JUDICIAL OVERSIGHT AND THE CONSTITUTION: IS THE SOUTH AFRICAN JUDICIARY OVERSTEPPING ITS JURISDICTION?

FELIX DUBE

26767538

Dissertation submitted in fulfillment of the requirements for the degree *Master of Laws* in Public Law and Legal Philosophy to the School of Post-Graduate Studies and Research in the Faculty of Law, North-West University, Mafikeng Campus

Supervisors: Dr J Sedumedi
Dr I Mwanawina

November 2016

DECLARATION BY CANDIDATE

I, Felix Dube, do hereby declare that this dissertation, entitled *Judicial Oversight and the Constitution: Is the South African Judiciary Overstepping its Jurisdiction?* submitted in fulfillment of the requirements for the degree *Master of Laws* in Public Law and Legal Philosophy to the School of Post-Graduate Studies in the Faculty of Law at North-West University, Mafikeng Campus, is the product of my own and original work in all respects. I further declare that it has not been previously submitted at this or any other institution and that all sources used herein have been indicated as such and duly acknowledged.

Signed at **MMABATHO** on this the 17th day of November 2016.

Felix Dube

CERTIFICATE OF ACCEPTANCE FOR EXAMINATION

I, Dr Joseph Sedumedi, hereby declare that this dissertation by Felix Dube for the degree *Master of Laws* in Public Law and Legal Philosophy entitled *Judicial Oversight and the Constitution: Is the South African Judiciary Overstepping its Jurisdiction?* be accepted for examination.

Signed at _____ on this the _____ day of_____ 2016.

_____

Dr Joseph Sedumedi

I, Dr Ilyayambwa Mwanawina, hereby declare that this dissertation by Felix Dube for the degree *Master of Laws* in Public Law and Legal Philosophy entitled *Judicial Oversight and the Constitution: Is the South African Judiciary Overstepping its Jurisdiction?* be accepted for examination.

Signed at Vanderbjilpark on this the 16 day of November 2016.

_____

Dr Ilyayambwa Mwanawina

DEDICATION

I will be vigilant to protect the independence and integrity of the Supreme Court, and I will work to ensure that it upholds the rule of law and safeguards those liberties that make this land one of endless possibilities for all Americans.

John Roberts
Chief Justice: United States Supreme Court

I dedicate this dissertation to the Constitutional Court of South Africa and its justices, serving and retired, for the marvellous work done in protecting and promoting the Constitution and the rule of law.

ACKNOWLEDGEMENTS

I express my gratitude to my supervisors Dr J Sedumedi and Dr I Mwanawina for their motivation and guidance in writing this dissertation.

I am grateful to Patience Bunhu and Obey Masilela for their support and contribution towards the commencement and completion of this dissertation.

I extend my gratitude to Prof AA Agbor for his mentorship and ignition of the enthusiasm in me to advance my academic qualifications through post-graduate studies.

I thank the Director of the School of Post-Graduate Studies in the Faculty of Law, Dr L Muswaka, for her support throughout this study.

I also wish to thank my family, colleagues and friends for their support and motivation.

Thank you all.

TABLE OF CONTENTS

ACRONYMS AND ABBREVIATIONS

ANC	African National Congress
CODESA	Convention for a Democratic South Africa
DA	Democratic Alliance
DGRU	Democratic Governance and Rights Unit
EFF	Economic Freedom Fighters
Harv.J.L. & Pub. Pol'y	Harvard Journal of Law and Public Policy
JSC	Judicial Service Commission
JSC	Judicial Service Commission
MPNP	Multi-Party Negotiation Process
N.C.J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPR/PL	South African Publiek Reg/Public Law
SASSA	South African Social Security Agency
UDM	United Democratic Movement
UNSW	University of South Wales

TABLE OF CASES

TABLE OF STATUTES

Colonial Laws Validity Act 28 & 29 of 1865

Commissions Act 8 of 1947

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

High Court of Parliament Act 35 of 1952

Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

Internal Security Act 72 of 1982

Judicial Services Commission Act 9 of 1994

Marriage Act 25 of 1961

Promotion of Administrative Justice Act 3 of 2000

Public Safety Act 61 of 1986

Republic of South Africa Constitution Act 32 of 1961

Riotous Assemblies Act 71 of 1956

Separate Representation of Voters Act 46 of 1951

South Africa Act, 1909

South Africa Amendment Act 9 of 1956

South African Reserve Bank Act 90 of 1989

Status of the Union Act 69 of 1934

Superior Courts Act 10 of 2013

Suppression of Communism Act 44 of 1950

ABSTRACT

The South African government derives its legal existence from the *Constitution of the Republic of South Africa*, 1996. This Constitution was adopted to end legislative supremacy, state impunity and racial inequality. The same Constitution is underpinned by judicial independence and the rule of law. Its transformative nature is built on the doctrine of separation of powers which divides government power between the legislature, the courts, and the executive. These three branches have equal powers and exercise checks and balances over one another. The judiciary keeps its counterparts within their constitutional mandate through judicial oversight which is mandated by several constitutional provisions.

This study investigates whether the judiciary has overstepped its jurisdiction. It traces the historical development of judicial oversight in South Africa and the constitutional principles underpinning it. It examines the need for effective measures that ensure the accountability of the judiciary without undermining its independence. It also analyses the conceptual and practical problems created by an infinite choice of remedies in constitutional adjudication, judicial activism and the counter-majoritarian dilemma.

Without derogating the marvellous work done by the judiciary in holding Parliament and the executive to abide by the Constitution, this study finds that the judiciary has overstepped its jurisdiction by failing to have proper regard to the doctrine of separation of powers and the need for constitutional deference and judicial restraint in political matters and policy-laden issues. The judiciary has used its wide powers of oversight to impose judicial supremacy. Several decisions demonstrate that the courts have now upgraded their position to one of supervisor over the whole government machinery. The result has been a floodgate of criticisms from high-ranking political figures in government. This is problematic in that it erodes political support for court decisions and threatens the institutional comity between the courts, Parliament and the executive.

Key words: constitutional democracy, transformative constitutionalism, separation of powers, checks and balances, judicial independence, judicial oversight, judicial overreach, jurisdiction, South Africa

Chapter 1 Context and Outline of the Study

1.1 Background

The South African government derives its legal existence from the *Constitution of the Republic of South Africa*, 1996. This Constitution succeeded the interim Constitution[1] in ending legislative supremacy and executive impunity brought by colonial and apartheid laws. It ushered in an era of transformative constitutionalism which enshrines a culture of human rights and accountability of government.[2] It divides public power between the legislature, the judiciary and the executive at local, provincial and national level. The legislature makes the law; the judiciary interprets the law and adjudicates disputes; and the executive enforces legislation, court decisions and develops national policy.

The three branches have equal authority and are independent from one another.[3] They are confined to their constitutional powers and are prevented from usurping power from one another through a system of checks and balances. This system is a countervailing measure for the separation of powers. While the legislature and the executive exercise checks and balances over each other through various methods which foster and promote accountability, the courts perform their part through constitutional review of legislation and executive action.

Judicial oversight, used synonymously with constitutional review and judicial review in this study, is the power and competence of the courts to assess and set aside legislation and executive actions for their unconstitutionality.[4] It is one of the core components of transformative constitutionalism. It is intertwined with the doctrine of separation of powers, which although not specifically provided for in the Constitution, is part of the new constitutional order.[5] The current constitutional dispensation is a constitutional democracy. It seeks to bring majorities and minorities in South Africa into peaceful co-existence under a supreme Constitution.[6] It imposes a greater role on the

---

1 *Constitution of the Republic of South Africa Act* 200 of 1993.
2 Currie and de Waal *Bill of Rights Handbook* 1-2.
3 Mahomed 1998 *SALJ* 112.
4 Collin *Dictionary of Law* 272.
5 *Glenister v President of RSA* 2009 1 SA 287 (CC) para 28.
6 The Preamble affirms that "South Africa belongs to all who live it, united in our diversity."

courts to protect the Constitution and individual rights against legislative and executive encroachment than the previous ones.[7] Various constitutional provisions make the judiciary the guardian and trustee of constitutional values and principles in the Bill of Rights. The judiciary thus fulfils this mandate through judicial oversight.

Judicial review presents numerous challenges for the courts and the whole constitutional order. The wide powers of review bestowed on the courts by the Constitution raise conceptual and practical problems regarding the relationship between constitutional democracy, separation of powers and judicial review. It is against this background that the exercise of judicial review over legislative and executive action is examined in this study.

1.2 Problem statement

The judiciary has the final say on the meaning of constitutional provisions and the constitutionality of legislative and executive action.[8] Only the courts can decide the nature, extent and applicability of the doctrine of separation of powers. They retain a monopoly in ascertaining the magnitude of their powers and whether or not it is permissible for them to interfere in matters involving the legislature and the executive. There is no constitutional mechanism to prevent the judiciary from overstepping its jurisdiction. It is up to the courts to determine the limits of their power by striking a balance between the doctrine of separation of powers and the constitutional accountability of the legislature and the executive.

Conclusively, the courts have very wide powers in government. This makes the judiciary invariably more powerful than the other two organs of state. Such power invested in the courts violates the doctrine of separation of powers and raises uncertainties concerning the relationship between the doctrine of separation of powers and judicial review. In recent times, the courts have been accused of using their wide-ranging powers of review to overstep the limits of their power. The supervisory order handed down in the *Nkandla*[9] judgment is one of the examples of the courts exceeding

---

7 For a synopsis of judicial oversight under previous South African constitutions, see Ch 2 of this study.

8 See s 167(5) of the Constitution.

9 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC).

their power. Against this backdrop, this study seeks to examine whether South African courts have overstepped the boundaries of judicial authority by intruding into legislative and executive domains.

1.3 Aims and objectives

This study aims to investigate whether the South African judiciary has used its power of judicial oversight to overstep its mandate. It seeks to achieve the following objectives:

i) To examine the philosophical framework for judicial oversight and its evolution in South Africa to help contextualise the increased judicial role in contemporary South African constitutionalism;

ii) To evaluate constitutional principles underpinning the exercise of judicial review in South Africa and the rationale for judicial intervention and interference in the activities and decisions of Parliament and the executive;

iii) To analyse conceptual and practical challenges arising from judicial review in South Africa. This is accomplished through an assessment of the impact of judicial review on the doctrine of separation of powers and transformative constitutionalism; and

iv) To determine whether the judiciary is downplaying the doctrine of separation of powers and overreaching its jurisdiction through judicial oversight.

1.4 Research questions

In investigating whether the South African judiciary has overstepped its mandate, this study identifies and establishes the propriety of judicial intervention in the activities of Parliament and the executive. It assesses the impact thereof on the doctrine of separation of powers and transformative constitutionalism. As such, the following questions are addressed:

i) What is the philosophical framework for judicial oversight and how has judicial review developed in South Africa?

ii) On what basis and to what extent can the judiciary interfere in the activities of the legislature and executive?

iii) What constitutional principles underpin judicial review in South Africa?

iv) What are the conceptual and practical problems arising from judicial review?

v) How does the doctrine of judicial review impact on the doctrine of separation of powers and what is its viability in contemporary transformative constitutionalism?

vi) Is the South African judiciary using the power of judicial review to downplay the separation of powers and consequently overreach its jurisdiction?

1.5 Basic hypothesis

Transformative constitutionalism in South Africa gives the judiciary, particularly the Constitutional Court, very wide powers. This results in judicial supremacy. The courts in South Africa constantly use judicial review to exceed their mandate. They downplay the doctrine of separation of powers by intruding into legislative and executive domains.

1.6 Rationale and justification

There is no clear demarcation between transformative constitutionalism, separation of powers, checks and balances and judicial review. As such, it is important to investigate constitutional principles underpinning the exercise of judicial review in order to understand the nature and extent of judicial oversight. It is also necessary to examine whether the judiciary has used judicial oversight to downplay the separation of powers and encroach legislative and executive action. Given that the ultimate responsibility to enforce court orders lies with the legislature and the executive, it is crucial to investigate how the courts could fulfil their constitutional obligation of judicial review and at the same time retain the legitimacy of their decisions.

This study examines whether the judiciary downplays the doctrine of separation of powers through judicial review. Academics have not been forthcoming with scholarly analysis of the conceptual and practical problems arising from judicial review in South

Africa. Politicians have been robust in their approach but demonstrate a lack of objectivity and succinct legal knowledge in their discussions.[10] The study therefore breaks this novel territory by interrogating how the judiciary downplays the doctrine of separation of powers through judicial review.

1.7 Research methodology

The nature of this study requires a doctrinal research approach which entails a systematic review of literature, legislation and case law. The study extensively relies on primary and secondary data available in the physical and virtual libraries of the North-West University. Primary sources of data used are the Constitution, statutes, and case law. Secondary sources include scholarly books, journal articles and extra-curial writings by serving and retired judges. The study also endeavours to privilege credible online sources which report on developments in government, such as the *Constitutional Speaking* blog run by a legal expert at the University of Cape Town.

It would have been beneficial to secure the views of current and former justices of the Constitutional Court on why the court has become more assertive in its approach to issues pertaining to the legislature and the executive and why it is making decisions which may be perceived to be in violation of the doctrine of separation of powers and beyond its jurisdiction. However, this has not been possible due to time and budgetary constraints. As such, the study places reliance on case law and extra-curial writings by serving and retired justices. The writings are invaluable in shedding light into the judicial mind-set. Court decisions are readily available in the North-West University's virtual library. It was easy to access and analyse them.

1.8 Scope and limitations

The study is limited to an examination of the approaches of the South African courts to judicial review. It investigates the historical context which gave the courts greater powers in government than they had prior to the democratic dispensation. It discusses constitutional principles regulating judicial oversight and assesses the conceptual and

---

[10] See Mokone 2012 http://wwwtimeslive.co.za/thetimes/2012/06/07/ramatlhodi-flays-the-judiciary; De Vos 2012 http://constitutionallyspeakingcoza/2012/02/14;http://mg.co.za/article/2012-02-10-power-of-constitutional-review-is-real-issue-behind-attack-on-judiciary 2012 .

practical problems arising from the exercise of this oversight role. The main objective is to ascertain whether the judiciary is overstepping its constitutional mandate. The study is limited to judicial review of national legislative and executive action in South Africa. Reference to judicial decisions is limited to cases decided by the Constitutional Court and the former Appellate Division of the Supreme Court of South Africa (currently the Supreme Court of Appeal). This is informed by the status of both courts as courts of last instance. The Appellate Division had the final say on all issues which came before it, in as much as the Constitutional Court does today. It should be noted that the study does not neglect other courts. It utilises, to a limited extent, some judgments of the High Court which inform some of the arguments herein.

Judicial review of administrative action in terms of section 33 of the Constitution and the *Promotion of Administrative Justice Act*[11] is beyond the scope of this study. The same shall apply to judicial review of the actions and decisions of Chapter 9 institutions. The study does not delve into the relationship between law and politics in judicial adjudication. It does not examine whether judges should take into consideration the potential political impact of their decisions. It does not explore the response of government to court decisions. To this end, the study is limited to the relationship between constitutional principles on the accountability of government to the Constitution and the people, separation of powers, checks and balances and judicial review.

1.9 Literature review

The works reviewed herein focus on the Constitutional Court's transformative mandate and how it has discharged this obligation. It highlights political, philosophical and jurisprudential problems emanating from judicial oversight. In exploring the framework within which the courts exercise oversight, the literature focusses on the role of the courts in constitutional democracy; the doctrine of separation of powers and the system of checks and balances; the rule of law; and judicial independence. It also explores the question of constitutional deference and judicial restraint through which the courts observe the limits of their powers.

---

11 *Promotion of Administrative Justice Act* 3 of 2000.

The consensus among academics is that the judiciary's protective mandate over the Constitution stands far above the democratic doctrine of separation of powers and goes beyond the system of checks and balances. According to Michelman,[12] "no part of South African law can be allowed to remain outside the Constitution's tent or beyond the Constitution's gaze." This suggests that judicial oversight is so important for constitutional democracy that the judiciary should do everything in its power to intervene where there is reason to believe that the Constitution is not complied with. It does not matter if the courts encroach into the domains of the legislature and the executive.

However, there is a paucity of legal research on the question whether the judiciary has overstepped its mandate. Klug[13] attributes this to the fact that previous scholarly studies on judicial review have focussed on the composition of the courts and their decision-making processes while recent ones focus more on judicial interpretation. He examines the source of judicial authority, how the courts exercise their powers and discusses the resultant challenges faced by the Constitutional Court in finding "its place" in South Africa's democracy. He explores the "interaction of principle and institutional pragmatism in the court's decision-making"[14] process, particularly when it comes to socio-economic rights, a key contributor to judicial review litigation.[15] His conclusions that the court has managed to avoid being abused as a political battlefield and that it has succeeded in fulfilling the role of a constitutional court in a young and unstable democracy is concurred with.[16]

Vile[17] is instructive in contextualising constitutionalism. He submits that the history, values and aspirations of a people guide a constitutional drafting process. He concludes that the constitution making process is as essential as the substantive

---

12 Michelman "Constittutional Supremacy and Appellate Jurisdiction in South Africa" 46.

13 Klug 2010 *Constitutional Court Review* 1-3.

14 The article is suitably titled "Finding the Constitutional Court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the court's decision making."

15 Some of the most notorious cases are *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC)*; Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC); *Government of RSA v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v TAC* 2002 6 BCLR 1033 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SASSA* 2014 1 SA 604 (CC).

16 Klug 2010 Constitutional Court Review 2.

17 Vile *Constitutionalism and the Separation of Powers* 2.

contents of a constitution's provisions. In his view, constitutionalism defines and constrains public power to safeguard constitutional values and principles. These views hold true in South African transformative constitutionalism. The idea of demarcating public power implies a mechanism of checks and balances. Currie and de Waal[18] submit that the South African constitutional dispensation is structured in such a way that the state has enough power to govern, but at the same time limits legislative and executive powers to preserve the rule of law and human rights. This submission highlights the importance of judicial oversight in the protection and promotion of the Constitution.

For itself, the Constitutional Court interprets its mandate as follows:

> In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention ... But even in these circumstances, courts must observe the limits of their powers.[19]

This reasoning shows the seriousness with which the Constitutional Court takes its mandate. It demonstrates the court's acceptance of the possibility of contravening the separation of powers while protecting the Constitution. It also shows that the court understands that its powers are not infinite, however wide.

Corder[20] submits that the overriding principle in contemporary South African democracy is the doctrine of separation of powers, which though not expressly provided for in the text of the Constitution, is part of the constitutional design.[21] He predicts a power wrangle between the judicial and executive branches of government emanating from the perception that the judiciary is overstepping its mandate. He calls for "principled calm."[22] His submissions are concurred with. However, his conclusion that President Zuma's ascension to the first office and the heat generated by the Hlophe saga threatened the Constitutional Court's powers to exercise oversight cannot

---

18 Currie *et al New Constitutional and Administrative Law* 10.
19 *De Lange v Smuts* 1998 7 BCLR 779 (CC).
20 Corder 2009 Constitutional Court Review 240.
21 *Glenister v President of RSA* 2011 7 BCLR 651 (CC) paras 29-32.
22 The article is entitled "Principled calm amidst a shameless storm: Testing the limits of the judicial regulation of legislative and executive power."

be accepted.[23] This study finds no basis to suggest that the judiciary's independence was compromised by the two.

Roux[24] recommends that the court must tread carefully in its approach to judicial review to avoid offsetting the balance of institutional comity. In his view:

> For a constitutional court like the South African one, working in a relatively well-developed legal culture that favours firm textual bases for democratic rights and in a political context marked by an ever-present threat of populist attacks on the Constitution, the role it plays in democratic consolidation must necessarily be quite cautious. In particular, courts in this situation need continually to strike an optimal balance between the risk to their independence posed by a failure to protect the democratic system from dominant-party attack and the risk to their independence posed by over-zealous, legally unsupported enforcement of democratic rights. Measured against that standard, the CCSA's recent record, though not without flaws, is generally to be admired.

This is an excellent recommendation from which the court and the rest of the judiciary could draw wisdom. It is particularly enlightening in that it contextualises the framework within which judicial oversight is exercised and the political climate in South Africa. Other academics have also come close to it. For example, in a reply to Klug,[25] Mendes[26] argues that the boundaries of constitutional review are often concealed in a grey zone between politics and the law. This puts the judiciary in controversies surrounding the nature and extent of its mandate. In Mendes's view, the courts cannot be seen to be overstepping their legal jurisdiction into politics because constitutional review itself exhibits a discretionary character. The political convictions of individual judges influence their decisions in review matters.[27]

It is thus important for the courts to be cautious of the limits of their powers. Issacharoff[28] submits that constitutional courts, like the South African one, should be bold in their decisions against legislative and executive actions to protect democracy. He accepts that by so doing, they might risk their reputations. Butler[29] seems to concur. He contends that it is important for the courts to be robust, especially where a one-party democracy dominates the country. He points out the decision in *Minister of*

---

23 Corder 2009 Constitutional Court Review 266.
24 Roux 2014 *Constitutional Court Review* 35.
25 Klug 2010 *Constitutional Court Review*.
26 Mendes 2010 *Constitutional Court Review* 34.
27 Mendes 2010 *Constitutional Court Review* 34.
28 See Issacharoff 2013 *Constitutional Court Review*.
29 Butler 2005 J*ournal of Contemporary African Studies*.

Health v TAC[30] in which the court had to

> … address critically the actions of the executive in a context in which policy debate was stifled and the ruling party caucus in an ANC-dominated legislature prevented effective legislature oversight.

By being robust, the judiciary risks overstepping its mandate and losing its legitimacy. It is then worth pondering how the Constitutional Court may exercise its constitutional mandate sustainably and maintain the institutional comity between the judiciary and its counterparts, particularly in the light of harsh criticisms from executive elements. Corder[31] asks the following questions:

> Situated more generally within the context of the inefficient or failed implementation of socio-economic- rights decisions of the Constitutional Court, is the Court becoming more forceful in the expression of its views? And will this exasperation spill over into counter-action by the frequently-chastised executive?

Beloff[32] argues that whereas judicial review saves as a bulwark and fortification against the abuse of public power by the executive, it is important for the courts to be mindful of their steps so as not to be activists, particularly in circumstances where they may appear to be placing themselves as an oppositional site to the governing party. He cautions courts not to overstep into the legislative arena and not to be too prescriptive to the law maker by imposing their values. He maintains that the courts must be seen to be nonpolitical, particularly where political decisions are concerned.

Mendes[33] observes that the judicial exercise of its oversight role could make the courts political targets, particularly where there is political resistance to its decisions. This is true, given that retired Constitutional Court Justice Albie Sachs[34] has statements attributed to him that show that the court is now concerned about its "place as an institution within the constitutional and political system." Mendes[35] recommends that where a court faces an acute lack of political will on the executive side, it must back off. Thus, political and democratic legitimacy are essential for institutional survival.

---

30 *Minister of Health v TAC* 2002 6 BCLR 1033 (CC).
31 Corder 2009 *Constitutional Court Review* 262.
32 Beloff 1999 *Denning Law Journal* 166.
33 Mendes 2010 *Constitutional Court Review* 39.
34 Mendes 2010 *Constitutional Court Review* 36.
35 Mendes 2010 *Constitutional Court Review* 41.

Cumaraswamy[36] is of the view that the doctrine of separation of powers underpins democracy. Mhodi[37] concurs and extends this to admit that the doctrine of separation of powers is a basic requirement for constitutionalism. Former Chief Justice of the Supreme Court of Zimbabwe, Gubbay CJ,[38] submitted that the rule of law underpins constitutionalism in that it prevents the exercise of arbitrary powers by the state. He further observed that judicial review enables the courts to compel legislative and executive organs of the state to abide by the Constitution, its values and principles by declaring invalid all acts which go against democratic values and principles. Thus, there is a close nexus between separation of powers, democracy and judicial oversight.

Judicial independence is vital for the courts to exercise the power of review. There is a plethora of literature on this. Mr Justice Sydney[39] observed that:

> … everything which can be said [on the topic of judicial independence] has already been said and repeated on so many occasions and in so many learned articles that any further observations are inevitably redundant.

It suffices to point out that judicial independence entails the institutional and individual independence of the judiciary organ of state from interference by the legislature and the executive.

Judicial oversight raises conceptual and practical problems. Notably, judicial oversight lacks democratic legitimacy because courts derive their mandate directly from the Constitution, unlike the legislature and the executive which obtain theirs from the voters. Bickel[40] argued that judicial review, which enables the courts to set aside legislation enacted by democratically elected representatives "thwarts the will of the majority." This is true, depending on the nature of a state's democracy, particularly if it is one of unrestrained majority rule by the majority. It has no application to South Africa which is based on a hybrid Constitution.[41]

---

36 Cumaraswamy 2002 *The Journal of the Malaysian Bar* 32.
37 Mhodi 2013 *The Constitutional Experience of Zimbabwe* 40.
38 Gubbay 2009 www.barcouncil.org.uk/media/100365/rule_of_law_lecture_agubbay_091209.pdf
39 Chidyausiku 2010 www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf.
40 Bickel *Least Dangerous Branch* 16-17.
41 For a discussion of models of contemporary constitutionalism and democracy, see Tushnet, Fleiner and Saunders (eds) *Routledge Handbook of Constitutional Law* 9.

The other issues plaguing the jurisdiction of the courts in South Africa and whether they have overstepped their mandate is the question of precedent. Mendes[42] explored whether the Constitutional Court can overrule its previous judgments. If it cannot, he reasoned, the masses are stuck with a decision which may have been, in the most unfortunate situations, wrong and not in tandem with evolving political and social conditions in the country.[43] It is thus more important for the court to be cautious of its steps. He contends that this is not only necessary for the purposes of avoiding mistakes, but also ensuring its survival.[44]

De Vos[45] submits that the courts must act within their constitutional powers to preserve the legitimacy of the legal system and their decisions. This ensures that the government complies with their orders. In his view, if they stray from their constitutional mandate, they become a danger to society. His views mirror former Chief Justice Mohamed's[46] position:

> Judicial power is potentially no more immune from vulnerability to abuse than legislative or executive power but the difference is this: the abuse of legislative or executive power can be policed by an independent judiciary but there is no effective constitutional mechanism to police the abuse of judicial power. It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial power is matched by the real depth of judicial responsibility. Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs

It is however difficult for the Constitutional Court to determine when it has crossed the line because its powers are very wide and abstract in nature. Issacharoff[47] is persuaded towards the opinion that what is more important is for the court to be vigilant in confronting attempts by the ANC-led executive to place itself beyond democratic accountability and the law.

In a nutshell, the literature reviewed above points to uncertainties regarding the doctrine of separation of powers and judicial review. It acknowledges that a judiciary that oversteps its mandate is bound to lose in the end. It is now incumbent upon this

---

42 Mendes 2010 *Constitutional Court Review*.
43 Brickhill 2010 *Constitutional Court Review* 79-80.
44 Mendes 2010 *Constitutional Court Review* 39.
45 De Vos 2009 *Constitutional Court Review* 409.
46 Mishra 2015 *Indian Journal of Law & Liberty* 4.
47 Issacharoff 2013 *Constitutional Court Review* 7-8.

study to investigate whether the South African judiciary has overstepped its jurisdiction and how institutional comity could be maintained through constitutional deference and judicial restraint.

1.10 Ethical considerations

The following ethical considerations guide the study:

i) The study will be published at the library of the North-West University. It being common cause that it will be available to students and academics who may rely on it, it is undertaken with due diligence to ensure its quality, integrity and reliability.

ii) It is carried out clear of conflicts of interests. This is achieved through avoidance of adverse political and social interests as these may impair objectivity.

iii) Sources used are analysed and interpreted within the context they were written in to minimise misinterpretations and misguided analysis. Every endeavour is made to ensure that the basis of every conclusion made in the study and recommendations thereof are sufficiently reasoned so that all those who rely on the study could make their own conclusions.

iv) Every effort is made to comply with all copyright laws. When omissions due to oversight become apparent, the earliest opportunity shall be taken to comply.

v) Given that this study focusses on a highly-rated institution and honourable judges in South Africa, analysis and criticisms are kept within the confines of the aims and objectives of the study. No references to pending cases before the courts are made unless where such reference is necessary, objective and not intended in any way to pre-empt the proceedings or incite a virtual mob against the litigants, the judiciary or the justices in their personal capacity.

1.11 Chapter overviews

This study is structured into the following six chapters.

Chapter 1: Context and outline of the study

This chapter contextualises and outlines the study. It provides the background to the study; the statement of the problem; aims and objectives; research questions to be answered; review of literature; research methodology; and the scope and limitations of the study.

Chapter 2: Philosophical framework and evolution of judicial oversight in South Africa

This chapter traces the historical development of the common law judicial review in South Africa from the establishment of the Union Government in 1910 up to the adoption of the Interim Constitution in 1993. It examines the doctrine of legislative supremacy and how it prevented the introduction of separation of powers. The chapter also focuses on the nature and scope of parliamentary sovereignty to highlight the risk to human rights posed by a supreme legislature, a constitution without a justiciable bill of rights and a weak judicial organ of state.

Chapter 3: Principles underpinning contemporary judicial review

This chapter progresses from the previous one to examine principles of the 1996 Constitution which regulate judicial review. It examines the judicial mandate under transformative constitutionalism. It then analyses the status and application of the doctrine of separation of powers with checks and balances. This puts into perspective the rule of law and the guarantee of judicial independence in contemporary constitutionalism. The chapter also discusses constitutional review to determine the judiciary's interpretation of its transformative role through review of decisions of the legislature and executive. Ultimately, this chapter ascertains the extent to which the judiciary may intervene in the activities of its counterparts.

Chapter 4: Conceptual and practical problems of judicial oversight

This chapter investigates whether the courts have overstepped their mandate through judicial review. It discusses the need for judicial accountability and examines the problems brought by judicial oversight. It analyses judicial supremacy and counter-majoritarian remedies issued by the courts. Then the chapter evaluates the activist judicial approach to government policy and how the courts overstep their mandate by entertaining and adjudicating political questions.

Chapter 5: Observing the limits of judicial oversight: Constitutional deference and judicial restraint

This chapter discusses the democratic legitimacy of judicial review to contextualise the need for judicial deference and restraint. It then examines the relationship between separation of powers and judicial deference. Finally, the chapter analyses institutional competence in considerations for judicial deference and restraint.

Chapter 6: Findings and Recommendations

This chapter presents conclusions drawn from the study and makes recommendations for judicial officers, the legislature and the executive branch of government. It is in this chapter that the study also identifies related areas for further research.

Chapter 2 Philosophical Framework and Evolution of Judicial Oversight in South Africa

2.1 Introduction

Judicial oversight is a supplement to the doctrine of separation of powers. It is grounded on the need to constrain legislative and executive action to ensure government accountability and safeguard the rule of law and human rights. Prior to 1993, the doctrine of legislative supremacy, also known as parliamentary sovereignty, regulated the relationship between the South African Parliament, the judiciary and the executive. Under this doctrine, judicial review of legislation was not possible.[48] The legislature possessed enormous powers, making it impossible for the courts to test the constitutionality of statutory enactments and executive actions. The selective application of the rule of law and the compromised independence of the judiciary during the colonial and apartheid eras resulted in serious violations of the basic rights and liberties of most South Africans.

Although South African constitutions between 1910 and 1993 divided government authority into legislative, executive and judicial functions,[49] the division was different from the contemporary separation of powers where the three branches of government wield equal powers and exercise checks and balances over one another. This constitutional revolution in 1993 marked the end of apartheid and signaled a new era for judiciary review in South Africa. The interim Constitution introduced the power of the courts to test the legislative process, statutory enactments and executive action against constitutional values and principles.[50]

This chapter seeks to contextualise contemporary judicial oversight in South Africa. It discusses the philosophical and jurisprudential framework within which this power is exercised and examines the historical development of the doctrine from pre-Union South Africa to the adoption of the 1996 Constitution.

---

48 *Reference re Remuneration of Judges* [1997] 3 SCR 3 para 309.
49 Moseneke 2008 *SAJHR* 347.
50 Moseneke 2008 *SAJHR* 347.

2.2 Philosophical framework

The philosophical origins of separation of powers and judicial review can be traced back to the Enlightenment period in Europe between the 17th and 18th centuries. This intellectual movement, as the name suggests, "emphasized reason and individualism rather than tradition."[51] The teachings and writings of the philosophers of the Enlightenment show a close relationship between judicial oversight and the separation of powers. The philosophers highlighted the need to avoid the concentration of power in one individual or organ of state through a division of state power. To preserve personal liberties, the philosophers proposed a separation of the powers of government into executive, law-making and judicial functions. They argued that this was the best way to hold governments accountable and to abide by the rule of law and ensure accountability to citizens.[52]

In the United States of America, Madison[53] justified the separation of powers as follows:

> … 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. **…** that such devices should be necessary to control the abuses of government. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself...

In England, John Locke was instrumental in advocating for separation of powers.[54] In France, Montesquieu was one of the most prominent advocates of the Enlightenment. His teachings contributed to the outbreak of the French Revolution of 1789.[55] He reasoned that when the powers to make law, interpret and enforce it are vested in one person or entity, there is bound to be abuse of personal liberties because the ruler makes tyrannical laws and executes them arbitrarily.[56] Montesquieu's writings speak to and tally with those of Plato, the ancient philosopher who propounded that the

---

51 Oxford University 2016 https://enoxforddictionaries.com/definition/enlightenment.
52 Langa 2006 *SAJHR* 4.
53 Madison *The Federalist Papers No 51* 262.
54 However, Ratnapala 1993 *American Journal of Jurisprudence* 190 argues that neither “Locke nor Montesquieu invented the theory of the separation of powers.” Vile *Constitutionalism and the Separation of Powers* 51 submits that the doctrine of “separation of powers had become a commonplace” in England when Locke wrote his treatise on the doctrine.
55 See Article 16 of the *Universal Declaration of the Rights of Men and Citizen* (1789).
56 Cohler Miller and Stone (eds) *(eds) Montesquieu: The Spirit of the Laws* 163.

overconcentration of power in the hands of one person leads to "wantonness of excess."[57]

There was thus a need for a non-political state institution, in the form of the judiciary, to moderate legislative and executive excesses. Brutus[58] put the position as follows:

> [I]f the legislature pass[es] laws, which, in the judgment of the court, [it is] not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.

The role of the courts in a state founded on the doctrine of separation of powers is important. Alexander Hamilton[59] reasoned that a judiciary separated from the legislature and executive would never threaten individual liberties. Thus, judicial oversight is a magisterial mechanism to safeguard human rights and democracy.[60]

Separation of powers and judicial review are nothing more than mere principles which must be given effect to through the rule of law. According to Dicey,[61] the rule of law comprises of the supremacy of the law above individuals so that citizens are not subjected to arbitrary use of state power, and the equality of all citizens, including government officials. The state must also obey its laws.[62] In South Africa, the need to protect personal liberties through separation of powers and judicial review had been outstanding long before the Unification of the four British colonies in 1910.

2.3 Historical development of judicial oversight

2.3.1 The testing right in the colonies

Prior to 1910, South Africa was divided into four British colonies: Transvaal, Natal, Orange Free State and Cape of Good Hope. The colonies had legislative autonomy separate from one another. The development of their legal systems was different due

---

57 Jowett *The Dialogues of Plato* 72; Vile *Constitutionalism and the Separation of Powers* 28.
58 Rentz 2009 http://www.coplac.org/publications/metamorphosis/metamorphosis.php?a=Fall2009&p=1&c=ss&s=title&o=ASC.
59 Hamilton *Federalist Papers No 78* 394.
60 O'Regan 2005 *PELJ* 124-125.
61 Van Wyk et al *Rights and Constitutionalism* 1.
62 *Commercial Farmers Union v Minister of Land*s 2002 2 ZLR 469 (SC).

to different influences from Dutch and British legal systems. British influence was profound in Natal and the Cape of Good Hope colonies due to many British settlers. The Boer Republics in the Transvaal and Orange Free State were dominated by Afrikaners and received no British influence. Consequently, British legal tradition id not influence these colonies. As far as judicial oversight (the testing right) was concerned, the Orange Free State had the most progressive constitution which, according to Davison,[63] was built on the ideals of the American Constitution. Its Constitution was supreme, leading to successful constitutionalism.[64] Its High Court exercised the testing right in *Cassim v State,*[65] a case in which it examined statutory compliance with an equality clause in the Constitution. The extra-curial writings of Chief Justice de Villiers, in which he expressed grave concern with proclamations which violated personal liberties, were instrumental in shaping the legislative mindset.[66]

The constitutional mindset of the Orange Free State, which enshrined judicial review, was not shared by the other British colonies in South Africa. Strong influences from the Westminster system of parliamentary democracy prevented the establishment of substantive judicial review in Natal and the Cape of Good Hope Colony.[67] The British system was premised on a supreme legislature whose enactments could not be challenged in the courts. Unfortunately for most South Africans, the Westminster system was adopted at the Unification of the colonies in 1910. This effectively prevented the adoption of the doctrines of separation of powers and judicial review. Parliamentary sovereignty, consolidated by legislation, gave the courts very limited opportunity to test legislative enactments.

In the Transvaal, judicial review failed not because of a lack of British influence, but because of President Paul Kruger who sought to entrench his power. The High Court, under Chief Justice Kotze, tried on numerous occasions to overrule his draconian Presidential Proclamations by emphasizing the importance of constitutionality.[68] This set the judiciary on a collision course with the President who decided to remove the judicial testing right from the law. When the Chief Justice and his bench refused to

---

63 Davidson 1985 *Harv.J.L. & Pub. Pol'y* 691.
64 Dugard *Human Rights and the South African Legal Order* 19.
65 *Cassim v State* 1892 9 Cape L. J. 58.
66 See De Villiers 1897 *Cape Law Journal*.
67 Davidson 1985 *Harv.J.L. & Pub. Pol'y* 688.
68 *Brown v Leyds* 1897 14 Cape L.J 71.

budge, Kruger dismissed them.[69] The power wrangles between the judiciary and the executive President in the Transvaal influenced delegates at the Natal Convention where Unification of the colonies into one country was approved.

2.3.2 Judicial oversight after the Unification

In 1909, a convention was called in Natal for the purposes of working out a mechanism for the Unification of the four British Colonies. The gathering succeeded with a proposal to the British government for formal legislative assent which was granted through the Union Constitution.[70] The delegates strongly resented incorporating judicial review in the Union Constitution. They were sceptical of a greater judicial role in government and argued that such a power stood to compromise the nation's sovereignty.[71] Although the delegates resented British imperial laws and policies, the Union of South Africa adopted the British constitutional structure based on the Westminster system of legislative supremacy.[72]

The Union Government slightly modified the doctrine of parliamentary sovereignty to benefit Britain, the colonial power. For example, while the British Parliament was sovereign, it was a representative of most British citizens and was accountable to the people. It could not legislate against their will.[73] The Union Parliament, however, only represented the white minority, and not the black indigenes. It was not accountable to the blacks, who formed the majority, and could thus do anything against them.[74] This gave legal legitimacy for white minority rule and led to the plunder of natural resources for the benefit of England.[75] According to Blackstone,[76] the Westminster system was abused such that while it accorded the white minority democracy, it deprived the majority blacks the same right and subjected them to authoritarian rule in a system where Parliament could do "everything that is not naturally impossible."[77]

---

69 Davidson 1985 *Harv.J.L. & Pub. Pol'y* 697-698.
70 *South Africa Act,* 1909.
71 Davidson 1985 *Harv.J.L. & Pub. Pol'y* 688.
72 Humby Kotze and du Plessis *Introduction to Law and Legal Skills in South Africa* 25.
73 Currie and de Waal *Bill of Rights Handbook* 2.
74 Currie and de Waal *Bill of Rights Handbook* 2.
75 Humby Kotze and du Plessis *Introduction to Law and Legal Skills in South Africa* 24.
76 Blackstone *Commentaries on the Laws of England* 129.
77 See also Currie and de Waal *Bill of Rights Handbook* 2.

The Union Parliament had an unfettered discretion to legislate on any matter.[78] It could adopt, amend or repeal legislation as it deemed fit and necessary. All state institutions, including the judiciary and the executive, were subservient to it. As subjects of legislative discretion, the courts had no authority to question the substantive constitutionality or moral validity of legislation. Their duty was to interpret the law as it was and help enforce it to the extent that they could without questioning its validity.[79] As former Constitutional Court Justice Madala[80] put it:

> [Courts] did not have the option to review and reverse unjust laws, rather the courts and all the other institutions had to implement and administer such law.

Although the Union Parliament was immune to internal judicial oversight, it was exposed to external constraints. Britain retained its dominance over the Union through the *Colonial Laws Validity Act.*[81] This statute gave the Imperial Parliament legislative supremacy over all colonies. It stipulated that all colonial laws which were repugnant to any Act of the British Parliament were invalid.

Although substantive aspects of legislation could not be challenged in the courts, procedural steps leading to its adoption were subject to judicial review.[82] The sovereign Parliament could enact any law as long as it followed constitutional procedure.[83] The courts were also empowered to inquire into the validity of legislation where there was an ulterior legislative motive and when the exercise of legislative discretion had been exceeded.[84] In other instances, the courts had authority to review substantive aspects of provincial legislation, municipal by-laws and administrative action.[85] It was accepted at the time that part of the judicial role was to moderate the exercise of public power. The basis of this assumption was the inherent jurisdiction of the Supreme Court.[86]

There was also widespread acceptance that the Supreme Court had the power to review amendments to entrenched provisions in the Union Constitution. The

---

78 Moseneke 2012 *SALJ* 14-15.
79 Wade and Philips *Constitutional and Administrative Law* 44.
80 Madala 2001 *N.C.J. Int'l L. & Com. Reg.* 748.
81 *Colonial Laws Validity Act* 28 & 29 of 1865.
82 Humby Kotze and du Plessis *Introduction to Law and Legal Skills in South Africa* 25.
83 Humby Kotze and du Plessis *Introduction to Law and Legal Skills in South Africa* 25.
84 *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11 paras 36-37.
85 *Reference re Remuneration of Judges* [1997] 3 SCR 3 688.
86 Corder 2011 *Advocate*. The Supreme Court was originally composed of four Provincial Divisions (Transvaal, Cape of Good Hope, Natal and Orange Free State) and the Appellate Division.

entrenched clauses related to the two official languages – English and Afrikaans- and the franchise. They could only be amended by a two-thirds vote of the House of Assembly and Senate sitting together at a third reading.[87] In *R v Ndobe,*[88] the Appellate Division asserted its power to review adjectival aspects of legislation. This case caused untold tensions between the legislature and the judiciary.

2.3.3 The Statute of Westminster and legislative autonomy

The British Imperial Parliament removed the colonial laws repugnancy clause and gave its dominions legislative autonomy through the *Statute of Westminster* in 1931.[89] For the Union of South Africa, this statute meant that the Union Parliament could entrench its supremacy in unprecedented ways. For the first time, the Union Parliament had unrestrained power to make its own laws to regulate the Union in any matter it deemed fit.[90] However, laws enacted for the Union by the British Parliament continued in force after the passing of the statute.[91] There was a general understanding that the enactment was not going to change law regarding entrenched provisions since it did not apply only to South Africa, but to all British dominions at the time.[92] The Union Parliament quickly moved to ensure that the rest of British law applied to South Africa only when it adopted it.[93]

The full extent of the magnitude of unfettered parliamentary sovereignty is to be found in *Sachs v Minister of Justice*[94] where the Appellate Division held that:

> Parliament, through legislation, may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway … It is the function of the courts to enforce its will.

This misinterpretation of the judicial role gave the Union Parliament judicial ammunition to make racially oppressive laws. In *Ndlwana v Hofmeyr*,[95] the Appellate Division had to consider whether Parliament could subvert the entrenched constitutional provisions.

---

87 S 137 of the Union Constitution.
88 *Rex v Ndobe* 1930 AD 484.
89 *Statute of Westminster* 1831.
90 S 59 of the Union Constitution.
91 See *Rex v Ndobe* 1930 AD 484 and *Harris v Minister of the Interior* 1952 2 SA 428 (A).
92 *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11.
93 This was achieved through the enactment of the *Status of the Union Act* 69 of 1934.
94 *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11.
95 *Ndlwana v Hofmeyr* 1937 AD 229 para 232.

In dismissing the appeal, it reiterated that the legislature was supreme, and thus its procedures were beyond the jurisdiction of the courts. It held:

> Parliament … can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is far as the Courts of Law are concerned at the mercy of Parliament like everything else.

This reasoning was flawed. The court failed to appreciate that the entrenched provisions were an implied limitation of parliamentary sovereignty. The judges were misguided into believing that their duty was to enforce the legislative intent in its entirety, even where it threatened entrenched constitutional provisions. Motivated by the decision, the Union Parliament embarked on an unprecedented abuse of legislative supremacy. However, the Appellate Division refused to endorse a violation of the franchise, leading to a constitutional crisis in the 1950s when the courts on one end, and the executive and the Union Parliament on the other, collided.

2.3.4 The trilogy cases and the constitutional crisis

The wrangle between the Appellate Division on one hand, and the legislature and the executive on the other, is captured in the trilogy cases.[96] The spat started when the legislature tried to violate the franchise using an illegal procedure. It removed Cape Coloureds and Africans from the common roll using the bicameral procedure instead of the entrenched unicameral procedure when it enacted the *Separate Representation of Voters Act.*[97] This time, however, it encountered a judicial brick wall. A differently constituted bench of liberal judges held in the *Coloured Vote* case[98] that if the reasoning in *Ndlwana*[99] was to be followed, the courts would not be able to protect individual rights in the Constitution. On this ground, the court overruled the precedent and reasserted its power to review procedural aspects of statutory enactment.

The Union Parliament was not pleased with the decision. It countered the judgment by enacting the *High Court of Parliament Act.* [100] This piece of legislation deemed every

---

96 Moseneke 2008 *SAJHR* 341. The cases are *Harris v Minister of the Interior* 1952 2 SA 428 (A); *Minister of the Interior v Harris* 1952 4 SA 769 (A); *Collins v Minister of the Interior* 1957 1 SA 552 (A).

97 *Separate Representation of Voters Act* 46 of 1951.

98 *Harris v Minister of the Interior* 1952 2 SA 428 (A).

99 *Ndlwana v Hofmeyr* 1937 AD 229.

100 *High Court of Parliament Act* 35 of 1952.

Member of Parliament a member of a High Court able to review decisions of the Appellate Division which invalidated legislative enactments. In what came to be known as the *High Court case*,[101] the judges strongly resisted the attempt by the legislature to take over their function. They conceded that the Union Parliament could create a court superior to the Appellate Division, but reasoned that the Parliament could not disguise itself as that court. The court emphasised that one of its responsibilities was to protect constitutional individual rights through invalidation of laws which failed to meet constitutional muster. It pointed out that the testing right was a judicial safeguard of the entrenched clauses.

In the face of a supreme legislature keen on usurping their powers, South African judges resorted to statutory interpretation rules which gave them opportunity to interpret legislation in ways favourable to individual rights. The judiciary, particularly the Appellate Division, mitigated the discriminatory nature of statutes through liberal interpretation. A notable example is the decision in *Dadoo v Krugersdorp Municipal Council*[102] in which the Appellate Division interpreted legislation prohibiting nationals of Asian descent from owning land not to mean that corporations owned by those people were also prohibited from owning land.

Progressive judges, such as Schreiner JA, refused to apply statutory interpretation methods which directly violated core tenets of the common law by infringing individual rights. For example, Schreiner JA refused to embrace the unequal development of the races.[103] His liberal approach to issues of societal class, race and gender, made him a lone dissenter in most cases.[104] Because of his anti-government stance in matters involving equality, Schreiner JA was bypassed for the position of Chief Justice in favour of his juniors Fagan JA and Steyn JA.[105] The executive's decisions to overlook Schreiner JA for the position of Chief Justice was in breach of the long-standing tradition that the most senior judge of the Appellate Division was appointed to the position upon the retirement of the Chief Justice can be viewed as executive interference with the judiciary through a divide and rule policy. Fortunately, "Schreiner

---

101 *Minister of the Interior v Harris* 1952 4 SA 769 (A).
102 *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530
103 Moseneke 2008 *SAJHR* 344.
104 Moseneke 2008 *SAJHR* 350.
105 Moseneke 2008 *SAJHR* 343.

carried on as if nothing had happened."[106]

Parliament responded to liberal judicial interpretation by passing legislation which expressly overruled court decisions. In 1956, for instance, it adopted the *South Africa Amendment Act.* [107] This Act prohibited the courts from determining the validity of all legislation except in matters involving the entrenched provisions. It effectively abolished judicial review of legislation. The Union also curtailed judicial oversight by vesting more discretion on the executive, making it impossible for the courts to apply a liberal interpretation to legislation.

The executive dealt a further blow to the judiciary by increasing the Appellate Division bench from five to eleven, filling the positions with pro-government candidates[108] based on their political connections.[109] The non-transparent judicial appointment process in which the Minister of Justice, acting on the advice of the Judge President of a Supreme Court division, recommended individuals for judicial appointment, made it possible for the executive to manipulate the judiciary through appointments.[110] The process of appointment undermined the collective and individual independence of the judges and made it possible for bias and prejudice to prevail in matters between political activists and the government.

In *Collins v Minister of the Interior*,[111] a swollen Appellate Division upheld a procedural but shrewd amendment of entrenched provisions regulating the franchise. The court found that the expanded Senate, used to obtain the requisite votes to pass the impugned statute, was a Senate, unlike the High Court in the *High Court* case. The court reiterated that if a legislature has power to legislate on a matter, and does so, the resultant legislation is valid, regardless of its purpose. This reasoning was a clear departure from the court's earlier interpretation of itself as the guarantor of constitutional rights. This judicial approach made it possible for apartheid to take root.

---

106 Moseneke 2008 *SAJHR* 343.
107 *South Africa Amendment Act* 9 of 1956.
108 Dyzenhaus *Constitution of Law* 21.
109 Kentridge 1982 *SALJ* 652.
110 Siyo and Mubangizi 2015 *PELJ* 820-821.
111 *Collins v Minister of the Interior* 1957 1 SA 552 (A).

2.3.5 Apartheid and the courts

The Union of South Africa severed allegiance to the British monarch in 1961 through the Republican Constitution.[112] This Constitution withdrew the Union from the Commonwealth of Nations and declared a Republic of South Africa. It excluded judicial review in two ways: Firstly, it installed the Parliament as the sovereign legislative authority in the Republic. Secondly, it ousted the jurisdiction of the courts from inquiring into the merits of legislation. Section 59(2) of the Republic Constitution stipulated that no court of law was competent to inquire into or to pronounce upon the validity of any Act of Parliament. This Constitution made it possible for the predominantly racist South African Parliament to enact legislation which enabled the executive to oppress, suppress and exclude most South Africans from economic participation and development.

The period between 1948 and 1994 in South African history has come to be referred to as apartheid. It was characterised by the enactment and vigilant enforcement of racially oppressive and discriminatory laws.[113] Although its independence was severely undermined by apartheid legislation and a lack of public confidence in the courts, the executive-mindedness of some of the judges made the judiciary an inextricable part of the apartheid legal order. Through its decisions, the judiciary contributed to legitimising and sustaining blatantly discriminatory and unjust legislation. Pro-apartheid decisions made it possible for the oppressive and suppressive apartheid system to work.[114] Most judges confined their interpretation of legislation to the traditional rules of interpretation: giving effect to clear and unambiguous legislative intent, no matter how arbitrary and unjust the legislature decided to be.[115]

Davidson[116] argued that South African judges were not willing to take an active role in the protection and promotion of basic human rights and liberties because of their overemphasis on the "positivist legal tradition of parliamentary supremacy." This is

---

112 *Republic of South Africa Constitution Act* 32 of 1961.
113 *Suppression of Communism Act* 44 of 1950; *Separate Representation of Voters Act* 46 of 1951; *Riotous Assemblies Act* 71 of 1956; *Internal Security Act* 72 of 1982 and *Public Safety Act* 61 of 1986.
114 See for example, *Rossouw v Sachs* 1964 2 SA 551 (A).
115 *S v Makwanyane* 1995 3 SA 391 (CC) para 301.
116 Davidson 1985 *Harv. JL & Pub. Pol'y* 742.

illustrated in *Bongopi v Council of the State, Ciskei*, [117] where the court insisted that its mandate was to declare the law as promulgated by the legislator, not to make it:

> This court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the current public attitudes or standards in regard to these policies is not its function.

Most of the judges chose a positivist approach in interpreting draconian apartheid security laws because "it absolved them from personal responsibility for the presence of oppressive law."[118] Dyzenhaus[119] points out that by so doing, the judiciary defaulted on its commitment to the rule of law. Its approach made it possible for the security forces to abuse politically accused persons with impunity. The height of this judicial endorsement of apartheid security law enforcement occurred in *Rossouw v Sachs*, [120] a decision which gave the green light to torture and other forms of the inhumane treatment of detained persons.

Although the judges were heavily criticized, there is argument that the courts had very little room to maneuver due to their statutory subjection to the whims, inconsistences and caprices of the legislature. They were undermined by the executive and the legislature working in cahoots to dominate and "to work injustice, thus creating a crisis of legitimacy in the whole legal system."[121]The collusion between the three branches of government put the justice system into disrepute at home and abroad:

> [T]he apartheid system created a society in which the majority came to regard the courts, judges and the administration of justice with suspicions and anger.[122]

The diligent enforcement of apartheid laws by the Appellate Division worsened the mistrust and hatred with which the oppressed South Africans viewed the judiciary.[123] The judges failed in most instances to presume that the legislature did not intend to violate morality or international law. Rather, they enforced a repressive and discriminatory system which international law had designated as a very serious crime.

---

117 *Bongopi v Council of the State, Ciskei* 1992 (3) SA 250 (CK) para 265.
118 Dugard *The Judicial Process, Positivism and Civil Liberty* 181.
119 Dyzenhaus *Constitution of Law* 20-21.
120 *Rossouw v Sachs* 1964 2 SA 551 (A).
121 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 191. See also Moseneke 2008 *SAJHR* 341 on Schreiner's career at the Appellate Division.
122 Madala 2011 *N.C.J. Int'l L. & Com. Reg*. 748.
123 For a discussion, see Klug *The Constitution of South Africa* 225-230 .

In 1973, the United Nations added apartheid to its category of very serious crimes in international law.[124]

Like the Tower of Pisa, apartheid courts leant on one side: that of the executive, such that they were perceived to be executive-minded and thus biased.[125] The Truth and Reconciliation commission found that during apartheid, judges

> … were accountable for having facilitated shadows and secrecy of the world which the security forces operated and for permitting the unrestrained implementation of apartheid policy.[126]

In fact, they had been cautioned back in 1966 of the repercussions of their approach and they chose not to heed advice.[127] Their conduct was harshly criticized in one of the leading law journals at the time.[128] It was pointed out back then that the judiciary was making itself an accomplice to a government plan that threatened to ignite anarchy in the country.[129]

Towards 1990, it was clear that South Africa was headed for a bloody civil war akin to liberation guerrilla wars in Mozambique and Zimbabwe. The struggle between the minority in government and the oppressed black majority was gaining momentum. The government was confident of the might of its armed forces, but was keen on averting the catastrophic consequences of a full blown civil war. It opened itself to negotiations with jailed ANC leaders, particularly Nelson Mandela, who had spent more than two decades as a political prisoner on Robben Island.

The negotiations for a new legal and political order began in December 1991 when the Convention for a Democratic South Africa (CODESA) was convened in Kempton Park.[130] Although the negotiations broke down in 1992, the commitment of the parties on both sides of the process succeeded in establishing the Multi-Party Negotiating Process (MPNP) in 1993. This forum decided on a two-step process of transition to

---

124 The *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973) defines the crime of apartheid as "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."

125 See in general, Ellmann *In a Time of Trouble*.

126 Dyzenhaus *Constitution of Law* 21. See also Dyzenhaus *Judging the Judges*.

127 Dyzenhaus *Constitution of Law* 21.

128 See Mathews and Albino 1966 *SALJ* for a full discussion.

129 Dyzenhaus *Constitution of Law* 21.

130 Currie and de Waal *Bill of Rights Handbook* 4.

democracy. The first step was the establishment of a unity government under an interim Constitution. The second was the election of a democratic government under a final Constitution. The interim Constitution came into force in 1994. It was the template upon which the final Constitution was to be written by the Constitutional Assembly based on the thirty-four constitutional principles.[131]

2.3.6 The Constitutional Revolution

The adoption of the interim Constitution in 1994 amounted to a constitutional revolution.[132] It was an overhaul of the South African legal system. It introduced constitutionalism in the South African legal order by emphasizing the supremacy of the Constitution to ensure that the exercise of all public power is authorized by the Constitution and carried out within the substantive and procedural ambits of the law. Its enactment signaled a critical break from the unrestrained abuse of public power and resources that was institutionalised during the colonial and apartheid eras.

The interim Constitution afforded South Africans the first opportunity in the history of the country to participate in a process that determined the principles according to which South Africa was to be governed and the limits of state authority that the people wanted to impose on government. To this end, the interim Constitution abolished the doctrine of legislative supremacy.[133] It replaced it with a supreme and justiciable Constitution whose application ensured the rule of law and the accountability, responsiveness and openness of government.[134]

The supremacy clause stipulated that the Constitution was the supreme law of the Republic and that any law or act contrary to it and its underlying principles was invalid.[135] It bound the legislative, executive and judicial organs of state at all levels of government.[136] It ushered in an era of respect for human rights and constitutional democracy. It was different from all its predecessors which were no more than mere

---

131 Moseneke 2008 *SAJHR* 348.
132 Currie and de Waal *Bill of Rights Handbook* 1-2.
133 Currie and de Waal *Bill of Rights Handbook* 2.
134 Principle VI of the interim Constitution.
135 S 4 of the 1993 Constitution.
136 S 4 of the 1993 Constitution.

pieces of legislation susceptible to simple amendment at the free will of Parliament.[137]

The interim Constitution expressly provided for a separation of powers between the legislative, judicial and executive branches of government premised on a system of checks and balances.[138] The adoption of this doctrine was meant to prevent the abuses of power which marked the apartheid legal order.[139] It came out of the realisation for the need for government branches to counter each other's powers.[140] In that way, the new constitutional order prevented organs of state from usurping power from one another.

It is apparent that the constitutional drafters feared encroachment into judicial independence more than any other interference between government branches. As such, they placed the judiciary on the same level with the two political branches of government, the legislature and the executive.[141] They gave the courts the power to review legislation, executive conduct and administrative action as a means of enforcing checks and balances. The duty of the courts was to develop a distinctive model of separation of powers for South Africa based on constitutional democracy under a justiciable Bill of Rights.[142]

The interim Constitution established the Constitutional Court, a specialised court with exclusive jurisdiction in matters involving the interpretation of constitutional text, its application and protection. The Constitutional Court's mandate was to ensure that the Constitution and all the laws of the Republic were upheld, defended, obeyed and respected. To this end, it could test the constitutional validity of legislation and the reasonableness, proportionality and procedural fairness of administrative action and executive action. It was also tasked with certifying the final Constitution on completion. The Constitutional Court was created higher than the Appellate Division on the appellate chain. This took away the Appellate Division's power of review. It unsettled the Appellate judges who, on numerous cases, attempted to exercise their common

---

137 Currie and de Waal *Bill of Rights Handbook* 3.
138 Principle VI of the 1993 Constitution.
139 Badenhorst 2015 *De Rebus* 1.
140 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC) para 22.
141 Mahomed 1998 *SALJ* 112.
142 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 108-109.

law review power, leading to a 'jurisdictional spat' between the two courts.[143]

Former President Nelson Mandela[144] said that the Constitutional Court was not established "to be another rubber stamp". It was expected to be "creative and independent". The emphasis was for its justices to abide by their oath of office. The traditional rules of statutory interpretation were changed from an approach based on the sovereignty of Parliament to one based on constitutional supremacy. The judiciary was entrusted with the protection of constitutional supremacy through judicial review. Thus, the task of the judiciary was no longer to give effect to the intention of the legislature regardless of how unreasonable or draconian the lawmaker chose to be, but to interpret and apply legislation in a way which promotes the spirit, purport and object of the Constitution.

The Constitutional Court called for a generous, purposive and contextual approach[145] based on the persuasion that a generous interpretation of a supreme constitution is ideal for the protection and promotion of individual rights.[146] In its early years, it overturned parliamentary legislation as part of its mandate to apply constitutional principles and protect human rights. It even struck provisions of the draft Constitution for failure to satisfy some of the principles prescribed by the interim Constitution.[147]

The role of the judiciary under the interim Constitution, as it is today, was that of a referee; ensuring that the legislature and the executive complied with constitutional principles. However, this mandate set the Constitutional Court on a collision course with democracy and politicians. In its quest to protect and promote human rights under the interim Constitution, the Court took an anti-majority stance. Its abolition of the death penalty,[148] for example, was castigated for being a disjuncture with public opinion and a judicial suppression of the majority will.[149]

---

143 Corder 2011 *Advocate* 39.
144 South African History Online 1995 http://www.sahistory.org.za/archive/speech-president-nelson-mandela-inauguration-constitutional-court-johannesburg-14-february-1.
145 *S v Mhlungu* 1995 3 SA 391 (CC) para 18.
146 *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) 328-329 paras 328-329.
147 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
148 *S v Makwanyane* 1995 3 SA 391 (CC) .
149 Currie *et al New Constitutional and Administrative Law* 36.

2.4 Conclusion

Judicial review of legislation and executive action from pre-Union South Africa to 1993 was severely constrained by the adoption of the Westminster system of parliamentary democracy which prevented the introduction of the doctrine of separation of powers. Legislative supremacy gave Parliament enormous power over the judicial and executive branches of government.[150] Thus, the institutional independence of the judiciary was severely undermined. The courts were unable, and at times unwilling, to exercise restraint over the government for violating fundamental constitutional rights.[151] The undermined judiciary was in no position to step in to protect individual rights.

The 1993 legal revolution brought an abrupt end to Parliamentary sovereignty and executive impunity. It ushered in a new constitutional order defined by constitutional supremacy, an independent judiciary, separation of powers and the system of checks and balances, and wider judicial review.[152] The interim Constitution guaranteed that its principles were the foundation upon which the final Constitution was to be constructed. It is now feasible to examine constitutional themes and principles underpinning contemporary judicial review.

---

150 Moseneke 2012 *SALJ* 14-15.
151 Davidson 1985 *Harv.J.L. & Pub. Pol'y* 690.
152 Currie and de Waal *Bill of Rights Handbook* 2.

Chapter 3 Principles Underpinning Contemporary Judicial Review

3.1 Introduction

The adoption of the final Constitution in 1996 finalised South Africa's constitutional democracy. The Constitution regulates the exercise of public power by constraining the political arms of government through judicial oversight. It guarantees constitutional democracy through separation of powers. The countervailing measures provided by the system of checks and balances protect the Constitution and safeguards individual rights against legislative supremacy and authoritarian rule. This secures the exercise of fundamental rights and freedoms guaranteed by the Bill of Rights.

Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic of South Africa and that all conduct inconsistent with it is invalid. The exercise of public power must promote the spirit, purport and object of the Bill of Rights.[153] Various constitutional provisions giving the courts the power of review guarantee compliance with this provision. Thus, judicial review is one of many mechanisms by which the Constitution guarantees the implementation of its provisions. This chapter examines constitutional principles regulating judicial review in a bid to understand the values that guide the courts in this exercise. It discusses ideals of transformative constitutionalism, the doctrine of separation of powers and its checks and balances, the rule of law and the independence of the judiciary.

3.2 Transformative constitutionalism

The adoption of the Constitution in 1996 set in motion a constitutional agenda for transformation through democracy and the correction of colonial and apartheid imbalances. The Constitution is grounded on the achievement of social justice and the promotion and protection of political and socio-economic rights. Its Preamble lays down a transformative constitutionalism agenda by recognising apartheid injustices, affirming democratic elections, recognising the Constitution as the supreme law and by committing the government to mitigate and reverse the injustices of the past. The

---

153 S 39(2) of the Constitution.

Constitutional Court is one of the vehicles for this transformation.

Founding constitutional principles of human dignity, equality and the protection and promotion of human rights and liberties[154] guide the implementation of transformative constitutionalism. They require a commitment by the judiciary to defend the Bill of Rights, particularly in matters of equality, human dignity and the right to life. The vertical and horizontal application of the Bill of Rights,[155] affirmative action and the justiciability of socio-economic rights sets the right legal framework for the attainment of these constitutional values. In *Azapo v President of RSA*,[156] the Constitutional Court recognised the need to heal divisions of the past through truth, amnesty and reconciliation for apartheid crimes. It affirmed its commitment not only to the law in black and white, but also to the achievement of social cohesion and harmony.

The interpretation of the Constitution requires a strong consideration of the historical context in which various constitutional provisions were formulated.[157] It entails that all government action must be justified within constitutional values and the rule of law. It is everyone's task in South Africa to work towards this ideal. Thus, transformative constitutionalism can only be realised through commitment of all government branches and persons in South Africa. It is not a judicial task alone.[158] The Constitution recognises this by separating government branches into three distinct branches.

3.3 Separation of powers

The doctrine of separation of powers is one of the pillars on which constitutional democracy is anchored. It is characterised by the equality of the legislative, executive and judicial organs of state. Although the Constitution does not expressly provide for separation of powers, it is 'axiomatic' that it is part of the constitutional design.[159] The separation of powers fosters the accountability of government to the people. Ideally, separation of powers means the institutional and functional independence of the three branches of government from one another. Practically, however, there is a divide

---

154 S 1(a) of the Constitution.
155 S 8 of the Constitution.
156 *Azapo v President of RSA* 1996 4 SA 671 (CC).
157 *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W).
158 Ackerman 2004 *New Zealand Law Review* 679.
159 *Glenister v President of RSA* 2009 1 SA 287 (CC) para 28.

between the courts on one hand, and the executive and legislature, on the other.

The overlap between the legislature and the executive stems from the blend between these two political arms of government which results in the "overconcentration of executive power in the legislature."[160] In *Minister of Health v TAC,*[161] the Constitutional Court had to intervene because policy debates in Parliament on how the South African government was to respond to the HIV pandemic were suppressed by the dominant ANC executive, preventing the legislature from effectively exercising oversight over the executive.[162] Although the preparation of all bills for introduction in the National Assembly is a legislative function, only the executive may introduce money bills.[163] Thus, an absolute separation of powers is not possible.[164]

The South African model of separation of powers is influenced by the historical context within which the Constitution was adopted.[165] It ensures democracy at its best while at the same time guaranteeing the exercise of individual rights. The result is the implementation of constitutional principles. The last two decades have seen the Constitutional Court developing a model of separation of powers suited for addressing apartheid injustices, promoting and protecting the rule of law and human rights. This stems from the Constitution Court's promise in *De Lange v Smuts*[166] that

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

South Africa derives several constitutional and democratic benefits from the separation of powers. The doctrine fosters respect for the rule of law, balances public power, gives the government legitimacy and contributes to economic development and social

---

160 Klassen 2015 *PELJ* 1903.
161 *Minister of Health v TAC* 2002 6 BCLR 1033 (CC).
162 Butler 2005 *Journal of Contemporary African Studies.*
163 S 73(1) and (2) of the Constitution.
164 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 109.
165 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 106-109.
166 *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 60.

stability.[167]

3.3.1 Institutional and functional separation

The Constitution guarantees the institutional separation of legislative, executive and judicial organs of state. It gives them distinct functions at national, provincial and local levels[168] and ensures that different personnel run them. It provides that Parliament has national legislative authority to make laws for the Republic.[169] The courts, comprised of Magistrate's Courts, the High Court, the Supreme Court of Appeal and the Constitutional Court,[170] constitute the judiciary and are vested with the interpretation of laws and the adjudication of disputes.[171] In addition, there are specialised courts established by various Acts of Parliament.[172] These include the Labour Court, Equality Court and the Competition Appeal Court. National executive authority is vested in the President.[173] The duty of the national executive is to enforce the law, court decisions, define government policy and prepare legislation for promulgation by Parliament.

The institutional and functional independence of various organs of state was eloquently put in *South African Association of Personal Injury Lawyers v Heath*,[174] where the Constitutional Court said:

> 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. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution, it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed.

Organs of state must only exercise functions conferred upon them by the law in accordance with the law. They may not usurp the functions of each other and may not delegate their plenary powers. Delegation of powers is permissible only where there is legitimate reason to believe that it would facilitate effective running of government operations without upsetting the separation of powers. In *Executive Council of the*

---

167 Langa 2006 *SAJHR* 9.
168 S 40(1) of the Constitution.
169 Chapter 4 of the Constitution.
170 S 166 of the Constitution.
171 S 165(1) of the Constitution.
172 S 166(c) of the Constitution empowers Parliament to establish specialised courts.
173 S 85 of the Constitution.
174 *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 25.

Western Cape Legislature v President of RSA,[175] the court held that the legislature may delegate powers of making subordinate legislation to the executive to facilitate effective promulgation of regulations. This ensures that the government has enough power to govern while at the same time preventing an accumulation of absolute power in the hands of one person or organ of state.[176]

Separation of powers prohibits government branches and their personnel from exercising functions within the exclusive domain of other organs of state. In *De Lange v Smuts,*[177] the court held that an order to commit a person to prison is a judicial, not executive function. As such, executive members may not make such orders. In *S v Dodo*,[178] it held that although the legislature has the autonomy to prescribe minimum sentences, it is incompetent to determine an appropriate sentence in a case because that is the sole jurisdiction of the courts.

3.3.2 Separate personnel

A separation of government powers also entails that no single person may belong to more than one branch of government.[179] For example, a member of the National Assembly elected to be President immediately ceases to be a member of the legislature upon election.[180] Judges cannot occupy other positions in government, in as much as members of the National Assembly and the executive must not hold judicial office. In *South African Association of Personal Injury Lawyers v Heath*,[181] the Court observed that the investigation of criminal offences is an exclusive executive function. It held that the appointment of a judge to head an investigative unit infringed upon the separation of powers.

The separation of personnel ensures that legislative, executive and judicial organs of state act independently and impartially. Without this separation, the purpose of separation of powers is defeated. However, circumstances arise where it is permissible for members of one branch of government to exercise functions that would ordinarily

---

175 *Executive Council of the Western Cape Legislature v President of RSA* 1995 4 SA 877 CC.
176 *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 60.
177 *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 61
178 *S v Dodo* 2001 5 BCLR 423 (CC).
179 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC).
180 S 87 of the Constitution.
181 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC).

fall within the exclusive domain of another government branch. A notable example is the commissions of inquiry. Under section 84(2)(f) of the Constitution and the *Commissions Act,*[182] the President may appoint a judicial officer to head a commission of inquiry. The appointment of judicial officers to head commissions of inquiry has many advantages, given the experience of judicial officers in evaluating evidence. Notable commission of inquiries include the Marikana Commission of Inquiry, the Commission of Inquiry into the Rapid Depreciation of the Rand and Related Matters, the Arms Procurement Commission and the Commission of Inquiry into Higher Education and Training, also known as the Fees Commission.

However, the appointment of judicial officers to head commissions of inquiry raises conceptual problems regarding separation of powers. A commission of inquiry is highly political.[183] It is investigative, not adjudicative. As such, it falls squarely within the province of the executive. In recent times, public confidence on commissions of inquiry has waned due to their constrained terms of reference and the non-binding nature of their findings.[184] The Arms Procurement Commission, for example, has been harshly criticised in the media for its exclusion of crucial evidence in investigating the 'arms deal'.[185] The perceived failure of the Marikana and Arms Procurement Commissions shows that the commissions are less of an investigative endeavour than a public relations exercise seeking to bestow legitimacy on the government's reaction to matters of serious public concern and importance. The courts have not yet had an opportunity to pronounce on the propriety of judicial officers heading commissions of inquiry.

3.3.3 Checks and balances

A complete separation of powers is not only impossible,[186] but also undesirable. A countervailing measure is thus required to address potential problems that may arise from a complete separation of powers. The system of checks and balances is one such measure. It is the most important aspect of the doctrine of separation of powers. It is a

---

182 *Commissions Act* 8 of 1947
183 See Beloff 1999 *Denning Law Journal* 92.
184 Child 2011 www.mg.co.za/article/2011-10-27-mixed-reactions-to-arms-deal-terms-of-reference.
185 Kings 2016 www.mg.co.za/article/2016-04-21-no-big-bangs-in-arms-deal.
186 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 108-109.

constitutional mechanism designed to balance the power possessed by government branches so that no organ of state becomes too powerful.[187] This results in organs of state imposing restraints on one another.[188]

3.3.3.1 The legislature

The Constitution provides that the National Assembly has an obligation to oversee the exercise of executive authority. It has a duty

> … to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.[189]

The National Assembly has a constitutional duty to implement measures to ensure the accountability of the national executive to it[190] and that legislation is implemented.[191] To this end, *Rules of the National Assembly* provide members of Parliament with an opportunity to hold the executive accountable through question and answer sessions. The cluster rotation system stipulated in Rule 109 of the *Rules of the National Assembly* handles questions to Cabinet Ministers. The Deputy President must answer questions every fortnight,[192] while the President must appear at least once per term.[193]

The Parliament also exercises checks and balances on the executive and the judiciary through appointment and dismissal. Members of the National Assembly elect the President.[194] If the President and Cabinet fail their constitutional obligations in one or more respects, the National Assembly may pass a motion of no confidence, causing the President and Cabinet to resign.[195] The President must reconstitute the Cabinet if the National Assembly passes a vote of no confidence in the Cabinet (excluding the President).

However, the checks and balances exercised by the legislature over the judiciary are

---

187 Quinot 2010 *Constitutional Court Review* 1.
188 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 109.
189 S 42(3) of the Constitution.
190 S 55(2)(a) of the Constitution.
191 S 55(2)(b(i) of the Constitution.
192 Rule 110 of the Rules of the National Assembly.
193 Rule 111 of the Rules of the National Assembly.
194 S 42(3) of the Constitution.
195 S 102 of the Constitution

ineffective in preventing the courts from becoming too powerful or exceeding their powers. The executive and Parliament collectively appoint and dismiss judicial officers. The President appoints judges after consultation with the Judicial Service Commission (the JSC). The JSC is headed by the Chief Justice and composed of a law teacher, the Minister of Justice and Constitutional Development, attorneys and advocates; persons appointed by the President after consultation with the National Assembly; four permanent delegates from the National Council of Provinces; four persons from the opposition parties in the National Assembly and six persons from the governing party.[196]In addition, there is the Judge President and Premier of the province concerned as and when the need arises to fill a High Court position.[197]

The JSC is thus composed of diverse individuals who cannot be easily compromised. The fact that the Chief Justice heads it safeguards the delicate appointment process. The independence of the judiciary is depended on the tenacity of the JSC which must adhere to constitutional values and principles, particularly the principle of reasonableness. It must not be arbitrary. The JSC must provide reasons for its recommendations or refusal to recommend a candidate for appointment.[198] This does not mean that the process is beyond manipulation. It simply puts in place precautions for the optimal advancement of democracy.[199]

Section 180 of the Constitution gives Parliament the authority to keep judicial officers in check by enacting legislation that specifically deals with judicial misconduct and complaints against judges. Section 177(b) of the Constitution regulates the dismissal of judges. It provides that the National Assembly may, by a vote of a two thirds majority, adopt a resolution for the removal for a judge who the Judicial Service Commission has found to suffer from an incapacity, gross incompetence or guilty of gross misconduct. Sections 14(4) of the *Judicial Services Commission Act*[200] elaborates on gross judicial misconduct as conduct that it is

> … unbecoming of the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of

196 S 178(1) of the Constitution.
197 S 178(1)(k) of the Constitution.
198 *JSC v Cape Bar Council* 2012 ZASCA 115 para 44.
199 Siyo and Mubangizi 2015 *PELJ* 826.
200 *Judicial Services Commission Act* 9 of 1994.

the courts.

Once the National Assembly has made the recommendation, the President may relieve the judge of his or her judicial duties. Judging from the Hlophe controversy, this is a cumbersome process. The lengthy period over which the Hlophe saga has dragged on without finality has poked holes into the integrity and public perception of the judicial appointment body. To nail the screw in the coffin, Nugent JA withdrew his application for appointment to the Constitutional Court on the pretext of the perceived lack of integrity and failures of the JSC in handling the Hlophe matter.[201]

3.3.3.2 The executive

The executive exercises very weak checks and balances over the legislature and the judiciary. This is due to two main reasons. Firstly, the President is appointed by the National Assembly and serves at its pleasure. Secondly, the institutional and functional independence of the judiciary prevents the executive from interfering with the courts and their decisions. Nevertheless, section 79 of the Constitution gives the President power to assent to a bill and sign it before it becomes law. The President may refuse to sign a bill that he has reservations about. In such instances, the President may refer the Bill back to the National Assembly for reconsideration[202] or refer it to the Constitutional Court for a determination on its constitutionality.[203] If the Constitutional Court certifies the Bill as constitutional, the President must assent to it and sign it into law. Once signed, the Bill becomes an Act of Parliament and should be transmitted to the Constitutional Court for safekeeping.[204] The President and Cabinet determine how to implement legislation by promulgating regulations for statutes. The administration of all Acts of Parliament is also an executive function.

The President wields enormous powers in the appointment of the highest-ranking officials heading constitutional institutions as stipulated in Section 6 of Schedule 6 of the Constitution. The National Director of Public Prosecutions, who heads the National Prosecuting Authority, is appointed by the President,[205] as well as the National

---

201 Siyo and Mubangizi 2015 *PELJ* 837.
202 S 79(1) of the Constitution.
203 S 79(4) of the Constitution.
204 S 82 of the Constitution.
205 S 179 of the Constitution.

Commissioner of Police,[206] the head of the national intelligence services,[207] military commanders[208] and the Governor of the Reserve Bank.[209] The President also appoints members of State Institutions Supporting Constitutional Democracy (Chapter 9 Institutions). He appoints the Public Protector; the Auditor General and Commissioners of the South African Human Rights Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Electoral Commission.[210]

3.3.3.3 The judiciary

The judicial branch of government is the institutional arrangement with which the Constitution ring fences the limits for legislative and executive conduct. It ensures that the state does not roll back on its promise to protect individual rights, particularly those of minorities and marginalised groups.[211] Considering the supremacy of the Constitution provided for in section 2, it has a mandate to set aside all law or conduct which is in violation of the Constitution. As the guardian and trustee of the Constitution, it has a duty to ensure that all conduct involving the exercise of public power promotes the spirit, purport and object of the Bill of Rights.[212] Judicial review is thus the mechanism by which the courts confine the legislative and executive branches of government to their constitutional powers.

Judicial review gives meaning and effectiveness to constitutional supremacy.[213] Section 2 of the Constitution provides that the obligations imposed by the Constitution must be enforced. Section 172(1)(a) of the Constitution gives superior courts the power to declare any conduct or act inconsistent with the Constitution invalid. Section 165(5) of the Constitution further binds all state organs and all persons, public or private, to court orders and decisions. It gives the judiciary the authority to investigate and redress constitutional violations.[214] The courts can declare what an organ of state must have

---

206 S 207 of the Constitution.
207 S 209(2) of the Constitution.
208 S 202 of the Constitution.
209 S 4(1) of the *South African Reserve Bank Act* 90 of 1989.
210 S 193(3) of the Constitution.
211 *S v Makwanyane* 1995 3 SA 391 (CC) para 88.
212 Klassen 2015 *PELJ* 1909.
213 Currie and de Waal *Bill of Rights Handbook* 9.
214 Klassen 2015 *PELJ* 1907-1908.

done in specific circumstances and prescribe what it must do to mitigate an offending act. This mitigates on-going violations and prevent future ones from occurring.

Judicial oversight places the legislature, executive officials and all state departments under the scrutiny of the courts to determine whether they have acted within or without their powers.[215] This prevents them from undermining democratic principles and the Bill of Rights.[216] It protects the Constitution and individual rights in three ways: first, through review of legislation to ensure that laws are constitutionally compliant;[217] second, through enforcing accountability in the executive by review to ensure that executive decisions are lawful, reasonable, proportional and procedurally fair;[218] and third, through legislative interpretation which favours individual rights. The Constitutional Court justified judicial review as follows:

> [T]he very reason for … vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worse and the weakest amongst us, that all of us can be secure that our own rights will be protected.[219]

Thus, judicial review is premised on an individualistic approach to the Constitution and the Bill of Rights.

Only superior courts (the High Court, Supreme Court of Appeal and the Constitutional Court) may decide on substantive and procedural aspects of legislation and executive action. As the pinnacle of the judicial branch of government, the Constitutional Court must confirm all declarations of invalidity of Acts of Parliament, provincial statutes and conduct of the President made by the other courts.[220] It has a duty to enforce checks and balances robustly to ensure the accountability of organs of state to the Constitution.[221] The entrenched jurisdiction of the Constitutional Court makes it

---

215 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (CC) para 14.

216 These powers were utilised in *Doctors for Life International v Speaker of the National Assembly* 2006 4 SA 416 (CC) where the Constitutional Court examined internal parliamentary procedures preceding the enactment of Bills and invalidated the impugned statutes for the legislature's failure to facilitate adequate public involvement prior to enacting the Acts.

217 Klassen 2015 *PELJ* 1911-1912.

218 S 33 of the Constitution.

219 *S v Makwanyane* 1995 3 SA 391 (CC) para 88.

220 S 176(5) of the Constitution

221 McLean *Constitutional Deference* 209.

possible for the court to do so.[222] Besides being the last court of appeal,[223] the Constitutional Court has general jurisdiction to decide matters involving the interpretation, protection and enforcement of the Constitution.[224] It has exclusive jurisdiction to decide whether the President has failed to fulfil a constitutional obligation.[225] It may also decide constitutional disputes between organs of state in the national and provincial spheres.[226]

The *Constitution Seventeenth Amendment Act* of 2013 enhanced the jurisdiction of the Constitutional Court to include the authority to grant litigants leave to appeal any matter that "raises an arguable point of law of general public importance."[227] The public-importance clause might have been included to reiterate the court's role of protecting and promoting human rights. The Constitutional Court also has jurisdiction to decide the constitutionality of parliamentary and provincial Bills and amendments to the Constitution. It may review legislation and certify the constitutionality of a provincial constitution.[228]

The wide power of the judiciary discussed above may lead to mistaken and wrongful judgments which cannot be corrected in time to prevent serious problems. For example, in *Zuma v National Director of Public Prosecutions*,[229] Nicholson J made unsubstantiated and unwarranted adverse findings against then President Thabo Mbeki. His judgment effectively triggered the President's forced resignation in 2008.[230] Although the Supreme Court of Appeal overturned the decision in a scathing criticism, the damage had already been done. The Supreme Court of Appeal acknowledged that the High Court had overstepped its mandate and found that Nicholson J's

> … approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial,

---

222 Du Plessis Penfold and Brickhill *Constitutional Litigation* 34.
223 S 167(3)(a) of the Constitution (subs. (3) substituted by s 3 of the *Constitution Seventeenth Amendment Act of* 2013).
224 S 167(7) of the Constitution.
225 S 167(4)(e) of the Constitution.
226 S 167(4)(a) of the Constitution.
227 S 167(b)(ii) of the Constitution.
228 See 167 of the Constitution.
229 *Zuma v National Director of Public Prosecutions* 2009 1 BCLR 62 (N).
230 Corder 2009 *Constitutional Court Review* 241.

executive and legislative functions.[231]

The Supreme Court Appeal did not, however, define 'the proper boundaries between judicial, executive and legislative functions', leaving the determination to the courts on the merits of each case. It is thus important for the courts to observe the rule of law by confining themselves to their constitutional powers.

3.4 The rule of law

The rule of law is an integral feature of constitutional democracy. It safeguards the separation of powers by requiring organs of state to exercise only the powers conferred upon them by the Constitution.[232] It stipulates that individuals exercising public power must do so in accordance with the law.[233] This prevents the state from creating and enforcing arbitrary laws. The South African legal system enables the rule of law to operate optimally. Constitutional provisions on equality, judicial independence, binding court decisions and the principles of natural justice reinforce the rule of law. The clear definition of powers of law enforcement agencies, uniform rules of civil and criminal procedure, and the prospective application of statutes contribute to legal certainty, a necessary component of the rule of law.

The Constitution requires public officials to confirm their commitment to the rule of law. Judges must take an oath or affirmation to uphold the law fearlessly without favour or prejudice.[234] Members of Parliament,[235] the President, the Deputy President and Cabinet ministers must also swear or affirm their allegiance to the Constitution before commencing their duties.[236] It is against their oath or affirmation that the legality of their actions can be tested. Legality entails that law must authorise the exercise of all public power. In *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council,*[237] the court observed that:

> … it is a fundamental principle of the rule of law, recognized widely, that the exercise

---

231 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 15.
232 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58.
233 Barnet *Constitutional & Administratiave Law* 44.
234 S 174(8) and Schedule 2 of the Constitution.
235 S 48 and Schedule 2 of the Constitution.
236 S 95 of the Constitution regulates oaths of offices and affirmations by Cabinet members.
237 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56.

> of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be fundamental principle of constitutional law.

In *Speaker of the National Assembly v De Lille,*[238] the court interpreted the principle of legality to mean that:

> No Parliament, however *bona fide* or eminent its membership; no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution

For the rule of law to operate, everyone must be equal before the law. Section 9 of the Constitution grants everyone equal protection and benefit of the law. It provides that everyone in the Republic is entitled to the equal enjoyment of rights and freedoms, regardless of their economic, political or social status.[239] Every person has a right not to be discriminated by the state or other persons.[240] The state has a duty to put in place mechanisms to prevent discrimination.[241] Persons adversely affected by a law, regulation or administrative action are entitled to the protection of the courts.[242]

There is a constitutional obligation on all persons and organs of state to obey and comply with court decisions.[243] In *Minister of Home Affairs v Somali Association of South Africa, Eastern Cape,*[244] the Supreme Court of Appeal observed that it is very dangerous for the executive to disregard a court order. There is an obligation, not a discretion, on everyone to abide by court decisions. Defiance and ignorance of court orders sets democracy backwards.[245] In *S v Mamabolo*,[246] the Court put the position as follows:

> The specter of executive officers refusing to obey orders of court because they think they were wrongly granted, is ominous. It strikes at the very foundations of the rule of law when government servants presume to disregard orders of court.

---

238 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (CC) para 14.
239 S 9(2) of the Constitution.
240 Ss 9(3), (4) and (5) of the Constitution.
241 S 9(4) of the Constitution.
242 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (CC) para 14.
243 S 165(5) of the Constitution.
244 *Minister of Home Affairs v Somali Association of South Africa, Eastern Cape* 2015 3 SA 545 (SCA).
245 *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* 2015 3 SA 545 (SCA) paras 35-36.
246 *S v Mamabolo* 2001 3 SA 409 (CC) para 65.

The obedience of government departments and their personnel to court orders must be exemplary.[247] Just as the United State Supreme Court observed, defiance of a court order by a government branch "breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.[248]

The judiciary relies on its moral authority for the implementation of its decisions. Courts can do no more than make orders. The will to enforce their decisions lies with the legislative and executive branches of government. In *S v Mamabolo*,[249] the court stated the position as follows:

> Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform is vital function as the interpreter of the Constitution, the arbiter in disputes between organs of states and, ultimately, as the watchdog over the Constitution and the Bill of Rights.

The Constitution recognises that the judiciary alone cannot guarantee the rule of law. For the courts to be able to uphold the rule of law, they must be institutionally and functionally independent from legislative and executive organs of state. [250] Individual judicial officers must be impartial and beyond manipulation. This enables the courts to uphold the rule of law at a time when executive elements are determined to break it.[251]

3.5 Judicial independence

The separation of powers is a prerequisite for the independence of the judiciary[252] which is vital for the rule of law and the achievement of justice.[253] Judicial independence is one of the cornerstones of democracy.[254] In its essence, it entails the functional separation and autonomy of the judiciary from Parliamentary and executive influence and interference. It also means the independence of individual judges in adjudicating disputes. As Strasbeg-Cohen[255] puts it:

> Judicial independence means that the judge [must be able to] adjudicate freely, without outside influence, pressure, or incentives, without fear, without bias [and only]

---

247 *S v Mamabolo* 2001 3 SA 409 (CC) para 63.
248 *Olmstead et al v United States* 277 US 438 (1928) para 485.
249 *S v Mamabolo* 2001 3 SA 409 (CC) para 16.
250 Préfontaine and Lee 1998 *Rev. quebecoise de droit int'l* 164.
251 Dyzenhaus *Constitution of Law* 67.
252 Weill 2014 *International Review of the Red Cross* 863.
253 Gubbay 2009 www.barcouncil.org.uk/media/100365/rule_of_law_lecture_agubbay_091209.pdf.
254 Siyo and Mubangizi 2015 *PELJ* 817.
255 Strasberg-Cohen 2005 *Mishpatim v'Asakim* 5.

> subject to the law, while acting in good accord with his professional discretion, sense of justice, and conscience.

Thus, judicial independence entails a two-pronged approach in which the competence of the courts is guaranteed and that all pressure and threats to the courts are removed and prevented from occurring.[256] South Africa maintains very high standards of judicial independence as evident from the separate entity position of the judiciary in government; fair and transparent judicial appointment processes; and the enormous command judicial decisions have.

Before examining the domestic position, it is imperative to discuss the position in international law. Article 14 of the *International Covenant on Civil and Political Rights,*[257] (ICCPR) provides for a "competent, independent and impartial tribunal established by law" to try cases in open court. Section 1 of the *Principles on the Independence of the Judiciary*[258] imposes an obligation on state parties to guarantee judicial independence in their constitutions. It implores them to respect, promote and protect the independence of the courts. It outlines various principles which when implemented, guarantee judicial independence. It protects judicial operations from state interference by placing the jurisdiction to determine legal disputes within the exclusive domain of the judiciary.[259]

The *African Charter on Human and Peoples' Rights*[260] also guarantees judicial independence. Articles 26 provides that

> States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedom guaranteed by the present Charter.

In compliance with international obligations, the South African Constitution incorporates all the provisions of instruments on the institutional and individual independence of the judiciary. Judicial independence is not a right, but an entrenched constitutional principle which falls outside the limitations clause. The executive and the legislature may not, for whatever reasons and by whatever means, limit the

---

256 See Weill 2014 *International Review of the Red Cross* 863.
257 *International Covenant on Civil and Political Rights* (1976).
258 *Basic Principles on the Independence of the Judiciary* (1985).
259 See ss 3 and 4 of the *Basic Principles on the Independence of the Judiciary* (1985).
260 *African Charter on Human and Peoples' Rights* (1981).

independence of the courts.[261] The Constitution sufficiently protects the independence of the judiciary.[262] It guarantees the independence of the courts to protect the rule of law and ensure an optimal operation of the system of checks and balances.[263]

The courts have had opportunity to test the adequacy of judicial independence. In *S v Van Rooyen,*[264] the Constitutional Court did so by juxtaposing the judiciary with the legislative and executive branches of government. It observed that the determination of judicial independence must be undertaken within the context set by the Constitution and that it must be objective. It emphasised the employment of the standard of a reasonable person. Using this criterion, the factors used to ascertain the independence of the courts are the values and principles of the Constitution and its provisions; legislation and regulations on judicial ethics; the level of public confidence in the courts; and the impartiality of the judges.[265]

3.5.1 Institutional independence

The Constitution guarantees the institutional independence of the judiciary by separating the courts from the legislative and executive branches of government and by placing them at par with the two. It protects the jurisdiction of the courts by stipulating that only the courts may exercise judicial powers. The courts are protected from having to account for their decisions to Parliament or the executive. They are subject only to the Constitution and the law, which they must apply impartially, and without fear, favour or prejudice.[266] All persons are prohibited from interfering with the courts.[267] Everyone has a constitutional obligation to assist and protect the independence, dignity, impartiality, accessibility and effectiveness of the courts.[268] Court decisions and orders bind all persons and organs.[269]

Judges are also responsible for safeguarding judicial independence. They must do so

---

261 *S v Van Rooyen* 2002 5 SA 246 (CC) para 35.
262 Siyo and Mubangizi 2015 *PELJ* 835-836.
263 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC) para 25.
264 *S v Van Rooyen* 2002 5 SA 246 (CC).
265 *S v Van Rooyen* 2002 5 SA 246 (CC) paras 32-34.
266 S 165(2) of the Constitution.
267 S 165(3) of the Constitution.
268 S 165(4) of the Constitution.
269 S 165(4) of the Constitution.

even in the most difficult circumstances.[270] The Constitutional Court's approach is that the courts must not only be independent, but must also be seen to be independent.[271] Any law or conduct that purports to place the judiciary under the control of any person or branch of government violates judicial independence and is therefore invalid.[272] Previously, the Minister of Justice was the head of the judiciary. This compromised judicial independence by placing an executive member to head the judicial organ of state. Section 9 of the *Constitution Seventeenth Amendment Act* of 2013 changed this position. It substituted section 175 of the Constitution to read that the Chief Justice is the head of the judiciary and must establish and monitor norms and standard for the court.[273] The individual independence of judicial officers reinforces the institutional independence of the courts.

3.5.2 Individual independence

This refers to the independence of each judge from undue influences within and without the judiciary. It arises from the need to protect judges from state interference and corrupt political and business interests. The appointment mechanisms for judicial officers and their conditions of service, particularly compensation, is vital in assessing the individual independence of judges. The Constitution guarantees individual judicial independence by regulating the appointment of judges, their tenure, salaries and other conditions of service to ensure that the executive does not use any of these to unduly influence judges. The appointment of judicial officers has already been discussed. Suffice to say that it is an open and transparent process that ensures that academically and professionally qualified individuals who possess the qualities of honesty and integrity are appointed to the bench. The goal is to prevent the executive from manipulating the courts by 'deploying cadres' to judicial positions with a view of making them a rubber stamp. The security clearance required for judicial appointment ensures this.

Once appointed, judges are accountable only to the Constitution and the law. As such, judges need not explain their decisions to the executive. They may also not appear

---

270 Moseneke 2008 *SAJHR* 342.
271 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC) para 25.
272 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 105.
273 S 165(6) of the Constitution.

before parliamentary committees to explain their judgments.[274] For judges to be individually independent, they should be free from political and commercial forces.[275] The Constitution provides them with security of tenure[276] and protects their salaries from reduction while in office.[277] So far, the South African judiciary is not compromised.[278] All attempt to interfere with the independence of judicial officers is strongly resisted. Any appointment which purports to place a judicial officer, whether or not it concerns the exercise of judicial powers, is considered as an affront to judicial independence. For example, the appointment of Judge Heath to head the Special Investigative Directorate was criticised and set aside by the court because it did not only violate the separation of powers as discussed above, but also because it subordinated the judicial officer to executive supervision and control.[279]

The Constitutional Court's resistance to President Zuma's attempt to extend the term of former Chief Justice Sandile Ngcobo in 2013 is another example of the judiciary's defence of individual judicial independence.[280] The President's move sparked outrage in the legal profession and culminated in an urgent application to the Constitutional Court to block the move. The case provided a defining moment for the court to shield itself from executive interference. The court observed that the discretionary power of the President to extend the tenure of a Constitutional Court judge strikes at the heart of judicial independence and separation of powers.[281] In its view, the President's discretion to request the Chief Justice to stay on for an additional term threatened judicial independence by implying that the Chief Justice served at the pleasure and behest of the President. It argued that this taints judicial independence by insinuating that the Chief Justice is subject to executive influence.

---

274 Cumaraswamy 2002 *The Journal of the Malaysian Bar* 39.

275 De Vos and Freedman (eds) *South African Constitutional Law in Context* 202.

276 S 176(1) of the Constitution fixes the tenure of Constitutional Court judges for a non-renewable term of 12 years, or until the judge attains the age of 70, whichever occurs first. An Act of Parliament may extend the term of office of a Constitutional Court judge. So far, Parliament has not extended the tenure of any judges.

277 S 176(3) of the Constitution provides that "salaries, allowances and benefits of judges may not be reduced."

278 Klassen 2015 *PELJ* 1902.

279 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC).

280 *Freedom Under Law v Acting Chairperson: JSC* 2011 3 SA 549 (SCA).

281 *Justice Alliance of South Africa v President of RSA* 2011 5 SA 388 (CC) para 65.

3.5.3 Internal independence

Another aspect of judicial independence relates to the protection of judges from control and undue influence within the judiciary itself. The principle is that a judicial officer must decide a case based on their assessment of the law and the facts only. Judges must be able to decide on matters without pressure from their colleagues or superiors. Thus, the Chief Justice or Judge President in any division may not instruct another judge on how to decide a matter, or suggest how the matter should be decided. The presiding judge exercises complete autonomy in adjudicating a dispute. This principle is subject to the established rules of appeal and review which kick in after the judge has delivered judgment in the matter. No appeal or review may be made before the matter is decided.

Although there is no evidence of judges interfering with one another in South Africa, the Hlophe controversy raises questions. Like a veld fire out of control, the saga has raged furiously in the courts and the press.[282] The fiasco surrounding the Judge President of the Western Cape High Court started in May 2008 when Constitutional Court Justices Jafta and Nkabinde alleged that Hlophe JP had attempted to unduly influence them to rule in favour of Mr Zuma in the *Zuma-Thint* cases.[283] They claimed Hlophe JP had said Justice Jafta was Zuma's 'last hope' and that he (Hlophe JP) 'had a mandate' to approach them on behalf of Zuma.[284] On 30 May 2008, Constitutional Court Justices collectively issued a media release, "as a court", condemning Hlophe JP's temerity and despicable conduct.[285] Hlophe JP responded with letter of demand in which he threated to sue the Constitutional Court and its Justices for damages for injury to his dignity and integrity caused by the media statement.[286] These events torched a storm in which the Constitutional Court became

> … a target of outspoken public comment by all and sundry, often intemperate, vitriolic, and intimidatory, and mostly ill-informed.[287]

The controversy is far from over. The Constitutional Court's dismissal of Jafta and

---

282 The dispute is reported in *Langa v Hlophe* 2009 4 SA 382 (SCA); *Hlophe v JSC* [2009] All SA 67 (GSJ); *Freedom Under Law v Acting Chairperson: JSC* 2011 3 SA 549 (SCA); *Nkabinde v JSC* 2016 4 SA 1 (SCA); *Nkabinde v JSC* [2016] ZACC 25.

283 *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 1 SA 141 (CC).

284 Choudhry 2009 *Constitutional Court Review* 2.

285 De Vos 2008 http://constitutionallyspeaking.co.za/the-hlophe-letter-of-demand/.

286 See De Vos 2008 http://constitutionallyspeaking.co.za/the-hlophe-letter-of-demand/.

287 Corder 2009 *Constitutional Court Review* 241.

Nkabinde JJ's appeal against a Supreme Court of Appeal judgment might as well have paved the way for their cross-examination by Hlophe's legal practitioners who insist that the two framed the Judge President.[288] Whatever the outcome of Hlophe's disciplinary hearing, it remains clear that the three judges at the heart of the controversy (Nkabinde, Jafta and Hlophe) and the Constitutional Court, are responsible for having contributed to the erosion of the integrity of the judiciary and the high esteem with which ordinary members of society held the South African judiciary.

Judicial politics emanating from the Hlophe saga raises "broader questions of constitutionalism."[289] The saga demonstrated that judges and the courts can easily be dragged into political mud.[290] Although many questions surrounding the controversy remain unanswered, what is clear is that the judges strongly resisted what they perceived to be an internal attempt to unduly influence them as individual judicial officers and as an institution in the performance of their constitutional duties. Judicial independence is supplemented by judicial ethics and a code of conduct which embodies impartiality and the lack of bias and prejudice in judicial decision-making.

3.5.4 Impartiality and other supplementary principles

In addition to institutional, individual and internal independence of the judiciary, there are adjunct principles which, though not regulated by the Constitution or legislation, remain sacred in adjudication. These are impartiality, recusal and the personal qualities of honesty, integrity and incorruptibility of judges. The *SARFU*[291] case is a leading precedent on this. The three principles are informed by the importance of impartiality in the adjudication of disputes; fairness and openness of the courts; and the need to maintain public confidence in the courts.[292] In *SARFU*,[293] the court opined that a "reasonable apprehension of bias" on the part of the judge impairs public confidence in the judgment and the administration of justice. There need not be actual bias, but a reasonably objective view that there might be bias.[294] As a matter of principle, judges with a conflict interest in a matter must recuse themselves, regardless

---

288 *Nkabinde v JSC* [2016] ZACC 25.
289 Klaaren 2009 *Constitutional Court Review* 87.
290 Klug 2010 *Constitutional Court Review* 7.
291 *President of RSA v SARFU* 1999 4 SA 147 (CC).
292 *SARFU* case above, para 35.
293 *SARFU* case above.
294 *SARFU* case above, paras 36-38.

of the nature of the interest.

Impartiality is one of the cornerstones of dispute adjudication. It refers to a judge's lack of bias and prejudice against the litigants or the values which they seek to enforce through litigation. Judges must not only be impartial, but must also seem to be. They should not do anything or say anything, in public or private, which may create the perception that they are biased as a matter of fact or may reasonably be biased. The position was eloquently put in *S v Collier,*[295] where the court held that

> … the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision.

The test for bias is thus objective. It was outlined in *SARFU*[296] when the Constitutional Court laid down the standard of a reasonable person with a balanced view of all material information as the standard to be employed in determining whether there is possibility that the judicial officer may be partial and not decide the issues based on law and the facts before the court. A reasonable person in this context is defined as a well-informed, thoughtful and observant individual; rather than an oversensitive, pessimistic or distrustful person.[297] A reasonable person can fully understand and appreciate the judiciary's employment of just and equitable remedies in constitutional adjudication.

Judges are protected against lawsuits emanating from mistaken or wrongful court decisions. This enhances their independence. A judge may not be sued for defamation for statements made in court proceedings. Judges are also protected from harassment through litigation in that it is extremely difficult to sue a judge. One must obtain the leave of the Judge President of the division within which the judge presides, or the Chief Justice in the case of the Constitutional Court.[298] Very good cause must be shown for such an application.[299] In discharging this onus, the applicant must show that they has "an arguable case".[300] The same procedure applies to subpoenaing a

---

295 *S v Collier* 1995 2 SACR 648 (C) para 650.
296 *President of RSA v SARFU* 1999 4 SA 147 (CC) para 48.
297 *S v Van Rooyen* 2002 5 SA 246 (CC) para 34; *US v Jordan* 49 F 3d 152 (5th Cir 1995) para 156.
298 S 47(1) of the *Superior Courts Act* 10 of 2013; *Soller v President of RSA* 2005 3 SA 567 (T) para 9.
299 *Stocks & Stocks Properties (Pty) Ltd v City of Cape Town* 1954 2 SA 345 (A) para 143.
300 *Nagan v Hlophe* [2009] ZAWCHC 56 para 10.

judge.[301] It is also well settled law that a judge may not be subpoenaed to testify on proceedings which went before him. It may be inferred that arresting a judicial officer is subject to the same principles.

3.6 Conclusion

The 1996 Constitution is the supreme law in South Africa.[302] It was adopted to transform South Africa from an era of impunity and abuse of human rights to a constitutional democracy guided by constitutional supremacy and the rule of law.[303] It regulates the exercise of public power by constraining the political arms of government through separation of powers.[304] The system of checks and balances safeguards fundamental rights and freedoms by preventing legislative supremacy and authoritarian rule. Judicial review is the constitutional mechanism by which the courts constrain the legislative and executive organs of state to their constitutional powers. It is made possible by the supremacy of the Constitution and its guarantees on judicial independence and the rule of law.

However, the Constitution does not provide for a system to confine the judiciary to its powers. The overemphasis on judicial independence neglects the need for judicial accountability. The wide powers bestowed upon the courts by the Constitution make the judiciary disproportionally powerful. This violates the doctrine of separation of powers and raises conceptual and practical problems which are addressed in the next chapter.

---

301 S 47(1) of the *Superior Courts Act* 10 of 2013.
302 S 2 of the Constitution.
303 Badenhorst 2015 *De Rebus* 1.
304 *Glenister v President of RSA* 2009 1 SA 287 (CC) para 28.

Chapter 4 Conceptual and Practical Problems of Judicial Oversight

4.1 Introduction

The controversy surrounding the nature and extent of the power of review vested on the courts by the Constitution can be understood in one of two perspectives: either constitutional drafters gave the courts too much power, by intent or oversight, or the judiciary has exceeded the limits of its power. To ascertain the correct of the two positions, it is imperative to examine conceptual and practical problems of judicial review. Whether or not the courts have overstepped their boundaries by neglecting the principles of deference and judicial restraint and the doctrine of separation of powers is a question that must be examined in the light of transformative constitutionalism which vests the judiciary with powers of review.

This chapter begins with a discussion of the need for judicial accountability and the impact of prominent criticisms against the judiciary. It investigates areas in which the courts may have overstepped their jurisdiction, such as the choice of 'appropriate' and 'just and equitable' remedies, the counter-majoritarian dilemma, the activist approach to government policy and the failure of the courts to observe the political questions doctrine.

4.2 The lack judicial accountability

The need to protect and maintain judicial independence should not be taken as a licence to impunity. Like all officials, judges should be accountable to the public for their duties [305] because "justice is not a cloistered virtue."[306] As the Canadian Supreme Court observed, "[j]udges are the servants, not the masters of the people."[307] Judicial operations are funded from taxpayers' money. Therefore, judges must account to taxpayers. The need for the judiciary to be accountable is also part of the broader constitutional framework which requires the government to be answerable to the

---

305 *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) para 25.

306 *Ambard v Attorney-General of Trinidad and Tobago* [1936] 1 All ER 704 (PC) para 709, alluded to with approval in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) para 25.

307 *David Actylene Gas Co v Morrison* (1915) 34 OLR 155 para 158.

people. Even if it was to be assumed that the judiciary is but one of several 'watchman' guarding the Constitution and the rule of law (the other ones being Chapter 9 institutions), it is important that there be mechanisms to "watch the watchman". In Israel, the Judges Ombudsman's Office is responsible for handling complaints against judges.[308] In South Africa, the equivalent is the JSC.

It may be argued that the maintenance of judicial independence is directly proportional to the implementation of measures which ensure the accountability of the judiciary for its failures, mistakes and misconduct.[309] Accountability measures must only be for the purposes of preventing and mitigating harm caused by errors in judicial decision-making; for to err is human. Judges, like all humans, are not error-proof. They are predisposed to the same desire for more power as Presidents and Parliaments are. Given the importance of judicial independence in the protection of the rule of law, democracy and the exercise of fundamental rights and freedoms, it is important that judicial accountability mechanisms be framed and implemented with the objective of protecting constitutional democracy and the advancement of constitutional ideals.[310]

There is a need for extreme caution in this regard. It is a delicate exercise which requires a careful balancing of judicial independence with judicial accountability to prevent judicial impunity and the subordination of the judiciary to the executive.[311] In its natural sense, accountability implies supervision. No accountability measures may trump the independence of the judiciary. At present, courts account for their processes and decisions through the provision of written reasons for judgment[312] and trials open to the public and therefore exposed to media scrutiny This is a right enshrined in s 34 of the Constitution. Ideally, the right to an open trial means that the public must be given access to the courtroom to avoid the conduct of legal proceedings in a clandestine manner. An open court also enables the public and the litigants to judge the quality of the adjudication process. In high profile matters, the proceedings can

---

308 See Strasberg-Cohen 2005 *Mishpatim v'Asakim*.
309 Shetreet 1987 *UNSW Law Journal* 7.
310 Strasberg-Cohen 2005 *Mishpatim v'Asakim* 13-14.
311 Shetreet 1987 *UNSW Law Journal* 4.
312 The courts cooperate fully with the Southern African Legal Information Institute by furnishing it with their decisions for upload to www.saflii.org where the public can freely access the judgments. Decisions of the High Court and the Supreme Court of Appeal are usually uploaded within twenty-four hours, while those of the Constitutional Court appear on the website immediately after they are handed down in court.

also be broadcast live on television. For instance, the murder trial and sentencing of Oscar Pistorius was aired live on DSTV's *The Oscar Pistorius Trial – A Carte Blanche Channel* on Channel 199.[313]

4.3 Criticisms against the judiciary

The right to freedom of expression, enshrined in section 16 of the Constitution, is the constitutional gateway through which the South African judiciary has been criticised. The common law offence of contempt of court, which used to shield the courts from public criticism, has been overruled by the Bill of Rights. It is only in the most serious circumstances that it may be invoked. The observation by Justice Frankfurter of the United States Supreme Court is worth noting:

> Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Judges must be kept mindful of their limitation and of their ultimate public responsibility by vigorous stream of criticism expressed with candor however blunt.[314]

However, this does not mean judges and the courts should be lambasted willy-nilly. The criticism should be specific, objective and in good faith.[315]

In recent times, the South African judiciary has faced extraordinary challenges. [316] Among these are the ominous signs of political attacks on the courts. [317] Madlingozi[318] bemoans

> … unprincipled and crass accusations lodged by political elites within the African National Congress against South Africa's 'independent' judiciary.

For instance, in 2005 the ANC expressed its grave concern with the judiciary in the following manner:

> We face the continuing and important challenge to work for the transformation of the judiciary… We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and

---

313 The Oscar Pistorius trial, sentencing and appeal proceedings are reported in *S v Pistorius* 2015 JDR 2127 (GP) and *Director of Public Prosecutions, Gauteng v Pistorius* 2016 2 SA 317 (SCA).

314 Radebe 2012 http://constitutionallyspeaking.co.za/media-statement-by-minister-radebe-about-con-court-review/.

315 Mogoeng 2015 http://constitutionallyspeaking.co.za/statement-by-chief-justice-and-heads-ofcourt-on-rule-of-law/.

316 Klug 2010 *Constitutional Court Review* 1.

317 Issacharoff 2013 *Constitutional Court Review* 30.

318 Madlingozi 2008 *Constitutional Court Review* 65-66.

> aspirations of the millions who engaged in struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole.[319]

In this instance, the judiciary is thus perceived as an impediment to the realisation of common social and political goals. Its alleged intrusion into government policy and the legislative process through review has been criticised. For this reason, ANC leaders have been calling for a 'review' of the Constitutional Court, an exercise intended to limit the powers of the apex court.[320]

The most prominent concerns focus on the judiciary's perceived outright disregard for the principle of separation of powers, counter-majoritarianism and judicial activism. These conceptual problems are examined below, together with failure of the courts to observe the political questions doctrine has presented its own challenges. Due to criticism from prominent political quarters, the judiciary is currently anxious of its institutional position.[321] This explains Chief Justice Mogoeng's request for an urgent meeting with President Zuma in 2015.[322] The courts have also been criticised for dictating to politically-elected representatives of the people and telling them how to carry their mandates. These allegations imply irregularities on the part of judges.

The protection and promotion of constitutional values is dependent on the guarantee that courts shall always decide cases before them based on the merits and the law, that they will adhere to the judicial oath of office, that they will not bend to external pressure, and most importantly, that they will not exceed their mandate.[323] If judges exceed their judicial independence by acting *ultra vires* their judicial function, such as where they display partiality and prejudice in decision-making, particularly in situations where politically-inflamed and policy-laden issues are involved, then they can be said be exceeding their mandate.

---

319 ANC 2005 http://www.anc.org.za/content/statement-national-executive-committee-occasion-93th-anniversary-anc.

320 Radebe 2012 http://constitutionallyspeaking.co.za/media-statement-by-minister-radebe-aboutcon court-review/.

321 Klug 2010 *Constitutional Court Review* 4.

322 The Citizen 2015 http://citizen.co.za/655996/zuma-in-high-level-meeting-with-sas-top-judges/.

323 *President of RSA v SARFU* 1999 4 SA 147 (CC).

4.4 The infinity of appropriate and just and equitable remedies

To enforce rights, courts rely on section 38 of the Constitution which provides that they "may grant appropriate relief". Section 172(1) of the Constitution stipulates that such relief may include a declaration of invalidity or "any order that is just and equitable". The nature of a dispute informs the choice of a remedy.[324] In general, the courts are guided by section 8 of the Constitution which provides that they may develop the common law (where legislation does not give effect to a right) or may rely on the limitations clause to limit a right.[325] The interpretation clause is important in guiding the courts in this regard: they "must promote the spirit, purport and object of the Bill of Rights."[326] This means that the remedy must be effective in preventing, correcting and reversing constitutional violations.[327]

Other popular remedies include the reading in or down of words into and from a statute;[328] orders of invalidity;[329] declaration of rights;[330] interdicts[331] and damages.[332] These remedies are very wide. The courts handle each case on its own merits. Hence, the remedies that the courts may grant in safeguarding the Bill of Rights are "open-ended and contextually flexible."[333] The remedies must, as a matter of principle, be based on constitutional imperatives, not personal inclinations or

---

324 *Bel Porto School Governing Body v Premier Western Cape* 2002 (3) SA 265 CC para 180-181.

325 S 36 of the Constitution is the limitations clause. It provides that the rights contained "in the Bill of Rights may be limited by law of general application if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." It prescribes that the courts must consider the nature and extent of the right and the limitation, the importance of the purpose of limiting the right, the relationship between the limitation and the purpose for such limitation and whether there are less restrictive means to limit the right.

326 S 39(2) of the Constitution.

327 *Steenkampf v Provincial Tender Board, Eastern Cape* 2007 3 SA 1210 (CC) para 29; *National Coalition for Gays and Lesbian Equality v Minister of Home Affairs* 2002 2 SA 1 (CC) paras 81-82.

328 The reading down of words from a statute is an indirect application of the Bill of Rights. See Currie and de Wall (eds) *Bill of Rights Handbook* 177.

329 In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 94, the court held that the supremacy of the Constitution provided in section 2 of the Constitution means that all conduct which is inconsistent with the Constitution is automatically invalid and will be set aside by the court. See also *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 17, 59. Orders of invalidity may be temporary pending correction relevant government functionaries.

330 In *President of RSA v Hugo* 1997 4 SA 1 (CC), the court declared that the right to equality had not been violated by the President's decision to pardon only women with children.

331 See *President of RSA v UDM* 2003 1 SA 472 (CC) paras 41-47 for interim interdicts; *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) for final interdicts; *EN v Government RSA* 2007 1 BCLR 84 (D) for structural interdicts.

332 Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC); Fose v Minister of Safety and Security 1997 3 SA 786 (CC).

333 *Bel Porto School Governing Body v Premier Western Cape* 2002 (3) SA 265 CC paras 180-181.

preferences.[334]

In as much as courts have a wide discretion to formulate remedies in constitutional review matters, they should observe the limits of their power. This ensures legitimacy of the judicial process.[335] They should not use their power of review to supervise the legislative and executive arms of government. In the *Nkandla*[336] case, however, the Constitutional Court granted a supervisory order compelling National Treasury, an integral part of the executive, to determine the reasonable amount that President Zuma was to pay back to the state for non-security upgrades to his private home. It instructed the fiscus to report to it within sixty days.

Although the *Nkandla* decision was hailed as a victory for the people against corrupt elements within the executive, legal expert Ngobeni[337] points out that the court exceeded its mandate. He indicates that the court had no legal authority to order an inquiry into aspects relating to the President's security because such matters are not justiciable. In his view, the Constitutional Court failed to heed the provisions of section 198 of the Constitution which gives Parliament "a superior constitutionally-derived and exclusive authority" to determine security features at the President's residence. However, Ngobeni does not define 'national security' and fails to clarify whether the courts are constitutionally-permitted to test claims of national security in circumstances where it is *prima facie* evident that public funds have been abused for personal gain.

Whereas the judiciary has been criticized for overreaching, there is a feeling that the courts are doing less than they should to protect the Bill of Rights. The perception is that the judiciary becomes more assertive only when it can garner and exploit overwhelming public support.[338] For example, the Constitutional Court used the public outcry generated by the Nkandla controversy to castigate the executive for spending more than R250 million upgrading President Zuma's private home at a time when many South Africans cannot afford the basics of life.[339]

---

334 *Stransham-Ford v Minister of Justice and Correctional Services* 2015 4 SA 50 (GP) para 14.
335 *Doctors for Life International v Speaker of the National Assembly* 2006 4 SA 416 (CC) para 37.
336 *EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC).
337 Ngobeni 2016 http://www.iol.co.za/concourt-erred-on-nkandla-ruling-2007309.
338 Davis and le Roux *Precedent and Possibility* 182-183.
339 *EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC).

In *Minister of Health v TAC*,[340] the court forced the executive to develop a policy for the provision of anti-retroviral treatment to indigent South Africans at a time when it was clear that such a decision was going to isolate President Mbeki and his Cabinet. In that case, the executive had adopted a hard-line stance on the subject by refusing to provide anti-retroviral treatment to those suffering from HIV/AIDS. Instead, it advised them to strengthen their immune systems with garlic, beetroot and African potato - foods that the Minister of Health at the time strongly argued were the best methods of combating the pandemic.[341] Critics argued that this was an irrational and cruel response to a people whose very existence was endangered by the virus. Hundreds of thousands of deaths could have been avoided if the government had promptly shifted its policy. Even today, South Africa is reeling from the repercussions of this ill-advised policy.[342] The Constitutional Court stepped in to avert catastrophe.[343]

Whereas the Constitutional Court's decision to order the executive to provide anti-retroviral treatment to infected persons was a positive step towards the fulfilment of socio-economic rights and the respect for the dignity of patients, it is still conspicuous that the court's decision overlooked the technical aspects of the provision of such treatment, given issues of budgetary allocation which arise with such a large-scale exercise. It being common cause that the end cannot justify the means, it is submitted that the court usurped an executive function without due regard of the financial implications of the decision.

4.5 The counter-majoritarian dilemma

Court decisions which go against the majority will of Parliament present what has come to be termed the counter-majoritarian dilemma. Counter-majoritarianism is a legal and political minefield. It refers to the notion that judicial review enables judges to invalidate legislation enacted by elected representatives of the majority, creating the impression that decisions of unelected officials with no mandate from the people are decisive.[344] The cause lies in the structure of South Africa's constitutional order which is

---

340 *Minister of Health v TAC* 2002 6 BCLR 1033 (CC).
341 Associated Press 2009 https://www.theguardian.com/world/2009/dec/16/dr-beetroot-dies-south-africa.
342 Yawa 2016 http://europenewsweek.com/thabo-mbeki-south-africa-hiv-aid s-436012?rm=eu.
343 Treatment Action Campaign 2001 http://www.tac.org za/newsletter/2001/ns03_08_2001.
344 Bickel *Least Dangerous Branch* 16-17.

> … a mixture of Diceyan constitutionalism and [minority] majoritarianism, in which democratic rights [are] conflated with the rights of the majority people, or the majority of their parliamentary representatives. It prove[s] a fatal brew. Whatever its content, the new South African Bill of Rights accord[s] greater weight to certain rights than to the decisions of Parliament, notwithstanding the latter's ostensible democratic degree. In short, South Africans … bind themselves to certain values which trump the output of a transient legislature.[345]

It appears that the counter-majoritarian dilemma facing the courts is aggravated by the fact that the adoption of the interim Constitution was met with a lot of scholarly writings on the nature and extent of the substantive content of the Bill of Rights. The Constitutional Court did not have the benefit of firmly footed scholarship on how it was to review legislation and executive action. It found itself facing a mammoth task to develop jurisprudence in this regard.[346]

Whatever other justifications for the counter-majoritarian dilemma may be, there is a real danger of judicial officers using judicial review to frustrate the majority will by replacing society's morality with their own.[347] Constitutional review does not justify why crucial decisions, which impact on millions of South Africans, should be entrusted to a few unelected officials whose judgments on matters of key national importance "may not be wiser, more principled or more moral than those of the majority in a democracy."[348]

Ironically, the judges themselves do not agree in certain matters. For example, the Constitutional Court gets split between majority and minority judgments. President Zuma[349] put the dilemma as follows:

> How could you say that [the] judgment is absolutely correct when the judges themselves have different views about it? We don't want to review the Constitutional Court, we want to review its powers. It is after experience that some of the decisions are not decisions that every other judge in the Constitutional Court agrees with… There are dissenting judgments. You will find that the dissenting one has more logic than the one that enjoyed the majority. What do you do in that case? That's what has made the issue to become [one] of concern.

Since the coming into force of the interim Constitution, the judiciary, headed by the Constitutional Court, has made decisions which have effectively thwarted the majority

---

345 Van Wyk et al *Rights and Constitutionalism* 1.
346 Van Wyk et al *Rights and Constitutionalism* 4-5.
347 De Vos and Freedman (eds) *South African Constitutional Law in Context*.
348 De Vos and Freedman (eds) *South African Constitutional Law in Context* 75.
349 De Vos 2012 http://constitutionallyspeaking.co.za/2012/02/14.

will in the quest for individual rights. The first one was the abolition of the death penalty in *S v Makwanyane.*[350] This decision was considered too liberal as it was handed down at a time when most South Africans embraced capital punishment as a deterrent to violent crime in the country. When submissions were made that the issue of the death penalty be taken on referendum, the court refused, holding that if such a request be acceded to, the majority will was going to prevail at the expense of minorities. The court observed that a situation where public opinion is decisive leaves all issues at the determination of the legislature, thus removing the need for constitutional adjudication. In the court's opinion, such a situation is not desirable because it has the potency to drive the country back into parliamentary sovereignty.[351]

A decade after it abolished capital punishment, the Constitutional Court made yet another counter-majoritarian decision. In *Minister of Home Affairs v Fourie,*[352] it embraced same sex unions. Although the right to sexual orientation is enshrined in the Constitution,[353] most South Africans did not think at the time that the legal recognition of same-sex relationships should be given effect to through legislation. Therefore, if a bill of that nature had been tabled in Parliament without the authority of the apex court behind it, it would never have passed. The Constitutional Court acknowledged the separation of powers but observed that the doctrine cannot be used as an obligation to deny just and equitable relief to litigants who have succeeded in raising a constitutional matter.

The individual rights approach of the Constitutional Court to judicial review has resulted in judicial incursions into Parliament's house procedures. The courts have, in several cases, told Parliament what to do and how to organise its house. In *Oriani-Ambrosini v Speaker of the National Assembly*,[354] the court decided that a Parliamentary rule requiring the prior approval of the Speaker of the National Assembly for the introduction of bills to the floor was unconstitutional. In its view, the implication of the impugned rule was that it enabled the ANC, the governing political party, to use its majority status to censor Parliamentary debate on certain political issues. In *Mazibuko v Sisulu*,[355] the

---

350 *S v Makwanyane* 1995 3 SA 391 (CC) .
351 *S v Makwanyane* 1995 3 SA 391 (CC) paras 87-89.
352 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).
353 S 9(3) of the Constitution prohibits discrimination based on sexual orientation.
354 *Oriani-Ambrosini v Sisulu* 2012 6 SA 588 (CC).
355 *Mazibuko v Sisulu* 2013 6 SA 249 (CC).

court declared that Chapter 12 of the *Rules of the National Assembly*, which did not provide for an easy mechanism for opposition political parties to schedule motions of no confidence in the President, was unconstitutional.

The decisions discussed above and the criticisms thereof point to judicial interference in the processes and decisions of Parliament. In all fairness, they may be considered activist, given the circumstances and their impact. This judicial approach has not been confined to the legislature, but to the executive as well in its formulation and implementation of national policy.

4.6 Activist approach to government policy

The development and implementation of national policy is the prerogative of the President and Cabinet.[356] Although there is no legal definition for the term, policy in this context is defined as a programme of action adopted by a government in addressing a specific issue of national importance. Civil servants in various government departments formulate government policies. Executives merely adopt the policies and give them political support. Thus, "not every policy which the executive develops and implements can claim a genuine democratic mandate."[357]

The influence of judicial oversight on the formulation and development of national policy is profound.[358] In the early years of South Africa's constitutional democracy, the courts allowed the ruling ANC great latitude for policy discretion to enable it to consolidate its political power.[359] Hence, there was no dispute between executive and judicial organs of state in this area. In recent years, however, the courts have been accused of activism for encroaching on the executive's policies under the guise of constitutional scrutiny.[360] It has been alleged that judges use their personal opinions on public policy to decide issues and that they always find constitutional violations. The gravest allegation is that they expose themselves to manipulation by external elements

---

356 S 85(2)(b) of the Constitution.

357 DGRU 2014 http://www.dgru.uct.ac.za/news/has-south-african-constitutional-court-over-reached-study-court%E2%80%99s-application-separation-powers.

358 Yoav and Menachem 2005 *Comparative Political Studies* 76.

359 Issacharoff 2013 *Constitutional Court Review* 2.

360 DGRU 2014 http://www.dgru.uct.ac.za/news/has-south-african-constitutional-court-over-reached-study-court%E2%80%99s-application-separation-powers.

seeking to undermine democratic processes.[361]

President Zuma[362] articulated the connection between the executive, the courts and government policy as follows:

> The Executive, as elected officials, has the sole discretion to decide policies for the Government. This challenge perhaps articulated clearly by Justice VR Krishna Lyer of India who observed that: "Legality is the court's province to pronounce upon, but canons of political propriety and democratic dharma are polemic issues on which judicial silence is the golden rule".

The court recognised this in *S v Makwanyane:*[363]

> This court is not to 'second guess' the executive or legislative branches of government or interfere with the affairs that are properly their concern… Our task is to give meaning to the Constitution and, where possible, to do so in ways that are consistent with the underlying purposes and are not detrimental to effective government.

The courts have no authority to approve or disprove government policy. Policy comes within judicial cross-hairs only when it is reflected in legislation or some other legal instrument.[364] When so reflected, it must comply with the Bill of Rights and other constitutional imperatives.[365] It is assessed against the standards of reasonableness, rationality, legality, openness and accountability.[366]

Where government policy is impugned in litigation, the duty of the courts goes no further than ascertaining whether the Constitution is complied with.[367] To achieve this, they employ an interpretation method that is generous, purposive and contextual.[368] However, they should not manipulate the interpretation process to give the Constitution any meaning which they desire, lest they be considered activist.[369] They are precluded from using the judicial office to express and advance personal interests.[370]

---

361 Mokone 2012 http://www.timeslive.co.za/thetimes/2012/06/07/ramatlhodi-flays-the-judiciary; Black *Black's Law Dictionary* 922.
362 De Vos 2011 http://constitutionallyspeaking.co.za/president-zumas-keynote-address-to-access-to-justice-conference/.
363 *S v Makwanyane* 1995 3 SA 391 (CC) .
364 DGRU 2014 http://www.dgru.uct.ac.za/news/has-south-african-constitutional-court-over-reached-study-court%E2%80%99s-application-separation-powers.
365 *Minister of Health v TAC* 2002 6 BCLR 1033 (CC) para 98.
366 Quinot 2010 *Constitutional Court Review* 142.
367 *Minister of Health v TAC* 2002 6 BCLR 1033 (CC)para 180.
368 *S v Makwanyane* 1995 3 SA 391 (CC) para 9.
369 *S v Zuma* 1995 SACR 568 (CC) para 17.
370 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 16.

Judicial activism is attributed to transformative constitutionalism which calls upon the courts to depart from traditional rules of interpretation and judicial precedents to give effect to constitutional values. When the courts instruct Parliament to make a law, they share law-making powers with the legislature. This makes them a "negative legislature."[371] The position was eloquently in *Matiso v Commanding Officer, Port Elizabeth Prison:*[372]

> The values and principles contained in the Constitution are, and could only be, formulated and expressed in wide and general terms, because they are to be of general application. In terms of the Constitution the Courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so, Judges will invariably 'create' law. For those steeped in the tradition of parliamentary sovereignty, the notion of Judges creating law, and not merely interpreting and applying the law, is an uncomfortable one. Whether that traditional view was ever correct is debatable, but the danger exists that it will inhibit Judges from doing what they are called upon to do in terms of the Constitution. This does not mean that Judges should now suddenly enter into an orgy of judicial law-making, but that they should recognise that their function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in Parliament.

Another classic example of judicial law-making is *Minister of Home Affairs v Fourie,*[373] where the court directed the National Assembly to promulgate legislation embracing the rights of same sex couples within twelve months. The order was accompanied by the threat that if the legislature failed to comply with the order within the stipulated period of one year, the court was going to automatically read in words into the statute.

The complexity of some government policies and the nature of expertise required in executing them require courts not to easily interfere.[374] In light of the doctrine of separation of powers, the courts should not usurp the powers of the legislature and the executive. It would be improper for them to impose themselves on the executive.[375] They must observe the limits of their powers and intervene in government policy only when it is reasonably necessary to protect a constitutional right.[376] Anything beyond that carries with it the risk of impeding the executive from

---

371 Ginsburg and Garoupa 2011 *Journal of International and Comparative Law* 540.
372 *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) 592 (SE).
373 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).
374 Moseneke 2012 http://www.constitutionalcourtreview.co.za/wp-content/uploads/2015/08/Courage-of-Principle.pdf.
375 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 51.
376 Roux *Politics of Principle* 367-368.

fulfilling its constitutional mandate. The political questions doctrine dictates that political questions which arise from government policies must be left in the hands of the political arms of government, the legislature and the executive.

4.7 Failure to observe the political questions doctrine

Before a court entertains a matter, it must be satisfied that, constitutionally, it has the jurisdiction to decide the issues. It must ascertain if it is the appropriate forum to decide the dispute. This is where the political questions doctrine comes in. It deals with the justiciability of political matters. It developed in the United States jurisprudence to indicate cases where the courts decline to exercise jurisdiction due to the political, rather than legal, nature of a case.[377] Ideally, courts deal with law, not politics.[378] Cases where policy is impugned often require courts to examine the constitutionality of political decisions. As such, the contestation of government policy is a political, not a judicial process.[379]

South African courts regularly make decisions with a direct political impact. They do not readily recognise the political questions doctrine and persistently refuse to avoid entertaining disputes for the mere presence of political questions.[380] They often adjudicate disputes between political parties and their members,[381] the National Assembly and its members,[382] and between the National Assembly and political parties.[383] This is due to the wide jurisdiction of the courts, their extensive powers of review and the abstract nature of constitutional issues which arise in certain matters. The infinite 'just and equitable remedies' they may grant render the political questions doctrine irrelevant.[384] The authority of the Constitutional Court as a final arbiter of all disputes make it possible for it to intervene in the internal affairs of other organs of state.[385] A notable example is *Mazibuko v Sisulu*.[386] In that case, the dispute arose

---

377 Okpaluba 2003 *SAPR/PL*.
378 *Merafong Demarcation Forum v President of RSA* 2008 5 SA 171 (CC) para 308.
379 *Implementation of the Geneva Conventions Act* 8 of 2012 para 93.
380 Okpaluba 2003 *SAPR/PL* 342.
381 *Congress of the People v Shilowa* 2012 JDR 1738 (GSJ); *Agang-South Africa v Mayoli* 2015 JDR 0310 (GJ).
382 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (CC).
383 *EFF v Speaker of the National Assembly* 2015 JDR 1593 (WCC).
384 Okpaluba 2003 *SAPR/PL* 334.
385 See s 167(5) of the Constitution.
386 *Mazibuko v Sisulu* 2013 6 SA 249 (CC) para 82.

from the procedure for the passing of motions of no confidence in the President by the National Assembly. This was clearly a political matter which the court should have left at the discretion of political forces within the National Assembly.

Constitutional provisions regulating access and standing in the courts make it possible for anyone to raise almost any issue in the courts.[387] Given their inferior numbers against an overwhelmingly superior ANC in the National Assembly, minority political parties are unable to pursue their goals. With or without the support of opposition parties, the ANC can pass ordinary legislation. Minority parties then turn to the courts to assist level the political playing field. Early in 2016, President Zuma,[388] criticised opposition parties for circumventing democracy by using the courts to block the enactment of vital legislation. He lamented the misconception among opposition political parties that true democracy is to be found in the courts. On the 5th of November 2016, he repeated his statements when he observed that non-governmental organisations and opposition political parties run to the courts each time when they lose a political battle in Parliament.[389]

Constitutional review litigation effectively thwarts political debate in Parliament by transferring political matters to the courts where they are argued by lawyers and decided by judges. This creates a political judiciary.[390] This is most prevalent when the ANC uses its numerical dominance to frustrate opposition parties. For example, in 2015, the ANC used its majority status in the National Assembly to shield the President from the recommendations of the Public Protector after Thuli Madonsela's office concluded that he had unduly benefitted from upgrades to his Nkandla home.[391] It further denied a motion of a vote of no confidence in the President.

Political parties, individuals acting in their own capacity and civil society organisations

---

[387] S 38 of the Constitution provides that the following persons may approach the court for appropriate relief where a right in the Bill of Rights has been infringed or is being threatened: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons: (d) anyone acting in the public interest; and (e) an association acting on behalf of its members.

[388] News24Wire 2016 http://businesstech.co.za/news/government/125807/democracy-is-not-court-zuma/.

[389] Harper *et al* 2016 www.news24.com/SouthAfrica/News/zuma-lashes-anc-veterans.

[390] O'Regan 2012 *SAJHR* 117.

[391] Public Protector 2014 *Secure in Comfort*.

who turn to the courts to protect their interests do so in the name of protecting and promoting the Constitution. This opens constitutional litigation to abuse due to the number of reasons encouraging politically motivated litigation. Given their rate of success in the courts, opposition parties manipulate the judicial process to gain political mileage by using court judgments as a springboard.[392] Litigation also comes with free media exposure for these parties, helping them to maintain a defined presence in the minds of citizens through these judicial processes.

Ironically, the judiciary constantly denies that it makes political decisions. In *President of RSA v UDM,*[393] the Constitutional Court emphasized the purely legal and apolitical nature of its mandate. It held that the merits of the impugned legislative provisions were a political, not a judicial question. As such, it refused to entertain the matter. In *Merafong Demarcation Forum v President of RSA,*[394] it reiterated that it does not deal with politics, for that is the domain of the voters. It only deals with bad law.

> Courts deal with bad law; voters must deal with bad politics. The doctrine of the separation of powers ... does not allow this court ... to interfere in the lawful exercise of powers by the legislature.

In *National Treasury v Opposition to Urban Tolling Alliance*,[395] the court refused an application for intervention as a friend of the court because it was politically motivated.[396] The court did not, however, explain how the judiciary is supposed to deal with borderline questions in which political activism is guised in constitutional review applications.

4.8 Conclusion

The Constitution gives the judiciary enormous powers. This creates conceptual and practical problems. The individualistic approach of the courts in constitutional review litigation results in counter-majoritarian remedies and an allegedly activist judiciary, particularly when it comes to government policy and contested political decisions. The courts have been criticised for meddling with government policies and deciding political

---

392 Klassen 2015 *PELJ* 1904.
393 *UDM v President of RSA* 2002 11 BCLR 1179 (CC) para 11.
394 *Merafong Demarcation Forum v President of RSA* 2008 5 SA 171 (CC) para 308.
395 *Implementation of the Geneva Conventions Act* 8 of 2012.
396 *Implementation of the Geneva Conventions Act* 8 of 2012 para 14.

matters which ordinarily fall within the exclusive domain of legislative and executive branches of government, thus infringing upon the doctrine of separation of powers.

The above discussion of the problems arising out of judicial review paints a gloomy picture of the judicial role in South Africa's constitutional democracy. The constant failure by the courts to exercise restraint on themselves, or at least defer matters to relevant functionaries, has resulted in the judiciary overreaching its constitutional mandate by overstepping the bounds of its power. It is thus important to examine the democratic legitimacy for judicial oversight and the extent to which the courts observe the limits of their mandate.

Chapter 5 Observing the Limits of Judicial Oversight: Constitutional Deference and Judicial Restraint

5.1 Introduction

An examination of constitutional principles underpinning judicial oversight and the resultant conceptual and practical problems has demonstrated that the South African judiciary wields enormous powers. A robust application of the system of checks and balances has seen the judiciary exceeding the appropriate boundaries of judicial authority. Notably, the courts have overstepped the boundaries of their authority by failing to exercise constitutional deference and judicial restraint. Given the questions on the democratic legitimacy of judicial oversight, the courts have demonstrated awareness of the need to defer issues to relevant functionaries. Constant criticism from political quarters has seen the courts relooking at their democratic and constitutional role for guidance on how to proceed in highly political and policy-laden matters, particularly where institutional competence and comity are concerned.

This chapter investigates how the courts have observed the limits of their power. It begins by discussing the democratic legitimacy of the courts to contextualise the relationship between constitutional deference and separation of powers. It progresses to investigate the approach of the courts to judicial review in instances where institutional competence to make particular decisions is concerned and where institutional comity between the judiciary on one end, and the legislature and the executive on the other, hangs in the balance.

5.2 The democratic legitimacy of judicial oversight

The crux of the argument against judicial review is that it lacks democratic legitimacy. Unlike the legislature and the executive, the judiciary does not derive its mandate from the people through the ballot, but directly from the Constitution. A narrow view of the situation reveals that judicial oversight interferes with democracy because it substitutes a few judges' decisions for the majority will.[397] To address this argument, it is important to understand exactly what democracy is. Loosely defined, a democracy is a

[397] De Vos and Freedman (eds) *South African Constitutional Law in Context* 75.

government ruled by freely elected majority representatives and characterised by the rights to free and fair elections.[398] It must be pointed out from the onset that the notion of democracy is as unclear cut as the doctrine of separation of powers. There is no universal model of democracy because the term 'democracy' is too indeterminate.[399]

The Constitution refers to democracy in several provisions but does not define the concept, probably because the constitutional drafters considered it an ideal to be given effect to through legislation and statutory interpretation. The Preamble states that the Constitution is "the foundation for a democratic and open society" based on the will of the people and the equality of all citizens before the law. Section 1 of the Constitution describes the state as sovereign and democratic. It identifies values which define the state: human dignity; equality; human rights and freedoms; non-racialism and non-sexism; constitutional supremacy; universal adult suffrage, a common voters' role, regular and free elections; and a multi-party political system. It further provides that these values ensure the accountability, responsiveness and openness of government to the people. Section 7(1) provides that the Bill of Rights "affirms the democratic values of human dignity, equality and freedom."

The Constitutional Court has identified several constitutional provisions as giving insight into the nature of South African democracy. In *Doctors for Life,*[400] the court observed that political rights enshrined in section 19 of the Constitution and the requirement for public access and involvement in the processes of Parliament, including the enactment of legislation, provided for in sections 59 and 72 of the Constitution, point to democracy. In *President of RSA v UDM,*[401] the court recognised 'multi-party democracy' in which all political parties seeking to represent the people in Parliament are given room to

> … organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid.

Three forms of democracy in operation in South Africa can be identified: direct,

---

398 Collin *Dictionary of Law* 89.
399 *UDM v President of RSA* 2002 11 BCLR 1179 (CC) .
400 *Doctors for Life International v Speaker of the National Assembly* 2006 4 SA 416 (CC) para 111.
401 *UDM v President of RSA* 2002 11 BCLR 1179 (CC) para 26.

participatory and representative democracy.[402] Parliament's failure to observe and give effect to constitutional provisions when enacting legislation renders statutes invalid.[403]In *President of RSA v UDM*,[404] the court observed that the right to make political choices is only relevant at the time of elections. Afterwards, citizens have no right to control the conduct of their elected representatives. In practice, this means that once the National Assembly is elected, the public has no control over what the elected officials do in Parliament. They can choose to promulgate legislation which curries favour with the electorate or they may do what they think is simply best, based on political and policy considerations. In the dissenting view of Sachs J in *Merafong Demarcation Forum v President of RSA,*[405] this is arms' length democracy and it is not participatory.

The confined, if not non-existent, democratic participation of ordinary citizens in regulatory procedures affecting their lives was demonstrated in *Merafong Demarcation Forum v President of RSA*.[406] The matter concerned the demarcation of the Merafong Municipality, which lay within the Gauteng and North-West Provinces. Upon public consultation, it was clear to the National Assembly that seventy-four percent of people in Merafong were opposed to relocation from the Gauteng to the North-West Province. Despite their explicit position, characterized by graphic acts of civil disobedience, the legislature went on to incorporate Merafong into a new municipality in the North-West Province. When the matter landed in the Constitutional Court, the court held that the National Assembly was not obliged to accede to public opinion; its duty was merely to consult with relevant stakeholders.

The process of election of the President sheds further light into South Africa's democracy. The people do not elect the President by ballot, as is the case in some jurisdictions.[407] The National Assembly, at its first seating, elects one of its members to become President.[408] The person so elected by the National Assembly as President

---

402 Currie and de Waal *Bill of Rights Handbook* 16-17.
403 See *Doctors for Life International v Speaker of the National Assembly* 2006 4 SA 416 (CC) in which statutes were declared invalid for Parliament's failure to facilitate adequate public involvement.
404 *UDM v President of RSA* 2002 11 BCLR 1179 (CC) .
405 *Merafong Demarcation Forum v President of RSA* 2008 5 SA 171 (CC).
406 *Merafong Demarcation Forum v President of RSA* 2008 5 SA 171 (CC).
407 Examples include the USA, Zimbabwe, Zambia.
408 S 86 of the Constitution.

chooses members of the Cabinet and serves at the pleasure of the National Assembly.[409] Cabinet members serve at the pleasure of the President. In all these processes, the ordinary citizen on the street has no say on who should be the President. The whole process is placed at the discretion of the political forces within the ruling party, the ANC. The President is thus directly accountable to the National Assembly, not the people.

It is observed from the previous discussions that all legislative, executive and judicial power is derived from the Constitution. The Constitution sets out the powers of the different organs of state and dictates how they should exercise their powers. The majority will, as presumably reflected in law, policy and administrative action, must be manifest and expressed within the constitutional framework that respects the Constitution and the entrenched fundamental rights in the Bill of Rights.[410] This means that it must be rational, proportional, provide for procedural fairness and must respect the basic rights and liberties of minorities and marginalised groups who cannot effectively influence things for themselves through the normal democratic channels.[411] The government must be open and transparent to the people, accountable to them and be ready to justify its actions when called upon to do so.[412]

Judicial review enhances democracy by ensuring that public power is exercised within the constitutional framework. It is the last option through which the people may hold the government to abide by the democratic principles enshrined in the Constitution. For this reason, the argument that judicial review interferes with democracy falls away. Judicial oversight further finds legitimacy in the binding nature of the individual right to equality. Borrowing from American jurisprudence, it can be argued that the judicial review is necessary for the courts to safeguard the decisions of “we the people” in the Preamble of the Constitution from being undermined by the other branches of government. The government does not constitute “the people”. It is a servant of the people and must respect and protect their aspirations. As such, democracy couched in majority rule by the majority does not represented “the people”. The values and principles entrenched in the Constitution are so fundamental to South Africa’s

---

409 S 91(2) of the Constitution.
410 Moseneke 2012 *SALJ* 12.
411 *S v Makwanyane* 1995 3 SA 391 (CC) para 88.
412 See s 1(d) of the Constitution.

constitutional democracy that it would be dangerous to entrust a government with the power to amend or repeal them.[413]

Whereas the argument on "we the people" is convincing, the courts face an uphill task if they are to justify their review power on this alone. The examination of the constitution-making process revealed that the Constitution was a compromise between majority and minority interests. It was "cobbled together at Kempton Park" without transparency.[414] Contrary to the claims of "we the people" in the Preamble, the final Constitution is not a product of democratic national debate. As such, it cannot be justified to be a true reflection of the views and aspirations of the people.[415]

Given the above discussion, it is important for the courts to distinguish judicial functions from legislative ones. Chaskalson JP put the position as follows:

> It is important that we bear in mind that there are functions that are properly the concern of the courts and other that are properly the concern of the legislature. At times, these functions may overlap. But the terrains are in the separate, and should be kept separate.[416]

The courts observe the limits of their powers through judicial deference and restraint.

5.3 Judicial deference

It has been observed in this study that the principle of separation of powers demands that all government branches, including the judiciary, must observe the limits of their power. In as much as they have wide powers of review, the courts have a constitutional obligation to keep within the bounds of their authority.[417] They must not hastily intrude into executive or legislative territory if the dispute could be easily resolved by reference to the relevant organ of state. In what has come to be termed judicial deference, the courts take extreme precaution when interfering with the functions of the executive and the legislature.[418]

The concepts of constitutional deference and judicial restraint are related to the

---

413 See Van Wyk et al *Rights and Constitutionalism* 1-2.
414 Van Wyk et al *Rights and Constitutionalism* 4-5.
415 Van Wyk et al *Rights and Constitutionalism* 4-5.
416 *Ferreira v Levin* 1996 (1) SA 984 (CC) para 183.
417 *Doctors for Life International v Speaker of the National Assembly* 2006 4 SA 416 (CC) para 37.
418 Okpaluba 2003 *SAPR/PL* 341.

doctrine of separation of powers.[419] They are a constitutional adjudication mechanism that seeks to give effect to the separation of powers by deferring matters to the legislature and executive for reconsideration.[420] In *National Coalition for Gays and Lesbian Equality v Minister of Home of Affairs,*[421] the court noted the necessity and desirability of the courts to exercise deference so as not to trespass "onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature."

It is inter-linked with the doctrine of judicial restraint which means judges should confine their role to the interpretation of legislation and adherence to the doctrine of judicial precedent.[422] The courts are mindful of the needs for constitutional deference and judicial restraint. For instance, in *Stransham-Ford v Minister of Justice*,[423] the court emphasized how important it was that the legislature enact a statute regulating the right to die with dignity as a supplement to the right to human dignity to give the courts a proper platform within which to adjudicate matters involving the same.

The concept of deference acknowledges the judiciary's sensitivity to constraints faced by the executive in day-to-day administrative action.[424] When a court defers a decision to the relevant functionary, it must not do so out of courtesy, but rather from the standpoint of separation of powers.[425] It must be able to balance and justify the checks and balances required by the doctrine of separation of powers with judicial deference.[426] The supremacy of the Constitution demands that the judiciary should be involved in legislative and executive functions when the two have failed in their constitutional obligations. Where such a failure occurs, the courts will assess the nature of the case and the requested remedy. They must then try as much as possible to defer the issue for correction to the relevant functionary.[427] Matters of policy where

---

419 DGRU 2014 http://www.dgru.uct.ac.za/news/has-south-african-constitutional-court-over-reached-study-court%E2%80%99s-application-separation-powers.
420 McLean *Constitutional Deference* 61-62.
421 National Coalition for Gays and Lesbian Equality v Minister of Home Affairs 2002 2 SA 1 (CC) para 66.
422 Black *Black's Law Dictionary* 924.
423 *Stransham-Ford v Minister of Justice and Correctional Services* 2015 4 SA 50 (GP).
424 *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA).
425 *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC).
426 Klassen 2015 *PELJ* 1917.
427 Moseneke 2012 http://www.constitutionalcourtreview.co.za/wpcontent/uploads/2015/08/Courage-of-Principle.pdf.

technical aspects arise are best deferred to the executive for appropriate action because the courts are not experts.[428] However, the technicality or complexity of a decision does not prevent the courts from declaring an executive decision unreasonable if it is shown that the decision cannot be justified through the proportionality and reasonableness tests.[429]

There are numerous examples of constitutional deference. In the *New Party Case,*[430] the court noted that the regulation of elections is the prerogative of Parliament and that it would be inappropriate for the courts to prescribe to the legislature on how to regulate elections. In *President of RSA v UDM,*[431] it refused to invalidate floor-crossing, thereby enabling the National Assembly to regulate its own affairs without judicial interference. In *Fourrie*,[432] the court was faced with a constitutional challenge in which it had to decide whether to read in provisions into the *Marriage Act*,[433] or defer to the legislature to promulgate a statute. It chose the latter and observed that by so doing, it was giving legitimacy to the statute. These cases demonstrate the importance of institutional and democratic competence considerations in judicial review.

5.4 Institutional competence and policy

Judicial restraint manifests itself when the courts observe the limits of their power by refraining from being unnecessarily prescriptive to the executive and the legislature.[434] The doctrine of separation of powers requires this. In socio-economic rights matters, the courts refuse to dictate to the government what its policy should be and how it is to be implemented.[435] Justice O'Regan[436] put it eloquently:

---

428 *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).
429 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).
430 *New National Party of South Africa v Government of RSA* 1999 3 SA 191 (CC).
431 *UDM v President of RSA* 2002 11 BCLR 1179 (CC).
432 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).
433 *Marriage Act* 25 of 1961.
434 *Glenister v President of RSA* 2011 7 BCLR 651 (CC) para 30.
435 See *Government of RSA v Grootboom* 2001 1 SA 46 (CC).
436 O'Regan 2011 http://hsf.org.za/helen-suzman-memorial-lecture-november-2011.pdf.

> … the approach of the Court has been to require government to explain why its policies in the field of social and economic rights are reasonable. Government must disclose to the Court 'what it has done to formulate the policy, its investigation and research, the alternatives considered and the reasons why the option underlying the policy was selected. This approach permits citizens to hold the democratic arms of government to account through litigation, but does not require government "to be held to an impossible standard of perfection.

The constitutionally-compliant policy choices made by the executive must be respected, even if there are, in the opinion of the courts, better options available.[437] Where there are different options regarding a government policy and the different approaches satisfy the standard of reasonableness, then the discretion of which option to adopt lies with the legislature and the executive, not the courts. However, this does not mean unrestrained power. If rights are affected by the policy, the limitations must be justified in terms of the general law of application provided for by the Constitution.[438]

When deciding whether to interfere with a government decision or not, the courts evaluate the competence of the government to decide. If it finds that the organ of state is well-equipped to make the decision, it must defer to it. This is a matter of constitutional competence. To a larger extent, it has nothing to do with the intellectual capacity or expertise of the judiciary,[439] although the courts must always acknowledge their lack of specialist knowledge and expertise to alter decisions.[440] *In Minister of Environmental Affairs v Phambili Fisheries,*[441] the court put the position as follows:

> [j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.

So far, the courts have demonstrated great deference in technical matters of government policy such as medical assistance[442] and the economy.[443] For itself, the Constitutional Court held in *Minister of Health v TAC*[444] that:

---

437 *Helen Suzman Foundation v President of RSA* 2015 2 SA 1 (CC) para 75.
438 *S v Makwanyane* 1995 3 SA 391 (CC) para 107.
439 McLean *Constitutional Deference* 73.
440 *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Management and Tourism* 2004 5 SA 91 (C) para 68.
441 *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 50.
442 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC) .
443 *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).
444 *Minister of Health v TAC* 2002 6 BCLR 1033 (CC).

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

This reasoning demonstrates the court's assessment of the appropriateness of a remedy in constitutional matters. This contributes to a harmonious relationship between the judiciary and its counterparts in government.

5.5 Considerations of institutional comity

Institutional comity is the mutual respect and courtesy shown by the three branches of government towards one another to ensure goodwill and smooth running of government operations. The need to preserve the current state of harmony between the three organs of the state inform the judiciary's stance on judicial deference.[445] Constitutional democracy demands that a balance should be struck between the executive's determination of legal values and the judiciary's constitutional obligations to resist an encroachment on basic rights.[446] As a general rule, the method of implementation of government policy is the prerogative of the executive.[447] Some matters are exclusive domains of the executive and the legislature. For example, aspects of foreign policy and international commercial affairs are exclusive executive territories which may not be dictated by the courts. [448] When faced with such matters, the limits of their power require the courts to exercise restraint.

The courts have always emphasized that the government is bound by its international obligations which have been domesticated in legislation.[449] The Constitution provides that legislation must be interpreted, among other considerations, in accordance with international law.[450] In *Glenister II*,[451] the Constitutional Court emphasized the

---

445 *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2010 4 SA 618 (CC).

446 Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" 279.

447 *Bato Star Fishing v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

448 *Kaunda v President of RSA* 2005 4 SA 235 (CC).

449 In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 1 SA 315 (CC), for example, the Court ordered the South African Police Service to investigate allegations of torture in Zimbabwe.

450 S 233 of the Constitution.

451 *Glenister v President of RSA* 2011 7 BCLR 651 (CC) para 97.

significance of international law to the South African Constitution:

> Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law…These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

Thus, the courts have the authority to intervene where the executive refuses to abide by its obligations under international law. However, given the complicated nature of diplomacy and government policies, it is imperative for the judiciary to exercise restraint in such matters. There are two reasons for this. The first is that where international law is concerned, diplomacy is involved and often complicated. The second is that it may be difficult in some instances for the executive to enforce a court judgment given competing interests. As such, friction may be generated between the courts and the executive. The executive may feel that there is undue interference and the courts may get the impression that their decisions are not being complied with.

The Al Bashir controversy is an example of how the relationship between the executive and the judiciary may be strained. In that case, the executive had failed, pursuant to a High Court order, to arrest and detain the Sudanese President Al Bashir pending his surrender to the International Criminal Court which has a standing arrest warrant against him for crimes against humanity. The court ruled that the executive was in breach of its international obligations and its own law.[452] The decision caused the government international embarrassment and difficulties at home.

5.6 Conclusion

A robust application of the system of checks and balances through judicial review raises problems which have seen the courts overstepping the boundaries of what may be termed appropriate judicial authority. The lack of a democratic mandate restrains the judicial role in deciding certain political and policy-laden issues. The need to observe institutional competence in matters related to government policy demands that the courts should observe the limits of their power through constitutional deference and judicial restraint. The courts have exercised restraint in balancing the attainment of

---

[452] S 10 of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.

constitutional imperatives and institutional comity between the judiciary and the political organs of state. Having investigated historical and contemporary issues surrounding judicial oversight, it is time to present the findings of the study.

Chapter 6 Findings and Recommendations

6.1 Introduction

This study investigated whether the South African judiciary has used judicial oversight to overstep its jurisdiction under the Constitution. The historical context within which judicial review of legislative and executive action was adopted in the 1996 Constitution has been examined, as well as the constitutional principles underpinning judicial review. Conceptual and practical problems emanating from judicial oversight and how the courts observe the limits of their power through constitutional deference and judicial restraint have been investigated.

This chapter presents the findings of the study. It commences with a summary of the study and proceeds to discuss the major findings of each chapter. It then proposes some recommendations for policy makers. The last part identifies areas for further research in South African constitutional democracy.

6.2 Summary of the study

The context and outline of this study was presented in the first chapter in which the theoretical framework and rationale of the study were discussed. The first chapter outlined the background of the study; the research questions; the basic hypothesis; ethical considerations; and the methodology used to carry out the study. The second chapter examined the philosophical framework for judicial review and traced the historical development of judicial oversight in the four British South African Colonies prior to the 1910 Unification up to the constitutional revolution brought by the interim Constitution in 1993.

The chapter revealed that the philosophical and jurisprudential framework for the exercise of judicial review dates to the Age of Enlightenment when philosophers proposed the division of government power into law-making, adjudicatory and enforcement organs of state. In contemporary constitutionalism, this entails a separation of powers between the legislative, judicial and executive branches of government. It also means the implied, if not express, power of the court to moderate legislative and executive extremes.

The third chapter set the stage for the exercise of judicial oversight. It examined constitutional values and principles underpinning judicial oversight. It investigated transformative constitutionalism under 1996 Constitution and detailed how it seeks to promote the rule of law and the protection of fundamental rights and freedoms. The doctrine of separation of powers with its checks and balances and judicial independence were discussed for their significant importance in substantive judicial review. The chapter also examined the enormous powers vested in the judiciary by the Constitution in South Africa.

The fourth chapter investigated the conceptual and practical problems emanating from the wide powers bestowed upon the judiciary by the Constitution. It discussed the need for judicial accountability and the criticisms that have been levelled at the courts by prominent political figures. It also examined the problems created by ‘appropriate’ and ‘just and equitable' remedies in constitutional adjudication and the counter-majoritarian dilemma. It explored the activist judicial approach to government policy and the constant refusal of the courts to recognise the political questions doctrine.

The fifth chapter examined the democratic legitimacy of judicial review in political matters and policy-laden issues. It also discussed how the courts have observed the limits of their authority through constitutional deference and judicial oversight. It placed emphasis on institutional competence and the need for the judiciary to be mindful of the need to maintain institutional comity. These chapters revealed major findings which are presented in the subsequent segment.

6.3 Major findings

This study notes that jurisprudence on the relationship between constitutional supremacy, separation of powers and judicial oversight is still developing. As such, making sweeping observations and recommendations is tantamount to putting the cart before the horse; more so given that the South African judiciary, a highly-rated institution, is in focus. However, the demands of the study dictate that one must proceed with fortitude. The first chapter revealed that there is a justified need for a study on whether the judiciary, particularly the Constitutional Court, has exceeded its mandate through judicial review. To fully answer this question, it was necessary to investigate the evolution of judicial oversight from pre-Union South Africa to the

present. The philosophical and jurisprudential framework for judicial oversight revealed that judicial review and the doctrine of separation of powers are interrelated. It also revealed that the judicial mandate of oversight stems from the countervailing measures provided by the system of checks and balances in South African constitutionalism.

The evolution of judicial review in pre-Union South Africa, particularly in the Transvaal, demonstrates the importance of constitutional guarantees for judicial independence for the courts to exercise effective review of legislation and executive action. The same goes for the period between the Unification and the adoption of the interim Constitution. During colonial rule and apartheid, the South African legal order guaranteed judicial independence at face value to give legal legitimacy to draconian and discriminatory laws. The independence of the judiciary was manipulated in several ways, including through political appointment of executive sympathisers to the bench.

The doctrine of legislative supremacy, adopted from the Westminster system of parliamentary democracy, subjected the courts to the whims and caprices of the legislature, giving the courts very little room to exercise substantive judicial oversight over the legislative process. The judiciary itself was guilty of human rights violations by failing to take a stand against immoral laws. Although there were some progressive judges such as Schreiner JA, the rest of the bench of the Appellate Division bent to the whims of the executive and contributed to giving legal legitimacy to the apartheid legal order. This period demonstrated the importance of a supreme constitution with a justiciable bill of rights, an independent judiciary and a commitment by all in society to observe the rule of law.

The interim Constitution was adopted to correct past injustices and served as a springboard for transformative constitutionalism. It brought about a new era for judicial review by providing for the supremacy of the Constitution, separation of powers with checks and balances and most importantly, judicial independence. It created the Constitutional Court as an institutional mechanism to safeguard human rights and the Constitution against draconian legislation and arbitrary executive power. The third chapter revealed that judicial review is made possible by the supremacy of the Constitution and the doctrine of transformative constitutionalism, separation of powers with checks and balances, the rule of law and judicial independence.

An examination of transformative constitutionalism revealed that the supremacy of the

Constitution and the justiciability of the Bill of Rights means that the exercise of public power must meet constitutional muster. It highlighted the crucial role played by the judiciary in enforcing separation of powers through judicial review as a measure of checks and balances. It also demonstrated that the Constitutional Court places the need to protect individual rights above the desirability of a strict adherence to the doctrine of separation of powers. It showed that the courts have always intruded into legislative and executive territory where they have determined that there are legitimate grounds to interfere.[453] There is thus no infringement of the principle of separation of powers where the court exercises its constitutional mandate to invalidate legislation and executive action which violates constitutional principles.

A study of the system of checks and balances revealed that this is an important mechanism for preventing the political organs of the state from consolidating their powers in undemocratic ways. It highlights that judicial review is mandated by the Constitution, which was adopted by a democratically elected parliament.[454] The assignment of a greater role for the judiciary came out of the realisation of the dangers of placing sovereign power in the legislature. The South African experience with parliamentary sovereignty and the abuse of law by those in power prompted the division of the state into three equal branches that exercise effective checks and balances over one another, although the judiciary exercises powers akin to a veto in most cases. In fact, the judiciary wields excessive powers than necessary to guarantee its independence.

However, the study also revealed that while the courts could restrain the executive and the legislature, these two have no way to curb judicial overreach. There is no mechanism for correcting mistakes in judicial adjudication. The Constitution also fails to provide the legislative and executive branches of government with means to hold the judiciary to account for wrongful decisions. Instead, there is an obligation on everyone and organs of state to abide by court decisions, no matter how flawed their reasoning may be. The fact that only the courts may decide the appropriate boundaries of judicial authority, as evident from the wide jurisdiction of the Constitutional Court, make the judiciary too powerful than its counterparts.

---

453 Klassen 2015 *PELJ* 1910-1911.
454 Currie and de Waal *Bill of Rights Handbook* 6.

The wide powers of the courts are augmented by their authority to define and develop the doctrine of separation of powers to fit the South African context. This leads to judicial supremacy. The Constitutional Court's guardian role over the Constitution and the finality of its interpretation of the meaning of constitutional text, taken together with the power to grant 'just and equitable' remedies in review matters, makes it too powerful than is desirable for a healthy separation of powers.[455] It is almost impossible for the legislature and the executive to curtail the court's powers through constitutional amendment due to the requirement for its approval for such amendments. However, this does not mean that public officials may use the doctrine of separation of powers to shield their actions from judicial oversight.[456] The courts are instrumental in ensuring that the legislature and the executive observe the principle of legality and the rule of law.

The study demonstrated the importance of judicial independence from external and internal manipulation by politicians, public officials, the commercial world and social forces. It also revealed that judicial independence does not mean that the judiciary is not accountable for its role in constitutional democracy. Judicial officers could enhance this independence through strict adherence to judicial ethics so that a saga akin to the Hlophe controversy does not rear its ugly head again. The professionalism and integrity of judges could go a long way in this regard.

Chapter four of the study investigated conceptual and practical problems arising from judicial oversight. It revealed that the constitutional framework within which judicial oversight is exercised is relatively new and as such likely to attract backlash from public officials who are often chastised by the courts. Thus, political criticisms from political should be expected. However, judicial criticisms have alarmed the judiciary which is now having concerns about its future as demonstrated by the Chief Justice's meetings with the President in recent times.[457] The robust exercise of the system of checks and balances, particularly in matters of socio-economic rights, have incurred the wrath and anger of executive elements who have voiced their desire to amend the Constitution

---

455 Issacharoff 2013 *Constitutional Court Review* 4.

456 Badenhorst 2015 *De Rebus* 1.

457 The Citizen 2015 http://citizen.co.za/655996/zuma-in-high-level-meeting-with-sas-top-judges/.

and review the powers of the Constitutional Court.[458] Fortunately, as de Vos[459] points out, public rants are no more than political banter couched in radical terms to drum up support for political parties.

The most significant complaints centre on counter-majoritarian decisions and the activist judicial approach to government policy. These present a dilemma for judicial officers as they must decide how to uphold individual rights of minorities and marginalised groups and at the same ensure that the wishes of the majorities can triumph. The other area of contestation is that judicial review does not recognise the difference between political and legal issues. It is thus important for the courts to exercise judicial restraint in these areas to ensure a firm but principled interpretation and enforcement of constitutional principles, while at the same time safeguarding the individual rights of minorities and marginalised groups.[460]

The fifth chapter examined the limits of judicial authority through constitutional deference and judicial restraint. It began by dichotomising the democratic legitimacy of judicial review. It is concluded from this chapter that South Africa's constitutional democracy does not give full effect to the will of the majority. Therefore, the courts are the only practical forum to which disgruntled citizens can challenge decisions of their elected officials.[461] Counting on their experience in dispute-adjudication, their expertise in law and the enormous research they do before handing down judgments, judges are best suited to safeguard the Constitution than anyone else. However, freedom from accountability does not give members of the judiciary the right to exceed their power. They must observe the limits of their power by establishing equilibrium between the system of checks and balances provided by the doctrine of separation of powers and the need to protect individual rights. This calls for a measure of deference and restraint in constitutional adjudication.

In a nutshell, this study finds that indeed, the South African judiciary, particularly the Constitutional Court, has exceeded its jurisdiction through judicial review. To this end, numerous recommendations are presented in due course to help the courts and policy

---

458 Mokone 2012 http://www.timeslive.co.za/thetimes/2012/06/07/ramatlhodi-flays-the-judiciary.

459 De Vos 2014 http://www.dailymaverick.co.za/opinionista/2014-01-12-changing-the-constitutionmuch-ado-about-nothing/#VzNsyPl97NM.

460 See Roux 2009 *International Journal of Constitutional Law*38.

461 De Vos and Freedman (eds) *South African Constitutional Law in Context* 76.

makers to find a way to strike a balance between the increased judicial role in contemporary constitutionalism and the respect for the doctrine of separation of powers for the purposes of maintaining institutional comity between the judiciary and its counterparts.

6.4 Recommendations

Courts are required by the Constitution not to encroach executive and legislative arena.[462] Their observance of the limits of judicial power is directly proportional to their independence and defines the level of legitimacy they courts enjoy.[463] However, there is a need for the courts to balance judicial restraint with judicial activism if the rights of minorities and marginalised groups are to be protected.[464] This study recommends that the courts should continue exercising their power of review without fear, favor or prejudice.

The courts are implored to maintain public confidence in the judiciary through the maintenance of high standards in the quality of adjudication, fair process, efficiency and accessibility. This not only ensures the observance of the rule of law and champion democracy, but also protects the rights of minorities and marginalized peoples who cannot protect their rights through the normal democratic process. For the courts to do so, it is important for the legislature and the executive to continue abiding by their commitment to the rule of law and promoting judicial independence.

The bravery of the courts in enduring enormous political and social pressures in defence of constitutional principles and values should be applauded. The courts should continue to intervene in the context of South Africa's history and looking forward into the future of this country. A strong legal system and a complete culture of intolerance to impunity by top public officials should guide the judiciary in serving this country from the problems which have befallen other African countries whose heads of state are the

---

462 *Glenister v President of RSA* 2009 1 SA 287 (CC).
463 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 19.
464 De Vos 2009 http://constitutionallyspeakingcoza/between-judicial-activism-and-judicial-restraint/.

law unto themselves.[465]

Supposing that the powers of the judiciary, specifically the Constitutional Court, are wider than may have been envisaged by the drafters, it is important that the Constitution be revisited to address the anomaly. In transforming the judiciary, the government must be cautious to ensure that it does not encroach on the independence of the judiciary. It is important that judicial transformation endeavours should reinforce the accountability of judges to restore public confidence in judicial disciplinary measures. Constitutional and legislative mechanisms guaranteeing judicial independence should ensure the accountability of the judiciary to the law.

Courts must remain mindful of the limits of their powers whenever they decide to exercise their powers of judicial review. There is extreme danger in placing too much power on a sovereign legislature as there is in judicial supremacy. It is thus important for the courts to observe that although the doctrine of separation of powers is qualified by checks and balances, an outright disregard of the principle is unjustified and constitutes legitimate grounds for concern.[466] The courts may not use their power of review to justify any decision as long as they think their judgment is in the best interests of the country. Their decisions must be pointed at the realisation of constitutional ideals and the rule of law, it always being remembered that there is a need to delicately balance legislative, judicial and executive power.

Political interference with the judiciary must be restrained to ensure that the judiciary fulfils its constitutional mandates of protecting the Constitution and human rights. The institutional independence of the judiciary should be maintained, as well as the independence of individual judicial officers. This demands a grassroots approach in which the legal profession, which feeds the judiciary with judges, should be maintained in high academic and professional standards to ensure that only men and women of outstanding competence and integrity make their way to the bench. This is a concerted

---

465 See for example, Martin 2006 *Round Table* 251 in which the erosion of the rule of law in Zimbabwe made it possible for President Robert Mugabe to describe Supreme Court judges as guardians of "white racist commercial farmers". His government subsequently refused to guarantee Chief Justice Gubbay's safety against liberation war veterans who stormed the Supreme Court chambers before the court was about to hear a constitutional challenge against state-sanctioned land invasions. They chanted political slogans, danced on the Chief Justice's desk and called for him to hanged.

466 Moseneke 2012 *SALJ* 17.

effort which requires the participation of all stakeholders. Judicial independence is not only protected by the structural guarantees provided by the Constitution but by the commitment of the judges themselves to safeguard their independence, positive legislative and executive attitude, and society in general.

Judges should remain vigilant in fighting for judicial independence and not let minor political distractions divert them from their mandate as the future of this country partly lies in their hands. However, they should be on guard against judicial activism, particularly where government policies are concerned. Judges must strengthen their integrity and the legitimacy of their personalities by observing the *Bangalore Principles on Judicial Misconduct*.[467] If they are untainted by controversies and allegations of delinquency, the stakes are high that their decisions would be held in high esteem.

Public attacks by politicians and government officials on the courts threatens constitutional democracy and the rule of law. The Constitution, which is the foundation of the authority of the courts and their legitimacy, is eroded by attacks on the judiciary. This is not meant to propose a ban on criticising the judiciary. It is necessary that the judiciary, as a branch of government at par with the legislature and the executive, be held accountable to the public by robust criticisms. Criticism should not be banned but embraced through dialogue. This does not mean judges and the courts should be lambasted willy-nilly. The criticisms should be with specific reference, objective and in good faith.[468] Executive bashing of the judiciary should not be taken too far because it is expected that there will be tension between the two organs of state where review is strong. The fact that so far nothing has been done to retaliate against judges demonstrates most of the criticisms are mere rhetoric. They show that South African democracy is alive and working.

Judicial criticism contributes to constitutional democracy by holding the judiciary to account for its actions. It keeps the courts mindful of their actions. Court processes and judgments affect the people in their day to day lives. It is thus important that the people should be able to raise their concerns and fears where the courts overstep their mandate, or where the courts are timid as to allow the legislature and the executive to

---

467 *Bangalore Principles of Judicial Conduct* (2002).

468 Mogoeng 2015 http://constitutionallyspeaking.co.za/statement-by-chief-justice-and-heads-ofcourt-on-rule-of-law/.

steam roll them. However, there is a difference between sound criticism and intimidation. Threats against the courts by politicians erodes the dignity and integrity of the courts. It is thus important that any frustrations must be resolved through dialogue between the three branches of government, not through the media or the campaign trail. This protects the courts from being used as scapegoats for political ends. It also ensures institutional harmony between the three organs of the state.

The counter-majoritarian dilemma has been examined. It is recommended that ccourts should not be keen on holding the legislature and the executive accountable to them for policy considerations, but must only focus on creating the right framework within which the citizenry can hold them to account through elections and opposition politics. Given the influence of court decisions and potential political consequences which may arise from such decisions, it is important for the courts to thread carefully when determining political matters. When intervening, they justify the manner and extent of their intervention.[469] This protects the judicial process from being high-jacked by shrewd politicians.[470]

With regards the counter-majoritarian dilemma, it is recommended that the courts must strive to strike a balance between upholding the Constitution and giving effect to the will of the majority. This may be achieved through an interpretation model which gives effect to the legislative intent to the fullest extent possible. In a nutshell, this study recommends that the courts must always be observant to the limits of their powers. They should leave political and policy aspects at the discretion of the institutionally competent branches of government.

6.5 Suggestions for further research

The study suggests the following areas and topics for further research:

i) A comparative study of South African judicial oversight to Zimbabwean, Kenyan, American, British and Indian models;

ii) The legal achievements and challenges brought by the Constitution of the Republic

---

469 Klassen 2015 *PELJ* 1908-1909.
470 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 9.

of South Africa, 1996;

iii) The independence of the National Prosecuting Authority; and

iv) Legislative and executive accountability in South Africa: Milestones and challenges brought by the 1996 Constitution.

BIBLIOGRAPHY

Literature

Ackerman 2004 *New Zealand Law Review*

Ackerman LWH "The legal nature of the South African constitutional revolution" 2004 *New Zealand Law Review* 633-679

Badenhorst 2015 *De Rebus*

Badenhorst M "Separation of powers is not constitutional kryptonite: opinion" 2015 *De Rebus* 1-4

Barnet *Constitutional & Administrative Law*

Barnet H *Constitutional & Administrative Law* 10th ed (Routeledge Taylor & Francis Group London 2013)

Beloff 1999 *Denning Law Journal*

Beloff M "Neither cloistered nor virtuous? Judges and their independence in the New Millennium" 1999 *Denning Law Journal* 153-172

Bickel *Least Dangerous Branch*

Bickel A *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Company Inc. New York 1962)

Black *Black's Law Dictionary*

Black H *Black's Law Dictionary* (West Publishing Co. St Paul Minn 1984)

Blackstone and Christian *Commentaries on the Laws of England*

Blackstone and Christian Blackstone W and Christian E *Commentaries on the Laws of England in Four Books* (A. Strahan and W. Woodfall 1795)

Brickhill 2010 *Constitutional Court Review*

Brickhill J "Precedent and the Constitutional Court" 2010 *Constitutional Court Review* 79-109

Butler 2005 *Journal of Contemporary African Studies*

Butler A "The negative and positive impacts of HIV/AIDS on democracy in South Africa" 2005 *Journal of Contemporary African Studies* 3-26

Choudhry 2009 *Constitutional Court Review*

Choudhry S "'He had a mandate': The South African Constitutional Court and the African National Congress in a dominant party democracy" 2009 *Constitutional Court Review* 1-86

Cohler, Miller and Stone (eds) *Montesquieu: The Spirit of the Laws*

Cohler AM, Miller BC and Stone HS (eds) *Montesquieu: The Spirit of the Laws* (Cambridge University Press Cambridge 2004)

Collin *Dictionary of Law*

Collin P *Dictionary of Law* (Bloomsbury Publishing Plc London 2004)

Corder 2011 *Advocate*

Corder H "Challenging government decisions: codified and uncodified judicial review in South Africa" 2011 *Advocate* 38-40

Corder 2009 *Constitutional Court Review*

Corder H "Principled calm amidst a shameless storm: Testing the limits of the judicial regulation of legislative and executive power" 2009 *Constitutional Court Review* 239-267

Cumaraswamy 2002 *Journal of the Malaysian Bar*

Cumaraswamy D "'Justice is not a cloistered virtue': Are judicial criticisms inter se permissible?" 2002 *Journal of the Malaysian Bar* 32-42

Currie and de Waal (eds) *Bill of Rights Handbook*

Currie I and de Waal J (eds) *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2015)

Currie *et al New Constitutional and Administrative law*

Currie I *et al The New Constitutional and Administrative Law: Constitutional Law* (Juta Cape Town 2001)

Davidson 1985 *Harv.J.L. & Pub. Pol'y*

Davidson J "The history of judicial oversight of legislative and executive action in South Africa" 1985 *Harv.J.L. & Pub. Pol'y* 687-744

Davis and Le Roux *Precedent and Possibiilty*

Davis D and Le Roux M *Precedent and Possibility: The (ab)use of law in South Africa* (Juta Cape Town 2009)

De Villiers 1897 *Cape Law Journal*

De Villiers H "The relation of the judicial to the legislative authority" 1897 *Cape Law Journal* 38-41

De Vos 2009 *Constitutional Court Review*

De Vos P "Between moral authority and formalism: *Nyathi v Member of Executive Council for Department of Health, Gauteng*" 2009 *Constitutional Court Review* 409-427

De Vos and Freedman (eds) *South African Constitutional Law in Context*

De Vos P and Freedman W (eds) *South African Constitutional Law in Context* (Oxford University Press Cape Town 2015)

Dotan and Hofnung 2005 *Comparative Political Studies*

Dotan Y and Hofnung M "Legal defeats - political wins why do elected representatives go to court?" 2005 *Comparative Political Studies* 75-101

Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights*

Du Plessis L and Corder H *Understanding South Africa's Transitional Bill of Rights* (Juta Cape Town 1994)

Du Plessis, Penfold and Brickhill *Constitutional Litigation*

Du Plessis M, Penfold G and Brickhill (eds) *Constitutional Litigation* (Juta

Cape Town 2013)

Dugard *Human Rights and the South African Legal Order*

Dugard J *Human Rights and the South African Legal Order* (Princeton University Press New Jersey 1978)

Dugard *The Judicial Process, Positivism and Civil Liberty*

Dugard J *The Judicial Process, Positivism and Civil Liberty* (Witwatersrand University Press Johannesburg 1971)

Dyzenhaus *Judging the Judges*

Dyzenhaus D *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing Oxford 1999)

Dyzenhaus *Constitution of Law*

Dyzenhaus D *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press New York 2006)

Dyzenhaus “The Politics of Deference: Judicial Review and Democracy”

Dyzenhaus D "The Politics of Deference: Judicial Review and Democracy" in Taggart M (ed) *The Province of Administrative Law* (Hart Publishing Oxford 1997)

Ellman *In a Time of Trouble*

Ellmann D *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Clarendon Press Oxford 1992)

Ginsburg and Garoupa 2011 *Journal of International and Comparative Law*

Ginsburg T and Garoupa N "Building reputation in constitutional courts: Political and judicial audiences" 2011 *Journal of International and Comparative Law* 540-568

Hamilton *Federalist Papers No. 78*

Hamilton A *Federalist Papers No. 78* (Independent Journal New York 1788)

Humby, Kotze and du Plessis *Introduction to Law and Legal Skills*

Humby T, Kotze L and du Plessis A *An* Introduction *to Law and Legal Skills in South Africa* (Oxford University Press Cape Town 2012)

Issacharoff 2013 *Constitutional Court Review*

Issacharoff S "The democratic risk to democratic transitions" 2013 *Constitutional Court Review* 13-53

Jowett *The Dialogues of Plato*

Jowett B *Laws III: The Dialogues of Plato V* 3rd ed (Oxford University Press Oxford 1892)

Kentridge 1982 *SALJ*

Kentridge S "Telling the truth about law" 1982 *SALJ* 648-655

Klaaren 2009 *Constitutional Court Review*

Klaaren J "Dominant democracy in South Africa? A response to Choudhry" 2009 *Constitutional Court Review* 87-96

Klassen 2015 *PELJ*

Klassen A "Public litigation and the concept of "deference" in judicial review" 2015 *PELJ* 1901-1929

Klug 2010 *Constitutional Court Review*

Klug H "Finding the Constitutional Court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the court's decision making" 2010 *Constitutional Court Review* 1-32

Klug *The Constitution of South Africa*

Klug H *The Constitution of South Africa: A Contextual Analysis* (Bloomsbury Publishing London 2010)

Langa 2006 *SAJHR*

Langa P “The separation of powers in the South African Constitution" 2006

SAJHR 8-22

Madala 2001 *N.C.J. Int'l L. & Com. Reg.*

Madala TH "Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary" 2001 *N.C.J. Int'l L. & Com. Reg.* 743- 765.

Madison *The Federalist No. 51*

Madison J *The Federalist No. 51* (Independent Journal New York 1788)

Madlingozi 2008 *Constitutional Court Review*

Madlingozi T "The Constitutional Court, court watchers and the commons: a reply to Professor Michelman on constitutional dialogue, 'interpretive charity' and the citizenry as *sangomas*" 2008 *Constitutional Court Review* 63-75

Mahomed 1998 *SALJ*

Mahomed I "The role of the judiciary in a constitutional state" 1998 *SALJ* 111- 115

Martin 2006 *Round Table*

Martin R "The rule of law in Zimbabwe" 2006 *The Round Table* 239-253

Mathews and Albino 1966 *SALJ*

Mathews A and Albino R "The permanence of the temporary: An examination of the 90- and 180- day detention laws" 1966 *SALJ* 16-43

McLean *Constitutional Deference*

McLean K *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press Pretoria 2009)

Mendes 2010 *Constitutional Court Review*

Mendes C "Fighting for their place: constitutional courts as political actors: A reply to Heinz Klug" 2010 *Constitutional Court Review* 33-43

Mhodi *The Constitutional Experience of Zimbabwe*

Mhodi P *The Constitutional Experience of Zimbabwe: Some Basic Fundamental Tenets of Constitutionalism which the New Constitution Should Embody* (LLM-dissertation University of KwaZulu-Natal 2013)

Michelman “Constitutional Supremacy and Appellate Jurisdiction in South Africa”

Michelman FI "Constitutional Supremacy and Appellate Jurisdiction in South Africa" in Woolman S and Bishop M (eds) *Constitutional Conversations* (Pretoria University Law Press Pretoria 2008)

Mishra 2015 *Indian Journal of Law & Liberty*

Mishra A "Law and liberty: A tug of war" 2015 *Indian Journal of Law & Liberty* 1-18

Moseneke 2008 *SAJHR*

Moseneke D "Separation of powers, democratic ethos and judicial function: Oliver Schreiner memorial lecture" 2008 *SAJHR* 341- 353

Moseneke 2012 *SALJ*

Moseneke D "Striking a balance between the will of the people and the supremacy of the Constitution" 2012 *SALJ* 9-22

Okpaluba *SAPR/PL*

Okpaluba C "Justiciability, constitutional adjudication and the political question in a nascent democracy” 2004 *SAPR/PL* 331-348

O’Regan 2012 *SAJHR*

O'Regan K "A forum for reason: Reflection on the role and work of the Constitutional Court" 2012 *SAJHR* 116-134

O’Regan 2005 *PELJ*

O'Regan K "Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution"

2005 *PELJ* 121-150

Préfontaine and Lee 1998 *Rev. quebecoise de droit int'l*

Préfontaine DC and Lee J "The rule of Law and the independence of the judiciary" 1998 *Rev. quebecoise de droit int'l* 163-186

Quinot 2010 *Constitutional Court Review*

Quinot G "Substantive reasoning in administrative-law adjudication" 2010 *Constitutional Court Review* 111-139

Ratnapala 1993 *American Journal of Jurisprudence*

Ratnapala S “John Locke’s doctrine of the separation of powers: A re-evaluation” 1993 *American Journal of Jurisprudence* 189-220

Roux 2009 *International Journal of Constitutional Law*

Roux T "Principle and pragmatism on the Constitutional Court of South Africa" 2009 *International Journal of Constitutional Law* 106-138

Roux 2014 *Constitutional Court Review*

Roux T "The South African Constitutional Court's democratic rights jurisprudence: A response to Samuel Issacharoff" 2014 *Constitutional Court Review* 33-73

Roux *The Politics of Principle*

Roux T *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press Cambridge 2013)

Shetreet 1986 *UNSW Law Journal*

Shetreet S "The limits of judicial accountability: A hard look at the Judicial Officers Act of 1986" 1987 *UNSW Law Journal* 4-16

Siyo and Mubangizi 2015 *PELJ*

Siyo L and Mubangizi J "The independence of South African judges: A constitutional and legislative perspective" 2015 *PELJ* 817-846

Strasberg-Cohen 2005 *Mishpatim v'Asakim*

Strasberg-Cohen T "Judicial independence and the supervision of the judges' conduct: Reflection on the purpose of the Ombudsman for Complaints Against Judges Law of 2002" 2005 *Mishpatim v'Asakim* 1-26

Tushnet, Fleiner and Saunders (eds) *Routledge Handbook of Constitutional Law*

Tushnet M, Fleiner T and Saunders C (eds) *Routledge Handbook of Constitutional Law* (Routledge New York 2013)

Van Wyk *et al Rights and Constitutionalism*

Van Wyk D *et al Rights and Constitutionalism: The New South African Legal Order* (Juta Cape Town 1994)

Vile *Constitutionalism and Separation of Powers*

Vile M *Constitutionalism and the Separation of Powers* (Liberty Fund Inc Indianapolis 1967)

Wade and Philips *Constitutional and Administrative Law*

Wade E and Philips G *Constitutional and Administrative Law* (English Language Book Society and Londman Group London 1978)

Weill 2014 *International Review of the Red Cross*

Weill S "Building respect for IHL through national courts" 2014 *International Review of the Red Cross* 859-879

Government publications

Public Protector 2014 *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* Report No. 25 of 2013/14

Universal Declaration of the Rights of Men and Citizen (1789)

International instruments

African Charter on Human and Peoples' Rights (1981)

Bangalore Principles of Judicial Conduct (2002)

Basic Principles on the Independence of the Judiciary (1985)

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

International Covenant on Civil and Political Rights (1976)

Internet sources

ANC 2005 http://www.anc.org.za/content/statement-national-executive-committee- occasion-93th-anniversary-anc

ANC 2005 *Statement of the National Executive Committee on the occasion of the 93rd Anniversary of the ANC* http://www.anc.org.za/content/statement- national-executive-committee-occasion-93th-anniversary-anc [date of use 21 July 2016]

Associated Press 2009 https://www.theguardian.com/world/2009/dec/16/dr-beetroot- dies-south-africa

Associated Press 2009 *South African minister who championed food to treat AIDS dies* https://www.theguardian.com/world/2009/dec/16/dr-beetroot-dies- south-africa [date of use 23 July 2016]

Chidyausiku 2010 www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimba bwe.pdf

Chidyausiku G 2010 *Modern challenges to the independence of the judiciary* www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimba bwe.pdf [date of use 22 June 2016]

Child 2011 www.mg.co.za/article/2011-10-27-mixed-reactions-to-arms-deal-term

s-of- reference

Child K 2011 *Mixed reactions on arms deal terms of reference* www.mg.co.za/article/2011-10-27-mixed-reactions-to-arms-deal-terms-of-reference [date of use 5 October 2016]

De Vos 2008 http://constitutionallyspeaking.co.za/the-hlophe-letter-of-demand/

De Vos P 2008 *The Hlophe letter of demand* http://constitutionallyspeaking.co.za/the-hlophe-letter-of-demand/ [date ofuse 12 November2015]

De Vos http://constitutionallyspeaking.co.za/between-judicial-activism-andjudicial-restraint/

De Vos P 2009 *Between judicial activism and judicial restraint* http://constitutionallyspeaking.co.za/between-judicial-activism-and-judicial-restraint [date of use 12 August 2016]

De Vos 2011 http://constitutionallyspeaking.co.za/president-zumas-keynote-address- to-access-to-justice-conference/

De Vos P 2011 *Zuma speaks at the access to justice conference* http://-constitutionallyspeaking.co.za/president-zumas-keynote-address-to-access-to- justice-conference/ [date of use 1 October 2016]

De Vos 2012 http://constitutionallyspeaking.co.za/2012/02/14

De Vos P 2012 *An ambiguous attack on constitutional democracy* http://constitutionallyspeaking.co.za/2012/02/14 [date of use 21 July 2016]

De Vos 2012 http://constitutionallyspeaking.co.za/media-statement-by-minister-rade be-about-con-court-review

De Vos P 2012 Media statement by Minister Radebe about ConCourt "review" http://constitutionallyspeaking.co.za/media-statement-by-minister-radebe-abo ut-con-court-review/ [date of use 23 August 2016]

De Vos 2014 http://www.dailymaverick.co.za/opinionista/2014-01-12-changingthe-constitution-much-ado-about-nothing/VzNsyPl97NM

De Vos P 2014 *Changing the Constitution: much ado about nothing*

http://www.dailymaverick.co.za/opinionista/2014-01-12-changing-the-constituti on-much-ado-about-nothing/#VzNsyPl97NM [date of use 30 July 2016]

De Vos 2015 http://constitutionallyspeaking.co.za/statement-by-chief-justice-and-hea ds-of-court-on-rule-of-law/

De Vos P 2015 *The judiciary's commitment to the rule of law: Statement by Chief Justice and heads of court on rule of law* https://constitutionallyspeakking.co.za/statement-by-chief-justice-and-heads-of-courts-on-the-rule-of-law/

DGRU 2014 http://www.dgru.uct.ac.za/news/has-south-african-constitutional-court- over-reached-study-court%E2%80%99s-application-separation-powers

DGRU 2014 *Has the South African Constitutional Court over-reached? A study of the court's application of the separation of powers doctrine between 2009 and 2013* http:// www.dgru.uct.ac.za/news/has-south-africanconstitutional-court-over-reached-study-court%E2%80%99s-application-separation- power -s [date of use 21 July 2016]

Gubbay 2009 www.barcouncil.org.uk/media/100365/rule_of_law_lectu re_agub-bay _0 91209.pdf

Gubbay AR 2009 *The rot started many years ago: The progressive erosion of the rule of law in independent Zimbabwe* www.barcouncil.org.uk/ media/100365/rule_of_law_lecture_agubbary_091209.pdf [date of use 29 June 2016

Harpter et *al* 2016 www.news24.com/SouthAfrica/News/zuma-lashes-anc-veterans

Harper *et al Zuma lashes ANC veterans* www.news24.com/SouthAfrica/ News/zuma-lashes-anc-veterans [date of use 6 November 2016]

Kings 2016 www.mg.co.za/article/2016-04-21-no-big-bangs-in-arms-deal

Kings S 2016 *No big bangs in arms deal* www.mg.co.za/article/2016-04-21- no-big-bangs-in-arms-deal [date of use 3 November 2016]

Mokone 2012 http://www.timeslive.co.za/thetimes/2012/06/07/ramatlhodi-flays-

the- judiciary

Mokone T 2012 *Ramatlodi flays the judiciary* http://www.timeslive.co.za/th etim-es/2012/06/07/ramatlhodi-flays-the-judi ciary [date of use 13 June 2016]

Moseneke 2012 http://www.constitutionalcourtreview.co.za/wpcontent/uploads/- 201 5/ 08/Courage-of-Principle.pdf

Moseneke D 2012 *Courage and principle: Reflections on the 30th anniversary of the assassination of Ruth First* http://www. constitutionalcourtreview.co.za/wpcontent/uploads/2015/08/Courage-of-Principle.pdf [date of use 23 July 2016]

News24Wire 2016 http://businesstech.co.za/news/government/125807/democr-acy-is-not-court-zuma/

News24Wire 2016 *Democracy is not court: Zuma* http://businesstech.co.za /ne ws/government/125807/democracy-is-not-court-zuma/ [date of use 5 June 2016]

Ngobeni 2016 http://www.iol.co.za/sundayindependent/concourt-erred-on-nkand la- ruling-

Ngobeni P 2016 *Concourt erred on Nkandla ruling* http://www.iol.co.za/rul ing https://iol.co.za/sundayindependent/concourt-erred-on-nkandla-ruling-20 07309 [date of use 21 July 2016]

O'Regan 2011 http://hsf.org.za/siteworkspace/helen-suzman-memorial-lecture-nove mber-2011.pdf

O'Regan K 2011 *A Forum for reason: Reflections on the role and work of the Constitutional Court* http://hsf.org.za/siteworkspace/helen-suzman-m emorial- lecture-november-2011.pdf [date of use 21 September 2016]

Oxford University 2016 https://enoxforddictionaries.com/definition/enlightenment

Oxford University 2016 *Oxford English Living Dictionaries* https://enoxford dictionaries.com/definition/enlightenment [date of use 1 October 2016]

Rentz 2009 http://www.coplac.org/publications/metamorphosis/metamorphosis.php-?a=Fall2009&p=1&c=ss&s=title&o=ASC

Rentz C 2009 *The Platonic guardians? Judicial activism in pursuit of social justice* http://www.coplac.org/publications/metamorphosis/metamorphosis.ph-p?a=Fall 2009&p=1&c=ss&s=title&o=ASC [date of use 1 August 2015]

South African History Online 1995 http://www.sahistory.org.za/archive/speech-president-nelson-mandela-inauguration-constitutional-court-johannesburg-14-febr uary-1

South African History Online 1995 *Speech at the inauguration of the Constitutional Court* http://www.sahistory.org.za/archive/speech-president-nelson-mandela-inauguration-constitutional-court-johannesburg-14-february-1 [date of use 10 June 2016]

Staff Reporter 2012 http://mg.co.za/article/2012-02-10-power-of-constitutional-review- is-real-issue-behind-attack-on-judiciary

Staff Reporter 2012 *Power of constitutional review is real issue behind attack on judiciary* http://mg.co.za/article/2012-02-10-power-of-constitutional-review- is-real-issue-behind-attack-on-judiciary [date of use 8 June 2016]

The Citizen 2015 http://citizen.co.za/655996/zuma-in-high-level-meeting-with-sas-top- judges/

The Citizen 2015 *Zuma in high-level meeting with SA's top judges* http://citizen.co.za/655996/zuma-in-high-level-meeting-with-sas-top-judges/ [date of use 21 July 2016]

Treatment Action Campaign 2011 http://www.tac.org.za/newsletter/2001/ns03_08_2001

Treatment Action Campaign 2001 *Treatment Action Campaign* http://www.tac.org.za/newsletter/2001/ns03_08_2001 [date of use 23 July 2016]

Yawa 2016 http://europenewsweek.com/thabo-mbeki-south-africa-hiv-aids-436012?rm=eu

Yawa A 2016 *Why Mbeki's HIV views have no place in South Africa*

http://europenewsweek.com/thabo-mbeki-south-africa-hiv-aids-436012?rm=eu [date of use 23 July 2016]