ARTICLE

THE EVOLUTION OF THE CONSTITUTIONAL LAW PRINCIPLE OF THE 'RULE OF LAW' IN THE SOUTH AFRICAN CONSTITUTIONAL COURT

Maropeng Mpya* and Nomthandazo Ntlama**

ABSTRACT

South Africa's transition to constitutionalism in 1994 signalled a change in the regulation of state authority and encapsulates the promotion of the fundamental values and principles of the new dispensation. These principles entail the rebuilding and re-affirmation of public trust and confidence in the functioning of the judiciary. On the other hand, the judiciary, especially the Constitutional Court that is the focus of this paper, is required to ensure the promotion of the principles, which include the rule of law, constitutionalism, and the separation of powers, democracy, and accountability. These are basic principles that have a direct bearing on the restoration of the credibility of the judiciary in relation to the manner in which it executes its function within the framework of the new constitutional dispensation. This role is entrenched in the 1996 Constitution, which affirms the independence of the judiciary and non-interference in the execution of its functions. Against this background, the paper examines the judicial development of the constitutional law principle of the 'rule of law' in the regulation of state authority by focusing on selected judgments of the Constitutional Court. Although the principle of the rule of law itself is broad, the objective is to establish a deepening of the general principles of constitutional law through the process of judicial review. Our use of the judgments of the Constitutional Court is motivated by its relative infancy in terms of shaping the principles of the new constitutional order and the concept of the rule of law, which are the founding values of the new dispensation and which serve as a mechanism for regulating government conduct. The intention is not to trace the history of the Court and/or exhaustively review its judgments but to identify a few cases that support the gist of the argument made in this paper.

* LLB, LLM (Cum laude), (Unisa), Certificate in Public International Law (UP), Certificate from the Institute for Global Law and Policy (Harvard Law School). Developmental Lecturer, School of Law: College of Law and Management Studies, UKZN.

** B.Juris, LLB (UFH); Certificate in Comparative Human Rights; LLM: Public Law (US); LLD (Unisa). Associate Professor of Public Law, School of Law, College of Law and Management Studies, UKZN.

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 31 | Number 1 | 2016 | pp. 114–139

https://doi.org/10.25159/2219-6412/2634
ISSN 2219-6412 (Print)

1. INTRODUCTION

The significant feature in the judicial evolution of the rule of law in South African constitutional law is the establishment of the Constitutional Court.[1] The Court carries a special mandate as an apex and final arbiter in all matters, in ensuring the promotion of the values and principles of the new dispensation.[2] It is acknowledged as a 'central architecture that embraces the development of the general principles of constitutional law that have the potential of effecting transformative change in the new South African dispensation'.[3] Solyom similarly notes that the 'setting up of the Court is a trade mark or a proof of the democratic character of the country'.[4] The Court therefore is charged with laying the foundation for the development of the constitutionalised jurisprudence of the rule of law 'that reflects the creation of a just and proper regulation of state authority'.[5]

The Court was established against the background of restoring the integrity and legitimacy of the judiciary.[6] The undertaking was born out of South Africa's divisive history and the atrocities of apartheid rule, in which the sovereignty of Parliament in the regulation of state authority was entrenched. The system of Parliamentary sovereignty had a negative impact on the functioning of the courts, which affected the meaningful and substantive conception of the development of the general principles of constitutional law such as the rule of law. Venter[7] contends that the 'dominant characteristic of South African constitutional law before 1994 was the notion of parliamentary sovereignty which was designed to ensure popular control over the head of state and executive and the retention of political power by the white inhabitants of the country'.[8] Parliamentary sovereignty not only compromised the integrity and credibility of the judiciary in the

1 Section 167 of the Constitution of the Republic of South Africa 1996, hereinafter referred to as the 'Constitution'. The Court was officially opened on 14 February 1995. See Pious Langa and Edwin Cameron, 'The Constitutional Court and the Supreme Court of Appeal after 1994' (2010) Advocate 28–32. The former justices of the Constitutional Court point out that the 'result of the multi-party negotiated settlement was the establishment of the Constitutional Court being an entirely new addition to the existing judicial structure, one that would be broadly acceptable to a restive and sceptical public that was emerging from deep divisions, conflict and gross human rights violations' at 29.

2 id 167.

3 Rait Maruste, 'The role of the Constitutional Court in democratic society' (2007) XIII Juridica International 8–13 at 8.

4 Laszlo Solyom, 'The role of the Constitutional Courts in the transition to democracy with special reference to Hungary' (2003) 18 (1) International Sociology 133–161 at 133.

5 Hugh Corder, 'A century worth celebrating' (2010) 127 (4) SALJ 571–580. He characterises the role of the Court as the 'pursuance of an implicit "nation-making" agenda as a guiding philosophy, with the emphasis on inclusiveness, reconciliation, compromise, redress, basic rights and the delivery of socio-economic rights so explicitly made in the Constitution [which are founded on the values of the new dispensation] especially, 'accountability, responsiveness and openness' at 578–579.

6 S 166 of the Constitution of the Republic South Africa, 1996 on the structure of the judicial system in South Africa.

7 Francois Venter, 'South Africa: a diceyan rechtsstaat?' (2012) 57 (4) McGill Law Journal-Revue De Droitde McGill 722–747 at 723.

8 ibid.

dispensation of justice, it also generated a lack of public confidence in the judiciary as a whole.

South Africa's transition to constitutionalism in 1994 signalled a change in the regulation of state authority and encapsulates the promotion of the fundamental values and principles of the new dispensation. These principles entail the rebuilding and re-affirmation of public trust and confidence in the functioning of the judiciary. Further, the judiciary is required to ensure the promotion of the principles, which include the rule of law, constitutionalism, and the separation of powers, democracy and accountability.[9] These are basic principles that have a direct bearing on the restoration of the credibility of the judiciary in relation to the manner in which it executes its function within the framework of the new constitutional dispensation. This role is entrenched in the 1996 Constitution, which affirms the independence of the judiciary and non-interference in the execution of its functions.[10]

The Constitutional Court is the pillar and is at the forefront not only in promoting the afore-mentioned principles but also in deepening constitutional democracy through the restoration of the integrity of the judiciary in its entirety. This role entails the management of the delicate balance between itself – as the upper echelon in the functioning of the judiciary – and the other two branches of the state: the executive and the legislature.[11] The balance involves the development of a constitutionalised progressive jurisprudence, which is designed not only for the advancement of the 'political will', but also for the affirmation of the rule of law within the broader context of constitutional law in the regulation of state authority and the regeneration of public confidence in the courts.[12] This role is very important for the establishment of the linkage between the principles of the rule of law and the process of judicial review. The linkage of the two characterises the independence of the judiciary in the exercise of its duties in line with the ideals of the new democracy.

Against this background, the paper examines the judicial development of the constitutional law principle of the 'rule of law' in the regulation of state authority by focusing on selected judgments of the Constitutional Court. Although the principle of the rule of law is broad, the objective in the article is to establish the deepening of the general principles of constitutional law through the process of judicial review.[13] Using

9 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6edn Juta 2015) at 7–22.

10 S 165 of the Constitution of the Republic of South Africa, 1996.

11 Francois Venter, 'Judges, politics and separation of powers' in Patrick Osode and Graham Glover (eds), *Law and Transformative Justice in Post-Apartheid South Africa* (Spekboom Publishers 2010). He points out that 'given our constitutional history and social circumstances, the South African courts are frequently called upon to deal with highly contentious and sensitive matters of policy' at 351.

12 Hugh Corder and Veronica Federico (eds), *The Quest for Constitutionalism: South Africa Since 1994* (Routledge 2016). They argue that 'the full expression of the rule of law was introduced for the first time in South Africa's history in 1994 when the legal system was strongly anchored in the culture of justification,' at 3.

13 Pierre de Vos and Warren Freedman, *South African Constitutional Law in Context* (Oxford University Press 2014) at 81.

the judgments of the Constitutional Court is motivated by its relative infancy in terms of shaping the principles of the new constitutional order, as well as the concept of the rule of law which is the founding value of the new dispensation[14] and which serves as a mechanism for regulating governmental conduct.[15] The intention is not to trace the history of the Court and/or exhaustively review its judgments but to identify a few cases that support the gist of the argument made in this article.

2. PARLIAMENTARY SOVEREIGNTY: A NIGHTMARE FOR JUDICIAL REVIEW IN THE PRE-DEMOCRATIC DISPENSATION

2.1. Historical context

The deep-rooted scars of South Africa's pre-democratic dispensation, which had been regulated by the apartheid regime to subordinate the judiciary, can be traced back to the system of parliamentary sovereignty. The concept entails the passage of law by the legislature and its application by the judiciary without substantive pronouncement on the legitimacy of its contents.[16] Without providing a detailed historical account of the origin of the general system of parliamentary sovereignty, its distinguishing features broadly are based on the articulation by Dicey, he held that

> the principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[17]

The system of parliamentary sovereignty supported 'the unlimited power and competence of Parliament which entailed its absolute sovereignty to legislate as it wishes on any topic, at any time and for any place, which meant the supremacy of the enacted statute and non-invalidation or change by any other domestic or external authority'.[18]

In the South African context sovereignty was fostered by the general apartheid system in state regulation. The Court in the *Certification*[19] judgment held that

14 S 1 of the Constitution.

15 De Vos (n 13).

16 Sascha Bachman and Tom Frost, 'Colonialism, justice and the rule of law: a Southern African and Australian narrative (2012) 45 (2) De Jure at 306–328.

17 Albert Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan 1915) at 36 in Cheryl Saunders and Anna Dziedzic, *Parliamentary Sovereignty and Written Constitutions in Comparative Perspective* (Centre for Policy Alternatives 2011) 477–506.

18 Pavlos Eleftheriadis, 'Parliamentary sovereignty and the Constitution' (2009) XXII (2) Canadian JLJuris 1–24 at 3.

19 *Certification of the Constitution of the Republic of South Africa* [1996] 10 BCLR 1253.

> South Africa's past has been aptly described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge". From the outset, the country maintained a colonial heritage of racial discrimination: in most of the country, the franchise was reserved for white males and a rigid system of economic and social segregation was enforced. The administration of African tribal territories through vassal "traditional authorities" passed smoothly from British colonial rule to the new government, which continued its predecessor's policy.[20]

The system of parliamentary sovereignty had a negative impact on the role of the judiciary in affirming the principles of judicial review. As similarly expressed by Hoexter:

> [T]he unrepresentative legislature … allowed the courts to become more deferential and were unable to use the concept of the [rule of law] to prevent the abuse of power which resulted in court's energies largely directed towards a negative enterprise: finding ways to restrict the application of the principles of the rule of law and their obverse, the grounds of review … leading to the all or nothing application of those principles, with most victims of official action getting nothing…The court's focus meant that the most fundamental, helpful and positive question was never asked: what does the [principle of the rule of law] require in this case?[21]

In the case of *S v Pitjie,*[22] the evident failure to review meant the rule of law was compromised: the magistrate drew an unjustified distinction between blacks and whites in the court of law. The case concerned an appeal over the decision of the magistrate who ordered the court be addressed at separate tables that were meant for black and white legal practitioners. Mr Pitjie, a black articled clerk, refused to use the table that was designated for blacks and insisted on addressing the magistrate from the white table. His insistence led him being convicted of contempt *facie curiae,* which was confirmed by Chief Justice Steyn of the Appellate Division. It was these types of judgment that delayed the evolution of the principle of judicial review as they concretised the deeply held government policy, which was the foundation for the distinction between blacks and whites in South Africa.[23]

On the other hand, at face value it seemed the judiciary understood its role as the foundation upon which the principle of judicial review may be developed. The perception created an impression that by the regulation of state authority the judiciary would not let parliamentary sovereignty become a form of bondage promoting an oppressive political will. The contention is drawn from the *Harris*[24] judgment in which it was declared that the establishment of a High Court of Parliament, with power to review the decisions

20 id 5.

21 Cora Hoexter, 'The principle of legality in South African Administrative Law' (2004) 8 (4) Macquarie LJ 165–182 at 167.

22 [1960] 4 SA 709 (A) quoted in Christopher Forsyth, 'The judges and judicial choice: some thoughts on the Appellate Division Court of South Africa since 1950' (1985) 12 (1) Special Issue on Law and Politics in Southern Africa: JSAS 102–114 at 104.

23 Forsyth (n 22) at 112.

24 *Minister of Interior v Harris* [1952] 4 SA 769 (A).

of the Appellate Division of the Supreme Court, would be invalid. The court held that '[the evolution of judicial review is designed to] safeguard the constitutional guarantees that are entrenched in the Constitution [in ensuring] their enforcement by the courts of law'.[25] The Court further emphasised its stance and held that

> Courts of Law exist to decide disputes between parties, yet under the High Court of Parliament Act a Minister of State, although he is not a party to the dispute, and although the parties themselves may not wish to carry the matter any further, is compelled to bring on review a judgment of the Appellate Division declaring an Act of Parliament invalid.[26]

The importance of judicial review was further emphasised by De Villiers CJ *In re Willem Kok and Nathaniel Balie,*[27] he said:

> [U]ndoubtedly occasions have arisen, and may again rise, when civil jurisdiction is suspended, and the ordinary forms of trial are held in abeyance, and in consequence Martial Law is proclaimed, but such a proclamation can only be justified, if at all, as an absolute necessity, and by way of self-defence, and cannot continue in force after the occasion which gave rise to it has ceased to exist. It is a power, which may be exercised by the military authorities, but they do so at their own peril, and cannot expect the assistance of any Civil Court in carrying it out. The Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences, which ensue[28] [author's emphasis].

However, the above affirmation is misconceived as being a true reflection of the non-subordination of the judiciary to parliament. Hahlo *et al* provide a historical exposition of the process of judicial review in South Africa, in which they remark on the equity, transparency, and quality of adjudication by the courts at the height of apartheid rule.[29] They state that it had long been accepted in South Africa that the judiciary was completely divorced from, and independent of the executive.[30] They further state that there was no evidence that the executive had ever attempted to interfere with or influence judges in the execution of their duties.[31] Hahlo *et al* emphasise with conviction that the administration of justice in South Africa conformed to the highest standards, which are traditional in the Western world.[32] The courts of the land were impartial and free from executive

25 id 780.
26 id 789.
27 Buchannan's Report 1879 (19).
28 ibid; Quoted in HR Hahlo and IA Maisels, 'The rule of law in South Africa' (1966) 52 (1) Virginia LR at 11. David Dyzenhaus, 'The pasts of law: the politics of the rule of law in South Africa' <http://www.yale.edu/macmillan/apartheid/apartheid_part1/dyzenhaus.pdf;> accessed 18 February 2015.
29 Hahlo (n 28) at 10.
30 ibid.
31 id 11.
32 id 12.

influence; the legal profession has behind it a long tradition of integrity, independence, and fearlessness, and is held in high esteem by all classes of the community.[33]

This account of apartheid's legal regime can be questioned. They missed an opportunity to examine the impact of the sovereignty of parliament on the role and functioning of the judiciary, which include developing the principle of judicial review. During the period of the apartheid dispensation, as pointed out by the Court in the *Fedsure* case

> judicial review was developed and applied by South African courts against the background of a legal order, which recognised the supremacy of parliament. Legislation duly passed by parliament in accordance with the then existing constitution was not subject to judicial review, and the power of the courts was confined to interpreting such laws and applying them to the facts of the particular case.[34]

The subordination of the judiciary to parliament 'balkanised the country'[35] and stifled the progressive development of the principles of constitutional law within the broader framework of the rule of law. The judiciary adhered to the will of parliament. Langa captures the impact of the system on the judiciary, by pointing out that

> although not all members of the old judiciary supported apartheid, it was the same judiciary that upheld tyrannical apartheid laws over forty years in the name of parliamentary sovereignty … [resulting] in the judiciary being perceived by the majority of South Africans as a cog in the apartheid machinery of exploitation rather than as a force for freedom or justice.[36]

The Courts reflected a 'fear-mongering' approach[37] in the dispensation of justice, which 'served the beleaguered state'[38] that focused on oppressing the majority of South Africans – black South Africans. The judiciary was reduced to being a 'mouth-piece of the law which subordinated its authority to just being a state official that centralised its core power in the hands of the Parliament'.[39] Parliamentary supremacy provided

33 ibid.

34 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] 12 BCLR 1458 para 28. Chaskalson P in *Pharmaceuticals Manufacturers Association of South Africa: In re ex Parte President of the Republic of South Africa* [2000] 3 BCLR 24 para 38.

35 Thembeka Ngcukaitobi, Jason Brickhill and Nikki Stein, *Constitutional Law Casebook* (Juta 2012) 11.

36 Report by Pious Langa entitled: 'Exchange of views between the Southern African Judges Commission and the Venice Commission on Constitutional Law Review in Common Law Countries and Countries with specialised Constitutional Courts' (17 March 2006, Strasbourgh) 015 CDL-JU, 1–4.

37 Joseph Diescho, 'The paradigm of an independent judiciary: its history, implications and limitations in Africa' in Nico Horn and Anton Bosl, *The Independence of the Judiciary in Namibia* (Macmillan 2008) 34.

38 id 35.

39 Maruste (n 3) 2. See, also: Langa (n 25) 1, as he further characterises the system of judicial review as one that was clouded 'by the legal culture that was exceptionally conservative prior to the Constitution [as] the courts were meant to (and did) interpret and apply the common law or "the will of the legislature" without question. There was no possibility of judicial review of legislation and human

a framework within which the judiciary executed its functions without offending the doctrine of sovereignty. The judges reinforced the system of sovereignty, as Webb[40] contends they 'lacked the desire to challenge and uphold the civil liberties and the resistance of the executive intrusion into the functioning of the judiciary'.[41] This means that the development of South Africa's principles of constitutional law, especially the rule of law, which were to have been driven by the courts in order to ensure adherence to the prescripts and values of constitutionalism, were compromised by the 'complicity of the judiciary in the enforcement of the oppressive apartheid regime that tainted public confidence in the administration of justice'.[42] In essence, the 'countervailing circumstances of the constitutionality of the supremacy of Parliament determined the regulation of the exercise of public power by the courts which was frequently eroded by legislation'.[43]

This practice is a travesty of justice where there was too much concentration of power in one branch of the state. The judiciary abdicated its judicial responsibility to the state, which gave rise to inherent tensions that compromised the entire system of checks and balances. The judiciary succumbed to political authority, Chief Justice Mogoeng classified it as

> one of the strongest pillars that kept the atrocities of apartheid alive, was the judiciary … [which] considered itself to be so bound by the prescripts of apartheid laws, as to be incapable of doing anything to the contrary … [the judges] must know that posterity will judge them harshly for failing to respond to the clarion call to transform our [country] and contribute positively to the renaissance of our continent, under the pretext that the opposing forces [were] just too well-organised and powerful.[44]

It is confirmed that the pre-democratic dispensation negatively affected the court system, which compromised the development of the principle of judicial review that could have advanced and constitutionalised the general principle of the rule of law in the regulation of state authority.

---

rights were seen as political rather than legal principles. The judges of the time were accordingly not free agents in advancing human rights. But they were obliged to administer oppressive laws [and] there was no faith that the apartheid judiciary would be able to give effect to the transformative aspirations and spirit of the new Constitution and Bill of Rights'.

40 Hoyt Webb, 'The Constitutional Court of South Africa: rights interpretation and comparative constitutional law' (1998) 1 (2) Fall 205–283 at 208.

41 ibid.

42 ibid.

43 *Pharmaceuticals Manufacturers Association of South Africa: In re ex Parte President of the Republic of South Africa* [2000] 3 BCLR 24 para 37. *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] 10 BCLR 1289 when the Court also held that 'in the past our courts have given effect to Acts of Parliament which vested wide plenary power in the executive' at 52.

44 Chief Justice Mogoeng Mogoeng, 'The role of the African University and African Intellectuals in deepening democracy, pursuing social justice and supporting the national development agenda (presentation at Unisa, Pretoria, 25 November 2014) 1–19 at 1.

2.2. Judicial review: affirmation of the independence of the judiciary

2.2.1. General concept of the principle of judicial review

Notwithstanding the historical record in South Africa, judicial review is a universal concept that defines the functioning of the courts. Finck holds that it entails the determination of the acceptability of a given law or other official action on the grounds of compatibility with constitutional norms, and which is based, first, on 'the importance of the extent of the Court's own jurisdiction. Secondly, implication of certain kinds of political questions over the doctrines and attitudes concerning judicial decisions. Thirdly, effect of the prevailing legal philosophy regarding the methods of legal interpretation; and lastly the influence of the nature of the Constitution, which the Court is called upon to interpret'.[45] These factors emphasise the importance of judicial review as an essential measure in restraining both public and private authorities in the exercise of their powers. Judicial review therefore is designed and is founded on the existence of a written, supreme and inflexible Constitution over all other laws that exist in the Republic. The Constitution should be designed in way that makes it difficult to amend it without the adoption of the particular way within which to undertake the process and the affirmation of the judicial process that guarantees its supremacy over other statutes.[46]

The gist of the process of judicial review, drawn from the above factors, is determined by the significance of judicial review in 'preserving the trust in the judiciary and because of the reticence required it to perform its arbitral role [that has] been in existence for many years to safeguard and protect it against vilification'.[47] This is the endorsement of the protection of its institutional integrity that, in the South African context, has been compromised by the apartheid system through parliamentary sovereignty. The protection of the judiciary's integrity is evident in the Constitutional Court's first judgment *S* v *Makwanyane*[48] in which the Court drew a distinct role between the judiciary and Parliament, in the consideration of matters before the two institutions and explicitly held that

> the very reason for establishing a new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect [and promote the development of the principles of the new dispensation] adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if

45 Daniel Finck, 'Judicial review: the United States Supreme Court versus the German Constitutional Court' (1997) 20 (1) Boston College ICLR 122–157 at 123–124.

46 id 125.

47 *S v Mamabolo* [2001] 5 BCLR 449 (CC) para 19.

48 *S v Makwanyane* [1995] 6 BCLR para 65.

> there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that [the state will function properly and] our own rights will be protected.[49]

It then qualified its affirmation for the importance of judicial review, by holding that the 'court cannot be diverted from its main duty to act as an independent arbiter of the Constitution by making choices that will find favour with the general public [or either the state]'.[50] The significance of judicial review was further endorsed in the *Heath*[51] judgment, when the Court held that the 'process must be upheld [failing which] the role of the courts as the independent arbiter [on the resolution] of issues involving the state will be undermined'.[52] This highlights the central character of the importance of the process of judicial review that seeks to ensure the non-subordination of the judiciary, whether to the other branches of government or to the general public. The process was firmly endorsed by Traverso J in *S v Dewani*[53] by reasoning in discharging Mr Dewani on murder charges against his newly-wed wife, the Judge held that

> [the judges took] an oath of office to uphold the rule of law and to administer justice without fear, favour or prejudice [and they] cannot permit public opinion to influence [their] application of the law [and] if any court permitted public opinion, which has no legal basis to influence their judgments, it will lead to anarchy. [The judges are] obliged to follow the established legal principles regarding the [application of the law in the resolution of disputes].[54]

The affirmation of the process of judicial review is further grounded on the principle of the independence of the judiciary. Section 165 of the 1996 Constitution provides that

1. Judicial authority is vested in the courts;
2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
3. No person or organ of state may interfere with the functioning of the courts;
4. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
5. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

49 id 88.
50 id 89.
51 *South African Association of Personal Injury Lawyers v Heath* [2001] 1 BCLR 77 (CC).
52 id 26.
53 (CC15/2014) [2014] ZAWCHC 188 (8 December 2014).
54 id 24; Fatima Schroeder, Natasha Bezuidenhout and Chelsea Geach, 'Dewani flies home first class' (IOL) <www.iol.co.za/news/crime/...dewani-flies-home-first-class.1-179205> accessed 9 December 2014.

These principles affirm the courts as the ultimate guardian of the Constitution, and they are bound to protect it whenever it is violated.[55] The principles entail not only non-interference but also the assistance and protection of the courts in ensuring their independence, impartiality, dignity, accessibility and effectiveness. Their role is further reinforced by the oath of office undertaken by the judges[56] to uphold and protect the Constitution and administer justice 'without fear, favour or prejudice'. The importance of judicial independence is emphasised in that 'it is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law'.[57] As discussed above, the impact of parliamentary sovereignty was to distort the judges' adjudication and compromise their judicial independence.

However, in the new dispensation, section 165 expressly vests judicial authority in the courts and nowhere else.[58] The grounding of the process of judicial review on the independence of the judiciary was clearly evidenced by the recent judgment of the Western Cape High Court in the *Economic Freedom Fighters v The Speaker of the National Assembly*.[59] The bone of contention in this matter involved an urgent application in which the applicants sought an interdict directed at preventing the Speaker of the National Assembly ('the first respondent') from implementing or enforcing the decision of the National Assembly of 27 November 2014. This meant the prevention of the imposition of the sanction of suspension of membership without remuneration or a fine in respect of the second to the twenty-first applicants respectively.[60] The Court was asked to consider whether the composition of the Powers, Privileges and Immunities Committee was legitimate; it was submitted that the Secretary General of the ANC, Mr Gwede Mantashe, had already made a public statement on the need for Parliament to act harshly towards the first applicant and this could improperly influence members of the committee.[61]

The Court was further asked to consider the implementation of the disciplinary measures that were based on selective prosecution in order to settle a political matter pertaining to executive accountability. The conduct of the Speaker, who, allegedly, could have formed part of the investigation because she was responsible for the interruption in the proceedings on 21 August 2014, by failing to recognise members of the first applicant (the leader of the EFF) who wished to raise points of order. The first applicant averred that she showed favouritism towards ANC members when no legitimate points

55 Phineas Mojapelo (Deputy Judge President of the Southern Gauteng High Court), 'Doctrine of separation of powers (A South African Perspective)' (2013) Advocate Forum 37–46 at 37.

56 *Justice Alliance of South Africa v President of Republic of South Africa* [2011] 10 BCLR 1017 (CC) paras 34–35.

57 *De Lange v Smuts* [1998] 7 BCLR 779 (CC) at para 59, quoted in *Justice Alliance* para 36.

58 *Justice Alliance* (n 56) 34; Robert Coniglio, 'Methods of Judicial decision-making and the rule of law: the case of apartheid South Africa' (2012) 30 Boston Univ ILJ 498–526 at 500.

59 *Economic Freedom Fighters v The Speaker of the National Assembly* 21471/2014 para 1.

60 id 1.

61 at 20.

of argument were raised by them. She also 'lied to the National Assembly' in claiming that she had not called the police when the facts showed that she had invited the police into the National Assembly and instructed them to eject members of the first applicant.[62]

In the consideration of the matter the court remarked that 'there is a principle that equally applies in the case of this nature' which was best articulated by Mahomed, CJ in the *Speaker of the National Assembly v De Lille And Another'* judgment.[63] The court held that

> this enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. It is Supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well-meaning can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.[64]

The Court relied on the foundation of the legal system of the country – the Constitution – and concluded that the report produced by the Powers, Privileges and Immunities Committee was fundamentally flawed and procedurally compromised because it was not the product of a fair investigation.[65] It held that the investigations were flawed and purposely manipulated to ensure a pre-determined outcome, because the submission of the leader of the EFF was disregarded and they referred to important matters relating to natural justice and procedural fairness as required by the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act,[66] the content of which was never addressed. The investigation was further compromised by the fact that no formal legal opinion was produced to explain how a majority ANC committee could reasonably constitute an investigation that was free of a reasonable apprehension of bias.[67]

Without an extensive analysis of this judgment, it is worth noting that in the affirmation of the process of judicial review it put the spotlight on the independence of the judiciary, which is closely linked to the principle of the rule of law. The judgement attests to the significance of the independence of the judiciary in the development of the principle of judicial review, in order to determine the matters that compromise the basic principles of the rule of law as framed within the context of constitutional law. It endorsed the prevention of anarchy, which in the past, clouded the importance of the

62 at 21.
63 [1999] 4 SA 863 (SCA).
64 id 14.
65 *The Economic Freedom Fighters* (n 59) 41.
66 4 of 2004.
67 ibid.

rule of law. It also commenced on a path of rebuilding the authority of the law itself in the regulation of state authority. The Court could not subordinate itself to the political will and sought to dispel the myth that judges are not truly independent because of the concept 'one cannot bite the hand that feeds him/her'.[68] It limited any potential perception that could have undermined public confidence in the justice system in the development of the principles of the rule of law. This action is crucial to the role of the judiciary in fulfilling its constitutional duty in ensuring the enforcement of the law in an impartial manner and independently of the legislature and the executive.[69]

It is thus concluded that the process of judicial review is simply the defining characteristic of the judiciary in the promotion of the rule of law and ensuring good governance in the regulation of state authority. It is a process that validates litigation in the determination of the arbitrariness of a particular conduct, which undermines the basic principles of constitutionalism.

3. JUDICIAL DEVELOPMENT OF THE RULE OF LAW

3.1. Rule of law: mere or substantive conception of constitutional law?

> [T]he rule of law involves the role of the courts to hold governmental power answerable to norms of legal legitimacy … [where] the judicial process [will] ensure the availability of adequate remedies to keep the government within the bounds of the law.[70]

The content of the rule of law has been under the microscope ever since the attainment of democracy. Due to South Africa's history, it is necessary to scrutinise the judicial development of the principle of the rule of law in order to emphasise the strengthening of the pillars of democracy. The importance was articulated long ago by Lucas J in *Rose v Johannesburg Local Road Transportation Board,*[71] who held that 'the common law of South Africa [is] understood [to have] extended the meaning of the rule of law [when] the judiciary is called upon to give a decision that must appear to be fair, impartial and unbiased'. Innes CJ further remarked that 'every subject, high or low, is amenable to the law, but none can be punished save by a properly constituted legal tribunal. If any man's rights or personal liberty or property are threatened, whether by the Government or by a private individual, the Courts are open for his protection'.[72]

68 CUP, *Cambridge Idioms Dictionary* (2nd, Cambridge University Press 2006).
69 *Justice Alliance* (n 56) 36.
70 Richard Fallon, '"The Rule of Law" as a concept in constitutional discourse' (1997) 97 (1) Columbia LR 1–56 at 7–8.
71 [1947] 4 SA 272 (W) quoted in Hahlo (n 18).
72 id 14.

The gist of judicial review in the promotion of the rule of law is the cardinal principle that defines non-arbitrariness in the regulation of state authority. It is one of the universal concepts of constitutional law, and relates to the German conception of the *Rechtsstaat* principle[73], which requires the application of the law to be rationally connected to legitimate government purpose. The recent judgment of the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*[74] put the essence of judicial review beyond doubt and consolidated the advancement of the foundations of the principle of the rule of law when the Court held that

> one of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because *constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck*[75] [author's emphasis].

This is a ground-breaking judgement for the rule of law and was sparked by the failure of the President to adhere to the recommendations of the Public Protector 'after an investigation into allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President'.[76] The Public Protector had concluded that the 'President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources and recommended that appropriate remedial action [be undertaken by] the President, duly assisted by certain State functionaries and determine the portion that is proportionate to what was not due that had accrued to him and his family. Further, to reprimand the Ministers involved in that project, for specified improprieties'.[77] However, instead of implementing the remedial action as recommended by the Public Protector, the President colluded with the National Assembly to derail the 'facilitation of compliance with the remedial action in line with its constitutional obligations to hold the President accountable'.[78] The collusion was the

73 Jan-Erik Lane, 'Good governance: the two meanings of the "rule of law"' (2010) 1 International Journal of Politics and Good Governance 1–27.

74 [2016] ZACC 11, hereinafter referred to as *EFF-DA* judgment.

75 Para 1.

76 Para 2. See the Public Protector's Report entitled: *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* Report No 25 of 2013/14 (Public Protector's Report).

77 ibid.

78 *EFF-DA* para 3.

result of the National Assembly's adoption of a parallel system in the examination of the Public Protector's report, which resulted in the absolution of the President liability.[79]

It is against this background that an application was filed at the Constitutional Court which raised a number not only of legal but constitutional questions and called upon the Court 'based on supremacy of our Constitution, the rule of law and considerations of accountability, [to determine whether]: first, the President should be ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the costs expended on non-security features at his private residence. Secondly, the President to reprimand the Ministers under whose watch State resources were expended wastefully and unethically on the President's private residence. Thirdly, the declaration by the court that the President failed to fulfil his constitutional obligations, in terms of sections 83,[80] 96,[81] 181[82] and 182.[83] Fourthly, the Court to declare as invalid and inconsistent with the Constitution the report of the Minister of Police and the resolution of the National Assembly that sought to absolve the President of liability and that the adoption of those outcomes amount to a failure by the National Assembly to fulfil its constitutional obligations, in terms of sections 55[84] and 181,[85] to hold the President accountable to ensure the effectiveness, rather than subversion, of the Public Protector's findings and remedial action. Fifthly, the clarification of the Public Protector's constitutional powers to take appropriate remedial action'.[86]

Without engaging with each of the questions before the Court, what is imperative was the establishment of the failure of the President to uphold the Constitution, in both his personal and institutional capacity. The Court further established that the National Assembly equally was to be blamed as it also failed to hold the executive accountable. Of further importance are the clarity given, and the confirmation of the binding nature of the recommendations of the Public Protector. In this instance the Court reasoned that it has exclusive jurisdiction in terms of section 167(4)(e) that entails a 'two-stage approach' that gives a contextual and purposive interpretation which seeks to establish

79 ibid para 12.

80 This section provides that: The President: (a) is the Head of State and head of the national executive; (b)must uphold, defend and respect the Constitution as the supreme law of the Republic; and (c) promotes the unity of the nation and that which will advance the Republic.

81 S 2 (b) provides that: Members of the Cabinet and Deputy Ministers may not: (b) Act in a way that is inconsistent with their office, or expose themselves to any situation involving risk of a conflict between their official responsibilities and private interests, or (c) use their position or information entrusted to them to enrich themselves or improperly benefit any other person.

82 [The Public Protector] is an independent institution that is subject only to the Constitution, which is required to exercise its function impartially without fear or favour wherein other branches must assist it to protect its autonomy without interference.

83 This section affirms the constitutional powers of the Public Protector as it does not only affirm its investigative role but goes further to endorse the remedial actions that have to be adopted.

84 S 55 (2).

85 (n 80).

86 *EFF-DA* para 4.

whether the alleged constitutional obligation that has not been fulfilled rests on the President or Parliament and requires the analysis as envisaged in section 167(4)(e).[87] It contextualised its reasoning by holding that as the highest Court of the land it had to 'tread' carefully because it 'deals with issues that have serious and sensitive political implications in order to give effect to the doctrine of separation of powers'.[88] It further held that absolution of the President amounted to self-help as the National Assembly gave itself the power that it does not have by nullifying the findings and the remedial action of the Public Protector.[89]

This is a ground-breaking judgment and crucial to the evolution of the principle of the rule of law in the regulation of state authority.[90] The judgment further means that not only the Public Protector but all the Chapter 9 institutions that were established to support constitutional democracy[91] will not remain 'toothless bulldogs' without powers with which to enforce their recommendations. It is disconcerting that the President, in both his personal and institutional capacity was found by the Court to have flouted the Constitution with impunity notwithstanding the fact that as the Court had put it: 'the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project'.[92] Similarly, the National Assembly was characterised as 'the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people [which] is an irreplaceable feature of good governance in South Africa'.[93]

The tone and language of the Court lent credence to the acclaimed reputation of the Constitution when its 'supposed' defenders were found to have violated it. The Court showed beyond doubt the gravity of the non-compliance with recommendations of the Public Protector and the impact it could have had on the evolution of the principle of the rule of law when people such as the President use their position of authority and power to act in a way that is inconsistent with the Constitution. The Court described the office of the Public Protector as 'the embodiment of a biblical David … who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are … [it] is one of the true crusaders and champions of

87 ibid paras 16–19.

88 ibid para 19. The background to the concept of doctrine of separation of powers will not be canvassed in this paper except to say it is not defined but it is evident from the way in which the Constitution is structured by giving clearly drawn boundaries among the branches.

89 *EFF-DA* at para 98.

90 Andile Mcineka, 'Nkandla: Constitution under siege? (2016) 9 (1) College of Law and Management Studies eNewsletter at 13–14.

91 See s 181 of the Constitution.

92 *EFF-DA* para 20.

93 Para 22.

anti-corruption and clean governance'.[94] The Court then gave content and meaning to the rule of law and held that

> [it] requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.[95]

This description of the centrality of the rule of law derives from an understanding that it protects and prevents lawlessness and commotion in order to allow people to plan their affairs with reasonable confidence so that they can know the legal consequences of various actions and it serves as an endorsement of the guarantee against, at least, some types of official arbitrariness.[96] The uniqueness of the rule of law received consolidation by the Constitutional Court in the *Justice Alliance* judgment.[97] The issue in this matter arose out of the extension of the term of office of former Chief Justice Ngcobo. The applicants challenged the constitutionality of the law that authorises the process by which the term of office of the Chief Justice was extended.[98] The Court was required to determine the validity of the delegation to the president, extend the term of office in terms of section 8 (a), and its compliance with section 176 (1) of the Constitution, followed by the determination of the impact of section 176 (1) on the differentiation of the term of office of the judges of the Constitutional Court and the obligation of the President to consult the JSC if section 8 (a) is found to be constitutionally valid.

The challenge raised the question of whether the president by this action had intentionally undermined judicial independence, the separation of powers and, most importantly, usurped the rule of law. The question touched on the bedrock of the significance of the division of state authority, which required the interpretation of section 176(1) and section 8(a) of the Constitution and, as a necessity, engaged the concepts of the rule of law, the separation of powers, and the independence of the judiciary.[99] These concepts are indispensable to a democratic society and their close relationship to the ideal of a constitutional democracy cannot be over-emphasised.[100]

The Court found the extension of the term of office of the former Chief Justice invalid, when it held that

94 Para 52.
95 Para 75.
96 Fallon (n 18) 7–8.
97 *Justice Alliance* (n 56).
98 ibid 1.
99 id 29; De Vos (n 13) at 60.
100 *Justice Alliance* (n 56) 30.

> the extension by the President does not qualify as an Act of Parliament as required. It does not bear the specific features of an Act of Parliament, such as originating from a Bill that was assented to and signed by the President. The extension is made through an executive decision of the President. Section 176(1) explicitly refers to an Act of Parliament extending the term. That is a strong indication that the legislative power may not be delegated by the Legislature.[101]

The Court substantiated its argument by holding that

> this indication is strengthened when one considers the wording of section 176(1) against that employed in section 176(2) of the Constitution [which] states that other judges, that is judges who are not Constitutional Court judges, hold office until they are discharged from active service 'in terms of an Act of Parliament'. There has been a deliberate differentiation in the wording, requiring direct action by Parliament in section 176(1) and a framework for action in section 176(2). Had it been contemplated that the power in section 176(1) be delegable, it is highly probable that the wording of section 176(2) would have been used.[102]

The Court further reasoned that the 'delegation to extend the term of the judge goes to the core of the tenure of the judicial office, independence and the separation and in a constitutional democracy such as ours, Parliament may not ordinarily delegate its legislative functions'.[103] The Court further alluded to the significance of section 8 (a), and found that it violates the principle of judicial independence because it creates 'an open-ended discretion that may raise a reasonable apprehension that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the executive [that may undermine] the judiciary being seen to be free from external interferences'.[104]

The judgment is an indication of the progress made in rebuilding South Africa through the process of judicial review in harnessing the principle of the rule of law. It seeks to constitutionalise the framework within which the state has to exercise its authority. It is worth reiterating that the country is no longer governed by parliamentary sovereignty but is founded on principles of constitutional law such as the rule of law. These principles are simplified by Fallon who contends that they are constituted, first, by 'the capacity of the legal rules, standards, or principles to guide people in the conduct of their affairs [in a manner] that ensures their understanding of the law and its compliance which endorses the importance of the framework for the people to be ruled and obey the law to ensure the reasonable stability of the law in order to facilitate planning and the coordination of activities. Secondly, they give content and meaning to the supremacy of the legal authority that should regulate the officials, including judges as well as ordinary

101 id 58.

102 *Justice Alliance* (n 56) 59; Chief Justice Mogoeng Mogoeng, 'The rule of law in South Africa: measuring judicial performance and meeting standards' <http://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/> accessed 8 February 2015.

103 *Justice Alliance* (n 56) 65.

104 id 68.

citizens. Lastly, they legitimise the instrumentality of the impartiality of justice where the courts should be available to enforce the law and the employment of fair procedures'.[105]

The affirmation of these principles is similarly expressed by Solyom as the 'change of the law [from] an instrument of power into a principled system that is regulated by the Constitution'.[106] The operationalisation of these principles in ensuring the advancement of the rule of law in constitutional law was consolidated in the judgement in *Democratic Alliance v the President of South Africa*[107]. The case demonstrates the management of the delicate relationship in strengthening the pillars of democracy. The case involved the appointment by the president of Adv. Menzi Simelane (the former Director-General of the Department of Justice and Constitutional Development) to the position of the National Director of Public Prosecutions. The crux of the matter in this case was whether Adv. Simelane was fit and proper to hold office of the NDPP in the light of the findings of the Ginwala Commission, at which he gave evidence. The Court had to consider whether the requirement of 'fitness and being proper' to hold the office of the National Director is an 'objective jurisdictional fact antecedent to the appointment in order to establish its legitimacy [which is concerned] with the distinction between reasonableness and rationality linked to the means and ends. Further, to establish whether the process as well as the ultimate decision must be rational in the determination of the consequences for rationality and separation of powers if relevant factors are ignored; and an investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred'.[108]

The case concerned an appeal from the Supreme Court of Appeal to the Constitutional Court as the apex in constitutional matters for the validation of its finding, which was that the decision of the president was irrational and would amount to a violation of the principle of the separation of powers.[109] The Court held that the latter principle was not applicable in this matter, because it has nothing to do with whether a decision is rational or not and therefore not of particular import in this case.[110]

However, the Court considered the rationality of the president's conduct in the appointment of Adv. Simelane. It first classified rationality as a standard which prescribes the lowest possible threshold for the validity of executive decisions, that was earlier described by the Court as the 'minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries'.[111] The

105 Fallon (n 58) 8–9.
106 Solyom (n 4) 143.
107 *Democratic Alliance v the President of South Africa* [2012] 12 BCLR 1297 (CC).
108 Para 12.
109 id 41.
110 id 44.
111 id 42.

rationale for this test is 'to achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other'.[112]

The Court considered the Ginwala Commission's findings declared by the Democratic Alliance, when Adv Simelane relied heavily on the 'non-disclosure of the letter that had been drafted by him and sent by the Minister consequent upon a letter received by the Minister from the then President (to Adv. Pikoli), together with his (Adv. Simelane's) evidence relating to the contents of the letter he had drafted,[113] the former President's letter to Adv. Pikoli's attorneys, in response to their request for certain documents,[114] the legal opinion that had been obtained by him and which was adverse to his opinion concerning the relationship between the National Director and the Director-General[115] and the evidence accusing Adv. Pikoli of dishonesty' by Adv. Simelane'.[116]

The Commission established that Adv. Simelane's testimony threw much doubt on his credibility and integrity because it was contradictory and without basis in fact or in law. Adv. Simelane was responsible for preparing Government's original submission to the Enquiry in which the allegations against Adv. Pikoli's fitness to hold office were first amplified.[117] Several of the allegations levelled against Adv. Pikoli were shown to be baseless, and Adv. Simelane was forced to retract several allegations against Adv. Pikoli during his cross-examination".[118] In the report of the Ginwala Commission itself, Dr Ginwala said of Adv. Simelane:

> I must express my displeasure at the conduct of the DG: Justice in the preparation of Government's submissions and in his oral testimony, which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv. Pikoli were without foundation. These complaints related to matters such as the performance agreement between the DG: Justice and the CEO of the NPA; the NPA's plans to expand its corporate services division; the DSO dealing with its own labour relations issues; reporting on the misappropriation of funds from the Confidential Fund of the DSO; the acquisition of new office accommodation for NPA prosecutors; and the rationalisation of the NPA.[119]

The Court held that this is 'the central issue upon which separation of powers and the rule of law are undermined and the ability of state institutions are also undermined by virtue of appointing personnel that are amenable to influence which is evidenced by the fact that with regard to the original government submission, many complaints were included that were far removed in fact and time from the reasons advanced in the letter

112 ibid.
113 id 53.
114 ibid.
115 ibid.
116 ibid.
117 id 50.
118 ibid.
119 id 51.

of suspension, as well as the terms of reference.[120] This further reflects Adv. Simelane's disregard and lack of appreciation and respect for the import of an enquiry established by the President'.[121]

The Court emphasised the importance of the extracts from the report of the Ginwala Commission that ought to have been cause for great concern to the President.[122] It held that they represented brightly flashing red lights warning of impending danger to any person involved in the process of Adv. Simelane's appointment to the position of National Director.[123] Any failure to take into account these comments or any decision to ignore them and to proceed with Adv. Simelane's appointment without further consideration, would not be rationally related to the purpose of the power, that is, to appoint a person with sufficient conscientiousness and credibility.[124] Besides, the Minister did in fact study the Ginwala Commission Report, the Public service Commission Report and the representations that had been made to him by Adv. Simelane's legal team in relation to that report – to the extent that it related to Adv. Simelane – before advising the President.[125] But, those reports were not considered to have any bearing on the impact they would have on Adv. Simelane's fitness to hold office. The invalidation of Adv. Simelane's appointment to the position of the National Director of Public Prosecutions is an indication of the building of the capacity of state institutions in ensuring compliance with the principles of the rule of law. It further shows the capacity of the judiciary to affirm the foundations of enforcement of current laws, which are instrumental in the application of the law in a coherent fashion and without any apprehension of bias.[126]

Another case of notable importance in the fight for the rule of law is the *Hugh Glenister v the President of the Republic of South Africa*[127] judgment. This case concerned the constitutional validity of the National Prosecuting Authority Amendment Act (NPAA Act) and the South African Police Service Amendment Act (SAPSA Act)[128] (these two statutes are referred to as the impugned laws). The core of the complaint relates to the 'disbanding of the Directorate of Special Operations (DSO), a specialised crime fighting unit that was located within the National Prosecuting Authority (NPA), and its replacement with the Directorate of Priority Crime Investigation (DPCI), which is located within the South African Police Service (SAPS)'.[129] The challenge relates to the core content of the 'constitutional authority of Parliament to establish an

120 ibid.
121 ibid.
122 id 52.
123 ibid.
124 ibid.
125 ibid.
126 id 59.
127 *Glenister v President of the Republic of South Africa* [2013] 11 BCLR 1246 (CC).
128 id 1.
129 ibid; see also Chief Justice Mogoeng Mogoeng, 'Chief Justice Mogoeng seeks judicial independence'. DR, June: 7 [13] De Rebus 9 92 [2013].

independent anti-corruption unit, in particular, the nature and scope of its constitutional obligation'.[130]

The Court in delivering its majority judgment states that a significant safeguard, which appears to elude both the applicant and the amicus curiae, is section 17B of the DPCI, which contains an explicit injunction on the application of the impugned laws.[131] It expressly requires that there is a need to ensure that the DPCI has the necessary independence in applying the provisions of the impugned laws.[132] What this means, in effect, is that in determining and approving the policy guidelines relating to the functioning of the DPCI, overseeing the functioning of the DPCI, exercising the powers of oversight over the Ministerial Committee, and in dealing with complaints relating to undue influence, all branches of government, including the officials who administer the provisions of the impugned laws, must apply the provisions of the impugned laws in a manner that will promote the independence of the DPCI.[133] The court remarked that if this were not done it violates not only the provisions of the impugned laws but the Constitution itself.[134]

Thus, the court held that it granted the applications for condonation and leave to appeal.[135] It added further that it would have dismissed the appeal and the constitutional challenge to the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008 for failure to facilitate public involvement in the legislative process.[136]

However, for the purposes of our argument, of relevance is the dissenting view of Moseneke DCJ and Cameron J, who held that the form and structure of the entity in question lies within the reasonable power of the state, provided, whatever form and structure are chosen, it does indeed endow the entity in its operation with sufficient independence.[137] Differently stated, the requirement of independence does not answer the question: what form and structure must the entity take?[138] It merely asks: does the form and structure given to the entity ensure that it is sufficiently independent?[139] It further raised the question of whether the DPCI has an adequate level of structural and operational autonomy secured through institutional and legal mechanisms in order to prevent undue political interference.[140]

130 *Glenister* (n 127) 1.
131 id 154.
132 ibid.
133 ibid.
134 ibid.
135 id 159.
136 ibid.
137 id 196; De Vos (n 13) 225.
138 *Glenister* (n 127) 196; see also De Vos (n 13).
139 *Glenister* (n 127) 196; Chief Justice Mogoeng (n 129) 92.
140 *Glenister* (n 127) 206.

The Court indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists,[141] because 'whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important in determining whether it has the requisite degree of independence'.[142] Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objective benchmarks for independence.[143] This is so because public confidence that an institution is independent is a component of or is constitutive of its independence.[144]

The Court made a comparative reference to the provisions that regulated the structure and functioning of the DSO that preceded it,[145] and held that it does not suggest that the DSO constitutes a 'gold standard' from which parliament cannot deviate.[146] The Court nevertheless considered that because parliament created an entity that in several ways is less independent than the DSO, is relevant to the inquiry in two ways:[147] The consideration was based on the impact of public perceptions in relation to the independence of the newly-created entity[148] wherein the public may have misgivings about the DPCI's independence given that the features that are protecting it are so markedly more tenuous than those of the DSO. [149] The Court further found it difficult to conclude that the creation of an entity that is markedly less independent than the DSO can fulfil the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.[150] This is because, as the court now shows, independence is assessed based on factors such as security of tenure and remuneration, and mechanisms for accountability and oversight.[151] This means that an analysis has to be undertaken to determine whether, overall, the body satisfies the threshold of adequate independence.[152] The now-defunct DSO was independent.[153] While it does not represent an inviolable standard, comparison with it shows how markedly short of independence the DPCI falls.[154]

The second general point the court made was that adequate independence does not require insulation from political accountability.[155] In the modern polis that would

141 id 207.
142 id 207.
143 ibid.
144 ibid.
145 id 209.
146 ibid.
147 ibid; Chief Justice Mogoeng (n 129).
148 id 210; Chief Justice (n 90).
149 ibid.
150 ibid.
151 ibid.
152 ibid.
153 ibid.
154 ibid.
155 id 216.

be impossible, and it would be averse to our uniquely South African constitutional structure.[156] What is required is not insulation from political accountability, but rather insulation from a degree of management by political actors that threatens to stifle the independent functioning and operations of the unit.[157] It concluded that the statutory structure creating the DPCI offends the constitutional obligation resting on parliament to create an independent anti-corruption entity, which is intrinsic to the Constitution.[158]

The Constitutional Court managed its delicate relationship by not prescribing to parliament what the constitutional obligation requires, but raised[159] concerns about the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, the subordination of the DPCI's power to investigate at the hands of members of the executive, and the lack of clear guidelines on the control the DPCI's policies which are inimical to the degree of independence that is required.[160] The mechanisms to protect against interference are inadequate, in that, Parliament's oversight function is undermined by the level of involvement of the Ministerial Committee, and in that the complaints system involving a retired judge regarding past incidents does not afford sufficient protection against future interference.[161]

The minority judgment illustrates the level of individual autonomy in the application of the law. Generally, the importance of the minority judgment in constitutional adjudication is its potential to provide an alternative to the dominant approaches that are used by the courts in resolving disputes. Mothupi contends that the minority judgment 'may be able to point to the weaknesses of the main judgment by concentrating on a single method of constitutional adjudication, show the importance of approaching constitutional issues in a balanced and flexible manner, take into account the values and aspirations that the Constitution was designed to achieve'.[162] The importance of these factors entails the 'stability and effectiveness of judicial power in implementing the rule of law which is guaranteed by the independence of the judiciary'.[163] The affirmation of the minority judgments in constitutional adjudication is an expression of the judge's intellectual independence from the majority.[164] It is in this context that the rule of law evolves in order to increase the responsibility of the judges in line with the oath of office they undertook to apply the law without fear or favour.

156 ibid.
157 ibid.
158 id 248.
159 ibid.
160 ibid.
161 id 250.
162 Silas Mothupi, 'The value of minority judgments in the development of constitutional interpretation in South Africa' (2005) 46 (2) Codicillus 13–23 at 19.
163 Julia Laffrangue, 'Dissenting opinion and the judicial independence' (2003) VIII Juridica International 162–172 at 162.
164 ibid.

On the whole, the cases discussed in this paper have shown that the principle of the rule of law is of great importance in South Africa, because not only is it a general principle of constitutional law but also a foundational value of the Constitution.[165] It provides a foundation for the regulation of state authority, which should be undertaken within the context of the principles and values of the new constitutional dispensation.[166] It is a fundamental principle of constitutional law that endorses the non-arbitrariness and meaningful operation of the law in ensuring that it is not just the end to a means but a means to an end.[167] The rule of law fosters and encapsulates the norms, policies, institutions and processes that form the core of a society in which individuals are safe and secure, where legal protection is provided for rights and entitlements, where disputes are settled peacefully, where effective redress is available for harm suffered and where all those who violate the law – including the state itself – are held accountable. These norms are derived from the foundational and legal framework that sees the Constitution as the highest law of the land, in which all its democratic pillars function optimally and upholding the rule of law.[168]

It is concluded from the above that the rule of law is the ultimate cornerstone of the justice system, which is essential for the affirmation of the development of the principles of judicial review. It affirms the certainty and application of the laws in a fair, reasonable and accessible way.[169]

4. CONCLUSION

The judicial development of the principles of constitutional law is framed within the broader framework of the rule of law. The rule of law not only is the general principle of the new dispensation, it is a foundational value for the regulation of state authority. Of great significance is its structuring as being directly linked to the supremacy of the Constitution, which is fundamental to the process of judicial review.[170] This means that the rule of law is not just a principle that requires the application of the law, but is the firm basis of the fundamental principle of constitutional law. The rule of law endorses the non-arbitrariness and equal operation of the law in ensuring that it is not a means but an end in itself. Its justification in relation to the application of the law is determined

165 S 1 (c) of the Constitution, which provides that the Republic of South Africa is founded on values of supremacy of the Constitution and the rule of law.

166 Michael Rautenbach, 'Policy and judicial review political questions, margins of appreciation and the South African Constitution' (2012) 1 TSAR 20–34.

167 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] 10 BCLR 1289, para 56.

168 Michael Zurn, Andre Nollkaemper and Randall Perrenboom, *The Rule of Law Dynamics: in an Era of International and Transitional Governance* (Cambridge University Press 2012) <http://books.google.co.za/books?isbn=1107024714> accessed 10 December 2014. Lane J E (n 61) at 1–27.

169 Michael Rautenbach and Erasmus Malherbe, *Constitutional Law* (LexisNexis 2003) at 9.

170 S 1 (c) of the Constitution of the Republic of South Africa.

by its rational connection to the legitimate government purpose.[171] In a nutshell, the principle reinforces the certainty and application of the laws in a fair, reasonable and accessible way.

171 *Makwanyane* (n 48) 156.