THE FATE OF HEATH'S SPECIAL INVESTIGATING UNIT: AN EVALUATION IN TERMS OF THE SEPARATION OF POWERS DOCTRINE

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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ABSTRACT

This thesis is a response to the judgment of the Constitutional Court in *South African Personal Injury Lawyers v Heath,* in which certain provisions of the Special Investigating Units and Special Tribunals Act were subjected to constitutional review. The outcome of the case was the striking down of certain provisions of the Act as unconstitutional, and the removal of Judge Willem Heath from his position as head of the Unit. The provisions were said to infringe upon the principle of separation of powers, an implicit term of the Constitution of South Africa. This principle affects the extent of the judicial power because of its influence on determining the acceptability of extra-judicial functions. The doctrine of separation of powers is therefore considered in its historical and theoretical context, with particular reference to the way in which it tends to limit or define the role of judges. Following this analysis, the status of institutions supporting constitutional democracy is examined, and the legislation governing Special Investigating Units is compared with that which regulates the office of the Public Protector. As a result, some alternative legislative means of achieving the ends of the Units, namely the combating of state corruption and maladministration, are suggested.

OPSOMMING

Hierdie tesis volg op die uitspraak van die Grondwetlike Hof in *South African Personal Injury Lawyers v Heath*, waarin sekere bepalings van die Wet op Spesiale Ondersoekeenhede en Spesiale Tribunale aan grondwetlike hersiening onderwerp is. Die uitkoms van die saak was dat sekere ongrondwetlike bepalings van die Wet ongeldig verklaar is, en dat Regter Willem Heath van sy posisie as hoof van die Eenheid onthef is. Dit is bevind dat die bepalings die beginsel van skeiding van magte, 'n implisiete term van die Suid-Afrikaanse Grondwet, geskend het. As gevolg van sy invloed op die bepaling van aanvaarbaarheid van buite-juridiese funksies, beïnvloed dié beginsel die omvang van die juridiese mag. Die skeiding van magte leerstuk word dus in sy historiese en teoretiese konteks oorweeg, met spesifieke verwysing na die manier waarop dit neig om die rol van regters te beperk of te omskryf. Na hierdie analise word die status ondersoek van instellings wat grondwetlike demokrasie ondersteun, en die wetgewing wat die Spesiale Ondersoekeenhede beheer, vergelyk met dié wat die Openbare Beskermer reguleer. Op grond hiervan word sekere alternatiewe wetgewende metodes voorgestel om die doeleindes van die Eenhede, naamlik die bekamping van staatskorrupsie en wanadministrasie, te bereik.

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CHAPTER 1: SEPARATION OF POWERS AND THE SOUTH AFRICAN CONSTITUTION

1 1 BACKGROUND AND AIMS

This thesis sets out to consider the effect of the principle of separation of powers, which is implicit in the South African Constitution,[1] on the extent of the judicial power. In particular, the effect of the principle on judges' performance of extra-judicial functions is analysed in detail. The emphasis falls mainly on the outcome and implications of the *Heath* judgment,[2] which is examined in the context of other relevant Constitutional Court decisions[3] and the theoretical roots of the separation of powers doctrine.

Three stages may be distinguished in the accomplishment of this end. Firstly, the origins of the separation of powers doctrine and its reception in South African law are identified and discussed. In this section of the argument, the doctrine is compared with and distinguished from similar theories, and its place in constitutional jurisprudence considered, paying particular attention to the specific form taken by the principle in its implementation in the Constitution. This includes analysis of abstract theories, constitutional institutions and South African case law.

The principle influences the extent of powers in all three branches of government, but in the second stage of the analysis it becomes clear that in this thesis the focus is on its effect on the role of judges. In this part, the decisions of the Constitutional Court concerning the extent of the judicial power and the function of judges receive particular attention. These pronouncements are influenced not only by the separation of powers doctrine referred to above, but also by historical factors, and the need to preserve judicial independence.

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[1] Constitution of the Republic of South Africa Act 108 of 1996
[2] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC)
[3] *Bernstein v Bester* 1996 (4) BCLR 449 (CC), *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR

The final stage draws together the results of these two sections, in order to explain the Constitutional Court's decision regarding the Heath's Special Investigating Unit in terms of its earlier *dicta* on the constitutionality of extra-judicial activities, and the extent of the judicial power under the new Constitution. During this stage, recommendations aimed at finding an acceptable way of incorporating the functions performed by the Unit into the existing constitutional order are put forward, so as to keep these Units effective as combatants of maladministration and corruption.

The importance of the *Heath* decision lies in its being the first case in which separation of powers was applied to the facts as an implied constitutional provision, rather than by reference to Constitutional Principle VI, which formed part of the interim Constitution.[4] Furthermore, the facts of the *Heath* case, in which the fate of Special Investigating Units established under the Special Investigating Units and Tribunals Act[5] was decided, also add weight to the importance of the judgment.

Previous Constitutions, such as the 1961 Constitution[6] and the 1983 Constitution[7] had also provided for a division between three branches of government, namely the legislature, executive and judiciary, with further subdivisions in the legislative and executive branches.[8] In this sense, a species of separation of powers could be read into these Constitutions.[9] However, at that time the separation of powers principle was applied under a dispensation in which Parliament, rather than the Constitution, enjoyed sovereignty, and in which the executive branch of government was pre-eminent.

1253 (CC), *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC), *S v Dodo* 2001 (5) BCLR 423 (CC) and *S v Mamabolo* 2001 (5) BCLR 449 (CC).

[4] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution', repealed in 1996) Schedule 4 sets out the Constitutional Principles, which were entrenched in the Interim Constitution.

[5] Act 74 of 1996

[6] Republic of South Africa Constitution Act 32 of 1961

[7] Republic of South Africa Constitution Act 110 of 1983

[8] In terms of s68(1) of the 1983 Constitution, for example, the judicial authority of the Republic was vested in the Supreme Court of South Africa.

[9] Essentially, this was the reasoning adopted in *Heath* (note 2 *supra*) par 21.

Moreover, these earlier Constitutions did not have the status of supreme law and contained no Bill of Rights, or expression of fundamental values. Despite the inclusion in the preamble of national goals such as respecting and protecting the human dignity, life, liberty and property of all, and upholding the independence of the judiciary and the equality of all under the law,[10] the attainment of these goals was the prerogative of the Parliament, and the application of the separation of powers principle was also left to the discretion of Parliament. This meant that the division of powers and functions between the various branches and organs of state could not be challenged in the courts, unless the constitutionally or legislatively required formalities had not been followed.[11]

However, since the advent of constitutional supremacy in South Africa, the separation of powers doctrine has manifestly become a substantively justiciable principle of South African law, and has been called upon in numerous constitutional challenges to legislation and executive acts.[12] The *Heath* case itself is a highly controversial example of such a challenge, based in part on the alleged infringement of the principle.

The challenge was aimed at the performance of certain functions, said to fall outside the limits of the judicial power, by a judge of the High Court, as head of a Special Investigating Unit. The Constitutional Court, recognising the separation of powers principle as an implicit constitutional provision, upheld the challenge, ruling that a High Court judge may no longer serve as head of a Special Investigating Unit.[13]

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[10] See especially the 1983 Constitution (note 7 *supra*) – the latter goal is also found in the preamble of the 1961 Constitution (note 6 *supra*).
[11] In terms of the 1983 Constitution s34, "no court of law [was] competent to inquire into or pronounce upon the validity of an Act of Parliament," except in cases of non-compliance with constitutional formalities.
[12] For example, *De Lange v Smuts NO* (note 3 *supra*) and *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (10) BCLR 1289 (CC), as well as the more recent cases at note 3.
[13] *SAAPIL v Heath* (note 2 *supra*) par 70

The Court makes it clear that the role of judges in South Africa and the limits of their functions have been affected by the doctrine of separation of powers,[14] since the adoption of a supreme Constitution that gives deliberate expression to this principle. It is also apparent that, since the demise of parliamentary sovereignty, legislation cannot assign any role it chooses to a judge, but the Constitutional Court has the final say in defining constitutional limits of the judicial function. It is still uncertain whether the new role of judges should be more or less extensive than it previously was. It is quite conceivable that some judicial functions have been extended, while others are now more limited. This leads us to the question postulated by this thesis, namely, how does the principle of separation of powers, implicit in the Constitution, affect the extent of the judicial role and the performance of extra-judicial functions by judges in South Africa?

The historical reasons for the incorporation of a separation of powers into the South African model of state are examined later in the thesis.[15] At this stage, however, it is important to note that no explicit reference to the doctrine had been made in any Constitution or other legislation affecting the model of governance until 1993, when the principle found expression in Constitutional Principle VI.[16] In order to be certified by the newly created Constitutional Court,[17] the final version of the Constitution had to comply with these principles, which had the force of constitutional provisions under the interim Constitution. This final text does not refer expressly to separation of powers, but was found to comply with the requirements of Constitutional Principle VI.[18]

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[14] Par 33, which contains the statement: "What is now permissible must be determined in the light of our new Constitution, and not necessarily by past practices."
[15] See especially chapter 2 below.
[16] Note 4 *supra*. This Constitutional Principle states: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."
[17] *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* (note 3 *supra*). The Constitutional Court was created in terms of the interim Constitution (note 4 *supra*), which required certification of the new text in terms of s74.
[18] *Certification* case (note 3 *supra*) especially par 113

1 2 MOTIVATION, METHODS AND ASSUMPTIONS

This thesis deals with possible changes to the role of judges relating to their performance of extra-judicial functions. These functions, though not strictly adjudicative, are an aspect of the judicial power, and it is this form of power which is exercised by judges serving on presidential commissions of inquiry or the Judicial Service Commission. Although many examples of extra-judicial activities performed by a judges exist, one particular instance becomes the focus of this thesis, namely Heath's role as head of a Special Investigating Unit, investigating corruption in the state administration.

The legislation governing the Special Investigating Units granted wide investigative powers to the person heading up the Unit. It also required that this person should be a judge of the High Court. In effect, this extended the role of judges by adding a new kind of extra-judicial function to the judicial power, though only under special circumstances in which a judge was appointed as head of a Unit. However, now that judges have constitutional powers of review over legislation and the conduct of the executive, any changes to the role of judges are also subject to the scrutiny of the Constitutional Court.

This is controversial, partly because judges are not elected by the population at large, making their exercise of power potentially contrary to the popular will,[19] and more specifically because in South Africa, they seem to represent the minority that used to have control over the country before the transition to democracy.[20] The

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[19] This issue finds its best-known expression in the legal problem known as the 'counter-majoritarian dilemma'.

[20] Sprigman & Osborne "*Du Plessis* is *not* Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" *SAJHR* 1999 (15) 25 at 51 refer to this problem as follows: "[T]here is a pungent irony in the fact that those who claim to be personally committed to a progressive social and economic agenda, at the very moment when the legislature is for the first time firmly in the hands of the majority of South Africans, would so energetically advocate a massive enlargement of the judicial power." The impact of this accusation on the Court's interpretation of its role must be significant. See however the remarks of Corbett CJ in 1993, rejecting accusations that the judiciary was illegitimate and did not represent the population as a whole, stating: "I do not think these general attacks upon the judiciary are well-founded or that they

conflict is immediately evident in the *Heath* decision, in which the legislature's decision to assign this additional function to members of the judiciary was found to be unconstitutional and therefore invalid.

Notwithstanding this unfortunate state of affairs, the need for an independent judiciary, which is not subject to the will of the people or the control of their democratically elected representatives, is constitutionally recognised.[21] The Constitutional Court has also made it clear that it does not regard the will of the majority as sovereign, but rather affords that status to the Constitution.[22] Strict limitations on judicial and extra-judicial functions, at least according to the supporters of such restrictions, can enhance perceptions of the independence of the judiciary.[23]

The question of how far the judicial power should extend is therefore highly relevant to the legitimacy, or perceived legitimacy, of the judicial branch of government. As becomes evident when the existing case law and other sources are consulted, there is no neat, obvious or clear-cut solution to this problem. Engagement with the issue in the form of an academic paper, which contributes to the debate on the subject, constitutes recognition of the notion that any definition of the extent of the judicial power should be provisional and subject to review. Even the Constitutional Court has demonstrated a reluctance to offer a clear test for determining the limits of the judicial function, stating:

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contribute constructively to the proper and efficient administration of justice in this country" *Business Day* 7 September 1993.

[21] Constitution (note 1 *supra*) s 165, especially ss (2) and (3).

[22] *S v Makwanyane*1995 (6) BCLR 665(CC) par 88 in which the Chaskalson P held that public opinion is "no substititute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour." He also asserts that "[i]f public opinion were to be decisive there would be no need for Constitutional adjudication."

[23] Mason "Extra-judicial work for judges: the views of Chief Justice Stone" *Harvard Law Review* 67 (1953) 193-216 at 205, describing the reaction of newspapers to Stone's refusal to participate in a commission of inquiry, reports columnist Frank R. Kent: "To have acted differently would have encouraged a practice that already has detracted from the dignity of the court."

> "It is undesirable, particularly at this stage of the development of our jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not compatible with the judicial office."[24]

The role of the Constitution in determining the boundaries of the judicial function is also problematic. Certain extra-judicial functions to be performed by judges are prescribed by the Constitution,[25] and it is therefore not helpful to restrict the definition of the judiciary's role simply to whatever can be defined as 'judicial'. Moreover, while it is clear that the extent of the judicial role is determined by the text of the Constitution, the text requires interpretation, and interpretation does not happen in a vacuum, but inevitably takes into account the historical and contemporary context in which it is performed.

The Constitutional Court also cautions against an overly abstract approach to interpretation in its *dictum* in *S v Dodo*,[26] quoting an American authority on the separation of powers, Prof Laurence H Tribe, on the need to use the constitutional text as the primary source informing interpretation of the principle:

> "We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does."[27]

It is assumed in this thesis that the new dispensation, in which the Constitution is supreme, does bring with it a new role for judges, and that this role is not rigidly cast, but develops in accordance with the developing constitutional interpretation of the principle of separation of powers, as well as other relevant factors. A further

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[24] *Heath* (note 2 *supra*) par 31
[25] An example is the s 86(2) duty of the President of the Constitutional Court to preside over the election of the President of the RSA.
[26] Note 3 *supra*.

assumption is that the introduction of this principle does not mean that the traditional judicial role, in which 'extra-judicial' functions were performed, must necessarily be restricted to entail only adjudication or constitutional interpretation. It is also possible to 'uphold and protect the Constitution'[28] through involvement in other activities.

The value of this thesis derives mainly from the accomplishment of its aim to investigate the role of judges, and the limits of the judicial power, but it also contributes in a more general way to the debate surrounding separation of powers jurisprudence, and its relation to constitutional supremacy. At a more practical level, it draws certain conclusions concerning the Special Investigating Units legislation, and makes a number of recommendations about how this legislation might be reformed or the Units incorporated into other existing structures, such as the Auditor-General, or Public Protector's office.

The primary method used in this thesis is a critical analysis of cases and legislation relevant to separation of powers, the Special Investigating Units and related matters, including the approach to the doctrine in certain other countries. The historical and theoretical context of the separation of powers doctrine is also briefly examined.

1 3 SEQUENCE OF CHAPTERS

Although the structure of this thesis coincides broadly with the three stages of argument introduced above,[29] each chapter contains a distinct line of argument, which may contribute to the overall argument in more than one way, as indicated in this section.

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[27] Par 17, quoting with approval from LH Tribe *American Constitutional Law I* (2000) (3 ed) 127
[28] Constitution (note 1 *supra*) Schedule 2 Item 6
[29] Section 1 1

This chapter presents an outline of the thesis, describing the background to the problem that gave rise to the research question addressed in the rest of the chapters and exploring the relevance of this question in the context of the current debate about the role of judges. It indicates the methodology and expected outcome of the analysis, and contains an explanation of terms used in the thesis.

Chapter two presents the theoretical basis for the doctrine of separation of powers, explaining its historical origins and rationale. This chapter also briefly examines how the doctrine is applied in other jurisdictions, how it came to be incorporated in South Africa's model of government, and specifically, as demonstrated in recent case law, how it affects the judicial role in this country. It therefore touches on both the general question of the separation of powers doctrine, and its contribution to the role of judges by securing the value of judicial independence.

In chapter three, the development in the Constitutional Court's approach to interpretation of the doctrine of separation of powers is traced, from the inception of the Court to the present. This entails an analysis of the relevant case law, in which the Court's professed and actual interpretive approaches are compared. One of the key issues in this chapter is the status of the separation of powers principle, and whether it should be considered separately from the Constitution, or only as it finds expression in the text. It is interesting to note that, while the Court generally endorses the latter alternative, this endorsement is not always supported in its interpretive practice.

Chapter four constitutes a further analysis of some of the cases examined in chapter three, this time with a view to understanding how separation of powers affects the question of judicial independence and the role of judges. The principle affects judges differently in different countries. For example, in the USA, the doctrine is grounded on the issue of protection of the individual from the abuse of state power, with the effect that the limitation of state functions, including the judicial power, often becomes the subject of the debate.

In South Africa, the focus is rather on preserving the independence of the judiciary and ensuring accountable and responsive government. This chapter looks at the *Heath* judgment in particular,[30] as part of the attempt to determine how the principle finds application to the role of South African judges, and also examines other Constitutional Court cases in which the effect of the separation of powers principle on the judicial role was considered, such as *S v Dodo* and *S v Mamabolo*.[31]

Chapter five draws together both strands of argument in order to assess the position of the Special Investigating Units. Insights into the separation of powers doctrine gleaned from history and the interpretive approach of the Court, as well as historical and judicial views on the practical implications of the doctrine for the judicial role are employed to achieve this end. The legislation governing the Units is compared to the legislation governing the Public Protector. This leads to a consideration of the place of the Units in the context of the structure of South Africa's government, as outlined in the Constitution. The outcome of the *Heath* decision, and its effect on the status and functioning of Special Investigating Units is addressed, and a number of recommendations about possible reforms are made.

1 4 CLARIFICATION OF TERMS

"Pure doctrine of separation of powers" – this term is used to refer to the strict definition of the doctrine, which requires separation of functions and membership of the branches, formulated as follows:

> "It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined

[30] Note 2 *supra*.
[31] Note 3 *supra*.

> to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch."[32]

"Abstract principle of separation of powers" – this refers to the doctrine as formulated in CP VI,[33] which finds expression in the constitutional text. However, this formulation of the principle is not directly expressed in the text, which is rather a practical embodiment of the non-specific principle.

"Separation of powers" – this refers to the principle as generally encountered in practice, with relaxations of various requirements mentioned in the pure doctrine, such as extra government branches or institutions, extra functions for members of the various branches, overlapping functions, and membership of more than one branch at a time. A possible formulation might be:

> "The functions of government may be horizontally divided into the legislative, executive, and judicial. These branches should be separate from and accountable to each other, and no one branch should be allowed to take over the functions of another branch."

"Implicit constitutional provision" – this term is used for the unexpressed principle of separation of powers, in preference to the term "tacit provision". This is explained as follows in *Heath*:

> "In the law of contract a distinction is drawn between tacit and implied terms. The former refers to terms that the parties intended but failed to express in the language of the contract, and the latter, to terms implied by law. The making of such a distinction in this judgment might be understood as endorsing the doctrine of original intent, which this Court

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[32] Vile *Constitutionalism and the Separation of Powers* (1967) 13
[33] Note 16 *supra*.

> has never done. I prefer, therefore, to refer to unexpressed terms as being 'implied' or 'implicit'."[34]

It appears that the implied term or provision referred to by the court is not a reference to the specific formulation used in CP VI, but rather to a general formulation of separation of powers, as practiced in most Western democratic states.

[34] *Heath* (note 2 *supra*) par 19

CHAPTER 2: THE ORIGINS OF THE SEPARATION OF POWERS DOCTRINE AND ITS INFLUENCE ON THE ROLE OF JUDGES

2 1 INTRODUCTION

The purpose of this chapter is to explain the decision regarding the role of judges in the *Heath* case[1] by referring to traditional definitions of the separation of powers and the judicial function, drawn from a long history of political and social theory. The question asked is what preconceptions derived from the pre-constitutional dispensation, inform current views on the role of a judge, and how these preconceptions affect the way in which the newly defined judicial role, assigned by the Constitution,[2] is interpreted. The process whereby the principle came to be incorporated into the text of the Constitution is also considered.

In the following chapter, different approaches to interpretation of the principle of separation of powers in the Constitution are analysed, to determine the impact of the new Constitution on the role of judges. However, the constitutional text itself is not the only determinant of the courts' understanding of this role. As was evident in Heath's case, numerous other considerations, including abstract formulations of the doctrine of separation of powers and the extent of the judicial role in foreign jurisdictions, are also taken into account.[3]

It is also important to realise that although the South African common law is based on Roman-Dutch principles, the judicial system and our court procedures have more in common with the British common law system.[4] It is therefore worth examining the role of judges in Britain and other Anglo-American legal systems, in order to establish the extent of the British influence on our conception of the central mission of the judiciary.

Separation of powers is a political theory originally conceived by Enlightenment philosophers and political theorists as a means of limiting the absolute power of

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[1] *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC)
[2] Constitution of the Republic of South Africa Act 108 of 1996
[3] Note 1 *supra* par 29-30
[4] This dates back to British colonial rule, in terms of which it was common practice to implement British judicial structures, while preserving the legal principles of the colony

the state, and guaranteeing the liberty of the individual. This ideal was to be achieved by distributing state authority among three separate branches, namely the judicial, executive and legislative branches of government, each with its own particular functions and officials, so that no person or group could establish dominance in all spheres of government.

In Britain, before the emergence of this theory, absolute state power had also previously been concentrated in the hands of monarchs. Later, as a result of much conflict between the crown and its subjects, especially the wealthy landowners and nobility, the legislative function was separated from other state functions and vested in Parliament.[5] The crown retained the power to pass and execute judgments, as well as seeing to state administrative and other public functions. A further separation of the judicial and executive powers occurred in the eighteenth century in response to Locke's argument that judges should be independent and impartial. His was a resolutely libertarian position, aimed at setting limits to royal power, and protecting individual liberty and property from the potential abuses of the crown.[6]

However, the separation of powers doctrine was not the only influential political theory holding currency at this early democratic stage, and it should be clear already that the initial separation of powers was not the now familiar tripartite one, but rather a two-way separation between Parliament and the crown. Moreover, two concomitant theories, the more ancient theory of mixed government, and later the practice-oriented doctrine of checks and balances, also gained in popularity during the Enlightenment, which, with its predilection

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concerned. Britain was an influential colonial power in much of Southern Africa, including South Africa itself.

[5] This was a result of the 'Glorious Revolution' of 1688. Prior to this, in 1215, the nobility had succeeded in gaining some rights against the monarchy, expressed in the Magna Carta, which is traditionally thought of as England's first constitutional document. Only a small part of the population was represented in the Parliament at this time, but representation was extended by degrees, and eventually full democracy achieved in 1928 when women obtained voting rights on the same terms as men.

[6] However, the British judiciary is still closely associated with the crown, and there is a significant tension between their perceived independence, and their alliance with the royal power, evident even in recent cases, such as *M v Home Office* 1994 (1) AC 377. In this case, the issue was whether the courts have jurisdiction to hold government ministers in contempt, and the House of Lords' positive answer relied on the notion of severability necessary to make sense of the question 'can the crown be in contempt of the crown?'

for a minimalist state, ushered in the era of liberal capitalist democracy in the West.

These three dominant theories were frequently combined in the political dispensations of the time, and are often still found in combination now. However, there are significant differences in their characteristics, and they share only the primary purpose of preventing a single person or group from becoming oppressively dominant and despotic. In the next part of this chapter, the origins and development of these theories are traced, which will assist in the identification of elements of these theories within South Africa's constitutional dispensation.

It is not disputed that the performance of extra-judicial tasks has been expected of judges in South Africa in the past, [7] and is also encountered in other countries, such as the USA and UK.[8] In South Africa, these tasks have included the delimitation of electoral constituencies and service on commissions of inquiry, while in the UK judges are commonly called upon to serve on Royal Commissions or on departmental committees, investigating controversial questions or reviewing legislation. The law lords are also directly involved in the legislative process.[9]

In the USA, judges have tended to turn down invitations to serve on committees appointed by the executive.[10] Nonetheless, they have never been completely exempted from extra-judicial work, and Justice Robert H. Jackson was named as the US prosecutor at the Nuremburg trials, much to the dismay of the Chief Justice of that time, Harlan F. Stone.[11] Judges of the High Court of Australia

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[7] See especially Kahn "Extra-Judicial Activities of Judges" *De Jure* (1980) 188 at 199, where he states: "There has never been a time in the history of this country when judges have confined themselves to...'the function of a judge, and his only function, [which] is to determine in a binding way issues between subject and subject or subject and Crown [state] according to established rules of law and to make rulings and decisions that are binding on the parties to the suit'."

[8] See Madison, Hamilton & Jay *The Federalist Papers* (1987) for the US, and Vile *Constitutionalism and Separation of Powers* (1967) for the UK position.

[9] Stevens *Law and Politics* (1979) 262 – see also 84, 184 and 615

[10] Kahn (note 5 *supra*) 214

[11] Mason "Extra-judicial Work for Judges: the Views of Chief Justice Stone" *Harvard Law Review* 67(2) 1953 193 at 213 "For Stone, Jackson's participation in the Nuremberg trials combined three major sources of irritation: disapproval in principle of non-judicial work, strong

have also withheld themselves from participation in committees appointed by the executive, but have occasionally performed diplomatic and other administrative functions, and in many Australian states Supreme Court judges have served on commissions of inquiry.[12]

2 2 HISTORICAL FOUNDATIONS OF THE JUDICIAL ROLE: MONTESQUIEU AND LOCKE

Prior to the establishment of constitutionally governed states with a supreme fundamental law, the Western world was already beginning to depart from absolute monarchy as a political system. This was particularly evident in the field of political philosophy, with thinkers of the early eighteenth century, such as Locke and Montesquieu, providing justifications for these changes in the format of the state and formulating their views on the necessity for an independent judiciary with no interest in the disputes heard.[13] At that time, government was widely supposed to be primarily, even totally, judicial in nature, with legislating, judging and execution all aimed at the discovery and interpretation of the pre-existent natural law, or the law of God, depending on the dominant religious perspective.[14]

The separation of the judicial function from the legislative and executive functions of state was initially seen as a way of setting limits to royal power,[15] and was derived from the ancient Greek and Roman theory of mixed government, rather than from the separation of powers doctrine as such. This theory, which predates separation of powers by many centuries, is an expression of the belief that different classes in society should all take part in the functions of government, so that the powers of the monarchy, aristocracy, and democracy

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objection to the trials on legal and political grounds, the inconvenience and increased burden of work entailed."

[12] 210 and 211

[13] This derives from the Roman law maxim *'Nemo iudex in re sua'*, which is one of the fundamental principles of natural justice.

[14] Vile *Constitutionalism* (note 8 *supra*) especially 1-75, for a fascinating explication of the developments in the competing theories of separation of powers, checks and balances, mixed government and the balanced constitution, as the historical shifts from the mediaeval conception of the state to modern constitutionalism took place.

[15] 67

are balanced. In terms of the separation of powers doctrine, these classes were sometimes identified with the executive, judiciary, and legislature respectively.[16]

However, contrary to the separation of powers ideal of a government in which each branch functions independently of the others, mixed government requires joint participation in these functions, with the emphasis falling on "the sovereignty of law over the ruler,"[17] rather than the confinement of certain branches to particular functions. This interpretation of the rule of law was derived from Aristotle's assertions that "law should be sovereign on every issue, and the magistrates and the citizen body should only decide about details" since "law can do no more than generalise".[18]

Montesquieu's view of the judicial role, on the other hand, may be seen as a clear expression of the separation of powers doctrine, in that he requires a division between the judiciary and the other branches of government, stating:

> "Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[19]

This view of the judge as adjudicator rather than law-giver, concerned with the law as it stands and not the politics which gives rise to it, has been particularly influential in Anglo-American legal systems, in which the court procedures are adversarial, and judges tend to be reluctant to make the

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[16] 33
[17] 23
[18] Aristotle *Politics* IV and *Ethics* V respectively, quoted in Vile *Constitutionalism* (note 8 supra) 23. The influence of this idea of the generality of law, which must be applied in individual cases by an autonomous and disinterested judge, is still being felt - see *S v Dodo* 2001 (5) BCLR 423 (CC) par 26
[19] Montesquieu *The Spirit of the Laws I* (1949) 152

"descent into the political arena."[20] Furthermore, although the implied distinction between law and politics brought about by this interpretation of the separation of powers doctrine has been consistently controversial,[21] it has nonetheless consistently been upheld as an ideal, especially in legal systems where parliamentary sovereignty prevails.[22] Judges have frequently relied on the argument that "political power should be disposed of by 'the people'" and "judges, as appointed officials, should be diffident in the exercise of their power."[23]

In addition to his recognition of the need for judicial independence, and insistence that the judiciary should be prevented from usurping political power, Montesquieu advocates a greater flexibility in the appointment of judges. He addresses the 'counter-majoritarian dilemma' alluded to above, by incorporating a rotational system in which people take it in turns to serve as judges, as well as a privilege to be afforded to accused persons to have some choice as to who should try their cause. He also proposes the introduction of a democratising element, in his assertion that "judges ought likewise to be of the same rank as the accused, or, in other words, his peers."[24]

These ideas have been implemented to a certain extent in countries such as the USA, where citizens are called upon to perform jury duty, and parties may reject jurors on particular grounds, thereby exercising a degree of choice. In South Africa too, the desirability of a system of judgment by one's peers has gained currency, despite the professionalism of the judiciary, in the

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[20] Nicolson "Ideology and the South African judicial process – Lessons from the past" *SAJHR* 1992 (8) 50 54.

[21] Stevens 1979 (note 9 *supra*) 14 remarks that the eighteenth century "demand for pure democracy, which was to take its most extreme forms in France and the North American colonies… [led in England] to the Reform Act of 1832…which permanently destroyed the political balance among King, Lords and Commons… and the inevitable tension between law and politics developed."

[22] "All [Lords of Appeal hearing constitutional cases between 1940 and 1955] in different ways took the view that parliamentary sovereignty implied that there should be no serious judicial questioning not only of acts of Parliament, but of decisions of the Civil Service." 388-389

[23] Cameron "Judicial Accountability in South Africa" *SAJHR* 1989 (5) 251

[24] Montesquieu 1949 153

institution of lay assessors, who may sit with a judge in order to assist the judge in better understanding the accused's situation.[25]

Locke's part in the development of the doctrine of separation of powers as an influential theory, expounded by Montesquieu and others, is undeniable, although he was by no means the originator of the theory, and did not write the final word on the subject. Locke's theoretical point of departure was the system of parliamentary sovereignty. He did not support the pure doctrine of separation of powers, but attempted to expand it by modifying it with other elements of his theory. He felt that it was rather unsophisticated at the time, as it did not display "much appreciation of the complex inter-relationships of a system of government the functions of which are divided up among several agencies."[26]

However, Locke's expanded theory sometimes appears confused in its use of terminology. Although he emphasises the necessity of independent judges, he also at times identifies the judiciary with the legislature or executive, for example in his statement that "the function of the legislature is to 'dispense justice'."[27] Another example of this apparent confusion of the branches is found when he advocates a separation between legislature and executive. He cites as his reason that if a monarch has "both Legislative and Executive power in himself alone, there is no Judge to be found, no Appeal lies open to any one, who may fairly, and indifferently, and with Authority decide."[28]

Despite these difficulties, it is apparent that Locke was much concerned with the independence of judges, and saw his theory, in which the complex balancing of the inter-related powers of government was imperative, as a way of ensuring their status as independent arbiters. His conception of the judicial function is too closely connected with the other branches of state for it to

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[25] Barrow *The Criminal Procedure Act* 1998 (10 ed) 70. An assessor is defined in s145(1)(b) as "a person who, in the opinion of the judge who presides at the trial, has experience in the administration of justice or skill in any matter which may be considered at the trial." The Magistrates' Courts Act 32 of 1944, s93 *ter* also provides for assessors to assist magistrates at civil hearings, but in an advisory capacity only.

[26] Vile *Constitutionalism* (note 8 *supra*) 52

[27] 59

assist in identifying the acceptable limits of the judicial role, but his recognition of the complexity of this exercise is a valuable insight which has influenced the development of theories dealing with this issue. In the next part of this chapter, therefore, later theories of separation of powers and checks and balances influenced by Locke are explored further in their historical context.

2 3 SEPARATION OF POWERS AND CHECKS AND BALANCES

Vile's formulation of a strict or pure doctrine of separation of powers identifies two elements of pure separation of powers. Firstly, the functions of government must be divided between the three branches of state, and there may be no sharing of functions or any encroachment of one branch upon another. No less important is the second element, which does not allow overlapping membership of more than one branch, so that no single group of people may hold power in two or more agencies of government.[29] In practice, however, the two elements have rarely occurred in this pure form.

If instead, therefore, a practice-oriented document is considered, such as *The Federalist Papers*, a collection of the arguments prepared by supporters of the original Constitution of the USA, the following pronouncement on the meaning of the maxim requiring a separation of state powers is found:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[30]

The writers then go on to point out that the most famous proponent of separation of powers, Montesquieu, used as an illustration of his theory the British political system, in which instances of overlapping membership of

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[28] Locke *Second Treatise* part VII par. 90-91, quoted in Vile *Constitutionalism* (note 8 *supra*) 61
[29] This formulation, found in Vile (note 8 *supra*) 13, is quoted in part 1 4 of chapter 1 *supra*.
[30] Madison, Hamilton & Jay *The Federalist Papers* Number XLVII (note 8 supra) 303

different branches, and partial control over the functions of other branches, abound. This suggests that, although the pure formulation of separation of powers provides a sound theoretical basis, the pure doctrine does not require a strict application in practice, provided that there is an effective means "to provide some practical security for each [branch of state], against the invasion of the others."[31] These practical concerns are a feature of the discourse on how to implement an effective separation of powers, since the mere existence of a supreme Constitution is of no value, unless that supremacy is respected and enforced.

However, since the duty of interpreting the Constitution falls to the judicial branch, the judiciary might in effect become the supreme branch of government, if there were a completely rigid separation of powers, with no scope for checks and balances on each branch by the others. For this reason the authors of *The Federalist Papers* conclude that "the interior structure of the government [must be contrived so] that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[32]

Of course, it is important to remember the comments of the South African Constitutional Court in *S v Dodo*, referring to the danger of placing too much emphasis on what the framers of the Constitution, or the Enlightenment political philosophers wrote, that "[w]hat counts is not any abstract theory of separation of powers, but the actual separation of powers '*operationally defined* by the Constitution'" (emphasis in original).[33]

Nonetheless, in any interpretation of the Constitution, a principle such as separation of powers, which was one of the founding principles against which the constitutional text was tested, and which has been recognised in South Africa as an implicit constitutional term,[34] must carry a certain amount

[31] Number XLVIII p.309
[32] Number LI p.318-9
[33] Note 18 *supra* par 17, in which Tribe *American Constitutional Law I* (2000) (3 ed) 127 is cited.
[34] *Heath* (note 1 *supra*) par 20

of interpretive weight. Abstract theories may inform our understanding of the judicial role, especially where the Constitution remains silent on whether a particular function is compatible with the role of the judiciary or not.

Moreover, the way in which the separation of powers doctrine had to be implemented in the South African Constitution, was in combination with a theory of checks and balances "to ensure accountability, responsiveness and openness".[35] This connection between the theory of checks and balances and the value of public accountability is well-established, and the United States Judge Bland, who is known for his opposition to the judicial review of legislation, expresses the connection in this context in the following terms: "A constitutional limitation is then, the voice of the people addressed to the public agents respectively, in relation to their separate and distinct duties... for the exercise of which they are accountable only to the people."[36]

Although the South African Constitution expressly provides for judicial powers of review, these comments are interesting in that they presuppose a wider community in which the limitations imposed by the Constitution on the branches of state may be interpreted and reviewed. The fact that Constitutional Principle VI refers directly to public accountability as a goal of separation of powers and checks and balances, suggests that, in South Africa, the public might also play a part in providing a check on the exercise of state power.[37]

However, the context in which these constitutional reforms have taken place is one in which it has been "an article of faith in the judiciary that a judge's duty is to apply 'the law',"[38] and in which consideration of policy was said to be beyond the judicial domain.[39] Moreover, in many cases the ideal of judicial

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[35] Constitutional Principle VI: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."
[36] Bland *The Opinion of Judge Bland on the Right of the Judiciary to declare an act of Assembly Unconstitutional and also, on the Constitutionality of the Act investing the County Courts with Equity Jurisdiction* 24 quoted in Haines *The American Doctrine of Judicial Review* (1959) 266.
[37] See in this regard Kriegler J's comments in *S v Mamabolo* 2001 (5) BCLR 449 (CC) par 15 and 29-30.
[38] Cameron 1989 (note 23 *supra*) 259. See also *R v Milne & Erleigh* (6) 1951 (1) SA 1 (A) 11-12 Centlivres CJ: "[A judge's] duty is to administer the law as it exists."
[39] Nicolson 1992 (note 20 *supra*) 63

neutrality was used to hide the 'inarticulate premises' on which court decisions were based.[40] This formalist or positivist way of thinking has been the subject of much criticism,[41] but the blame for the positivist approach cannot be laid exclusively at the door of parliamentary sovereignty.

Even the Constitutional Court's extraordinary role in the adoption of South Africa's Constitution, which had to be certified by the Court as complying with the Constitutional Principles before it could be considered valid and operational as the supreme law, should not be seen as guaranteeing a difference in the courts' general approach. The principles, and the Constitution once validated, could still be seen simply as rules to be applied to cases coming before the courts. Although these texts seem, in their open-ended formulation, to demand value judgments in their interpretation, and ethical as opposed to merely legal choices in their application, a court might just as easily restrict its interpretation to a literalist reading of constitutional provisions, refusing to engage with other issues affecting the decision.[42]

Nicolson, writing before the adoption of the Constitution, warns that "[o]ne should be careful not to assume that judicial formalism was simply an inevitable function of the Westminster system of government and hence that a Bill of Rights will automatically result in judicial activism."[43] The new South African era of constitutional supremacy brings with it new challenges to the judiciary to redefine its role, rather than ready-made definitions of the judicial function.

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[40] Cameron 1989 (note 23 *supra*) 259, referring to Dugard *Human Rights and the South African Legal Order* 1978

[41] Dugard "The Judicial Process, Positivism and Civil Liberty" *SALJ* 1971 (88) 181 at 184 gives the reasons for the acceptance of positivism, which was "the predominant legal philosophy of nineteenth century England," in South Africa, as "the decline of natural-law doctrine in Europe" and "the pervasiveness of English legal influence." At 187 he criticises it as leading to "a rejection of legal values… which results in the repudiation of policy considerations in the judicial process."

[42] A recent example of such an approach may be found in the judgment of Flemming DJP in *Beta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 par 6.2: "There are situations, often novel factual situations, where the law can incline in one direction rather than the other. Policy has really always been part of adjudicating. Any such opportunity or need is clearly distinguishable from the present situation."

[43] Nicolson 1992 (note 20 *supra*) 71

Using the historical and theoretical framework examined in the preceding parts, an analysis of the role of a judge in a constitutional state follows. A comparative approach has been adopted, incorporating descriptions of the judicial role in other constitutional jurisdictions, but the emphasis falls on how these sources have influenced the South African judiciary, and the relevance of sources used will be demonstrated in the light of South African cases, or the Constitution.

2 4 THE JUDICIAL ROLE IN A CONSTITUTIONAL STATE

The role of judges in South Africa is, as has been indicated already, determined as much by historical factors as by the new Constitution. The historical analysis in this chapter points to the reliance placed on traditional assumptions about judicial independence, which is frequently equated with the ideal of a judge as passive arbitrator, rather than active enquirer, as being concerned with law rather than politics, and as upholding the public interests expressed in the law ahead of particular or private interests.

The critique that follows in this part of the chapter also draws from history and precedent, but maintains the view that, in a constitutional state, judicial independence is not simply a function of a judge's degree of involvement in controversial or political issues, but derives from the expression of constitutional values and compliance with constitutional provisions by all branches and organs of state. The attainment of this goal, in terms of which the state represents and 'lives out' constitutional values, while promoting debate about what this actually means, is a complex and difficult process. However, it cannot be facilitated by drawing hasty conclusions about the role of judges in order to secure a supposedly independent judiciary that does not soil its hands with matters unrelated to its 'central mission' of adjudication, especially if those matters are political rather than legal.

In analysing the seminal US case on separation of powers, *Marbury v Madison*,[44] earlier American legal theorists frequently applauded the decision on

[44] 5 US (1 Cranch) 137 (1803). The specific issue in *Marbury* was judicial review of executive conduct, the legitimacy of which was held to depend on whether the conduct was purely

the grounds "that the law/ politics distinction was crucial to Marshall's great achievement as Chief Justice: the establishment of the rule of law as the basis of Supreme Court jurisprudence."[45] More recently, however, the realisation has grown that "value questions inhere in deciding which issues of separation of powers or individual rights to remove from the sphere of democratic politics for resolution by the courts. Therefore we need to qualify Marshall's assertion ... that '[i]t is emphatically the province and duty of the judicial department to say what the law is'."[46] These shifts in opinion illustrate the previously denied difficulties with which the courts are faced in carrying out their task of upholding the Constitution and the law.

Constitutionalism entails more than just the rule of law, though this is one of its elements.[47] As Davis points out, South African law was abruptly "required to come to grips with the difficulties of constitutionalism and thereby to make meaning of this new promise of unity,"[48] when the Constitution was adopted. The new Constitution did indeed establish a new legal and social order in which all citizens were granted the right to participate, but this new order is far from the homogeneous nation postulated by theorists of the eighteenth century. This is a reference to Habermas's observations on the problems of constitutionalism, which relate to the dependence of traditional concepts of constitutional democracy on the idea of a homogeneous nation state in which everyone has an equal stake, which equal participation and political rights do not guarantee.

The difficulty of the judiciary's task is intimately connected with these observations, and it is therefore unfortunate that the Constitutional Court should attempt to link judicial independence with abstinence from the political domain, at precisely the point in South Africa's history at which the courts have been

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political (and thus unreviewable) or not. The Constitution of the RSA Act 108 of 1996 s167(5) expressly grants the Constitutional Court final jurisdiction for judicial review of all legislation and conduct of the President.

[45] Haskins & Johnson, "Foundations of Power: John Marshall 1801-15" *History of the Supreme Court of the United States* (1981) (2 ed), cited in Shane & Bruff *Separation of Powers Law: Cases and Materials* (1996) 43

[46] Shane & Bruff (note 45 *supra*) 43

[47] Constitution (note 44 *supra*) s1(c)

[48] Davis *Democracy & Deliberation* (1999) 7

called upon to participate in the shaping of South Africa's political environment through interpretation of a supreme Constitution.

In the *Heath* case, the Court rejects the argument of the court *a quo* that the legal tradition of our country allowed judges to perform 'executive' functions, such as presiding over commissions of inquiry, on the grounds that this "tradition" comes from the pre-constitutional South African past, in which the legislature was sovereign, and that "[w]hat is now permissible must be determined in the light of our new Constitution, and not necessarily by past practices."[49]

While this is on the surface a laudable attitude, the Court did not seem to recognise that, if reinterpreted in the light of the Constitution, past practices need not be discarded out of hand. A more encouraging stance in this respect was adopted in *Dodo*, in which the Court refers to the pre-constitutional courts' approach to the interpretation of legislation with a guarded approval. In *S v Toms; S v Bruce*,[50] the Appellate Division, at the time South Africa's highest court, referring to the question of mandatory minimum sentences, acknowledged that the legislature was perfectly competent to impose its 'sovereign will' on the courts. However, it then added that to do so, the legislature would have to "express itself in clear and unmistakable terms... Courts will not be astute to find that a mandatory sentence has been prescribed."[51]

This approach amounts to a form of 'dumb insolence', which the courts were at that time obliged to use as a defence against the ruthlessness of parliamentary sovereignty, if justice were to have any chance of prevailing. Of course, this rather limited defence was not always sufficient to ensure a fair outcome, and is wholly inappropriate to the radically different constitutional setting in which the judiciary now operates. The Constitutional Court therefore concludes that, on the issue of mandatory sentences, "little is to be gained from our pre-1994

[49] *Heath* (note 1 *supra*) par 33
[50] 1990 (2) SA 802 (A), cited in *Dodo* (note 33 *supra*) par 18
[51] 807 cited in par 21

jurisprudence,"[52] although it also gives its assurance that "[n]o disagreement with, or criticism of, *Toms* is implied."[53] Unfortunately, the Court was not disposed to engage fully with the pre-constitutional position in which judges operated, when it made its ruling on the judicial function in the *Heath* case.

The *Heath* judgment represented a return to a narrow conception of the judiciary, as preferably occupied solely with adjudicative concerns. The Court states that "judges who perform functions such as presiding over a commission of inquiry, or sanctioning search warrants, may also become involved in litigation. But that is an unwanted though possibly unavoidable incident of the discharge of what are essentially judicial functions,"[54] from which the inference is clearly that the Court not only acknowledges that judges are not always confined to adjudication, but also allows that functions such as presiding over commissions and sanctioning warrants are in fact judicial.

Despite this, the Court opines: "By their very nature, such functions [as recovering money for the state] are partisan,"[55] a statement reflecting a great deal of reluctance to make allowance for the new realities of the constitutional state. In this new context, the functions mentioned above might become public rather than partisan functions, aimed at rooting out corruption and restoring constitutional values such as accountability, by a variety of means.[56]

It is also problematic to justify a certain type of 'unwanted' function, such as judicial involvement in litigation, as constitutionally acceptable as long as it is 'unavoidable' and incidental to the accomplishment of judicial functions. If it can be acceptable in some cases, when it is necessary for the performance of judicial functions, then there should surely be a better reason not to condone it in others than simply that it is undesirable. Moreover, this line of reasoning misses the point that the activities described above are administrative functions

[52] *Dodo* (note 33 *supra*) par 21
[53] Par 21
[54] *Heath* (note 1 *supra*) par 39
[55] Par 40
[56] See for example Constitution (note 44 *supra*) s182(1)(c) which grants the Public Protector, an independent state institution supporting constitutional democracy, the power to "take

more readily classified as extra-judicial and cannot seriously be described as 'essentially' or 'by their very nature' judicial.

The Court also relies on a dissenting judgment from an Australian case, in support of its view that there is an "inextricable link between the SIU as investigator and the SIU as litigator on behalf of the state."[57] The Australian judge declared:

> "[I]t is not compatible with the holding of federal office in Australia for such an office holder to become involved as 'part of the criminal investigative process', closely engaged in work that may be characterised as an adjunct to the investigatory and prosecutory functions. Such activities... could impermissibly merge the judiciary and the other branches of government. The constitutional prohibition is expressed so that the executive may not borrow a federal judge to cloak actions proper to its own functions with the 'neutral colours of judicial action',"[58]

The rationale for the Australian decision is evidently the ideal of the judge as impartial adjudicator. Accepting this as the correct interpretation of the judicial role, the Constitutional Court concludes that Heath's position as head of the Special Investigating Unit is "incompatible with his judicial office and contrary to the separation of powers required by our Constitution,"[59] apparently disregarding the possibility that "the state" on behalf of which Heath was required to litigate might, under this new Constitution, mean something more than the executive.

It is furthermore not at all clear that a provision like the prohibition referred to in the judgment exists in our Constitution; certainly the Court does not refer to

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appropriate remedial action" on discovering any improper conduct in state affairs or the public administration.

[57] *Heath* (note 1 *supra*) par 45

[58] *Wilson v Minister for Aboriginal and Torres Straight Islander Affairs* (1996) 189 CLR 1 44-5 quoted in *Heath* (note 1 *supra*) par 44

[59] Par 45

one here, but impliedly supports the contention that judicial action is politically neutral. Compare this with Davis's argument that the constitutional enterprise in which judges are involved entails a form of politics and is not necessarily neutral:

> "The judiciary is therefore part of the political arena of society. By virtue of the fact that it is engaged in the meaning of a text, the nature of this form of politics is, of course, very different from that carried out elsewhere in society. But while texts constrain, they do not determine mechanistically. The interpretation of a constitutional provision and the further act of application to a set of facts is the outcome of argument, of competing or differing political projects or visions, of the influence and impact of contending ideological argument."[60]

2 5 CONCLUSION

The difficulties of clearly defining the judicial role in a constitutional state, though not exhaustively dealt with in this chapter, have been placed in their historical and comparative theoretical context. The course of development in the judicial function has been traced from Enlightenment theorists, through the propagation of their ideas to colonies such as South Africa which, like many other countries, has adopted a Constitution in which these theories are expressed. In this part of the chapter, the Court's initial view of the role and functions of judges, as discussed above, is compared with some more recent conceptions of the constitutionally mandated role of the judiciary.

The influence of the separation of powers doctrine on the Constitutional Court's understanding of the role of judges, and the lack of uniformity in the Court's approach to foreign precedents in its analysis of the doctrine, have been brought to light. However, the somewhat arbitrary approach in *Heath*, in which US and Australian tests were employed for the purpose of circumscribing the role of the

[60] Davis (note 48 *supra*) 14

judiciary,[61] has been moderated quite substantially by the more recent decisions of *Dodo* and *Mamabolo*.[62]

A fine illustration of Kriegler J's comment that "[c]omparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us... But that is a far cry from blithe adoption of alien concepts or inappropriate precedents"[63] is found in the Court's citation of Prof Laurence H Tribe in *Dodo*.[64] Tribe's remarks advocate a close reading of the constitutional text, in which the constitutionally mandated judicial role and legitimate functions as expressed in the text are given priority. This prevents the courts from attempting to introduce tests drawn from foreign jurisdictions, unless the constitutional texts there are sufficiently similar. Needless to say, the text is not exhaustive of the judicial function. However, it does expressly grant the courts authoritative responsibility for the adjudication of legal disputes, and the interpretation of law.[65]

Other functions assigned to judges in terms of the Constitution, such as service on the Judicial Service Commission and similar duties, indicate that the role of the judiciary is more extensive now that judges enjoy a constitutionally guaranteed independent status, and are sworn to "uphold and protect the Constitution and the human rights entrenched in it, and [to] administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."[66] The judiciary is, like all state institutions, primarily bound to defend the supremacy of the Constitution.[67]

Though still appointed by the executive, the judiciary is now accountable only to the Judicial Service Commission under the Constitution, which prescribes

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[61] This approach calls to mind the comment of Kriegler J, in *Bernstein v Bester NO* 1996 (2) SA 751 (CC) par 133, that "far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our constitution, without any attempt to explain why it is said to be in point."

[62] Notes 18 and 37 *supra* respectively. See chapter 3 *infra* for Kriegler J's reasons for rejecting the importation of an American test in this case.

[63] *Bernstein v Bester NO* (note 61 *supra*) par 133

[64] Note 33 *supra* par 17

[65] Constitution (note 44 *supra*) s165

[66] Schedule 2 Item 6

[67] s41, and in particular ss(1)(d) and (e), sets out the duties of other state organs in this regard.

strict measures for the removal of judges in order to keep the judicial branch independent of the other branches of government. This facilitates the constitutional review task of the courts, which play a vital role in ensuring that the Constitution is respected and protected.

In the remaining chapters of this thesis, an analysis of the judicial role, compared with the function of other institutions supporting constitutional democracy, is performed, and the meaning of judicial independence is examined in the light of the recent cases dealing with the separation of powers.

CHAPTER 3: THE INTERPRETATION OF AN IMPLIED CONSTITUTIONAL PROVISION

3 1 INTRODUCTION

In 1993, for the first time in South Africa, a supreme Constitution was adopted.[1] Although this was an interim Constitution, the first of two stages in South Africa's constitution-making process, it represented a radical shift from the previous dispensation that has had far-reaching implications for the way in which the role of judges is understood. These developments in the judicial role have been sustained and continued in the subsequent implementation of the 1996 Constitution.[2] An important effect of the unusual two-stage process followed in the adoption of South Africa's Constitution, was the involvement of the Constitutional Court, established by the interim Constitution, in the validation of the final constitutional text.

As Basson points out, "it is clear that the interim Constitution gives considerable weight to the provisions which deal with the Constitutional Principles and the fact that the Constitutional Court must certify that the new constitutional text complies with these principles."[3] However, apart from its connection with this unprecedented judicial responsibility, the new constitutional text has affected the way judges interpret 'the law' in its most general and all-encompassing sense. The Constitution forms a basis for our law, and thus influences the judicial decision-making process. It contains provisions relating to its application, both directly and as affecting legal interpretation.[4] Moreover, being itself a law, the Constitution requires interpretation and also gives directives relating to its own interpretation.[5]

According to the Constitution, "[t]he Constitutional Court is the highest court in all constitutional matters."[6] This adds the weight of constitutional authority to the interpretations of the Court, although the Court is also influenced by other

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[1] Constitution of the Republic of South Africa 200 of 1993
[2] Constitution of the Republic of South Africa 108 of 1996
[3] Basson *South Africa's Interim Constitution: text and notes* (1995) 104
[4] Especially s8, the 'application clause', and s39, the 'interpretation clause'.
[5] For instance s39(1) gives directives relating to the bill of rights.
[6] s167(3)(a). 'Constitutional matters' must include questions of interpretation.

interpreters of the Constitution, such as legal academics and the lower courts, to whom this authority is not given. It should be noted that the creation of a separate court to deal with constitutional matters was a subject of contention during the drafting of the Constitution.[7] Proponents of a specialist constitutional court based their arguments primarily on the need to establish a new court with a clean interpretive record, since the existing courts were experiencing a legitimacy crisis that had resulted from their traditional formalist approach and implicit support of the executive.[8]

In this chapter, the development of the Court's interpretive approach to the constitutional provision made for a separation of powers between branches of government, is considered. This development is traced through the sequence of cases dealing with the question of separation of powers and how it affects the definition of the judicial function. The Court has expressed its desire to retain a flexible approach to the doctrine, without presuming to pre-empt the issue of 'whatever the outer boundaries of separation of powers are eventually determined to be."[9] This flexibility in applying the doctrine is ascribed to the Court's interpretive approach in the *Certification* case,[10] in which it was dealing with the compliance of the final constitutional text with the Constitutional Principles, rather than constitutional provisions as such.

More importantly, it is submitted that the outcomes of Constitutional Court cases such as those considered in the next chapter, namely *Heath,*[11] *Dodo,*[12] *Mamabolo*[13] and the *Certification* case,[14] depend to a considerable extent on the

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[7] Forsyth "Interpreting a Bill of Rights: the future task of a reformed judiciary?" *SAJHR* 1991 (7) 1 questions the desirability of a specialist Constitutional Court.
[8] Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 191 "The law and the courts had been undermined by the consistent use of them as instruments of domination to work injustice, thus creating a crisis of legitimacy in the legal system as a whole." See also Dugard "The Judicial Process, Positivism and Civil Liberty" *SALJ* 1971 (88) 200 "Adherence to legal positivism has reduced the legal profession to the status of a technical trade in the eyes of the public."
[9] *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) par 61
[10] Par 60 refers to this aspect of *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the RSA, 1996* 1996 (10) BCLR 1253 (CC).
[11] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC)
[12] *S v Dodo* 2001 (5) BCLR 423 (CC)
[13] *S v Mamabolo* 2001 (5) BCLR 449 (CC)
[14] Note 10 *supra*

approach adopted. This is primarily because the doctrine of separation of powers does not have a universal meaning, and the courts are reluctant to limit the development of South African separation of powers jurisprudence by defining its implications in narrow terms.[15]

The *Certification* case is atypical, in the sense that it does not involve constitutional interpretation as we might usually expect, but rather an evaluation or weighing up of the constitutional text as subject to the Constitutional Principles agreed on by the Constitutional Assembly.[16] However, this process still demands that the text be interpreted before it can be tested against the principles, and that the principles also be interpreted. For this reason, the approach of the Court to the interpretation of the Constitutional Principles themselves, which in this case functioned as the authoritative text, is also considered.

One of these principles, Constitutional Principle VI, explicitly requires a horizontal separation of powers between three branches of government, and an accompanying system of checks and balances. The fact that these requirements are incorporated into a single principle, suggests that they should be seen as complementary, while the inclusion of a system of checks and balances suggests that adherence to the pure doctrine of separation of powers is not required. The principle also aims at achieving a particular goal, which is "to ensure accountability, responsiveness and openness."[17] It is worth noting that, although there is no specific reference to the principle of separation of powers in the text of the final Constitution, the purpose of Constitutional Principle VI is expressed in the section 1 founding values, one group of which is aimed at securing precisely those three characteristics – namely accountability, responsiveness and openness in government.[18]

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[15] *De Lange v Smuts* (note 9 *supra*) par 61; *SAAPIL v Heath* (note 11 *supra*) par 31; *Certification* case (note 10 *supra*) par 108, 113

[16] This process was a requirement of s71 of the interim Constitution (note 1 *supra*).

[17] Constitutional Principle VI *Certification* case (note 10 *supra*) 1402 Annexure 2

[18] Constitution of the RSA (note 2 *supra*) s1(d) "The RSA is one sovereign, democratic state founded on the following values: Universal adult suffrage, a national common voters roll,

The importance of the interpretive method followed by the courts is explained by Botha, in his 1994 paper on constitutional interpretation, in the assertion that "the legitimacy, and therefore the ultimate success of the new constitutional order will, to a great extent, hinge on the interpretation and application of the Constitution by the judiciary: the people must feel that the Constitution is *working for them*" (Botha's emphasis).[19] This also applies to the method of the courts in interpreting the principle of separation of powers.

3 2 THE COURT'S APPROACH IN THE CASE LAW

3 2 1 *Bernstein v Bester NO*

The Constitutional Court's first mention of the principle of separation of powers, as it affects the extent of the judicial power, was made in *Bernstein v Bester NO,*[20] in which the constitutionality of s417 and 418 of the Companies Act[21] was challenged under the interim Constitution.[22] These sections authorised a commissioner appointed by the liquidators of a company to summon the auditors of the company under liquidation to appear before him/her and produce certain documentation. The reference to separation of powers occurs in the context of the challenge based on "the implied right to fairness in civil litigation,"[23] which was drawn from a particular reading of s22 and 7(4)(a) of the Constitution.[24]

The Court addresses the question of whether the norm that civil procedure ought to aim at fairness between the contending parties is enacted by the Constitution as an entrenched right, and comes to the conclusion that our courts "have consistently adopted the view that words cannot be read into a statute by

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regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[19] Botha "Interpretation of the Constitution" 1994 *SA PublicLaw* 257-264 259

[20] 1996 (4) BCLR 449 (CC)

[21] Act 61 of 1973

[22] Note 1 *supra*. It is worth noting at this point that separation of powers, as laid out in Constitutional Principle VI, was included in a schedule of the interim Constitution and therefore had the force of law at the time of this judgment.

[23] *Bernstein v Bester NO* (note 20 *supra*) par 102

[24] Note 1 *supra* s7(4)(a) sets out the *locus standi* requirement, while s22 states: "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands."[25] Whether the implication is a necessary one is determined by asking if it is necessary in order "to realise the *ostensible legislative intention* or to make the Act workable" (my emphasis).[26]

The Court's approach to the reading of an implied constitutional provision is thus directly adopted from the approach of the Appellate Division of the Supreme Court to the reading of implied statutory provisions. The provisions in question were then read in the context of the interim Constitution as a whole, and found "to be workable and to realise the ostensible legislative intention, without the implication the appellants [sought] to rely upon."[27] The Court then adds that, if s22 is read with s96(2), which provides that "[t]he judiciary shall be independent, impartial, and subject only to the Constitution and the law," its purpose may clearly be seen as the emphasis and protection, "generally, but also specifically for the individual, [of] the separation of powers, particularly the separation of the judiciary from the other arms of the State."[28]

The section is then linked to the upholding of the rule of law, and the prevention of legislatures from turning themselves into "courts".[29] However, the challenge is finally dismissed on the grounds that the complaint raised on the basis of this s22 is really an equality issue, which should be dealt with in terms of the right to equality.[30] Nonetheless, the Court speculates, without deciding on the issue, that the implied provision could be rejected using the argument that "the framers deliberately elected not to constitutionalise the right to a fair civil trial."[31]

This reference to the framers' intention, though *obiter*, raises a number of difficult questions about the identity and authority of the framers,[32] not only

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[25] Par 105. This strict test is drawn from *Rennie NO v Gordon NNO* 1988 (1) SA 1 (A) 21E.
[26] *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) 749C
[27] *Bernstein v Bester NO* (note 20 *supra*) par 105
[28] Par 105
[29] Par 105, in which the example given is the High Court of Parliament Act challenged in *Minister of the Interior v Harris* 1952 (4) SA 769 (A). See also the discussion on the law/politics distinction at 2 2 in chapter 2 *supra.*
[30] Interim Constitution (note 1 *supra*) s8
[31] *Bernstein v Bester NO* (note 20 *supra*) par 106
[32] Most of the drafting of the interim Constitution was done by technical committees, and it was finally approved in 1993 by members of the Multi-Party Negotiating Process, the structure of

because of the legitimacy problems of the parties involved,[33] but because the negotiating process through which the interim Constitution came into being was not conducive to the formation of collective intentions of the kind postulated here.[34]

The situation under the final Constitution, which underwent both political and judicial scrutiny before it became a valid enactment, might be far more complex. It is thus understandable that a resort to the framers' intention is deliberately avoided by the Court in *Heath,*[35] in which an implied provision is decisive in the judgment, and applied without the assistance of either of the tests mentioned above.[36]

3 2 2 *In re: Certification of the Constitution of the RSA*

The unusual interpretive approach of the Constitutional Court in the *Certification* case[37] is, as is to be expected, largely dictated by the unique context within which it finds itself operating. It describes its task, the "judicial certification of a Constitution", as unprecedented, and distinguishes between the formal purpose and underlying purpose of the exercise.[38] The formal aspect is dealt with simply by stating that the Court must pronounce judgment on whether or not the provisions of the proposed new South African Constitution comply with the Constitutional Principles contained in the interim Constitution.[39] The question of the underlying purpose is tackled by placing the process within its

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which is described by Eloff in De Villiers (ed) *Birth of a Constitution* "The Process of Giving Birth" 14-19.

[33] The chief role-players were members of the 3-chamber parliament, homeland governments, and other parties, the support of none of which "had ever been tested during fully democratic elections." Basson (note 3 *supra*) xxi.

[34] Note De Villiers description in "The Constitutional Principles: Content and Significance" (note 32 *supra*) 39 of the outcome of 'headline negotiations', which "gave the impression of consensus, which actually was not the case at all. The slightest attempt to interpret and explain the agreements and consensus led to conflict and contradictory statements."

[35] Note 11 *supra*

[36] See also note 76 *infra*

[37] Note 10 *supra*

[38] *Certification* case (note 10 *supra*) par 1

[39] Par 1

historical, political and legal context and by explaining the extent and limitations of the court's powers as reflected in this process.[40]

In summary, these powers have two main features. They extend beyond the answering of challenges to the Constitution brought to the attention of the Court by a variety of interested parties, and include the whole text. On the other hand, they are limited to abstract review of the constitutional provisions in question, so as not to pre-empt concrete disputes which may arise before the Court at a future date.[41] In this process of abstract review of the whole constitutional text, the Court follows a liberal approach to interpreting the Constitutional Principles, declaring that they "must not be interpreted with technical rigidity".[42] Implicit in such an approach is a desire to certify the text as complying with the Constitutional Principles wherever this might be possible. This amounts to a presumption of compliance, which is evident in many parts of the judgment.

An example from the section dealing with central government issues is the pronouncement that the provision made in the Constitution for separation of powers between the legislature and executive (which is not an absolute separation) complies with the Constitutional Principle that requires such separation because "the language of [the Constitutional Principle] is sufficiently wide to cover the type of separation required by the new text."[43] In other words, since the Constitution may be construed as including the principle of separation of powers, *the extent* of this separation becomes irrelevant for the purposes of certification.

A similar argument is used to dismiss challenges to the Judicial Service Commission (JSC) and its composition. The Court points out that, because the Constitutional Principles dealing with the appointment of judges only set criteria according to which judges should be selected without prescribing any particular method for how the process of appointment should work, it becomes irrelevant

[40] Par 1
[41] Par 2-3
[42] Par 36
[43] Par 113

that the JSC "could have been constituted differently, with greater representation being given to the legal profession and the judiciary."[44]

The JSC is simply the chosen method for constitutionally guaranteeing that these criteria will be met, and the Court "cannot interfere with that decision."[45] More specifically, the Court recognises the limitations inherent in the Constitutional Principles, and that these will have to be supplemented by the text. The constitutional text is meant to give particular expression to a general principle specified in the Constitutional Principles. Where there are various ways of giving expression to a particular principle, the text can adopt only one, and the Court does not need to concern itself with the alternatives and whether any of these may be better, but must be satisfied that the chosen alternative does indeed constitute a form of that general principle.

As the Court declares, in its analysis of Constitutional Principle VI: "There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute."[46] It proceeds to consider a number of other democratic states in which there is said to be a separation of powers, and accepts that membership of more than one branch of state, especially the legislature and executive branches, is common. It is also acceptable, provided that there is "functional independence" of the branches of government, which "prevents the branches from usurping power from one another."[47]

In its comments on the significance of the Constitutional Principle for the judiciary, the Court states: "What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law

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[44] Par 124
[45] Par 124. Presumably the Court *would* interfere if the criteria, also expressed in s174(1) of the Constitution (note 1 *supra*) were actually being applied ineffectively by the JSC.
[46] Par 108
[47] Par 109

impartially and that it should function independently of the legislature and the executive."[48]

Using this comparative approach to the theory of separation of powers, the Court comes to the conclusion that the imperfect separation can be seen as fulfilling the further requirement, also contained in Constitutional Principle VI, of checks and balances, since it allows for both "independence and interdependence of government branches."[49] Although the Court does not expressly refer to the demise of parliamentary sovereignty here, it does mention our history of legislative and executive dominance earlier in the judgment,[50] and it is within this context that this observation is made. Finally, the Court indicates that "the model adopted reflects the historical circumstances of our constitutional development."[51]

3 2 3 *De Lange v Smuts NO*

Separation of powers was raised in *De Lange v Smuts NO*[52] as part of the challenge to s66(3) of the Insolvency Act,[53] which dealt with the powers of the presiding officer at a creditors' meeting to issue a warrant committing an uncooperative witness to prison. This would include anyone who refuses to be sworn, refuses to answer any question lawfully put to him/her, or fails to answer any question fully or satisfactorily. It was argued that this provision infringed the principle of separation of powers, by granting someone who was not a judicial officer, or not exercising a judicial function, the power to commit a person to prison until he/she agreed to cooperate.

The Constitutional Court delivered five separate judgments, and for the purposes of this chapter, only the separation of powers related aspects of each judgment, according to the degree in which they rely on the doctrine, will be

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[48] Par 123, in which s165 of the Constitution (note 1 *supra*) is held to guarantee this requirement.
[49] Par 112
[50] Par 6
[51] Par 112
[52] Note 9 *supra*
[53] Act 24 of 1936

considered. The main points of disagreement among the members of the Court concerned whether or not the impugned section was completely constitutional, not constitutional at all, or constitutional only if the presiding officer was a magistrate.

Ackermann J relied partly but not exclusively on separation of powers in reaching the latter conclusion. On the status of the separation of powers principle in the Constitution,[54] he states only that the Constitution provides for separation of powers "pursuant to Constitutional Principle VI,"[55] and refers to the statement of the Court in the *Certification* case[56] that "[t]here is... no universal model of separation of powers."[57] He opines 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 by the Constitution and that reflects a delicate balancing, informed by both South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."[58]

This is similar to the abstract review method used by the Court in the *Certification* case, although it also emphasises the need to examine the doctrine in the context of the specific provisions of the Constitution and the historical context of South Africa. As in the *Certification* case, there is a marked reluctance to engage with the practical questions of how this 'delicate balancing' may be accomplished, beyond declaring that this "complex matter" will be "developed more fully as cases involving separation of powers issues are decided."[59]

The conclusion drawn by Ackermann J is that the power to commit a recalcitrant witness to prison "is within the very heartland of the judicial power

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[54] Note 1 *supra*
[55] *De Lange v Smuts NO* (note 9 *supra*) par 60
[56] Note 10 *supra*
[57] *De Lange v Smuts NO* (note 9 *supra*) par 60
[58] Par 60

and therefore cannot be exercised by non-judicial officers,"[60] and for additional support he refers to similar pronouncements made by US courts. The capacity in which the judicial officer performs the function, namely as presiding officer at a creditors' meeting, does not apparently detract from the fact that it is the prerogative of judicial officers to exercise such powers.

Sachs J concurs with the conclusion drawn by Ackermann J, but uses only the separation of powers principle as his justification.[61] He interprets the act of sending an unco-operative witness to prison as a judicial act, forming "a crucial part of the authority reserved in democratic states to the judiciary."[62] For this reason, he declares: "The doctrine of separation of powers prevents Parliament from entrusting such authority to persons who are not judicial officers performing court functions as contemplated by s165(1) [of the Constitution]."[63]

He then interprets s165(1), which vests judicial authority in "the courts" as including members of the courts, even while not presiding over the institution of a court, because "[u]nlike other appointees, magistrates exercising powers of committal to prison under s66(3) of the Insolvency Act will enjoy institutional independence and can be expected to apply the law impartially and without fear, favour or prejudice."[64] Independence is thus seen as attaching to the person of a judicial officer, rather than the court as an institution.

In finding that the provision is wholly unconstitutional, Mokgoro J does not refer explicitly to separation of powers, but disagrees strongly with Ackermann and Sachs JJ that the fact that the person committing the witness to prison is a judicial officer is an adequate safeguard of individual liberty.[65] She states that the provision vesting the judicial authority in the courts, s165, was enacted not

[59] Par 61
[60] Par 61
[61] Par 174
[62] Par 175
[63] Par 176
[64] Par 178
[65] Par 137

"due to the presence of the judicial officers, but because of the rule of law which is upheld there."[66]

O'Regan J comes to the same conclusion, on the grounds that a magistrate presiding at a creditors' meeting is not performing a judicial function, but acts in an administrative capacity and is therefore not authorised to exercise the judicial power of committing a person to prison.[67]

The judgment of Didcott J opposes the view that "sending people to jail should always be the function of the judiciary alone," and concludes that the contested section is not unconstitutional.[68] He refers to the fact that "[t]he separation between the executive and the judiciary is not total in South Africa,"[69] and that magistrates are called upon to perform a number of administrative tasks falling within the domain of the executive, and "moving readily and frequently from the bench to the bureaucracy and back."[70]

He goes on to note that, whether the presiding officer at a creditors' meeting is a magistrate or not, he/she is likely to be independent and impartial, with "no interest to promote or protect in that area."[71] The imprisoned party is also fully entitled to appeal immediately to the High Court, thus allowing the judiciary to intervene and decide substantively on the merit of the committal.

What is most striking in *De Lange v Smuts NO*, is the lack of agreement among members of the Court, not only about the extent of the judicial function, and what acts are included in it, but also about how the separation of powers principle should be interpreted. Each judgment shifts the emphasis to a different

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[66] Par 137. Mokgoro J summarises her position by quoting Lord Acton that "[t]here is no worse heresy than that the office sanctifies the holder of it."
[67] Par 160. O'Regan quotes Le Dain J in *Valente v The Queen* (1985) 24 DLR (4th) 161 at 171: "[A]n individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal" par 159.
[68] Par 125
[69] Par 124
[70] Par 124
[71] Par 125

aspect of the doctrine, the meaning of judicial independence, and the meaning of the provision granting judicial authority to the courts.[72]

3 2 4 *South African Association of Personal Injury Lawyers v Heath*

The Constitutional Court's decision in *Heath*[73] is interesting for a number of reasons, and deals with a more complex set of facts and legal issues than the later cases of *S v Dodo* or *S v Mamabolo.*[74] For one, it is a unanimous decision of the Court (per Chaskalson P) on the question of separation of powers, which puts to rest many of the differing opinions on the judicial function expressed in *De Lange v Smuts NO.*[75] In the context of constitutional interpretation, it is particularly significant in that it pronounces finally on the status of "implied" or "implicit" constitutional terms.

Using a reference to the contract law distinction between tacit and implied terms, the Court elects to call such terms 'implicit' or 'implied by law', since the designation "tacit" would suggest that these terms were intended by the drafters but never expressed in writing. To accept such a proposition as valid grounds for adopting a constitutional provision, the Court explains, might be seen as "endorsing the doctrine of original intent," a controversial interpretive approach which our Constitutional Court claims never to have adopted.[76] The Court then declares that implicit constitutional provisions have the same force as express provisions, on the authority of the *Fedsure* case,[77] in which legislation conflicting with the legality principle implicit in the interim Constitution was held to be invalid.[78]

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[72] Constitution (note 1 supra) s165
[73] Note 11 *supra*
[74] Note 12 and 13 *supra*
[75] Note 9 *supra*
[76] Par 19. However, in *Bernstein v Bester NO* (note 20 *supra*) the Court made an *obiter* statement to the effect that "[t]he Constitution as a whole and section 22 in particular, appears to be workable and to realise the ostensible legislative intention" par 105. The 'ostensible legislative intention' differs from 'legislative intention' in that it refers not to the actual intention of the legislature, but only the intention as demonstrated in, or apparent from the text.
[77] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC)
[78] *Heath* (note 11 *supra*) par 20

Next, the Court embarks on a comparative exercise in which it determines that the South African Constitution is not alone in containing no express term incorporating the doctrine of separation of powers, but that the USA and Australia also provide for separation of powers only implicitly, by vesting state powers in three separate branches of state.[79] The obvious reason for this is the one stated by the Court in the *Certification* case, which is that a reference to the doctrine of separation of powers could mean a wide variety of different things, and does not embody a universal rule or principle.[80]

It is therefore unhelpful to examine the separation of powers doctrine either in the abstract, as a theory, or as it is practically applied in other democratic states, and difficult to ensure that "laws inconsistent with what the Constitution requires" with respect to such separation are declared invalid, without having recourse to the text itself.[81] To overcome this difficulty, the Court compensates by using the term "separation" to mean "independence", as is evident in statements such as: "The separation of the judiciary from the other branches of government is an important aspect of the separation of powers *required by* the Constitution, and is essential to the role of the courts under the Constitution" (my emphasis).[82]

The consequences of this decision will be explored at more length in chapter 5 of this thesis; suffice it to say for now that the immediate result was that the Court did not examine the necessity of judicial independence primarily with reference to our Constitution, in which this requirement is expressly contained.[83] Continuing in an exploratory vein, the Court begins to consider the possible circumstances in which the performance of extra-judicial functions by judges might infringe the separation of powers doctrine. To do so, the Court is led to consider the kinds of assignment that judges in other jurisdictions might not be

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[79] South Africa's interim Constitution (Act 200 of 1993) was an exception in this regard, as it incorporated the Constitutional Principles into a schedule which has the same force as the rest of the provisions in the text, one of which, Constitutional Principle VI, expressly referred to separation of powers.
[80] Note 10 *supra* par 108: "There is, however, no universal model of separation of powers."
[81] *Heath* (note 11 *supra*) par 22 suggests that we should attempt this.
[82] Par 25. It is submitted that the Court is also using 'required by' to mean 'implicit in', although if 'independence' were substituted for 'separation', 'required by' would be justified by s165(2).
[83] The Court does refer in passing to s165(2), at par 26 of the judgment.

allowed to accept, and these guidelines are refined to a few core tests for which of these activities would pass constitutional muster.[84]

However, there is an understandable reluctance on the part of the Court to incorporate these tests wholesale into our law, and instead, the Court declares that the decision rests finally with the Court itself.[85] The Court does not at any stage examine the text of the Constitution very closely in making this decision, and it is therefore not clear that a particular interpretive approach is being implemented. Moreover, comments such as "They [ie. the functions performed by the SIU] are inconsistent with judicial functions as ordinarily understood in South Africa," suggest an intuitive or 'common sense' approach to the decision, informed by the Court's 'ordinary understanding' of the judicial function, rather that by engagement with what the supreme Constitution prescribes or expresses.

3 2 5 *S v Dodo*

In *Dodo*'s case,[86] the issue at stake is whether mandatory minimum sentences prescribed by the legislature are constitutionally acceptable. In deciding this, the Court looks, on the one hand, at the interpretation of a Bill of Rights provision, namely the "fair trial" right as set out in s35,[87] and on the other at the question of separation of powers, and how to interpret this doctrine correctly in the light of our Constitution. It is this second enquiry which demands the majority of our attention in this chapter.

The court *a quo* relied on previous analyses of the separation of powers principle, as developed by the Constitutional Court in the *Certification* case,[88] *Bernstein v Bester,*[89] *De Lange v Smuts*[90] and especially *Heath*,[91] to justify its

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[84] Par 29
[85] Par 31. It should, however, be noted that the reasons given for striking down the relevant legislation were lifted directly from these tests – see for example par 45, in which the Court holds that the functions of the head of the SIU are "far removed from 'the central mission of the judiciary'."
[86] Note 12 *supra*
[87] Constitution (note 6 *supra*)
[88] Note 10 *supra*
[89] Note 20 *supra*
[90] Note 9 *supra*
[91] Note 11 *supra*

decision that sentencing "falls within the heartland of the judicial power, and is not to be usurped by the legislature,"[92] and that mandatory minimum sentences are not constitutionally acceptable. However, the Constitutional Court adopts a rather different approach, having recourse to the constitutional text itself and the recognition in that text of legislative involvement in the sentencing process. The rights of accused persons include the right "to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."[93]

This not only fits the old maxim *nulla poena sine lege*,[94] but also gives effect to the view that prescribed sentences send a message to the would-be criminal about the consequences of a particular crime, which may serve as a deterrent measure; and if this message is altered, the person should be allowed to hold the legislature to the original 'bargain'.[95]

This way of reading s35(3)(n) undermines the separation of powers argument used in the court *a quo*, which denies or at least downplays the contribution of the legislature to the sentencing process. The Constitutional Court distinguishes between two aspects of sentencing, namely the prescription of a general principle for sentencing, and the individualising of that principle in a particular case.[96] The former is the function of the legislature, which "cannot provide for each individually determined case," while the power to determine the particular outcome of the general principle is left to the courts.

This interdependence accords with the need for checks and balances within the framework of a state based on constitutional supremacy, and the Constitution is the ultimate decider of how any general legislative principle should be applied to an individual or group. In the legislation in question, the court was not turned

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[92] *Dodo* (note 12 *supra*) par 8. This amounts to the test used in Heath's case to determine whether the principle of separation of powers had been violated.
[93] Constitution (note 6 *supra*) s35(3)(n), quoted in *Dodo* (note 12 *supra*) par 25
[94] "No punishment without a law", an expression of the legality principle in criminal law.
[95] Of course, this assumes that the criminal has investigated which sentence is likely to be passed, or that the punishment in question has been well-publicised and is common knowledge.
[96] *Dodo* (note 12 *supra*) par 26

into a "rubber stamp" for the legislature, with no discretion as to sentence whatsoever.[97] The discretion allowed is confined to situations where "substantial and compelling circumstances" dictate that the mandatory minimum sentence should not be imposed.[98]

In accordance with s39(2) of the Constitution, the Court must interpret this legislative test in the context of the need "to promote the spirit, purport and objects of the Bill of Rights."[99] Although it does not expressly refer to this provision, it nevertheless endorses the interpretive approach prescribed here, commonly known as "reading down", where it examines the question of whether the High Court is compelled, in terms of the legislation, "to pass a sentence which is inconsistent with the accused's right... 'not to be punished in a cruel, inhuman or degrading way'," [100] and comes to the conclusion that the legislation "does not, *on its proper construction*, transgress the Bill of Rights check on the legislature, and therefore does not infringe the separation of powers principle either" (my emphasis).[101]

The reason for my emphasis in the preceding paragraph is to highlight the complementary practices of using the interpretive method of 'reading down', aimed at promoting the Bill of Rights, and the incorporation of the Bill of Rights guarantees into a theory of checks and balances, in which the Bill of Rights constitutes "a most important check on the legislature."[102] The 'gross proportionality' tests from foreign jurisdictions, and other accessories, are in turn employed in terms of s39(1) of the Constitution, which deals with Bill of Rights interpretation, in order to determine what constitutes an infringement of s12(e), and reach the same conclusion supported by 'reading down' the legislative provisions.

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[97] Par 20, in which *S v Toms; S v Bruce* 1990 (2) SA 802 (A) is differentiated from the situation encountered here.
[98] Par 10
[99] Note 1 *supra*
[100] *Dodo* (note 12 *supra*) par 34
[101] Par 41
[102] Par 41

In summary, a court should interpret the requirement of "substantial and compelling circumstances" so as to give effect to the spirit, purport and objects of the Bill of Rights prescription that no one should be "punished in a cruel, inhuman or degrading way."[103] At the same time it should implement the appropriate tests as to what might make the punishment in question 'cruel, inhuman or degrading,' so as to fulfil its role as a check on the legislature. This has the unusual effect of incorporating the separation of powers doctrine, together with checks and balances, as expressed in Constitutional Principle VI, into an interpretive approach based on s39.

3 2 6 *S v Mamabolo*

The case of *S v Mamabolo*[104] is of particular interest as a Constitutional Court case, in that it deals with the constitutionally permissible limits on criticism of judges and their decisions. For the judges concerned, this is clearly very close to having to rule on their own interests, and the decision must at one time or another affect their own position. This is not to say that the Court had a direct interest in the case on its facts, but it will certainly experience the repercussions of what was decided here.

The question of constitutional interpretation was addressed primarily in the context of the Bill of Rights, and whether the criticism at issue here was protected by the right to freedom of expression,[105] as well as whether the 'contempt of court' summary proceedings used by courts complied with the fair trial rights set out in s35 of the Constitution. However, the Court also paid some attention to s165 of the Constitution, which obliges all organs of state "to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts."[106]

It is the interpretive approach to this provision which forms the main subject of the analysis in this chapter. Some comments are also made on the way in which

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[103] Constitution (note 6 *supra*) s12(e)
[104] Note 13 *supra.*
[105] Constitution (note 6 *supra*) s16
[106] s165(4)

the Court interprets the separation of powers doctrine as implied within our constitutional order, because the view that the Court adopts with regard to the position of the judiciary in terms of this doctrine affects its understanding of s165.

As in the *Certification* case, the Court's point of departure in interpreting this obligation to protect the judiciary, and the need for a separation of powers, is rooted in the history of South Africa. The Court asserts that this opening section of the chapter dealing with the courts and the administration of justice, indicates a recognition of "the vulnerability of the judiciary and the importance of enhancing and protecting its moral authority."[107] The clear implication is that these have been low priorities in the past, and this constitutional provision may help to remedy the situation, if upheld and applied correctly.

The Court interprets the obligation imposed on state organs in s165(4) as emphatically broad, given the "compendious meaning" assigned to the term "organ of state" in s239 of the Constitution,[108] and proceeds to use these insights to explain the peculiar position of the courts, and the reasons for some of their practices, including the need for public proceedings and a right of appeal to a higher court.

In Mamabolo's case the Court clearly uses the separation of powers doctrine in a very specific way. The context dictates that the doctrine must be applied, not to protect the independence of the courts, nor to preserve certain functions for the judiciary alone, nor even to defend other branches of state from interference by the courts, but instead for the less traditional purpose of ensuring the 'dignity' and 'effectiveness' of the courts, to quote just two of the aims of s165(4).

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[107] *Mamabolo* (note 13 *supra*) par 17

[108] Note 6 *supra*. The definition of "organ of state" is given as "(a) any department of state or administration in the national or provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a public power or performing a function 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, but does not include a court or a judicial officer."

This implies a recognition on the part of the Court that there is no real need to toy with or speculate about the meaning of the separation of powers doctrine in the abstract, nor to attempt an historical analysis of the traditional position of the courts, except as a brief explanation of the necessity of a s165 obligation. The Court accepts for these purposes that separation of powers does form part of our law under the new Constitution, as per its earlier decision in *Heath,*[109] but it makes no specific mention of *Heath* and the interpretation of the doctrine there, choosing instead to focus on the text of the Constitution itself within the framework of our country's political and historical situation.

The Court rejects arguments advocating the implementation of an American test to set boundaries on the right to free expression in one's criticism of the courts, again finding it more desirable to examine the constitutional text itself before resorting to foreign or even domestic precedents. The Court draws a brief comparison between the South African Constitution and that of the USA, describing the former as "infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country," compared with the latter, which "paint[s] eighteenth century revolutionary insights in broad, bold strokes."[110]

In other words, the Court again emphasises the need to view the text as primary when engaging in any interpretation of the Constitution, and at one point declares that we now have "the benefit of a constitutional environment in which all law is to be interpreted and applied,"[111] which points again to the considerable influence our interpretation of the Constitution exerts on every area of our law.

Contempt of court is a common law issue, but of course it must be seen in the light of the Constitution, and although s165(4) does not impose any obligation

[109] Note 11 above
[110] *Mamabolo* (note 13 *supra*) par 40.
[111] Par 45 – and *cf.* Constitution (note 6 *supra*) s39(2)

on individuals, or the press, to assist the courts, it does support the possibility of using legislation or "other measures" to ensure that the courts function as desired. The Court thus concludes that "where the Constitution itself contemplates legislative protection of these judicial qualities, it would be difficult to uphold an argument that any measure to that end which, even minimally, limits one or the other of the fundamental rights contained in the Bill of Rights, is an unjustifiable infringement."[112] To summarise, the approach used in this case gives substance to the notion of constitutional supremacy by placing the text first, and using the context as an aid to understanding the text itself.

3 3 CONCLUDING REMARKS

The most strikingly noticeable change in the approach of the Constitutional Court is evident in its dealings with implicit provisions of the Constitution. If the approach in *Bernstein v Bester NO*[113] is compared to that followed in the *Heath* case,[114] the development of a distinctive Constitutional Court jurisprudence is very clear. In *Bernstein*, the Court still has recourse to the approach of the appellate division for a test to determine whether a constitutional provision is 'implied by law'. In *Heath*, no such test is applied, and the Court simply pronounces that it "cannot accept that an implicit provision of the Constitution has any less force than an express provision,"[115] and assumes that separation of powers is such a term, without citing any authority for this finding.[116]

In making this pronouncement, the Court was dispensing with the argument of the court *a quo*[117] that, because there is no express provision referring to separation of powers in the Constitution, the court was not competent to set

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[112] Par 39.
[113] Note 20 *supra*
[114] Note 11 *supra*
[115] Par 20
[116] This is in itself problematic, as even the *obiter* pronouncements on implied constitutional provisions in *Bernstein* (note 20 *supra*) suggest that s22 read with s96(2) of the interim Constitution Act 200 of 1993, only imply the principle of separation of powers, and this principle actually had the force of law under the Constitution at that time – see note 22 *supra*.
[117] *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T)

aside what would only amount to "a tacit principle of the Constitution."[118] It rejects the use of the designation 'tacit', in favour of the term 'implied' or 'implicit',[119] and refers to the judgment of the Court in the *Certification* case,[120] in which it was confirmed that "the provisions of our Constitution are structured in a way that makes provision for a separation of powers."[121]

However, since *Heath*, there has been little consistency in the Court's application of this newly recognized principle, which now forms part of our constitutional law. The Court in *Dodo* and *Mamabolo* was at pains to point out that it does not support an abstract adoption of the doctrine without reference to the text of our Constitution and the manner in which it finds expression there.[122] The doctrine is allegedly only accepted as part of our law to the extent that it is contained within the provisions of the Constitution, but in practice, as an implicit provision, it is being used as an additional substantive ground for review of legislation. For example, in the recent case of *S v Mamabolo*,[123] after referring to the constitutional provision for the removal of a judge from office, the Court states:

> "The nature of the separation of powers between the judiciary on the one hand and the legislature and executive on the other, is however such that any other check on the judiciary by the legislature or the executive runs the risk of endangering the independence of the judiciary and undermining the separation of powers principle."[124]

With its importation of tests from the USA and Australia for deciding on the acceptable extent of extra-judicial functions for judges, *Heath* is another

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[118] 1160A
[119] Note 11 *supra* par 19
[120] Note 10 *supra*
[121] *Heath* (note 11 *supra*) par 22. This is not the same as saying that separation of powers is an implied provision in our Constitution.
[122] See especially *Dodo* (note 12 *supra*) par 17: "What counts is not any abstract theory of separation of powers, but the actual separation of powers *operationally defined* by the Constitution," and *Heath* (note 11 *supra*) par 22: "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" (my emphasis).
[123] Note 13 *supra*
[124] Par 30. No reference is made to the constitutional text as justification for this statement; rather it relies on the Court's interpretation of the abstract doctrine of separation of powers.

example of this practical tendency.[125] It is difficult to explain why in *Heath*, the Court is content to use tests drawn from these foreign jurisdictions, while in *Mamabolo*, the Court finds American authorities wholly inappropriate, given the radical differences between the United States and South African Constitutions.[126] In this case, the Court instead displays a remarkable inventiveness and ingenuity in its interpretation of constitutional provisions relating to separation of powers and checks and balances.[127]

On the whole, the Court's level of caution, even while bringing about some quite radical developments in interpretation, like combining the 'reading-down' of a legislative provision with the idea of Bill of Rights guarantees as checks and balances, as in *Dodo's* case,[128] is to be welcomed. On the other hand, the strange reluctance in *Heath* to confront the core issue of whether the legislation called into question in that case could be reconciled to the constitutional text, regardless of what extra-judicial functions are permitted in other jurisdictions, and whether the legislation was being implemented appropriately, can justly be criticised.

Another noteworthy feature of the approach to the interpretation of separation of powers is the emphasis the Court places on flexibility.[129] This desire not to close the debate concerning the extent of the separation of powers doctrine, and its effect on the judicial role in South Africa, probably derives from the approach of the Court in the *Certification* case to Constitutional Principle VI.[130] However, given the very different task with which the Court was concerned in that case, the open-endedness of the later decisions is not necessarily appropriate. On the other hand, the advantage is that, as a result, the effect of separation of powers on the judicial role also remains provisional and subject to review.

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[125] Note 11 *supra* par 29-30
[126] See note 110 *supra*
[127] See the discussion in this chapter at parts 3 2 5 and 3 2 6 *supra*.
[128] See note 102 *supra*
[129] This flexibility is particularly evident in *De Lange* – see the discussion at note 9 and 59 *supra* – and in *Heath* – see the discussion at note 85 *supra*.
[130] See especially the discussion at note 42, 43 and 46 *supra*.

The remainder of this thesis will continue with an examination of the implications of some of these decisions concerning the separation of powers doctrine, and how they have affected the courts' understanding of the role of judges. The question that still demands an answer is whether a judge must, to preserve the independence guaranteed by the Constitution, be withheld from any activities that are not directly related to what the Court has determined to be 'the central mission of the judiciary'. This is essentially the adjudication of adversarial disputes, although certain deviations from this central mission may still be allowed.[131] Alternatively, the new Constitution might require that the role of judges be re-examined, and the guarantee of independence used as an enabling provision, allowing judges far greater freedom to take on a more investigative and inquisitorial type of role.

The dispute in its most basic form therefore returns to the contentious issue in *De Lange v Smuts*,[132] namely whether the text of the Constitution guarantees the independence of judges themselves, or if it matters whether they are sitting on the bench hearing cases, presiding over meetings of creditors, or serving on Special Investigating Units that actively investigate allegations of corruption.

It is worth noting that, even in *Heath,* a compromise position regarding eligibility for the post of head of a Special Investigating Unit, if a different interpretive approach had been adopted. For example, 'reading down' the provisions of the Special Investigating Units legislation so as to ensure that the independence of judges was retained, or focusing on how the Units were actually designed to function under the legislation in question, instead of on the particular operation of Heath's Unit,[133] might have brought about the developments in the judicial role envisaged by the Special Investigating Units legislation.

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[131] The extent of such deviations and the circumstances under which they might be permitted are not clear, as the tests introduced in *Heath* (note 11 *supra*) were apparently an *ad hoc* measure.
[132] Note 9 *supra*
[133] The Heath Unit was considered over-zealous in its operations, and perhaps as a result, no other Unit was ever established.

CHAPTER 4: JUDICIAL INDEPENDENCE AND THE ROLE OF JUDGES

4 1 INTRODUCTION

Many arguments against extending the role of judges beyond that of the disinterested adjudicator, rely primarily on the idea that involvement in tasks or functions that require something other than adjudication tend to compromise the independence of the judiciary, either by subjecting them to some form of control, or simply creating the appearance of partiality in the eye of the public, thus undermining the integrity of the courts. An extreme expression of this view may be found in the writings of American former Chief Justice Harlan F. Stone's, in which he opines "that it is highly undesirable for a judge to engage actively in public or private undertakings other than the performance of his judicial functions."[1] In this chapter, the validity of such arguments is questioned, and resulting perspectives on the independence of the judiciary used in an evaluation of recent cases dealing with separation of powers and the judicial function.[2]

In the previous chapter, the development of the Constitutional Court's interpretive approach to the separation of powers principle was analysed. This analysis was used to determine the impact of particular interpretations of the principle on the Court's understanding of the judicial role. This chapter continues our enquiry into how to interpret or define the role of judges, this time asking whether the role necessarily entails the performance of an adjudicative role, as is traditionally expected, or whether it can also be fulfilled by performance of extra-judicial functions.

The hypothesis here is that any function assigned to judges by the Constitution, whether 'judicial' in the strict sense or not, and any function not in conflict with the duty imposed on judges by the Constitution, should be considered part of the judicial function. As has already been mentioned, the Constitutional Court did

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[1] Mason "Extra-Judicial Work for Judges: the Views of Chief Justice Stone" *Harvard Law Review* (1953) 193-216 203

[2] The cases to be considered are *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the RSA* 1996 (10) BCLR 1253 (CC), *South African*

not consider the role of head of a Special Investigating Unit to be compatible with the role of a judge. It is therefore appropriate to begin with the *Heath* decision, and how the Court in that case begins to hammer out its own definition of the judicial role.

One of the arguments used in *Heath* to explain the need for judicial independence was the provision made in our Constitution for separation of powers.[3] However, it is not immediately clear that the doctrine of separation of powers is of particular assistance in interpreting the role of a judge, as assigned by our Constitution. Although separation of powers has now been accepted as an implicit provision of the Constitution, it also appears from the judgment that the doctrine only applies in our law to the extent to which it is expressed within the text of our Constitution. When establishing a constitutionally acceptable definition of the role of South African judges, the text of the Constitution should take precedence over the doctrine of separation of powers or any other constitutional principle.

This approach became the trend in cases subsequent to *Heath*, in which the role of the judiciary has been further examined in the light of separation of powers and the Constitution.[4] These cases will be analysed one by one, beginning with *Heath*, and moving chronologically through *Dodo* and *Mamabolo*, in order to demonstrate the Constitutional Court's refinement of its views on judicial independence, separation of powers, and the role of judges.

4 2 THE BACKGROUND TO THE CONTROVERSY

The controversy surrounding the application of separation of powers to the judicial role centred on Willem Heath, a former judge of the High Court of South Africa. In 1995, he was appointed in terms of an Eastern Cape Provincial

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Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC), *S v Dodo* 2001(5) BCLR 423 (CC) and *S v Mamabolo* 2001 (5) BCLR 449 (CC).

[3] *SAAPIL v Heath* (note 2 *supra*) par 25

[4] See chapter 3 of this thesis for a more detailed description of the various approaches to constitutional interpretation adopted by the Constitutional Court in its analysis of the separation of powers doctrine.

Notice[5] to head a commission of inquiry into matters relating to State property in the Eastern Cape. At that time, he was a judge of the Ciskei Supreme Court, and the new task assigned to him was to inquire into alleged administrative malpractices in the former Ciskei.

The success and credibility of a commission of inquiry may depend on the personality and reputation of the chairperson appointed, and Heath soon demonstrated a flair for attracting the attention and support of the media.[6] However, this kind of publicity in the media is less vital for such a commission than it is for an official such as the Public Protector, who relies on the public to report complaints about public administration.[7] Inevitably Heath, being so adept at handling the media, was generally portrayed as a type of additional Public Protector, while the commission soon became known in the national media exclusively as "the Heath commission".

When the Special Investigating Units and Special Tribunals Act[8] was promulgated at the end of 1996, this commission was dissolved by president Nelson Mandela.[9] In its place, he proclaimed the establishment of a Special Investigating Unit, to be headed up by Heath, which was to report to the president on irregularities in the administration of State or public property, in any part of South Africa.[10]

Since the duties to be performed by this Unit were even wider than those of the original Heath commission, Heath was *de facto* no longer able to perform any of the ordinary functions of a judge. Instead, all his time was to be devoted to the performance of an extra-judicial function - the investigation of alleged corruption. Although the Special Investigating Units were intended to investigate only matters assigned to them by the president, the Heath Unit did not hesitate to apply to the president for proclamations, to such an extent that

[5] EC Provincial Notice 10 of 1995
[6] *Financial Mail* July 25 1997 "Cover Story: No place to hide from the long arm of Heath"
[7] Brynard "Supporting Constitutional Democracy in South Africa: an Assessment of the Public Protector (Ombudsman)" *SAIPA* 1999 34(1) 7-23: "Ombudsmen need publicity of their activities and more importantly, of the existence o the office."
[8] Act 74 of 1996
[9] Proclamation R24 of 1997

this particular Special Investigating Unit – and despite the provision for others in the legislation, no others were ever established – effectively acted on own initiative.

One of these anti-corruption initiatives, resulting from allegations of improprieties in the paying out of claims against the Road Accident Fund, led Heath and his Unit to open an investigation of the lawyers engaging in this type of litigation. As a result, a group of these lawyers came together and founded the South African Association of Personal Injury Lawyers ("SAAPIL"), which, to prevent the investigation from going ahead, sought to challenge the status of the Special Investigating Unit itself.

The Transvaal Provincial Division, on first hearing the case, rejected SAAPIL's arguments, but the recent Constitutional Court decision in Heath's case, supports their contention that the scope of the courts' extra-judicial function has been restricted by the introduction of a supreme Constitution which makes provision for separation of powers. The Court held that Heath's role in presiding over the Unit was not compatible with the legitimate functions of the judiciary. The importance of judges' adhering to these legitimate functions has been expressed in our courts as follows: "*Regterlike amptenare moet in hulle amptelike lewe hulle streng beperk tot die funksies wat aan die amp verbonde is.*"[11]

However, in the court *a quo,*[12] after examining the history of appointments of judges to do extra-judicial work, Coetzee AJ had stated that "over the past 150 years there has never been a time when judges confined themselves to the function of a judge." He refers to a number of examples of extra-judicial duties, and cites various instances of their performance, both here and within other jurisdictions, to support his conclusion that the Special Investigating Units and

[10] See also Proclamation R24 of 1997

[11] Hiemstra CJ, in *S v Mongale* 1979 (3) SA 669 (B). Literally, "Judicial officers must, in official life, limit themselves strictly to the functions associated with their office" (my translation).

[12] *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T) at 1154.

Special Tribunals Act[13] did not violate the Constitution or the principle of judicial independence, and that Heath's role as investigator was compatible with his position as a judge.

4 3 JUDICIAL INDEPENDENCE

The principle of judicial independence has been accepted as a necessary precondition for a credible and legitimate judiciary since at least the seventeenth century in Britain, when the lack of security of tenure enjoyed by judges forced them to comply with the will of the political sovereign, or face removal from the bench.[14] The 1701 *Act of Settlement* introduced a number of reforms, granting judges tenure through political changes, salaries that were set and revised by parliament, and removal only at the behest of both houses of parliament. These measures have since been implemented as a matter of course in most democratic countries, including South Africa.

However, it is not certain that these three basic tenets are sufficient guarantees of judicial independence, or whether additional safeguards must be put in place to ensure that the judiciary retains credibility as an independently functioning branch of the state. Two aspects of judicial independence can be identified – the first concerning the autonomy of the courts, and the second the immunity of judges from civil liability for acts committed in the performance of their function as judges.[15] These aspects both find expression in our Constitution, which guarantees independence for the courts, and provides for investigations into the conduct of judges only by the Judicial Service Commission.[16] Though it

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[13] Note 8 *supra*

[14] See chapter 2 for a more detailed explanation of how this principle was transmitted from Britain to her colonies, including South Africa, and also the comments of Georgina Pickett in "The Canadian Judicial System" *Consultus* Nov 1997 133-136 "At the time, it was common for judges to be ousted with any political changes, or when politicians viewed the judges' rulings as incorrect, creating substantial pressure on judges to make decisions according to what those leaders wished the results to be, rather than according to the judges' interpretation of the law" 134.

[15] See Pickett (note 14 *supra*) for further commentary on these aspects.

[16] Constitution of the Republic of South Africa Act 108 of 1996 s165 and s177(1)

does not directly limit liability of judges for mistakes in adjudication, the state is likely to incur vicarious liability for errors of this kind.[17]

In deciding whether the judiciary is sufficiently independent, one of the factors that may be considered is what functions a judge is expected to perform, and whether the judge is subject to any form of control or influence from the other branches of state in the performance of these functions. A link therefore exists between judicial independence and the judicial function, in the sense that judges must be able to carry out their duties independently, and without "fear, favour or prejudice." The need for an independent judiciary may consequently act as a constraint upon our interpretation of the acceptable limits of the judicial function.

The judicial function receives further attention in the Constitutional Court judgment on Heath, in which it was held that the question at hand was ultimately "whether or not the functions that the judge is expected to perform are incompatible with the judicial office."[18] In paragraph 25 of the judgment, the Court also remarks that "[u]nder our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent." It proceeds to conclude that the appointment of a judge to the position of investigator under the Special Investigating Units Act violates the principle of separation of powers, since "[t]he functions that the head of the SIU is required to perform are far removed from the 'central mission of the judiciary'."[19]

If the Court were indeed correct in reading the Constitution's recognition of the three branches of state as a wholesale adoption of the separation of powers doctrine, then all that would be necessary would be to educate the public and other courts about the rationale for this new interpretation and the necessity for

[17] Further comments on this possibility may be found in Labuschagne "Deliktuele Aanspreeklikheid van die Staat vir Foute van die Regsprekende Gesag: Is die Oervader Uiteindelik Ontheilig?" *THRHR* (59) 479-485
[18] Note 2 *supra* par 31
[19] Par 45

the resultant limitation. The value of maintaining the three separate branches is certainly not disputed, and may be demonstrated by referring to other jurisdictions, and to the philosophical foundations of the doctrine.

However, the Court makes it clear that, in its own opinion, "[i]t is undesirable, particularly at this stage of the development of our jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office."[20] It appears from both the *Heath* judgments and other separation of powers cases that the question of the role of judges and the duty of the courts remains a central problem in our law.

Furthermore, it is far from clear that the role of judges should be a static and unchangeable one, informed by traditional assumptions about the nature and limits of the judicial function.[21] Another way of approaching the problem is with the recognition that "the instruction to judges to promote the values that underlie an open and democratic society based on human dignity, equality and freedom make it clear that judges are expected to play a far more activist role than has previously been the case."[22]

4 4 ANALYSIS OF THE CASE LAW

4 4 1 The *Certification* Case

To achieve the goal of this chapter, it is necessary to consider the tests which were used in reaching the final decision on Heath, and to evaluate these in the light of the Constitution. As is to be expected, the role of judges and the courts is outlined in some detail in the Constitution.[23] The Constitution establishes an independent and impartial judiciary, and excludes the courts from the section

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[20] Par 31

[21] Botha "Democracy and Rights: Constitutional Interpretation in a Postrealist World" *THRHR* (63) 561-581 575, where it is argued that the Constitution requires us to discard such assumptions.

[22] 575-6

[23] Constitution (note 16 *supra*) Chapter 8 – Courts and the Administration of Justice, and also Schedule 2, Item 6 – Judicial Oaths

239 definition of "organs of state", as well as from the domain which the Public Protector may investigate.[24]

In the *Certification*-case,[25] the Court refers to the judiciary's position with respect to Constitutional Principles V, VI, and VII,[26] and comes to the conclusion that the functions assigned to judges, the structure of the courts, and the composition and workings of the Judicial Service Commission, as set out in the Constitution, all accord with these principles. The Court holds that an independent judiciary is "an essential part of the separation of powers", and points to section 165 as aiming to ensure this outcome. This section vests judicial authority in the courts and protects courts against interference by individuals or state organs. In this context, the Court identifies judges themselves with the judicial authority and the courts, concluding: "Constitutionally, therefore, all judges are independent."[27]

There is no suggestion in the *Certification* judgment that any of the functions assigned to judges, or the participation of the legislature and executive in the appointment of judges, violate the separation of powers as expressed in Constitutional Principle VI. The overlaps in function between the three branches of state are easily justified with reference to the Constitutional Principle itself, as it not only contains a stipulation that the three branches be kept separate, but also refers to a supplementary requirement, namely that there should be "appropriate checks and balances to ensure accountability, responsiveness and openness." These checks and balances typically allow a measure of power-sharing between the three branches, and prevent a rigid separation of powers from ensuing. The Judicial Service Commission is an excellent example of such 'appropriate checks and balances', and the judicial appointment process demonstrates interaction and power-sharing among the branches according to this principle.

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[24] s182(3) "The Public Protector may not investigate court decisions."
[25] *Certification* case (note 2 *supra*)
[26] Constitutional Principle V requires that the legal system should ensure equality before the law and an equitable legal process (par 137), Constitutional Principle VI provides for a separation of powers between the legislature, the executive and the judiciary, with checks and balances (par 123), and Constitutional Principle VII requires an appropriately qualified, independent and impartial judiciary (par 123).

No attempt is made in the *Certification* judgment to set limits to the judicial power, but the emphasis here falls on the need for judicial independence. The Court satisfies itself that the Constitution adequately safeguards this independence and that the other branches cannot interfere with the courts. Since the role of the courts is not addressed in positive terms in the *Certification* case, we must turn to the Constitution itself, and existing views on the judicial authority derived from precedents, in order to address the question of what constitutes the primary purpose of the judiciary, and how this relates to the role of judges.

4 4 2 *South African Association of Personal Injury Lawyers v Heath*

In *Heath,* the Constitutional Court begins its pronouncements on the role and function of judges reasonably enough, expressing the undesirability, "particularly at this stage of the development of our jurisprudence concerning the separation of powers [of laying] down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office."[28]

No less reasonable is the subsequent statement of the Court that "the question is one calling for a judgment to be made as to whether or not the functions that the judge is expected to perform are incompatible with the judicial office." However, if this judgment should not be made at the hand of "rigid tests" laid down by the court, it requires some other source of justification.

It is regarding this source of justification that the Court adopts a surprising stance. The view is expressed that "the question in each case *must turn* upon considerations such as those referred to by Mr Trengove, and possibly others, which come to the fore because of the nature of the particular function under consideration" (my emphasis).[29] The considerations referred to by Mr Trengove

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[27] Par 123.
[28] Par 31. This suggests a willingness on the part of the Court to allow for greater flexibility in defining the judicial role. See also chapter 5 of this thesis, in which the scope for inquisitorial conduct by judges under the new Constitution is considered.
[29] Par 31

are tests distilled from United States and Australian decisions concerning extra-judicial functions of judges, and judge Blackmun's statement summarising the relevant American jurisprudence:

> "Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogative of another Branch and that are appropriate to the central mission of the judiciary."[30]

Having approved these considerations as relevant in our constitutional dispensation, the Court proceeds to state that, in making the judgment about where the performance of particular functions by a judge may "materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary," the Court "may have regard to the views of the legislature and executive." However, it fails to mention what must surely be the primary source of justification for any such judgment – the Constitution itself.[31]

Despite this omission, the Court goes on to refer to a number of specific constitutional provisions which prescribe non-adjudicative functions for judges. Rather than using the existence of such functions to extend and develop our understanding of the role of judges, the Court simply concludes that these functions "are not inconsistent with the role of the judiciary in a democratic society."[32] The reasons given are, in the case of judges presiding over elections of executive and legislative functionaries, that this provision ensures "that [the elections] are carried out impartially and strictly in accordance with Constitutional requirements" and in the case of the giving of advice on the administration of justice, or serving on the Judicial Service Commission, that the judges are performing functions "related to the subject matter of the judicial office."

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[30] Par 29
[31] Par 31
[32] A conclusion which is perhaps superfluous, given that the Constitutional Court has already on another occasion certified the functions assigned to the judiciary as not conflicting with the

The fact that the Court finds it necessary to justify the Constitution's assignment of functions to judges is in itself rather disconcerting. It suggests that, instead of being guided by the Constitution to an understanding of the role of judges, the Court is attempting to test the functions assigned to judges against some external conception of the role of a judge. Furthermore, a lack of consistency is demonstrated, in that this judgment is made without referring to the question of whether such functions would stand up to the relevant imported American and Australian tests, and more importantly, whether these tests are in fact compatible with our Constitution.

Despite these problems, the Court goes on to reject the reasoning followed in the court *a quo* that the performance of extra-judicial functions is part of the historical role of judges and should therefore be permitted. The Court finds that this is no longer an appropriate function for judges, because the tradition in question comes from the era of parliamentary sovereignty, and "what is now permissible must be determined in the light of our new Constitution, and not necessarily by past practices."[33] It apparently ignores the principles concerning the role of judges that might be drawn from serious engagement with the functions assigned to judges by the Constitution and their implications, and ironically seems to miss the point that the new Constitution does not assign judges a purely adjudicative role.

4 4 3 *S v Dodo*

In *S v Dodo,*[34] the Constitutional Court again considered the question of how the separation of powers doctrine influences the role of the courts, and the extent to which it finds application in our law. The context in which these pronouncements are made is the question of whether mandatory minimum life sentences, prescribed by legislation for certain crimes or types of crime, are constitutionally valid and enforceable. There was no question here, as in *Heath*,

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Constitutional Principles, including Constitutional Principle VI which refers to separation of powers – see *Certification* case (note 2 *supra*).

[33] *Heath* (note 2 *supra*) par 33

[34] Note 2 *supra*

of the courts' having exceeded their constitutional powers, but rather of the legislature's attempting to encroach upon the prerogative of the judiciary.

The order of the court *a quo*[35] was that s51(1) of the Criminal Law Amendment Act[36] was in conflict with, amongst other constitutional provisions, the separation of powers principle under the Constitution, and should be struck down. This order had to be confirmed by the Constitutional Court, but the argument that had convinced the Eastern Cape High Court did not succeed before South Africa's highest court.

In the Constitutional Court judgment, the High Court's reasons for opposing the legislation introducing mandatory life sentences are given as follows: the sentence prescribed by the legislation is very extreme, and is the most severe sentence that can be lawfully imposed by the court. This means that the court must carefully weigh all relevant factors before imposing it. This discretionary balancing of factors falls within the exclusive prerogative of the judiciary. The court states, using the terminology of *Heath*: "It falls within the heartland of the judicial power, and is not to be usurped by the legislature."[37]

The Constitutional Court, however, did not deem this striking down of the legislation to be necessary, and uses the legislative "escape clause" allowing the courts to impose a lesser sentence if "substantial and compelling circumstances" exist, read with the Bill of Rights provisions for a fair trial, and the right not to be subjected to cruel, inhuman and degrading treatment or punishment,[38] as granting sufficient discretion to the courts to avoid conflict with the separation of powers.

The Court does not assume the helplessness of the judiciary in the face of legislation that is possibly excessively draconian, or which allows deviation from its prescribed sentences only in the most extreme cases, but rather takes as its overriding consideration the fact that the duty of the judiciary is to uphold the

[35] Summarised in *Dodo* (note 2 *supra*) par 4-9
[36] Act 105 of 1997
[37] *Dodo* (note 2 *supra*) par 8
[38] Constitution (note 16 *supra*) s35 and s12 respectively

provisions of a supreme Constitution. The legislature does not have the power to defeat the purposes of the Bill of Rights, and the courts can therefore never be compelled by legislative means to do so either. The Court also refers to the attitude of courts under our previous dispensation, finding authority for the view that even in a state in which parliamentary sovereignty obtains, "Courts will not be astute to find that a mandatory sentence has been prescribed."[39]

4 4 4 *S v Mamabolo*

In Kriegler J's judgment in *Mamabolo*, with which the majority of the Constitutional Court agreed, though Judge Sachs wrote a separate concurring judgment, the summary proceedings for contempt of court cases and the common law charge of 'scandalising the court' were subjected to constitutional scrutiny. The Court found that, although the common law crime of 'scandalising the court' did infringe on the right to freedom of expression,[40] the infringement could be justified under the limitations clause in the Bill of Rights,[41] provided that the Court was satisfied that "the offending conduct, viewed contextually, really was likely to damage the administration of justice."[42]

As to the summary proceedings for dealing with these cases, the Court found that the procedure was unsatisfactory in many respects, and concluded that it ordinarily constituted "a wholly unjustifiable limitation of individual rights and must not be employed."[43] Instead, the usual processes for the prosecution of offences should be followed, to give effect to the fair trial rights contained in the Bill of Rights.[44] The procedure is also held to conflict with the nature and function of the judicial branch of state, as "it is inherently inappropriate for a court of law, the constitutionally designated primary protector of personal rights and freedoms, to pursue such a course of conduct."[45]

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[39] *S v Tom; S v Bruce* 1990 (2) SA 802 (A) at p.807, quoted in *Dodo* (note 2 *supra*) par 21
[40] Constitution (note 16 *supra*) s16
[41] s36(1)
[42] *Mamabolo* (note 2 *supra*) par 45
[43] Par 58
[44] Constitution (note 16 *supra*) s35
[45] *Mamabolo* (note 2 *supra*) par 58

From this it should be apparent that the question of the role and function of judges also features prominently in this case, and the description that follows, covers some of the pronouncements on this issue that relate to the separation of powers doctrine, and how it affects the judicial role. The Court acknowledges the judiciary as a completely independent pillar of state, constitutionally mandated to exercise the state's judicial authority. It then makes this comment:

> "Under the doctrine of separation of powers [the judiciary] stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete."[46]

Nevertheless, the *dictum* in *Coetzee v Government of the RSA*[47] that "the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained," is cited here with approval, and with the conclusion that this *dictum* places an obligation on the judiciary to establish a quantity of 'moral authority' as surrogate for the political power that it lacks. This should enable the judiciary to perform 'its vital function' as "the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state."[48]

In this description of the judicial function, the non-adjudicative part, in which the court functions as an executive check is, at least by implication, accorded due recognition. It is this part of the 'vital function' of judges that finds expression where judges are called upon, for example, to serve on the Judicial Service Commission, or a presidential commission of inquiry.[49]

It is also interesting that the Court holds that the crime of contempt of court is a 'public injury', damaging to the administration of justice,[50] and with the sole

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[46] Par 16
[47] 1995 (10) BCLR 1382 (CC) par 61
[48] *Mamabolo* (note 2 *supra*) par 16
[49] Constitution (note 16 *supra*) s178(1)(a)-(c) and s84(2)(f) respectively.
[50] *Mamabolo* (note 2 *supra*) par 25

aim of preserving "the capacity of the judiciary to fulfill its role under the Constitution."[51] However, the charge of 'scandalising the court' is not to be confused with the democratic check on the judicial power which vocal public criticism constitutes, which is an essential function that cannot be taken over by the executive or legislative branches without compromising the independence of the courts and undermining the principle of separation of powers.[52] This democratic check functions most effectively where the integrity of the judiciary is not impugned, and the legitimacy of the judicial process is not undermined.

Since there is no straightforward or completely reliable test for where criticism crosses the boundary between acceptable scrutiny and harmful or damaging 'scandalising', the subsequent decision that the summary proceedings for hearing such contempt of court cases are unconstitutional is all the more understandable. To summarise, the Court in this case adopts a particular political reserve, shying away from the exercise of power, and portraying itself as a comparatively weak institution, strengthened only by integrity and moral authority.

4 5 CONCLUSIONS

In the preceding analysis of the different approaches of the Court to the question of how the judicial function is affected by the Constitution, and by the separation of powers principle, the lack of unanimity about the role of judges, even within the Constitutional Court, is demonstrated. The problem is, as Botha points out, that "[d]espite the radical premises of the Constitution, judges continue to be constrained by assumptions about the nature and limits of the judicial function."[53]

This does not necessarily mean that there is no scope for the development of an extended role for judges, in which they may continue to enhance their moral authority and vigorously promote the values and principles entrenched in the

[51] Par 45
[52] Par 30
[53] Note 21 *supra* 577. This is probably more true of the lower courts and the High Courts, but even the Constitutional Court, in the *Heath* decision, seemed to make these kinds of assumption.

Constitution. Many extra-judicial functions which judges may be called upon to perform, might not be easy to classify as belonging to any particular branch of the state, but relate directly to the vital function of protecting and upholding the Constitution.

For example, as will be pointed out more clearly in chapter 5, the legislation on which the Heath Special Investigating Unit was founded, demonstrates many similarities with the Public Protector Act, which regulates the functions of the Public Protector and was promulgated at the order of the Constitution[54]. The office of the Public Protector was established in the 1996 Constitution as one of the independent "State Institutions Supporting Constitutional Democracy".[55] These institutions, like the Special Investigating Units, do not fall naturally into the category of either executive, legislative or judicial, although they sometimes act as executive checks.

The existence of these types of function is a further indication of the positive effects for the judiciary of a supreme Constitution, containing broad directives and a set of values within which judges have a good deal of interpretive space in which to manoeuvre. This finds expression in *Mamabolo* where the Court indicates that it now has "the benefit of a constitutional environment in which all law is to be interpreted and applied."[56] Within this constitutional environment, the role and function of the judiciary may also be re-interpreted. An examination of the implications of such a re-interpretation follows in the final chapter.

[54] Constitution (note 16 *supra*) s182(1) and (2)
[55] Chapter 9
[56] Note 2 *supra* par 45

CHAPTER 5: EXECUTIVE CHECKS AND ENFORCEMENT MECHANISMS – THE FATE OF HEATH'S SPECIAL INVESTIGATING UNIT

5 1 INTRODUCTION

South Africa's new Constitution[1] is a complex and detailed document, that guarantees fundamental rights, provides for its own sovereignty[2] and assigns powers and functions to the various organs of state. Beyond that, it places checks on these powers and ensures its supremacy by creating constitutional enforcement mechanisms. Examples of formal limitations on state power identified in the interim Constitution,[3] and still relevant under the final text, include the following: the Constitutional Court may apply the Bill of Rights to test the actions of the executive and parliament; the Offices of the Auditor-General, Public Protector and Human Rights Commission ensure that the state respects rights and performs its functions efficiently and accountably; and the courts may review administrative action.[4]

In the context of these constitutional provisions and limitations, this chapter attempts to identify an appropriate place for Special Investigating Units,[5] and to outline their role as supportive institutions in a constitutional democracy. This entails both an explanation of the rationale for their existence, and a comparison of the operation of two particular executive checks,[6] namely the Public Protector's office and the Special Investigating Units.

In the first part, the types of executive checks and enforcement mechanisms introduced by the new Constitution are identified, and the circumstances

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[1] Constitution of the Republic of South Africa Act 108 of 1996
[2] Constitution (note 1 *supra*) s2
[3] Act 200 of 1993
[4] Venter "Parliamentary Control and Ministerial Responsibility under the New South African Constitution" *Strategic Review for South Africa* 16(2) Nov 1994 71-97 91. Klug "Constitutional Law" *Annual Survey of South African Law* 1994 1-12 refers to the creation of protective institutions to support "[i]ndividual protection against government abuse and maladministration" 10. See also Rautenbach & Malherbe *Constitutional Law* (1994) 180-185 for other examples.
[5] The Special Investigating Units were created under the Special Investigating Units and Tribunals Act 74 of 1996.
[6] The executive branch of state is responsible for administration of the state and is usually considered particularly susceptible to abuses of power. Historically, South Africa has also experienced particular problems in this area – see Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 191.

through which they came to be included in our Constitution explored. Special attention is given to the previous constitutional position in South Africa, in which the legislature was sovereign, and executive policies frequently influenced the courts and threatened their independence.

In the next part, two specific forms of executive checks, namely the Public Protector and Special Investigating Units, are compared with one another, and comparisons drawn between the two sets of legislation governing their operation. After this, the relationship between these two institutions is examined, in order to explain their differences and similarities. This also requires an analysis of the intended function of Special Investigating Units, and consideration of the possibility that, if they had been established in the form envisaged for them, these Units might have introduced a new understanding of the judicial function.

Finally, some alternative ways of dealing with the Special Investigating Units are suggested. The outcome of the recent *Heath* decision has meant that the legislation under which the Units operate requires amendment. Suggested improvements to the legislation rely on the arguments and analyses in this chapter and the preceding ones, and in the concluding part of the chapter, these alternative suggestions are examined.

5 2 CONSTITUTIONAL ENFORCEMENT MECHANISMS

Turning now to the rationale for the existence of constitutional enforcement mechanisms, it is apparent that the need to prevent constitutional provisions and limitations on power from becoming mere 'parchment barriers'[7] is nothing new or in any way unique to South Africa. The basic argument is expressed as follows by Vattel, an eighteenth century writer on fundamental laws: "The Constitution of a state and its laws are the foundation of public peace and the

[7] This ubiquitous concern is expressed in these terms in Hamilton, Madison & Jay *The Federalist Papers* (1987) Number XLVIII: "Will it be sufficient to mark, with precision, the boundaries of these departments [ie. The executive, judicial and legislative branch] in the constitution of government, and to trust to these parchment barriers against the encroaching spirit of power?" 309

firm support of political authority," but to operate as intended, they must be respected by the whole nation, including those in authority. He warns that "the Constitution and laws of a state are rarely attacked from the front, it is against secret and gradual attempts that a nation must chiefly guard."[8] One of the ways to guard against such erosions is to create enforcement mechanisms for constitutional provisions, as has been done in the South African Constitution.

The argument is extended, and expressed in more familiar contemporary terminology, by Du Plessis and Corder, who state that "[t]he ultimate success of any human rights regime depends on a range of factors, among them a political willingness by the executive and legislative arms of government to respect entrenched rights, [and] widespread knowledge, accessibility and legitimacy of rights protection among the population as a whole."[9] The most important factor is identified by these writers as "the interpretive policy adopted by the members of the courts whose task it is to give life to the words used in any Bill of Rights."[10]

Chapter 2 has already outlined the variety of interpretive approaches adopted by our Constitutional Court, but the main implication of the above statement is that courts with the authority and responsibility to ensure that the Constitution is protected and upheld should exist, and it is for this reason that judges are required to take an oath or solemnly affirm that they will "uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice."[11]

However, though the role of judges in upholding to Constitution is crucial, it is not the only mechanism for the enforcement of rights. Du Plessis and Corder envisage mechanisms operating at two levels, one aiming to transform the legal profession, making lawyers thoroughly familiar with the Constitution and

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[8] Vattel *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns* quoted in Haines *The American Doctrine of Judicial Supremacy* (1959) 41-42.
[9] Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (note 9 *supra*) 191
[10] 191
[11] Constitution (note 1 *supra*) Schedule 2 Item 6(1)

ensuring their accessibility to all South Africans, while the other aims "to establish a 'culture' of accountability to the people in the minds of all those participating in government, as well as propagating widespread familiarity with the availability of human rights protection in the popular mind."[12] This latter aim, and the institutions created to realise it, is what primarily concerns us in this chapter.

The culture of accountability finds its constitutional grounding in the very first section of the Constitution, which establishes democratic government as a founding value, "to ensure accountability, responsiveness and openness."[13] To be effective, checks on the executive and constitutional enforcement mechanisms must operate independently of the authorities whose powers they tend to limit. Some of our constitutional checks, such as the state institutions created to strengthen constitutional democracy,[14] are completely independent of any branch or organ of state, while others, such as the Constitutional Court, form part of a particular branch, but operate independently of the other branches.[15]

Rautenbach and Malherbe, in their analysis of executive checks, divide control over executive bodies into three main categories, namely public control, parliamentary control and judicial control.[16] Judicial control corresponds largely to the first aim of constitutional enforcement mechanisms, as mentioned above, and includes the usual remedies of administrative law, such as review or appeal, interdict, mandamus and the right to appeal directly to the Constitutional Court, which is empowered to review all executive conduct, including acts of the president.[17]

Public control includes the press, public gatherings, interest groups in the community, and cultural institutions. These forms of control are not

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[12] Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (note 9 *supra*) 191

[13] Constitution (note 1 *supra*) s1(d). This provision emphasises the relevance of this particular value to the executive branch of the state.

[14] Constitution (note 1 *supra*) Chapter 9

[15] s165

[16] Rautenbach & Malherbe *Constitutional Law* (1994) 180 *et seq.*

constitutionally regulated, but are protected by the Bill of Rights. For instance, s16 of the Constitution guarantees the right to freedom of expression, and specifically mentions the freedom of the press and other media, and academic freedom and freedom of scientific research, which are generally acknowledged as "of major importance in any democratic state."[18] A related right is the s18 right to freedom of association, which allows individuals to group together and "jointly form views on matters of public interest."[19]

However, the final form of control, parliamentary control, is more directly relevant here as a constitutionally implemented executive check. Various forms of parliamentary control exist, but the focus here is on investigative committees and other institutions, that report to parliament. These include both internal parliamentary committees, and independent bodies, such as the Auditor-General and Public Protector, which are authorised and funded via parliament, though they are not staffed or controlled by members of parliament. It is interesting that Rautenbach and Malherbe also include presidential commissions of inquiry, the appointment of which the Constitution assigns to the president,[20] and which may also investigate executive actions, as part of the parliamentary control, since these commissions tend to report also to parliament. In such cases, the executive institutes a check on itself, but the commission appointed is not solely accountable to the president, and thereby retains credibility as long as it is not interfered with in carrying out its assigned investigations.

A more recent example of an executive check that could be initiated by the president was the implementation of legislation allowing the president to appoint Special Investigating Units to investigate certain forms of corruption and maladministration. This legislation will enjoy further attention below.

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[17] Constitution (note 1 *supra*) s167(4)(e) & (5)
[18] Rautenbach & Malherbe (note 16 *supra*)
[19] Note 16 *supra*

5 3 COMPARISON OF THE PUBLIC PROTECTOR AND SIU LEGISLATION

Now that the context in which institutions such as the Public Protector and Special Investigating Units operate has been defined, the legislative framework in which they function will be examined. The Public Protector's office was created under the Constitution as an independently functioning organ of state, subject to only the Constitution and the law, and accountable to the National Assembly. Since the purpose for which the Public Protector exists is to act as a watchdog over "any conduct in state affairs, or in the public administration in any sphere of government,"[21] it seems to be closely connected with the executive branch.

Yet, like the courts, it is said to be independent and impartial. So far it has proved possible to accept the Public Protector's impartiality,[22] despite this close connection. The head of the Special Investigating Unit, on the other hand, was taken to be performing an executive function,[23] even though, as a High Court judge, the independence and impartiality of this person is also constitutionally guaranteed.[24] A good starting point in attempting to understand this seeming contradiction, is to analyse and compare the legislation responsible for the Public Protector's operation with that of a Special Investigating Unit.

The legislation pertaining to the Public Protector establishes the Public Protector on a very similar footing to that of a judge of the High Court. Moreover, High Court judges are first among those listed in the Public Protector Act[25] as eligible for appointment to the position of Public Protector, the others being experienced legal practitioners, academics, or persons with experience in the administration

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[20] Constitution (note 1 *supra*) s84(2)(f)
[21] This includes an investigative function, and not just passive observation.
[22] Brynard "Supporting Constitutional Democracy in South Africa: An Assessment of the Public Protector (Ombudsman)" *SAIPA* 34 (1) 1999 states that "it can safely be predicted that the institution has the potential to make a significant contribution to constitutional democracy in South Africa and that it will be part of our constitutional dispensation for a long time to come." See however Prof David Unterhalter's criticism of the Public Protector's recent actions in investigating the state's controversial arms procurement deal, in which he states that "to require someone to forego their civil claim is possibly an improper exercise of [the public protector's] power." Soggot and Brümmer *Mail & Guardian* 10-16 August 2001.
[23] *South African Personal Injury Lawyers' Association v Heath* 2001 (1) BCLR 77 (CC) par 46
[24] Constitution (note 1 *supra*) s165.

of justice, for instance, from the offices of the National or Provincial Directors of Public Prosecutions.

The argument could be made that, in passing the Special Investigating Units Act,[26] the legislature was effectively creating a similar check on the executive, not necessarily assigning executive functions as such to the Unit. In short, the distinction is drawn in our Constitution between the executive authority, and checks on the executive such as the Chapter 9 institutions supporting constitutional democracy.

Despite references in our case law to the 'Montesquieuan principle of a threefold separation of state power'[27] as a doctrine newly incorporated into our jurisprudence by the Constitution, the reality of how the South African state is constituted is far more complex than this simple division into legislature, executive and judiciary. Apart from the three branches, our Constitution also refers to three spheres of government, namely the National, Provincial and Local,[28] which constitute the legislative and executive branches of government. At the local government level, moreover, these two branches are virtually indistinguishable.[29]

The structure of the judicial authority is also tiered, but according to a different system, with courts at four basic levels, corresponding to the Constitutional Court, the Supreme Court of Appeal, the High Courts, and the Magistrates Courts, explicitly named by the Constitution, which also provides for other courts to be established by the legislature, with status similar to the latter two of these four types.[30]

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[25] Act 23 of 1994, amended by the Public Protector Amendment Act 113 of 1998, see s1A(3)
[26] Note 5 *supra*
[27] *Ex Parte Chairperson of the Constitutional Assembly, in re: Certification of the Constitution of the RSA, 1996* 1996 (10) BCLR 1253 (CC) par 6 and Constitutional Principle VI; see Chapter IV A of the judgment.
[28] Constitution (note 1 *supra*) s40.
[29] Chapter 7: Local Goverment, especially s151(2), which states: "The executive and legislative authority of a municipality is vested in its Municipal Council."
[30] s166.

Furthermore, there are a number of constitutional institutions established 'to support constitutional democracy', which do not fall easily into any one of the three branches of state, but would be defined as 'organs of state' in terms of s239 of the Constitution. These include the Independent Broadcasting Authority, the Independent Electoral Commission and the Human Rights Commission, as well as the Public Service Commission. Some of these state organs fall into the category of constitutional enforcement mechanisms, while others operate as executive checks.

There is a marked similarity, in particular, between the role of Special Investigating Units and the office of the Public Protector, which may be seen in the similarities in the legislation governing each of these institutions. Both the head of a Special Investigating Unit and the Public Protector are appointed by the President.[31] More significantly, both are required by legislation to submit regular reports to the National Assembly.[32] The Public Protector's report is also tabled at the National Council of Provinces, while the Special Investigating Unit must also report to the President.

As far as the functioning of the two institutions is concerned, both enjoy a large degree of operational independence. There is a certain connection between the Public Protector's office and the minister of justice, who appoints the Deputy Public Protectors, and determines their conditions of employment, after consultation with the Public Protector,[33] but the office is open to requests from anyone to investigate matters, and may also act on its own initiative.[34]

The Special Investigating Unit receives its instructions on what it should investigate by means of presidential proclamations,[35] and is required to perform any additional functions, not in conflict with the Special Investigating Units

[31] The former in terms of s3(1) of the Special Investigating Units Act (note 5 *supra*), and the latter in terms of s1A(2) of the Public Protector Act (note 25 *supra*).
[32] Public Protector Act (note 25 *supra*) s8(2)(a) and (b) and Special Investigating Units Act (note 5 *supra*) s4(1)(f),(g) and (h).
[33] Public Protector Act (note 25 *supra*) s3(2)
[34] s6
[35] Special Investigating Units Act (note 5 *supra*) s2(1)

Act, requested by the President.[36] Presumably, before the amendment of this Act, while the head of the Unit was required to be a High Court judge, such functions would also not have been permitted to conflict with that person's duty to uphold the Constitution and the law.[37]

By this token, the restriction of eligibility for head of a Special Investigating Unit to High Court judges, in terms of s3(1) of the Special Investigating Units Act, could be seen as ensuring the independence and impartiality of the person in this position, since these qualities are guaranteed for judges by the Constitution. The Public Protector, whose office is established by the Constitution, enjoys similar independence.

The remuneration and security of tenure of both the Public Protector and the head of a Special Investigating Unit are similar, with s2(2)(a) and (b) of the Public Protector Act granting the Public Protector no less remuneration than that of a High Court judge, and protecting these benefits from reduction during the Public Protector's seven-year term of office.[38]

Section 1A(3) of the Public Protector Act specifies a wider category of persons eligible for the office of Public Protector, which is comparable to the category from which judges might be appointed. First listed as suitable candidates, moreover, are High Court judges. Section 9 of the Act creates an offence of "contempt of the Public Protector", similar to the offence of contempt of court. The office can thus be seen as a kind of hybrid of justice administration and court, which, like the Special Investigating Unit, is not easily classified as executive, and also performs no adjudicative functions. An alternative formulation is that the Public Protector's office enjoys a similar status to the courts, but fulfills a different role in the administration of justice.

The most significant difference between these two institutions is that, while the Public Protector is a constitutionally created and recognised institution, the

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[36] s4(1)(e)
[37] Constitution (note 1 *supra*) Schedule 2, Item 6(1)
[38] By way of a further comparison, Constitutional Court judges are appointed for a non-renewable term of 12 years – see Constitution (note 1 *supra*) s176(1).

Special Investigating Units are created by legislation, and used to derive constitutional protection indirectly, in that the Constitution guarantees the independence and tenure of High Court judges. Now that judges are no longer eligible for appointment in the position of head of a Special Investigating Unit, the Units are far more vulnerable to executive interference.

5 4 SPECIAL INVESTIGATING UNITS AND THE ROLE OF JUDGES

When the legislation governing Special Investigating Units was drafted and promulgated, the goal of the Units was not necessarily, despite the similarities described in the previous part of this chapter, simply to duplicate the operations and functions of the Public Protector's office, or to compete with the Public Protector for matters to investigate. Their goal could also be interpreted as introducing a new dimension to the role of judges, over and above their traditional function of presiding over the courts. In terms of the Constitution, the primary function of a judge is not simply the fulfillment of an official position, on the bench, but is consistently linked with the constitutional ideal, initially expressed in s2 of the Constitution, that the Constitution must be protected and upheld.[39] This is confirmed in s165(2), which assigns to the courts the duty of applying the Constitution and the law "impartially, and without fear, favour or prejudice," while the judges' oath binds all judges to "uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."[40]

Although the Constitution tends to conflate the judges and judicial authority, and identify them with the courts, it does also allow for the performance, by judicial officers and especially the president of the Constitutional Court, of extra-judicial functions unrelated to the operations of the courts. The form of separation of powers contained in our Constitution, therefore, does not envisage a strict separation, in which the judiciary is held exclusively to a judicial role,

[39] Constitution (note 1 *supra*) s2 "This 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."
[40] Schedule 2 Item 6.

but is flexible enough to accommodate extra-judicial functions, provided that these are in line with the duty of judges to protect the Constitution. Within this understanding of the role of the judiciary, it becomes possible to conceive of a legal system in which judges may, in circumstances which require such conduct of them for the protection of the Constitution, act in non-traditional, even inquisitorial ways, not only when chairing commissions of inquiry, or leaving the bench to take up an appointment at the Public Protector's office, but by being appointed as head of a Special Investigating Unit, in terms of the legislation analysed above.

This new understanding of the judicial role, which relies on an interpretive approach to the Constitution that emphasises the judge's role as protector of the Constitution, thus expanding the definition of the role to allow the judiciary to become a constitutional enforcement mechanism or type of judicial check on the executive as a matter of course. The Constitutional Court's interpretation in *Heath*, discussed in the previous chapter, precludes this kind of expansion, and restricts the role of judges to a primarily adjudicative function that excludes involvement in investigations of the type envisaged by the Special Investigating Units legislation. Involvement in such extra-judicial activities is seen as compromising the courts' independence, and falling outside of the central mission of the judiciary, thus conflicting with the principle of separation of powers.

It is perhaps understandable that the Constitutional Court reacted to the Special Investigating Units legislation in this rather conservative way, however, given the *de facto* operations of the Heath Unit. Rather than waiting for the president to assign matters to it for investigation, this Unit tended to function proactively, applying for presidential proclamations whenever it discovered an alleged misappropriation of funds or other irregularity.[41] To all intents and purposes, the Unit was functioning like an additional Public Protector or Auditor-General, and

[41] *Mail &Guardian* (note 22 *supra*)

in some cases was even competing with these institutions for the right to investigate particular matters.[42]

The Special Investigating Units legislation makes room for more than one Unit to operate at any given time, apparently envisaging the investigation of controversial and complex matters by various High Court judges, who would, on completing each inquisitorial assignment, resume their usual role as arbitrators of adversarial disputes. Compare this to Heath's Unit, which built up a considerable backlog of matters to investigate, to the extent that it became clear that Judge Heath would probably never return to the bench, and the Unit would never be wound up.[43]

The legislation aims to facilitate and regulate the appointment of numerous 'judicial commissions of inquiry', under the name 'Special Investigating Units', although in effect it was used to create an extra Public Protector. Instead of extending the judicial function by introducing a new extra-judicial function for judges, the effect of the legislation was limited to the creation of an additional executive check, headed up by a judge who was no longer concerned with any adjudicative functions at all. In the next part of this chapter, some alternative legislative means to accomplish the goals set out for the Special Investigating Units, which the Constitutional Court would not allow them to achieve by this means, are investigated.

5 5 Alternative Legislative Approaches to Special Investigating Units

Given that the outcome of the *Heath* case[44] was the striking down of certain sections of the Special Investigating Units Act, and in particular, the requirement that the head of a Unit should be a judge,[45] it follows that amendments to this legislation are required. The first consequence of the

[42] The most compelling example of this was the much publicised competition over who should investigate the controversial government arms deal.
[43] *Heath* (note 23 *supra*) par 41
[44] *Heath* (note 23 *supra*)
[45] Par 46 and 70

decision in *Heath* was that Judge Willem Heath was required to step down from his position as head of the Unit, and has since resigned from the bench,[46] and that former ANC MP Willie Hofmeyr has been appointed in his place.[47]

There have as yet been no substantial changes to the Unit's functioning or position, but an internal audit of the Unit has led to an attempt to address some of the issues raised by the Constitutional Court. The report and suggestions, which Hofmeyr has adopted, were put forward by Jan Henning, special director of court management at the National Directorate of Public Prosecutions, at the order of Penuell Maduna, Minister of Justice and Constitutional Development.[48]

In the light of these developments, and the insights concerning the performance of extra-judicial functions by judges gained from the case analyses and considerations of separation of powers, two alternative solutions to the problems with the Special Investigating Units legislation, identified in the *Heath* judgment, might be considered. Either of these would be preferable to the current position, in which the Units are potentially vulnerable to executive control and might become ineffective as executive checks.

The first approach, which accords with many of the recommendations of the Henning report, recognises the desirability of protecting the independence and legitimacy of the Units, which is the most important goal of any revisions to the legislation. It also respects the view put forward in *Heath* that the primary role of a judge should be adjudicative.[49] It solves the problem of how to secure the position of the head of a Unit as an independent and impartial agent, by creating a branch within the office of the Auditor-General that fulfils the investigative role currently assigned to the Units.

In effect, the Special Investigating Units legislation would have to be incorporated into the legislation governing the Auditor-General, in the form of a special unit that investigates corruption and the misappropriation of public

[46] *News24* June 14, 2001 "Decision on Heath 'Irregular'" and "No need to reply to Heath"
[47] *News24* July 30, 2001 "Anti-corruption Laws need Teeth"
[48] Ngobeni *Mail &Guardian* 10-16 August 2001.
[49] Note 23 *supra* par 45

money, according to directives issued by presidential proclamation.[50] This special unit could then simply refer any evidence of misconduct to the National Director of Public Prosecutions (NDPP), and deliver reports via the usual channels.[51] It is doubtful that the head of this special unit could be called upon to perform any other functions at the request of the president, but it might be possible provided that there are appropriate safeguards to ensure that such requests do not undermine the independence of the Auditor-General's office.

The recovery of funds via civil litigation within the Special Tribunals might be achieved by incorporating such a function in the Public Protector Act, using as justification s182(1)(c) of the Constitution, which gives the Public Protector the power, as regulated by National legislation, "to take appropriate remedial action" when confronted with any evidence of improper conduct.

Appointments to head up this branch could be done on a similar basis as is the practice established by the current Auditor-General or even Public Protector legislation, meaning that judges of the High Court might again be eligible for appointment, but with the benefit that they may then resign from the bench without losing their independence, which will be constitutionally guaranteed as soon as they become part of the Auditor-General's office.

The second approach is to preserve the current Special Investigating Units legislation as intact as possible, while still changing the role of the head of a Unit, making the position compatible with the judicial role, so that a judge could continue to fill it. This would involve the 'reading down' of certain provisions of the legislation, and the amendment of others. The powers of litigation, for example, would have to be repealed, and instead the NDPP and Public Protector's office would be given the responsibility for any criminal prosecutions and the recovery of public funds.

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[50] The Henning report (*M&G* note 48 *supra*) terms the need to apply for a proclamation a hindrance to the Unit's effectiveness, which ensconcing it within the Auditor-General's office may help to remove, as the Auditor-General may investigate on its own initiative – see Constitution (note 1 *supra*) s188.

[51] Constitution (note 1 *supra*) s188(3).

All requests made by the president for the head of a Special Investigating Unit to perform certain functions, as well as any presidential proclamations affecting the Unit, should be subjected to the test of whether they compromise the integrity and independence of the head of a Unit, who is, as a judge, bound by an oath or solemn declaration to uphold the Constitution. In this alternative approach, it is the judicial function of acting as a check on the executive which is emphasised.

Although in many ways, this second solution to the problems with the legislation, retaining a judge as head of a Unit, is preferable to the first, as it places the Units in a very strong position to act as an enforcement mechanism for various constitutional provisions. It also means that the judicial branch would be empowered to act as an effective check on the executive, in performance of a non-adjudicative task. However, in the wake of the *Heath* case, this might be considered undesirable, and it has the added drawback of creating an institutional check which is not recognised explicitly by the Constitution.

If instead the first option is adopted, incorporating the Special Investigating Units into an independent institution supporting constitutional democracy, that is established by the Constitution itself, this has the additional benefit of enjoying support from a number of other institutions, and has also found favour with the staff of the Unit itself.[52] Furthermore, if such an approach were followed, the need to extend the definition of the judicial role would not be directly pursued any further, thereby giving effect to the Constitutional Court's desire to leave this question open for further debate and development.[53]

[52] Note 48 *supra*. The Henning report has been approved by the SIU staff, and the Auditor-General is apparently willing to consider it.
[53] Note 23 *supra* par 31

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