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Does the lack of sufficient formulation and articulation of principles guiding the limits of the Constitutional Court undermine its legitimacy?

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Abstract

It is not simply enough to have a separation of powers written on paper. In this paper I shall look at the pragmatic approach adopted by the Constitutional Court when adjudicating upon executive and legislative power in order to ensure its institutional security and legitimacy. I shall evaluate throughout this paper how the lack of sufficiently and consistently formulating and articulating principles that guide the Constitutional Court's own limits could actually undermine the Court's legitimacy in our current political climate.

1. INTRODUCTION

1.1 Background and research question

The Constitution[1] grants the judiciary with the responsibility of being the ultimate guardian of the Constitution.[2] All power is derived from and in accordance with the values set out in the Constitution, of which the judiciary is the final arbiter.[3] The judiciary is often tasked with the power to strike down legislation that is inconsistent with the Constitution as well as set aside power that is exercised unlawfully.[4] All public power is bound by the rule of law and reviewable by the court.[5]

South Africa does not follow a rigid separation of powers[6] and the judiciary possesses extensive judicial review powers[7]. The Constitutional Court has reaffirmed its powers by virtue of the clear language of the supremacy clause[8], namely that the Constitution alone sets the review standard for executive and administrative action.[9]

As a result of the South African Constitutional Court's constitutional mandate and extensive review powers, the Court often adjudicates upon power exercised by other branches of government. However the Constitutional Court will only review such powers in terms of whether the powers were exercised in accordance with the Constitution, or whether legislation conforms with the Constitution.[10] The Court usually does not look into the substantive merits of the decision.

In relation to the Constitutional Court's comprehensive review powers, Seedorf and Sibanda have stated that:

> 'In such a constitutional system [the South African constitutional system] it is necessary that the courts themselves formulate, articulate and apply principles for guiding the limits of their own powers and preventing their abuse. The

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[1] The Constitution of the Republic of South Africa, Act 108 of 1996 ('The Constitution of South Africa')
[2] *President of the Republic of South Africa & Others v South African Rugby Union & Others* 1999 (4) SA 147 (CC) at para 72-73
[3] S Seedorf & S Sibanda 'Separation of powers' in Woolman et al(eds) *Constitutional law of South Africa* looseleaf 2ed (2008) Chapter 12 at 12-52
[4] Ibid
[5] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58
[6] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) ('First Certification Judgment') at para 111
[7] Seedorf & Sibanda op cit (n3) 12-51
[8] S 1(c) of The Constitution of South Africa
[9] *Pharmaceutical Manufacturers Association of SA in re: Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at para 85
[10] *Ferreira v Levin NO & Others v Powell NO & Others* 1996 (1) SA 984 (CC) at para 180

> formulation and application of these principles is important for the actual self-constraint that the courts exhibit. However the articulation if these principles is equally important. Since the ultimate constraint on the abuse of power by the court is political, articulation publicizes the standards by which the exercise of the courts' powers will be measure by society and its elected representatives. The courts' powers if improperly and irresponsibly exercised, may undermine the courts' institutional legitimacy and lead to a situation where the other branches of government no longer respect the authority of the courts.'[11]

The Constitutional Court has on several occasions made a conscious decision based on separation of powers not to interfere with decisions by other branches of government, provided that they are in line with the Constitution.[12] It can be seen however that the Constitutional Court sometimes uses the separation of powers as an 'express principle of constitutional law, while on other occasions it provides a more hidden rationale for the Court to employ other tools of constitutional interpretation to justify a deferential approach'.[13]

From an analysis of the cases that the Constitutional Court has adjudicated upon, it is observed that the judiciary does not always follow strict constitutional principle. Roux[14] has suggested that the Constitutional Court does not always follow strict constitutional principle as the Constitutional Court sometimes trades off principle against pragmatic considerations in order to maintain its institutional security in a dominant party democracy such as South Africa.[15]

The perfect example is between the case of *United Democratic Movement v President of the Republic of South Africa*[16], on the one hand, where the court chose to take a deferential approach and observe the separation of powers, and the *New National Party*[17] case on the other hand, where the court chose to provide an interpretive role to the political participation rights and democracy, thus providing a deeper level of scrutiny into the actions of the other branches of government.

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[11] Seedorf & Sibanda op cit (n3) 12-55 – 12-56
[12] Ibid
[13] Seedorf & Sibanda op cit (n3) 12-72
[14] T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law*
[15] Ibid at 27
[16] *United Democratic Movement v President of the Republic of South Africa* 2003 (1) 495 (CC) *('UDM')*
[17] *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC) *('New National Party')*

As stated above, it is vital for the Constitutional Court to 'formulate and articulate principles' that guide its own limits in order to prevent abuse by the court, however the cases of *UDM* and *New National Party* illustrate how the Constitutional Court does not always follow strict constitutional principle. The Constitutional Court may sometimes 'prevent the legislature from pursuing a particular policy by subjecting it to a strict constitutional standard', whilst on other occasions the Constitutional Court may 'defer to the legislature's policy choice, without any apparent logic or coherent justification connecting the two sets of cases'.[18]

In this paper I wish to explore how the pragmatic approach adopted by the Constitutional Court prevents it from sufficiently formulating and articulating principles that guide its own limits and how over time this may undermine the Constitutional Court's own legitimacy.

1.2 Structure of dissertation

In part 2 of this paper, I shall give an overview of the South African model of separation of powers. I shall discuss how South Africa's one-party dominance affects the separation of powers, which has resulted in the judiciary playing a sensitive and crucial role.

In part 3, I consider how the establishment of the Constitutional Court and its composition has influenced the way the political branches have received and respected decisions that the Constitutional Court has handed down, which has contributed to enhancing its institutional legitimacy.

In part 4, I look at the balance that the Constitutional Court has to exercise between its extensive powers of judicial review and the separation of powers. I shall particularly illustrate from an number of cases that it is often unpredictable when the Constitutional Court will observe the separation of powers and that the actual guiding limits of the Court's power is rather faint.

In part 5, I shall consider a foreign jurisdiction, namely that of Canada, in order to identify if there are any lessons that the South African Constitutional Court could learn in the judicial review of the executive and legislative powers.

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[18] Seedorf & Sibanda op cit (n3)12-72

In part 6 of this paper, I shall conclude that in the current political climate, the lack of sufficiently formulated and articulated principles guiding the limits of the Constitutional Court can actually undermine its legitimacy.

2. Separation of powers: The South African context

2.1 Separation of powers prior to 1994

The Westminster system was used in South Africa before 1983which was as a result of our British past. The Westminster system centralized political power in an elected Parliament. [19] Parliamentary sovereignty reigned as Parliament controlled the executive in theory and its decisions were not subject to control by any other institution.[20] As a result the 'constitutional' system in South Africa prior to 1983 was not founded fully on the doctrine of separation of powers.[21] However there were several components of the separation of powers doctrine present[22], namely the classification of political power into legislative, executive and judicial functions, and the judiciary was in theory guaranteed independence from both legislative and executive interference.[23] The distinctions afforded to the different branches of government were however merely formal and hence did not amount to a real and meaningful system of checks and balances.[24] 'The 1983 South Africa Constitution[25] is particularly noted for the absence of substantive power constraints and for vesting supreme power in the executive, with a particularly potent State President at the helm'.[26] The absence of a meaningful separation of powers doctrine during the Apartheid era allowed the 'endemic invasion of fundamental rights and the political exclusion and economic impoverishment of the poor and working classes'.[27] The end of Apartheid marked the end of the Westminster system in South Africa. South Africa had transformed from a racially divided society into democratic, socially inclusive

[19] Seedorf & Sibanda op cit (n3) 12-16
[20] Ibid
[21] JD van der Vyver 'Separation of Powers' (1993) 8 South African Journal of Public Law 177
[22] Ibid at 188-189
[23] Ibid
[24] Van der Vyver op cit (n21) at 189
[25] The Constitution of the Republic of South Africa, Act 110 of 1983 ('1983 Constitution')
[26] Van der Vyver op cit (n21) 188
[27] *D Moseneke 'Oliver Schreiner Memorial lecture: separation of powers, democratic ethos and judicial function'* 2008 *SAJHR* 341 at 347

society that made a break from the past. The arrival of the 'new order' was based on the ideals of constitutional supremacy.[28]

2.2 Separation of powers post 1994

Constitutional Principle VI introduced the separation of powers doctrine to our constitutional jurisprudence. The Constitutional Principles served as a guideline for the Constitutional Assembly in its drafting of our final constitution.[29] Constitutional Principle VI provided that 'there shall be a separation of powers between the Legislature, Executive and the Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' The drafters of the Final Constitution regarded the separation of powers not as a goal in itself but as a means to democracy and good governance.

The 1996 Final Constitution makes no express mention of the separation of powers doctrine. However, the Constitutional Court in the *First Certification*[30] judgment noted that there is no fixed or rigid constitutional doctrine of separation of powers and that the separation of powers doctrine is to be found in the provisions outlining the functions and structure of various organs of state and their respective independence and interdependence.[31] The doctrine of separation of powers is part of our constitutional design and this is clearly present in Chapters Four and Eight of the Constitution which provide for a clear separation of powers between the three spheres of government.[32]

> 'The separation of powers doctrine is not fixed or rigid and the courts are duty bound to develop a distinctively South African model of separation of powers: a separation of powers doctrine that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing which is informed 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'.[33]

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[28] Seedorf & Sibanda op cit (n3) 12-17
[29] Seedorf & Sibanda op cit (n3) 12-18
[30] *First Certification* supra (n6)
[31] Ibid at para 108
[32] Ibid
[33] Judge Phineas Mojapelo ' The doctrine of separation of powers (a South African perspective) April 2013 *The Advocate* at 39

2.3 Relationship between the South African National Executive and National Legislature: Checks and balances

A strict separation of powers also means a separation of personnel within the different spheres of government.[34] In this view, members of the executive could not also be members of the legislature. However according to the separation of powers doctrine in the South African context, the Constitution does not provide for a separation of personnel between the legislature and the executive.[35] This is as a result of our Westminster heritage.[36] South Africa currently has a parliamentary system with remnants of its Westminster past still evident in the constitutional design of our central institutions.[37]

The role of the Legislature is set out in section 44(1) of the Constitution, which entails the power to make laws, to amend the Constitution, and to assign or delegate legislative powers to other legislative bodies in another sphere of government.[38]

The Executive authority is vested in the President and is exercised by the President together with the other members of cabinet.[39] The Executive functions are set out in section 85(2)(a)-(e) of the Constitution.[40]

However, regardless of the institutional separation of Parliament and the National Executive in our Constitution, members of the National Executive (except for up to two members) must at the same time be members of the National Assembly. As a result, an almost complete majority of members of the National Executive are simultaneously members of the National Assembly.[41] Hence there is no separation of personnel between the legislative and executive branch of government.

The constitutionality of the members of the executive also being members of the National legislature was tested in the *First Certification*[42]judgment, however the Court

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[34] MJC Vile *Constitutionalism and the Separation of powers* (1967) 40
[35] Van der Vyver op cit (n21) 188-189
[36] Ibid
[37] Christina Murray ' Legislature, Executive and Judicial Authority in a quasi federal state' https://www.academia.edu/505689/Republic_of_South_Africa_Legislative_Executive_and_Judicial_Governance_in_a_quasi_federal_state (last accessed on 15 April 2014) at 4
[38] S 44(1) of the Constitution of the Republic of South Africa, Act 108 of 1996
[39] S 85(1) of the Constitution of the Republic of South Africa, Act 108 of 1996
[40] S 85(2) of the Constitution of the Republic of South Africa, Act 108 of 1996
[41]Seedorf & Sibands op cit (n3) 12-23
[42] *First Certification* supra (n6) at para 109

was of the view that this particular feature ensured accountability of the executive to the legislature. In terms of our Constitution, the executive is placed under the scrutiny of the National Assembly 'to ensure that all executive organs of state in the national sphere of government are accountable to it',[43] as well as oversight over the exercise of the National Executive power in the implementation of legislation.[44]

This provision of the Constitution illustrates the idea of 'checks and balances' between the different branches of government. The purpose of checks and balances is to ensure that the different branches of government control each other and serve as counter weights to the power possessed by the other branches.[45] In other words, its purpose is to make government accountable to each other.

2.4 The effect that South Africa's dominant party democracy has on the checks and balances provided for by the Constitution

The African National Congress (ANC) is the ruling party of South Africa. The party maintains close to a two-thirds majority in the legislature. South Africa is said to have a number of pathologies of a dominant party democracy which are namely[46], the lack of an effective opposition party which could credibly contend for power against the ANC[47]; the shift of the locus of politics and political accountability away from the formal institutions of parliamentary democracy into the party itself[48], and lastly the ANC's dominant status has eroded the checks on the power of the executive which was created by the South African Constitution.[49] The ANC's dominant status has undermined precisely those procedures and mechanisms that should operate through political means in these circumstances to check its power.[50]

Political parties in parliamentary systems tend to be stronger because they have the responsibility of forming a government and will be unable to do so without some discipline.[51] Members of the political party as a result have some incentive to defer to

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[43] s 55(2)(a) of The Constitution of the Republic of South Africa, Act 108 of 1996
[44] S 55(2)(b) of The Constitution of the Republic of South Africa, Act 108 of 1996
[45] *Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC)para 112
[46] Sujit Choudry '"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 at 11
[47] Ibid at 13
[48] Choudry op cit (n46) 12
[49] Choudry op cit (n46) 11
[50] Ibid
[51] J Bowen and S Rose-Ackerman "Partisan Politics and Executive Accountability: Argentina in Comparative Perspective" (2003) *Supreme Court Economic Review* pp 157- 210 at p 159

the party leadership in taking positions and casting votes. The strongest political parties will be produced by a closed list proportional representation electoral system because 'party leaders have a high level of control over the rank and file since the leadership determines rank on the party list'. [52]

South Africa, as mentioned above, has a parliamentary system and our electoral system is one based on closed list proportional representation. The dominant party makes up almost two-thirds of the Legislature and the entire National Executive. The ANC is a large mass party with an external power base.[53]As a result the party exercises a stricter and more institutionalized regulation of group activities.[54] The ANC exercises discipline over its members through several means, most notably through constitutional (anti-defection clause) and parliamentary rules (the role of parliamentary whips).[55] These disciplinary measures are intended to ensure that the members of parliament pursue party policy as defined by the ANC leadership.[56]

The strong presence of party discipline leaves much of the power to be held by party bosses who determine the ranks of members on the party list. There is little incentive for members of parliament to step out of line of the party policy for fear of losing their seat.[57] The shift of the locus of politics has shifted away from formal institutions to within the party[58]. The National Executive (except for two members) are members of the ANC and also members of parliament and as well as a majority of the legislature comprising of the ANC and the strict party discipline within the ANC. The checks and balances as set out in the Constitution under s 55(2) on the power of the National Executive by the Legislature is largely ineffective.[59]

The Judiciary, which is independent, impartial, not politically influenced and the ultimate guardian of the Constitution, often provides effective oversight over the other two branches of government.[60] The Judiciary as a result is placed in an ideal position

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[52] Ibid
[53] H Mathisen and E Tjonneland '*Does Parliament matter in new democracies? The case study of South Africa 1994-2000'* (2001) at 8
[54] Ibid
[55] Choudry op cit (n46) 9
[56] Ibid
[57] Bowen and Rose-Ackermann op cit (n51) 160
[58] Choudry op cit (n46) 12
[59] Choudry op cit (n46) 11
[60] Seedorf and Sibanda op cit (n3) 12-27;

of holding the executive and legislature accountable, as there is no public power that is beyond judicial scrutiny.[61]

2.5 Role of an independent Judiciary in a dominant party democracy

An independent judiciary is important in a dominant party democracy in order to uphold the rule of law. In discharging its function as the ultimate interpreter of the Constitution, the Court usually draws on a set of background assumptions about the nature of South African politics and derives its constitutional role from this understanding.[62]

The Constitutional Court has emphasised that their primary duty is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. [63] This reaffirms their role as the guardian and final arbiters of our Constitution.

The judiciary provides the most crucial check against the executive and legislature through judicial review of the legislative and executive action. According to Pieterse, '[j]udicial review of legislative and executive action is arguably both the most common and most dramatic instance of checks and balances'.[64] The judiciary plays an important role in most constitutional systems, and especially in the South African constitutional context as the Constitution places the judiciary in a position that is independent from the legislative and executive branches and thus not confined to the politics between these branches.[65]

Ncgobo CJ has eloquently stated that

> '[t]he judicial branch is responsible not only for resolving disputes between private parties but also for resolving disputes between government and private parties and even disputes between different branches or sectors of government. It has the responsibility to protect individuals from government overreaching, and it plays an important role in our country's constitutional balance of powers.

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[61] *Heath* supra (n45)at para 46
[62] Choudry op cit (n46) 33
[63] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 113. (*TAC*)
[64] M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 at 386
[65] M Dlamini ' The political nature of the judicial function' (1992) 55 *THRHR* 411 at 414

> Indeed, Sometimes the judiciary is the fulcrum on which powers of government are balanced. The judiciary, after all, is the branch of government that holds the other branches to their responsibilities.'[66]

As a result of the vital role and responsibility that the Judiciary has been granted, it is essential that the separation of powers is upheld and the independence of the Judiciary is maintained.[67] As stated above, all power is bound by the rule of law and reviewable, and the judiciary bears the task of reviewing such power. The Constitution guides the judiciary in the exercise of their judicial review power.[68] The judiciary however must utilize their judicial review power with caution so as not to enter into the realm of the legislative or executive branch.

It is thus essential that the judiciary consciously strikes a delicate balance between its duty to ensure that all public power is exercised in accordance with the rule of law on the on hand, and its duty to ensure that it does not infringe upon the terrain of the legislative or executive branch on the other hand.[69] Lenta points out that given the large breadth of judicial review powers that the court is granted with, it is essential that the 'defensible limits of judicial review' are carefully defined and observed by our courts.[70]

2.6 Counter-majoritarian dilemma

Lenta points out the validity of

> 'whether and the extent to which judicial decisions which strike down legislation enacted by democratic elected legislature, or decisions which contradict the wishes of the majority may be deemed democratic'.[71]

This is formally known as the counter-majoritarian dilemma. The South African Constitutional Court has been accused on numerous occasions of being counter-majoritarian by our ruling party (ANC), these accusations are often linked to the 'theme of transformation' which 'insinuates' that a 'suitably transformed' judiciary

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[66] S Ncgobo ' Sustaining public confidence in the judiciary: An essential condition for realizing the judicial role' (2011) 218 *SALJ* 5 at 9
[67] *Heath* supra (n45) at para 26
[68] S 165 & s167 of the Constitution
[69] *De Langa v Smuts NO* 1998 (3) SA 785 (CC) at paras 60-61
[70] P Lenta 'Judicial restraint and overreach' (2004) 20 *SAJHR* 544 at 544; 575; 576
[71] P Lenta ' Democracy, Rights Disagreement and Judicial Review' (2004) 20 *SAJHR* 1 at 3

would be sympathetic to the ruling party.[72] I shall discuss this counter-majoritarian dilemma a little further in part 5 with regard to accountability and democratic dialogue.

The Judiciary in South Africa is at a pivotal moment[73], the Constitutional Court often acts strategically when reviewing the decisions of other branches of government in order to maintain its institutional security in a dominant party democracy.[74] The continuous calls for transformation of the judiciary by the ANC may also have an impact on the impendence and impartiality of the judiciary thus eroding the Constitutional Court's legitimacy.[75] The ANC has regarded the Constitutional Court as being 'counter-revolutionary' and called for the mobilization of the judiciary.[76] The idea of transformation within the judiciary is sometimes mistaken for political compliance.[77] The Constitution clearly provides the Judiciary with the 'necessary means to resist encroachments by the political branches of government'[78]. As the guardian of the Constitution[79] which has the authority to review all public power[80], the 'mandate for judicial review would be meaningless if the Constitutional Court were faced with the prospect of seeing its members replaced by more politically compliant judges, or being closed down or having its powers significantly curtailed'.[81]

As an independent branch, that is capable of ensuring that the legislature and executive do not abuse their power, and having thus far lived up to this expectation, it is vital that the Constitutional Court maintains not only its institutional security, but also its sociological legitimacy-especially in South Africa's dominant party democracy where the checks and balances between the political branches have withered away.[82] This is necessary in order for the Constitutional Court to effectively carry out its constitutional

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[72] Murray Wesson and Max Du Plessis '*Fifteen years on: Central issues relating tot the transformation of the South African Judiciary'* (2008) 24 SAJHR 187 at 188
[73] Ibid at 187-213
[74] Roux op cit (n14)
[75] 'ANC fears "mobilization" of judges against Zuma' Business Day (4 August 2008)
[76] Ibid
[77] Louise *Vincent* 'Of no account? South Africa's electoral System (non) debate' *(2006) Journal of Contemporary African Studies* 81-100 at 91
[78] Sibanda and Seedorf (n1) at 12-73
[79] *SARFU* supra (n2) at paras 72-73
[80] *Pharmaceuticals* supra (n9) at par 85
[81] Seedorf & Sibanda op cit (n3) 12-73
[82] Roux (n14) above; Seedorf & Sibanda op cit (n3) 12.3 (d)(iii)

mandate in holding the branches of government accountable, and as a result upholding the rule of law.[83]

Throughout the rest of this paper I wish to illustrate the current institutional and sociological legitimacy of the Judiciary in South Africa, and how this can be maintained and strengthened by the Judiciary adopting an appropriate form of deference suitable to the South African context.

In the next part I aim to give an overview on the establishment of the Constitutional Court and how it is this as well as the composition of the Court that has influenced the way the political branches have received and respected decisions handed down by the newly established Court, thus enhancing and ensuring its institutional legitimacy. I also look at the downside of the approach that the Court uses in handling the political branches and how this can over time erode its institutional legitimacy.

3. The Constitutional Court

The Constitutional Court ('CC') is a product of South Africa's democratic transition.[84] The Technical Committee involved in South Africa's transition process agreed that 'the judiciary shall be competent, independent, and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights'.[85] There were several key points pertaining to structure, composition and jurisdiction that the negotiating parties disagreed upon, most notably, 'whether the CC should be instituted as a separate arm of the judiciary; whether it should have exclusive jurisdiction in constitutional matters; the qualifications needed by prospective CC judges; and the procedure for their appointment'.[86] The underlying question in each case was how best to ensure the independence, quality and legitimacy of the CC.[87] There was the unspoken feeling amongst several parties and organisations that the existing Appellate Division lacked the political legitimacy to play the role of a court

[83] Ibid
[84] H Klug *The Constitution of South Africa: A contextual analysis* (2010) 223
[85] R Spitz & M Chaskalson *The Politics of Transition: A hidden history of South Africa's negotiated settlement* (2000) 191
[86] Klug op cit (n84) 231
[87] Ibid

of final appeal on constitutional issues and, further, that the composition of a CC's bench had to be a fair reflection of society.[88]

Chief Justice Corbett of the Appellate Division of the Supreme Court of Appeal felt that a separate CC would actually undermine the 'prestige and authority' of the Supreme Court of Appeal and that this separate court would be considered to be political and would in essence undermine the 'evolution of a human rights culture in South Africa and the legitimacy of the Constitution as the supreme law'.[89] Corbett CJ was of the view that the Constitutional Court created to uphold the Bill of Rights should not be a separate court, but rather a special chamber within the Supreme Court of Appeal.[90] A further issue was that the Technical Committee suggested that Constitutional Court judges be nominated by an all-party parliamentary process and be appointed by 75 percent majority of Parliament.[91] This conflict had brought the multi-party negotiations to a deadlock as the significance of the proposed Constitutional Court became increasingly clear.[92]

In the end it was decided that a separate Constitutional Court with final jurisdiction on all final constitutional matters would be established as well as 'adopting specific rules relating to the appointment of new justices to ensure a presence of some sitting judges on the bench thus simultaneously providing change and continuity'.[93]

The CC was an 'essential element' in facilitating transition in South Africa through a 'two-stage process of democratic change'.[94] In the first stage, South Africa adopted an interim Constitution and held a democratic election to 'elect a new government and a legislative body whose two houses met jointly to form a Constitutional Assembly'.[95] In the second stage, the Constitutional Assembly then adopted an agreed set of Constitutional Principles in order to produce a final Constitution for the democratic South Africa.[96] It was the duty of the newly established CC to ensure that the

[88] Klug op cit (n84) 231
[89] Ibid
[90] Ibid
[91] Klug op cit (n84) 232
[92] Ibid
[93] Ibid
[94] Klug op cit (n84) 224
[95] Ibid
[96] Klug op cit (n84) 224

Constitution produced by the Constitutional Assembly complied with the Constitutional Principles.[97]

3.1 The CC and the ANC

The African National Congress, which was and still is the dominant political force in South Africa after the 1994 elections was the 'greatest political actor with greatest capacity to attack the court and also held the most effective means of protectiing it'.[98] Whilst taking into consideration that there was an overwhelming absence of an effective opposition, 'the ANC's interest in respecting the Court's independence would not have been the Court's potential role in assisting it to regain power in the event that it was voted out of office'.[99]

The CC lack of public support is significantly lower than that which is 'ordinarily thought, to act as a buffer against political attack'.[100] According to Roux, given the absence of a credible opposition party, the ANC might actually have been able to protect the Court against the effects of its low public support- especially if the Court served some useful purpose to the ANC.[101] Roux states that the burden of persuasion of proving that the CC's starting position was equivalent to that of CCs in mature democracies, can be discharged by means of four potential arguments[102]:

Firstly, 'the CC began its work in a political environment that was marked, if not only by political fragmentation, then at least by a fair measure of political uncertainty'.[103] The ANC during South Africa's transitional period was not the dominant political force at the time and needed the co-operation of other parties for the adoption of the Interim and Final Constitution.[104] The ANC however did have the opportunity to control and use the Court in order to ensure that the 'procedural and substantive safeguards for the protection of minority rights in the Final Constitution did not pose

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[97] Ibid
[98] T Roux *The Politics of Principle: The first South African Constitutional Court 1995-2005* (2013) 125
[99] Ibid
[100] Roux op cit (n98) 125
[101] Roux op cit (n14) 27
[102] Roux op cit (n98) 126
[103] Ibid
[104] Ibid

an obstacle in order to achieve their policy goals', whilst on the other hand 'the CC's stamp of approval was necessary in order to ensure a solid transition to democracy'.[105]

Secondly, the ANC's strong 'internal tradition of respect for judicial independence', and especially 'President's Mandela's charismatic leadership on the issue' would have made up for any 'deficiencies in the broader political culture, especially given the ANC's dominance of South African politics'.[106] The ANC had a long history of being a liberation movement that although often contested, used the courts for the advancement of policy goals.[107] Academics such as Roux speculate that the ANC was influenced by this history of the courts, and also 'the figure of Nelson Mandela as an attorney who had personal experience of the capacity of law to place limits on political power'[108]. This may have largely influenced the key players of the ANC and developed a 'profound commitment to the value of judicial independence'.[109]

Thirdly, the close personal and ideological ties between the judges and members of the ANC political elite could have restrained the ANC from attacking the Court. Some CC members were also members of the ANC or members of organisations that condemned the actions of the Apartheid government. 'It is one thing to be told to amend a policy by a known ideological opponent, another to be told the same thing by an opponent who lost a limb in the course of a shared liberation struggle'.[110]

Fourthly, the 'strength and diversity of South African civil society, and especially the tradition of cause lawyering that had developed under Apartheid would have made up for the centralization of political power in the hands of the ANC'.[111] The struggle against Apartheid gave birth to a large variety of civil society organisations. According to Roux, some of these organisations may still remain loyal to the ANC thus using the Court to influence the ANC policies in ways that the ANC's own internal process does not allow.[112]

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[105] Roux op cit (n98) 127
[106] Ibid
[107] Roux op cit (n98) 127
[108] Ibid
[109] Roux op cit (n98) 127
[110] Roux op cit (n14) 23
[111] Roux op cit (n98) 126
[112] Roux op cit (n98) 128

It can be suggested from the above that there is a strong connection between the ANC and the CC, and it can be seen from this connection that despite the CC's significant lack of public support, the CC is still able to maintain its institutional security due to the ANC shielding it from repercussions. I shall now turn to analyzing the legitimacy of the CC.

3.2 The legitimacy of the Constitutional Court of South Africa

The legitimacy of a court has something to do with the 'right' of a court to make decisions.[113] This is essential if courts are to fulfill the role that is assigned to them according to democratic theory.[114] It is one of the most important and essential tasks of the court in transitional political systems to develop and establish institutional legitimacy.[115] Legal legitimacy refers to the plausibility of a judicial decision or body of decisions according to conventions of legal reasoning accepted by the legal community. [116]Legitimacy is essential because the courts are often 'absent of the proverbial powers of the purse and the sword', courts are dependent upon the satisfaction of their constituents in order to gain compliance with (or acceptance of) their decisions.[117] The court's are often relied on to check the power of the governing majority and thus there need to be mechanisms in place that protect the court from the displeasure of the political branches.[118]

The South African CC has succeeded in establishing its legal legitimacy as 'most of the decisions handed down by the court seem to have been founded upon credible interpretations of the two post-apartheid Constitutions'. [119] Legal legitimacy is a variable standard as decisions can be more or less legitimate according to their persuasiveness in legal professional terms.[120]

It should be noted that the political science sense of the term legitimacy is not the same as the legal sense and differs greatly.[121] The political science sense refers to CCs

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[113] J Gibson & G Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court ' (2003) 65 *Journal of Politics* 1, 4-5
[114] Ibid
[115] Ibid
[116] Gibson & Caldeira op cit (n113) 1;5
[117] Ngcobo op cit (n66) at 7
[118] Ibid
[119] Roux op cit (n14) at 6
[120] Ibid
[121] Roux op cit (n14) at 14

acquiring both institutional security and public support.[122] Furthermore political scientists tend to assume that courts are unified political actors in terms of which judges are capable of acting in a unified manner in order to promote the interests of the court.[123] The second assumption that is made by political scientists is that in CCs in new democracies are capable of pursuing a determinate strategy over time.[124] These assumptions are not unfounded to legal theorists, they are neither self-evident. This is because although courts are sometimes regarded as engaging in co-ordinated action, 'courts are more often than not, seen to be divided into different ideological or doctrinal camps with no single coherent strategy'.[125]

The law-politics distinction is often seen as a condition of the legitimacy of the court by the legal arena.[126] A judge who decides a case on political grounds brings the legal profession into disrepute and when a court 'loses the respect of the professional community it thus becomes more vulnerable to political reprisals'.[127]

The political science account furthermore views judges of being capable of a collective action over time, this is particularly so in new democracies.[128] In a new democracy, a Constitutional Court's institutional security is not yet properly established and thus political attack is not far fetched.[129] The courts in new democracies are usually continuously aware of guarding and maintaining their independence when reviewing the powers of the political branches of government, as they cannot rely on mutual respect from the other branches of government.[130] In mature democracies the courts can usually rely on mutual respect from the political branches of government and have already established their institutional security.[131]

The South African situation is a unique one. The South African CC as stated above was born out of the multi-party negotiations that occurred during South Africa's transitional process. The ANC, which is currently the dominant party had proposed

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[122] Ibid
[123] Roux op cit (n14) 14-15
[124] Ibid
[125] Roux op cit (n14) 14
[126] Ibid
[127] Ibid
[128] Roux op cit (n14) 13
[129] Ibid
[130] Roux (n14) 13-14
[131] Ibid

and pushed forward the idea of a separate, independent CC. As stated above, most of the members of the CC share the same ideological and personal ties as the ANC elite as members of the CC had 'either been former members of the ANC or people that were broadly sympathetic to the ANC governments social transformations policies'.[132]

Academics have argued that its these ties with the ANC that has resulted in the CC maintaining it's institutional security and insulating it from public attack.[133] The South African CC is known to lack in public support. It has been argued that in a dominant party democracy, the lack of public support for a CC is unlikely to ever be translated into votes and as a result the CC may be able to ignore public opinion as a constraint on principle if the dominate party insulates the court from the immediate repercussions of its decision'.[134]

3.2.1 Public Opinion

An example of a case in which the CC's decision ran counter to public opinion, would be the death penalty case of *S v Makwanyane*[135] ('Makwanyane'). In this case there were two accused who were convicted by the then Witwatersrand Local Division on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. The two accused were sentenced to death on each count of murder and to long terms of imprisonment on the other counts.[136] The trial was concluded prior to the enactment of the 1993 Interim Constitution and thus at the time of he trial, the constitutionality of the death sentence had not arisen. The CC at the time was left with the task of deciding whether or not the death sentence was consistent with the provisions of the Interim Constitution.

The ANC's wish for the abolishment of the death penalty was relatively well known and included in their draft Bill of Rights that was presented that The Multi-Party Negotiating Process.[137] The inclusion of the right to life in the Interim Constitution allowed the ANC to argue for 'an unqualified right to life and for specific provisions

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[132] Roux op cit (n14) 23; Roux op cit (n98) 126
[133] Ibid
[134] Roux op cit (n98) 27
[135] *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)
[136] Ibid at para 1
[137] Spitz &Chaskalson op cit (n85) 331

relating to the death penalty and abortion to await the deliberations of the elected constitution-making body'.[138]

The 1993 Interim Constitution did not include an express abolition clause with regards to the death penalty. Instead the Interim Constitution included the right to life and the freedom from cruel, inhuman and degrading punishment.[139]

The Attorney- General in the present case had argued that what is considered to be cruel, degrading and inhuman treatment depended upon the attitudes of society, and that the South African society did not regard the death sentence to be such.[140] The President of the CC at the time, Justice Arthur Chaskalson had thus contained in his judgment (which formed part of the majority judgment), a detailed discussion on the relevance of public opinion. Justice Chaskalson had contended that although public opinion may have some relevance to the enquiry, public opinion cannot replace the duty vested upon the courts to interpret and uphold the Constitution. Public opinion is not decisive and if it were, there would be no need for constitutional adjudication.[141]

> 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.' [142]

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[138] Ibid
[139] *Makwanyane* supra (n135) at para 4
[140] *Makwanyane* supra (n135) at para 11
[141] *Makwanyane* supra (n135) at para 88
[142] Ibid

Although public opinion was in favour of the retention of the death penalty, the institutional security of the CC was never threatened as the ANC elite had favoured the decision and the ANC thus shielded the CC from repercussions of this decision from the public.[143]

3.2.2 Politically Controversial Cases

As stated in part 2, the CC has a broad mandate that is granted by the South African Constitution- there is no action that is beyond constitutional scrutiny. As a result there has been several politically controversial questions that the CC was left to decide. The limits of the South African separation of powers doctrine, which was discussed in the previous chapter is often tested when the CC is left to answer politically controversial questions.

In 2002, a set of laws was passed that amended the anti-defection clause at the local, provincial and national level. According to these sets of laws, floor crossing would only be permitted during two window periods of 15 days. These window periods would occur in the second and the fourth year after an election. Furthermore, a 10 percent threshold within the party would have had to be satisfied in order for members to cross the floor. The case of *United Democratic Movement v President of the Republic of South Africa*[144] was a challenge of an anti-defection clause that was passed by the Legislature. It was argued in this case that the anti-defection clause was inconsistent with the values of the Constitution, as the legislation was not passed in order to serve a specific governmental purpose but rather to serve the purposes of the ruling party who maintained an enviable majority in Parliament.[145] The CC was however not convinced that the anti-defection laws contravened the founding values of the Constitution. The Court reasoned that in a Proportional Representation system, the fact that a defection clause may operate to the disadvantage of smaller political parties does not necessarily mean that the defection is inconsistent with the Constitution.[146]

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[143] Roux op cit (n14) 27
[144] *UDM* supra (n16)
[145] *UDM* supra (n16) at para 22
[146] *UDM* supra (n16) at para 47

The court failed to give adequate attention and content to the concept of democracy as well as political rights that are enshrined in our Constitution.[147] The CC in this case took the view that the term 'democracy' was too indeterminate and thus the Court could not substitute its own view on what it felt would be the appropriate form of democracy in comparison to that of the legislature. The Court simply failed to use this opportunity to develop a 'more robust standard understanding of democracy'.[148]

The approach taken by the Court in this case is markedly different from several other cases that the Court has decided upon in which it undertook an interpretive role of the founding provisions in relation to political participation.[149] It has been speculated by many academics that the reason the court behaved in this manner in this particular case was for the sole reason of showing the deference it felt it owed to the legislature.[150]

The case of *New National Party v Government of the Republic of South Africa*[151], which involved whether the statutory requirement that voters should be in possession of a green bar coded identity which was imposed approximately six months before the 1999 general election was constitutional. This statutory requirement had an effect on the right to vote, as most voters were not in possession of a green bar coded identity document. The approach taken by the CC in this case differs from the decision of *United Democratic Front v President of the Republic of South Africa* in which the court was unified its decision. In this case the court was split as to whether this statutory requirement was unconstitutional.[152]

Yacoob J was of the view that the statutory requirement of voters' being in possession of a green bar coded identity document was not an infringement of the right to vote and thus not unconstitutional because the reasonable voter could take reasonable measures in order to exercise his or her right to vote.[153] Yacoob J went to great lengths to emphasize the separation of powers doctrine and respect for the legislative branch

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147 Oscar Sang 'The Separation of Powers and New Judicial Power: How the South African Constitutional Court plotted its course' Elsa Malta Law Review http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce_uploads/09b.pdf -last accessed on 21 January 2014

148 Seedorf & Sibanda op cit (n3) 12-54

149 Ibid; See *Minister of Home Affairs v National Institute for Crime Prevention and Re-intergration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC) at para 21

150 Seedorf & Sibanda op cit (n3) 12-71; Sang op cit (n64)

151 *New National Party* supra (n17)

152 Lenta op cit (n70) 556

153 *New National Party* supra (n17) at para 40-44

whilst still providing an interpretive role of the right to vote.[154] Yacoob J emphasized that it is the role of Parliament to determine the means on how voters should identify themselves and not the role of the court to do so. [155]

Yacoob J stated that the Court will not review Acts of Parliament passed by the legislature on the grounds on unreasonableness as the reasonableness of statutory provisions are with the ordinary competence of Parliament.[156] The only time the Court will review a statutory provision on the grounds of unreasonableness is if the Court was of the view that the statutory provision was not related to a specific governmental purpose.[157] This would make the statutory provision arbitrary and arbitrariness is inconsistent with the rule of law and the Constitution. [158]

The majority of the Court which took the view of Yacoob J and imposed a fairly low standard of judicial review although it did highlight the importance of the right to vote and the rule of law, whilst noting that parliament is not at liberty to determine how the electoral scheme is to be structured as parliament has to establish a 'rational relationship between the electoral scheme which it adopts and the achievement of a legitimate governmental purpose'.[159]

O'Regan J was of the view that the approach of the majority was overly deferential.[160] O'Regan J instead highlighted the importance of the right to vote being foundational to our democratic system and this right cannot being exercised without a legislative framework and thus this legislative framework should enhance and not limit democracy by limiting citizens participation in the political participation process.[161] As a result 'particular scrutiny is required by the court in order to ensure that fair participation in the political process is afforded'.[162]

The approach taken by the Court in the *New National Party* case is particularly different to the approach taken in the *UDM* case. The Court did not give greater

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[154] *New National Party* supra (n17) at para 24
[155] *New National Party* supra (n17) at para 19
[156] *New National Party* supra (n17) at para 47
[157] Ibid
[158] Ibid
[159] Seedorf & Sibanda op cit (n3)12-70; *New National Party* supra (n63) at para 24
[160] *New National Party* supra (n17) at para 122
[161] Ibid
[162] *New National Party* supra (n17) at para 122

interpretation to the political participation rights and democracy in the *UDM* case and merely seemed to show deference to the legislative branch.[163]

As stated in part one, it is vital for the court's to 'formulate, articulate and apply principles for guiding the limits of their own powers and preventing their abuse'.[164] *UDM* and *New National Party* are clear examples how the CC does not always follow strict constitutional principle as the CC sometimes 'prevents the legislature from pursuing a particular policy by subjecting it to a strict constitutional standard and sometimes it defers to the legislature's policy choice-without apparent logic or coherent justification connecting the two set of cases'.[165]

The CC's somewhat unpredictable approach as to not only when, but also the level of intensity of scrutiny it will adopt in the review of the other branches of government 'in order to safeguard its institutional security will over time widen the tolerance interval of the other branches of government for adverse decisions, thus allowing it too enforce the Constitution even in the most difficult cases'. [166] Sibanda and Seedorf observe that this is a reminder of the

> 'fundamental principle of separation of powers that only power arrests power and that is not enough to simply have a separation of powers written down on paper, a system of countervailing checks and balances have to be operative. Separation of powers does not prevent "the gradual concentration of the several powers in the same department", if those institutions tasked with providing limitations on the concentration and abuse of power lack "the necessary means or personal motives to resist encroachments of the others"'.[167]

The Constitution does however provide mechanisms for the protection and independence of the CC from the political branches.[168] The CC's mandate that it is given by the Constitution would be 'meaningless if the CC was to be replaced with more politically compliant judges and have its powers curtailed or even be closed down'.[169] The CC thus has to ensure its institutional security in order to prevent the

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[163] Seedorf & Sibanda op cit (n3) 12-71
[164] Seedorf & Sibanda op cit (n3) 12-56
[165] Seedorf & Sibanda op cit (n3) 12-72
[166] Ibid
[167] Seedorf & Sibanda op cit (n3) 12-72 – 12-73
[168] s 165 of The Constitution of The Republic of South Africa, Act 108 of 1996
[169] Seedorf & Sibanda op cit (n3) 12-73

legislative and executive branch from accumulating too much power and fulfill its constitutional mandate.[170]

The CC has been receiving a lot of pressure from the political branches. In the pre-run to the 2014 election, President Zuma had publicly states that the ANC wishes to make Constitutional amendments part of which will curtail the oversight powers that the judiciary currently has over the executive.[171]

The respect for the decision of the CC has been threatened on previous occasions by the political branches. In the case of *Minister of Health v Treatment Action Campaign*[172] which involved the availability of the anti-retroviral drug, Nevirapine for the treatment of HIV/AIDS, there was much contest by the Minister of Health and the President at the time, Thabo Mbeki over the use of the drug for the treatment of HIV/AIDS.[173] The Minister of Health publicly stated that she would refuse to abide by the decision of the Court if it went against her. The Minister of Health however did later retract her statement but this could have not expressed the sentiments of the ANC elite any clearer.[174] The CC eventually dismissed the state's argument of separation of powers in this case as 'irrelevant and ill founded', and gave a unanimous decision which declared that the restriction of the availability of the anti-retroviral, Nevirapine unconstitutional and a violation of the applicant's rights to have access to health care services.[175] The CC imposed an order that mandated the provision of Nevirapine in all public hospitals and clinics.[176] The political branch, despite the comments of the Minister of Health did eventually uphold and respect the decision of the CC.

This was one of the few cases where the CC relied heavily on public opinion and went against the wishes of the ANC political elite.[177] Roux argues that the CC tends to exploit political circumstances on principle and in this way build its legitimacy.[178]

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[170] Ibid
[171] President Zuma speech on 9 January 2014 at ANC 102 Birthday Celebrations- http://m.timeslive.co.za/thetimes/?articleId=10706459
[172] *TAC* supra (n63)
[173] M Heywood 'Preventing Mother-to-child HIV Tranmission in South Africa: Background strategies and Outcomes of the Treatment Action Campaign's case against the Minister of Health' (2003) 19 *SAJHR* 278, 306
[174] Heywood op cit (n173) 308
[175] *TAC* supra (n63) at para 96-106
[176] Ibid
[177] Roux op cit (n14) 38
[178] Ibid

As stated in part 1, the CC is not always in a position to hand down decisions based solely on principle and often has to act pragmatically and compromise on principle in order to avoid direct confrontation with the political branches and ensure its institutional legitimacy. [179]

4. DEFERENCE AS RESPECT

In this chapter I will discuss the concept of deference and analyse the approach of deference that the South African courts use when dealing with the legislative and executive branch. The South African Constitutional Court has preferred to use the term 'respect', rather than deference when dealing with the legislative and executive branch, this will be discussed below.

4.1 What is deference?

As part of the process of judicial review, courts often assess the exercise of public power for consistency with constitutional norms.[180] The courts have a degree of discretion regarding how strictly the norms are to be applied- they can apply the norms strictly thus encompassing a high level of judicial scrutiny, on the other hand they can apply the norms more leniently and prefer to accept the wisdom of the legislature or executive that it has in fact met the standard required by the norm in question.[181] It is this degree of discretion that is encompassed in the notion of deference. Deference is thus not an all-or –nothing approach but rather a range of approaches to the institution whose action is under review as well as the action itself. Deference is the court's understanding of its role and the role of other branches of government in adjudication.[182]

According to Lenta, the concept of deference 'arises out of the observation of the separation of powers' as the separation of powers doctrine requires that the 'judiciary refrain from intruding unnecessarily into the realm of the other branches of government'. [183]

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[179] Roux op cit (n14) 38-39
[180] Kirsty Mclean *Constitutional deference, Courts and socio-economic rights in South Africa* (2009) 61
[181] Ibid
[182] Mclean op cit (n180) 62
[183] Lenta op cit (n70) 457

Dyzenhaus distinguishes between two definitions of deference.[184] The primary definition of deference, which is based upon Dicey's rule of law theory, means 'submission to authority'.[185] The secondary definition of deference is deference as respect. According to Dyzenhaus, the secondary definition of deference as respect 'provides an ideal which can inform an attempt to rearticulate the relationship between the Legislature, the courts and the administration in such a way that the courts retain a legitimate role as ultimate authority on the interpretation of the law'.[186]

The principle of deference can never amount to a bright line test.[187] It is a 'complex notion relating to the doctrine of separation of powers, justiciability and comity'.[188] How and when a court chooses to defer is determined by the court's approach to three considerations, which are namely 'the court's understanding of its institutional role; the court's understanding of its institutional competence; and the nature of the matter before the court'.[189] According to Mclean these considerations are analogous to Cartesian co-ordinates, the point at which these the co-ordinates meet illustrates the court's specific approach to deference.[190]

4.2 Judicial restraint v Deference

Deference must be distinguished from the notion of judicial restraint. Although these two concepts at times may overlap, judicial restraint is often contrasted with the notion of judicial activism.[191] Judicial activism refers to a court that plays an active role in governance-it has its own political programme and uses its decisions to advance that programme.[192] Richard Posner has stated that

> 'if "judicial activism" simply refers to the recognition that in constitutional democracies judges wield a great deal of discretion and that they are necessarily active participants in governance, then activism will refer accurately, but unhelpfully, to the activity of all judges and 'restraint' will be

[184] D Dyzenhaus 'The politics of deference: Judicial review and democracy' in Michael Taggart (ed) *The Province of Administrative Law* (1997) 279
[185] Ibid at 303
[186] Dyzenhaus op cit (n184) 303
[187] See Mclean (n180) 64
[188] Ibid
[189] Mclean op cit (n180) 63
[190] Ibid
[191] Mclean op cit (n180) 64
[192] Ibid

an empty and equally unhelpful category'[193]

Posner distinguishes between deference, separation of powers, judicial self-restraint and prudential self-restraint. Posner defines judicial deference as judges being cautious about putting forward their own views and limiting their discretion as far as possible.[194] In terms of 'separation of powers judicial self-restraint', Posner defines this as judges limiting the courts power when dealing with the other branches of government and deferring to the decisions of the other branches of government.[195] Prudential self-restraint requires that judges avoid making decisions that will impact upon their ability to make future decisions.[196]

A highly activist court may advance their specific programme through 'striking down decisions or legislation that run contrary to their programme, or even through deferring certain decisions to the legislative or executive branch which reinforces their specific programme'.[197] It is quite possible to have a highly activist court, which in the appropriate circumstances defers to the other branches of government.[198]

Deference can thus be seen as the principle of showing a certain amount of weight or respect to the decisions of the legislative or executive branches of government in the exercise of judicial review, and not necessarily submissiveness to the political branches.[199]

4.3 Deference in South Africa

4.3.1 Deference in the pre democratic South Africa

Deference as expressed above is 'ineluctably bound up with the separation of powers and area of competence associated with each of the three branches of government'.[200] Dyzenhaus regards the primary definition of deference as 'submission to authority'.[201] This primary definition of deference is synonymous with the approach taken by the courts in the pre-democratic South Africa. In the pre-democratic South Africa, the courts have been criticised for its 'overly deferential approach to executive political

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193 Richard Posner *The Federal Courts* (1996) 314
194 Ibid; Lenta op cit (n70)
195 Ibid
196 Lenta op cit (n70) 548
197 Mclean op cit (n180) 64
198 Ibid
199 Mclean op cit (n180) at 62; Dyzenhaus op cit (n184)
200 C Hoexter *Administrative Law in South Africa* (2012) 148
201 Dyzenhaus op cit (n184) 303

will'.[202] The courts in the pre-democratic era saw their task as being 'solely to interpret and apply the intention of the legislature with little or no regard for individual liberties'. As a result this allowed 'a judge to show sympathy to a legislative programme and to give full effect to his predispositions without having to accept public responsibility to do so'.[203] The reality was that the judiciary in the pre-democratic South Africa showed 'a tacit complicity in Apartheid policies and a thinly-veiled support for the system'.[204] The idea of deference in the present democratic South Africa is often viewed negatively, as many associate deference to the jurisprudence of the Apartheid era.[205]

4.3.2 Deference in South Africa post 1994

As stated in part one, the Constitution is now supreme in South Africa. All public power is bound by the rule of law and thus reviewable.[206] The rule of law is a founding value of the Constitution, of which the Court is the 'ultimate guardian'.[207] As a result the scope of judicial review has expanded significantly in comparison to our pre-democratic past.

There is now a substantive ingredient involved in judicial review.[208] In other word, the courts are now allowed to evaluate the merits of a case as well as the procedural elements.[209] As a result the courts have to guard against second-guessing administrators who are entitled to a margin of appreciation regarding the merits of the case.[210] It is because of this very aspect that it is important that courts are able to 'justify the intervention of non-intervention'.[211] Alfred Cockrell states that 'one of the

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[202] K Mclean 'Towards a framework for understanding deference' (2010) SAPL 445, 460
[203] E Cameron 'Legal chauvinism, executive mindedness and justice- LC Steyn's impact on South African Law' (1982) 99 *SALJ* 38, 51-62
[204] Mclean op cit (n202); D Davis & H Corder 'A long march: Administrative Law and the Appellate Division' (1988) 4 *SAJHR* 281, 295-302
[205] D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite?" ' (2006) 22 *SAJHR* 301, 320
[206] *Fedsure* supra (n5) at para 58
[207] *SARFU* supra (n2) at para 72
[208] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004) (4) SA 490 at para 45
[209] *Carephone v Marcus NO* 1998 (11) BLLR 1253 (CC) at para 110-111
[210] De Smith, Woolf and Jowell *Principles of Judicial Review* (1999) 451
[211] Hoexter op cit (n200) 147

pressing needs in modern South African law is for the articulation of rigorous and coherent principles that will guide legal intervention and non-intervention'.[212]

Deference according to Dyzenhaus' secondary meaning is now more appropriate to the current democratic South African context: this is deference as respect. According to Lenta, 'deference requires that judicial review be carried out with sensitivity to the legitimate field of choice open to the elected branches in deciding public policy'.[213] Deference recognizes the expertise and experience of the elected branches.[214] Deference however, should not be 'interpreted as the refusal to decide on the validity of legislative, executive or administrative action'; nor should it be interpreted to mean that judges are permitted to withdraw certain cases from the scope of judicial review'.[215] The legislative power that rights should be protected should only be constrained by the requirement that right should be protected.[216]

4.4 Substantive merit based review v Procedural review

The courts traditionally applied the concept of deference through maintaining the distinction between review and appeal and which thus protected them from usurping their functions.[217] The distinction between appeal and review, which is distinctly clear in theory, is blurred in practice by the affect of our Final Constitution.[218] According to Corder, the distinction between appeal and review is no longer tenable and not necessary, as 'our courts have now been expressly authorized to determine the reasonableness of administrative action, *which must contain a merit-based substantive element'*.[219] The South African Courts have acknowledged the blurring of the distinction of appeal and review. In the case of *Rustenburg Platinum Mines*[220], Cameron JA explained that the distinction between appeal and review id difficult to draw because 'process-related scrutiny can never blind itself to the substantive merits

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[212] A Cockrell "Can you Paradigm?-Another Perspective on the Public Law/Private Law Divide' in TW Bennet et al (eds) *Administrative Law Reform (1993) 227, 247*
[213] Lenta op cit (n70) 457
[214] Ibid
[215] Ibid
[216] Lenta op cit (n70) 457
[217] C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) *SALJ* 484,491
[218] Hoexter op cit (n200) 111
[219] H Corder 'Without Deference with Respect: A response to Justice Kate O'Regan' (2004) 121 *SALJ* 438
[220] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Concilaition, Mediation and Arbitration* 2007 (1) SA 576 (SCA)

of the outcome'.[221] O'Regan J in *Bato Star*[222] noted that 'although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and review continues to be significant and courts should take care not to usurp the functions of administrative agencies'.[223]

According to Hoexter, the blurring of the distinction of review and appeal is harmless.[224] The danger lies not in the review of the merits of the case but rather in 'judicial overzealouness in setting aside administrative decisions that do not coincide with the judge's own opinions'.[225]

4.5 Deference in South African administrative law

Leading academic in administrative law in South Africa, Hoexter, draws inspiration from Dyzenhaus' concept of deference as respect. She proposes that the concept of deference we should be aspiring to within the field of administrative law is:

> 'a judicial willingness to appreciate the constitutionally-ordained province of administrative agencies; to acknowledge the expertise of those agencies in policy-laden or polycentric issues; to give their interpretations of fact and law due respect; and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for-and the consequences of-judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal'.[226]

Hoexter points out that her view of deference ties to the notion of variability.[227] The courts are required to justify their intervention or non-intervention in a 'candidly and conscious manner'.[228] It should not be done in a formalistic manner or be an all-or-

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221 Ibid at para 31
222 *Bato Star* supra (n208)
223 *Bato Star* supra (n208) at para 45
224 Hoexter op cit (n200) 111
225 Ibid
226 Hoexter op cit (n217) 501-502
227 Hoexter op cit (n217) 502
228 Ibid

nothing approach.[229] Whether or not the court shall intervene will depend upon the circumstances of the case.[230]

In the case of *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*[231], the majority judgment of Chaskalson CJ had used a particularly deferential standard of rationality. Chaskalson CJ stated that 'the role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation'.[232] If such requirements are met and the decision is considered to be a reasonable one, the court will not interfere with the decision.[233]

However the minority judgment of Mokgoro and Sachs JJ stated that 'while courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, could create a misleading impression'.[234] This is would occur in instances where there is an infringement of a constitutional right and 'there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account'.[235] 'It is the remedy that must adapt itself to the right, not the right to the remedy'.[236]

In the case of *Logbro Properties v Bedderson NO and Others*[237], Cameron JA held that the tender committee should have considered the increase of property values as a polycentric decision as the decision entailed the complex nature of balancing all public interests that its mandate required it to fulfill.[238] The court stated that the determination of tenders was not a 'unilinear question involving the assertion of one subject's rights against the administration'.[239] The tender committee's task involved a lot more than just looking at the appellant's tender. The committee also had to balance a number of different public interests, which included the public benefit to be gained by receiving

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[229] Hoexter op cit (n217) 504
[230] Ibid
[231] 2002 (3) SA 265 (CC) ('*Bel Porto*')
[232] Ibid at para 87
[233] Ibid
[234] *Bel Porto* supra (n231) at para 186
[235] Ibid
[236] Ibid
[237] 2003 (2) SA 460 (SCA) ('*Logbro*')
[238] Ibid at para 29
[239] Ibid

a higher price as a result of the increase of property values.[240] The tender committee was thus more suitable to perform this balancing exercise as opposed to the court. The court quoted Hoexter's view of deference[241] and accepted that as a result of the complexity of the decision, the tender committee was better suited to make such a decision.

In the *Phambili Fisheries*[242] case, Schutz JA had observed that in terms of the Marine Living Resources Act the Chief Director as the delegate of the Minister had a wide discretion to strike a balance, in order to further the objectives of the Act.[243] The decision of the Chief Director was indeed a polycentric one.[244] The court observed that judicial deference is appropriate 'where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency'.[245] The first respondent (Phambili) had argued before the court that the decision made by the Chief Director was incorrect. Schutz JA was quick to note that it seems to appear that what is really under attack is the 'substance of the decision and not necessarily the procedure at which decision was arrived at'.[246] He went further and stated that it is not the job of the court to impose its own opinion on what it felt would be a more preferable decision where the decision was lawfully and rationally made.[247]

The court also recognized that 'judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function' but rather that the 'law places certain administrative action in the hands of the executive, not the judiciary'.[248] In this case Schutz illustrates deference in terms of constitutional and institutional competence.[249] The power was conferred upon the executive to make administrative decisions, not the

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[240] *Logbro* supra (n237) at para 20;21;22
[241] Hoexter op cit (n217) 501-502
[242] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) ('Phambili')
[243] Ibid at para 47
[244] *Phambili* supra (n242) at para 48
[245] *Phambili* supra (n242) at para 53
[246] *Phambili* supra (n242) at para 52
[247] Ibid
[248] *Phambili* supra (n242) at par 50
[249] Hoexter op cit (n200) 152

judiciary.[250] The judiciary was also not competent and ill suited to determine such a decision.[251]

The decision of the SCA is *Phambili* was taken on appeal to the Constitutional Court in *Bato Star*[252]. O'Regan J had agreed with Schutz JA in Phambili that judicial deference ought not to mean 'timidity or unreadiness to perform a function'.[253] However O'Regan J felt that the word 'deference' may give rise to misunderstanding the true function of a review court, and preferred to use the word 'respect' instead.[254]

O'Regan J stated that the need for courts to treat decision-makers with appropriate deference or respect, 'does not flow from judicial courtesy or etiquette but rather from the fundamental constitutional principle of the separation of powers'.[255] Thus, in treating administrative agencies with respect, the court recognizes the proper role of the Executive within the Constitution.[256] A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government.[257] The court is bound to give 'due weight to findings of fact and policy decision made by those with special expertise and experience in the field'.[258] A failure to do so by a court would amount to usurpation of the functions of the administrative agencies by the court.[259]

The extent of the 'respect' that the court affords an administrative agency will depend upon the character of the decision as well as the identity of the decision-maker.[260] In cases where the decision-maker who has a special expertise in the area of the decision made and has to strike an equilibrium between a range of competing interests or considerations, the court should show respect to the decision-maker.[261] Where goals are set out by a power that the administrative agency should aim to achieve and where

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[250] *Phambili* supra (n242) at par 52
[251] Ibid
[252] *Bato Star* supra (n208)
[253] *Bato Star* supra (n208) at para 46
[254] Ibid
[255] Ibid
[256] *Bato Star* supra (n208) at para 48
[257] Ibid
[258] Ibid
[259] *Bato Star* supra (n208) at par 46
[260] *Bato Star* supra (n208) at para 48
[261] *Bato Star* supra (n208) at para 48

the power does not dictate the route that should be taken in achieving those goals, the court should pay due respect to the route selected by the decision-maker.[262]

Ngcobo J in his minority judgment regarding whether the Minister had complied with a provision to give effect to transformation in the fishing industry, stated that it is not the duty of the courts to dictate to the functionaries how to implement transformation, that is best left to the functionaries concerned.[263] There are various ways in which transformation can be achieved and how this is done is complex and essentially a matter of policy.[264]

As much as respect should be shown to the administrative agencies, there is no public power that is beyond judicial scrutiny.[265] The court should thus be careful not to rubberstamp an unreasonable decision simply because of the complexity of the decision or the identity.[266] Where a decision is made that would not reasonably result in the achievement of a goal or where the decision made is not reasonable in light of the merits of the case or the reasons given for it, the court will be able to review such a decision.[267]

The trend of deference in South African administrative law is that the courts tend to show a measure of deference to polycentric issues and where the administrator has a special expertise in the area. This however does not mean that the court cannot review the merits of the case of the process at which the administrator arrived at the decision. The Court however cannot substitute their opinions or impose a decision that the Court feels would be more appropriate, this would amount to the court usurping their functions.

4.6 All public power is bound by the rule of law

[262] Ibid
[263] *Bato Star* supra (n208) at para 104
[264] Ibid
[265] *Pharmaceuticals* supra (n9) at para 85
[266] *Bato Star* supra (n208) at para 48
[267] Ibid

Justice O'Regan has stated that the role of the courts in a constitutional democracy is to protect the Constitution and hold the Executive and Legislative branch accountable to the provisions of the Constitution.[268] Section 1(c) of the Constitution states:[269]

> '1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (c) Supremacy of the constitution and the rule of law'

The rule of law is a foundational value of our constitutional order.[270] The principle of legality is an aspect of the rule of law.[271] Rationality is dictated by the principle of legality and requires that there must merely be a rational relationship between the exercise of public power and the purpose for the power was given.[272] Rationality review acts as a safety net as it allows the courts to review actions of public power that do not fall within the definition of administrative action under the PAJA.[273] The Constitutional Court has relied on the principle of legality in order to 'ensure that legislation is stated in a precise, clear and accessible and reasonably precise manner' and that there is a rational relationship between a scheme adopted by Parliament and the achievement of a legitimate governmental purpose.[274] According to Hoexter, the beauty of the principle of legality is that it allows the courts to 'defer to the government at the margins without relinquishing its supervisory role completely'.[275]

In the case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[276], the court held that 'the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.[277] The case of *Pharmaceuticals*[278] described the rationality standard of review as a 'minimum

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[268] Justice O'Regan 'Sesmic Shift in administrative law' (2004) 121 *SALJ* 424, 432
[269] Section 1(c) of the Constitution of the Republic of South Africa, Act 108 of 1996
[270] Ibid
[271] Hoexter op cit (n200) 122; *Fedsure* supra (n5) at para 57-59
[272] *Pharmaceuticals* supra (n9) at para 85; Hoexter op cit (n21) at 358
[273] Hoexter op cit (n200) 124
[274] C Hoexter 'The Rule of Law and the Principle of legality in South African Administrative Law Today' in Marita Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty: Essays in honour of Tony Matthews* (2011) 55, 55
[275] Hoexter op cit (n200) at 124
[276] *Fedsure* supra (n5)
[277] Ibid at para 58
[278] *Pharmaceuticals* supra (n9)

threshold requirement that is applicable to the exercise of all public power by members of the executive and other functionaries'. [279] The court stated that:

> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally connected to the purpose for which the power was given otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution.'[280]

In recognizing the role of the courts, as well as the separation of powers the Court in this case set out that the review of public power under the rationality standard does not mean that the courts should impose their own opinions on what they feel would be appropriate but a court does have the power to intervene and set aside and irrational decision.

> 'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard *does not mean that the courts can or should substitute their opinions as to what is appropriate*, for the opinions of those in whom the power has been vested. As long as the *purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately*. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision'…. (own emphasis)[281]

4.7 Rationality review and legislative action

Legislative action is also reviewable on the ground of rationality. In the case of *New National Party v Government of Republic of South Africa*[282], the Constitutional Court held that there must be a 'rational relationship between the scheme which Parliament adopts and the achievement of a legitimate governmental expectation'. A failure to do

[279] Ibid at para 90
[280] Ibid
[281] *Pharmaceuticals* supra (n9) at para 90
[282] *New National Party* supra (n17)

so will result in Parliament acting arbitrarily or capriciously and thus render the action unconstitutional.[283]

In the case of *Affordable Medicines Trust*[284] which arose out of a challenge of the Director-General's power to prescribe conditions under which licences to dispense medication may be issued, the applicants argued that the means used by the government to achieve its objective to increase access to medicines that are safe for consumption was not rationally related to this objective nor was it authorized by the empowering provisions of the Medicine's Act.

Ngcobo J emphasized that all public power must comply with the Constitution and that the principle of legality which is a branch of the rule of law 'entails that both the legislature and executive "are constrained by the principle and they may perform no power and perform no function beyond that conferred upon them by law"'.[285]

A court cannot interfere simply because it disagrees with or considers the legislation to be inappropriate.[286] Ngcobo J, in being aware of the limits of the court's power and the separation of powers doctrine, quoted the case of *New National Party* to explain why rationality review rather than reasonableness is more appropriate in reviewing legislative action.

In the *New National Party* case, the court stated that:

> 'Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of Courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary . . . If the legislation defining the scheme is rational, the Act of Parliament cannot be challenged on the grounds of 'unreasonableness'. Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote…'[287]

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[283] Ibid at para 19
[284] *Affordable Medicines Trust v Minister of Health* 2005 ZACC 3 ('*Affordable Medicines*')
[285] Ibid at para 49
[286] *Affordable Medicines* supra (n284) at para 77
[287] *New National Party* supra (n17) at para 24

In the case of *S v Lawrence*[288], the Court stated that the rationality test should be seen as requiring only that there is a rational connection between the legislation and the legislative purpose that the Act seeks to achieve. The Court distinguished between reasonableness and rationality review by emphasizing that rationality review does not require a proportionality analysis. The Court sought to fulfill its role whilst respected the functions of the legislature, thus ensure a proper balance. Ngcobo J stated that rationality review involves restraint on the part of the Court, and in exercising its power to review legislation the courts should strive to respect the role of the legislature.[289] In this case it was held that the courts are ill-suited to pass review legislative policies on economic issues.[290]

The case of *De Lille & Another v Speaker of the National Assembly*[291] dealt with the internal procedures of parliament. In this case, an opposition MP, Patricia De Lille had mentioned a number of government officials as former spies for the Apartheid regime during parliamentary proceedings. The Speaker of parliament had then ordered De Lille to withdraw her remarks, which she did immediately. The ANC, then sought to set up an ad hoc committee to investigate the conduct of De Lille. The ad hoc committee was a multi-party committee, although the ANC was in the majority. The ad hoc committee had recommended that De Lille should apologise to all the officials she had mentioned and be suspended from parliament for 15 parliamentary working days.

In an attempt to set aside the suspension order, De Lille approached the Cape High Court and alleged procedural unfairness on the part of the committee. The Speaker of parliament had relied on the Powers and Privileges of Parliament Act 91 of 1963. Hlophe J had found that the committee had breached the rules of natural justice as De Lille had not been afforded a fair hearing.[292] Hlophe had went further and stated that while 'it is undesirable for the courts of law to get steeped in politics'[293], the Constitution had changed the judicial role in reviewing public power and thus Hlophe was of the view that the exercise of parliamentary privilege was not immune from

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[288] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC)
[289] Ibid at par 42
[290] Ibid
[291] 1998 (3) SA 430 (C) ('*De Lille*')
[292] *De Lille* supra (n291) at paras 15-19
[293] *De Lille* supra (n291) at para 20

judicial review.[294]

The Speaker had then taken the decision on appeal to the SCA where it was dismissed with costs.[295] The SCA was of the view that Parliament was bound by the rule of law and thus confined to act within the prescripts of the Constitution

In the case of *Glenister v President of the Republic of South Africa & Others*[296], which dealt with a private party attempting to arrest the enactment of legislation which proposed to disband the Directorate of Special Operations (Scorpions). The Chief Justice had asked the parties to confine their arguments to

> '. . . whether, in the light of the doctrine of the separation of powers, it is appropriate for this Court, in all the circumstances, to make any order setting aside the decision of the National Executive that is challenged in this case.'[297]

Langa CJ then responded by stating that the separation of powers is part of the South African constitutional design, although it is not expressly mentioned. He then went further and described the important role of the courts as a result of the separation of powers doctrine.

> '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. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.'[298]

In relying on the *Doctor's for Life*[299] case, Langa CJ described that judicial intervention would only be appropriate if

> '…….an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the courts in our constitutional order: While

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[294] *De Lille* supra (n291) at para 22
[295] *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA)
[296] 2009 (1) SA 287 (CC) ('*Glenister*')
[297] Ibid at para 9
[298] *Glenister* supra (n296) at para 33
[299] *Doctor's for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC)

> duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature. This is a formidable burden facing the applicant.'[300]

4.8 Rationality review and executive decisions

Political acts of the executive are also subject to rationality review by the Courts. In the case of *Kaunda v President of the Republic of South Africa*[301], the Court acknowledged that it was ill-equipped to deal with matters of foreign policy that generally fall within the domain of the executive. Chaskalson CJ, whose judgment formed part of the majority judgment stated that:

> 'A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy, which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.'[302]

The majority of the court took to heart the sensitive and complex nature of foreign affairs in terms of which the Court lacked expertise and as a result the Court was willing to grant the Executive a broad discretion in this regard.[303] However despite this broad discretion being afforded to the Executive, the majority of the court did emphasize that all public power is subject to constitutional scrutiny and that included issues such as foreign affairs[304].

Given the sensitive and complex nature of foreign affairs, the court opted to provide a relatively low standard of rationality review.[305] O'Regan J in her dissenting judgment stated that although all public power must be justifiable under our Constitution, the precise scope of the justifiability will depend on a range of factors including the nature of the power being exercised.[306]

According to Seedorf and Sibanda, the difference between the minority and majority

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[300] *Glenister* supra (n296) at para 33
[301] *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC) ('*Kaunda*')
[302] Ibid at para 77
[303] *Kaunda* supra (n301) at para 81
[304] *Kaunda* supra (n301) at para 80 (Chaskalson CJ) and para 192 (Ngcobo J)
[305] Seedorf & Sibanda op cit (n3) 12-68
[306] *Kaunda* supra (n301) at para 244

judgment in this case is not about the right in issue, rather it is what the court should do when it lacks a normative framework.[307] Whilst the majority of the Court concluded that it should adopt a low standard of rationality, O'Regan J in her dissenting judgment thought that the Court should first look to see whether it could fill an open Constitutional standard by reference to other constitutional provisions.[308]

O'Regan J emphasized that whether or not there is an obligation upon the executive to provide diplomatic protection has to be answered in light of the 'normative commitment to human rights…. as well as the importance afforded to international law in our Constitution…..' .[309] As a result the role of the court would then be not to dictate to the Executive on whether or not it should afford diplomatic protection, but rather in light of our Constitution and International Law place an obligation upon the Executive to take steps to ensure that the applicants are protected from possible egregious violations of international law.

However the majority was of the view that in the absence of any clear legal obligation the court may only apply the review standard of lawfulness. Lawfulness is regarded in this instance as the 'absence of irrationality', thus the moment that the 'government can show that it has taken the matter seriously and has acted in good faith, the court cannot scrutinize the matter any further'.[310]

In the case of *Albutt v Centre for the Study of Violence and Reconciliation*[311], which concerned the special dispensation of pardoning politically motivated offenders, the court had expanded the principle of legality by treating procedural fairness as a requirement of rationality.[312] The court held that it would be irrational for the President to exercise pardoning powers without first hearing the victims of the offences. The Court noted that the Executive has a wide discretion in selecting the means it chooses to achieve its constitutionally permissible objectives and the court may not interfere and impose the means that it feels would be more appropriate, however when these means are being challenged on the ground of rationality, the court

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307 Seedorf & Sibanda op cit (n3) 12-68
308 *Kaunda* supra (n301) at para 237
309 *Kaunda supra* (n301) at para 270
310 Seedorf & Sibanda op cit (n3) 12-68
311 2010 (3) SA 293 (LAC) *('Albutt')*
312 Ibid at paras 75-76

has a duty to examine these means in order to ensure that it is rationally related to the objective that it seeks to achieve.[313]

> 'The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved…….'[314]

It is difficult to disagree with the finding of the court that the President cannot grant a pardoning of political prisoners with the exclusion of the victims from the process.[315] However one cannot feel that Ncgobo J does not practice what he preaches as he emphasizes the wide discretion of the executive on the one hand, yet on the other hand sets out more 'appropriate means' to include victim participation in order to achieve the desired objective.[316] The Court thus examines what should be the desired rational outcome by examining the means used.[317]

Another case in which the Court reviewed an act of the executive on the ground of rationality is that of *Democratic Alliance v The President of the Republic of South Africa*[318]. This case dealt with the appointment of the National Director of Public Prosecutions by the President. It was argued by the applicants in this case that the decision of the President to appoint Mr Menzi Simelane ('Simelane') as the National Director of Public Prosecutions was irrational as was not a fit and proper person, which was required by the National Act.[319]

Yacoob ADCJ noted that rationality review is concerned with the 'relationship between means and ends'.[320] This means that there needs to be a connection between the means used to achieve a particular purpose.[321] The aim of the court in reviewing this relationship is not to determine other means it feels that would be more appropriate

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313 *Albutt* supra (n311) at para 51
314 Ibid
315 A Price ' The content and justification of rationality review' (2010) 25 *SAPL* 347, 373
316 L Kohn *The burgeoning constitutional requirement of rationality and the separation of power: Has rationality review gone too far?* LLM (UCT) (2013) 53; Hoexter op cit (n274) 61
317 Ibid
318 [2012] ZACC 24 ('*Simelane*')
319 s 179 of the Constitution; s 9(1)(b) of the National Prosecuting Authority Act 32 of 1998
320 *Simelane* supra (n318) at para 32
321 Ibid

in achieving the desired objective, but only whether the means employed are rationally connected to the desired purpose.[322]

Yacoob ACDJ relied on the cases of *Albutt*[323], *Bato Star*[324] and *Affordable medicines*[325] for concluding that executive decisions may only set aside if they are irrational and may not ordinarily be set aside if procedurally unfair or unreasonable. The rationality standard to be applied to the review of executive decisions thus prescribes the lowest possible threshold.

Yacoob ADCJ whilst relying on *Affordable Medicines*[326], noted that the rationale for rationality being the minimum threshold requirement to the exercise of public power, was 'to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'.[327] According to Yacoob, this applied equally to executive decisions.[328]

As a result of this finding, Yacoob ADCJ found that the separation of powers cannot be undermined by the rationality enquiry.[329] Yacoob ADCJ went on further to state that the idea that there is a lower threshold of rationality review in executive decision-making than there would be in an administrative law setting is incorrect.[330] According to Yacoob ADCJ, there are no differing thresholds of rationality review.[331] He went on to further state that the separation of powers has no concern with rationality review and was not of particular importance in this case.[332]

The conclusion reached by Yacoob ADCJ is baffling, as it does not follow why he relied on the decisions on *Albutt; Bato Star* and *Affordable Medicines*, which notably highlighted that although all public power is reviewable, and that there should be a respect for the decision making of the Legislative and Executive branch should be respected if it is rational. Furthermore in the case of *Kaunda*[333] where the Court

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322 Ibid
323 *Albut*t supra (n311)
324 *Bato Star* supra (n208)
325 *Affordable Medicines* supra (n284)
326 Ibid
327 *Affordable Medicines* supra (n284) at para 86
328 *Simelane* supra (n318) at para 43
329 *Simelane* supra (n318) at para 44
330 Ibid
331 Ibid
332 Ibid
333 *Kaunda* supra (n301)

explicitly noted the lower threshold of rationality to be utilized by the courts in the review on executive decision-making because of the highly complex and political nature of such decisions upon which the court was ill-suited to determine.[334]

In her FW De Klerk Memorial Lecture, Justice O'Regan stated that in the cases of *Kaunda*[335], *SARFU*[336] and *Hugo*[337], the Constitutional Court had recognized that there are clear constitutional reasons why the 'justiciability of purely executive decisions is far narrower than that of administrative decisions…it is appropriate for courts to defer to the executive's special role and expertise….'.[338]

The case of *Hugo* is concerned with the s 82(2) powers that is conferred upon the President by the Constitution, and resembles the former prerogative powers.[339] The court emphasised that the Bill of Rights that is entrenched in our Constitution binds all organs of state at all levels of government and hence the power of the President is subject to review by the courts.[340]

SARFU[341] also dealt with a s 82(2) power conferred upon the President- the President's power to appoint a commission of inquiry. According to Hoexter, these s 82(2) powers conferred upon the President by the Constitution has a 'strong political flavour' and although these powers are reviewable, the courts tend to show a certain degree of deference to such powers because of their political character.[342]

Although the *Simelane* judgment dealt with the powers of the President as head of the Executive and not Head of State, the Constitution requires that the NDPP be appropriately qualified and the National Legislation required that the NDPP appointed be a fit and proper person. The National Legislation did not give content as to what constitutes a 'fit and proper' person and thus this surely gives the President a measure of discretion is deciding who constitutes a fit and proper person.[343] Yacoob ADCJ

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334 Ibid at para 77
335 *Kaunda* supra (n301)
336 *SARFU* supra (n2)
337 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)
338 Kate O'Regan 'Checks and Balances Reflections on the Development of the Separation of Powers Under the South African Constitution' *PER/PELJ* 2005 (8) 1 139/150
339 *Hugo* supra (n337) at para 5
340 *Hugo* supra (n337) at paras 11&13
341 *SARFU* supra (n2)
342 Hoexter op cit (n200) at 35
343 s 9(1) of the National Prosecuting Authority Act 32 of 1998

undertook an extensive review of the facts surrounding the case as well as reports from the Ginwala Commission. Given the highly political flavour of the case, as well as the principle set out by the court of previous occasions that it will not scrutinize decisions taken by the executive in good faith, it seems odd that Yacoob ADCJ seems to weigh the decision taken against the means.[344] Yacoob seemed to employ more of a reasonableness review rather than a rationality review, as he attempted to strike a 'reasonable equilibrium between a range of competing considerations by a decision maker with a specific expertise in the area'.[345]

This overarching rationality review (or reasonableness) can surely be argued to be an intrusion on the separation of powers. It is speculated that Yacoob stretches rationality review as a matter of judicial pragmatism.[346] The overwhelming evidence against Mr Simelane left the Court stuck between a hard place and a rock[347] as it could not make a finding in law to rule against the lack of credibility, integrity and honesty of Mr Simelane. The Court thus employs this rationality review in order to examine the process (of which the national legislation was absent of) in which President Zuma appointed Mr Simelane.

4.9 When to defer?

The Constitutional Court's approach to deference can be said to be a little uncertain. As stated in the previous part, the Constitutional Court may sometimes 'prevent the legislature from pursuing a particular policy by subjecting it to strict constitutional standard' or on the occasions 'it defers to the legislature's policy choice- without any apparent logic or coherent legal justification'.[348]

Albie Sachs eloquently describes this uncertainty:

> 'There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic to the judicial function itself

[344] *Kaunda* supra (n301); *Hugo* supra (337); *SARFU* supra (n2)
[345] *Bato Star* supra (n208) at para 49-54
[346] Roux op cit (n14)
[347] Kohn op cit (n316) 59
[348] Seedorf & Sibanda op cit (n3) 12-72

> that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but of when….'[349]

The strategic nature upon which the Constitutional Court hands down judgments in order for them to be respected by the political branches is a consequence of the dominant party democracy in South Africa, and thus the Constitutional does often trades off some principle against pragmatic considerations.[350]

This strategic approach does currently ensure the institutional security of the Court however 'it is important for courts themselves to formulate, articulate and apply principles for guiding the limits of their own powers'.[351] Although the formulation and application of principles illustrate the self-restraint that the courts exhibit, 'the articulation of these principles publicizes the standards by which the exercise of the courts powers will be measured by society and the political branches'.[352] When the courts' powers are 'improperly and irresponsibly exercised, the legitimacy of the court is undermined and this could lead to a situation where the government no longer respects the authority of the courts'.[353]

5. DEFERENCE IN CANADA

In this part I examine how deference operates in Canada. According to Corder, 'no consideration of a topic within the broad field on constitutional law should occur without taking into account the country's constitutional history'.[354] This is the precise reason why I have chosen to examine the jurisprudence of Canada. Firstly, like South Africa, Canada has a Commonwealth background. Secondly, the 1996 South African Constitutional model leaned partly towards the Canadian constitutional model.[355] Thirdly, the judiciary in Canada plays a similar role to the judiciary in South Africa in terms of their respective democracy.[356] Fourthly, the concept of deference has

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[349] A Sachs 'Book Review' (2001) 86 *Univ of Toronto LJ* 87
[350] Roux op cit (n14)
[351] Seedorf & Sibanda op cit (n3) 12-55
[352] Ibid
[353] Seedorf & Sibanda op cit (n3) 12-56
[354] H Corder 'Judicial review of parliamentary actions in South Africa' in D Chirwa & L Nijzink (eds) *Accountable government in Africa* (2012) 85
[355] R Simeon 'Considerations on the design of federations: The South African Constitution n comparative context' (1998) - available at http://www.queensu.ca/iigr/WorkingPapers/Archive/1998/1998-2RichardSimeon.pdf (last accessed on 15 April 2014)
[356] Mclean op cit (n180) 25

received a large amount of academic as well judicial attention in Canada and the judiciary in Canada is explicitly mindful of their role, which makes it a good example to South Africa.[357]

5.1 Judicial review

The Canadian Supreme Court is regarded as the protector of rights that are enshrined in the Canadian Charter of Rights and Freedoms ('Canadian Charter') through the process of judicial review.[358] Civil and political rights are amongst some of the rights protected by the Canadian Charter; socio-economic rights and the right to property are not given express protection in the Canadian Charter.[359]

The Canadian Courts embark on a two-stage process in order to determine whether rights have been violated.[360] This two-stage process is similar to that adopted by the South African Courts. In the first stage, the court interprets the right in order to determine the scope of the right and decides whether the Charter protects the affected right. In the second stage, the court embarks on a limitation analysis. The Canadian Charter provides that the rights in the Charter may be limited where the limitation is a 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society'. The burden is thus upon the state to prove on a balance of probabilities to that the limitation is justifiable. The case of *R v Oakes*[361] sets out the limitation test and provides that the limitation clause enclosed in the Canadian Charter means that parliament can only limit freedoms and rights that are protected by the Canadian Charter when it can prove that it is important and necessary to do so.[362]

5.2 Democratic Dialogue

Mclean states that the use of the limitation analysis promotes a 'culture of justification' as the legislature and executive have to justify by means of reason in order to limit rights protected by the Canadian Charter.[363] Since the courts are regarded as the protector of the Canadian Charter, the court often engages in a dialogue with the

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[357] Ibid
[358] PW Hogg *Constitutional Law of Canada* (1997) 787
[359] Mclean op cit (n180) 26
[360] Ibid at 87
[361] *R v Oakes* [1986] 1 SCR 103
[362] Ibid at 138-139
[363] Mclean op cit (n180) 28

legislature and executive.[364] In Canadian jurisprudence, deference is informed by the idea of a 'democratic dialogue'.[365] *Hogg* and *Bushell* suggest that because judges under the Canadian Charter 'who are neither elected into their offices or accountable for their actions, are vested with the power to strike down laws that have been made by the duly elected representatives of the people', it is easy for critics to conclude that judicial review in a democratic society is illegitimate.[366]

However, the Constitution is drafted in 'broad, vague language', which thus gives judges a measure of discretion in 'interpreting' the law of the Constitution.[367] This process of interpretation moulds the Constitution into a likeness favoured by the judges.[368] However judges cannot merely strike down laws or impose their own interpretation of the Constitution, they would have to first have to engage in a 'dialogue' with the legislative branch. [369]

According to Hogg and Bushell:

> 'Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.'[370]

In the case of *Vriend v Alberta*[371], the courts promoted the idea of a 'democratic dialogue' as well as declare its support of respecting the political branches of government:

> '….In reviewing legislative enactments the executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. ….most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives….By doing this, the legislature responds to the courts; hence the dialogue among the branches.'[372]

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364 PW Hogg & AA Bushell ' The Charter dialogue between the courts and legislatures (or perhaps the Charter isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Journal* 75
365 Ibid; Mclean op cit (n180) 30
366 Hogg & Bushell op cit (n364) 77
367 Ibid
368 Ibid
369 ibid
370 Hogg & Bushell op cit (n364) 79
371 *Vriend v Alberta* [1998] 1 SCR 493
372 Ibid at para 138

The Court further describes this dialogue process as a method of fostering accountability between the branches and enhancing the democratic process.

> ' A great value of judicial review and this dialogue among the branches is that each branch is somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decision can be reacted to by the legislature in the passing of new legislation…*This dialogue between and accountability of each of the branches has the effect of enhancing the democratic process, not denying it'….(own emphasis)*[373]

The Court also ensured that in the dialogue process that the courts should show respect to the legislature and executive and not second guess the decisions of the legislative or executive branches, or make judgments on issues that the court is ill-equipped to decide upon.

> 'In carrying out their duties, courts are not to second guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choices; this is for the other branches. Rather, the courts are to uphold the Constitution…respect by the courts for the legislature and the executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.'[374]

There are four features that make the dialogue possible.[375] These features will be discussed along with the relevant case law in each instance to illustrate how the dialogue informs the idea of deference. The first feature of the dialogue is that section 33[376] of the Charter is the power of legislative override.[377] The power to strike down legislation allows the legislature to re-enact legislation that has been struck down by the courts. The Legislature can insert an 'express notwithstanding clause' into a statute and this will immunize the statute from judicial review. [378] However the

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[373] *Vriend* supra(n371) at para 139
[374] *Vriend* supra (n371) at para 136
[375] Hogg & Bushell op cit (n364) 82
[376] Section 33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).
(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).
[377] Hogg & Bushell op cit (n364) 83. The section 33 power of legislative override is not applicable to the voting and mobility rights (ss 3-6); language rights (ss 16-23) and sexual equality (ss 28).
[378] Hogg & Bushell op cit (n364) 84; Mclean op cit (n180) 29

'notwithstanding clause expires at the end of five years and requires re-enactment in order to be continued in force.[379]

Secondly, section 1 allows for a right to be limited within 'reasonable limits'.[380] The limitation analysis allows the courts to 'speculate on how the offending legislation could be remedied'.[381] This is usually by suggesting that a less restrictive means be provided in order to achieve the same result.[382]

In the case of *RJR-MacDonald Inc v Canada*[383], which concerned the constitutionality of a total prohibition on commercial tobacco advertising and also that an unattributed health warning on tobacco products as a violation of the right to freedom of speech. The majority of the court had taken the view that deference is context specific, however the court should be careful so as not to be overly deferential.

> 'As with context, however, *care must be taken not to extend the notion of deference too far*. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problem within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether parliament's choice falls within the limiting framework of the Constitution. *The courts are no more permitted to abdicate their responsibility than is parliament. To carry judicial deference to the point of accepting parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded'....(own emphasis)*[384]

The minority of the court was of the view that different levels of deference should apply, which is dependent upon the nature of the right and the nature of the legislation before the court.[385] The minority described the nature of the legislation is this regard as 'social engineering' which should be afforded a high degree of deference. [386] The

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[379] Ibid
[380] Section 1: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
[381] Mclean op cit (n180) 29
[382] Ibid; *R v Oakes* supra (n361)
[383] *RJR-Macdonald Inc v Canada (AG)* [1995] 3 SCR 199
[384] Ibid at para 136
[385] *RJR-Macdonald* supra (n383) at para 64
[386] *RJR-Macdonald* supra (n383) at para 68-70

nature of the right was described as not worthy of having a high degree of protection because the 'harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering or pornography'.[387]

According to Mclean, the difference between the minority and the majority judgment is the role that deference should play in determining the nature of the burden that the state bears in the section 1 analysis.[388] The minority's deferential approach meant that the state did not have to meet its burden according to the usual civil standard of proof, but only had to 'demonstrate that it had a reasonable basis for believing that such a rational connection exists'.[389] The majority, although of the view that a contextual approach should be taken of the section one analysis, they reasserted that the 'civil standard of proof on a balance of probabilities was the appropriate standard of proof in all stages of the proportionality analysis'.[390] The majority of the court cautioned against taking the contextual approach of section 1 too far in a manner that would 'undercut the obligation on parliament to justify limitations which it places on Charter rights' and thereby 'substitute ad hoc judicial discretion for the reasoned demonstration contemplated by the Charter'.[391]

In the case of *Thomson Newspapers v Canada*[392], which concerned the limitation of free speech relating to opinion survey results during the final three days of a federal election campaign. The court made reference to a number of contextual factors in determining the appropriate level of deference. The majority of the court found that the means adopted by the legislature did not meet the minimum impairment test.[393] In deciding the appropriate level of deference it was necessary to look at the nature of the expression in issue.[394] It was found that the nature of the expression was 'at the core of the political process' and thus a deferential approach by the court would not be appropriate.[395] The court went on to state that factors that could militate in favour of a deferential approach are firstly the vulnerability of the group sought to be protected;

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387 *RJR-Macdonald* supra (n383) at para 75
388 Mclean op cit (n180) 33
389 Ibid; *RJR-Macdonald* supra (n383) at para 67-68
390 *RJR-Macdonald* supra (n383) at para 137
391 *RJR-Macdonald* supra (n383) at para 134
392 *Thomson Newspapers Co v Canada (AG)* [1988] 1 SCR 877
393 Ibid at para 117
394 *Thomson Newspapers* supra(n392) at para 93
395 Ibid

secondly the interests of the voter and of the pollster are opposed and thirdly the 'reasonable apprehension of harm test that has been applied where it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society'.[396] The court found that Canadian voters were not a vulnerable group, and that the government could not claim any widespread of significant harm to the group and the autonomy and dignity of the group was not under attack.[397] The court thus found that a 'significant level of deference' was not necessary and that based on the facts the legislative means adopted did not constitute a minimal impairment.[398]

In the case of *R v Edward Books*[399], which dealt with the constitutionality of the Retail Business Holidays Act. The legislature had crafted the Act in such a manner that it exempted business with less than seven employees from closing on a Sunday whilst prohibiting retail stores with more than seven employees from opening on a Sunday. In deciding whether the manner in which the legislature had crafted this exemption was reasonably, Dickson CJ had stated that 'the legislature is entitled to a measure of leeway on how to achieve its goals'.[400] Dickson CJ went on to state that although there could be a better legislative solution to the religious exemption, it was not up to the Court to impose such a solution and declare the Act unconstitutional, as that would impose 'an excessively high standard on the legislature'.[401] The Court thus found that the State made a serious effort to balance the rights of those affected and it demonstrated that its legislation was a justifiable infringement on the right to freedom of religion.[402] In his concurring judgment, La Forest also emphasised that the needs to be a reasonable amount of room left to the legislature in crafting its legislation.[403] However, La Forest also emphasised that there is a duty on the legislature to craft legislation that is reasonable, once this obligation is fulfilled, the court may go no further.[404]

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396 *Thomson Newspapers* supra (n392) at paras 112-117
397 Ibid
398 *Thomson Newspapers* supra (n392) at para 117
399 *R v Edwards Books & Art Ltd* [1986] 2 SCR 713
400 Ibid at para 147
401 *Edwards Books* supra (n399) at para 149
402 *Edwards Books* supra (n399) at para 151
403 *Edwards Books* supra (n399) at para 183
404 Ibid

The case of *Chaoulli v Quebec*[405] dealt with the validity of s 15 of the Health Insurance Act and s 11 of the Hospital Insurance Act. These two provisions prohibited Quebeckers from taking out medical insurance for services in that private sector that are available under the provincial health system. The appellants argued that this prohibition amounted to an infringement under s 7 of the Charter.[406]

The majority of the Court was of the view that there was an infringement of s 7 of the Charter.[407] More importantly, the court engaged in a debate on how much deference was owed to the legislature. Deschamps J noted that:

> '….It must be possible to base the criteria for judicial intervention on legal principles and not socio-political discourse that is disconnected from reality.'[408]

The majority emphasised that although the democratically elected legislature has the role of defining and implementing social policy, the courts have the responsibility of holding such policy accountable to the foundational commitments of the society enshrined in the Constitution.[409] When the legislature provides reasons that can be justified in terms of the democratic values of the Constitution and the justification also maintains the public order and general well being of citizens, then it is possible for the court to defer.[410]

The courts should also be aware of its institutional competence to assess the subject matter before it. Deschamps J stated that:

> 'Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state'. [411]

Deschamps J argues that deference is something to be applied depending on the circumstances and evidence before the court.[412] Hence the capacity of the court to

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[405] *Chaoulli v Quebec* (AG) [2005] 1 SCR 791
[406] Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
[407] Chaoulli supra (n405) at para 40
[408] *Chaoulli* supra (n405) at para 85
[409] *Chaoulli* supra (n405) at para 93
[410] Ibid
[411] *Chaoulli* supra (n405) at para 95
[412] *Chaoulli* supra (n405) at para 96-97

decide upon a matter is dependant upon the evidence before the court, 'rather than a deeper appreciation of the inherent limitations of the court for adjudication of complex, polycentric matters'.[413]

Fourthly, the guarantee of equality rights under the section 15(1) of the Charter, which can be satisfied through a variety of remedial measures.[414] Section 15(1) of the Charter prohibits laws that discriminate on the listed grounds.[415] A judicial decision under section 15(1) does demand that the legislature adapt its laws to accommodate the individual or group that has been affected.[416] Despite this, there are still several options available to the legislature in order to remedy the exclusion of the affected group or individual. This can be done by either extending the provision of the benefit or 'leveling-down' the benefit, so that no one receives the benefit.[417]

It should be noted however, there are instances where the dialogue between the branches of government in foreclosed. Such instances are when section 1 (the limitation analysis) does not apply; where the objective of the law is unconstitutional and where political forces preclude legislative action.

5.3 Canadian approaches to deference

The Canadian approach to deference is difficult to describe as a single, coherent principle. Rather there are several themes to the Canadian approach to deference that the Courts have adopted.[418] The first theme that is observed is that the institutional ability of the court to assess the subject matter before it.[419] The case of *Chaoulli*[420] gives a clear illustration Deschamps J who found no difficulty in engaging in complex, polycentric issues.

The second theme is the court's awareness of its democratically mandate role in adjudicating decisions made by the executive and legislature which usually involve a

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413 Ibid; Mclean op cit (n180) 38
414 Hogg & Bushell op cit (n364) 82; 90
415 These grounds are namely race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, or any laws which discriminate on the basis of any ground that is analogous to the listed grounds.
416 Hogg & Bushell op cit (n364) at 90
417 Mclean op cit (n180) 29; Hogg & Bushell op cit (n364) 91
418 Mclean op cit (n180) 41
419 Ibid
420 *Chaoulli* supra (n399)

balancing of rights or interests.[421] The case of *Edwards Books*[422] illustrates this theme as the court in this case emphasised on granting the legislature a degree of leeway in formulating policy. This is in line with the version of deference that was adopted by Dyzenhaus[423], in which Dyzenhaus defines deference as respect for the other branches of government.[424] This definition of deference as respect, 'opens up space for judicial sensitivity' of the legitimate decisions of the other branches. [425]

The third theme of the court's approach to deference is the nature of the right infringed. The case of *Thompson Newspapers*[426] clearly illustrates the how the nature of the right determines the court's approach to deference. In this case the court was of the opinion that since a fundamental right to expression was involved, the court should show little deference to the executive or legislature in the proportionality analysis.

5.4 Constitutional dialogue in South Africa

The South African approach to deference that was discussed in part 4, just like the Canadian approach, is hard to describe in a single, coherent principle. However as seen from the cases discussed in the previous chapter, the common thread amongst the cases is that the court is bound to give 'due weight to findings of fact and policy decisions made by those with special expertise in the field'.[427] This criteria is limited by the fact that there is no power beyond judicial scrutiny and all power is bound by the rule of law.[428] According to Moseneke, 'judicial review is a necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing the limits that the Constitution itself imposes on governmental power'.[429] The power of the judiciary to review public power and uphold the Constitution is at tension with need on the other hand to maintain and uphold the separation of powers, of which the doctrine is implicitly found in our Constitution.[430]

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421 Mclean op cit (n180) 29
422 *R v Edwards Books & Art Ltd* supra (n399)
423 Dyzenhaus op cit (n184) 279
424 Ibid at 307
425 Ibid
426 *Thomson Newspapers Co v Canada* supra (n392)
427 *Bato Star* supra (n208) at para 48
428 *Pharmaceuticals* supra (n9) at para 85
429 D Moseneke 'Striking a balance between the will of the people and the supremacy of the Constitution' (2012) 129 *SALJ* at 17
430 P Langa ' "A delicate balance": The place of the judiciary in a constitutional democracy' (2006) 22 *SAJHR* at 8

Given the tension between the power of the judiciary to review the actions of the executive and legislature on the one hand, and the responsibility of upholding the separation of powers on the other, the 'courts elect to proceed slowly' and carefully in sensitive cases.[431]

The expansive power of the judiciary to hold government accountable has often been viewed as counter-majoritarian, which was discussed in part 2 above. The counter-majoritarian dilemma arises because 'unelected judges are empowered to overturn the decisions of democratically-elected representatives of the majority'.[432] Hogg and Bushell have posed a counter-argument to this theory, as discussed above- judicial review is not illegitimate as long as it creates a democratic dialogue between the courts and the other branches of government.[433]. The operation of the dialogue is illustrated in terms Canadian jurisprudence above.

The role of the judiciary in South Africa is similar to that of Canada. The operation of constitutional dialogue has been embraced in South Africa. The 'dialogue' in the South African context, is facilitated by several constitutional features, these features are notably the power to strike down 'unconstitutional legislation and conduct'; or the power of the court to refer legislation back to Parliament to correct which illustrates how the 'courts and the political arms of government interact "in a specialised, structured way"'.[434]

The withering of Parliamentary oversight of the executive as the ANC tightened the hold over their MPs[435] has resulted in judicial review becoming an ever so increasingly important tool used by the Constitutional Court to ensure that the values enshrined in the Constitution are upheld and prevent the abuse of political power. Hoexter states that the 'judicial control of public power is likely to flourish' as the courts are able to 'impose principles of legality on officialdom'.[436] Kohn in her thesis argues that this is

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[431] M Marshall 'The Separation of powers: An American perspective' (2006) 22 *SAJHR* 10 at 18
[432] Kohn op cit (n316) at 27
[433] Hogg & Bushell op cit (n364) 79
[434] Kohn op cit (n316) at 30; Z Yacoob 'The dynamic Constitution' http://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/ -last accessed on 15 April 2014
[435] Corder op cit (n354) 88
[436] Hoexter op cit (n217) 495

indeed the case due to the 'burgeoning and seemingly exhaustible principle of legality'.[437]

This 'burgeoning and exhaustible principle of legality' is a 'catch all' tool used by the Constitutional Court to counteract the unfortunate pathologies of our one party dominance.[438] The court uses rationality review and the principle of legality as a tool to prevent the abuse of political power.

Although the role of our judiciary is similar to that of the Canadian judiciary, the operation of the constitutional dialogue between the branches of government has not necessarily been so. The need of the CC to ensure it institutional security and legitimacy has resulted in the CC acting pragmatically which results in an uncertainty as to when and how the dialogue between the branches would occur.

6. CONCLUSION

All public power is confined by the rule of law. The principle of legality is an aspect of the rule of law and through its rationality requirement, the judiciary often tests public power in order to ensure that it is rational. The judiciary has expanded the 'frontiers of judicial review' through rationality review.[439]

The CC does lack in public support, however the ANC often shields the CC from the repercussions of its decisions.[440] The CC is aware of this fact and the overwhelming political power that the ANC possesses that the CC often takes into consideration the 'reaction of other political players when deciding a case'.[441] The CC thus often acts pragmatically in order to ensure its legitimacy which results in the CC on occasion observing the separation of powers and on other occasions using the 'safety net' of rationality review to review deeper into the actions of the executive and legislature.[442] The expansion of the 'frontiers of judicial review' could over time 'widen the "tolerance interval" of the other branches for adverse decisions, thus allowing it to

[437] Kohn op cit (n316) 60
[438] Choudry op cit (n46) 11 ; Hoexter op cit (n436); Kohn op cit (n316)
[439] Kohn op cit (n316) 60
[440] Roux op cit (n14)
[441] Seedorf & Sibanda op cit (n3) 12-72
[442] Roux op cit (n14)

enforce the Constitution even in the most difficult cases'.[443] According to Seedorf and Sibanda, this is 'reminiscent of a fundamental aspect of the separation of powers: that only power arrests power'.[444]

The expansion of the CC's 'de facto political power to enforce the Constitution' undermines the separation of powers, as it is not enough to simply have a separation of powers on paper.[445] This is can be explicitly seen from the expansion of the 'frontiers of judicial review' through rationality review.[446] Separation of powers simply does not work 'if those institutions tasked with providing limitations on concentration and abuse of power lack "the necessary means or personal motives to resist encroachments of the others"'.[447]

The CC has shown respect to the other branches of government, particularly Parliament by 'issuing orders requiring Parliament to amend legislation within a particular period, instead of curing the defects itself'.[448] The judgments given by the CC have always been respected and upheld by the executive and legislature. However, as the calls for 'transformation' of the judiciary have grown louder and party discipline within the ANC grown stricter, the CC has faced criticism for 'meddling in politics'. Ncgobo J has stated that criticisms of the decisions of judges are welcome as long as it focuses on the reason for the decision or unethical conduct. 'Unbridled and unwarranted attacks on the judiciary…imperil confidence in the court' and thus undermine the court's legitimacy as the acceptance of judicial decisions, which is essential for maintaining the rule of law, rests upon public confidence.[449]

In order for the CC to ensure it fulfills its important constitutional mandate of ensuring that all the values of the Constitution are upheld and all public power is exercised in accordance with that set out by the Constitution, it is thus vital for the CC to maintain its institutional security and legitimacy.[450] The CC thus needs to *sufficiently* formulate and more importantly articulate the constitutional principles that guide its own limits

[443] Seedorf & Sibanda op cit (n3) 12-72
[444] Ibid
[445] Ibid
[446] Kohn op cit (n316) 60
[447] Seedorf & Sibanda op cit (n3) 12-71
[448] Corder op cit (n354) 102
[449] Ngcobo op cit (n66) 15
[450] Seedorf & Sibanda op cit (n3) 12-73

in order to prevent the erosion of respect for its decisions which would result in the CC's institutional security and legitimacy being undermined.

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