

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a power to regulate such matters is not sufficient. The legislature must take steps where the limitation of rights is at risk to ensure that appropriate guidance is given.³⁶⁵

This principle is a sound one, and may also be used to determine the constitutional limits of the delegation of legislative authority: where the implementation of a statutory provision may lead to a violation of a right in the Bill of Rights the essential circumstances under which such violation is justified need to be determined by the democratically elected legislature. If it is left to the executive (by way of a discretionary decision or by way of subordinate legislation) it is impossible to determine whether the executive has acted in accordance with the will of the legislature or not. As Steven Budlender has argued, the constitutionality of a delegation will depend on the nature of the delegated power involved and the effect that the exercise of such power has.³⁶⁶ The more a delegated law-making power affects the democratic process, the institutional function of Parliament or the legislatures in other spheres of government, and the more it poses a threat to the protection, promotion and fulfilment of the rights in the Bill of Rights, the more detail

361 *Executive Council Province of the Western Cape 1999* (supra) at paras 94, 116-18.

362 *Ibid* at para 94 (our emphasis).

363 *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC).

364 *Ibid* at para 54.

365 *Dawood* (supra) at para 54 note 74.

366 See Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17, § 17.3(e)(i).

the legislature needs to specify in the empowering law itself and the less it may leave to the executive to specify in subordinate legislation.

Similar separation of powers concerns are raised when rule-making authority is delegated to bodies other than organs of state, either directly by Parliament or by way of sub-delegation by the executive. In a number of decisions, courts have had to decide whether rules created by private institutions were subject to judicial review — a problem related to the definition of organs of state in FC s 239 and the application of the Final Constitution in the private sphere.³⁶⁷ From a separation of powers point of view, however, the crucial question is the legitimate source of such private bodies' power to make abstract rules in the first place.

The leading case in this regard is *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another*.³⁶⁸ The legislature here had clearly empowered the Minister of Trade and Industry to make certain regulations, but the empowering Act remained silent on whether the Minister could — as he had done — further delegate this rule-making power to a private body. The majority of the Constitutional Court had no objection to such sub-delegation (provided that it fell short of the delegation of plenary legislative power), even in the absence of express authorization in the statute.³⁶⁹ In a compelling dissenting judgment, however,

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Langa CJ disagreed with the majority's view. Citing established case law, he held that the doctrine 'delegatus delegare non potest' requires that, where the legislature has delegated powers and functions to a subordinate authority, it must be assumed to have intended that authority to exercise those powers and to perform those functions itself, and not to delegate them to someone else, and that the power delegated in the Act did not therefore include the power to sub-delegate.³⁷⁰ Only an express authorization to sub-delegate or the deduction of such authority by necessary implication from the statute could have legitimated the further delegation of law-making power to a private body.³⁷¹

(iv) Executive-controlled dispute resolution

Although the judicial authority is vested in the courts (FC s 165(1)), several specialized bodies, tribunals, agencies, commissions, boards and other structures outside the court system are entrusted with adjudicative functions, such as the Competition Commission, the Competition Tribunal and the Competition Appeal Court;³⁷² the Commission for Conciliation, Mediation and Arbitration;³⁷³ the Complaints and Compliance Committee of the Independent Communication

367 See, for example, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & Others* 1983 (3) SA 344 (W) for a pre-1994 case; *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T); *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T).

368 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC).

369 *AAA Investments* (supra) at paras 48, 125–31.

370 *AAA Investments* (supra) at para 81.

371 *Ibid* at paras 82–83.

Authority of South Africa;³⁷⁴ and the South African Human Rights Commission (with its internal adjudication system).³⁷⁵ All these bodies were set up to provide efficient, cost-effective and fair dispute-resolution procedures using adjudicators with specialist knowledge of technical expertise in the particular subject matters dealt with. Other legitimate considerations for the establishment of extra-curial dispute-resolution mechanisms include the need to use less formal procedures (dispensing with legal representation, for example) and the need for decentralized systems more accessible to people living outside major urban areas.

However, as appealing as the idea of lightening the judiciary's case load and providing more efficient alternatives might be to prospective litigants, the danger exists that such institutions may not be subject to the same strict standards of independence and impartiality as the courts. A litigant will not gain anything from efficiency if the dispute is not resolved according to the same professional standards as he or she rightly expects from the courts. From a separation of powers perspective, the judicial function may be undermined not only by declaring certain subject matters and disputes to be outside the review powers of courts ('ouster clauses'), but — in a more subtle way — by establishing dispute-resolution mechanisms that are under the control of the executive, and thereby 'outsourcing'

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certain adjudicative functions. Such outsourcing is constitutionally problematic, not because judges are always better at dispute resolution, but because the positive aspect of separation of powers — the prevention of bad government by reducing the concentration of power — is seriously threatened when administrative decisions are not checked and balanced in a review process by independent institutions, such as the courts.

In other jurisdictions, particularly within the common law tradition,³⁷⁶ the 'outsourcing' of dispute-resolution mechanisms to special adjudicative bodies is a matter of great concern. Violations of the separation of powers doctrine are particularly real when such policies bring the adjudicative function under the influence and possible control of the executive.

372 See Competition Act 89 of 1998 ss 19 (Competition Commission), 26 (Competition Tribunal) and 36 (Competition Appeal Court).

373 See Labour Relations Act 66 of 1995 s 112.

374 See Independent Communication Authority of South Africa Act 13 of 2000 s 17A as amended by the ICASA Amendment Act 3 of 2006.

375 See Jonathan Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (eds) (2nd Edition, OS, December 2005) Chapter 24, § 24C.3(c)(ii).

376 In continental European jurisdictions this problem is not as prevalent because, first, legal disputes have traditionally to be decided exclusively by judges while, secondly, the specialized court structure allows for more judicial resources. For example, administrative and executive decisions in France are exclusively challenged in a 'tribunal administratif', which, despite its name, has the status of a court of law. In Germany, Article 19(4) of the Basic Law constitutionally guarantees that any (alleged) rights violation by a public authority can be challenged in a court of law, usually in a 'Verwaltungsgericht'.

In Australia, the High Court has from 1915 onwards taken the view that the judicial power has to be exercised independently and impartially by bodies meeting the traditional description of a court.³⁷⁷ The legislature is prevented from establishing alternative bodies that may issue judicial remedies and from establishing new 'courts' if those courts are not structured in a way comparable to traditional courts, i.e. with life tenure for the judges.

In the UK, a tribunal system separate from the courts of law has developed as a standard mechanism for dispute resolution in several subject areas.³⁷⁸ By and large, this no longer results in many separation of powers concerns as there is a lot of overlap between the courts and tribunals, both with regard to the decisions they take and with regard to the procedures they apply. However, in the 1950s, after a series of allegations of misconduct by government officials, a committee was established to look at the working of administrative tribunals and inquiries. The committee's subsequent report recommended three crucial criteria for the operation of non-court tribunals: openness, fairness and impartiality. The report noted:

Take openness. If these procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take fairness. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly, there is impartiality. How can a citizen be satisfied unless he feels that those who decide his case come to their decisions with open minds?³⁷⁹

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The 'Franks Report' of 1957 established the UK practice of regarding tribunals and similar bodies, not as ordinary courts, but nevertheless as institutions involved in adjudication, and hence subject to the judiciary's standards of independence rather than being seen as part of the administration.³⁸⁰

The Final Constitution explicitly addresses this potential problem. FC s 34 (the right of access to courts) provides that any legal dispute has to be resolved before a court 'or, where appropriate, another independent and impartial tribunal or forum'.³⁸¹ According to the Constitutional Court, this section must be read with FC s 165(2), which provides that the courts are 'independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. The purpose of FC s 34 in this context is

to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. [FC s 34] achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision

377 *New South Wales v Commonwealth* (1915) 20 CLR 54 ('Wheat Case'); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

378 See Bradley & Ewing (supra) at 695–704.

379 Oliver Franks *Report of the Committee on Administrative Tribunals and Enquiries*, UK Parliament Command Paper, 5th Series, Cmnd 218 (1957) ('Franks Report') at paras 23–24.

380 Bradley & Ewing (supra) at 694.

381 See Jason Brickhill & Adrian Friedman 'Access to Courts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop *Constitutional Law of South Africa* (eds) (2nd Edition, OS, November 2007) Chapter 59.

fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into 'courts'.³⁸²

Accordingly, any such tribunal or forum must prima facie enjoy the same independence and impartiality as the courts mentioned in FC s 166. There are several ways, however, in which such independence and impartiality may be achieved, either by ensuring institutional or, as a minimum, personal independence. Institutional independence is guaranteed in the area of criminal law. FC s 35(3)(c) specifically states that an accused person has the right to a public trial before an ordinary court of law, i e the adjudication of criminal offences can not be transferred to any other forum. The Constitutional Court has interpreted this provision to mean that, generally, deprivations of physical liberty either have to be authorized by a court or, at least, by a forum presided over by a judge or a magistrate, i e a judicial officer of the court structure established under the Final Constitution and in which FC s 165(1) has vested the judicial authority of the Republic.³⁸³ On the other hand, public servants who answer to higher officials in the executive branch do not enjoy the same independence as the judiciary and therefore may not deprive a person of his or her personal liberty. Consequently, even fora that do not enjoy the same independence as courts *institutionally* may be 'upgraded' if their adjudicative functions are performed by a judicial officer. In assessing whether a particular dispute-resolution function is performed by sufficiently independent and impartial bodies, the Constitutional Court looks at the structure of the body, not its name.

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In *Metcash v SARS*,³⁸⁴ which concerned a challenge to the procedure for resolution of disputes over the payment of Value-Added Tax (VAT), the Constitutional Court analyzed the independence of the Special Income Tax Court,³⁸⁵ a forum in which a taxpayer may challenge the assessment of VAT by the SARS Commissioner. The Court held, first, that applications (so-called 'appeals') to the Special Court were not 'forensic' but proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions by a specialist tribunal.³⁸⁶ This did not infringe the taxpayer's right of access to courts, however, because the tribunal was independent and impartial:

The Special Court operates to all intents like an ordinary court and has extensive powers to interfere with, amend or set aside decisions of the Commissioner. Although the procedure is referred to in the legislation as an appeal, it is a full hearing more akin to a trial. The relevant provisions of the Income Tax Act that establish the Special Court and prescribe its procedure . . . are eminently fair and afford a dissatisfied vendor more than a merely formal right of appeal. The court is presided over by a judge, who sits

382 *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 105.

383 *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 74.

384 *Metcash Trading Ltd v Commissioner, South African Revenue Service, & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) ('*Metcash v SARS*').

385 According to Value-Added Tax Act 89 of 1991 s 33, the Special Income Tax Court (constituted under Income Tax Act 58 of 1962 s 83) also has jurisdiction with regard to VAT disputes.

386 *Metcash v SARS* (supra) at para 32.

with an accountant and a representative of the business community. There is a right to legal or other expert representation, to adduce evidence and to challenge or rebut adverse evidence in a full-blown trial on the issues raised in the taxpayer's notice of appeal. Withal, therefore, a hearing before the Special Court meets the criteria of section 34 of the Constitution.³⁸⁷

In 2007, the Islamic Unity Convention (the operator of a radio station) challenged the status and powers of the Broadcasting Monitoring and Complaints Committee and its successor, the Complaints and Compliance Committee of ICASA, as (among others) being contrary to FC s 34.³⁸⁸ The Constitutional Court considered whether the structure of, and the powers conferred on, the two committees ensured fairness, independence and impartiality.

[T]he BMCC, when investigating and adjudicating a complaint, [has] to afford the complainant and the licensee a reasonable opportunity to make representations and to be heard [and] . . . both [are] entitled to legal representation. . . . [T]he Chairperson of the BMCC must be a judge of the High Court, whether in active service or retired, a practising advocate or attorney with at least ten years' appropriate experience, or a magistrate with at least ten years' appropriate experience. This requirement, in my view, was aimed at ensuring fairness, impartiality and independence. The Chairperson was an experienced, legally trained person. In my view, the scheme adequately ensured fairness.³⁸⁹

Although both the BMCC and the CCC seem to meet all the requirements, they are not courts of law concerned with the fair resolution of social conflict, but regulatory bodies performing an administrative function in the interests of the

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administration to which they belong, and hence prone to 'institutional bias'. However, in this particular case, FC s 34 was not even implicated, because the BMCC and the CCC do not take final decisions, but rather refer their findings and recommendations to ICASA for final decision-making. Before an administrative agency has taken a final decision, the *Islamic Unity Convention* Court held, there is no 'dispute' that can be resolved by the application of law.³⁹⁰

The separation of powers doctrine requires that all adjudicative functions be performed by substantially independent and impartial bodies according to a fair procedure. These essential requirements apply to both courts and other dispute-resolution bodies and do not depend on the name of the adjudicatory body. It is crucial that neither side may dictate to the adjudicatory body the way in which it should decide the matter, that the matter should be looked at from both sides, and that adjudicators should not fear punishment or dismissal when a state body is unhappy with their decision. In cases where internal, non-independent administrative review procedures are a precondition for further review (such as in the case of the BMCC and the CCC), it is crucial for the separation of powers (and FC s 34) that a truly independent body or a court of law should exercise full review

387 Ibid at para 47.

388 *Islamic Unity Convention v Minister of Telecommunications & Others* 2008 (3) SA 383 (CC).

389 Ibid at para 49 (Mpati AJ).

390 *Islamic Unity Convention* (supra) at para 55.

powers. This means that the independent body should in no way be bound by the findings and decision of the earlier body, but should consider the case de novo.

At some stage in all (new) areas of regulation disputes will arise concerning the application of the legislation. The separation of powers principle does not prescribe whether such disputes should be settled by courts or law or some (newly established) commission or tribunal system. As pointed out, the criteria of institutional and functional independence apply to both kinds of dispute-resolution structure. And both FC s 34 and the separation of powers principle allow for an appeal to the Constitutional Court if an applicant challenges the decision made by the commission, tribunal or committee on the basis that the decision-maker lacked the required independence and impartiality.
