The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign

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Abstract: *This article considers the application of the doctrine of separation of powers by the South African judiciary in a series of judgments flowing from applications and appeals concerning the disbanding of a specialised crime-fighting unit, the Directorate of Special Operations ('DSO', colloquially known as 'the Scorpions') and the establishment of another unit, the Directorate of Priority Crimes ('DCPI', colloquially known as 'the Hawks') through legislative enactment. It traces the judiciary's stance on the separation of powers in the different stages of the litigation – before, during and after the conclusion of the legislative process. It does so against the background of South African precedent on the doctrine and in the light of a perceived power imbalance between the branches of government. Ultimately, it questions the appropriateness of the current understanding of the doctrine of separation of powers in the context of a dominant-party democracy.*

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A. Introduction

On 27 April 2014, South Africa commemorated twenty years since its first democratic elections. South Africans can look back on two decades of constitutional democracy with a mixture of pride and concern. South Africans can be proud of many achievements, including increased access to housing and health care for many vulnerable citizens, but many political, socio-economic and other challenges remain.

In this article, I turn the attention to one of the challenges that remain, and that arise from the basic constitutional design of South Africa separating governmental power as legislative, executive and judicial. In particular, I seek to highlight a concern regarding the counter-balancing role that the South African judiciary has been requested increasingly to perform, given the country's political landscape. Over the past few years political parties, civil society organisations and individuals alike have been quick to turn to the courts when they perceived their voices on political matters to have been silenced or ignored by those in power. Such legal challenges raise difficult questions about the separation of powers between the elected branches and the judiciary, particularly in a nascent constitutional democ-

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racy where political party dominance is evident. It asks of the courts to provide a balance of power in what is often a battle between political opponents. This raises fundamental questions about the appropriateness of the involvement of a court in such matters given the current understanding of the separation of powers.[1]

In this consideration of the doctrine I look at a particularly interesting trilogy of court challenges which illustrates the difficulty of the application of the doctrine of separation of powers in South Africa. Glenister, a South African businessman, sought to question a government decision to disband a highly successful special investigation unit, the Directorate of Special Operations ('DSO' or 'Scorpions', as the unit was colloquially known), which fell out of political favour with influential members of the ruling African National Congress ('ANC') in the mid-2000s. The ANC has ruled South Africa since the end of apartheid and voters in successive national elections supported the party overwhelmingly.[2] In particular, its large political majority has allowed the party to dictate the legislative agenda and pass legislation unhindered by protestations from parliamentary opposition parties.

B. The establishment and disbanding of the Scorpions in context

The DSO was established formally in 2001, giving effect to a 1999 political decision of the ruling ANC to establish an elite crime-fighting unit. It was established to address the lingering legitimacy crisis of the South African Police Service ('SAPS') and the lack of public confidence in the government's ability to combat crime effectively. The unit was established as a directorate within the National Prosecuting Authority ('NPA') and was authorised to utilise an unprecedented multi-disciplinary approach to fight crime, which entailed a combination of traditional police powers of investigation and information gathering under the direction of a prosecutor.[3] The Scorpions proved successful in carving out and carrying out its mandate. The public had confidence in the ability of this unit to deal with crime effectively as a result of the consistently high conviction rates.[4]

The Scorpions investigated and prosecuted several individuals in high-profile cases, involving the multi-billion dollar arms procurement deal (the Strategic Defence Procurement

1 See *IM Rautenbach,* Policy and judicial review – political questions, margins of appreciation and the South African constitution, Tydskrif vir die Suid-Afrikaanse Reg 1 (2012), p.28 rightly points out that the distinction between 'political questions' and 'legal questions' is unhelpful and misleading as law and politics are interrelated.

2 Over the years support for the ANC has been steadfast. The party received overwhelming support in successive elections; in 1994 62.65% supported the party, in 1999, 66.36%, in 2004 69.69% and in 2009 65.9%. In the recent election that took place on 7 May 2014, the ANC garnered 62.15% of the national vote. For detailed election results since 1994, see www.elections.org.za (last accessed on 30 June 2014).

3 *Jean Redpath,* The Scorpions: Analysing the Directorate of Special Operations, Pretoria 2004, p. 14 f.

4 *Redpath*, note 3, p.51 and *Joey Berning and Moses Montesh,* Countering corruption in South Africa: The rise and fall of the Scorpions and Hawks, SA Crime Quarterly 39 (2012), p.5.

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Package)[5] and the so-called 'Travelgate' saga.[6] Several of the people prosecuted and implicated as a result of the Scorpions' investigation were high-profile ANC members and/or their associates.[7]

In the wake of these high profile investigations, questions regarding the mandate, location of the unit in the NPA, the role of the Scorpions in relation to the South African Police Service and the unit's methods of operation and case selection arose. The impression was that the unit was politically motivated in choosing its investigations and prosecutions. Therefore, the then President of South Africa, Thabo Mbeki, appointed a commission of enquiry, headed by Judge Sisi Khampepe to investigate these issues, and particularly to consider the unit's role, being a part of the prosecutorial machinery, in relation to the SAPS.[8]

Despite adverse findings on practical management and oversight issues and a lack of coordination of its work with that of the Police Service which hampered the effective functioning of the DSO, Judge Khampepe recommended the retention of the Scorpions as a directorate in the National Prosecuting Authority. The Judge also recommended the clarification of the reporting lines of members of the unit to the Minister of Justice and Constitutional Development, responsible for the prosecuting authority, and the Minister of Safety and Security, responsible for policing, respectively. The Khampepe Report was adopted by the Cabinet in July 2006.[9]

While the adoption of the recommendations by the Cabinet could be interpreted to imply uniform acceptance of its contents by the ANC, the intra-party dynamics of the ANC indicated otherwise. At the 52nd ANC Conference in Polokwane in 2007, the party resolved to establish a single police service to strengthen the capacity of the police and to combat crime effectively. This measure was amplified by an explicit resolution to disband the DSO and to incorporate this unit in the SAPS, the so-called 'the Polokwane resolution'.[10]

The ANC's decision to disband the Scorpions quickly took the form of draft legislation which was approved by the Cabinet by the end of April 2008, following which the National

5 A commission of enquiry was appointed to investigate this procurement deal, see www.armscomm.org.za for terms of reference and details regarding the investigation (last accessed on 17 July 2014).

6 See *Centre for Social Accountability v Secretary of Parliament* 2011 (5) SA 279 (ECG).

7 For example, Yengeni was convicted of fraud and sentenced to imprisonment for purchasing a luxury vehicle at a much reduced price in return for an undertaking of support for an international arms company (*S v Yengeni* (A1079/03) [2005] ZAGPHC 117 (11 November 2005)).

8 Khampepe Commission of Enquiry into the Mandate and Location of the Directorate of Special Operations ('The DSO'), Final Report February 2006, http://www.thepresidency.gov.za/pebble.asp?relid=347 (last accessed on 17 July 2014).

9 *Andrew Kanyenrigire*, Investigating the investigators: A summary of the Khampepe Commission of Enquiry, SA Crime Quarterly 24 (2008), p.35. The report was only made public in 2008.

10 African National Congress, 52nd Conference Resolutions, http://www.anc.org.za/show.php?id=2536 (last accessed on 17 July 2014). See also *David Bruce*, Demise of the Scorpions will be dismal for democracy, http://www.csvr.org.za/index.php/media-articles/latest-csvr-in-the-media/2094-demise-of-scorpions-will-be-dismal-for-democracy-.html (last accessed on 17 July 2014).

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Prosecuting Authority Amendment Bill [B23-2008] and the South African Police Service Amendment Bill [B30-2008] were introduced in Parliament.

C. Glenister's court battles for the Scorpions' retention

Glenister, in his own interest and in the interest of the public, launched a series of court applications at different stages of the process embarked on to give legislative effect to the Polokwane resolution. In what follows, I outline each of his legal challenges and the courts' decisions in response thereto.

I. The first challenge

Glenister's first line of attack was to challenge the executive decision to initiate legislation to give effect to the Polokwane resolution.[11] In his application, Glenister highlighted the success of the Scorpions in investigating and prosecuting priority crimes.[12] He further emphasised the acceptance of the recommendations of the Khampepe Report by the Cabinet prior to the Polokwane Conference.[13] He contended that the executive was concerned mainly with accounting to the ANC rather than to the citizenry.[14] Glenister submitted that the decision to initiate legislation would violate his rights to life, dignity, freedom and security of the person and property.[15] At the time of the court hearing, it was unclear whether the draft legislation had been placed before Parliament. The court accordingly considered its powers in relation to possible intervention with the executive decision and in respect of the legislative process.[16] Insofar as the intervention in the legislative process is concerned, the court held that Glenister in effect had asked the court to intervene in the deliberative stage of the legislative process. At this early stage of the process, the court held, courts are loathe to intervene in the legislative process out of respect for the expertise of the legislative branch. It held that an assessment of the constitutionality the legislation once passed was more appropriate.[17] However, in certain circumscribed instances the Constitution allows the highest court, the Constitutional Court, to intervene in the legislative process before the completion thereof. Such interference will only be undertaken in exceptional circumstances where no alternative remedy is available to the applicant upon completion of the legislative process. The court rejected Glenister's contention that exceptional circumstances existed in this instance in that staff members of the DSO resigned in numbers thus diminishing the capacity of the institution to combat crime. It held that the resignations could not necessar-

11 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143.
12 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.6-7.
13 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.9-12.
14 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.16.
15 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.22.
16 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.24.
17 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.27-30.

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ily be attributed to the impending relocation of the specialist priority crime unit from the prosecuting authority to the police service.[18] The court also considered its jurisdiction in relation to the executive decision to initiate legislation as an alternative, and came to the same conclusion, namely that no exceptional circumstances existed that would justify intervention in the domain of the executive. In the light of the above, the court concluded that it did not have jurisdiction to consider the application and it ordered the removal of the matter from the court roll.

Aggrieved by this finding, Glenister approached the Constitutional Court ('CC') with an application for leave to appeal and an application for direct access to the CC after the High Court's decision was handed down in May 2008. The CC heard arguments in mid-August 2008 from Glenister, as the applicant, and from the United Democratic Movement ('UDM'), a minority political party as the eleventh respondent and the Centre for Constitutional Rights[19] as *amicus curiae*. The Ministers of Safety and Security and for Justice and Constitutional Development as respondents actively opposed the application. All members of the court concurred in the judgment of Langa CJ, delivered on 22 October 2008.[20]

The CC directed the parties to address only the appropriateness of the court reviewing and setting aside the decision of the executive to introduce the legislation in the light of the doctrine of separation of powers.[21] The exposition of the factual background to the dispute and the arguments presented in the CC were similar to those set out and presented in the court *a quo*, with the important addition of the UDM's argument regarding the application of the doctrine of separation of powers in this matter.[22] In essence, the UDM contended that the dynamic nature of the separation of powers doctrine allows the court to account for a shift in the power balance between the three branches of government by providing the balance where there is domination by one of the branches. In this matter, the party argued that the dynamism of the doctrine would allow the court to 'act as a counterweight' in the legislative process flowing from the executive decision. This, the party contended, was necessary because the ruling party dominated the legislature to such extent and in a way that marginalised opposition parties in the legislative process, thus leaving their voices unheard. Were the court to agree to that intervention is possible, the party contended that the decision was in breach of legality requirement implicit in the rule of law.[23]

18 *Glenister v President of the Republic of South Africa* (14386/2008) [2008] ZAGPHC 143, p.38-42.

19 The Centre for Constitutional Rights is a charitable trust with its core mission being the protection of the constitution, see http://www.cfcr.org.za/index.php/about/mission (last accessed on 17 July 2014).

20 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

21 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC), para. 9.

22 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC), para. 22.

23 *Michael Osborne and Nobahle Mangcu-Lockwood*, Counsel for the Eleventh Respondent, Heads of Argument of the Eleventh Respondent, http://www.constitutionalcourt.org.za/Archimages/12770.PDF (last accessed on 17 July 2014) paras. 47, 51-69 and 73-86.

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The court rejected the argument of the UDM. It stood by its earlier precedents and rejected the invitation to act as a political counterweight, limiting its role to that which in its view was constitutionally permissible.[24] Significantly, the court held that there was nothing untoward in the pursuit of a party political agenda by the ruling party through legislative enactment.[25] The court confirmed its earlier dictum: it would only intervene in the legislative process in exceptional circumstances and only when irreversible, irreparable harm will flow from the enactment of the legislation. Where an alternative remedy, such as a challenge to a statute after legislative enactment, can effectively address the concerns of an applicant, intervention in the deliberation of legislative enactments is not appropriate as no rights, as yet, existed that were affected by the proposed changes.[26] No such evidence existed in the view of the court and the applications were thus dismissed.

II. The second challenge

Not only did the Constitutional Court reject the contentions of the applicant in the appeal relating to intervention in the legislative process, but the litigation campaign suffered another blow when the Western Cape High Court dismissed Glenister's further application in his quest to retain the Scorpions as a unit in the NPA.[27]

The second line of attack involved an application to the high court to prohibit the speaker of the National Assembly from allowing members of the Assembly to vote on the bills that were introduced to give effect to the Polokwane resolution concerning the DSO. Specifically, the applicant raised concern about the participation of members of Parliament in the legislative process who were implicated in the Travelgate scandal and thus investigated by the Scorpions.[28] These members, according to the applicant, had to withdraw from deliberations and from voting on the bills as they had a vested interest in the disbanding of the unit. Prior to launching this application, the applicant engaged with the speaker on the matter, and ultimately filed a complaint in terms of the Code of Conduct for Assembly and Permanent Council Members. His complaint was that Parliament failed to follow its own rules in the process of law-making which requires declaration of interests and determination whether such an interest prohibits participation in the legislative process. Glenister filed his complaint to obtain information and to assure that the interests of all members would be declared, and that no member who was subjected to investigation would be allowed to par-

24 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC), para. 55.

25 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC), para. 54.

26 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC), paras. 29-54.

27 *Glenister v The Speaker of the National Assembly* (17259/2008) [2009] ZAWCHC 1 (13 January 2009).

28 *Glenister v The Speaker of the National Assembly* (17259/2008) [2009] ZAWCHC 1 (13 January 2009), para.2.

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ticipate in the legislative process concerning the disbanding of the Scorpions.[29] Pending the finalisation of this complaint, he requested the court to halt the voting process.

As with the first challenge, this court canvassed the background to the matter extensively, thus contextualising the dispute politically. The court acknowledged the legislature's appreciation of the importance of the proposed change through its extensive involvement of the public in the legislative process through public hearings.[30] This appreciation notwithstanding, the court's role in determining this application turned on the application of the doctrine of separation of powers as it relates to the ability of parliament to regulate its internal procedures and arrangements. The court held that the internal rules of Parliament (in this instance the Code of Conduct – the basis of Glenister's complaint) constrained the exercise of power by the legislature. Accordingly, the court had to determine whether it was appropriate to intervene in the legislative process for reasons of non-compliance with the constraints as determined by the legislature within the framework of the Constitution.[31] Importantly, the court held that such a determination could only be made on the basis of evidence supporting the application. In the absence of such evidence and because of the separation of powers, the requested relief could not be granted.[32]

III. The challenge to the legislation

Both the National Prosecuting Authority Amendment Act 56 of 2008, which disbanded the Scorpions, and the South African Police Service Amendment Act 57 of 2008 establishing the new unit, were passed by Parliament on 23 October 2008. Overwhelming support for the bills came from the ruling ANC's representatives in Parliament.[33] The president assented to the bills on 27 January 2009.

29 *Glenister v The Speaker of the National Assembly* (17259/2008) [2009] ZAWCHC 1 (13 January 2009), paras. 15, 19 and 23.

30 *Glenister v The Speaker of the National Assembly* (17259/2008) [2009] ZAWCHC 1 (13 January 2009), paras. 3-14.

31 *Glenister v The Speaker of the National Assembly* (17259/2008) [2009] ZAWCHC 1 (13 January 2009), paras. 27-34.

32 It is noteworthy that the court was aware of the default on the part of the speaker in providing information to the applicant: *Glenister v The Speaker of the National Assembly* (17259/2008) [2009] ZAWCHC 1 (13 January 2009), para. 39.

33 The bills were passed with 252 favorable and 63 opposing votes in the National Assembly African People's Convention: *Leon Engelbrecht*, Parliament votes to abolish the Scorpions, http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=553&catid=52:Human%20Security&Itemid=114 (last accessed on 17 July 2014). It is noteworthy that the ANC issued a press release after the media reported that 20 of its members of parliament did not vote on the bills. The press release clarified that the 20 abstaining members were unable to be present at the time of the vote, and that all the other members of the party who were members of parliament voted in favour of the bills as per the official stance of the party: African National Congress, ANC Caucus statement on the "Scorpions Bill", http://www.anc.org.za/caucus/show.php?ID=1007 (last accessed on 4 April 2014).

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Shortly after the assent to the legislation, Glenister launched his third line of attack, aimed at the constitutionality of the legislation that relocated the specialised crime-fighting unit, the Directorate for Priority Crimes ('DCPI') to the police service. In his application to contest the constitutionality of the legislation made in the Western Cape High Court, Glenister alleged irrationality of the legislative scheme and the violation of several constitutional obligations on the part of the executive and legislature.[34] All the arguments were dismissed, with the court finding that a rational connection existed between the legitimate governmental purpose to enhance the capacity of the SAPS to confront priority crimes and the scheme devised in the legislation.[35] Following this ruling, Glenister approached the CC with an application for leave to appeal.[36]

For purposes of the current discussion, Glenister's multi-pronged attack on the legislation, ranging from the irrationality, unreasonableness and unfairness of the decision to relocate the unit, to his concerns about the legislative process and public involvement in that process are not important, as the divided court was in agreement on those issues.[37] In this instance the court did not consider the issue of separation of powers pertinently as was done in the previous cases to determine reviewability of the matter. It focused its attention rather on the constitutionality of the legislation that was passed by the legislature. The court found, by a narrow majority, that the legislation was unconstitutional for a totally different reason, namely that the legislation fell short of the international law obligations undertaken by South Africa in respect of the independence of corruption-fighting units.

Moseneke DCJ and Cameron J, for the majority, interpreted the international law obligations undertaken by South Africa through its ratification of the UN Convention Against Corruption generously and as placing constitutional obligations on the legislature in respect of the standard of independence. On their laboured and opaque interpretation,[38] the international law obligation to establish an independent unit became rooted in the Constitution itself as a result of the constitutional injunction to respect, protect, and promote and fulfil all human rights, provided for in s 7(2) of the Constitution.[39] This imported constitutional obligation was further subjected to a proportionality analysis, such as usually employed to determine whether the limitation of a fundamental right is justifiable. For purposes of the pro-

34 *Glenister v the President of the RSA and others* (7798/09) [2010] ZAWCHC 92 (26 February 2010), para. 3.

35 *Glenister v the President of the RSA and others* (7798/09) [2010] ZAWCHC 92 (26 February 2010), para. 13.

36 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

37 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), paras. 17 and 54.

38 For further criticism of the judgment see *Christian Gowar,* The status of international treaties in the South African domestic legal system, SAYIL 36 (2011), p. 323-324. See in particular, *Juha Tuovinen*, The role of international law in constitutional adjudication: Glenister v President of the Republic of South Africa, South African Law Journal 130 (2013), p. 664, 667.

39 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para. 189.

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portionality analysis, the judges compared the structures and frameworks regulating the operation of the DCPI with those which were in place in respect of the DSO.[40] While the judges were at pains to note that the DSO did not represent a gold standard, their reliance on these standards suggest otherwise. Their emphasis on public perception and public confidence in a crime-fighting unit[41] strengthens support for the inference that the DSO was relied upon as the gold standard. Ultimately, the judges concluded that the DCPI was vulnerable to political interference and granted parliament 18 months to rectify the oversight. Three judges concurred with them in this finding, thus delivering Glenister and the *amici* with partial relief.

For purposes of the current discussion, a detailed exposition of the minority judgment, prepared by Ngcobo CJ, is not necessary. However, his straightforward interpretation of the weight of international law obligations within in the framework of South African law[42] highlights the complicated nature of the reasoning put forth in the majority judgment. The chief justice clarified that international law agreements signed by the executive and ratified by Parliament bind South Africa internationally, but that they do not create rights and obligations that are enforceable nationally. Such international law provisions may be considered as interpretative tools in determining the scope of provisions contained in the bill of rights. However,

> *'treating international conventions as interpretative aids does not entail giving them the status of domestic law in the republic. To treat them as creating domestic rights and obligations is tantamount to "incorporating the provisions of the unincorporated convention into our municipal law by the back door"'*[43]

Where a convention is enacted by an act of Parliament, or in a schedule to such an act or through enabling legislation, Ncgobo CJ emphasised that it could only attain the status of ordinary legislation which could not give rise to constitutional obligations.[44]

The interpretation and analysis of Ngcobo CJ stand in contrast with the reasoning of the majority of the court on this point. Following precedent, the chief justice held that the decision to give effect to the policy (whether popular or not) falls outside the bounds of judicial review as the only constraint on the legislature was that of rationality. The majority of the court, however, when confronted with the politically fraught challenge, dealt with it in a

40 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), paras. 209ff.

41 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para. 207.

42 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), paras. 86-103.

43 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para. 98.

44 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), paras. 99-103.

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highly contestable manner through constitutionalisation of international law standards despite textual provisions to the contrary.[45]

Existing precedent on the separation of powers did not allow the majority to find for Glenister, as policy choices and giving legislative effect to these choices have been identified as belonging in the domain of the elected branches. However, the peculiar reasoning of the majority to introduce standards where none existed, creates the impression of the pursuit of a specific outcome to appease the applicant, the *amici* and the public, and then shoehorning the reasoning to support the desired outcome. Following precedent, as Ngcobo CJ did, would have led to an unpopular outcome, but one that could not be criticised as convoluted. The 'need' on the part of the majority to resort to creative methods of legal interpretation raises questions as to the precedent on separation of powers and the appropriateness thereof in the current South African context.

D. Separation of powers – precedent and propriety

I. The basic idea and purpose

The basic understanding of separation of powers views the doctrine as a central feature of modern constitutionalism. The doctrine requires institutional, personal and functional division of governmental power into a legislative, an executive and a judicial branch. Each of the branches is meant to occupy itself in specialist fashion with its particular governmental function. The typical exposition of the concept specifies that it is enhanced by checks and balances, which allow branches some 'intrusion' into the domains of other branches, thereby providing for countering-balancing powers and/or safeguards to ensure exercise of power by the other branches within constitutionally acceptable bounds.[46]

There is disagreement as to the purpose of the separation of powers, which has implications for its application. For purposes of this discussion I will contrast two purposes of the doctrine that have been portrayed as opposing, namely that of separating powers to curb power-abuse on the one hand, and that of ensuring effective governmental functioning on the other. In relation to the former purpose, Barendt[47] argues that governmental functions and powers are separated to avoid abuse of power and to protect the freedom of the individual. This is premised on the idea that the concentration of power in one branch of government, particularly in one of the elected branches, will lead to arbitrary exercise of power. In response to this explanation, Barber[48] rejects Barendt's explanation as a conflation of the doctrine of separation of powers and a theory of the state. In Barber's view, the powers and functions of the branches of government are separated only to ensure effective gover-

45 *Tuovinen,* note 38, p. 667-669.

46 *Johan van der Vyver*, The separation of powers, South African Public Law 8 (1993), p.177-179.

47 *Eric Barendt*, Separation of powers and constitutional government, SA Public Law 10 (1995), p. 606.

48 *Nicholas Barber,* Prelude to the separation of powers, Cambridge Law Journal 60 (2001), p.61-62.

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nance.[49] He explains that '[t]esting the efficiency of an institution requires the clear identification of its goals and a careful practical examination of its outcomes'. This exposition of the doctrine is thin, but Barber heeds that it necessarily must be underpinned by a political theory that answers to the need of the particular polity.[50]

The separation of powers is premised on the idea that functions within the state are either legislative, executive or judicial. But the lines between the functions of governance, and thus the branches, are becoming more indistinct and many governmental functions combine aspects traditionally classified as belonging in another branch.[51] So, for example, courts make law in the course of judgments and the executive legislates when it promulgates subordinate legislation. Further, institutions such as human rights bodies and ombudsmen fall outside the triad but perform essential governmental functions in keeping the executive accountable, in reviewing legislation and resolving disputes.

Not only is modern governance complex, it also takes place in a political context. So while Barber's distinction between the theory of the state and the practical division of the labour of governance is appealing in its clarity, it does not account for complexity and the political nature of all exercise of governmental power. This reality necessitates an acknowledgement of the role of separation of powers on a politico-legal plane and particularly requires an acknowledgment that separation of powers fulfils more than one purpose – it allows specialisation and effective exercise of power and limits the exercise of power.

II. South African precedent

It is important to remember that the South African Constitutional Court was established at the advent of constitutional democracy to address legitimacy issues regarding the judiciary as it existed pre-1994. This court was thus unencumbered by the legacy of apartheid and the conservatism of many sitting members of the judiciary at the time who served exclusively at the behest of the executive. In the new dispensation judges are appointed by the president on the recommendation of the Judicial Service Commission, which represents the interests of all three branches, civil society and the legal profession.[52]

The Constitutional Court has been called upon to apply the doctrine of separation of powers in different contexts. These include its application in relation to executive acts, in-

49 *Barber,* note 48, p.65.

50 *Barber,* note 48, p.66.

51 *Barber,* note 48, p.69-70.

52 See sections 174 and 178 of the Constitution.

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cluding presidential appointments,[53] in socio-economic rights cases[54] and in relation to the legislative process.[55] When challenges to legislation and policy programmes to give effect to justiciable socio-economic rights were placed before the court, the court justified its 'intrusion' into the domain of the elected branches as justified by the Constitution itself on narrow grounds.[56] In the majority of cases the court based its decision on the identification of the true nature of the power in question and matching that with the most appropriate branch to perform that function, seemingly separated from the political context. Questions regarding a balance of powers between the branches were seldom explicitly raised, but power imbalance affecting the exercise of power underpinned requests for intervention in the legislative process, as the applicants alleged that the proposed legislation was not properly ventilated by, for example, allowing the public to make representations. In these matters, the court similarly opted for a de-politicised application of the doctrine, focusing on matching functions – the legislature with law-making – obliging it to facilitate reasonable public participation in the legislative process with no guarantee to the public that their views will be taken seriously.[57] This approach addresses process, not outcome.

The extensive canvassing of the political context in the Glenister judgments illustrate the different courts' awareness of the political import of the challenges. But Glenister's challenges to the executive decision and his litigation in the high court to the prevent the participation by implicated members of parliament in the legislative process to disband the Scorpions, were decided in accordance with existing, de-politicised precedent on the separation of powers, focusing on matching the nature of the power with the appropriate branch of government. In the 2008 CC decision, the court emphatically rejected an invitation to provide counter-balance to the excess of power of the ruling party in the legislature based

53 For example, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC); *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) and *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC).

54 For example, *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

55 For example *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa (1)* 2006 (5) SA 47 (CC); *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 (1) BCLR 47 (CC); *Merafong Demarcation Forum v President of the Republic of South* 2008 (5) SA 171 (CC) and *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC).

56 See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), paras. 98-100.

57 See *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC), para. 62 and para. 56 referring with emphasis to *Doctors for Life v Speaker v Speaker of the National Assembly* 2006 (6) SA 416 (CC), para 145.

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on the separation of powers.[58] The court's thin conceptualisation of the doctrine – matching functions with functionaries – and particularly its deference to the elected branches remain entrenched in South Africa. While this thin (and technicist) approach, which seemingly ignores the political dimension of the exercise of governmental power, provides for certainty in law and has the potential to enhance effective government, it does not necessarily curb the abuse of power.

III. Separation of powers reconsidered

A thicker, contextualised and politically-attuned view of the separation of powers insists that the doctrine serves more than one purpose and that account must be taken on both identified purposes. Effective governance and limited or accountable government are not mutually exclusive and both should be pursued in the application of the doctrine. In order to accomplish this, Minow's[59] suggestion to abandon the 'wooden notion of bounded, separated branches' is appealing. This conceptualisation acknowledges that 'boundaries depend on relationships'. Rather than to restrict a particular branch to a predetermined set of functions or powers, this view of separation of powers requires sensitivity of the courts to the balance of power in a particular instance.[60] Minow adds that a view of the separation of powers as a means to balance power requires sensitivity to 'the historical moment, the substantive issue at stake, the responsiveness of the other branches to that issue, and their abilities to reassert their role(s)'.[61]

What then was 'the historical moment' providing context to Glenister's challenges? Could the legislature have provided a strong counter-balance to the executive in asserting its role as the representative of the people? Or did the circumstances require the court to provide the counter-balance in the absence of strong political opposition (and strict party discipline) in the legislature?

IV. The South African political landscape and the balance of power

The ANC is one of the oldest liberation movements in the world. It has governed South Africa since 1994, without any real challenge from opposition parties to the seat of government at the national level.

Early concerns about the emergence of the ANC as a dominant party were raised shortly after the second democratic elections in 1999.[62] After the 2009 elections, the idea of

58 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC), para. 55.

59 *Martha Minow,* Making All the Difference: Inclusion, Exclusion, and American Law, New York 1990, p.359.

60 *Minow,* note 59, p.369.

61 *Minow,* note 59, p.361.

62 See *Hermann Giliomee and Charles Simpkins,* The Dominant Party Regimes of South Africa, Mexico, Taiwan and Malaysia: a comparative assessment, in: Hermann Giliomee and Charles

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South Africa as a one-party dominated state has become more publicised and more widely accepted.[63] This is coupled with increasing discontent with the performance of the ANC in government at all levels. At the level of local government this dissatisfaction has manifested itself in violent service delivery protests all over the country. Allegations of corruption, nepotism and mismanagement on the part of the government fuel these protests, indicative of dissatisfaction with this behaviour of the majority party.[64]

One-party dominance may enhance stability, particularly during times of transition and change, and while it may support the national reconciliation,[65] it is generally regarded with concern. Long-term one-party dominance creates the political space to erode accountability in governance and is seen as a gateway to authoritarianism. One-party dominance also raises concern with regard to elections. Where a dominant party can rely on repeated, unquestioning majority support in elections, lines between state and party become blurred and policies are pursued in the interest of the party at the expense of the populace. In the South African context, the historical legacy of the ANC as the most influential liberation organisation is important. This legacy ensures continued support for the party by the majority of South Africans who benefitted from liberation. Often, in furtherance of the entrenchment of dominance, opposition to the dominant party and it policies are cast as opposition to the national project. This strategy places opposition parties on the back foot. Given that the dominant party sets the political agenda, opposition parties, who in mature democracies will vie for government, are left to respond to matters placed on the agenda by the dominant party, rather than to provide a real alternative to voters. With party-dominance in a system, voters either continue to support the party of liberation (in South Africa, the ANC) or they become apathetic and abstain from voting.[66]

Constitutional democracy should not be reduced to elections. However, the institutions of government, the systems of checks and balances and the political means to keep government accountable through robust debate between opposing parties suffer when a single party dominates. For example, where strict party discipline requires members of political parties to support the official party stance in the legislature, a dominant party is almost guaran-

Simpkins (eds.) The Awkward Embrace: One-party Dominance and Democracy, Amsterdam 1999, p.1-45.

63 *Heidi Brooks*, The Dominant Party System: Challenges for South Africa's Second Decade of Democracy, Journal of African Elections 103 (2004), p.122-124. See also *Sujit Choudhry*, 'He had a mandate': the South African Constitutional Court and the African National Congress in a dominant party democracy, Constitutional Court Review 2 (2009), p.1 and *John F. McEldowney*, One-party dominance and democratic constitutionalism in South Africa, Tydskrif vir die Suid-Afrikaanse Reg 2 (2013), p.269.

64 *Azwifaneli Managa*, Unfulfilled promises and their consequences: A reflection on local government performance and the critical issue of poor service delivery in South Africa, *AISA POLICY-brief* 76 (2012), p.1-5.

65 See for example, *Shumbana Karume*, Party Systems in the SADC Region: In Defence of the Dominant Party System, Journal of African Elections 103 (2004), p.49-52.

66 *Brooks,* note 63*,* p.140.

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teed the passing of legislation it proposes, irrespective of public support for the legislation or counter-arguments raised by the opposition. This was evident in the case of the disbanding of the Scorpions when the dominant ANC pursued its policy to disband the unit despite its success and popular support for its work.[67]

Where legislation or governmental action flouts the constitutional standard, judicial review provides the safeguard. In performing the function of review, an overly deferent court will ignore the ebb and flow of power in the system. Instead of considering the mutual influences of politics on law and law on politics, it will match the governmental function with the appropriate branch and ignore the underlying and ever-changing relationships between the branches. A court appreciative of the changeability of power and power relations between the branches of government will approach such a challenge differently, aware of the political context and of the implications of its judgments. Such an approach to the separation of powers is alive to change and the doctrine is not reduced to matching tasks with functionaries. It is viewed as relational, with the courts accounting for the ability of the legislature to hold the executive accountable for its policy choices in the face of overwhelming public opposition to those choices. The court, in particular, should consider the implications of party discipline for voting patterns of members of the legislature and determine whether the will of the public is truly reflected by the legislation forced through the legislature. Thus, the UDM's 2008 argument before the CC to provide counter-balance in the legislative process warranted a more careful interrogation of the dynamics of the legislative process and the ability of the legislature to reflect the will of the people.

E. Whither the separation of powers?

The context of Glenister's challenges is that of one-party dominance. The separation of powers, as it has been interpreted by the courts, allowed the dominant ruling party to thwart the will of the people.

Prior to and during the legislative process, the courts that were confronted with the difficult challenges posed by Glenister found easy shelter in the application of the doctrine of separation of powers as prescribed by precedent. But Glenister's challenge was not without success. The CC eventually partially vindicated the challenge based on of the independence of the DCPI, but it did so on the basis of imprecise reasoning.

What Glenister's challenges required, was a consideration of the 'historical moment' of the challenge and the ability of the legislature to fulfil its mandate as the representative of the people, free from political party-dominance that erodes accountability to the people. This would require the court to acknowledge its political role as ultimate guardian of the Constitution. To fulfil that role, a more nuanced and attuned-to-political-reality approach to the separation of powers is necessary. While this suggestion may raise questions about judicial appointment procedures and the accountability of the judiciary to the people, it makes

67 *David Bruce*, note 10.

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for more honest reasoning within the imperfect and constantly renegotiated boundaries between the branches.

Glenister's litigation campaign holds a lesson for courts all over the world confronted with political party dominance and the quest for a balance of power.

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