Is the ambit of judicial review in South Africa properly guarded to ensure that judges do not (ab)use it to the extent of replacing constitutional supremacy with judicial supremacy?

Submitted in partial fulfilment of the requirements for the degree LL.M. (Constitutional and Administrative Law) in the Faculty of Law, University of Pretoria

by

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February 2020

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ACKNOWLEDGMENTS

I am indebted to my supervisor, Professor Koos Malan, for his incisive and masterful guidance.

DEDICATION

To all my family members.

ABSTRACT

"Ours is a constitutional democracy, not a judiciocracy", so said Chief Justice Mogoeng Mogoeng in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017 (9) BCLR 1108 (CC) para 1]. Not one of the three arms of government, namely, the legislature, executive and judiciary, is supreme in relation to the others. Instead, the Constitution is supreme and each of the three arms of government has exclusive jurisdiction in its constitutionally ordained domain. Their powers are separated, conferred, and protected by the Constitution, subject to the principle of checks and balances.

However, not all the stakeholders in the South African legal discourse appreciate or even believe in the practical value of this separation of powers. To the contrary, and alarmingly, there has, in the recent past, been an increase in the number of claims that the judiciary considers itself supreme. On 15 May 2017, for example, approximately over 1000 ANC supporters marched through the streets of Durban behind a banner bearing a rhetorical question: 'who runs SA: courts or executive?' The general concern appears to be that judges are seemingly (ab)using their judicial review powers to replace constitutional supremacy with judicial supremacy.

The aim of this dissertation is to question the validity of this concern. First, the dissertation will explain the difference between the constitutional and judicial supremacy regimes, with the view to demonstrate why a replacement of the constitutional supremacy regime in the South African legal system with the judicial supremacy regime by the judiciary would be inappropriate. This would explain why the concerns of judicial overreach, if valid, would be justified. Second, the dissertation will discuss judicial review, with the view to explain the perceived power of the judiciary over the other branches of government. Third, and as the crux of the dissertation, will be the discussion of a number of factors and considerations that come into play when judges adjudicate. This will demonstrate that, whilst theoretically possible, judicial supremacy is not something that judges can simply implement on a whim. The dissertation will cast doubt on the validity of claims that judges are (ab)using judicial review to replace constitutional supremacy with judicial supremacy.

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CHAPTER 1: INTRODUCTION

1.1 Background to the Dissertation

The fundamental premise of this dissertation is that judicial supremacy is bad, for any democracy. This is so because 'it allows an unelected judiciary to decide issues that belong to the people themselves and renders the people powerless to do anything'.[1] Instead of judicial supremacy, nations should strive for, and embrace, a legal system that is suffused by constitutional norms without disempowering the people. This places South Africa's legal system in the category of progressive legal systems, as it exalts the Constitution above all other laws or conduct.

However, some critics of the South African legal system have viewed it as myopic the assumption that the South African legal system is not susceptible to judicial supremacy simply because South Africa is a constitutional democracy. They argue that the South African Constitution has armed judges with a very dangerous weapon in the form of judicial review powers. This weapon enables judges to substitute the legislature's views for their views under the subterfuge of interpreting and applying the constitution. Therefore, they argue, the South African legal system could very well be described as a system where judges, not the constitution, are supreme.

This dissertation argues that this argument is unfounded, especially in the context of the South African constitutional democracy. It argues that the ambit of judicial review in South Africa is properly guarded to ensure that judges do not (ab)use it to the extent of replacing constitutional supremacy with judicial supremacy.

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[1] CB Lain 'Soft supremacy (Special Issue on Judicial Supremacy)' (2017) 58 *William and Mary Law Review* 1609.

1.2 **About the Dissertation**

South Africa has had a written Constitution since its formation as the Union of South Africa in 1910.[2]

The current Constitution of the Republic of South Africa, 1996 (Constitution) is the supreme law of the land. This is explicitly stated in its text. Section 2 provides that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[3] This supreme position was afforded to the Constitution by 'we, the people of South Africa', at least technically.[4] We are all, as 'the people of South Africa', including all spheres of government and all laws and conduct, subject to the Constitution.[5]

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[2] Prior to the unification of the four colonies in 1910, only the Orange Free State and the South African Republic (Transvaal) had written Constitutions. The Cape Colony and Natal did not have. The first Constitution of the Republic of South Africa (then the Union of South Africa) was embodied in the South Africa Act, 1909 which established the Union of South Africa with effect from 31 May 1910. The second Constitution, called the Republic of South Africa Constitution Act 32 of 1961, came into force on 31 May 1961 when South Africa was declared a Republic. The third Constitution, called the Republic of South Africa Constitution Act 110 of 1983 came into force on 3 September 1984. The current and "final" Constitution was first introduced as an interim arrangement through the Interim Constitution Act 200 of 1993 and later adopted as the final Constitution in the form of the Constitution of the Republic of South Africa Act, 1996. See http://www.sahistory. org.za/article/history-south-african-constitution-1910-1996 (accessed on 26 March 2017).

[3] See sec 2 of the Constitution.

[4] See the Preamble to the Constitution. The Constitution was a product of a negotiation process between political parties, ostensibly acting on behalf of 'we, the people of South Africa'. The debate around the process leading to, and the actual adoption of the final Constitution, particularly whether or not the Constitution is, matter-of-factly, a product of "we, the people of South Africa" is beyond the scope of this dissertation. Suffice to accept, for present purposes, that 'we, the people of South Africa' adopted the Constitution as the supreme law of the land, as so provides the Preamble to the Constitution.

[5] See secs 7(2), 83(b) and 165(2) of the Constitution.

There is however a catch. The Constitution is, on its own, nothing more than a mere document. It neither has a body to kick nor a soul to damn.[6] It requires real people to respect, protect, promote and fulfil its provisions. That is where government comes in.

South Africa subscribes to the doctrine of separation of powers between the legislature, executive and the judiciary, with appropriate checks and balances and has a constitution-backed system of judicial review. The Constitution empowers one of the three arms of government, namely the judiciary, to apply it without fear, favour or prejudice in all legal questions, coming before it for adjudication.[7] The result of this is a constitutional democracy in which the courts are the ultimate guardians of the Constitution.[8] This also means that courts are empowered, not just by some antiquated common law doctrines, but by the Constitution itself, to review and set aside decisions of the other two arms of government which they, the courts, decide are unlawful. This is what invokes the fear of judicial supremacy.

Judicial supremacy can loosely be defined as a phenomenon under which courts use the Constitution to seize power for themselves to have the final say over issues reserved for the legislature and the executive.

Who guards the guardians?[9] How are the judicial review powers managed so as to ensure that judges do not replace constitutional supremacy with judicial supremacy? The answer advanced in this dissertation is that the fear of the so-called judicial supremacy in the South African context is unfounded. The common and statutory law content of the South African legal system, as purified and strengthened by the

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[6] Derived from the famous quote 'Corporations have neither bodies to be punished, nor souls to be condemned' of Lord Chancellor Edward Thurlow, 1st Baron Thurlow quoted in J Poynder *Literary extracts from English and other works collected during half a century together with some original matter* (1844) 268.

[7] See sec 165(2) of the Constitution.

[8] *Glenister v President of the Republic of South Africa and Others* 2009 1 SA 287 (CC) para 37.

[9] Derived from the Latin phrase '*quis custodiet ipsos custodes*?' found in the work of the Roman poet Juvenal from his Satires (Satire VI, lines 347–348). See https://en.wikipedia.org/wiki/Quis_custodiet_ipsos_custodes%3F (accessed on 13 November 2016).

Constitution, coupled with the inherent weaknesses of the judiciary and a number of other political, economic and social adjudicative considerations, render the perceived ability of judges to replace constitutional supremacy with judicial supremacy a mere imagination, if not a politicking slogan.

1.3 **Problem Statement**

The courts are constitutionally empowered to 'apply' the Constitution in the execution of their functions.[10] It is only courts that can declare any law or conduct that they find to be inconsistent with the Constitution invalid, to the extent of its inconsistency.[11] It is only courts that can judicially review administrative action.[12] To cement this judicial review power, courts have declared that all exercises of public power are subject to judicial review either under the specifically legislated pathways or under section 1(c) of the Constitution. In the result, courts are the guardians and authoritative arbiters of legal issues and are mandated to ensure that all branches of government act within the law.

The problem with this is that it may be argued that it enables judges, if they so decided, to displace constitutional supremacy, adopted by 'we, the people', with judicial supremacy. What would stop judges from 'applying' the Constitution and the law in a manner that displaced constitutional supremacy in favour of judicial supremacy? What are the balancing or restraining factors? That is the problem addressed in this dissertation.

1.5 **The Significance of the Dissertation**

The dissertation seeks to dispel the perception that judges are so powerful that they can use judicial review to willy-nilly, or through some commonly held ideological agenda or conspiracy, overhaul the South African legal system by replacing constitutional supremacy with judicial supremacy.

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[10] See sec 165(2) of the Constitution.

[11] See sec 172(1) of the Constitution.

[12] See sec 33(3)(a) of the Constitution.

This is significant because if the perception or suspicion of judicial supremacy displacing constitutional supremacy has some merit, that would strike at the heart of *trias politica*, which is one of the fundamental elements of our constitutional design. It would also make mockery of the hard-fought triumph over apartheid and the doctrine of parliamentary supremacy. It would transform our legal system from a constitutional democracy to the much despised judiciocracy, which is incompatible with the fundamental principles of democracy. It would render the words of Justice Mogoeng Mogoeng that "ours is a constitutional democracy, not a judiciocracy"[13] nothing more than judicial rhetoric.

More importantly, it would mean that an unelected judiciary has the power to decide issues that belong to the people themselves, which would strike at the heart of the doctrine of popular sovereignty which is embraced in the South African constitutional democracy.

1.6 **Methodology and Approach**

This dissertation does not seek to advance a case for any specific school of thought. It merely explains South Africa's rich jurisprudence to demonstrate that, when adjudicating, judges are not free to invent their own legally unsupportable answers to legal questions so as to pursue a specific agenda.

The dissertation uses an analytical research method. Primary and secondary materials from libraries and the internet are used to assess the role of judges. The aim is to show how judges' constitutionally endowed powers of judicial review are constrained to ensure that judges do not use their judicial review powers to replace constitutional supremacy with judicial supremacy.

1.7 **Limitations**

It is not the purpose of this dissertation to exhaustively discuss all aspects of the South African legal, political and socio-economic landscape that contribute towards

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[13] *Electronic Media Network Limited & Others v eTV (Pty) Ltd & Others* 2017 (9) BCLR 1108 (CC) para 1 ("*Electronic Media Network"*).

restraining judges when executing their judicial functions. Only the most pertinent factors are discussed, sufficient to dispel the myth that judges are at ease to impose their will on government, and effectively govern the country through their decisions.

1.8 **Chapter Overview**

This dissertation consists of five chapters. Chapter one establishes the background, objectives, significance, methodology and scope of the dissertation. Chapter two explains the difference between constitutional supremacy and judicial supremacy. Chapter three explains the concept of judicial review and how certain of its aspects may undermine constitutional supremacy. Chapter four is the crux of the dissertation. It identifies and explains a number of South African legal concepts and unwritten judges' rules to demonstrate what adjudication entails. Its aim is to show that judges do not just do as they please. They are restrained by long established legal principles by which they have to abide. This leads to the conclusion that, even if they wanted to, judges would find it hard, if not impossible, to use judicial review to replace constitutional supremacy with judicial supremacy.

CHAPTER 2: CONSTITUTIONAL SUPREMACY VS JUDICIAL SUPREMACY

2.1 Introduction

The supremacy doctrines define the type of legal system a particular jurisdiction subscribes to. Jurisdictions subscribing to the doctrine of constitutional supremacy exalt the constitution above all laws, as the litmus test of lawfulness for all laws and conduct. Those subscribing to the doctrine of parliamentary supremacy believe in the wisdom of legislators and hedge legislative decisions against judicial interference. Although not prevalent or openly admitted, judicial supremacy occurs when judges indirectly become legislators by overreaching and, contrary to the principle of *trias politica*, invalidating laws passed by democratically elected parliamentarians. They sometimes effectively amend these laws by reading-in "missing" words into, or reading-down express terms of, these laws, using the 'upholding the constitution' sleight of hand.

In this chapter constitutional supremacy and judicial supremacy, which are alleged to be the competing supremacy doctrines in the South African legal system, are discussed with a view to explain the differences between them and to highlight why judicial supremacy is rejected in constitutional democracies.

2.2 Constitutional Supremacy

Constitutional supremacy is a doctrine whose advent and initial embracement in the world's legal systems is time immemorial. It is a multi-sourced doctrine. Depending on who you ask, it can be sourced from any of the Achaean, the Amphictyonic and the Lycian of ancient times; the English Magna Charta; the Bible and the Law of God; Colonial Charters; etcetera.[14] There can however be no gainsaying that this doctrine was popularised by the American constitutionalists. Alexender Hamilton expressed it beautifully when he wrote in the *Federalist Papers*:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that

[14] A Joseph 'Historic roots of the supremacy of the Constitution' (1927) 11 *Constitutional Review* 151.

> the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.[15]

This expression of the doctrine was given constitutional enshrinement for the first time globally in Article 6 of the US Constitution as follows:

> This Constitution … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[16]

What it basically means is that the constitution is king. Neither parliament, nor the judiciary, nor the executive, is supreme, but the Constitution. The constitution is the litmus test of lawfulness of any private or state conduct or law.

Embracing the system of constitutional supremacy means a number of things. As AV Dicey put it, 'in the supremacy of the constitution are involved three consequences'.[17] They are, in the first place, that there must, usually, exist a written constitution. In the second place, such written constitution must be rigid or inexpansive (that is, not amendable in the ordinary manner as are other laws). In the third place, parliament, the executive and the judiciary must be subordinate to it.[18] That is what the doctrine of constitutional supremacy encapsulates.

This is the doctrine that suffuses the South African legal system. On 27 April 1994, South Africans entered into a new social contract in the form of the Interim Constitution[19] which was intended as a bridge between the apartheid past and the constitutional democratic future and to facilitate the continued governance of South Africa, while an elected Constitutional Assembly drew up a final Constitution. Section 4 of the Interim Constitution provided that:

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[15] A Hamilton 'The Federalist No. 78' in Gary Wills (ed) *The Federalist Paper by Alexander Hamilton, James Madison and john Jay* (1982) 395.

[16] See art 3 clause 2 of the Constitution of the United States.

[17] AV Dicey *Introduction to the Study of the Law of the Constitution* (1982) 3.

[18] As above.

[19] Constitution of the Republic of South Africa Act 200 of 1993 ("Interim Constitution").

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

More importantly, Principle VI of Schedule 1 of the Interim Constitution provided that:

> The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

When certifying the final Constitution, the South African Constitutional Court, a then relatively new court created by the Interim Constitution, found that 'constitutional supremacy is unambiguously and adequately entrenched in the final Constitution'.[20]

In terms of the final Constitution, South Africa is founded on the value of the '[s]upremacy of the constitution and the rule of law', amongst others.[21] The consequence of the Constitution being the supreme law of the land is that law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. It applies to all laws.[22] Indeed the courts are obliged, when interpreting any legislation, and when developing common or customary law, to promote the spirit, purport and objects of the Bill of Rights.[23] The legislature, judiciary, executive and all organs of state are bound by the Bill of Rights.[24] So are natural and, where appropriate, juristic persons.[25] Every power, executive, legislative, or judicial is subordinate to and controlled by the Constitution.

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[20] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) 208 (*Certification case*).

[21] See sec 1(c) of the Constitution.

[22] See sec 8(1) of the Constitution.

[23] See sec 39(2) of the Constitution.

[24] See sec 8(1) of the Constitution.

[25] See sec 8(2) of the Constitution.

The supremacy of the Constitution is not only a rule, in the legal sense, it is also a value[26] on which the Republic of South Africa is founded, and also features in the preamble to the Constitution. According to Woolman *et al* constitutional supremacy as a value means that in South Africa there is only one system of law, which is 'shaped by the Constitution which is the supreme law, and all of the law, including the common law, derives its force from the Constitution and subject to constitutional control.'[27] They say that the supremacy of the Constitution in section 1(c) names the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in section 1 and instinct in the rest of the Constitution.[28] A full exposition of the difference between the supremacy of the Constitution as a rule or principle and as a value is beyond the scope of this dissertation.

What then does judicial supremacy mean?

2.4 **Judicial Supremacy**

2.4.1 *Judicial Supremacy is not Judicial Activism*

Judicial supremacy should not be confused with the so-called judicial activism, although it will not be difficult to confuse the two as they are not necessarily inimical to each other. The so-called judicial activism has no universally accepted definition.[29] It is a relative concept that does not lend itself to a precise and defined meaning. In fact, for some scholars such as David *et al*, 'there is really no such thing as judicial

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[26] See Sec 1(c) of the Consitution.

[27] S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* (2007) 11-37. See also *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of South Africa and Others* 2000 2 SA 674 (CC) para 44 ("*Pharmaceutical Manufacturers*").

[28] As above 11-38.

[29] My views on judicial activism are informed by my reading of numerous articles on this topic and informal conversations with Justice Edwin Cameron, for whom I worked as a law clerk, and my fellow clerks at the Constitutional Court, including Sebastian Bates (American foreign law clerk), Kate Peterson (South African law clerk) and Michel Djandji (American foreign law clerk). The conversations were not about this dissertation but were illuminating and advanced my understanding of judicial activism. I am therefore indebted to them.

activism'.[30] Instead, as they say, the term is used to express disagreement with a particular judicial conclusion.[31] Kirby agrees that judicial activism exists in the eye of the beholder.[32] He calls it a phrase 'used to wound and curse its object rather than to invite a reasoned debate.'[33] The term appears to be a mere constitutional cliché.[34]

De Vos and Van Loggerenberg have attempted to assign a definition to the term as referring to "a judiciary that plays an active role *vis-à-vis* the other branches of government generally, or in resolving a dispute between the parties specifically'.[35] Central to it is the view that judges can and should creatively interpret the texts of the Constitution and the laws in order to serve their own visions regarding the needs of contemporary society. Judicial activism postulates that judges assume a role as independent policy makers or independent 'trustees' on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws. The concept of judicial activism is the polar opposite of judicial restraint.

The question of whether judicial activism is desirable in a constitutional democracy and, if it is, the form it should take, is beyond the scope this dissertation. The point made here is only and simply that judicial activism does not equate to judicial supremacy. By its very nature, adjudication requires judicial activism. It can either be in the form of supine adherence to the letter of the law, whatever its substantive content is, or can involve an active interpretation of laws that recognises the revolving

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[30] R David at al 'Judicial Activism on the Rehnquist court: An empirical assessment' (2008) 23 *St. John's Journal of Legal Comment* 35.

[31] As above.

[32] M Kirby 'The Fourth Hamlyn Lecture 2003 (shortened version), The Hamlyn Lectures, Fifty-Fifth Series, "Judicial Activism' Authority, Principle and Policy in the Judicial Method"' (Delivered 25 November 2003) 57.

[33] As above.

[34] TA Padua 'The expression judicial activism as a constitutional cliche must be abandoned: A critical analysis' (2015) 5 *Brazilian Journal of Public Policy* 135, 169.

[35] W de Vos & DE van Loggerenberg 'The activism of the judge in South Africa' (1991) *Journal of South African Law* 592 610.

nature of societies which always necessitates adaptation of laws so as to accord with present day values and societal norms. The latter can easily be labelled judicial activism if it interferers with the traditional views of the role of a judge. However, in reality, the former is no less judicial activism. There is no such thing as judges only apply the law. As Kirby points out, this is 'rooted in deception: deception of the community, of other lawmakers and, perhaps most worrying of all, of the judiciary and legal profession itself.'[36]

This was lucidly demonstrated during the apartheid era in South Africa. Some judges who had no moral objection to apartheid 'actively' enforced the apartheid laws, hiding behind the doctrine of parliamentary supremacy. This happened to the extent of even misrepresenting this doctrine or disregarding other possible interpretations of the law that assuaged the reach of the ignominious apartheid laws. They applied the increasingly repressive apartheid laws while disclaiming any moral responsibility for doing so. This ensured that black people were relegated to secondary or last citizen status, if any afforded to them, with no right to vote, to move freely, to occupy any skilled posts in employment or to exercise any of the elementary dignities of citizenship. They had no legal entitlement to be on or to own property anywhere in the great majority of South Africa's land area.

Judges assiduously hid behind the so-called legal positivism, claiming that they merely declare the law and did not make it. This was not only morally wrong and incorrect, as it is now widely accepted, it was the best form of deception there could ever be.[37] Positivism had nothing to do with it. Hart's embrace of the positivism doctrine was such that it did not exempt judges from taking anti-apartheid stances whilst 'applying the law'.[38] However, because it was more than just applying the law, some judges "actively" pursued an agenda which firmly entrenched the apartheid system in South

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[36] Kirby, MD 'Attacks on judges—A universal phenomenon' (1998) 72 *Australian Law Journal* 599.

[37] J Durgad 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181.

[38] See HLA Hart 'Positivism and the separation of law and morals' (1958) 4 *Harvard Law Review* 71. See also LL Fuller 'Positivism and fidelity to law — A reply to Professor Hart' (1958) 4 *Harvard Law Review* 71 available at http://academic2.american.edu/~dfagel/Class%20 readings/Hart/Separation %20of%20Law%20And%20Morals.pdf (accessed 30 September 2016).

Africa. As Cowling pointed out: 'within the framework of legislative supremacy, the positivistic approach to judicial decision making [provided] an extremely convenient cloak behind which judges can hide their "inarticulate major premises" by attributing inequitable results to the legislator.'[39]

The enforcement of apartheid laws was just another form of judicial activism. It obviously cannot comfortably be labelled as such now as it is the direct opposite of what judicial activism is understood to be in the modern understanding of the term. Maybe it could appropriately be called negative judicial activism.

There could be no gainsaying that under the doctrine of parliamentary supremacy, which was the overall dictating doctrine for judicial interpretations of legislative instruments at the time, judges could not strike legislation as unconstitutional. In fact, parliament even excluded certain laws from judicial purview.[40] That notwithstanding, judges still retained the power of interpretation. Pitifully, some of them used that power in ways that increasingly demonstrated an executive bias and disregard for standards of human rights evolving in the international community.[41]

That was judicial activism, just as the robust, 'progressive' and liberal interpretations of the law today are. There is therefore negative and positive judicial activism. They are both part and parcel of adjudication. They can never be indicators of judicial supremacy. Quite the contrary. They are an integral aspect of the judiciary's function in a constitutional democracy, which is to interpret the law. Viewed in the context of the other balancing factors and considerations that bind judges when interpreting the law, judicial activism does not equate to judicial supremacy and must not be confused with it.

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[39] MG Cowling 'Judges and the protection of human rights in South Africa: Articulating the inarticulate premise' (1987) 3 *South African Journal on Human Rights* 177 189.

[40] Sec 34(3) of the Republic of South Africa Constitution Act 110 of 1983 provided that 'no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament'.

[41] L Berat 'Courting justice: A call for judicial activism in a transformed South Africa' (1993) 37 *St. Louis University Law Journal* 849 870.

2.4.2 *What then is Judicial Supremacy?*

Judicial supremacy effectively refers to a phenomenon where courts exercise their judicial review powers with little, if any, appreciation for the separation of powers' boundaries. According to Gardbaum, judicial supremacy can manifest in four different forms, namely, (i) interpretive supremacy; (ii) attitudinal supremacy; (iii) decisional supremacy; and (iv) political supremacy.[42]

Interpretive supremacy is, according to Gardbaum 'the most common sense of judicial supremacy'. It refers to the legal authority of the court (particularly the Constitutional Court in the South African context) to authoritatively and finally determine what the constitution requires, such that its decisions have the same legal status as the Constitution itself. The other arms of government are bound by these decisions; so are lower courts (in the light of the doctrine of *stare decisis*). This renders the judiciary supreme, on interpretive matters.

Those who deny that this form of judicial supremacy can exist in a *trias politica* constitutional system argue that all the three arms of government have an equal constitutional right and obligation to interpret the constitution when fulfilling their obligations. The legislature and the executive interpret and apply the constitution on a daily basis and their interpretations are final, unless set aside by a court of law in the limited number of cases that end up in court. Others deny this form of judicial supremacy on the basis of popular constitutionalism. They argue that, in the South African context for example, 'we, the people of South Africa' are the final interpreters of the Constitution.[43]

Attitudinal supremacy is described by Waldron as the manner in which courts exercise their judicial review powers.[44] It refers to 'how' the courts (particularly the highest

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[42] S Gardbaum 'what is judicial supremacy' in G Jacobsohn *et al Comparative Constitutional Theory* (2018) 21.

[43] L Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (2005).

[44] J Waldron, Judicial Review and Judicial Supremacy 11 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 14-57 2014) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2510550 (accessed on 11 September 2018).

court), or certain members of the judiciary, approach certain matters. Some judges are 'originalists', others 'pragmatists', others 'progressives', etc. A 'progressive' court would often strike down legislative strides of a 'conservative' parliament. This refers to instances where there is a reasonable 'conservative' interpretation of the Constitution that can be adopted by the court to constitutionally approve the legislation in question, but due to 'approach and attitude' of the court, the legislation is invalidated. This form of concern about judicial supremacy is therefore different from the interpretive supremacy concern, as it relates to 'approach' to interpretation, as opposed to the 'power' to interpret.

Decisional supremacy is about the consequences of a court's decision to invalidate legislative law. Does the decision mean that the invalidated legislation ceases to be of any force? If the answer is yes, that means the court has decisional supremacy. This is the position in South Africa. Whereas, according to Gardbaum, in other countries, for example New Zealand and United Kingdom, 'statutory bills of rights provide that judicial decisions finding legislation incompatible with protected rights are *never* legally authoritative in that such a decision does not affect the validity of the legislation and courts are still required to apply it in the case at hand'.[45] As he further points out, 'the major issue here is whether courts or the elected branches of government have the legal power to ensure that their view prevails as to whether a statute conflicts with the constitution/bill of rights and remains the law of the land'. It is as a result of the presence or otherwise of decisional supremacy that:

> Today in Canada and South Africa prisoners vote in parliamentary elections because of the judicial rulings; while in the UK and New Zealand they so not – despite similar court decisions.[46]

Political supremacy refers to 'the political power of the courts (or the highest court) to control and resolve constitutional issues, relative to that of the other branches of government'. [47] In the political *trias politica*, courts impose their political and

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[45] Gardbaum (n 42 above) 21.

[46] As above.

[47] As above.

constitutional hermeneutic views on the legislature and the executive. 'From this perspective, judicial supremacy is not a matter of legal power, formal authority, or what judges say or assert in their opinions, but is all about empirical assessments of inter-branch politics and policy outcomes.'[48]

A number of prominent constitutional law scholars have publicly declared their support for judicial supremacy. These include Erwin Chemerinsky, Dean of the University of California, Berkeley, School of Law. Chemerinsky argues that, absent the courts and judicial supremacy:

> What is to stop Congress or the President from enacting a law that is unconstitutional but politically expedient? What, other than the drastic remedy of impeachment, is to stop the President from pursuing unconstitutional policies when they are politically popular? Often there is no one--other than the courts--to deter wrongdoing and compensate those injured by constitutional violations.[49]

He argues that because courts are 'the branch of government that can best enforce the Constitution's limits against the desires of political majorities' they are best placed to be the supreme interpreters of the constitution.[50] He provides the following further justifications for judicial supremacy:

1. Courts are obliged to hear complaints properly placed before them, regardless of the social status of the litigant, whereas legislators are not, save where it is politically expedient. This does not only make courts accessible to the entire population; it protects the minority against the tyranny of the majority;
2. Courts are obliged, not only to hear, but to respond to complaints brought before them. The same cannot be said of the legislature as allegations of constitutional violations can be debated endlessly with no legislative solution, leaving the victims without any remedy.

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[48] As above.

[49] E Chemerinsky 'In defense of judicial supremacy (Special Issue on Judicial Supremacy)' (2017) 55 *William and Mary Law Review* 1459.

[50] As above.

3. Courts are mostly insulated from politics. They generally enforce the constitution with little regard of the views of or influence from the political majority. The point he makes is that "constitutional interpretation inherently requires choices as to what the Constitution should mean, how its abstract values should be applied in specific situations", made by an institution whose commitment is to the Constitution, not securing popularity and votes.
4. Courts are required to explain their reasoning to prevent against arbitrary decision making. The legal limits imposed on the legislature in making its decision leave room for decisions grounded on political expediency more than constitutional values and principles.

4.4.3 Opposition Against Judicial Supremacy

In his book, 'Taking the Constitution Away from the Courts', Tushnet posits that 'what the Constitution means is not necessarily what the Supreme Court says it means.'[51] Judicial supremacy can therefore never be allowed to be the order of the day in a constitutional democracy.

It is beyond the scope of this dissertation to exhaustively discuss arguments against judicial supremacy. It will be sufficient, for present purposes, to briefly discuss the main argument against judicial supremacy, which is that it impermissibly allows unelected judges to impose their (almost irrevocable) will on the people – which is undesirable in a constitutional democracy.

There can be no gainsaying that all the branches of government have the prerogative and obligation to interpret and apply the Constitution in their respective domains in a *trias politica*- based constitutional order. The unique position of the courts is that they are constitutionally empowered to scrutinise the interpretations of the other branches and, where deemed appropriate, correct or substitute them for the courts' interpretations. This places unelected judges above elected representatives of the people who are presumed to express the will of the majority of the citizenry when passing laws.

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[51] M Tushnet *Taking the Constitution away from Courts* (1999) 6.

Unlike the legislature's interpretations of the Constitution expressed through laws passed, which can be changed by "we, the people" through elections, the court's interpretations are binding on all the spheres of government and "we, the people" and are difficult to change (to the extent requiring a constitutional amendment). They are often permanently imposed on the entire nation. The question of death penalty in South Africa, as decided in *S v Makwenyane*[52], is a clear example. The Constitutional Court unanimously decided in 1994 that the death penalty was unconstitutional and therefore unlawful. Considering South Africa's current political discourse, comprised of a numerous political parties representing diverse sections of the society along perceived and real ideological and racial divides, chances of there ever being a single political party commanding an absolute majority in parliament (so as to be able to singularly amend the Constitution to allow for reinstatement of the death penalty) are almost zero. The decision of the eleven unelected justices of the Constitutional Court has almost irrevocably decided the question of death penalty for the South African population.

It is no answer to say that the eleven unelected justices did not decide the question for the South African population, but "we, the people" decided the question ourselves through the inclusion of the right to life in the Constitution, amongst other constitutional provisions which formed the basis of the Court's decision in *Makwenyane*. There is no explicit provision in the Constitution abolishing death penalty. Such argument would be premised on the assumption that the Constitutional Court was correct in its interpretation of the Constitution.

Now, even if parliament, acting for the majority of the people, were to pass a law, based on parliament's own interpretation of the Constitution, reinstating the death penalty, such law would not pass constitutional muster, as interpreted by the Constitutional Court and would therefore fail. A constitutional amendment, requiring way more than a simple parliamentary majority, would be necessary. If the eleven unelected justices of the Constitutional Court were wrong in their interpretation of the Constitution in *Makwenyane*, "we, the people" are almost irrevocably stuck with that

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[52] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) ("*Makwenyane*").

wrong interpretation, absent a constitutional amendment or the Constitutional Court itself reconsidering its interpretation.

In a constitutional democracy where the constitution is supreme, judicial supremacy could metaphorically be called 'treason' against the Constitution.

There is generally nothing wrong with judges enjoying authoritative hermeneutic power when it comes to the Constitution and the law. For reasons of certainty and coherence of the law, someone must have the predictable and principled last word. There is no other well-suited government branch to do this than the judiciary. Indeed, we the people of South Africa, through the Constitution, bestowed the judiciary with the 'final say' jurisdiction on judicial matters.[53] We then gave each of us the right to have a dispute that can be resolved by application of the law referred to court.[54] So, what is wrong with judges enjoying final say jurisdiction on the meaning and ambit of the law, in particular the Constitution?

The Constitution is not like any other Act of parliament that courts interpret on a daily basis using conventional methods of interpretation. In South Africa, the people, through their freely elected representatives (functioning as a constitutional assembly), adopted the Constitution as the supreme law of the land so as to, amongst other things:

> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law[55]

This is a radical endorsement of the defining feature of the doctrine of parliamentary supremacy, the principle of popular sovereignty, within a constitutional democracy. It says government must be based on the will of the people. That will is generally expressed through parliament, not the courts. The overarching document on which the will of the people has been expressed is the Constitution. Judges only have to say what the will is, as expressed in the Constitution, not what it should be. As the former

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[53] See sec 165 of the Constitution.

[54] See sec 34 of the Constitution.

[55] See the preamble to the Constitution.

Chief Justice of the United States of America, Charles Evans Hughes once said: 'we are under a Constitution, but the Constitution is what the judges say it is.'[56] Franklin Roosevelt added his perspective in 1937 in a radio address on reorganization of the judiciary and said:

> Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court Bench. An amendment like the rest of the Constitution is what the Justices say it is rather than what its framers or you might hope it is.[57]

That is why the most traditional and natural system of government based on the will of the people is a parliamentary sovereign system, as prevails in the English legal system. After all, in a democratic society the legislature is comprised of freely elected representatives of the people. They are the ones to tell us what the will of the people should be, in legal terms, in line with their mandate from the electorate.

South Africans however did not bestow supremacy to parliament; neither did they bestow it to the judiciary. Instead they exalted the Constitution as the supreme law of the land. However, the Constitution is just a document and does not have the required human physiological attributes to tell us what it requires in any given circumstance. The drafters were of course mindful of this. They, through the very same instrument of the Constitution, appointed the judiciary to authoritatively and 'finally' speak on the Constitution's behalf. They appointed it to act as a translator who has the carte blanche to proverbially lip-read the Constitution when it is required to say something and to indisputably verbalise its dictates and commands.

The problem comes when the other branches of government, the court's partners in the *trias politica*, the legislature and the executive, lip-read the Constitution for themselves for purposes of fulfilling their own constitutional functions in government. Courts are empowered to correct them if, in the courts' view, their interpretations are

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[56] C Hughes *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908) 139.

[57] See http://xroads.virginia.edu/~ma02/volpe/newdeal/court_fireside_text.html (accessed on 14 June 2017).

constitutionally wrong. There are many reasons why this is desirable in a democratic society. It is however when the courts' judicial review powers are not properly balanced that the undesirable toxicity of unrestrained judicial review, in the form of extreme judicial supremacy, manifests itself and collapses a constitutional democracy. This is so because:

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.[58]

These were the words of Bishop Hoadly preaching at a sermon before King George I in 1717. He was, to a certain extent, correct. Davis summarises the problem in the following terms:

> Review is conducted by unelected judges who are empowered to overturn the will of a democratically elected and accountable legislature in terms of a process of interpreting abstract constitutional provisions. In short, the question arises as to how to account for and justify the curtailment of the operation of a democratic political system by an unaccountable institution.[59]

This is why the extent of judicial review has to be balanced. Judges are not lawmakers and any likelihood of them usurping that role, which is constitutionally reserved for the legislature, is to be met with the wrath of constitutional blameworthiness. Judicial supremacy, in the form of the counter-constitutional judiciocracy, is simply undesirable in a constitutional state.

Judges must always resist any temptation to venture into saying what the law should be. The temptation may at times be irresistible in a country where government or the legislators are not trusted by many due to a number of factors. These include corruption which, according to Chief Justice Mogoeng Mogoeng 'has become a scourge in our country and… poses a real danger to our developing democracy'.[60]

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[58] D Davis `Democracy — its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* 104.

[59] Davis (n 34 above) 104.

[60] *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC) para 57.

But judges have to hold their judicial review horses from gallivanting into the political polycentric terrain.

They must ask themselves: 'just who do we think we are?' This is what the current Chief Justice of the US Supreme Court, John Glover Roberts Jr asked in a recent landmark case of *Obergefell v. Hodges.*[61] In this case the US Supreme Court held, in a five–four split, that the fundamental right to marry is guaranteed to same sex couples by both the due process clause and the equal protection clause of the fourteenth amendment to the United States Constitution. Roberts CJ wrote a dissenting judgment and questioned the Court's power to decide the question of same sex couples' right to marry. He said:

> This Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise 'neither force nor will but merely judgment.[62]

Roberts CJ did not end there, he continued:

> Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.[63]

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[61] *Obergefell v. Hodges* 135 S.Ct. 2584 (*Obergefell*). In this case Kennedy J delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor and Kagan JJ joined. Roberts CJ wrote a dissenting opinion, in which Scalia and Thomas JJ joined. Scalia J wrote a dissenting opinion, in which Thomas J joined. Thomas J wrote a dissenting opinion, in which Scalia J joined. Alito J wrote a dissenting opinion, in which Scalia and Thomas JJ joined.

[62] As above 2587.

[63] As above.

It was in this context that Roberts CJ asked the question - 'just who do we think we are?' - directed at the five lawyers (the majority of the Court) who decided the same sex question which Roberts CJ firmly believed was not within the constitutional domain of the Court. He exposed the counter-majoritarian nature of judicial review, which is more pronounced in the case of judicial supremacy.

Of course, there are views in support of the counter-majoritarian nature of judicial review (short of judicial supremacy). Majoritarianism is itself not ideal, to the extent that it embraces absolute majority rule. It is unsustainable in that form in a constitutional democracy in which everyone is equal before the law. In that context, the counter-majoritarian nature of judicial review assists in preventing tyranny of the majority and protecting the rights of the minority from oppression by social majorities. Societies are always bound to have majorities and minorities on a number of issues. If those sometimes extreme and diametrically opposed societal compositions are not harmonised by a social contract, destruction is inevitable. The society will be self-destructive. The Constitution is therefore the society's attempt to protect itself against itself. The decision to exalt the Constitution above all laws and make it difficult to amend was motivated by fear that political majority could gain control of government and disenfranchise and perhaps prosecute the minority.

That said, judicial supremacy is not an option. The most deleterious consequence of uncontrolled judicial supremacy or unbalanced and unrestrained judicial review is that is exposes the judiciary to public criticism. This in turn can cause a serious dent in the legitimacy of the judiciary and the concomitant public confidence in it. As Kirby puts it, 'whatever its origin, "judge-bashing" is dangerous. It threatens public confidence in the independence of the judiciary. It weakens faith in the decisions of judges.'[64]

Judge-bashing often occurs when judges appear to have jumped their pre-eminent domain fences and intruded into a sphere reserved for legislators and administrators. The bashing often comes from politicians. In most cases however, the political outrage is not necessarily an indicator of judicial overreach. Many factors contribute to this.

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[64] Kirby (n 32 above) 52.

This dissertation is concerned with the factors and considerations that balance the extent of judicial review to ensure that constitutional supremacy is not replaced by judicial supremacy. However, before the balancing factors and considerations are flashed out in some detail, which will be done in chapter four, it is necessary to start with a discussion of the concept of judicial review.

CHAPTER 3: JUDICIAL REVIEW IN SOUTH AFRICA

3.1 Introduction

This chapter is not intended to provide a detailed analysis of the concept of judicial review. Nor is it about the pros and cons of judicial review. It will therefore not venture into the literature on the legitimacy or otherwise of judicial review. It is instead intended to provide an overview of the concept, by highlighting the aspects of judicial review that potentially place the judiciary at the elevated 'big brother' position vis-à-vis the other arms of government and empowers it to review and set aside their decisions. It is this aspect of judicial review that this dissertation is about. This aspect apparently terrorizes the minds and hearts of the custodians and die-hard proponents and defenders of the fundamentals of the doctrine of separation of powers. They say, if left unchecked, this aspect of judicial review potentially places the judiciary in a position where it can suppress the doctrine of constitutional supremacy in favour of judicial supremacy.

Simply defined, judicial review entails the constitutional scrutiny of government action by an independent court of law, and the concurrent power to strike down action which the court finds inconsistent with the constitution. It 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'.[65]

Judicial review has been part of the South African legal system for a very long time, as will be explained below. It was not introduced by the new constitutional dispensation. What however happened in the new constitutional dispensation in South Africa is that judicial review took a different form. In this chapter, the pre-constitutional dispensation form of judicial review will be discussed briefly. This will be followed by a discussion of judicial review under the current South African constitutional dispensation, with a view to demonstrate its burgeoning effect and the threat it is perceived to pose to the doctrine of constitutional supremacy.

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[65] D Moseneke 'Striking a balance between the will of the people and the supremacy of the Constitution' (2012) 129 *South African Law Journal* 9 17.

3.2 **Judicial Review Pre-1994**

The concept of judicial review is generally understood to have its roots in a 1796 judgment of the United States Supreme Court in *Hylton v. United States.*[66] It was however in a later decision of the US Supreme Court, in *Marbury v. Madison*, that this concept was fleshed out in some detail and settled.[67]

In the South African context, judicial review is not a recent post-apartheid era phenomenon. As early as 1854, the concept of judicial review was adopted and constitutionally embraced in the Orange Free State Republic.[68] South Africa Republic (Transvaal) followed suit in 1858, albeit the Transvaal's 1858 Constitution was not as fully embracive of judicial review as that of the Orange Free State. This was prior to the unification of these territories with the Cape and Natal to form the Union of South Africa (now known as the Republic of South Africa) in 1910. The unification of the four territories brought with it some changes, including the establishment of the Supreme Court of the Republic of South Africa as the highest court in the Union.[69]

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66 *Hylton v United States* 3 US 171 (1796). There is scholarly disagreement on whether Sir Coke's obiter dictum in *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 114 is the real source of judicial review. See R.H. Helmholz, Bonham's Case, Judicial Review, and the Law of Nature, (2009) 1 *Journal of Legal Analysis* 325. Whichever is the correct source, the point being made here is that the doctrine of judicial review is long established.

67 *Marbury v. Madison* 5 US 137 (1803).

68 The 1854 Orange Free State Constitution entrenched fundamental rights which could not be infringed by ordinary legislative action. The power of the Volksraad (legislature) was constrained and limited by the requirement that it be exercised intra vires the Constitution at all times under the watchful eye of the judiciary. This was eloquently asserted by Hertzog J in *The State v. Gibson* 15 Cape L. J. 1 (1898) at 4 when he said:

> The Volksraad is beyond doubt the highest legislative authority, but still not unqualifiedly the highest authority. Above the legislative authority stands the constitution-giving authority – that is, sovereign people, to whom the majesty belongs.

See J Davidson 'The history of judicial oversight of legislative and executive action in South Africa (1985) 8 *Harvard Journal of Law and Public Policy* 687.

69 H Corder 'Judicial authority in a changing South Africa' (2004) 24 *Legal Studies* 253.

The unification also necessitated a reconciliation of the legal systems of the four colonies. Orange Free State was the only territory whose legal system did not shield legislative actions from constitutional scrutiny by courts. South Africa Republic (Transvaal), although initially attempting to embrace the concept of judicial review along the lines that the Orange Free State did, 'had a marked distaste for any assertion of judicial review' by the time of the unification.[70] Natal and the Cape Colony were populated by British settlers, which meant that the British doctrine of parliamentary supremacy negated any sensible, human-rights-orientated embrace of the concept of judicial review. All of this resulted in a unified system that constrained the courts' role to giving effect to the intention of the legislature as reflected in the statutes, not to question it. The doctrine of parliamentary supremacy seminally prevailed and shaped the development of South Africa's judicial review jurisprudence for many years to come.

In *Ndlwana v Hofmeyr, N.O.*[71] the Appellate Division elucidated the import of the doctrine of parliamentary supremacy when Acting Chief Justice Stratford stated that 'parliament's will, therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of Law whose function it is to enforce that will not to question it.'[72] He continued:

> Once we are satisfied on a construction of the Act, it is no function of a Court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the Courts, arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will.[73]

This however did not mean that in expressing its will Parliament was at large to do as it pleased and to flout the procedural requirements regulating how it must express its

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[70] Davidson (n 69 above) 698.

[71] *Ndlwana v Hofmeyr N.O.* 1937 A.D. 229 ("*Ndlwana*").

[72] As above p. 237.

[73] As above.

will. Indeed, in the seminal case of *Harris v Minister of the Interior*[74] Chief Justice Centlivres rejected the Court's finding in *Ndlwana* that, as long as the three constituent elements of Parliament act together, they may express their will in any way they choose. Chief Justice Centlivres' objection was that if that was the case then 'courts of law would be powerless to protect the rights of individuals which were specifically protected in the constitution of this country.'[75]

Centlivres' judicial-review-friendly construction of the doctrine of separation of powers was however not long-lived. The doctrine of parliamentary supremacy and its role in insulating Parliament from constitutional scrutiny by the courts was reaffirmed in *Collins v Minister of Interior*.[76] In *Collins* Chief Justice Centlivres wrote that "[i]f a Legislature has plenary power to legislate on a particular matter, no question can arise as to the validity of any legislation on that matter and such legislation is valid whatever the real purpose of that legislation is.'[77]

Therefore, before the dawn of constitutional democracy in South Africa, the court's judicial review powers were sourced from the common law, in particular the *ultra vires* doctrine. This doctrine was 'the justification for judicial interference'.[78] It was premised on the doctrine of parliamentary supremacy and empowered courts to shepherd administrative acts to ensure that they remained within (that is, intra) the statutory boundaries set by Parliament. This meant that courts were able, as a right inherent in the courts, to set aside administrative action that was found to be *ultra vires*.[79]

Other possible grounds included: (i) where there had been no decision at all as required by the statute, in that the administrative body failed to consider the matter entrusted to it by the statute for decision or failed to apply its mind to the matter, or

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[74] *Harris v Minister of the Interior* 1952 2 SA 428 (AD) ("*Harris*").

[75] As above p. 469.

[76] *Collins v. Minister of Interior* 1957 1 SA 552 (AD).

[77] As above p. 565.

[78] L Baxter *Administrative law* (1984) 307.

[79] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 115.

failed to exercise it discretion; (ii) where the administrative body or official disregarded the direct provisions of the statute; (iii) where there was fraud, bad faith or corruption; and (vi) where the body or official acted for improper or ulterior purposes or motives.[80]

The point being made here is that, pre-1994, judicial review was not grounded on the doctrine of constitutional supremacy. It was instead suppressed by the doctrine of parliamentary sovereignty. Court's powers to review and set aside decisions of the other branches of government were limited and the idea of judicial supremacy was beyond contemplation.

3.3 Judicial Review in the Constitutional Democracy

In the new democratic South Africa, judicial review has its basis in the Constitution, which creates a unitary system of law. Indeed:

> There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all of the law, including the common law, derives its force from the Constitution any subject to constitutional control.[81]

Let us first look at some of the judicial-review-related provisions from the Constitution. Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of the supremacy of the constitution and the rule of law, amongst others. Section 2 of the Constitution declares that law or conduct inconsistent with the Constitution is invalid. This provision is buttressed by sections 165 and 172 of the Constitution. Section 165 vests judicial authority in South Africa in the courts and enjoins them to apply the Constitution and the law impartially and without fear, favour or prejudice. Section 172(1)(a) of the Constitution requires the courts, when deciding constitutional matters within their powers, to declare that any law or conduct that is inconsistent with the Constitution is invalid, to the extent of

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[80] L Rose Innes Judicial review of administrative tribunals in South Africa (1963) 55.

[81] *Pharmaceutical Manufactures* (n 29 above) para 44.

it inconsistency.[82] Section 33(1) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and section 33(3)(a) requires that legislation must provide for review of administrative action by courts.

Arising out of the aforementioned constitutional provisions and of course the common law and some statutory provisions are a number of pathways to judicial review. Hoexter has identified that there are 'no fewer than five different pathways to administrative law review: the PAJA, s 33, special statutory review, the principle of legality and the common law.'[83] Only two will be discussed here. These are judicial review under the principle of legality, which is a product of innovative judicial interpretations of section 1(c) of the Constitution and judicial review under the Promotion of Access Justice Act,[84] which is a legislative response to section 33 of the Constitution. These two pathways to judicial review will be discussed in the context of the title of this dissertation. What this means is that the dissertation will not seek to explain all aspects of these pathways to judicial review, but rather to briefly touch on those aspects of them that seek to, or should be developed to, limit the extent of judicial review. This will serve to demonstrate that a threat of judicial supremacy overpowering constitutional supremacy exists.

3.3.1 *Judicial review under PAJA*

Section 33(3) of the Constitution provides that national legislation must be enacted to give effect to the administrative action rights in section 33(1) and (2) and to, amongst other things, provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. In other words, this section provides that Parliament must statutorily empower courts to review administrative

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[82] In *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* [2017] ZACC 31 para 8 the Constitutional Court emphasised that 'virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional.'

[83] C Hoexter *Administrative Law in South Africa* (2007) 114.

[84] Promotion of Access Justice Act 3 of 2000.

action and define the parameters of such powers. Parliament duly complied. It enacted PAJA.

On the dictates of the principle of subsidiarity, which is 'a familiar norm of almost all modern, democratic legal systems',[85] PAJA is now the obvious[86] pathway to judicial review of administrative action, unless PAJA itself (or any other original legislation) is constitutionally challenged for non-compliance with section 33, in which case a direct reliance on section 33 of the Constitution is permissible. The principle of legality cannot be relied on to review administrative action in respect of which PAJA applies.[87]

How is the extent of judicial review limited under PAJA? It is limited in two respects, both embraced in the definition of 'administrative action' in PAJA.[88] First, in the

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[85] K Klere 'Legal subsidiarity and constitutional rights: A reply to van der Walt' (2008) 1 *Constitutional Court Review* 129 134.

[86] In *Sidumo v Rusternburg Platinum Mines* Ltd 2008 (2) SA 24 (CC) the Constitutional Court found that PAJA was not necessarily the sole piece of national legislation giving effect to section 33, for there was nothing in section 33 to preclude further specialised legislation. In this case the Constitutional Court found that section 145 of the Labour Relations Act 66 of 1995 should also be regarded as an instance of such national legislation in the labour sphere, and thus as specialised legislation alongside PAJA.

[87] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 2 SA 63 (SCA). This case is now before the Constitutional Court.

[88] PAJA define 'administrative action' as any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

requirement that a decision or failure to take a decision, when acting in terms of a recognised empowering provision, must adversely affect rights of any person and must have a direct, external legal effect. Second, is the specific exclusion from the ambit of reviewable administrative action of certain decisions.

The bite of the exclusions in the context of the title of this dissertation is that, unless an administrative decision qualifies as administrative action under PAJA, a court will have no power to judicially review or set it aside relying on the generous grounds under PAJA. This is PAJA's own internal limitation of judicial review to ensure that constitutional supremacy prevails over judicial supremacy.

Granted, the definition of administrative action under PAJA is 'cumbersome' and 'serves not so much to attribute meaning to the term as to limit its meaning by

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(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) *(a)*, *(b)*, *(c)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85 (2) *(b)*, *(c)*, *(d)* and *(e)*, 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) *(d)*, *(e)* and *(f)*, 126, 127 (2), 132 (2), 133 (3) *(b)*, 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1);

surrounding it with a palisade of qualifications.'[89] It does however play an important role of limiting the extent of judicial review under PAJA. No matter how innovative judges and lawyers may be in attributing certain interpretations to the definition of administrative action under PAJA, the specific exclusions make certain decisions of public bodies completely untouchable for judicial review purposes under PAJA. This ties the judges' hands and renders judicial supremacy impossible insofar as the PAJA pathway of judicial review of administrative action is concerned. Of course, there is the principle of legality as an alternative. Now let us turn to look at the principle of legality.

3.3.2 *Judicial review under the principle of legality*

What happens when an exercise of public power is not administrative action as defined in PAJA? Is it immune from constitutional scrutiny? No. Section 1(c) of the Constitution declares South Africa a democratic state founded on the value of the rule of law, amongst others. 'The rule of law, to the extent at least that it expresses the principle of legality, is generally understood to be a fundamental principle of constitutional law.'[90] It requires that all government action must comply with the law, including the Constitution.[91] In other words, what it means is that 'the exercise of public power is only legitimate where lawful'.[92] But what does the lawfulness requirement entail? This is where the judiciary has the upper hand. Our courts have been developing and continue to develop the principle of legality since *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[93] (*Fedsure*). It has been expanded to mean that (i) a holder of public power must act in good faith and must not misconstrue his or her powers[94] and (ii) the

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89 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 21.

90 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 para 56.

91 As above para 72.

92 As above para 56.

93 As above para 56.

94 *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 148.

exercise of public power should not be arbitrary or irrational;[95] which means that it must be procedurally fair[96] supported by reasons[97] and not only must there be a rational connection between the means adopted to achieve a lawful government purpose and the purpose itself, the means must also be proportional to the ends (for example, a sledgehammer must not be used to crack a nut).[98] The last requirement is the most concerning. It appears to give judges the power to question the wisdom of parliamentarians. This looms closer to judicial supremacy as the lines between review and appeal can easily be blurred. Under the principle of legality, State organs may also apply to court to review and set aside their own decision.[99]

The elasticity of the principle of legality is concerning as it, on the face of it, gives judges power to creatively find ways to scrutinise, review and set-aside decisions of the other branches of government. Judges could use this power to ordain themselves as the supreme authority in government, which, as discussed above, is undesirable in a constitutional democracy.

Does this mean we should do away with judicial review? No. Judicial review is desirable and in fact an indispensable cornerstone of a constitutional democracy. The need for an authoritative interpreter of the Constitution that can best enforce the Constitution's limits against the desires of political majorities cannot be gainsaid. Judges owe no political allegiance to political parties or voters. They operate under no fear of repercussions (for example, being re-called or risking election). Through judicial review the will of the majority still prevails in the form of law, policy or conduct which accords with the dictates of the Constitution. As former Deputy Chief Justice Moseneke observed:

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95 *Pharmaceutical Manufacturers* (n 29 above).

96 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 419 - 20.

97 *The Judicial Service Commission v The Cape Bar Council* 2013 1 SA 170 (SCA).

98 *Democratic Alliance v The President of the Republic of South Africa* 2013 1 SA 248 (CC).

99 *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).

> Judicial review, then, is a necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing limits that the Constitution itself imposes on government power.[100]

If that is the case (that is, judicial review is indispensable in a constitutional democracy like ours) and there is an appreciation that the principle of legality is elastic enough to allow judges to replace constitutional supremacy with judicial supremacy, is the claim that the South African judicial review system is nearing judicial supremacy valid? No. The South African judicial review system is far from judicial supremacy. This in fact takes us to the crux of this dissertation. There are a number of balancing factors that limit the extent of judicial review from burgeoning to the level where judges can easily replace constitutional supremacy with judicial supremacy. An important selection of these factors are discussed in the next chapter.

[100] Moseneke (n 66 above) 12.

CHAPTER 4: FACTORS THAT BALANCE THE EXTENT OF JUDICIAL REVIEW

4.1 Introduction

This dissertation is about the preservation of constitutional supremacy in the South African legal system in the face of the burgeoning judicial review powers enjoyed by our courts. It aims to dispel the perceived threat of judicial supremacy replacing constitution supremacy. The undesirability of judicial supremacy in a constitutional democracy is spelled out in chapter two. So is the role played by the doctrine of constitutional supremacy and its importance in the South African constitutional democracy. In chapter three, judicial review and the threatening expansion of the ingredients of the principle of legality is explained and highlighted in some detail. The question that remains to be addressed is how to contain judicial review to ensure that constitutional supremacy is not replaced by judicial supremacy.

This is a question of balance and there are many factors and considerations at play. It is beyond the scope of this dissertation to exhaustively discuss these factors and considerations. What follows is a discussion of the obvious ones. The aim is to demonstrate that, when exercising their judicial review powers, courts are not at large, legally unrestrained and unshackled. Indeed section 8 of the Constitution makes it clear that the judiciary is equally bound by the Bill of Rights as the legislature, executive and other organs of state. Section 165 of the Constitution posits that courts are also subject to the Constitution and the law.

The following balancing or restraining factors and considerations will be discussed next: the doctrine of separation of powers, the theory of deference, the doctrine of precedents, and extra-legal considerations. However, before that, it is important to highlight the inherent weakness of the judiciary *vis-à-vis* the other branches of government.

4.2 **Inherent weakness of the judiciary**

It must be pointed out, at the outset, that the judiciary is not as strong as perceived to be, in relation to the other branches of government. It is truly the weakest of the spheres of government. Its frailty was conceded many years ago. Alexander Hamilton famously acknowledged that in a body politic whose legislative, executive and judicial powers are separated, the legislative branch controls money, the executive controls

force, and the judiciary controls neither.[101] He contended that the judiciary was the 'least dangerous' branch of government within the *trias politica*:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

South Africa's former Chief Justice Mahomed echoed Hamilton's sentiment when he eloquently observed:

> Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation.[102]

There are legitimate fears that the South African judiciary may, despite its acknowledged weakness in the greater scheme of things, exercise its judicial review powers in a manner that places it above the Constitution. After all, the judiciary is a 'bastion or stronghold of the legal order, however challenging the times may be.'[103] It is the heartbeat of the constitutional arrangement, as it exercises a pre-eminent and 'robust role . . . in the legal and political life of the nation.'[104] This is why, in a constitutional democracy, balancing the extent of judicial review through calculated,

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[101] A Hamilton, J Madison & J Jay 'The Federalist papers random house edition (2003) 7 *Notes* 504) 504.

[102] I Mahomed 'The role of the judiciary in a constitutional state' (1999) 115 *South African Law Journal* 111 112. See also *S v Mamabolo* 2001 3 SA 409 (CC).

[103] D van Zyl 'The judiciary as a bastion of the legal order in challenging times' (2009) 12(2) *Potchefstroom Electronic Law Journal* 6.

[104] *Dada & others NNO v Unlawful Occupiers of Portion 41 of the Farm Rooikop & Another* 2009 2 SA 492 (W) paras 41–2.

self-reinforcing, structural limits is as critical as the concept of judicial review itself. A replacement of the doctrine of constitutional supremacy with judicial supremacy in the South African constitutional jurisprudence, disguised as guardianship of the Constitution, would be injurious to South Africa's constitutional design.

The judiciary cannot afford to unduly impose itself over the other branches of government, on whose cooperation it relies for its effectiveness. As Malan points out:

> A fiercely independent and impartial judiciary, ruling left, right and centre against the executive, might prove to be largely ineffective if the executive decides to ignore those rulings instead of abiding by and giving effect to them.[105]

The judiciary's dependence on the other arms of government is further illustrated by Malan as follows:

> It is appointed and financed by the political branches, devoid of its own resources and dependent upon the goodwill and cooperation of the legislature, executive, state administration and the public in general to give effect to its rulings.[106]

The judiciary is also not comprised of individuals of identical personality traits, ideological beliefs, background, religious convictions, intellectual strengths, etc. Judges are often very different individuals in many respects. There is indeed often clashes in approaches to legal problems, founded on and influenced by various factors including, race (although not always openly acknowledged), generational-gap, actual or assumed intellectual acumen, upbringing, etc. This is a problem inherent within the judiciary, which makes it almost impossible to have a single-minded judiciary that can conspire and gun for supremacy over the executive and the legislature, at the expense of constitutional supremacy.

Other inherent weaknesses of the judiciary are discussed below under different headings.

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[105] K Malan Reassessing Judicial Independence and Impartiality Against The Backdrop of Judicial Appointments in South Africa (2014) 17 *Potchefstroom Electronic Law Journal* 57.

[106] As above 25.

4.3 **The Doctrine of Separation of Powers**

The most prominent balancing factor, in ensuring that judicial review does not become a judicial tool to usurp power from the other branches of government, is the doctrine of separation of powers. Chief Justice Mogoeng Mogoeng recently explained it lucidly in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and* Others.[107] In this case the Constitutional Court found that the Minister of Communications did not have to consult with e.TV, one of the respondents, when amending the much debated and politically fought-over Broadcasting Digital Migration Policy to exclude decryption capabilities from state funded set top boxes.[108] The first line of the Court's majority judgment, penned by Chief Justice Mogoeng Mogoeng, reads: 'Ours is a constitutional democracy, not a judiciocracy.'[109] The Chief Justice explained:

> Consonant with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament, whereas the judiciary and the executive authority of the Republic repose in the Judiciary and the Executive respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.[110] (footnotes omitted)

Whenever one talks of the doctrine of separation of powers, the temptation is often irresistible to retell the story, told in legions of scholarly writings, of how it developed since its conception. However, venturing into the historical traces, which would be incomplete without a discussion of how the French lawyer and political philosopher, Montesquieu, [111] who is credited for expounding the modern formulation of the doctrine, articulated this doctrine or how, before him, the 'father of liberalism', John

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[107] *Electronic Media Network* (n 13 above) para 1.

[108] The set top boxes will enable millions of South Africa's poor households to receive the impending, new, digital television signal without having to junk their current television sets, which can receive only the old, analogue signal.

[109] *Electronic Media Network* (n 13 above) para 1.

[110] As above.

[111] A Cohler, B Miller & H Stone *Montesquieu: The spirit of the laws* (1989).

Locke, alluded to the idea,[112] will be avoided in this dissertation. Also, Sir William Blackstone's valuable commentary on the doctrine, although attractive to spell out, will be avoided.[113] So will the articulations of the doctrine by the British jurist and constitutional theorist, Dicey[114] and English philosopher and political economist John Stuart Mill.[115] Rather, an explanation of the basic ingredients of the doctrine, including the spicing added by the American influence initiated by John Adams[116], will be felicitous.

In his book, The Spirit of the Laws, Montesquieu wrote in the 18th century:

> There is no liberty if the judiciary power be not separated from the legislature and the executive. Were it joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislature. Were it joined to the executive power, the judge might behave with violence and oppression.[117]

The doctrine of separation of powers, as articulated by Montesquieu and progressed by Adams, is lucidly abridged by Van der Vyver as comprising four principles.[118] The first principle is that of *trias politica*, in terms of which government power is divided between the legislature, executive and the judiciary. To give meaning to this, each branch of government should, as a second principle, be staffed with different officials who may not serve simultaneously for more than one branch. The third principle is that each of these branches is mandated with separate core functions; namely making the law, executing and enforcing the law, and adjudicating on questions of law,

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[112] J Locke *Two Treatises of Government* (1824).

[113] W Blackstone *The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England* (2009).

[114] AV Dicey (1982) *Introduction to the Study of the Law of the Constitution* 337

[115] JS Mill *Considerations on Representative Government* (1861).

[116] John Adams was an American patriot who served as the second President of the United States and drafted the Massachessetes constitution. See https://en.wikipedia.org/wiki/John_Adams (accessed on 23 March 2017).

[117] Cohler, Miller & Stone (n 113 above).

[118] JD van der Vyver 'The separation of powers' (1993) 8 *Southern African Public Law* 177 178.

respectively. This is how far Montesquieu idealised the doctrine of separation of powers. It was Adams who modified it to include a fourth principle of checks and balances in terms of which each branch is empowered to exercise some form of oversight over the others.

In the *Certification case* the Constitutional Court emphasised that 'there is no universal model of separation of powers'.[119] In *De Lange v Smuts* the Court observed that:

> [There is] no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balance informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other to avoid diffusing power so completely that government is unable to take timely measures in the public interest.[120]

It was not long after when, in *South African Association of Personal Injury Lawyers v Heath*, the Constitutional Court reaffirmed that there 'can be no doubt that our Constitution provides for such a separation [of powers] and that laws inconsistent with what the Constitution requires in that regard, are invalid'.[121]

This doctrine is therefore a 'vital tenet of our constitutional democracy'.[122] In its uniquely South African conception, this doctrine entails that, pursuant to the supremacy of the Constitution, the courts, as its guardians and as the final, independent and authoritative arbiters of legal issues, are mandated to ensure that all branches of government act within the law. The proviso to this extensive judicial power is that 'the courts in turn must refrain from entering the exclusive terrain of the

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[119] *Certification case* (n 20 above) para107.

[120] *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 60.

[121] *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 22.

[122] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 6 SA 223 (CC) (*Urban Tolling Alliance*) para 44. See also *Executive Council, Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC) para 50; *Bernstein v Bester N.O.* 1996 2 SA 751 (CC) para 105; and *Glenister v President of the Republic of south Africa* 2011 3 SA 347 (CC) paras 29-36.

executive and legislative branches of Government *unless* the intrusion is mandated by the Constitution itself'.[123]

In a special session of Parliament on 1 November 2011, held to bid farewell to former Chief Justice Sandile Ngcobo and to welcome the newly appointed Chief Justice Mogoeng Mogoeng, president Jacob Zuma said:

> In paying tribute to our former and current Chief Justice, we reiterate our firm belief in the principles of the rule of law, the separation of powers, and judicial independence.[124]

There is therefore an appreciation of this doctrine not only from the judicial side, but also from a political side. What does this doctrine do for purposes of this dissertation? It balances the extent of judicial review. It is a deeply entrenched jurisprudential restraining doctrine which serves to keep judges within their pre-eminent domain. It posits that 'there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others'.[125]

What all this means is that judges are not loose cannons. They are jurisprudentially bound by the separation of powers not to usurp the functions and constitutional mandates of the other branches of government. Courts can therefore not willy-nilly tell Parliament or the executive how to fulfil their functions. Neither can the executive nor Parliament prescribe to the courts. This doctrine ensures that none of the three arms of government is superior to the others. This makes the claim of judges using judicial review to turn constitutional democracy to judicial supremacy less valid.

Of course, one may argue that, even with the doctrine of separation of powers, nothing stops judges from intruding into the spheres of the other branches of government under pretence of fulfilling their constitutional mandate. Such an argument will be overlooking the other factors, particularly the extra-legal factors, which are always at

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[123] *Urban Tolling Alliance* (n 163 above) para 44.

[124] As reported by news24 – htttp://www.news24.com/SouthAfrican/Politics/Court's-can't be (2-11-2011) (accessed on 12 April 2016).

[125] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) para 98.

play when judges adjudicate. These will be considered under the heading 'extra-legal factors' below. For now, let us look at two doctrines that are a manifestation of the doctrine of separation of powers to illustrate how this doctrine restrains judges from overreaching.

4.3.1 *Deference*

The Constitution does not mention the term deference, in the form of judicial restraint, anywhere in its text. Neither does it specifically mention separation of powers. However, as mentioned earlier, it is now axiomatic that the doctrine of separation of powers is part of our constitutional design.[126] Deference in turn is the practical manifestation of the doctrine of separation of powers. It refers to the notion that courts must, when exercising their judicial review powers, always exercise restraint. Put differently, courts must respect the doctrine of separation of powers and not intrude into the province of the other branches of government, unless the intrusion is constitutionally mandated. Deference is slightly more nuanced than the broader concept of separation of powers. Hoexter tells us that when she first called for the development of this doctrine in South Africa, she was referring to 'the articulation of rigorous and coherent principles that will guide legal intervention and non-intervention'.[127]

The notion of deference focuses more on administrative decisions and judgment on polycentric issues. As Hoexter points out, it consists of:

> 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 interests legitimately pursued by administrative bodies and the practical and financial constraints under which they have to operate.[128]

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[126] *Glenister* (n 61 above) para 298.

[127] Hoexter (n 83 above) 147 quoting A Cockrell 'Can you paradigm? – Another perspective on the public law / private law divide in T W Bennett et al (eds) *Administrative Law Reform* (1993) 227 247.

[128] Hoexter (n 83 above) 151.

The functional role of the notion of deference in the context of this dissertation is that it balances judicial review so as to ensure that democracy is not overshadowed by judiciocracy. Others choose to call it respect, although that does not imply a supine judiciary bowing to the dictates of the other branches of government. O'Regan J lucidly explained this interesting terminological choice in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* as follows:

> Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function''. . . . The use of the word ''deference'' may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of separation of powers itself.[129]

The most important principle that can be discerned from this quote is that deference is not a matter of judicial choice. It is not a matter of judges trying to make the other branches of government feel important. It is a constitutional command to judges, to stay within their domain. The effect of the doctrine of deference, in the context of this dissertation is that it commands judges to appreciate their limited wisdom when it comes to executive or administrative and legislative matters. It suppresses any possible scope for judicial supremacy. It serves as a judicial restraint and, parallel to that, commands judges to approach judicial review not as big-brothers, but as on-the-same-level co-partners, to the other arms of government in the search for the most appropriate government approach to intrinsically political matters. It posits that judicial review should never be used as an expression of distrust of elected representatives, but rather as a supplementary governing tool for the proper functioning of government. In *Ferreira v Levin*[130] the Court stated that it was not its role to approve or disapprove of political decisions, but rather to ensure that the implementation of political decisions was constitutionally compliant.

This again makes the claim that judges may willy-nilly use the instrumentality of judicial review to replace constitutional supremacy with judicial supremacy less valid.

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[129] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 46.

[130] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC).

4.3.2 *Distinction between appeal and review*

The distinction between appeal and review is another manifestation of the separation of powers doctrine. Kriel agrees that 'the review/appeal dichotomy is plainly a manifestation of the separation of powers'.[131] Since the early twentieth century, the South African legal system distinguishes between appeals[132] and reviews. In terms of this distinction, appeals speak to the merits of a particular decision, whereas reviews are about the processes leading to the decision. As Hoexter puts it, 'the distinction reflects the separation of powers, a fundamental pillar of our constitutional order'.[133]

In *Chief Constable of the North Wales Police v Evans,* Lord Brightman, writing for the House of Lords, illuminated the rationale behind this distinction as follows:

> Unless [this] restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.[134]

Of course, the distinction is not always clear-cut. Indeed, in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* the Supreme Court of Appeal acknowledged that 'the line between review and appeal is notoriously difficult to draw'.[135] That may be so, but it does not mean that the distinction is no longer valid, as Corder seemed to suggest in 2004:

> We need openly to acknowledge that the old approach to distinguish review from appeal is no longer tenable. It is also not necessary, as our courts have now been expressly authorised

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[131] R Kriel 'Administrative law' (1998) *Annual Survey* 89 96.

[132] The appeals referred to here are appeals in the strict sense, to a court of law, not internal administrative appeals that sometimes have to be exhausted before legal proceedings may be instituted challenging an administrative decision.

[133] Hoexter (n 83 above) 111.

[134] *Chief Constable of the North Wales Police v Evans* (1982) 3 All ER 141 (HL) 143.

[135] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* 2007 1 SA 576 (SCA) para 31.

> to determine the reasonableness of administrative action, which must contain a merits-based substantive element.[136]

The distinction is fundamental to the doctrine of separation of powers. Kriel was correct when he cautioned that:

> A collapse of the distinction between appeal and review is a most radical step which, if it were to be done properly, would require a fundamental rethinking of our notion of separation of powers.[137]

Hoexter correctly echoes this sentiment: 'to question the distinction too deeply is to question the doctrine of the separation of powers itself'.[138] As a result 'the distinction ... continues to be asserted and upheld every day in the courts, and generally without qualification'.[139] The distinction continues to serve as a deterrent to the courts' power to review the merits of decisions of the other branches of government. The functional purpose of the distinction is that it balances the courts' judicial review powers so as to ensure that constitutional supremacy is not replaced by judicial supremacy. Judges are barred from scrutinising the merits of the decisions of the other branches of government, as that would amount to usurpation of the functions entrusted to those branches by the Constitution. That is yet another balancing factor.

4.4 **The doctrine of precedents**

Contrary to what the sceptics of judicial review might argue, courts are not at large, with no accountability obligations. In addition to being accountable to the public and indeed the other arms of government, lower courts can be held to account by higher courts. Even the highest court is bound by its previous decisions, unless a departure passes the justifiable departure test. This is because of the long established and firmly entrenched doctrine of precedents. It is often expressed by the Latin maxim *stare*

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[136] H Corder 'Without deference, with respect: A response to Justice O'Regan (2004) 121 *South African Law Journal* 438 443.

[137] Kriel (n 130 above) 96.

[138] Hoexter (n 83 above) 111.

[139] As above.

decisis et non quieta movere (to stand by decisions and not to disturb settled matters). A court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters. In other words, previous decisions do not only bind lower courts but also bind courts of final jurisdiction to their own decisions.

The significance of the doctrine of precedents is well expressed by the US Supreme Court's Justice O'Connor in *Planned Parenthood of Southeastern Pennsylvania v Casey*:

> The very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.[140]

The importance of the doctrine cannot be understated. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of the law.

In the *Certification* case the court remarked 'the sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are shown to be clearly wrong is no less valid here than is generally the case'.[141] In *Gcaba v Minister for Safety and Security and Others* van der Westhuizen J said the following:

> Precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot "rule" unless it is reasonably predictable. A highest court of appeal – and this Court in particular – has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned.[142]

This does not mean that a court cannot deviate from binding decisions, but it does mean that a cogent explanation is required when deviation is unavoidable. As was said in the US case of *Arizona v. Rumsey*:

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[140] *Planned Parenthood of Southeastern Pennsylvania v Casey* 112 SCt 2791 (1992) 700.

[141] *Certification case* (n 20 above) para 8.

[142] Gcaba v Minister for Safety and Security and Others 2010 1 SA 238 (CC) para 62 ("*Gcaba*").

> Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.[143]

In the Australian case of *Ostime v Australian Mutual Provident Society,* Lord Deming said:

> The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps.[144]

Rycroft identifies a series of prudential and pragmatic considerations when a departure is considered, extracted from US case law:

(a) Has the rule proved to be intolerable simply in defying practical workability?
(b) Is the rule subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation?
(c) Have related principles developed as to have left the old rule no more than a remnant of abandoned doctrine?
(d) Have facts so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification?
(e) Is the most recent decision a collision with a prior, intrinsically sounder doctrine?
(f) Is the decision a direct obstacle to the realization of important objectives embodied in other laws?[145]

In the South African context, the test was laid out in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* as follows:

> These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts

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[143] *Arizona v Rumsey* 467 US 203 (1984).

[144] Ostime v Australian Mutual Provident Society [1960] A.C. 459, 489.

[145] A Rycroft 'The doctrine of stare decisis in Constitutional Court cases' (1995) 11 *South African Journal on Human Rights* 587 592.

> of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.[146]

In *Gcaba* van der Westhuizen J, as he then was, stressed that:

> As jurisprudence develops, understanding may increase and interpretations may change. At the same time though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts.[147]

The doctrine of precedents ensures that judges do not reinvent the wheel. They are not at liberty to substitute long established legal principles and doctrines for what they believe to be right, having regard to their own conceptions of what is right. Even if there was a desire to overhaul the legal system and entrench judicial supremacy as the prevailing mother-doctrine which informs adjudication, judges would not be able to do that willy-nilly. They are bound by the existing precedents which they can only depart from only for good reasons and, sometimes, only under exceptional circumstances. Of course, an objectively unjustifiable departure will trigger other considerations like judicial legitimacy through public confidence which would reinforce judicial restraint.

4.5 **Extra-legal considerations**

For purposes of this dissertation, extra-legal considerations refer to those factors that feature in judges' minds when adjudicating but are not necessarily legal considerations. The list of these factors will not be exhausted in this dissertation, nor can it in fact be exhaustive in its nature. Also, there must be an appreciation that the

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[146] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19 (unreported, decided on 4 November 2010) para 28.

[147] *Gcaba* (n 141 above) para 62.

factors and the weight placed on each of them by judges differ depending on the political and socio-economic baggage carried by the judge in question.

4.5.1 *Judges are not robots*

The fear that judicial review might result in constitutional supremacy being replaced by judicial supremacy in the South African context is premised on a misconceived perception that judges are somehow tantamount to robots. It is a fallacy that judges can simply be programmed to subscribe to uniform ideological preconceptions, thereby resulting in a structured judicial coup d'état. Adjudication entails much nuanced not readily visible politics of law. Langa succinctly explains this as follows:

> Judges bear the ultimate responsibility to justify their decisions not only by reference to authority but by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of law. . . . [T]ransformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the 'personal, intellectual, moral or intellectual preconceptions' on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.[148]

This is candidness at its best. Not all judges would publicly acknowledge this. Much less the US Supreme Court's Chief Justice Roberts Jnr who, in his confirmation hearing in 2005, said:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.[149]

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[148] P Langa 'Transformative constitutionalism' (2006) 17/3 *Stellenbosch Law Review* 351.

[149] See http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (accessed on 12 April 2017).

This was an unrealistic and extremely legalistic approach which has no place in modern day adjudication, if it ever had a place in the past. It might accord with the traditional role of the judiciary, which is how judges regarded their role to be. This was however not what was happening is reality. Former US president Barak Obama voted against Roberts CJ precisely because of this fallacious portrayal of what adjudication really entails. Obama later said:

> While adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases – what matters on the Supreme Court is those 5 percent of cases that are truly difficult….In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those circumstances….the critical ingredient is supplied by what is in the judge's heart.[150]

It was also not surprising that when, five years later, Alena Keagen, who is now an associate justice in the US Supreme Court, was asked during her confirmation hearing in 2010 to comment on Roberts CJ' 'umpires' metaphor she rejected it. She said:

> The metaphor might suggest to some people that law is a kind of robotic enterprise, "that there's a kind of automatic quality to it, that it's easy, that we just sort of stand there and, you know, we go ball and strike, and everything is clear-cut ... that there is no judgment in the process...I do think that that's not right. And it's especially not right at the Supreme Court level. ... Judges do, in many of these cases, have to exercise judgment. They're not easy calls.[151]

Roberts CJ's approach has also been rejected by many constitutional law scholars as unrealistic. Posner correctly identified it as having been a ploy to avoid incurring unnecessary political opposition to his nomination for a United States Supreme Court seat:

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[150] See http://edition.cnn.com/2005/POLITICS/09/12/roberts.statement (accessed on 12 December 2016).

[151] See http://abcnews.go.com/Politics/Supreme_Court/elena-kagan-hearings-worthwhile/story?id=11068199 (accessed on 12 December 2016).

> Judges' motivations would be uninteresting were judges legalists in the extreme sense endorsed by John Roberts at his hearing for confirmation as Chief Justice. He said that a judge, even if he is a Justice of the Supreme Court, is merely an umpire calling balls and strikes. Roberts was updating for a sports-crazed era Alexander Hamilton's description of a judge as the government official who, unlike an official of the executive or legislative branch of government, exercises judgement but not will, and Blackstone's description of judges as the oracles of the law, implying (if taken literally) an even greater passivity than Hamilton's and Roberts's definitions.[152]

The point being made here is that judges are not like vending machines, to which you insert money, press a coke button and, Bob's your uncle, you get your coke. If they were like vending machines, they would be a special type. You would insert money into them; press a coke button but get just about anything, depending on how your pressed the button and how your money is processed inside the machine.

It is this undeniable truism of adjudication that ensures that a judge's judgment on whether or not to exercise restraint is informed by many extra-legal factors, most of which point towards the prudence of judicial restraint.

4.5.2 *Strategic adjudication*

In the *Law's Empire* Ronald Dworkin said:

> An actual justice must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices and to make their decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principal.[153]

It is a matter of prioritizing strategic ends over a blind application of the law. Judges always strategically avoid, as they must, making decisions whose subjects, the community and government in particular, would justifiably reject. A rejection of a court's decision may cripple courts' legitimacy and threaten their existence.

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[152] R Posner *How Judges Think* (2008) 40-1.

[153] R Dworkin *Law's Empire* (1986) 380-1.

Former US Chief Justice John Marshall demonstrated this avoidance of rejection strategy as long ago as 1802 in *Marbury*.[154] In that case he dedicated most of his judgment to explaining how and why the administration of President Thomas Jefferson had violated the law. However, despite the finding of violation, Justice Marshall said the Court could not do anything about it due to its own lack of jurisdiction. Of course, the Court could have done something about it. It could have ordered President Thomas Jefferson to deliver the outstanding commissions. But it strategically chose not to because of possible rejection of that order by President Thomas Jefferson.

In fact President Thomas Jefferson had made it clear that the Court could not give him a mandamus even if the Court had jurisdiction.[155] Therefore, to save the court from embarrassment and possible relegation to the realm of irrelevance and toothlessness, Justice Marshall strategically avoided ordering President Thomas Jefferson to do anything – which he was not going to do. He instead gave an order that was perceived to be the Court's avoidance of the issue, but at the same time firmly establishing the doctrine of judicial review.

Failure of strategic adjudication and its consequences was illustrated in *Worcester v. Georgia*[156] where the same Chief Justice Marshall ordered the then President Andrew Jackson to take immediate steps to secure the release of Samuel Austin Worcester. In response to the Court's decision, President Andrew Jackson is alleged to have said 'John Marshall has made his decision; now let him enforce it'.[157] That is the power of the executive. It is in charge of enforcement of court judgments. Courts' effectiveness requires strategic engagement with the executive, of course without compromising fulfilment of its constitutional obligations.

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[154] *Marbury* (n 68 above).

[155] See http://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html (accessed on 11 October 2016).

[156] *Worcester v. Georgia* 31 US 515 (1832).

[157] E Miles 'After John Marshall's decision: Worcester v. Georgia and the nullification crisis' (1973) 39 *The Journal of Southern History* 519.

Back home. Not long-ago judges were disregarded and ignored over the Bashir matter, when the Department of Home Affairs simply allowed the Sudanese leader to leave the country, in defiance of a court order. This is the last thing that judges want. It gives them more of a reason to always tread carefully. Roux calls this careful treading 'adjudicative strategy'.[158] Currie calls it 'judicious avoidance'.[159] Judges do not only have to tread carefully in relation to avoiding usurping the roles of the other branches of government, they also have to consider public support. They need the support of the general public to keep the other branches of government in line. A court revered and considered legitimate by the general public will hardly have its decisions ignored by government, for fear of being punished and hammered by the public in the ballot box.

This links comfortably to the idea of judicial self-restraint. Once all the considerations are at play, a judge must make a decision. As the twelfth Chief Justice of the Supreme Court, Harlan Fiske Stone said:

> While the unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.[160]

The late former Chief Justice Mahomed echoed this:

> It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial power is matched by the real depth of judicial responsibility. Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs.[161]

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[158] T Roux *The Politics of Principle: The first South African Constitutional Court, 1995–2005* (2013) 447.

[159] I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

[160] *United States v. Butler* 297 US 1 (1936).

[161] The late former Chief Justice Mahomed, the first black Chief Justice of a democratic Republic of South Africa when addressing the International Commission of Jurists in Cape Town on 21 July1998, quoted in G Manyatera 'A critique of the superior courts judicial selection mechanisms in Africa: The

Linked to this are pragmatic and institutional considerations.

> Whatever judges say, deep-seated philosophical, social, psychological and even political considerations can affect judicial approaches to the resolution of legal problems, particularly in the higher appellate courts.[162]

Pragmatism is the key word. As Klug has pointed out, judges have developed 'both a strategic mode of engagement with the political branches as well as a judicial pragmatism in navigating the difficult challenges posed by cases brought before [them].'[163]

Klug refers to two of many instances. One of them is in the case of *The AParty & Others v Minister for Home Affairs & Others*.[164] The approach adopted by the Constitutional Court in this matter is strikingly similar to the approach adopted by Chief Justice Marshall in *Marbury* discussed above. Like in *Marbury*, the Court in this case denied direct access, largely to safeguard its institutional interest. This after former Chief Justice Ngcobo acknowledged that 'the key issue is the question of the constitutional validity of the electoral system – a matter that lies peculiarly with Parliament's constitutional remit.'[165] The case involved 'fundamental questions concerning the right of every citizen to vote in an election.'[166] Klug explains the strategic and pragmatic approach adopted by the Constitutional Court in this case as follows:

> While the Court explicitly declined to make a decision on the constitutionality of the registration provisions challenged in the case, it did manage to (i) postpone a possible confrontation with

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case of Mozambique, South Africa and Zimbabwe' unpublished PhD thesis, University of Pretoria, 2015 183.

[162] Kirby (n 32 above) 69.

[163] H Klug 'Finding the Constitutional Court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the Court's decision making' (2010) 3 *Constitutional Court Review* 1.

[164] The AParty & Others v Minister for Home Affairs & Others 2009 3 SA 649 (CC) (*AParty*).

[165] As above para 80.

[166] *AParty* (n 164 above) para 1.

> the government over the scope of legislative power to design the electoral system; (ii) establish a fairly high standard for when it would be appropriate to grant direct access to the Constitutional Court; and (iii) use the facts of the case to argue that the outcome was essentially the consequence of the applicants' own tardy behaviour since they had failed to fulfil their duty as citizens to make the appropriate arrangements to register to vote before departing the country and instead relied on a limited political process in an attempt to secure their rights.[167] (footnotes omitted)

Judicial strategy, pragmatism and institutional considerations count against any possibility of judicial supremacy in a constitutional democracy.

4.5.3 *Public opinion and public confidence*

In *Makwenyane* Chaskalson P, as he then was, authoritatively quoted Justice Powell's comment in his dissent in *Furman v Georgia*[168] that:

> The weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery - not the core - of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.[169]

Despite acknowledging that '[p]ublic opinion may have some relevance' to the enquiry whether death sentence was permissible under the Constitution, Chaskalson P endorsed the statement by Justice Powell in *Furman v Georgia.* He downplayed the role of public opinion in adjudication saying '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.[170]

This reduction of public opinion to some insignificant consideration in the process of adjudication is not realistic. As Folkes points out, it may have been possible in

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[167] Klug (n 163 above) 13.

[168] *Furman v. Georgia* 408 US 238 (1972).

[169] *Makwenyane* (n 53 above) para 89.

[170] *Makwenyane* (n 53 above) para 88.

Makwenyane to dismiss public opinion because the circumstances were simply extraordinary.[171] The Court had more to lose if it exalted and endorsed public opinion which favoured a perceived perpetration of the injustices of our past, in the wake of protracted political negotiations that had as an element of their bedrock the abolition of inhumane and degrading treatment of persons. In other not so extraordinary circumstances, public opinion matters and is sometimes decisive of the matter, as Mahomed J pointed out in *Makwenyane*.[172]

Indeed, in *Makwenyane*, Kentridge AJ was less dismissive of public opinion. He acknowledged that 'were public opinion on the question clear it could not be entirely ignored.'[173] He was justifiably concerned that public opinion on the issue before Court was not as clear-cut as may have been assumed by the parties who argued for the retention of death penalty. Such opinion could not just be gleaned from 'the results of informal public opinion polls, still less by letters to the press' which is what these parties sought to do.[174]

This is not to say that courts root their decisions on the amorphous ebb and flow of public opinion. What it means rather is that in their identification of legal solutions to legal problems, judges are often likely to adopt a legal solution that does not upset overwhelming public opinion. In doing this, the primary goal is not to please the public, although judges can hardly begrudge public exuberance over their decisions, but to secure public support in the court's entrenchment of its legitimacy. That is why what Fowkes calls the 'public status' of ideas presented by each matter that comes to court plays a critical role in adjudication.[175] This was evident in a number of decisions of the Constitutional Court. Some examples that Fowkes refer to include *Hoffman v*

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[171] J Fowkes (2016) *Building the Constitution: The practice of constitutional Interpretation in post-apartheid South Africa* 68.

[172] *Makwenyane* (n 53 above) para 266.

[173] As above para 200.

[174] *Makwenyane* (n 53 above) para 200.

[175] Fowkes (n 171 above) 73.

South African Airways[176] where the Constitutional Court confronted the issue of workplace discrimination based on one's HIV status and was backed by the 'public status' of the idea of protecting HIV-positive persons against discrimination. There was already a public demand for this protection, which the Constitutional Court could not ignore. As Fowkes points out:

> The ANC government had instituted a number of important protections for HIV-positive persons, which the Court could refer to in a long footnote as authority for the proposition that HIV-positive persons 'enjoy special protection in our law….key individuals were advocating human rights-based approaches to the epidemic . . . activists from the anti-apartheid and LGBTI equality context like Simon Nkosi and Zackie Achmat . . . were forerunners in being open about their HIV-positive status and fighting stigma.[177]

Judges require public support. There is often the question that is asked on who guards the guardians. The answer to that question may involve a number of considerations. However, the most significant is the public's role in guarding the judiciary. Practically, judges account to the general public, albeit indirectly. Their authority exists only because there is someone who bows to it. Where there is no subject, there can be no ruler. In a normal democracy, judges rely on the general public to use the ballot box to punish politicians who disobey court decisions. For that to happen, judges must be on the good side of public opinion, to the extent legally justifiable. After all, it is about the will of the people, right? Doesn't the preamble to the Constitution talk about 'laying the foundations for a democratic and open society in which government is based on the will of the people'? Yes, it does. Is the judiciary not an arm of government? Yes, it is.

Judges cannot just, willy-nilly, decide to do away with the doctrine of constitutional supremacy in favour of judicial supremacy, without considering public opinion. Just like the legal order of apartheid which 'undermined faith and confidence in the whole

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[176] *Hoffman v South African Airways* 2001 1 SA 1 (CC).

[177] Fowkes (n 171 above) 345.

South African legal system' a system of judicial review not endorsed by the Constitution may have similar results.[178]

The following factors contribute to public confidence in the judiciary: the practice of open courts; the giving of reasons for decisions grounded on established legal principles; efficiency; consistency with the interests of justice, fairness; freedom from corruption and improper influence; processes that are not dependent on the personality or personal attitudes of individual judicial officers, etcetera. Perhaps one should add to these the manner in which judges compose themselves in both their private and their public lives. All these add to judicial restraint and make the claim of judicial supremacy less valid.

4.5.4 *The Doorbell theory and Gate-Keeping Criteria*

Courts are never the instigators of court cases. Instead, they rely on the general public, either for personal or public interest purposes, to identify issues for them and to bring such issues before the courts for determination. They function like doorbells. Unless pressed, they do not ring. This is what I refer to as the doorbell theory. The utility of a doorbell depends on at least three things. First, there must be a bell-presser who presses it according to its operating manual. Second, the bell itself must be in a good working condition. Third, the person to whom it is directed must be willing and able to understand and respond to its sound. Of course, this is a limited example meant only for making a specific point. That point is that, courts do not initiate cases, just as doorbells do not just ring on their own. This is an important consideration when one determines whether courts can easily impose themselves, over the other branches, as the supreme branch of government in a constitutional democracy, under the disguise of constitutional interpretive authority. This is the first hurdle they would have to jump. What if there is just no bell-ringer? Surely the bell would never ring on its own. In other words, unless the right cases are brought before courts, requiring courts to interpret specific laws in a manner that entrenches judicial supremacy, courts have their proverbial hands tied.

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[178] J van der Westhuizen 'The protection of human rights and a Constitutional Court for South Africa: Some questions and ideas, with reference to the German experience' (1991) *De Jure* 1 2.

Moreover, even after the bell is pressed, its operating manual has to be complied with, for its effectiveness. It does not just ring at a press of a button. In the case of courts, their operating manual includes the long-standing legal doctrines of justiciability or standing, ripeness, mootness, jurisdiction, etcetera. Adherence to these rules is the basic ingredient for judicial legitimacy. Bickel correctly posits that courts should take these principles seriously in order to retain judicial legitimacy.[179]

Take the doctrine of justiciability for example. Its main dictate is that a matter is not justiciable, and is therefore out of a courts' reach, when it requires the court to impermissibly intrude into the domain of the other branches of government. This doctrine breeds the doctrine of judicial restraint, emphasising judicial avoidance of those issues not properly suited for adjudication.[180]

The late Justice Scalia of the US Supreme Court expressed his view of justiciability or standing in *Ariz. State Legislature v Ariz. Indep. Redistricting Comm'n* as follows:

> That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable 'realistic appreciation of the consequences of judicial action.' To the contrary. '[T]he law of Art. III standing is built on a single basic idea - the idea of separation of powers.' It keeps us minding our own business.[181]

The situation is not very different in South Africa. Woolman et al agree that, in general, South African courts:

> Will only entertain matters initiated by persons with standing, which are not hypothetical or academic and which are brought at a time and in a manner which renders them appropriate for decision. Constitutional litigation is, in principle, no different.[182]

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[179] A Bickel *The Supreme Court and the idea of progress* (1970) 58-9.

[180] C Okpaluba 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (parts 1 and 2)' (2003) 18 *Southern African Public Law* 331 and (2004) 19 *Southern African Public Law* 114.

[181] *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* 135 S. Ct. 2652 (2015).

[182] Woolman, Roux & Bishop (n 27 above) 7-1.

This is despite the broad approach to standing propounded by Chaskalson P, as he then was, in *Ferreira* where he said*:*

> Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.8 Such an approach would also be consistent in my view with the provisions of section 7(4) of the Constitution on which counsel for the Respondents based his argument. I will deal later with the terms of this section and the purpose that it serves.[183] (Footnotes omitted)

All this points to a conclusion that the doctrines of standing, ripeness, mootness, jurisdictions, etcetera contribute in balancing the extent of judicial review, so as to ensure that constitutional supremacy is not replaced by judicial supremacy.

4.5.5 *Continuing demand for transparency*

Judges are not some type of secrete administrators of justice who can simply wake up one day and decide to overhaul the entire legal system so as to empower themselves over the other branches of government. The question is often asked – who guards over the guardians? The basis of the question is that, if judges are the ultimate guardians of the South African social contract, who guards over them? The obvious answer is: the general public. Judges are accountable to the general public. This means that the continuing demand for transparency in the administration of justice will make it even more difficult for judges to replace constitutional supremacy with judicial supremacy, in the face of the current constitutional provisions relating to the courts' role and the doctrine of separation of powers. The general public is watching.

Open and transparent administration of justice is essential to the public's understanding of courts and fosters trust and confidence in the judicial system. Open justice is not a recent phenomenon. Ponnan JA succinctly summarised the position

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[183] *Ferreira* (n 129 above) para 65.

recently in *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (*Van Breda*) as follows:

> The idea that South African civil courts should be open to the public goes back to 1813. Marais J explained in *Financial Mail (Pty) Ltd v Registrar of Insurance & others* 1966 (2) SA 219 (W) at 220F-G: 'Until 1813, in consonance with the then universal practice in Holland . . . whilst judgments and orders of the Cape courts had to be pronounced in public, evidence and argument in trial cases were heard in camera, with only the parties and their lawyers in attendance. The British Governor of the Cape, in 1813, issued a proclamation requiring all judicial proceedings in future to be carried on with open doors as a matter of "essential utility, as well as the dignity of the administration of justice"; it would imprint on the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner.[184]

Openness and publicity are a deterrent against maladministration and misconduct by both judges and the state. As was pointed out by Chief Justice Spigelman of New South Wales in *G (Nova Scotia) v MacIntyre*:

> The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements to sit in open court, to publish reasons, to accord procedural fairness, to avoid perceived bias and to ensure fairness of a trial, is the way the judiciary is held accountable to the public.[185]

The purpose of this section is not to discuss the right to freedom of expression weighed against the right to fair trial, as was predominantly the issue at play in *Van Breda*. The discussion in this section is rather founded on the following premise. The courts' legitimacy is fundamentally rooted in public confidence. The general public's views, including those of legal scholars, and perceptions on the independence of the judiciary are integral in the useful existence of the judiciary. That is on the one hand.

On the other hand, media is the number one leader in shaping public opinion and perceptions. It is therefore a no-brainer that the media can and indeed does play a

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[184] *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & Others* 2017 3 All SA 622 (SCA) ("*Van Breda*").

[185] *G (Nova Scotia) v MacIntyre* [1982] 1 SCR 175,183-184. See also J Spigelman 'Seen to be done: The principle of open justice - Part I' (2000) 74 *Australian Law Journal* 378 378.

major role, not only in holding the courts accountable, but also in legitimising courts. As Ponnan JA pointed out in *Van Breda*:

> The media plays a vital watchdog role in respect of the court process. One of the aspirational goals of the media is to make governmental conduct in all of its many facets (including courts) transparent.[186]

This oversight role was recognised in US's *Sheppard v Maxwell* where the court observed that 'the press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and the judicial process to extensive public scrutiny and criticism.'[187]

It follows therefore that the general public, including media personnel, legal scholars, bureaucrats and politicians need to understand the relationship between the judiciary and the other two branches of the body politic. This would obviate confusion about the judiciary's role in interpreting and reviewing legislation and in exercising control over executive action.

There are a number of advantages to transparent adjudication and public account by courts. Lopucki identifies the following benefits:

(a) exposure and reduction of corruption;
(b) enhancement of legislative control over the courts;
(c) popularisation of the law;
(d) enhancement of the information infrastructure;
(e) prediction of litigation outcomes;
(f) reduction of lawyer and litigant error; and
(g) automation of document service and file maintenance.[188]

Courts appreciate this. The Constitutional Court issues media summaries pre-hearing and post-judgment. The purpose of these media summaries is scribed at the

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[186] *Van Breda* (n 184 above) para 40.

[187] *Sheppard v Maxwell* 384 US 333 (1966) at 350.

[188] L Lopucki 'Court-system transparency' (2009) 94 *Iowa Law Review* 481 538.

beginning of each summary as ‘to assist the media in reporting the case’. The Supreme Court of Appeal follows a similar approach in most cases and its media summaries are ‘intended for the benefit of the media’. The media statements summarise cases for laymen’s consumption.

This level of transparency restrains judges from thwarting the will of the people so much that constitutional supremacy is replaced by judicial supremacy.

There are many other restraining factors like training for judges which emphasises on judicial restraint; duty to give reasons, appointments of appropriate candidates; judges’ oath of office; structural interdict v supervisory orders; etc. All this to nullify the claim that South African judges may in the near future or are already toppling constitutional supremacy for judicial supremacy through judicial review.

CHAPTER 5: CONCLUSION

The courts' power to review and set-aside decisions of the other branches of government, including declaring legislation invalid is an essential feature of a constitutional democracy. It cannot be denied that, in their natural conditions, humans battle for their own good and survival. That is why overconcentration of power in one person or a group of persons, for purposes of governing a nation, was resisted and discouraged as early as the Christian era, if not before. The fear of possible abuses of power is grounded in practical experiences.

The doctrine of separation of powers, which is part of our constitutional design, therefore requires that government power be shared and that all three arms of government work together as partners. Each of the partners exclusively specialises in a specific field. In the process of governing, depending on the nature of the task at hand, one partner, in whose exclusive field the task falls, leads the team as a senior/lead partner and the others support as junior partners. There is no one partner who must be a lead partner and supreme over the others on all government matters.

That said, there is no need for this dissertation to attempt to justify judicial review or the doctrine of separation of powers, or indeed the doctrine of constitutional supremacy. South Africans have already embraced these fundamental pillars of a constitutional democracy. What this dissertation does is to address possible fears that the power given to judges to review decisions of the other branches of government may be open to abuse, so much so that judges may take over the legislative function. The majority of these fears are attributable to the lack of understanding of the long-established and deep-rooted features of the South African legal system. The dissertation shows the following:

(a) Judicial supremacy or judiciocracy is shunned in most constitutional democracies. As a legal structure, it is indeed not, and has never been, part of the South African law. The judiciary is just another branch of government. It is not supreme over the other branches of government.
(b) Most of the rhetoric of judicial supremacy are not grounded on sound legal reasoning. They are expressions of political disappointments over what is viewed to be politically incorrect judicial decisions. This is not unique to South

Africa, but is everywhere, particularly in well-established constitutional democracies.

(c) Other claims of judicial supremacy or overreach stem from a confusion between judicial supremacy and the so-called judicial activism. This confusion is regrettable, and indeed legally unsupportable. The two concepts are fundamentally different, if not diametrically opposed. Judicial supremacy disregards any interpretation of the Constitutional that requires that the judiciary defer to the other branches of government. This is so to the extent of disregarding precedents and other well established legal doctrines and principles. It is concerned with placing the judiciary at the helm of government. Judicial activism on the other hand is about treating the Constitution and the law as a chameleon - always changing colours to match its environment – the so called living constitution. It is about interpreting the law transformatively to accommodate the ever-changing societal norms and the dictates of modernisation and globalization.

(d) The concept of judicial review as conceived under the South African legal system continues to grow in scope and reach. This however does not threaten the doctrine of constitutional supremacy as the expansion is necessitated by the very doctrine of constitutional supremacy. Of course the immediate response to that would be that it is exactly through the very Constitution that the judiciary exalts itself over the other branches of government. But then this is where the other considerations discussed in this dissertation come into play. They restrain the judiciary from using its constitutional interpretive authority to thwart the South African constitutional structure so as to willy-nilly intrude into the domains of the other government spheres. The exclusions within PAJA and the narrowly defined requirements of the principle of legality are internal modifiers of the reach of judicial review.

(e) The doctrine of separation of powers modifies the extent of judicial review directly and indirectly through its manifestations in the form of the doctrine of deference or the distinction between appeal and review. This doctrine and its manifestations render the substitution of constitutional supremacy with judicial supremacy a near impossibility.

(f) The other different judicial considerations discussed in this dissertation decisively and almost conclusively point to an entrenched constitutional

supremacy system in South Africa which is not about to be replaced by judicial supremacy, if ever, despite the full embrace of judicial review.

In the result, one may safely conclude that the South African legal system features sufficient legal principles and doctrines to guard against constitutional supremacy being replaced by judicial supremacy. There is no doubt that the doctrines referred to above such as the doctrine of separation of powers, the theory of deference or respect, the doctrine of precedents, the distinction between appeal and review, etcetera require development and strengthening to effectively resist judicial overreach. However, for now, they are there and cannot just be wiped out of our legal system to make way for judicial supremacy.

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