

# Revisiting section 81 of the Constitution: The commencement date of legislation (legislative power) distinguished from promulgation (legislative process)

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## **Abstract**

Section 81 of the Constitution regulates promulgation through publication as part of the legislative process (ie, a procedural norm). The provision further creates a presumption that unless the legislature explicitly determines a commencement date in an Act it enters into force upon promulgation. The commencement date of legislation is thus part of the *contents* of a statute (ie, a substantive norm), which must be determined by the legislature when adopting the legislation. In a number of judgments, however, the Constitutional Court espoused the idea that the commencement date is part of the legislative *process* instead of being part of the *contents* of a statute. Thus it allowed the legislature to delegate its power to determine a commencement date for legislation to the president as head of state in transgression of section 44(1)(a)(iii) of the Constitution: this provision only mandates a delegation of core legislative powers to another legislative body. The confusion is partly due to an initial tendency of the Constitutional Court to interpret constitutional provisions in isolation and partly to the unconsidered re-importation of Westminster constitutional common law. In the Westminster system a delegation of the power to determine a later commencement date for legislation (ie, after promulgation) to the executive and/or head of state was justified in terms of the doctrine of parliamentary sovereignty. Parliamentary sovereignty, however, was abolished in 1994: such a delegation of power is no longer compatible with sections 44(1)(a)(iii), 55(2)(b)(i), 79 and 87 of the Constitution. Lately, the Constitutional Court even ruled that the power to determine a commencement date for legislation is an executive power, which is to be exercised in terms of sections 85 and 101 of the Constitution, although section 81 explicitly confers this power upon the legislature. A reconsideration of the Court's interpretation of section 81 is therefore overdue: it not only

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compromises legislative power and the separation of powers, but goes to the substance of the rule of law and legal certainty as foundational values of the constitutional state.

## 1 Introduction

It is important to distinguish legislative *power* from the legislative *process*. In terms of the separation of powers, legislative power is the exclusive domain of legislative bodies. Although the executive may initiate legislation, it cannot adopt legislation. The adoption of legislation must also be distinguished from the ceremonial power of the president as head of state to assent to and promulgate legislation. These functions of the executive and head of state are part of the legislative process but do not constitute legislative power.

Section 81 of the Constitution of the Republic of South Africa, 1996 (Constitution) regulates promulgation through publication as part of the legislative process. The provision also creates a presumption that unless the legislature explicitly determines a commencement date in the statute it enters into force upon promulgation. The commencement date of legislation is part of the contents of a statute, which must be determined by the legislature when adopting the legislation.

In a number of judgments, however, the Constitutional Court espoused the idea that the commencement date is part of the legislative *process* instead of being part of the *contents* of a statute. The confusion is partly due to an initial tendency of the Constitutional Court to interpret constitutional provisions in isolation and partly to the unconsidered re-importation of Westminster constitutional common law by the courts despite the fact that the Westminster system was abolished in 1994. A reconsideration of the court's interpretation of section 81 is therefore overdue: it not only compromised legislative power, but goes to the substance of the rule of law and legal certainty as foundational values of the constitutional state.

## 2 A textual and comparative interpretation of section 81 of the Constitution

Section 81 of the Constitution reads as follows:

A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect *when published or on a date determined in terms of the Act* (emphasis added).

The first part of the provision (until 'promptly') deals with promulgation through the publication of a statute.<sup>1</sup> It contains a procedural norm that the president is obliged to ensure that such a statute is 'published promptly'. The president may therefore not postpone the taking effect of a law adopted by parliament by unduly delaying its publication. As it will be set out subsequently, the promulgation of a statute constitutes the final stage in the legislative process.

The second part of the provision (from 'and takes effect ...') stipulates substantive norms for the *commencement* of a statute. There are two possible dates upon which a statute can take effect, that is the date 'when [it is] published' or 'a date determined in terms of the Act'. The provision thus establishes a presumption that a statute commences on the date of its publication unless the legislature has specified another commencement date in the statute itself. The commencement date of legislation is part of the contents of a statute: it falls in the scope of power of parliament to determine such a date when adopting the legislation. The rationale of the provision is to lay down a *specific date* for commencement to create legal certainty about the exact date when such legislation becomes legally binding and enforceable.

A statute therefore cannot enter into force on some unspecified future date. The phrase 'in terms of the Act' should thus be interpreted to mean 'by the Act'. A delegation of the power to determine a commencement date at a later stage (after promulgation) to a cabinet minister or the president as head of state is not supported by section 44(1)(a)(iii) of the Constitution: legislative power may only be delegated to another legislative body. Neither the cabinet nor the president as head of state qualifies as a legislative body.<sup>2</sup> A delegation of such power to the executive is also not compatible with section 55(2)(b)(i) of the Constitution: if the executive should have leeway to postpone or indefinitely delay the commencement of legislation, that would nullify the power of the legislature to maintain oversight that the executive implements legislation adopted by parliament.

A comparative perspective of the position in another constitutional state could also be helpful to shed light on the commencement date of legislation. Section 81 of the South African Constitution is similar to article 82 of the German Constitution or *Grundgesetz* (GG).<sup>3</sup> The only difference is that when a German

<sup>1</sup>The *Webster's Dictionary* provides the following meaning for the term 'promulgation': to make known or public the terms of a law; to put a law into action or force.

<sup>2</sup>Section 42(1) read with ss 85 and 87 of the Constitution. Section 87 of the Constitution determines that the president, once elected, ceases to be a member of the National Assembly.

<sup>3</sup>Article 82 of the *Grundgesetz* (GG) regulates the certification, promulgation and entry into force of legislation. It reads as follows:

(1) Laws enacted in accordance with the provisions of the Constitution shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette. Regulations shall be certified by the department that issue them and, unless a law otherwise provides, shall be promulgated in the Federal Law Gazette.

statute does not specify a commencement date explicitly, the statute is deemed to enter into force fourteen days after the date on which the statute was published in the *Government Gazette* and not on the same day as envisaged by section 81. Like its South African counterpart, article 82 GG has two components, that is, a procedural norm that regulates promulgation and a substantive norm that determines the commencement date.

Promulgation through publication of legislation is a prerequisite to ensure legal certainty and constitutionalism. The German Constitutional Court emphasised the importance of the public being properly informed about the content of new legislation and when that commences:<sup>4</sup>

[T]he publication of a statute is essential for law to become legally binding; it is a prerequisite for its enforceability. The promulgation of a statute implies that legal norms should be made public in a manner that persons affected by it could reliably inform themselves about the contents thereof ... The opportunity to acquaint oneself [with the contents of a statute] may not be unreasonably cumbersome.

Under both constitutions parliament can specify a commencement date, and if not, the presumption sets in. In theory, parliament can determine a future or a retroactive date for a statute to enter into force. It may be sensible, for example, that new taxation measures should enter into force on a date that coincides with the beginning of the next tax year otherwise law enforcement might become very cumbersome. A retroactive commencement date, on the other hand, is not always permissible.<sup>5</sup>

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- (2) Every law or regulation shall specify the date on which it shall take effect. In the absence of such a provision, it shall take effect on the fourteenth day after the day on which the Federal Law Gazette containing it was published.

This provision also regulates the commencement date of executive regulations issued in terms of an empowering statute in the manner envisaged by art 80 GG.

<sup>4</sup>BVerfGE 65, 283 (291) citing BVerfGE 16, 6 (16f and 18) and BVerfGE 40, 237 (252f and 255). See Sachs *Grundgesetz-Kommentar* (2009) 1627-1634.

<sup>5</sup>Criminal laws may not be retroactive at all. This is prohibited in South Africa by s 35(3)(l) of the Constitution and in Germany by art 103(2) GG. As a general rule, administrative justice requires that a person should be able to rely on the statutory position as it was at the time when undertaking something or planning the future. To ensure legal certainty, genuine retroactivity of legislation is prohibited in relation to matters that have been concluded, eg subsidies that were awarded; it cannot subsequently be reversed by law. Legislative measures which implement burdens retroactively or restrict previous advantages (eg advantageous tax levels) or benefits (eg, tax breaks) retroactively are also not allowed. Conversely, retroactivity of legislation that creates advantages or benefits, eg, higher child care support, is not forbidden. For a discussion, see Sachs (n 4) 819-824 and 1636; Von Münch and Kunig *Grundgesetz-Kommentar* (2001) vol 2 at 14; Maurer *Staatsrecht: Grundlagen, Verfassungsorgane, Staatsfunktionen* (2007) 562-575; Wolf 'Namibian taxation procedure in the light of just administrative action' (2012) 4(1) *Namibian LJ* 98 at 114 and 165-166. The restrictive position espoused by Rautenbach and Malherbe *Constitutional law* (2009)

The German Constitutional Court held that the commencement date of a statute is part of the contents of a statute (ie, material law) and not merely part of the broader legislative process in which other state organs also participate.<sup>6</sup> Parliament itself must determine a commencement date if another date than the date of promulgation is envisaged. The court held that it is a core legislative power, which may not be delegated to another state organ:<sup>7</sup>

Since the contents of a statute falls in the exclusive domain of power of the democratically elected parliament, the commencement date of a statute must be determined by the legislature and may not be delegated to the executive (BVerfGE 42, 263 [283]).

Article 82 of the German Constitution further specifies that the same rules for commencement apply to executive regulations that were issued in terms of an enabling statute. An executive regulation also enters into force on the date specified for its commencement in the regulation; otherwise it automatically enters into force fourteen days after its publication.<sup>8</sup> This aspect has been regulated less satisfactorily by the South African Constitution.<sup>9</sup>

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174 that an Act takes effect 'upon such publication or *on a later date*', which would exclude any retroactive legislation altogether, does not seem justified. The presumption against retrospectivity allows certain exceptions to the rule – see Du Plessis *The interpretation of statutes* (1986) 98-102. This is very similar to the legal position in Germany.

<sup>6</sup>In BVerfGE 34, 9 (23) the German Constitutional Court held that: 'The commencement date of a statute is part of the contents of the law and not part of the legislative process'. See also BVerfGE 87, 48 (60): 'In terms of art 82(2) GG a statute must determine on which date it commences. The commencement date is part of the contents of the statute, which must be determined by the legislature; it is not part of the legislative process ...'. For a discussion, see also Sachs (n 4) 1636; Maurer (n 5) 560-562.

<sup>7</sup>BVerfGE 45, 297 (326). In this judgment, the court relied on BVerfGE 42, 263 (283) where the Constitutional Court held that the court *a quo* was correct in reasoning that 'the legislature may not leave the commencement date of a statute open and delegate the decision when a statute should enter into force to another state organ'. This includes the head of state as well as the executive.

<sup>8</sup>The German Constitution regulates this in detail in art 80(1) GG. It determines that executive regulations are valid only once certain conditions have been met: (i) an enabling statute must have conferred such powers upon the executive explicitly; (ii) the scope, contents and objectives of such powers must be stipulated with the necessary clarity in the enabling statute; (iii) a regulation must expressly refer to the legislative basis that empowered the executive body to make regulations; and (iv) a regulation must be officially and properly published. The Federal Constitutional Court confirmed this in clear terms in BVerfGE 40, 237 (252f and 255).

<sup>9</sup>Section 101(3) of the South African Constitution provides that: 'Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public'. The promulgation and commencement date of such regulations, which are necessary to establish their legal enforceability, are not explicitly regulated. The provision is also ambivalent insofar as it refers to executive regulations as 'subordinate legislation', thereby creating the impression that the executive has legislative powers or that parliament could delegate its legislative power to the executive. Section 239 of the Constitution also creates confusion insofar as it states that both national and provincial legislation 'includes

### 3 The legislative process

This part will focus on the various stages of the legislative process before deficits of the Constitutional Court's interpretation of section 81 are discussed in the next part. The legislative process encompasses the series of actions by various state organs by which a proposal for law is formulated and considered, refined, approved and finally promulgated according to prescribed procedures. The following stages can be distinguished:

#### 3.1 *The initiation of legislation by the cabinet or by members of parliament*

The cabinet may initiate legislation in terms of section 85(2)(d) of the Constitution.<sup>10</sup> Most bills are introduced by the executive, but members of parliament may obviously also initiate legislation.<sup>11</sup> In the matter of *Oriani-Ambrosini* the appellant contested the constitutionality of the Rules of Parliament, which required that a member needs the Assembly's permission before s/he may introduce a bill in the Assembly. The Constitutional Court ruled that the majority may not block the tabling of a bill in parliament or by a parliamentary committee even before the bill is introduced.<sup>12</sup>

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*subordinate legislation* made in terms of an Act of Parliament' (emphasis added). These definitions cause an internal conflict with ss 43, 44 and 104 of the Constitution because it equates *executive* regulations made in terms of an enabling statute with the legislature's power to *make and adopt legislation*. A delegation of legislative power is explicitly prohibited by s 44(1)(a)(iii) of the Constitution. This conflict cannot be resolved logically or systematically – not even with all the aid of harmonious interpretation. The best would be to repeal the definitions of s 239 of the Constitution. If the intention was to establish the legal enforceability of executive regulations, this ought to be done properly and should be part of s 101 of the Constitution. For the sake of legal certainty and clarity references to 'subordinate legislation' should rather be replaced with 'executive regulations'.

<sup>10</sup>In *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 6 SA 588 (CC) paras 31-32, the court held that s 85(2)(d) of the Constitution should be interpreted to mean that the power of the cabinet to initiate legislation is a responsibility to be discharged collectively. The court further held that although a cabinet member is entitled to introduce a bill in the Assembly in terms of s 73(2), a minister does not have the individual power to initiate or prepare legislation and introduce a bill without prior consultation with and approval of Cabinet. It should be noted, though, that individual members of the cabinet (with the exception of the president) are also members of the Assembly. In this case the Constitutional Court explicitly strengthened the position of individual members of parliament to introduce legislation (see n 12). The restrictive interpretation attached to the wording of s 85(2)(d) by Mogoeng CJ in the majority judgment might not be justified. If an individual minister would be barred from introducing a bill unless the cabinet approved of it, it would have the same effect as barring an individual member of parliament from introducing a bill without prior approval of a majority in parliament.

<sup>11</sup>This is regulated by ss 55(1)(b) and 73(2) of the Constitution. See Rautenbachand Malherbe (n 5) 162-163.

<sup>12</sup>In *Oriani-Ambrosini* (n 10) paras 57 and 57, the court ruled that: 'The power of an individual member of the Assembly to introduce a Bill, particularly those from the ranks of opposition parties, is more than ceremonial in its significance. It gives them the opportunity to go beyond merely

### ***3.2 The deliberation and adoption of legislation by parliament***

Sections 43 and 44 of the Constitution vest legislative power in the national sphere in the Assembly, whereas section 104 regulates the legislative power of the provincial legislatures. There are different types of bills that could be tabled in parliament and for some of them specific procedures are prescribed.<sup>13</sup> Parliament considers bills during different stages or readings. Various committees play an important role in the legislative process and often amend bills extensively.<sup>14</sup> Public involvement in the legislative process must be facilitated.<sup>15</sup> After consideration of a bill, parliament then adopts or rejects it. If it is adopted, it is submitted to the head of state for assent and publication.

### ***3.3 The assent and signing of legislation by the president as head of state***

After parliament has adopted a bill, the president as head of state must assent to and sign it in terms of section 79 of the Constitution. The question that arises is what 'assent' means: does it imply that the president can veto legislation or does it rather mean that he should officially certify that a bill has become a law?

A brief excursion on the Westminster common law position as it existed before the new Constitution was adopted seems expedient because the courts, as it will be elucidated later, continued to invoke the prerogative power of assent and delegation of legislative powers to determine a commencement date for legislation in the same way under the new constitutional regime.

British constitutional common law was taken over under the 1910 Constitution, with the governor-general exercising certain powers on behalf of the British monarch. South Africa was a colony and part of the British Empire at that

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opposing, to proposing constructively, in a national forum, another way of doing things. It serves as an avenue for articulating positions, through public debate and consideration of alternative proposals, on how a particular issue can be addressed or regulated differently and arguably better. ... Even if a Bill does not result in an Act of Parliament, the power to introduce it is vital to the type of democracy envisaged by our Constitution. This is so because it facilitates meaningful deliberations on the significance and potential benefits of the proposed legislation. It is therefore an important power and should not be restricted without good reason.'

<sup>13</sup>The vast majority of bills are ordinary bills (the so-called s 75 bills) that are not constitutional amendments, money bills, or bills affecting the provinces. Bills that amend the Constitution are subject to the requirements of s 74 of the Constitution, whereas bills that affect the provinces must observe the procedure prescribed by s 76 of the Constitution. Money bills deal with raising and appropriating public funds, and are considered according to a different procedure than ordinary bills (s 77 of the Constitution). For a discussion, see Rautenbach and Malherbe (n 5) 161-162, 165-173.

<sup>14</sup>Rautenbach and Malherbe (n 5) 161-162.

<sup>15</sup>Sections 59(1)(a) and 72(1)(a) of the Constitution. In *Doctors for Life v Speaker of the National Assembly* 2006 6 SA 477 (CC) non-compliance with this duty led to invalidity of certain laws.

stage. In Britain, the assent as royal prerogative power is a ceremonial formality which converts a bill into an Act of Parliament.<sup>16</sup> The assent to legislation is a *legislative* prerogative, which the constitutional monarch exercises to conclude the legislative process.<sup>17</sup> A strict convention applies that the head of state has no veto right and must assent to bills that are duly adopted by the houses of parliament.<sup>18</sup> Since the British parliament consists of the House of Commons, the House of Lords and the monarch, it can be said that the royal assent to legislation is both part of the legislative *process* and an exercise of legislative *power*.

Under all Westminster constitutions of South Africa, too, parliament consisted of the governor-general/state president, the assembly and the senate.<sup>19</sup> The head of state was required to assent to and sign bills and the convention that he may not veto legislation also applied.<sup>20</sup>

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<sup>16</sup>In Great Britain, the royal assent is not a matter that involves the monarch personally. An Act of 1541 authorised that the royal assent could be given by commissioners in the presence of the Lords and Commons. No monarch since 1854 has given the royal assent personally, although the power to do so remains. In practice, the assent is a ceremonial power which was performed by the Lord Chancellor and the Clerk of the Parliaments. When royal assent was required, the Lord Chancellor submitted a list of bills ready for assent. In the House of Lords, attended by the Commons with the Speaker, the Clerk of the Parliaments read the title of the bills for assent and pronounced the assent. By the Royal Assent Act 1967 it is no longer required that the Commons interrupt their business to enable them to attend the Lords for this purpose. The assent is now notified separately to each House by its Speaker. See Bradley and Ewing *Constitutional and administrative law* (2007) vol 1 at 200.

<sup>17</sup>In Great Britain the royal prerogative powers cut across all spheres of state power. A distinction is made between various categories of royal prerogative powers, that is personal, legislative, executive, judicial and prosecuting prerogatives. These are residual powers of a constitutional monarch, which are usually exercised on advice of specific state organs. Personal prerogatives include that the king never dies and is never an infant. The British monarch is also the head of the Church of England. Legislative prerogatives include that the monarch convenes and prorogues Parliament and assents to and signs legislation. The assent is exercised by the Lord Chancellor on behalf of the monarch (see n 16). Executive prerogatives include that the monarch appoints the leader of the strongest party as prime minister. Other executive prerogatives are exercised on advice of the prime minister. Judicial prerogatives include the appointment of high court judges and granting a reprieve or pardon altering sentences meted out by courts. This power is exercised on advice of the justice minister. (The royal appointment of judges to High Courts was abolished by the Constitutional Reform Act 2005. Since 2006, all judges are appointed by the Judicial Appointments Commission.) The prosecuting prerogative entails that criminal proceedings are instituted in the name of the Crown by the Attorney-General. See Jackson and Leopold *Constitutional and administrative law* (2001) 308-332; Joliffe *Constitutional history of medieval England* (1961); Keir *Constitutional history of modern Britain, 1485-1937* (1947); Maitland *Constitutional history England* (1968); Wolf 'Pre- and post-trial equality in criminal justice in the context of the separation of powers' (2011) 14(5) *Potchefstroom Electronic Law Journal (PER)* 58 at 119-122.

<sup>18</sup>Bradley and Ewing (n 16) 21 and 200. In Great Britain, the veto right of a monarch was exercised for the last time by Queen Anne in 1708 and fell into disuse after that.

<sup>19</sup>Section 59(1) of the 1961 Constitution. See Wiechers *Staatsreg* (1981) 254-272. The senate was abolished in 1981.

<sup>20</sup>In terms of s 64 of the 1961 Constitution, the state president (nominal head of state) could assent to a bill or refer it back to parliament with recommended amendments. In practice, it never happened that the state president did not assent to a bill that was adopted by parliament. See



In British common law, the legislative prerogative to assent to a bill is important because it transforms a bill into law. In the absence of a written constitution common law defines what an 'Act of Parliament' is and when it commences.<sup>21</sup> There are three possible commencement dates for a statute: at the beginning of the day of assent,<sup>22</sup> a later date specified by the legislature in the statute itself, or an unspecified future date to be determined by the government.<sup>23</sup> In regard to the third option, it has been argued that in terms of the doctrine of parliamentary sovereignty, parliament may delegate its legislative power to determine when an enactment should commence to other state organs such as the executive.<sup>24</sup> The legislature, however, could not curb powers exercised under a prerogative (in this case the royal assent).<sup>25</sup>

In *Sachs v Dönges* the Appellate Division confirmed that questions concerning prerogatives were governed by principles in English law.<sup>26</sup> In *Sachs* the exercise of an executive prerogative power to issue passports was at issue.<sup>27</sup> Schreiner JA held that such an Act done by virtue of this prerogative is 'an Act done by the executive, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us'.<sup>28</sup> The court ruled

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Wiechers (n 19) 288-289; Carpenter *Introduction to South African constitutional law* (1987) 173-174. For the position in terms of ss 31-35 of the 1983 Constitution, see Rautenbach and Malherbe (n 5) 173; Carpenter 184-185.

<sup>21</sup>Bradley and Ewing (n 16) 65.

<sup>22</sup>In the late 18<sup>th</sup> century the question arose from exactly which point in time an Act becomes enforceable, eg immediately after the monarch assented to it and signed the Act or only after midnight on the next day. The issue was resolved by the Acts of Parliament (Commencement) Act 1793 and later the Interpretation Act 1978. In terms thereof a statute is deemed to enter into force beginning on the day on which royal assent is given if no other provision is made in terms of the Act itself. See Bradley and Ewing (n 16) 200.

<sup>23</sup>Parliament may give power to the government by Order of Council or to a minister by statutory instrument to specify when the Act, or different parts of it, will enter into force. See Bradley and Ewing (n 16) 200-201.

<sup>24</sup>In Britain there is no formal limit on the power of parliament to delegate legislative powers, including the power to determine the commencement of legislation, to the government. See Bradley and Ewing (n 16) 88, 201.

<sup>25</sup>In *Roberts v Hopwood* [1925] AC 578 (HL) 602 Lord Sumner held that '[e]xcept in the case of an exercise of power under the prerogative, a public authority has no powers other than those which have been conferred upon it by legislation'.

<sup>26</sup>*Sachs v Dönges* 1950 2 SA 256 (A) 288.

<sup>27</sup>Before 1955, the issue of passports fell entirely within the discretion of the executive, but it was no crime to leave the country without a passport. In 1954 the government refused to issue passports to 57 persons, mostly political activists. This did not prevent them from travelling to Great Britain and from there to Eastern Europe. Parliament then reacted by making a law in 1955 to make it a criminal offence to leave the country without a passport. If a person wanted to leave the country permanently, an 'exit permit' was to be issued. The person forfeited citizenship and became stateless. This was challenged by Sachs. For a discussion, see Dugard *Human rights and the South African legal order* (1978) 142, and 329.

<sup>28</sup>*Sachs v Dönges* (n 26) 306-307.

in favour of Sachs and held that a subject who had been granted a passport by the Crown could not be deprived of it by an executive revocation. Parliament was not allowed to curb prerogative powers with legislation. It is not clear why the courts later implied, with reference to *Sachs v Dönges*, that all former prerogative powers are executive in nature.<sup>29</sup> Thus, legislative as well as judicial prerogative powers were erroneously classified as executive in nature and had serious consequences for the separation of powers under the 1996 Constitution.<sup>30</sup>

The difficulty with delegating the legislative power to determine when an Act should enter into force to the executive is that it blurs the distinction between legislative and executive power.<sup>31</sup> The lack of systematisation of constitutional functions of state organs in Great Britain is largely due to the unjustified criticism by Dicey of the French and German systematisation of public law, in particular of administrative law, in the late 19<sup>th</sup> century.<sup>32</sup> However, by the mid-1950s British scholars voiced serious concern that so much legislative power has been delegated to the executive or has been left in its discretion that the latter was actually usurping the legislative power of parliament.<sup>33</sup>

The Interpretation Act affirmed the options for the commencement of legislation but contained some modifications of the common law. Section 13(1) of the Act determined that unless the legislature determines a specific date for commencement, a statute is deemed to enter into force upon publication.<sup>34</sup> From

<sup>29</sup>On the classification of prerogative powers, see (n 17).

<sup>30</sup>In *President v Hugo* 1997 4 SA 1 (CC) paras 11 and 17-24, Goldstone J on behalf of the majority incorrectly classified the former judicial prerogative of mercy as being executive in nature. For a critical assessment, see Wolf (n 17) 125 and further. In *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 36, Chaskalson P on behalf of the majority also implied – with reference to the *Sachs* judgment – that the former legislative prerogative to assent to legislation was ‘a discretionary power exercisable by the executive government’. In both these cases, the courts fell back on outdated prerogatives despite the fact that they intoned that in terms of the new Constitution these are ‘original powers’ – see (n 44).

<sup>31</sup>Such ‘subordinate legislation’, as executive regulations are referred to, implies a hierarchy of law-makers in which parliament ranks higher than executive law-makers instead of clearly demarcating legislative and executive powers. The delegation of power to make regulations in terms of a valid law should not be conflated with the adoption of such law by parliament.

<sup>32</sup>Dicey *The law of the Constitution* (1915) 326. For a discussion, see Künnecke *Tradition and change in administrative law: An Anglo-German comparison* (2007) 1-17, 92; and Arthurs ‘Rethinking administrative law: A slightly Dicey business’ (1979) *Osgoode Hall LJ* 1.

<sup>33</sup>See Schwartz *French administrative law and the common-law world* (1954) 20 n 4 referring to a book review by Robson in (1950) 21 *Political Quarterly* 411. Bradley and Ewing (n 16) 676 refer to a parliamentary committee concluded in 1996 that there is ‘too great a readiness in Parliament to delegate wide legislative powers to Ministers, and no lack of enthusiasm on their part to take such powers’.

<sup>34</sup>Sections 13(1) and 16A(2) of the Interpretation Act 33 of 1957. The latter provided that ‘any law so published shall be deemed to have come into operation on the day on which it was first so published as a law, unless some other day is fixed by or under that law for the commencement thereof’ (emphasis added). See Du Plessis (n 5) 18-19.

then on a statute commenced on the date of publication and no longer upon assent. The rationale was that provisions of an enactment must be made known to those that are expected to obey them.<sup>35</sup> The legislature could either use a 'delaying clause' to specify a later date for commencement than the date of publication, or it could specify a retrospective commencement date, but this option was restricted.<sup>36</sup>

Section 13(3) of the Act affirmed the delegation option but unlike British common law which left room for delegation to the executive to determine a commencement date after assent, the provision narrowed delegation down to the state president as head of state.<sup>37</sup> Since the state president was part of parliament, the fixing of such a commencement date remained a legislative power, but had to be distinguished from the assent as prerogative power. From a systematic point of view, this was certainly an improvement.

When the legislature cast the common law in a statutory format that adapts the common law, the statutory provisions replace the common law. Yet, although section 13(3) of the Interpretation Act only sanctioned delegation to the state president as head of state, Steyn CJ per implication reinstated the previous common law position in *S v Manelis* in that he extended the scope of section 13(1) in a very legalistic way.<sup>38</sup> A delegation of legislative power to the executive

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<sup>35</sup>See Steyn *Die uitleg van wette* (1981) 180-181.

<sup>36</sup>On the presumption against retrospectivity of legislation, see Du Plessis (n 5) 98-102.

<sup>37</sup>Section 13(3) of the Interpretation Act determined that: 'If any Act provides that an Act shall come into operation on a date fixed by the *State President* by proclamation in the *Gazette*, it shall be deemed that different dates may so be fixed in respect of different provisions of that Act' (emphasis added).

<sup>38</sup>1965 2 All SA 20 (A). The facts were as follows: A provincial council (legislative body) issued an ordinance in 1959 and determined that it should enter into force 'on a date fixed by the administrator' (executive head of the province). Section 91 of the 1910 Constitution determined that the administrator must publish an ordinance after the governor-general assented to it in terms of s 90 of the Constitution and that it takes effect upon publication. The administrator then fixed the date for commencement to be the same as the date of publication. *De facto* the ordinance therefore still entered into force on the date of publication, but the court *a quo* held that the administrator had signed the proclamation four days earlier and thus fixed the date before he had any authority to do so. In considering the interpretation of s 13(1), the court referred to s 14 of the Act and made the perplexing observation that it may be said 'that the section [ie, s 14] draws a distinction between the bringing into operation of a law and the commencement of a law' (23). This is obviously a legal obfuscation. Section 14 deals with powers conferred in terms of a law that was promulgated and which has entered into force in order to *implement* the law, eg appointing persons to offices, making regulations, issuing warrants or taking other forms of administrative action. In essence, this provision deals with how the executive or other bodies upon whom specific powers are conferred by law, should exercise these powers in order to implement legislation. It would also include measures in advance to ensure that everything is in place for an executive department to implement a law immediately upon taking effect. Unfortunately, the chief justice was more renowned for his legalistic interpretation of statutes than conceptual thinking on the basis of the separation of powers. He was a strong supporter of the doctrine of parliamentary sovereignty and in this spirit

to determine a commencement date for legislation as such was not explicitly discussed in the judgment.

The 1993 and 1996 Constitutions abolished parliamentary sovereignty and replaced that with the supremacy of the Constitution.<sup>39</sup> The systematisation of public law according to functions exercised by various state organs that are assigned to them by a constitution is a core element of the constitutional state model.<sup>40</sup> The separation of functions should not be conflated with a strict separation of officeholders in the separation of powers.<sup>41</sup> Since the new Constitution confers legislative power to determine the contents of legislation exclusively upon legislative bodies and precludes the Assembly explicitly from delegating legislative power to state organs other than legislative bodies, section 81 of the 1996 Constitution retained only the first two options for the commencement of legislation, that is, a date determined in a provision of a statute by the legislature or the date of publication.<sup>42</sup>

Section 13(3) of the Interpretation Act was amended in 1993 in anticipation of the constitutional transition. It appears, however, that the amendment act simply transferred all powers that were previously exercised by the state president to the president and provincial premiers and did not take the nature of specific powers into account.<sup>43</sup> Since the president and premier are executive organs in

concluded that 'it was obvious that Parliament intended the powers conferred by this section [ie, s 14(e)] to be wide and comprehensive' (24) and thus implicitly condoned the delegation of legislative power.

<sup>39</sup>Section 2 of the 1996 Constitution.

<sup>40</sup>See Blaau[w] 'The *Rechtsstaat* idea compared with the rule of law as a paradigm for protecting rights' (1990) 107 SALJ 78 at 80-81; Wolf 'The prosecuting discretion: A power under administrative law or criminal law' (2011) *J of SA Law* 703 at 706.

<sup>41</sup>Both in South Africa and in Germany, cabinet ministers are also members of parliament, but they exercise different constitutional functions. This distinction is not always clear in literature on the topic. See eg, O'Regan 'Checks and balances: Reflections on the doctrine of the separation of powers under the South African Constitution' (2005) 8(1) *PER* 120; Van Rensburg 'Die aard van die wetgewende diskresie by die Suid-Afrikaanse uitvoerende gesag' (2000) 3(2) *PER* 26.

<sup>42</sup>Section 64(2) of the Interim Constitution determined that a bill 'to which the President has assented and a copy of which he or she has signed, shall upon its *promulgation* be an Act of Parliament'. The provision obviously relied on promulgation though publication in terms of s 13(1) of the Interpretation Act. The provision itself did not explicitly specify that promulgation (commencement) coincided with the publication of an Act. The first part of s 81 of the 1996 Constitution clarified this. The remark of Rautenbach and Malherbe (n 5) 174 n 499 that it 'was wrong to elevate a mere administrative action performed in practice by officials of parliament and the government printer, to a constitutional requirement for valid law' in relation to s 64(2) misses the point and negates the relevance of the date of publication for legal certainty insofar as it pinpoints the commencement of a statute.

<sup>43</sup>Section 10(2) of General Law Third Amendment Act 129 of 1993 amended s 13(3) of the Interpretation Act to read as follows: 'If any Act provides that that Act shall come into operation on a date fixed by the State President by proclamation in the *Gazette*, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act'. Section 6 of Constitution

terms of the new constitution, the danger existed that a legislative power to determine when a statute should commence could be turned into an executive power. And exactly this happened.

The switching to a different constitutional system also affected the character of assent to legislation. It can no longer be said that assent is based on royal prerogatives as residual powers of a constitutional monarch as it was implied under the Westminster constitutions. The head of state is a democratically elected person that exercises functions assigned to that office in terms of the constitution.<sup>44</sup> With the assent to legislation the president certifies that a bill has become a law. The assent to a bill is therefore still part of the legislative *process*, but cannot be classified as a legislative *power* because the president no longer forms part of parliament.<sup>45</sup>

Section 79 of the 1996 Constitution regulates assent to a bill in detail: The president must either assent to and sign a bill passed by the National Assembly or, if the president has reservations about the constitutionality of the bill, refer it back to the Assembly for reconsideration.<sup>46</sup> If, after reconsideration, a bill fully accommodates the president's reservations, the president must assent to and sign the bill; if not, the president must either assent to and sign the bill; or refer it to the Constitutional Court for a decision on its constitutionality.<sup>47</sup> The president may refer to the court only those aspects of the bill, which he referred back to the Assembly for reconsideration.<sup>48</sup> If the Constitutional Court decides that the bill is constitutional, the president must assent to and sign it.<sup>49</sup> Section 79 of the Constitution has in fact been drafted very well from a constitutional law perspective for it avoids a situation where the function of assenting to legislation

Consequential Amendments Act 201 of 1993 replaced the reference to the 'State President' with 'President or the Premier of a province' in lieu of the Constitution of the Republic of South Africa 200 of 1993 (interim Constitution) entering into force in April 1994. The new version of the provision now determined that if an Act should come into operation 'on a date fixed by the President or the Premier of a province by proclamation in the *Gazette*, it shall be deemed that different dates may so be fixed in respect of different provisions of the Act'.

<sup>44</sup>The Constitutional Court confirmed that regardless of the historical origins of the former royal prerogatives these powers are now 'original' presidential powers by virtue of being listed in s 84 of the 1996 Constitution, since the Constitution 'proclaims its own supremacy' – see *In re Certification of the Constitution of the RSA* 1996 1996 4 SA 744 (CC) para 116; *President v Hugo* (n 30) para 13; and *Minister of Justice v Chonco* 2010 1 SACR 325 (CC) para 30.

<sup>45</sup>Sections 36 and 37 of the 1993 Constitution; s 87 read with s 42(1) of the 1996 Constitution.

<sup>46</sup>Section 79(1) of the 1996 Constitution.

<sup>47</sup>*Id* s 79(4).

<sup>48</sup>In the *Ex parte President of the RSA: In re: Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) paras 11-20, it was held that the court's function upon referral is restricted to a consideration of the president's reservations and that it is not called upon to adjudicate on the constitutionality of the Bill in its entirety.

<sup>49</sup>Section 79(5) of the Constitution.

could be exercised in such a way that that would be tantamount to a constitutional review of legislation.<sup>50</sup>

From the wording of section 79 it is clear that the president has no veto right of legislation. If parliament would therefore leave it in the discretion of the president as head of state, who doubles as head of the executive, to put legislation into force, he could *de facto* veto legislation by delaying to put legislation in force as long as it suits the executive or even indefinitely. Such a leeway could also be used to cherry pick which provisions should enter into force and which not. The notion that parliament may delegate its powers to the president to determine a commencement date at a later stage after publication also contradicts the clear obligation in section 81 that the president must ensure that an Act is 'published promptly' to ensure its speedy commencement.

The certification of a bill as law by the head of state serves the following purposes:

- it validates that the text of the copy of the bill, which has been signed, is exactly the same as the text of the bill that was passed by parliament (authenticity);
- it confirms that the president has made sure that the Act was adopted according to the prescribed procedures and in accordance with constitutional norms (legality); and
- it has a representative and democratic integrating function insofar as the head of state incorporates the law as symbol of democratic decision-making by the elected representatives of the people and signals that all differences

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<sup>50</sup>If one compares the detailed prescription exactly how the president should deal with a situation where he has reservations about the constitutionality of a bill with art 82(1) of the German *Grundgesetz* a number of difficulties that could arise has been very effectively avoided. The German provision specifies that 'laws enacted in accordance with the provisions of the Constitution shall be certified by the Federal President'. There is no other article in the German constitution where the exact meaning of the provision is more hotly debated. The difficulty is that the federal president must certify legislation but may not exercise this function in a way that would be tantamount to a constitutional review of legislation. He may obviously not usurp judicial functions. The question therefore is whether this phrase should be interpreted as only conferring a competency on the head of state to examine whether a bill has been adopted in accordance with the correct procedure (procedural constitutionality) or whether he may also examine whether a bill is in conformity with constitutional norms (substantive constitutionality). Most scholars argue that the head of state (the federal president) may only consider the procedural constitutionality of a bill, but even opponents of the view that he may not consider the substantive constitutionality of a bill agree that the president has the duty not to certify legislation when a bill is obviously unconstitutional (eg, if it abolishes a fundamental right). For a discussion of the different views, see Maurer (n 5) 553-559. Although this topic is hotly debated in academic circles, it has actually caused very few difficulties in practice.

they might have had during the deliberation of the Act, has been concluded and that the law is becoming part of the legal order of the country.<sup>51</sup>

The certification thus creates a rebuttable presumption that the law is authentic and legal. This implies that the constitutionality of the Act or specific provisions can still be challenged at a later stage, but remains valid until declared unconstitutional.<sup>52</sup>

### 3.4 *Promulgation through publication*

The publication is the final stage in the legislative process and signifies the commencement date of legislation, unless the legislature has determined another date. The commencement date of legislation is of great importance for the rule of law and legal certainty. There should be clarity about the precise date when an Act becomes enforceable and legally binding. As it was pointed out, the president is obliged to publish legislation promptly so that it can enter into force speedily.

## 4 Interpretation of section 81 of the Constitution by the courts

The following part will show how the courts slowly reintroduced Westminster common law to permit a delegation of legislative power to determine a commencement date for legislation. The courts tended to focus on section 81 in isolation instead of considering its inter-relation with other provisions. By the time that the Constitutional Court started to apply a harmonious interpretation of various provisions of the Constitution the damage was done. A harmonious interpretation of constitutional provisions is a well-established rule in German constitutional interpretation,<sup>53</sup> which the South African Constitutional Court

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<sup>51</sup>Maurer (n 5) 552.

<sup>52</sup>Section 35(2) of the 1993 Interim Constitution contained an explicit presumption of constitutionality of legislation adopted by parliament. See De Waal 'A comparative analysis of the provisions of German origin in the interim Bill of Rights' (1995) 1 *SAJHR* 1 at 17, who points out that the presumption of constitutionality requires the court to favour the constitutional alternative in situations where more than one construction of a statute is possible. One could argue that such a presumption of constitutionality is also implicit to s 39 read with s 167(4) and (5) of the 1996 Constitution.

<sup>53</sup>For a discussion, see Ehmke 'Prinzipien der Verfassungsinterpretation' in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1963) 53 at 77; Hesse *Grundzüge des Verfassungsrechts* (1999) 11; Müller *Einheit der Verfassung* (1979) 225; Müller *Juristische Methodik* (1997) 257-61; Müller 'Basic questions of constitutional concretisation' (1999) 10(3) *Stellenbosch Law Review* 269-283.

endorsed in 2007.<sup>54</sup> It implies that a specific provision may not be interpreted in isolation, but must be interpreted in the light of other provisions that co-influence a specific aspect of the Constitution.

#### 4.1 *Revival of the delegation of legislative power in terms of Westminster common law*

The Constitutional Court's judgment in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* was central to the revival of Westminster common law on the delegation of legislative power to determine when an enactment should come into force.<sup>55</sup> The facts were briefly that Parliament adopted a statute that consolidated two statutes. The new Act was published on 18 December 1998, but contained a provision which determined that it 'comes into operation on a date determined by the President'.<sup>56</sup> On 30 April 1999, the president issued a proclamation to put the Act into force.<sup>57</sup> The scheduling of medicines for human and animal use and the making of other regulations was an essential component of the regulatory system established by the Act. The new Act, however, repealed the existing regulatory system before

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<sup>54</sup>In *Matatiele Municipality v President of the RSA* 2007 6 SA 477 (CC) para 36, Ngcobo J quoted a judgment of the German Federal Constitutional Court (BVerfGE 1, 14) and held that: 'Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it "has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate". Individual provisions of the Constitution cannot therefore be considered and construed in isolation. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole'. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 55, the Constitutional Court endorsed the view that 'constitutional rights are mutually interrelated and interdependent and form a single constitutional value system'. In *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 63-64, the court reaffirmed that: 'These values are not mutually exclusive but enhance and reinforce each other'.

<sup>55</sup>*Pharmaceutical Manufacturers Association* (n 30).

<sup>56</sup>Section 55 of the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998. Before the passing of the Act, the registration and control of medicine for human and animal use were governed by the Medicines and Related Substances Control Act, 101 of 1965. The registration and control of agricultural substances and stock remedies were governed by the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 36 of 1947 (the Stock Remedies Act). The 1998 Act repealed all but a few provisions of the 1965 Act, and made material amendments to the Stock Remedies Act. The Act provides that the manufacture, sale and possession of medicines for human and animal use should be controlled through a system of scheduling substances and regulating the manufacture, the sale and possession of substances in the various schedules.

<sup>57</sup>Proclamation 49 in GG 20024 of 1999-04-30.



regulations were issued in terms of the new Act and thus created a legal *lacuna*.<sup>58</sup> On 7 May 1999, the minister purported to provide new schedules to the Act by way of regulation, but other essential regulations contemplated by the Act had not been made.<sup>59</sup> Concerned to avoid the consequences of bringing the Act into force prematurely, the applicants lodged an urgent application with the High Court for an order declaring that the proclamation and the government notice were invalid.

Fabricius AJ dismissed the application and held that the president acted within his powers and the fact that he had prematurely put the legislation in force on the basis of incorrect advice was not sufficient cause for reviewing the president's decision.<sup>60</sup>

On appeal, a full bench of the Transvaal High Court reversed the decision of Fabricius AJ, and held that that proclamation was null and void and of no force or effect. The court at first offered the following sound argument:<sup>61</sup>

Legislative power, which includes the power to determine when the particular measure should come into operation, is conferred by the Constitution upon Parliament and not upon the President, whether as the head of State or as head of the Executive. In terms of section 81 of the Constitution, a Bill assented to and signed by the President thereby becomes an Act of Parliament, which must be 'published promptly' and it takes effect 'when published or on a date determined in terms of the Act'. *It thus lies within the constitutional power of Parliament, and not the constitutional power of the President (whether as head of State or as head of the Executive), to determine when enactments should take effect. If Parliament says nothing at all on the subject in any particular case, then, by default, the enactment will take effect upon publication* (emphasis added).

The court then proceeded to postulate the scenario that parliament may determine, whether by specifying a particular date 'or providing a mechanism for that date to be fixed', some other date upon which the enactment should take effect.<sup>62</sup>

Often, as in the present case, administrative preparations are required to be made as a prerequisite to bringing the legislation into effect *and it is best left to the*

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<sup>58</sup>The medical substances regulated were listed in Schedules 1-9 of the 1965 Act which run over 30 pages. The schedules underpinned the prohibition of the sale, possession or use, *inter alia* of very poisonous substances. The 1965 Act was essential to protect the welfare of the public and to prevent the trading of dangerous substances in uncontrolled circumstances. For detail, see *Pharmaceutical Manufacturers Association* (n 30) paras 61-63.

<sup>59</sup>General Notice R 567 in GG 20025 of 1999-05-07.

<sup>60</sup>*Pharmaceutical Manufacturers Association* (n 30) paras 8-10.

<sup>61</sup>*Pharmaceutical Manufacturers Association of SA In re: Ex parte President of the Republic of South Africa* 1999 4 SA 788 (T) at 796G-I.

<sup>62</sup>Cited in *Pharmaceutical Manufacturers Association* (n 30) para 12.

*executive branch of government to determine when the appropriate time has arrived.* In the constitutional structure of this country it is the President, as the head of the executive branch of government, who is the appropriate person to whom to delegate that power. However, the power that he exercises in that regard is *one that is delegated to him by Parliament and not one that is conferred upon him by the Constitution.* *In casu*, such delegation was done through section 55 of Act 132 of 1998 (emphasis added).

The court cited the judgments of Lord Sumner in *Roberts v Hopwood* in the House of Lords and of the South African Appellate Division in *Mustapha v Receiver of Revenue, Lichtenburg* which do not deal with delegation of legislative power to determine the commencement date of legislation, in support of its reasoning.<sup>63</sup> The court then concluded that 'it was beyond doubt that the legislature could not have intended the president to exercise the discretion to put the legislation in force at least until such time as the Act was capable of being given effect to'.<sup>64</sup> Along this route the court revived the third option of Westminster common law on the commencement of legislation to allow a delegation of legislative power to the executive.

The court compromised the Constitution insofar as it mandated a delegation of legislative power to the president in contravention of section 44(1)(a)(iii) of the Constitution. The matter could easily have been resolved if the court ruled that section 55 of the Act was unconstitutional because it was in conflict with a constitutional norm. The legislature could also have prevented a legal *lacuna* in that it determined that the existing regulatory system should remain in force until it is replaced by new regulations or parliament itself should have drafted the schedules with the aid of experts in the field to be ready for implementation upon promulgation.

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<sup>63</sup> *Pharmaceutical Manufacturers Association* (n 28) para 13. *Roberts v Hopwood* [1925] AC 578 (HL) dealt with the exercise of prerogative powers and to what extent the exercise of such discretionary powers was justiciable – not with the delegation of (ordinary) legislative power (see (n 25)). It is also odd that the court should have cited the *Mustapha* judgment to interpret a highly complex modern constitution: the systematisation of public law was so rudimentary in 1958 that administrative law was conflated with contract law. The case also did not deal with the delegation of legislative power to determine the commencement of an Act. It concerned an Act that regulated the administration of 'Crown land' held in the SA Native Trust for the benefit and exclusive use of 'natives' (Africans). Crown land fell in the domain of the prerogative powers that were to be exercised by the governor-general – see *Carpenter* (n 20) 173. The Act empowered the governor-general to make regulations for the administration of trust land, *inter alia* relating to the occupation of trust land for trading purposes by 'non-natives'. The minister to whom the exercise of powers were delegated, terminated a permit (which the courts regarded as a 'contract based on statutory powers') that was granted to an Indian solely on the basis of race. The court held that the regulations did not permit the minister to terminate a permit, once given to an Asian, solely on the basis of being non-white since the power to terminate the permit rests upon no provision that expressly or impliedly authorises its exercise by way of racial discrimination. See *Mustapha v Receiver of Revenue, Lichtenburg* [1958] 3 All SA 303 (A) 307.

<sup>64</sup> *Pharmaceutical Manufacturers Association* (n 30) para 13.

The matter was then referred to the Constitutional Court in terms of section 172 of the Constitution as it concerned the constitutional validity of an Act. In considering the matter, the court emphasised that the new constitutional system that was introduced in 1994 was a legal watershed: 'It shifted constitutionalism, and with it all aspects of public law, from the realm of the common law to the prescripts of a written constitution which is the supreme law'.<sup>65</sup>

The Constitutional Court agreed with the order of the full bench but followed a slightly different reasoning.<sup>66</sup> The court based its judgment on its power under section 173 of the Constitution 'to develop constitutional common law, taking into account the interests of justice'.<sup>67</sup> The rationale behind this provision is to fill possible gaps in the Constitution but it does not permit the Court to replace clear provisions with a different content.<sup>68</sup> Without a single reference to the nature of legislative power in terms of sections 43 and 44 of the Constitution, including the explicit prohibition to assign legislative power to other branches of state power, and a clear regulation in terms of section 81 on the commencement date of legislation, the court proceeded to 'develop' (or rather to revive defunct Westminster) common law on the commencement of legislation.

Chaskalson P cited numerous judgments of courts in Westminster systems dealing with the delegation of legislative power. In the absence of a clear statutory regulation to the contrary, these courts were reluctant to interfere in the legislative process.<sup>69</sup> The court further relied on the unfortunate judgment in *S v Manelis* in support of the delegation of legislative power to the president to determine a commencement date for legislation.<sup>70</sup> In Westminster systems such delegation is justified on the basis of the doctrine of parliamentary sovereignty.<sup>71</sup> Yet the

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<sup>65</sup> *Id* para 45.

<sup>66</sup> *Id* para 59.

<sup>67</sup> *Id* para 46.

<sup>68</sup> The Constitutional Court is bound by the Constitution as the supreme law of the land and is obliged to give effect to its provision in terms of ss 1(c) and 2 read with s 165(2) of the Constitution. See also *Pharmaceutical Manufacturers Association* (n 30) para 49 where the Constitutional Court held that common law supplements the provisions of the written Constitution but derives its force from it and must be developed 'within the framework of the Constitution consistently with the basic norms of the legal order that it establishes'.

<sup>69</sup> *Id* paras 71-77. The court cited *R v Secretary of State for the Home Department ex parte Fire Brigade Union* [1995] 2 AC 513 (HL); *AK Roy v Union of India* (1982) 1 SCC 271 para 51. In the latter case, the government refused to put legislative amendments into force two and a half years after the statutes were adopted by parliament and for all practical purposes vetoed the legislation by indefinitely postponing its commencement.

<sup>70</sup> *Id* paras 76 and 78. Although Chaskalson P referred to s 14 of the Interpretation Act (para 66) on which Steyn CJ based his extensive interpretation of s 13(1) of the Act, he did not reason that the delegation of legislation to the president is based on s 13(3) of the Interpretation Act. On the *Manelis* judgment, see (n 38).

<sup>71</sup> (N 24).

court stated that the 1996 Constitution 'expressly rejects the doctrine of the supremacy of parliament'.<sup>72</sup> In conclusion, Chaskalson P maintained:<sup>73</sup>

The power [to put legislation into force] is derived from legislation and is *close to the administrative process*. In my view, however, the decision to bring the law into operation *did not constitute administrative action*. When he purported to exercise the power the President was *neither making the law, nor administering it*. Parliament had made the law, and the executive would administer it once it had been brought into force. *The power vested in the President thus lies between the law making process and the administrative process*. The exercise of that power requires a *political judgment* as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. *In substance the exercise of the power is closer to the legislative process than the administrative process*. If regard is had to the nature and subject matter of the power, and the considerations referred to above, *it would be wrong to characterise the President's decision to bring the law into operation as administrative action . . . .* It was, however, the exercise of public power which *had to be carried out lawfully and consistently with the provisions of the Constitution* in so far as they may be applicable to the exercise of such power (emphasis added).

The court negated that section 81 contains a procedural as well as a substantive norm. The only power which this provision confers upon the president is the prompt publication of the Act to promulgate it. The legislative process is concluded once the statute is published. This is a function of the head of state. The second part of the provision contains a substantive norm about the commencement date as part of the contents of a statute. The 'political judgment' as to when the legislation should be brought into force is a power of the members of parliament, not the head of state. They decide by majority vote whether an Act should enter into force on a specific date or upon promulgation when they adopt legislation.<sup>74</sup>

The court's positioning of the power to put legislation into force as 'close to the administrative process' but 'still closer to the legislative process' is confusing to say the least. The reference to an 'administrative process' creates the impression that the executive is somehow involved in putting legislation into force. In terms of the Constitution, however, the role of the executive in the legislative process is restricted to the initiation of legislation. Cabinet members may obviously participate in the deliberation of legislation because they are members of parliament. They also vote on the adoption of legislation, but do so in their

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<sup>72</sup>*Pharmaceutical Manufacturers Association* (n 30) para 40.

<sup>73</sup>*Id* para 79.

<sup>74</sup>Section 53 of the Constitution.

capacity as members of parliament. The president is not a member of parliament and may also not vote on legislation.<sup>75</sup>

The court seems to have difficulties to distinguish between legislative power and different kinds of executive functions. The determining of the commencement date of legislation does not have anything to do with what the court referred to as an 'administrative process': it is neither an executive function nor an administrative act.<sup>76</sup> Before a minister could issue regulations in terms of such an Act, the Act must first be promulgated because the legality of regulations depends on valid law empowering the minister to issue such regulations. Administrative action also has to be taken in terms of a valid Act. The latter powers are exercised in terms of sections 85 and 101 and not in terms of sections 43 and 44 of the Constitution.

#### ***4.2 Incorporating the revived Westminster common law on delegating legislative power as part of section 123 of the Constitution (provincial legislation)***

In *In re: The Constitutionality of the Mpumalanga Petitions Bill, 2000*,<sup>77</sup> the delegation of the power to put parliamentary legislation into force was again at issue. The Constitutional Court had to decide whether the provincial parliament of Mpumalanga may confer the power on the speaker to fix a date on which the Act is to come into operation under section 123 of the Constitution. This provision is the counterpart of section 81 in the provincial sphere and contains exactly the same substantive norms on the commencement date of legislation, that is that an Act 'takes effect when published or on a date determined in terms of the Act'. The province's premier contended that the provision was in breach of the doctrine of separation of powers 'as the power to fix the date of the coming into operation of an Act is one conveniently performed by a member of the executive only, usually the President or a provincial Premier'.<sup>78</sup>

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<sup>75</sup>Sections 54 and 87 of the Constitution.

<sup>76</sup>The term 'administrative process' is ambivalent: does it refer to the exercise of executive power, eg the making of generally applicable regulations in terms of an enabling statute, or to administrative action? In the first instance, such action would require a statute that has validly entered into force. This does not have anything to do with the commencement of legislation. The court's view that a minister could already make regulations in terms of such an Act before the Act is promulgated (*Pharmaceutical Manufacturers Association* (n 30) paras 66-67), is not allowed in a constitutional state because the legality of regulations depends on valid law empowering the minister to issue such regulations. 'Administrative action', again, refers to a collection of measures that are taken in the course of exercising executive power in terms of generally applicable law in the individual instance that has a direct external effect in relation to the addressee for the measure to be legally binding and enforceable.

<sup>77</sup>2002 1 SA 447 (CC).

<sup>78</sup>*Id* para 21.

Langa DP endorsed the view of the Transvaal full bench in *Pharmaceutical Manufacturers Association*.<sup>79</sup> Yet, whereas the latter court reasoned that the justification for the delegation of legislative power by the assembly cannot be inferred from section 81 and is based on common law, Langa DP held that ‘the power conferred on the legislature *by the Constitution* is a special one which enables the legislature to appoint a functionary to determine when the law comes into force’.<sup>80</sup> The purpose of such delegation, according to the court, is ‘to delay the operation of the legislation to enable the necessary steps to be taken in order to make the legislation effective before the law comes into force’.

The court cited Chaskalson P’s view that power to put legislation into force ‘lies between law-making and administration’ and stated that the functionary best placed to make such determination is ordinarily the head of the executive responsible for the implementation of the legislation. There is, however, ‘no provision of the Constitution that requires that it be the President or the Premier’. Hence, the choice of the person is left to the legislature.<sup>81</sup> In conclusion, the court dealt with the doctrine of the separation of powers and conventions in relation to the powers conferred on the speaker. The court espoused the view that the allocation of powers to the speaker to determine the commencement date of the statute does not implicate the doctrine of separation of powers.<sup>82</sup>

The court did not cite any provision to support the claim that the Constitution mandates a delegation of legislative power and overlooked section 44(1)(a)(iii). Section 123 does not deal with a delegation of legislative powers. In terms of this provision, the premier has only one procedural function to execute, namely the prompt publication of an Act. If a provincial parliament wants to delay the commencement of an Act, it should state a future date or hold the bill back until everything is in place for its commencement. A provincial parliament may also not single out one of its members to determine a commencement date after the bill was adopted. The passing of an Act of Parliament is done collectively by majority vote of the members of parliament.

#### ***4.3 Incorporating the delegation of legislative power to determine a commencement date as part of section 81***

In *Ex Parte Minister of Safety and Security: In re: S v Walters* the Constitutional Court took matters one step further and now also found that section 81 mandates the delegation of legislative power to determine a commencement date.<sup>83</sup>

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<sup>79</sup>*Id* para 22.

<sup>80</sup>*Id* para 23.

<sup>81</sup>*Ibid*.

<sup>82</sup>*Id* para 25.

<sup>83</sup>2002 4 SA 613 (CC).

The case started with a murder trial before the High Court at Umtata. The prosecution arose from a shooting incident one night in February 1999 when the two accused shot at and wounded a burglar fleeing from their bakery. One or more of the burglar's wounds proved fatal, resulting in the murder charge to which the defence raised exculpatory provisions of section 49(2) of the Criminal Procedure Act 51 of 1977.<sup>84</sup> The presiding judge held that the section was inconsistent with the Constitution and infringed several fundamental rights.<sup>85</sup>

The impugned provision was already amended by parliament in October 1998. The Amendment Act was assented to by the president on 20 November 1998 and published on 11 December 1998.<sup>86</sup> However, a section of the Amendment Act determined that the Act 'comes into operation on a date fixed by the President by proclamation in the *Gazette*'.<sup>87</sup> Due to the delegation of the power to the president to put the Act into operation, the Act had not yet taken effect when the shooting occurred in February 1999 and could not be invoked against the accused.<sup>88</sup>

At a meeting on 23 April 1999 the Minister of Safety and Security and the Minister of Justice agreed that promulgation should be kept in abeyance to enable police training to take place. Pursuant to an agreement reached at a meeting between these two ministers, the president was advised towards the end of June 2000 to implement the provisions with effect from 1 August 2000. On 30 June 2000 the president signed a proclamation fixing 1 August 2000 as the date on which sections 7 and 8 of the Amendment Act would come into operation. On 27 July 2000 Acting President Zuma wrote to the justice minister, informing him that the SAPS were 'not in a position to give effect to the provisions of the amended section', and that the implementation would be delayed. The Department of Justice continued pressing for implementation, but the president declined to publish the proclamation so that the legislation could be implemented. A year later the Minister of Safety and Security and the SAPS proposed that the amendment should be referred back to parliament for revision. The minister thus required that promulgated legislation should be revised before he would be willing to implement it. This caused the Minister of Justice to write to his colleague on 30 May 2001, stating among other things:<sup>89</sup>

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<sup>84</sup>Section 49(2) of Act 51 of 1977 determined that when a person is to be arrested and the person who is authorised to execute the arrest '... cannot arrest him or prevent him from fleeing by other means than killing him, the killing shall be deemed to be justifiable homicide'.

<sup>85</sup>*In re: S v Walters* (n 83) para 11.

<sup>86</sup>Notice No 1636 in GG no 19590 of 1998-12-11.

<sup>87</sup>Section 16 of the Judicial Matters Second Amendment Act 122 of 1998.

<sup>88</sup>*In re: S v Walters* (n 83) paras 14, 68.

<sup>89</sup>*Id* para 68.

As you are aware the Amendment Act, which reflects the will of Parliament and to which effect should be given, was placed on the Statute Book during December 1998. After more than two years the sections dealing with the use of force during arrest have not yet commenced. The situation has become untenable and it is increasingly difficult for me to account for the long delay.

In practice it became clear that the delegation of legislative power to the president to determine the commencement of law was exploited to delay the implementation of legislation and was affecting the oversight functions of parliament.

The court found that there are 'two possible inception dates' in terms of section 81 of the Constitution, but proceeded with the claim that a statute commences 'either upon its publication or on another date determined in the Act itself or *in a manner it prescribes*'.<sup>90</sup> The court in fact added a third option which is not mandated by the provision:<sup>91</sup>

Although the Constitution does not expressly say so, it is clear that this power vested in Parliament to include in an enactment terms for determining its date of inception, includes the power to prescribe that such date is to be determined by the President. The language of section 81 is wide enough to allow such a procedure and there is no objection in principle to a legislature, in the exercise of its legislative powers, leaving the determination of an ancillary feature such as an inception date to an appropriate person. It is therefore recognised legislative practice to use this useful mechanism to achieve proper timing for the commencement of new statutory provisions. Accordingly this Court has twice accepted the existence and constitutional propriety of the practice without comment.

Whereas the Constitutional Court in *Pharmaceutical Manufacturers Association* still maintained that such a delegation of legislative power was based on (Westminster) common law and cannot be inferred from section 81, the court now reasoned that such an interpretation was implicit to section 81. Needless to say, this court again ignored the prohibition of such delegation by section 44(1)(a)(iii) of the Constitution.

The contention that 'the language of section 81 is wide enough to allow such a procedure' is controversial: the two commencement options do not concern legislative procedure, but are substantive norms on the content of legislation. It can hardly be said that the commencement of legislation is merely an 'ancillary feature'. Clarity on when legislation enters into force is a prerequisite for legal certainty and the rule of law.

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<sup>90</sup>*In re: S v Walters* (n 83) para 70.

<sup>91</sup>*Id* para 71.



It is more than ironic that the court, after condoning the unconstitutional delegation of legislative power which made the way free for the executive to delay the implementation of legislation, then concluded that a procrastination by the president to put legislation in force 'could not lawfully be used to veto or otherwise block its implementation'.<sup>92</sup> Yet, the executive was doing exactly that.

#### 4.4 *Turning legislative power to adopt legislation into an executive power contemplated under sections 85 and 101 of the Constitution*

The next case to consider section 81 was *Kruger v The President*.<sup>93</sup> In this case the president issued a proclamation to bring certain provisions of an Amendment Act into force, and then amended the proclamation to bring other provisions first into force before the first proclamation took effect.<sup>94</sup> The court concluded that both proclamations were invalid: the first proclamation was held to be objectively irrational and invalid under the doctrine of objective invalidity,<sup>95</sup> whereas the second one was invalid because it attempted to amend the first one and did not specify a commencement date. The doctrine of incorporation could not be applied since the first proclamation was a nullity.<sup>96</sup>

On the issue of whether the legislature could authorise the president to fix a date on which an Act of Parliament should come into operation, Skweyiya J, on behalf of the majority, relied on the previous judgments of the Constitutional Court, again ignoring the prohibition to delegate legislative power to the executive.<sup>97</sup> The court maintained that the proclamations which put the legislation into force were 'intended to be a step in the *legislative process*',<sup>98</sup> which is correct. This court too uncritically endorsed Chaskalson P's view that the power of the president to bring law into operation is 'a power which lies *between* the law-making and the administrative process'.<sup>99</sup>

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<sup>92</sup>*Id* para 73.

<sup>93</sup>2009 1 SA 417 (CC).

<sup>94</sup>The Road Accident Fund Act 56 of 1996 was amended by Act 19 of 2005. Section 13 of the Amendment Act specified that the Act 'takes effect on a date determined by the president by proclamation'. The President issued Proc R27/2006 on 2006-07-11 to put ss 4, 6, 10, 11, and 12 of the Act into force. This proclamation was published on 19 July 2006 and should enter into force on 31 July 2006. The president then realised that he made a mistake and that ss 1-5 should first enter into force and thus issued a second proclamation to correct this. This was Proc R32/2006 which was issued on 28 July 2006, published on 2006-07-31 and took force on the same date.

<sup>95</sup>*Kruger v The President* (n 93) paras 52-54. In order to declare these proclamations invalid, the court invoked rules that were formulated previously in judgments that concerned the constitutionality of legislation in rebuttal of their assumed validity and constitutionality after they entered into force.

<sup>96</sup>*Id* paras 61-68.

<sup>97</sup>*Id* paras 9-11.

<sup>98</sup>*Id* paras 11 and 13.

<sup>99</sup>See (n 73).

The court then boldly introduced a new *scenario*, namely that parliamentary legislation should be put into force *by way of executive action* envisaged under section 85 of the Constitution.<sup>100</sup> The court relied on the problematic section 13(3) of the Interpretation Act, which turned a legislative power into an executive power in 1993.<sup>101</sup> Section 85, however, lists the executive powers of the cabinet: it includes the power to initiate legislation as part of the *legislative process*, but it does not encompass *legislative power* as envisaged by sections 43 and 44 of the Constitution to adopt legislation or to determine when it should enter into force. The question is, whether the court now implies that the power of the legislature to determine a commencement date in the Act itself would be defunct. A core legislative power cannot be executive in nature at the same time.

The court also failed to distinguish powers which the president exercises as head of state from powers he exercises as head of the executive. The signing of a bill and publication of an Act are powers that are exercised by the head of state in terms of sections 79, 81 and 84(2). Sections 85 and 101 of the Constitution are not applicable in relation to the promulgation and commencement of legislation. Yet, the court argued that legislation could be put into force in terms of section 101 of the Constitution.<sup>102</sup> The latter provision prescribes how executive powers should be exercised. In terms of this judgment, it would now be possible for the executive to issue an ordinary regulation, which usually requires an empowering provision in terms of an enabling statute, to put legislation that should confer such powers, into force. With this step, the delineation of legislative power and executive power has been blurred completely.

## 5 Implications for legal certainty and the rule of law

The way in which the Constitutional Court has interpreted section 81 to justify a delegation of legislative power to the executive to determine when a statute should enter into force has serious implications for the rule of law and constitutionalism:

- It blurs the constitutional separation of powers, which is one of the core elements of the formal concept of a constitutional state,<sup>103</sup> and it seriously impedes the oversight functions of parliament to ensure the prompt implementation of legislation by the executive.

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<sup>100</sup>*Kruger v The President* (n T93) paras 5-6 and n 5.

<sup>101</sup>*Id* para 9 n 8.

<sup>102</sup>*Id* para 5.

<sup>103</sup>See *Blaau[w]* (n 40) 81 point (a).

- It creates an artificial 'hiatus period' between the date when a statute should enter into force upon promulgation if no commencement date is specified by the legislature in the Act itself and the date when the president as head of the executive decides when it is opportune to put a law into force.<sup>104</sup> This affects the right to equal treatment because law that should apply from the date of its publication is not enforced from that date. Thus, crimes that should have been prosecuted cannot be prosecuted and legal rights that could have been claimed are blocked by the unconstitutional postponing of the commencement date.<sup>105</sup> This could seriously compromise trust in the legal system.<sup>106</sup>
- In practice, the delayed and piecemeal way in which statutes are put into force impedes legal certainty. Legal practitioners and academics must now first trace presidential proclamations – often scattered over years – to clarify whether and which parts of a law have been put into operation. In *Derby-Lewis Van der Merwe J* pointedly referred to the difficulties to gain an overview of the law in force and complained that the Correctional Services Act 'has become a labyrinth where one can easily lose one's way'.<sup>107</sup>
- The notion of legality of statutory law as premises upon which the rule of law rests in a constitutional state implies that the legislature itself is bound by legislation it adopted until it has been repealed or amended.<sup>108</sup> Yet, it happened that legislation that was duly adopted by parliament was never put into force and was eventually 'repealed' before it even commenced.<sup>109</sup>

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<sup>104</sup>See eg, *Ingledeu v The Financial Services Board* 2003 4 SA 584 (CC) para 36; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).

<sup>105</sup>Section 1(c) read with ss 3 and 9 of the Constitution.

<sup>106</sup>This is one of the formal elements of a constitutional state concept – see Blaau[w] (n 40) 81 point (g).

<sup>107</sup>2009 6 SA 205 (GNP) 213.

<sup>108</sup>This is one of the formal elements of a constitutional state concept – see Blaau[w] (n 40) 81 point (b).

<sup>109</sup>The Correctional Services Act 111 of 1998 was amended by the Correctional Services Amendment Act 25 of 2008. Section 87 of the Act left it to the president to determine when the amendments should enter into force. He issued an *executive regulation* (Regulation no 9159 published in Notice 68 of GG no 32608 of 2009-10-09) to put the provisions of the Amendment Act *retroactively* into force as from 16 September 2009, although retroactivity of criminal law is explicitly prohibited in the Bill of Rights (see (n 5)). Sections 21, 48 and 49 of the Amendment Act were excluded from entering into force. In 2011, the principal Act was again amended and once again the president cherry-picked which provisions will enter into force and which not. A new s 73 'replaced' the version contemplated by ss 48 and 49 of the 2008 Amendment Act, without the latter having entered into force, although this legislation was formally adopted by parliament.

It also happened that the president put criminal law retroactively into force in contravention of the bill of rights.<sup>110</sup> This compromised the predictability of state action.<sup>111</sup>

## 6 Conclusion

A strong case can be made out that the Constitutional Court's interpretation of section 81 is in conflict with several provisions of the Constitution. The main reason for this is that the court interpreted this provision in isolation and not in the broader context of sections 43, 44(1), 55(2)(b)(i), 79, 81, 84(2) and 87 of the Constitution. The court later endorsed a harmonious interpretation of constitutional norms, but at that stage the damage was done. In none of the relevant judgments did the court even aver the explicit prohibition of the delegation of the legislative power by the Constitution in section 44(1)(a)(iii). In the chain of judgments, the court reintroduced Westminster common law on the delegation of legislative power to state organs other than legislative bodies in its interpretation of section 81. Such delegation was based on the doctrine of parliamentary sovereignty, but as the court itself noted, this doctrine is no longer compatible with the constitutional separation of powers. Currently, it endorses the untenable position that the legislative power to determine a commencement date for legislation is an executive power to be exercised under sections 85 and 101 of the Constitution.

Prominent judges of the Constitutional Court recently lamented that too much power is centred in the hands of the executive.<sup>112</sup> Yet, the court has also contributed to this state of affairs insofar as it concerns the interpretation of section 81 and has seriously compromised the legislative power of parliament and in the process curbed its oversight powers. In contrast to other difficulties, a course of correction with regard to the interpretation of section 81 of the Constitution to restore the power of parliament would be relatively easy. It is long overdue to bring the application of section 81 back in line with explicit constitutional norms.

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<sup>110</sup>See (n 5).

<sup>111</sup>See (n 109). The predictability of state action is also one of the elements of the formal concept of the constitutional state – see Blaau[w] (n 81 point (d)).

<sup>112</sup>'Moseneke calls for review of presidential powers' *City Press* (2014-11-12); 'Mogoeng Mogoeng calls for a more independent judiciary' *City Press* (2014-06-21).