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PRE- AND POST-TRIAL EQUALITY IN CRIMINAL JUSTICE IN THE CONTEXT OF THE SEPARATION OF POWERS

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1 Introduction

South Africa adopted the constitutional state model by implementing the *Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution)* and subsequently the final *Constitution of the Republic of South Africa, 1996 (Constitution)*. The Bill of Rights entrenches equality before the law and equal protection and benefit of the law. This also applies to criminal justice. As a rule, criminal trials usually conform to the norm of equal treatment. However, there are serious deficits in securing pre-trial equal treatment with regard to criminal investigations and decisions whether or not to prosecute as well as post-trial equality with regard to the execution of sentences and the release of incarcerated persons. Post-trial equality should extend to decisions regarding the remission of sentence, such as the granting of parole and pardons. Here, too, there are deficits that are in need of attention.

Difficulties pertaining to pre-trial equality stem partly from a lack of clarity in relation to the nature of prosecuting powers and the state organ that should be responsible for leading criminal investigations. Whereas section 179(2) of the 1996 *Constitution* confers the power to institute criminal proceedings and to carry out all necessary functions incidental to that upon state prosecutors, section 205(3) of the *Constitution* does not clearly delineate administrative policing powers to secure public safety and order from investigations that form part of criminal procedure.

The Westminster criminal justice system has been perpetuated in practice, although there are major differences in how the separation of powers in constitutional states functions in the field of criminal justice. The presidential appointment of the national

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director as foreseen by section 179(1)(a) and ministerial oversight under section 179(6) have led to the presumption that the prosecutors resort under the executive branch and perform administrative powers, whereas they are in fact responsible for criminal justice. Another problem relates to the prosecutors' powers to take *nolle prosequi* decisions in cases that would merit prosecution. This may impinge upon judicial powers, since such a decision is tantamount to a non-judicial acquittal.

Insofar as it concerns post-trial equal treatment with regard to the remission of sentence, the main source of difficulties is section 84(2)(j) of the *Constitution*. The former royal prerogatives were received in South Africa during colonial times and prevailed under the Westminster constitutions.¹ Many of these powers have been retained as powers of the head of state in section 84(2) and include the prerogative to pardon or reprieve offenders and to remit fines, penalties and forfeitures. Although section 84(2)(j) does not explicitly mandate the president to delegate these powers to a cabinet minister, the status quo has been perpetuated. In 1959, part of the power to pardon and remit sentences was delegated by way of statute to the justice minister in order to enable him to grant parole to incarcerated persons. Under the 1996 *Constitution*, which is based upon a different constitutional model, this arrangement implies that judicial sentences can be altered by executive organs. This raises the question of whether or not that is reconcilable with the binding nature of judicial decisions as guaranteed by section 165(5).

The transition from the Westminster criminal justice system to the constitutional state model has created a number of difficulties. Some aspects of criminal justice previously resorted under the executive branch, a fact which made it difficult to draw a clear distinction between administrative-law and criminal-law powers. The shortcomings of the definition of administrative action in the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)* will be discussed in this context. Subsequently, the constitutionality in terms of section 81 of legislation which has been put into force by way of executive regulation will be considered. Such regulation affects diverse criminal laws and led to the abolition of the Directorate of

1 These are not the only royal prerogatives that have been perpetuated. Other prerogatives are contained elsewhere, eg that the head of state is the commander-in-chief (s 202 *Constitution*) and that he assents to and signs legislation (s 79 *Constitution*).

Special Operations, also known as the "Scorpions". Finally, it will be asked if constitutional provisions that were certified by the Constitutional Court can be struck down on an *ex post facto* basis because they perpetuate the Westminster criminal justice system and undermine the constitutional state.

2 Pre-trial equal treatment and the demarcation of prosecuting powers

This section will focus on pre-trial equal treatment in criminal justice. It starts out by sketching a case study. The Shaik/Zuma matter concerns alleged corruption in the arms procurement deal dating back to the late 1990s. The matter became prominent due to the media's focus on the stalling or selective and reluctant pursuit of the relevant criminal investigations, which left a trail of executive interference in the sphere of criminal justice. The demarcation of prosecuting powers in relation to judicial powers and executive powers respectively will therefore be discussed in detail. The different prosecuting models that prevail in the Westminster and constitutional state systems will also be highlighted.

2.1 Selective prosecution: a case study of Shaik and Zuma

In order to assess the constitutional implications of the Shaik matter, the background leading up to his prosecution should be recapitulated. The National Director of Public Prosecutions Bulelani Ngcuka and Justice Minister Dr Penuell Maduna, who were subject to severe criticism in Yengeni's corruption trial,² also featured in the selective prosecution for corruption of Shaik. At first Ngcuka accused both former Deputy President Zuma and his financial advisor Schabir Shaik of bribery and corruption. Later Ngcuka and Maduna called a press conference on 23 August 2003 in which Ngcuka stated:

After careful consideration in which we looked at the evidence and the facts dispassionately, we have concluded that, whilst there is a *prima facie* case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case.³

2 *S v Yengeni* 2006 1 SACR 405 (T) paras 55-75 (cited as "*S v Yengeni*").

3 Cited in *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 40 (cited as "*NDPP v Zuma* (SCA)").

Feinstein contended that the preferential treatment of Zuma was due to political intervention by former President Mbeki.⁴ Two days later Shaik was arrested and charged that he facilitated a bribe for Deputy President Zuma from French arms dealer Thint amounting to R500 000 a year. The prosecuting authority proceeded to prosecute Shaik alone, although corruption is a reciprocal crime.⁵ Shortly afterwards two close associates of Shaik apparently leaked allegations to a newspaper that Ngcuka was a former apartheid spy. Although the Hefer Commission of Inquiry exonerated Ngcuka, he resigned from office.⁶ At a later stage, Zuma's legal counsel turned the facts around and contended that the National Prosecuting Authority wanted to have a "dry run" against Shaik to make the way free to prosecute Zuma.

The chief prosecutor in Zuma's corruption trial criticised all three consecutive heads of the prosecuting authority for the fact that Zuma's case never saw the light of day.⁷ In terms of the Constitution, prosecutors are obliged to exercise the power to prosecute "without fear, favour or prejudice".⁸ This implies pre-trial equal treatment and precludes selective prosecution or the dropping of charges in *prima facie* cases for reasons of political expediency. In the *Zuma* case where he contested the reopening of the case, the Supreme Court of Appeal distinguished between *prima facie* evidence that would merit the prosecution of an accused and discharging the onus of proof during a criminal trial. The court held that *prima facie* evidence does not need to be conclusive or irrefutable at the stage when criminal proceedings are instituted. It must have enough merit only once the criminal investigations are

4 The charge sheet was drawn up to charge both Shaik and Zuma. When the prosecutors presented that to Ngcuka, he is alleged to have responded: "I will charge the deputy president only if my president agrees". Feinstein alludes to conversations with prosecutors, where they indicated that a "shadowy financier" close to Mbeki and Zuma who played an ongoing role in financing the ANC "was off limits" and that he could be prosecuted. See Feinstein *After the Party* 173, 217 and 230. Former President Mbeki himself was allegedly involved in irregularities pertaining to the arms deal. See "Mbeki 'paid R30m arms-deal bribe'" *Mail & Guardian* (2008-8-3); "Mbeki, Manuel 'doctored arms deal report'" *News24* (2009-10-22).

5 *S v Shaik* 2008 2 SA 208 (CC) paras 27-30, 40, 42 ff. Zuma declined to give evidence on behalf of Shaik (para 40).

6 Apparently Mo Shaik, Schabir's brother, and Mac Maharaj leaked the allegations to *City Press*. See *Hefer Commission of Inquiry Report* (2004) para 2 referring to the newspaper article "Was Ngcuka an Apartheid spy?" *City Press* (2003-9-7). It cannot be excluded that the allegations that Ngcuka was an apartheid spy might have been an act of revenge for his having prosecuted Schabir Shaik. Zuma had supervised the intelligence unit led by Mo Shaik where the allegations originated, and declined to give evidence before the Hefer Commission. See *Hefer Commission of Inquiry Report* (2004) paras 33-44.

7 "We had a good case against Jacob Zuma, says prosecutor" *Sunday World* (2009-04-11); "Improper not to prosecute JZ" *Mail & Guardian* (2010-10-1).

8 Sections 179(2) and (4) *Constitution*.

concluded "in the sense of reasonable prospects of success".⁹ The rationale behind this requirement is to prevent the laying of spurious charges. Whether or not a case would actually be winnable in court is the domain of the judiciary and not the prosecutors. That decision depends on the evidence presented to the court under cross-examination, where the prosecution is required to present *prima facie* evidence of each element of the crime. Only if the prosecution can during the trial establish a *prima facie* case which is strong enough to discharge the burden of proof will the accused be required to rebut it by raising a reasonable doubt.¹⁰ The court found that the trial court failed to comply with the basic rules of procedure when Nicholson J presumed that there was political meddling in the prosecution, even though this was not proved.¹¹ The court held that the motive behind a prosecution is irrelevant insofar as a crime that ought to be prosecuted had been committed.¹² The court concluded that it was difficult to see, in the light of the Shaik judgment, how the prosecution could have failed to prosecute Zuma.¹³

The judgment was delivered on 12 January 2009. Although Zuma applied for leave to appeal to the Constitutional Court to set aside the decision of the Supreme Court of Appeal on the merits of its interpretation of section 179(5) of the *Constitution*, the hearing was scheduled for 12 May 2009 only. Time was therefore running out for the African National Congress (ANC) to decide if Zuma should be the party's presidential candidate in the elections of April 22. The Damocles sword of his corruption trial, which was scheduled for 16 August 2009 in the Kwazulu-Natal High Court, was still hanging over his head.¹⁴ Meanwhile a special ANC committee engaged in negotiations with the prosecuting authority's Deputy Director Hofmeyr to find a political solution to save Zuma from his legal woes.¹⁵ In a rare cloak and dagger action, an unidentified spy secretly passed on to his legal counsel recordings of

9 *NDPP v Zuma (SCA)* paras 27, 43; see also Zeffert, Paizes and Skeen *Law of Evidence* 121-130.

10 *S v Coetzee* 1997 3 SA 527 (CC) para 195; *Scagell v Attorney-General, Western Cape* 1997 2 SA 368 (CC) para 11.

11 *NDPP v Zuma (SCA)* paras 44-54.

12 *NDPP v Zuma (SCA)* para 37.

13 *NDPP v Zuma (SCA)* para 51.

14 The dates have been set out in the "Replying affidavit of Zuma to the DA" *Politicsweb* (2009-9-17) para 15.

15 "The man behind the Zuma deal" *Cape Argus* (2009-3-20); "The high price of political solutions" *Mail & Guardian* (2009-4-27). Hofmeyr is a former ANC member of parliament who was redeployed to the NPA to head the Scorpions; see fn 138.

bugged telephone conversations between Ngcuka and Scorpion's head McCarthy which took place in 2007 on the topic of the timing of Zuma's trial.¹⁶ The acting National Director of the prosecuting authority Mpshe and the Director of the Scorpions Hofmeyr then construed the (illegally?) bugged conversations as an abuse of power that justified the dropping of the charges against Zuma.¹⁷

Mpshe instructed the prosecutors to withdraw the corruption case against Zuma from the KwaZulu-Natal High Court. It is not clear why the presiding judge in the pending corruption trial did not query the legality of the prosecuting authority's power to enter a *nolle prosequi* in a *prima facie* case.¹⁸ In effect, both the prosecuting authority and a judge of a lower court overruled a binding decision of the Supreme Court of Appeal.¹⁹ At the very least one would have expected the Judge President of the KwaZulu-Natal High Court to query the dropping of the charges against Thint and Thetard, since they were not affected by the disreputable spy tapes. The court also

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- 16 Initially the leaking of the so-called "Zuma tapes" was attributed to Arthur Fraser, head of the powerful operations division of the National Intelligence Agency. It was speculated that he switched allegiance to Zuma after former President Mbeki was recalled from office. See "The spy who saved Zuma" *Mail & Guardian* (2009-4-9). Later the former head of the SAPS's crime intelligence unit, Mulangi Mphego was identified as the person who leaked the top-secret recordings that scuttled Zuma's corruption trial. See "Top cop scuttled Zuma case" *Mail & Guardian* (2010-5-21). After Zuma came to power, Simelane was appointed as the new National Director of the NPA. He apparently protected Mphego from being prosecuted. See fn 117. It is not clear what role Faiek Davids, the SIU's deputy serving under Hofmeyr, played in relation to a voicemail sent to him by Scorpions head McCarthy. McCarthy resigned and Davids was suspended from office by Hofmeyr, allegedly due to a "break-down of trust" between him and Hofmeyr. See "Sources: SIU deputy head facing the axe" *News24* (2010-11-28). It should be noted that a break-down of trust as a ground for suspension from office is restricted to political appointees in internal executive relationships and does not apply to prosecutors.
- 17 "Full NPA Statement" *News24* (2009-4-6). Mpshe relied heavily on comparative English precedent to justify the *nolle prosequi* for Zuma. James Linscott has set out that under English law the key legal precedent cited by Mpshe would not support a decision to drop charges under such circumstances. See "On Mpshe's legally flawed decision" *Legal Brief* (2009-4-17). Moreover, at the time when Mpshe entered the *nolle prosequi* based on his interpretation of British criminal law precedents, the British parliament had actually initiated legislation to abolish *nolle prosequis*. See Chapter 3 of the *Draft Constitutional Renewal Bill* (2008). This further underscores the controversial nature of the *nolle prosequi* in Zuma's case.
- 18 Zuma's charge sheet disclosed that between 25 October 1995 and 1 July 2005 he or his family received 783 payments totalling R4.072.500 from Shaik or his companies. Witnesses at the Shaik trial testified about Shaik's recurring irritation at how Zuma spent money without caring where it came from. The most significant example was Zuma's Nkandla homestead, built in 2000 - a luxury he could not afford. Payment for the Nkandla homestead was, according to the prosecution, bound up with the notorious "encrypted fax" drawn up by Thomson CSF (later Thint) executive Alain Thetard. The fax reflected Thetard's report of his meeting with Shaik and Zuma in March 2000, ie the month Zuma commissioned architects to design his homestead. See "The case against Jacob G Zuma" *Mail & Guardian* (2009-4-3).
- 19 Tshabalala JP concluded that as the NPA decided to withdraw the charges "that was the end of the matter". See "Zuma's five minutes to freedom" *The Daily News* (2009-4-7); "Zuma unlikely to be charged again, says judge" *The Daily News* (2009-4-7).

did not consider that meddling in criminal proceedings is an offence in its own right, which offence could have been prosecuted separately.²⁰ What is even more conspicuous is that the prosecuting authority and the court made no attempt to ascertain the legality of the act of spying on the prosecuting authority.

2.2 The demarcation of prosecuting powers

2.2.1 Prosecuting powers in relation to judicial powers

The above discussion illustrates the difficulties involved in demarcating the constitutional powers of prosecutors *vis-à-vis* the courts in order to avoid their impinging upon the judicial sphere of competence.²¹ The prosecuting authority may exercise the discretion to institute criminal proceedings,²² but is obliged to ensure equal treatment and not to block access to the courts by granting arbitrary *nolle prosequis*.²³ *Nolle prosequis* in *prima facie* cases are tantamount to non-judicial acquittals. The prosecuting authority must therefore be careful not to overstep the limits of its powers. In *S v Yengeni*, the court justly castigated Ncguka and Maduna for impinging upon judicial powers by promising the accused a mild sentence for fraud after they let him off the hook with regard to corruption.²⁴

2.2.2 Prosecuting powers in relation to executive state administration

The discussion further indicates that there is no clear separation of functions pertaining to the administration of justice and executive state administration in South Africa at the moment. South Africa professes to have adopted the constitutional state model in 1994, but has in practice done so only partially. The bedrock of the

20 Section 32(1)(b) read with s 41 *National Prosecuting Authority Act* 32 of 1998 (hereinafter *NPA Act*).

21 Sections 165 and 179 read with s 41(1)(f) and (g) *Constitution*.

22 Section 179(2) *Constitution*.

23 Sections 9, 34 and 35 *Constitution*.

24 *S v Yengeni* paras 10, 23. Before the trial Yengeni met with Maduna and Ncguka at the home of the justice minister. Ncguka offered to drop corruption charges against Yengeni if he would plead guilty to the alternative and less serious charge of fraud. He further undertook to arrange that Yengeni would not receive a stiffer sentence than a fine of R5.000. If he were charged with corruption, the minimum sentence upon conviction would have been imprisonment for 15 years. Even though the prosecutor suggested the fine as sentence, the court *a quo* sentenced Yengeni to four years imprisonment. On appeal, the High Court confirmed the sentence of the regional court but admonished the court *a quo* for having been too lenient in sentencing.

Westminster system's separation of powers as it affects criminal justice is still largely in place. Consequently, state prosecutors are regarded as an extended arm of the executive,²⁵ although they are grouped together with the judiciary in Chapter 8 of the 1996 *Constitution* as a state organ of the third branch of state power.

2.2.2.1 The origins of the Westminster prosecuting model

The perception that prosecutors are part of the executive has its origins in the legal history of England. The Attorney-General, whose office dates back to the 15th century, acted as the law officer of the Crown and was a member of the Cabinet.²⁶ Sir William Blackstone recorded that the Attorney-General was "the king's immediate officer and the king's nominal prosecutor".²⁷ The office of the Director of Public Prosecutions was first established in 1879. The Director was appointed by the Attorney-General to oversee prosecutions by the police. Criminal investigations and prosecutions thus developed as an accusatory function of the police in 19th century England. Prosecutors were introduced more recently to split those policing functions into criminal investigations (conducted by the police) and taking the matter to court (by legally trained prosecutors).

The British prosecution system was reformed by the *Prosecution of Offences Act* of 1985 in order to strengthen the position of prosecutors. However, until today the responsibility to decide if evidence justifies a prosecution lies initially with the police. Only once they have so decided will the police refer the case to the Crown Prosecution Service. The Act also did not abolish the right of the police to prosecute. This concept can be traced to theories that were prevalent in late 19th century liberalism that the state's duties ought to be restricted to securing safety and order.²⁸ This might explain why prosecutors still tend to be regarded as the extended arm of

25 This perception has been endorsed by the courts. See *In re Certification of the Constitution of the RSA* 1996 4 SA 744 (CC) paras 140-148 (cited as "*In re Certification of the Constitution*"); *S v Yengeni* para 23; *Travers v National Director of Public Prosecutions* 2007 3 SA 242 (T) para 40; and the minority judgment by Ngcobo CJ in *Glenister v President of the Republic of South Africa* 2011 ZACC 6 paras 120, 122, and 142 (cited as "*Glenister II (CC)*"). See also *Ginwala Report* (2008) paras 46-66.

26 His primary function was to act as a legal advisor to the Crown and to represent the Crown in court. The Attorney-General is a politician who must be a member of Parliament, usually the House of Lords. Nowadays he is no longer a member of the Cabinet, though.

27 Blackstone *et al Laws of England* 253.

28 Bailey *Policing and Punishment* 65 ff; Sullivan *Liberalism and Crime* 111.

the executive in Great Britain and the many Commonwealth countries that adopted a similar system during colonial times.²⁹

The dominant criminal justice model in the Anglo-American tradition is that prosecutors resort structurally under the justice minister but have varying degrees of functional independence. Conflict between prosecutors and political office bearers relating to the instituting of criminal proceedings arose early on. The doctrine of independent aloofness took root in Great Britain during the 1920s to counter that.³⁰ However, political interference in the domain of state prosecution is no rarity, even today.³¹

In a recent comparative study, Yale law professor James Whitman came to the devastating conclusion that procedural fairness and equal treatment under United States and United Kingdom criminal law lag far behind their Continental European counterparts. One of the major differences is how the ideal of equality before the law is understood. Whereas Anglo-American law generally requires that all people should face an equal threat of punishment, Continental European law additionally demands that all people face an equal threat of criminal investigation and prosecution. The normative quality of pre-conviction equality is therefore much higher in the constitutional states of Europe than elsewhere.³²

29 Brazier *Constitutional Practice* 63, 109-111; Jackson and Leopold *Constitutional and Administrative Law* 372-374 and 425. See in general also Fionda *Public Prosecutors*; Mansfield and Peay *Director of Public Prosecutions*; Hirschel, Wakefield and Sasse *Criminal Justice*.

30 King 2000 *U Western Aust L Rev* 157.

31 In the UK the Law Lords, the UK's highest court until very recently, overturned the landmark decision of a High Court. The court a quo ruled that the director of the Serious Fraud Office acted unlawfully when, acting on government advice, he terminated a corruption investigation into BAE Systems' arms deals with Saudi Arabia in response to lobbying by BAE and a threat from Saudi Arabia to withdraw diplomatic and intelligence co-operation. The judgment in *The Queen on the Application of Corner House Research and Campaign against Arms Trade v The Director of the Serious Fraud Office and BAE Systems plc*, High Court of Justice, Queen's Bench Division (Administrative Court), unreported, Case No CO/1567/2007, 14-15 February 2008 was overturned by the Law Lords on appeal. See "Law Lords: Fraud office right to end bribery investigation in BAE Case" *The Guardian* (2008-8-31). This outcome apparently prompted the British parliament to table a bill that envisages abolishing the Attorney-General's power to enter a *nolle prosequi* altogether. In the USA a White House aide of former President George W Bush played a key role in 2006 in having federal prosecutors in the justice department fired for political reasons, because they refused to drop investigations into voter fraud and electoral corruption. See "Bush aides pushed to get attorneys replaced" *International Herald Tribune* (2009-8-13).

32 Whitman 2009 *Journal of Legal Analysis* 119 ff; and Whitman *Harsh Justice* in general.

2.2.2.2 The origins of the Continental European prosecuting model

The path taken by Continental European states over the last 200 years in criminal justice is very different from that taken in Anglo-American countries. Despite the slow evolutionary process, prosecutors are for all practical purposes regarded as the *de facto* second organ of the third branch of state power. The prosecutors were historically split off from the judiciary to separate inquisitory investigations from adjudication. This model was adopted by most of the Continental European states under strong French influence during and in the aftermath of the Napoleonic conquests.³³ The French model with its emphasis on inquisitory procedures is no longer predominant, though. Most European countries tend to follow what is often called the German model, which has incorporated many accusatory elements.³⁴ This is not the only difference from the Anglo-American systems, though. The organs conducting criminal investigations also differ. In England, Wales and Ireland the police conduct criminal investigations, whereas prosecutors lead criminal investigations in Germany, France, Italy, Sweden, Finland, Scotland, and the Netherlands.³⁵

In Germany, prosecutors are regarded as guardians of the rule of law and have the duty to exercise their powers benevolently in the service of justice and not as pawns of the executive.³⁶ Unlike the situation in accusatory systems, they are obliged to be neutral in their search for the truth and must conduct criminal investigations objectively. In order to do so they consider both incriminating and exculpatory evidence,³⁷ they honour the binding force of statutes (the principle of legality),³⁸ and to secure equal treatment prosecute all cases where there is sufficient evidence.³⁹

33 On German and French theory see Collin 2001 fhi.rg.mpg.de; Rüping 1992 *Golddammers Archiv für Strafrecht* 157; Schulz "Teilung der erkennende Gewalt" 311 ff; Dölemeyer "Ministère public und Staatsanwaltschaft" 85 ff; and in general Wohlers *Entstehung und Funktion der Staatsanwaltschaft*.

34 Kelker 2006 ZGS 413 ff.

35 Tupman and Tupman *Policing in Europe* 37 ff.

36 § 159 and § 160 of the *Strafprozeßordnung (StPO)* or *Criminal Procedure Act*. The concept of prosecutors as neutral and objective *Wächter des Gesetzes* (guardians of the law) was first formulated by Von Savigny and Uhden at the time when the Prussian Prosecution Service was created, in around 1846. See in general Collin 2001 fhi.rg.mpg.de.

37 § 160(2) *StPO*.

38 § 152(2) *StPO*.

39 § 170(1) *StPO*. See in general Kelker 2006 ZGS 390 ff; Hassemer "Legalität and Opportunität" 529 ff; Lorenzen "Legalitäts- and Opportunitätsprinzip" 541 ff.

Prosecutors may make use of police assistance to investigate criminal offences, but always lead criminal investigations.⁴⁰ The rationale behind this arrangement is to ensure procedural fairness and respect for fundamental rights by trained lawyers in pre-trial criminal investigations. The police are not the only civil servants of the executive branch who function as the helping hand of prosecutors. Prosecutors may also require tax, customs, and intelligence officers or civil servants from other state departments, as the case may be, to assist them in criminal investigations.⁴¹ In specialised and complex areas of corruption and commercial criminality, however, prosecuting authorities have their own forensic teams, which include chartered accountants, commercial and financial experts, and information technology specialists, who investigate such offences.⁴²

A clear distinction should be made between the administrative powers of the police to secure public safety and order, and the functions of prosecutors to investigate and prosecute criminal offences with police assistance.⁴³ Criminal investigations by the police are conducted under the auspices of prosecutors and are regulated in terms of criminal procedure,⁴⁴ whereas the exercise of the powers to secure public safety and order is regulated in terms of administrative law.⁴⁵

40 § 161 *StPO* determines that state prosecutions are prosecutor-led (*Herrin des Verfahrens*). The role of prosecutors is not restricted to leading actual criminal trials in court as in England.

41 § 152(2) *Gerichtsverfassungsgesetz* or *Courts Constitution Act (GVG)*.

42 The prosecuting authority of Bochum, which resorts under the jurisdiction of the *Generalstaatsanwaltschaft* of Hamm, specialises in this field, for example. This anti-corruption unit was recently in the news with regard to the criminal trial of the former head of the postal service, Zumwinkel, who embezzled millions which he deposited in secret accounts in Lichtenstein. The unit's forensic experts, who are not lawyers or prosecutors, are employed by the prosecuting authority on a permanent basis and are not outside consultants employed on a case to case basis.

43 Hassemer *Strafrecht* 36; Götz *Polizei- und Ordnungsrecht* 180 ff.

44 § 163 *StPO*.

45 Götz *Polizei- und Ordnungsrecht* discusses the former at 180-186, 196 ff and the latter at 186-196. Should the police exceed the scope of their powers or act in a manner which is not in line with the principle of proportionality, there are legal remedies available to persons who were adversely affected. See also Schenke *Polizei- und Ordnungsrecht* and Pieroth, Schlinck and Kniesel *Polizei- und Ordnungsrecht* on the administrative powers of the police in general.

2.2.3 *The prosecuting authority as a state organ in its own right*

The ideal of democracy that crystallised in the 18th century initially foresaw a separation of powers between the judiciary (the courts), the legislature and the executive.⁴⁶ This is still the way most constitutions refer to the structure, although another important state organ since developed. The dilemma is that the constant evolution of constitutional practice is often ahead of theoretical precepts, which are inadequately formulated or tardily updated in constitutions. The unsatisfactory outcome is that the state prosecutorial system is often treated as a useful state organ occupying an undefined space somewhere between the executive and the judiciary.

In modern constitutional state theory, however, the separation of powers is increasingly based on the functions of office bearers or state organs, which are regulated by corresponding fields of law. The separation of powers therefore implies a distinction between the function of making law (performed by the legislature), the function of executing or implementing law in the field of executive state administration (performed by the executive), and the function of enforcing law through prosecution and adjudication (the administration of justice by prosecutors and the judiciary). In public law, this requires a clear separation of the state organs responsible for enforcing criminal law and invoking administrative law respectively. The prosecuting authority cannot logically be construed to be part of the executive since it does not execute administrative law. The functions of the prosecuting authority resort under the administration of justice and have to do with enforcing criminal law.⁴⁷ From this perspective, it should be obvious that the prosecuting authority is a state organ in its own right within the third branch of state power. The judicial powers relating to the administration of justice are obviously more

46 This was the way in which Montesquieu conceived of the *trias politica* in his famous *Spirit of the Laws (De l'esprit des lois)* of 1748. He went a step further than Locke, who distinguished between the legislature, executive, and the conduct of foreign affairs only.

47 Redpath *Scorpions* 70 conceives of the separation of powers along the lines of the power to make law (legislative), the power to enforce law (executive), and the power to resolve disputes arising under law (judiciary). Thus she classifies the functions of the prosecutors as being quasi-judicial. One should be careful, though, to equate police powers of arrest with "law enforcement" of the executive in general. The executive cannot enforce the law in the sense of prosecuting criminal offenders or convicting and sentencing them.

encompassing and not restricted to the enforcement of criminal law only. The judiciary has to resolve disputes in all other fields of law as well.

2.2.3.1 The prosecuting model in Germany

It was indicated above that prosecution in Germany developed into a *de facto* second organ of the third branch of state power. The different branches of state prosecution attach to criminal courts in their jurisdiction at a federal and a *Länder* (state) level with the bulk of criminal offences falling under the jurisdiction of the states.⁴⁸

At a constitutional level, however, one of the difficulties is that article 20(2) of the *Grundgesetz* of 1949 (the *Constitution*)⁴⁹ refers to the three branches of state power as the legislature, the executive, and "judicial bodies". In the 1950s it was assumed as a matter of fact that the reference to "judicial bodies" encompassed the prosecutors, because like judges they are guardians of the *Constitution* and the rule of law. This assumption was based upon the *Gerichtsverfassungsgesetz* (the *Courts Constitution Act*) that laid the foundation for the administration of justice (*Justizverwaltung*) in 1877, and which still regulates the powers of the judiciary and prosecutors.⁵⁰ Together they were referred to as the *Justiz* (the judicature). Since then, things have become a little muddled.⁵¹

Unlike articles 92-104 of the 1949 *Constitution*, which regulates judicial powers in detail, the status of prosecutors has not been explicitly regulated at a constitutional level. The question therefore arises whether or not prosecutors are independent in a manner similar to that of the judiciary. Judicial independence means that the judge

48 The jurisdiction of federal prosecutors includes offences endangering internal and external state security, and includes terrorism, spying, treason, illegal nuclear proliferation, political extremism of the far right and the far left as well as extremism by foreigners. For an organogram of how a typical prosecuting authority at the state level is structured, one can look at that of the *Generalstaatsanwaltschaft* of Hamm, one of the three high-level prosecuting authorities in Northrhine Westphalia apart from Cologne and Düsseldorf. See www.gsta-hamm.nrw.de/aufgaben/aufbau_behoerde_gsta/index.php. It lists different investigating units in areas such as organised crime, drugs and environmental crime, commercial and tax criminality, corruption, political and press criminality and state security matters.

49 *Grundgesetz für die Bundesrepublik Deutschland* of 23 May 1949 (*BGBI* 1).

50 The Act was adapted in 1950 and amended in 1975 (*BGBI* of 9.5. 1975, vol I, 1077). It was amended again in 2010 (*BGBI* of 24.7.2010, vol I, 975).

51 Haas *Strafbegriff* 31 ff.

president of a court has no power to prescribe to other judges on the bench what the contents of their judgments should be. They are subject only to the *Constitution* and the law.⁵² The executive may also not make any administrative regulations or give individual instructions to the judiciary. The Constitutional Court has clipped the wings of the executive whenever it has tried to impinge on the domain of the judicial powers, and has unequivocally established its independence.⁵³

The position of prosecutorial independence has not been regulated equally clearly. Since the *Constitution* does not explicitly regulate the status of prosecutors, one is forced to fall back on the *Courts Constitution Act*. The problem is that this statute regulates the status of prosecutors rather ambivalently. It was introduced in times of a constitutional monarchy when the constitutional state had not yet taken on its modern form. In terms of that statute, prosecuting authorities are hierarchically structured within a specific jurisdiction to oversee criminal investigations and to coordinate prosecutions.⁵⁴ This hierarchical structure is comparable to executive state administration within a specific state department, except that the focus is on criminal-law prosecutions. This is referred to as "internal supervision" within the prosecuting authority.⁵⁵ This does not mean, though, that a higher-ranking prosecutor may give orders to a lower-ranking one not to prosecute in specific instances although there is *prima facie* evidence of an offence. That would be a contravention of the principle of legality. The hierarchical structuring merely serves the efficient management of criminal investigations and prosecutions.

What complicates matters, however, is that the 1877 *Courts Constitution Act* also makes provision for "external supervision" of the prosecutors by justice ministers.⁵⁶ How this should be interpreted in view of a modern separation of powers has been a

52 Article 97 *Grundgesetz*.

53 BVerfGE 14, 56 at 69; BVerfGE 26, 79 at 93; BVerfGE 26, 186 at 198; BVerfGE 27, 312 at 322; BVerfGE 31, 137 at 140; BVerfGE 36, 174 at 185; BVerfGE 55, 372 at 389; BVerfGE 60, 175 at 214. See in general Sachs *Grundgesetz Kommentar* 1975-1983.

54 § 146 GVG. At the top of the hierarchy is the prosecutor general (*Generalstaatsanwalt*), followed by the chief prosecutors (*Leitende Oberstaatsanwälte*), the deputy chief prosecutors, the departmental heads (*Oberstaatsanwälte*), line prosecutors at regional courts and junior prosecutors. The higher positions supervise the lower ones.

55 Geerds "Weisungsrecht gegenüber Staatsanwälte" 297 ff; Kelker 2006 ZGS 397.

56 § 147 GVG.

cause of disagreement for decades.⁵⁷ At least there seems to be some agreement that such external supervision is a power *sui generis*, which is restricted to the justice ministers and does not extend to other cabinet members. It may therefore not be equated with ordinary internal executive supervision. The external supervision further does not include overseeing details of prosecutions or taking decisions about whether or not to prosecute. These powers have explicitly been conferred upon prosecutors and cannot be delegated to the minister or replaced with ministerial powers.⁵⁸

Prosecuting independence therefore primarily denotes independence from executive interference in criminal proceedings and does not first and foremost refer to the internal hierarchic structure of the prosecuting authority. Although one can say that judicial independence is more extensive, both organs are bound by the rule of law and must exercise their powers with neutral objectivity.

This explains why German prosecutors did not hesitate to investigate and prosecute former Chancellor Kohl and Minister of the Interior Kanther when the slush fund

57 The status of the office of prosecution as a state organ in its own right has received little attention from constitutional law experts. The topic has generally been tackled by criminal law scholars, who have come up with various theories. The scenarios vary from perceptions that prosecutors are part of the judicial branch to the other extreme of their being part of the executive, with another option being that they fit "somewhere in between". See Koller *Staatsanwaltschaft* 35-136; Collin *Wächter der Gesetze* 151 ff; Kelker 2006 ZGS 392 ff.

58 § 145 GVG. See Geerds "Weisungsrecht gegenüber Staatsanwälte" 301. Although Wille "Das externe Weisungsrecht" 318 ff appears to favour an interpretation in support of a hierarchical ministerial relationship between the prosecuting authorities and the justice ministers, such an interpretation is not supported by § 145 GVG. He also fails to make a clear distinction between the criminal-law functions of prosecutors in the administration of justice and administrative-law powers of the justice minister as part of the executive (art 62 *Grundgesetz*). The role of French prosecutors, who are also hierarchically structured, is similar to that of German prosecutors, and the justice minister has only external supervising powers. However, lately there seems to be some confusion about the legal construct of "external supervision" in French criminal law as well. Smedovska and Falletti "Prosecuting Service in France" 171 ff interpret the external supervision of prosecutors as a form of internal executive control. For a more illuminating overview, compare *Council of Europe Report* (2009) paras 37 ff, 41. French judges (*juges* or *magistrates du siège*) and prosecutors (*procureurs* or *magistrates debout/duparquet*) are traditionally grouped together in the third branch as *magistrates*. Whereas one refers to the "powers" of parliament and the executive as *pouvoirs*, the power of these magistrates is called *autorité*. In practice, the French justice minister (*garde des sceaux*) apparently gives orders to prosecutors as if they were in a hierarchical executive relationship to him, albeit with the safety mechanism that the *cour de cassation* could review such decisions if the victim or affected person insists on that. A dispute on undue political interference in state prosecutions was recently brought before the European Court of Human Rights. See *Moulin v France* ECHR Case No. 881, 23 November 2010.

scandal of the Christian Democratic Union (CDU) broke.⁵⁹ Political meddling in prosecutions occurs rarely.⁶⁰ As former rapporteur of the Council of Europe on legal affairs, the current German justice minister expressed the opinion that the "external supervision" clause ought to be abolished.⁶¹ In practice the role of the justice minister has been reduced to keeping the channels open between the prosecutors and the executive organs assisting in criminal investigations. Apart from such a liaising role, the justice minister secures budgetary funding for the judiciary and the prosecutors and manages the infrastructure of the courts. Other duties of the minister include prison administration and overseeing the constitutionality of draft legislation.⁶²

2.2.3.1 The constitutional status of South African prosecutors under section 179

Section 179 of the 1996 *Constitution* regulates the constitutional status of prosecutors, but the status seems to hover between the third branch of state power and the executive. The prosecutors have been classified together with the judiciary under Chapter 8 as the state organs responsible for the administration of justice.

59 Due to Swiss banking secrecy and a refusal of Swiss authorities to make cardinal evidence about money laundering available to German prosecutors, Kohl was not prosecuted but forced into plea bargaining and paid a hefty fine of DM300.000 (about one year's salary of the chancellor). See "Alle Menschen sind gleich, Kohl ist gleicher" *Süddeutsche Zeitung* (2001-29). Kanther was prosecuted and convicted. He was sentenced to two years imprisonment in the first instance, a sentence that was reduced upon appeal. See BGH 2 StR 499/2006 (Case No 140/2006), decision of 18 October 2006 revising the decision of the *Landgericht Wiesbaden* 6 Js 320.4/00 16 KLS. Parliamentary investigations run concurrently. In Germany, commissions of inquiry are appointed by parliament (a 44 *Grundgesetz*) and not the president. (In South Africa it used to be a royal prerogative power and is still treated like that by s 84(2)(f) of the *Constitution*). The parliamentary commission of inquiry headed investigations into the slush fund systems. See Deutscher Bundestag 2002 dip.bundestag.de; Anonymous 2002 www2.stroebele-online.de; "Permanente Erregung. Eine Bilanz des Untersuchungsausschusses zur Parteispendenaffäre" *Die Zeit* (24/2002).

60 Wille "Das externe Weisungsrecht" 318 refers to an instance where the justice minister of Rhineland-Palatinate exceeded the scope of his powers. He was instrumental in dismissing 5 prosecutors in Bad Kreuznach, who refused to drop charges against winemakers who artificially sweetened wine with glycol and created a serious health risk. See "Pflicht zum gehorsam" *Der Spiegel* 13/1991 53-57.

61 *Council of Europe Report* (2009) paras 54, 60. It should be noted that the Report generally reflects the legal position in Germany and the United Kingdom correctly but contains some inaccuracies.

62 For an overview of the functions of the federal justice minister in English see Federal Ministry of Justice [no date] www.bmj.bund.de.

Section 179(2) favours the typical model in constitutional states. It confers the power "to institute criminal proceedings on behalf of the state" and "to carry out any necessary functions incidental to instituting criminal proceedings" upon the prosecuting authority and not upon the department of justice. The scope of section 179(4) clearly goes beyond the mere functional independence of the prosecuting authority for it demands that prosecutors should exercise their functions "without fear, favour or prejudice". It implies that the prosecutors are not subject to ministerial orders and this has been affirmed statutorily.⁶³ Such an interpretation would correlate with German criminal procedure, that demands objectivity and neutrality in criminal proceedings.

Section 179(5) also lends credence to a view that the National Director of Public Prosecutions is on a par with the Minister of Justice and Constitutional Development, because he determines prosecuting policy "in concurrence" with the minister. It does not signal a relationship of subordination typical of an internal executive hierarchy. In that case, the wording of the provision would have determined that the minister should determine prosecuting policy "in consultation with" or "on the advice of" the national director. This can mean only that the prosecuting authority was conceived as a state organ in its own right and not as a part of the executive.

The break with the Westminster criminal justice model was not as neat, though. Section 179(6) contains an ambivalent provision that the Minister of Justice and Constitutional Development is "responsible for the administration of justice" and "must exercise final responsibility over the prosecuting authority". This provision matches the typical way in which the functional independence of prosecutors is usually cast in a Westminster constellation, where they form part of the executive branch. However, the responsibility of the minister could just as well be interpreted more restrictively in the sense that it merely constitutes a form of "external supervision", as in German constitutional law.⁶⁴

63 Section 32(1)(a) *NPA Act* prescribes that the prosecuting authority should "serve impartially" and carry out its functions "in good faith and without fear, favour or prejudice" and "subject only to the Constitution and the law".

64 The conclusion of Ngcobo CJ in the minority judgment of *Glenister II (CC)* paras 75 ff that subsections (4) and (6) of s 179 do not intend prosecutors to be independent in a manner similar to that of judges must be treated with reservation. Obviously judicial independence is different from prosecuting independence. The hierarchical structure within the prosecuting authority,

Section 179(1)(a), however, causes more serious difficulties to the attempt to secure the independence of the prosecuting authority from the executive branch. It provides that the National Director of the Prosecuting Authority should be appointed by the President in his capacity as "head of the executive". This clearly constitutes an anachronism in the separation of powers typical in a constitutional state. One could have understood it if it were merely an official act of inauguration by the President acting in the capacity of head of state. The wording of the provision, however, has cast the power in the format of a straightforward executive power.

Although subsection (1)(a) provides only that the President could appoint the National Director, the legislature has interpreted this as meaning that the executive can have an input into every single appointment to the prosecuting authority.⁶⁵ Consequently, presidents in the past have construed the prosecuting authority to be part of the executive and subject to the orders of the cabinet.⁶⁶ Former President Mbeki substantiated the suspension of Pikoli from office with the argument that there was a "break-down of relations" between him and the justice minister.⁶⁷ This is

however, may not be abused to contravene the principle of legality. Ngcobo CJ further seems to equate the position of the NPA in relation to the justice minister as an internal executive relationship comparable with that of the SAPS in relation to the Minister of Police. This perception would restrict the independence of the prosecutors even more than the Westminster notion of functional independence.

65 Sections 10-16 *NPA Act*. Even ordinary prosecutors are appointed by the minister of justice on the recommendation of the national director.

66 In a letter dated 17 September 2007, former President Mbeki wrote to the justice minister about the pending arrest and prosecution of the then Police Commissioner Selebi and declared it a matter of national security, which falls under his auspices. The letter of Justice Minister Mabandla to the National Director of the NPA, Pikoli dated 18 September 2007 clearly intended to interfere in the pending prosecution. During the hearings of the Ginwala Commission, legal counsel for Pikoli put it to the justice minister that she unlawfully interfered in criminal prosecutions in terms of s 32(1)(b) *NPA Act* and that conviction of this offense may lead to imprisonment of up to two years under s 41(1) of the Act. President Zuma also regards the prosecutors as a part of the executive branch, see "Government is NPA's boss – Zuma" *News24* (2009-12-14).

67 Letter of former President Mbeki suspending Pikoli on 23 September 2007, made public during the Ginwala Inquiry. Apparently the Ginwala Commission of Inquiry interpreted the decision of the Constitutional Court in *President v SARFU* 2000 1 SA 1 (CC) paras 240-245 as a taboo to call upon the President to give evidence in any commission of inquiry. In fact, the court held that there may be "exceptional circumstances" that would "require the President to give evidence" (par 245). During the Ginwala enquiry it would have been appropriate to call President Mbeki as a witness to clarify the circumstances relating to the suspension of Pikoli from office after he and the president crossed swords over the arrest and intended prosecution of former national police commissioner Selebi.

normally aground for dismissing only a director-general, who is a political appointee to an executive state department.⁶⁸

2.3 Repercussions of the constitutional certification of sections 179(1)(a) and (6)

Although concerns were raised during the certification procedures about the proper separation in section 179 of the powers of the prosecuting authority from the powers of the executive, the Constitutional Court brushed them aside.⁶⁹ The court departed from the premises that the separation of powers distinguishes between the legislature, the executive, and the judiciary only.⁷⁰ Without considering the option that the prosecuting authority could be a state organ in its own right, the court simply argued that the prosecutors were not part of the judiciary, and consequently, they must resort under the executive.⁷¹

The court rejected objections that the President as head of the executive should not appoint the head of the prosecuting authority. It held that "...even if it [the prosecuting authority] were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers".⁷² In effect, the court failed to acknowledge the fact that one state organ can indirectly control another through making such appointments and thus compromise the independence of such appointees.

68 *Masetlha v President* 2008 1 SA 566 (CC) paras 66-91.

69 *In re Certification of the Constitution* paras 140-148.

70 Principle VI of the Constitutional Principles in Schedule 4 to the *Interim Constitution* required that in the final *Constitution* there should be "a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness". This was not meant to be a *numerus clauses* to restrict the classification of state organs though. The principles explicitly made provision for other state organs such as traditional leader structures (a XIII), a Public Service Commission, an Auditor-General and Public Protector (a XXIX), and the office of the president as head of state (Schedule 5) as state organs.

71 The *Constitution* clearly demarcates its powers in s 179(2) as the investigation and prosecution of criminal offences, and not adjudication (s 165) or executive state administration (s 85). The view expressed by Redpath *Scorpions* 71 that the prosecution "in reality has a quasi-judicial function" is not supported by the *Constitution*.

72 *In re Certification of the Constitution* para 141.

Care was taken to place restrictions on the previously simple power to make executive appointments of judges, but the executive's power to appoint the head of the prosecuting authority remained undiluted.⁷³ Even though the system of making judicial appointments was modified in the 1996 *Constitution*, the changes are insufficient to secure judicial independence. The President still has the power to appoint the Chief Justice and Deputy Chief Justice as well other judges of the Constitutional Court in his capacity as head of the executive⁷⁴. Although he must consult with the Judicial Service Commission and the leaders of other political parties with regard to these appointments, he has much leeway for judicial politics and indirect control through the making of these appointments. All other judges are also appointed by him on the advice of the Judicial Service Commission.⁷⁵ The composition of the Judicial Service Commission also falls short of international standards, which require that at least half of the members of such a judicial appointments commission should consist of members of the judiciary and that there should be no executive influence on judicial appointments, in order to secure judicial independence.⁷⁶ The Judicial Service Commission in South Africa usually consists of 23 members (in some instances of 24).⁷⁷ Only three of them are from the judiciary. Judges are thus outnumbered at a ratio of 1:8. The Constitutional Court nevertheless certified the making of judicial appointments in this manner as being sufficient to ensure judicial independence.⁷⁸ In the case of the appointment procedures of the director of the national prosecuting authority, the institution of even such a slight precaution to ensure relative prosecutorial independence was denied.

73 Originally both judicial appointments to higher courts and the appointment of the attorney-general resorted under the royal prerogatives. For a historical background to how appointments of the judiciary evolved under the Westminster constitutions of South Africa, see fn 426. With the fusion of the offices of the head of state and the head of the executive in the 1983 *Constitution*, the former prerogatives were turned into executive powers. This might explain why ss 174(3), (4) and 179(1)(a) refer to presidential appointments in the capacity as head of the executive. The latter provision was taken over directly from the *Attorney-General Act* 92 of 1992. See the discussion under 2.4.1.

74 Section 174(3) and (4) *Constitution*.

75 Section 174(6) and s 175(1) *Constitution*.

76 The Council of Europe lately recommended that at least half of the members of the electoral bodies that appoint judges or prosecutors should be made up of judges and senior prosecutors respectively. See *Council of Europe Report* (2009) para 3.3.2. The United Kingdom ushered in similar reforms in 2005 but made sure that no politician may appoint members of the judiciary.

77 The Commission consists of three members of the judiciary, ten from the two legislative bodies, the justice minister, four appointments by the president as the head of the executive, two advocates, two attorneys and one law professor. Eleven members (the justice minister included) are thus politicians and a total of five (the justice minister included) are executive appointees.

78 *In re Certification of the Constitution* paras 119-139.

To lend substance to its arguments, the court referred to the Namibian decision of *Ex Parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*.⁷⁹ In that case, Leon AJA referred extensively to an article on the concept of a constitutional state.⁸⁰ The article focused on differences between the British notion of the rule of law and the German concept of a *Rechtsstaat*. The court endorsed the view that "Namibia is a *Rechtsstaat* just as South Africa under the apartheid regime was not". Having said that, the court proceeded to discuss six models of state prosecution, as they were set out by Edwards during a meeting of Commonwealth Law Ministers in 1977. Most of these countries, however, adhere to the Westminster criminal justice model insofar as they accept the notion of the functional independence of prosecutors within the executive branch.

The perception is quite widespread that the concept of constitutionalism (the *Rechtsstaat* idea) as it evolved in the constitutional states of Continental Europe can be equated with the British notion of rule of law.⁸¹ It appears that the court was not aware that the prosecuting systems of most Continental constitutional states differ substantially from these models. A constitutional state is different from the Westminster system not only insofar as it relies on a written constitution with a Bill of Rights as the supreme law. The different branches of state power hold each other in an equilibrium of power. The more limited form of the British rule of law, which is subject to the doctrine of parliamentary sovereignty, is therefore ruled out. Similarly, a preponderance of power relating to judicial and prosecuting appointments, which tips the balance of power towards the executive, is not compatible with the more encompassing notion of the rule of law in a constitutional state.

79 *Ex Parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 8 BCLR 1070 (NmS).

80 Blaau 1990 SALJ 76-96.

81 In 1984 Lawrence Baxter made the observation that in "recent years the German concept of the *Rechtsstaat*, or 'just state', has proved attractive to some Afrikaans lawyers who either dislike the English concept of the Rule of Law, or who simply prefer the German formulation". See Baxter *Administrative Law* 79. Even after South Africa switched to the constitutional state model, Goldstone J contended that the United Kingdom was a constitutional state, apparently with the British rule of law in mind. See *President v Hugo* 1997 4 SA 1 (CC) para 27 (cited as "*President v Hugo*"). On the other extreme, Nicholson J in *Zuma v National Director of Public Prosecution* 2008 ZAKZHC 71 (cited as "*Zuma v NDPP (KZHC)*") para 173 was apparently still under the impression that the 1996 *Constitution* was modelled on the Westminster system, instead of its having abolished that.

In relying upon the Namibian judgment the Constitutional Court endorsed the executive appointment of the national director and certified it as compatible with the separation of powers in a constitutional state.

2.4 The difficulties of transcending to a constitutional state

A number of difficulties about the proper status of the prosecuting authority and the delineation of their powers *vis-à-vis* the judiciary and the executive are undeniably plaguing the new constitutional system. The Khampepe and Ginwala Commissions of inquiry illustrate the point.⁸² The most pressing issues that need to be addressed are the following: the flawed nature of the doctrine of functional independence; the executive appointment of prosecutors; arbitrary *nolle prosequis* favouring politicians and their friends, which reinforce the executive's sense that it has no need to be accountable; whether or not there should be prosecution-led criminal investigations; whether or not the prosecuting authority should have its own forensic teams for specialised crime in units such as the recently disbanded "Scorpions" (the Directorate of Special Operations); and finally, the need for a clear delineation of prosecuting powers *vis-à-vis* the powers of the police force.

2.4.1 The flawed nature of the doctrine of functional independence

Under the former Westminster constitutions, the administration of justice and executive administrative powers were only partially separated. The *Attorney-General Act* 92 of 1992, which was adopted shortly before the *Interim Constitution* took force, unequivocally perpetuated the model of functional independence,⁸³ although it restricted political influence on prosecutions more clearly than previously.⁸⁴

82 *Khampepe Inquiry Final Report* (2006); *Ginwala Report* (2008).

83 Section 2(5) required that the Attorneys-General should declare under oath that they will perform their duties and exercise their powers "without fear, favour or prejudice". True independence of the Attorneys-General under the *Attorney-General Act* 92 of 1992 can be questioned, though. They were not only executive appointees (s 2), but the State President also determined their salaries and conditions of service (s 3). Moreover, he could suspend them from office based on misconduct, ill-health, and the incapacity to carry out duties efficiently. Unless Parliament requested that such an Attorney-General should be restored to his office, the way was clear for the State President to remove him from office. The two houses of parliament could also initiate a removal from office (s 4). No mechanisms like the obligatory judicial review of the suspension or

Chapter 7 of the 1993 *Interim Constitution* regulated the powers of the prosecuting authority and grouped them together with the judiciary as state organs responsible for the administration of justice.⁸⁵ From this classification, one would have presumed that the prosecutors were intended to be another organ of the third branch of state power. Section 108 contained an enabling clause to regulate the jurisdiction, powers and functions of the Attorneys-General by way of statute.⁸⁶

The 1992 legislation, however, remained in force until 1998 and served as the model for the drafting of section 179 of the 1996 *Constitution*. The ambivalent outcome is that most of the provisions could be interpreted in a way that would be compatible with the constitutional state model, but in the final instance, prosecuting independence is torpedoed by sections 179(1)(a) and (6). Section 179(1)(a) took over the appointment procedures for the head of the prosecution authority from section 2(1) of the *Attorney-General Act* and made it an executive power. The model of functional independence was re-established in this way, although South Africa had moved to the constitutional state model.

The doctrine of functional independence is seriously flawed and not compatible with the manner in which specific fundamental rights impact on the exercise of their functions by state organs in terms of the separation of powers. German courts laid the foundation with the premise that fundamental rights are "rights of the subject" *vis-à-vis* a more powerful state.⁸⁷ Subsequently, this was structured as a public-law

removal from office to ensure due process were built into the legislation. For a historical overview of the powers and degree of prosecutorial independence, see Harms DP in *NDPP v Zuma (SCA)* paras 29-32.

84 Section 3(5) *Criminal Procedure Act* 51 of 1977, which allowed the Minister of Justice to reverse any decision taken by an Attorney-General, was repealed by s 8 *Attorney-General Act* 92 of 1992.

85 Section 108 *Interim Constitution*.

86 Section 108(2) *Interim Constitution*.

87 In BVerfGE 50, 290 at 337, the German Constitutional Court referred to the earlier *Lüth* judgment and held that in terms of the historical application of the theory of public-law rights (*subjective öffentliche Rechte* or "rights of the subject") and the current content thereof, these rights are "individual human and civil rights that aim to protect human freedom, particularly where it appears to be jeopardised". See in general Henke *Das subjective öffentliche Recht*; Müller *Positivität der Grundrechte* 100; Schmitt Glaeser *Verwaltungsprozeßrecht* 101 ff; Maurer *Staatsrecht* 254, 259. Stolleis *History of Public Law* 211-213 actually traces the theory on the rights of the subject and illegal administrative action back to doctrinal shifts during the Weimar Republic which came about due to the codification of public law safter the 1870s. Rautenbach, Venter and Wiechers first introduced this concept in South Africa. See Rautenbach 1971 *THRHR*

relationship,⁸⁸ which in turn was further separated to distinguish between such relationships in criminal and administrative law respectively.⁸⁹ In South Africa the main difficulty in delineating the administrative-law relationship from the criminal-law relationship can be traced to conflicting perceptions about what is regarded as "administrative action".⁹⁰

The public-law relationship underpinning criminal law is indeed very different from that under administrative law. The former relationship is the domain of the administration of justice, where state power is wielded by the judiciary and state prosecutors *vis-à-vis* an accused, whereas the administrative-law relationship concerns state power wielded in the executive sphere. The former relationship is of a triangular nature with judges holding the scales of justice at the pinnacle and the prosecutors facing the accused to ensure justice in the public interest.⁹¹ The administrative relationship, however, is usually of a vertical nature.⁹²

The model of functional independence inevitably blurs the distinction of functions exercised in terms of criminal law and administrative law. In terms of English constitutional law and criminal justice it is difficult to draw such a distinction because the police do not only execute administrative powers in securing public safety and

399; Rautenbach 1976 *TSAR* 168; Venter *Publiekregtelike Verhouding* 148 ff; Wiechers *Publieke Subjektiewe Reg* 270 ff. See also Blaauw-Wolf 1999 *SAPL* 178.

88 See eg Maurer *Staatsrecht* 254 ff, 263 ff.

89 See eg Maurer *Allgemeines Verwaltungsrecht* 163 ff. See also the text around n 43-n 45. Venter *Publiekregtelike Verhouding* tends to focus only on the administrative law domain.

90 The first South African handbook on administrative law as a separate field of public law saw the light only in 1973, viz Wiechers *Administratiefreg*. In contrast to Baxter, who later linked administrative action to the exercise of a public power, Wiechers followed the Continental European tradition that links administrative action specifically to the exercise of executive power. In contrast to internal executive action, administrative action denotes executive action with a direct external effect that relates to individuals or legal persons. This distinction is not clearly made in English administrative law, which departs from the exercise of a public power in general. This extended concept of administrative action makes it possible to accommodate criminal justice as a part of the executive's sphere of competence. The exercise of a "public power" therefore includes action taken by prosecutors and the police in terms of criminal procedure. See the subsequent discussion under 4.2.2.

91 A similar triangular relationship exists in private-law disputes, where the judge holds the scales of justice and the applicant faces the respondent.

92 The relationship of state organs *vis-à-vis* individuals or legal persons is of a vertical nature because a state organ can invoke state power. However, it is also possible that one state organ can exercise administrative power relating to another state organ, eg legal supervision. State organs *inter se* do not necessarily stand in vertical relationship to each other, though. This is a complex field of administrative law, which would go beyond the current discussion.

order; they may actually enforce criminal law by prosecuting criminal offences as well.⁹³

Under the 1996 *Constitution*, the manner in which these powers should be exercised in relation to persons affected by it is regulated in the Bill of Rights. It cannot simply be ignored, for the Bill of Rights is binding upon all branches of state power.⁹⁴ Section 33 (administrative justice) regulates specifically how executive state organs must exercise administrative powers, whereas sections 34 and 35 are of particular importance in criminal justice. Section 35 sets out rights regarding pre-trial criminal investigations, prosecutions, fair criminal trials, sentencing and the post-trial execution of sentences. In the *Zuma* case, Harms DP rightly held that the doctrine of legitimate expectation relates to administrative discretionary powers and administrative justice (section 33). It therefore does not apply to the exercise of the discretionary powers of prosecutors under section 179.⁹⁵

Although not restricted to criminal procedure, section 34 is important insofar as prosecutors may not hinder the access of victims of crime to the courts with a *nolle prosequi* in instances that would merit a prosecution. In German criminal law, victims or persons affected by criminal offences have remedies to insist on criminal prosecutions and can even take the matter to court to get an order that forces prosecutors to institute criminal proceedings.⁹⁶

93 One must be careful with perceptions that the 1996 *Constitution* sanctions "law enforcement" by the police. See Redpath *Scorpions* 70. S 205(3) of the *Constitution* provides that the police may investigate criminal offences, but does not confer prosecuting powers upon the police. The power of arrest should not be conflated with law enforcement in general. It can justify administrative-law functions to secure public safety but could be part of criminal procedure. Although prosecutors usually have limited powers of arrest in most countries, prosecutors in Italy have extensive powers of arrest.

94 Section 81(1) *Constitution*.

95 *NDPP v Zuma* (SCA) paras 76-80. The doctrine of legitimate expectation was introduced by the Appellate Division in *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) to ensure greater fairness of administrative action. In *Thebus v S* 2003 ZACC 12, the Constitutional Court underscored that criminal prosecutions and convictions are subject to the requirements of s 35. See also Joubert *Strafprosesreg* 65-68, 99.

96 This procedure is referred to as a *Klageerzwingung* and is regulated by § 172 *StPO*. In terms of that, the victim or person who laid the criminal charges must be informed in writing if the prosecutor does not proceed with criminal charges. The victim has two weeks in which to appeal the decision to the next level of the prosecuting authority. If the prosecutors still refuse to take the matter to court, the victim can appeal the decision not to prosecute within one month to a competent criminal court (at the level of a high court) within the jurisdiction of the prosecuting authority. Such an appeal must set out the facts of the case and substantiate why it would be in the public interest to prosecute the offence. Under § 173 *StPO* the court may require that the

In South Africa, both the judiciary and the prosecutors are subject to the *Constitution* and the law, and are obliged to apply it impartially and without fear, favour or prejudice.⁹⁷ Judges presiding over criminal trials are thus obliged to make sure that the law is correctly applied in a charge sheet, and if not, may correct it.⁹⁸ In the case of Yengeni this would have implied that if the criminal offence he committed fulfilled the requirements of corruption, the presiding judge should have corrected the lesser charge of fraud.⁹⁹ German judges are also obliged to consider all material evidence and must call witnesses who could clarify the facts even if they were not called by the prosecution or the accused.¹⁰⁰ The different constitutional role of judges and prosecutors signals a shift away from a purely accusatory system where judges are bound by a charge sheet and expected to stand on the sideline like an uninvolved referee.¹⁰¹

2.4.2 Executive appointment of prosecutors

Section 179(1)(a) was taken over from the *Attorney-General Act* of 1992, and the *National Prosecuting Authority Act* of 1998 restates it.¹⁰² Although the Act retained the functional independence framework of its predecessor, it contains two modifications. First, it abolished the provincial Attorneys-General by centralising

prosecuting authority provide a detailed account of the steps it undertook to investigate the alleged criminal offence, and if the court is not satisfied, it may order further investigation into the matter. If the court is not satisfied that the matter warrants a criminal trial, it may reject the appeal and must inform both the prosecuting authority and the victim of the reasons for the decision. Under these circumstances a criminal prosecution may be reopened only on the basis of new facts or evidence that has come to light (§ 174 *StPO*). If the judge is of the opinion that the evidence merits a criminal trial, the judge may order the prosecutors to institute criminal proceedings (§175 *StPO*).

97 Sections 165(2) and 179(4) *Constitution*.

98 § 207(2) No 3 *StPO* empowers a German judge who presides over a criminal trial and leads the proceedings to open the trial with a diverging judicial opinion on the offence under consideration in terms of the applicable law.

99 See the discussion under 2.2.1.

100 § 244(2) 1st sentence *StPO*.

101 The comparison of the accusatory system with a game based on fairness with a neutral referee dates back to Hume and Locke, see Kelker 2006 ZGS 413. The comparison might still hold true for private-law disputes. However, one should bear in mind that the comparison dates back to a time when there was no clear separation between private and criminal law. For a critical analysis of the accusatory system under the previous constitutional model, also see Du Plessis 1991 SALJ 577.

102 Section 2(1) *Attorney-General Act* 92 of 1992 and s 10 *NPA Act*.

power in the hands of a National Director;¹⁰³ and second, it dropped the requirement that the National Director should have experience for a continuous period of at least ten years as an advocate.¹⁰⁴ This led to the practice that trusted political appointees who first held the position of Director-General in the Department of Justice and Constitutional Development were regularly appointed as national directors of the prosecuting authority.¹⁰⁵

The following deficits with regard to the appointment of the National Director can be listed: the individual is a political appointee of the executive, who can be suspended from office in terms of procedures that practically lay the prosecuting authority lame.¹⁰⁶ The Act further unconstitutionally blocks direct access to the Constitutional Court to resolve disputes between the prosecuting authority and the executive about the scope of their powers.¹⁰⁷ The Act also does not provide for any penalising mechanisms for an abuse of power by the President.¹⁰⁸ It is significant that two commissions of inquiry were appointed by former President Mbeki to investigate the alleged impropriety or unfitness of a National Director to hold office within four years. This bears testimony to the precarious position of the prosecuting authority *vis-à-vis*

103 Section 2 *NPA Act*. The step was apparently motivated by the fact that all Attorneys-General were still white appointments from the previous government. To correct that, s 8 determines that the prosecuting authority must reflect the racial composition of the country. There was some irritation about the conduct of political trials such as that of former defence minister Magnus Malan that were perceived as having been pursued half-heartedly. See Fernandez "Post-TRC Prosecutions" 65 ff; Nerlich "Lessons for the ICC" 59. It should be noted that post-Truth and Reconciliation trials fared no better under the centralised prosecuting system. Although former President Mbeki created a special unit for such prosecutions, Pikoli gave evidence before the Ginwala Commission that several cabinet ministers were concerned that no members of MK should be prosecuted. See "Pikoli's replying affidavit in interdict application" *Politicsweb* (2009-8-12) paras 269-274. Apparently they were worried that MK members could be prosecuted for the torture or killing of prisoners of war in some of the ANC's prison camps such as Quatro, since that is not regarded as a legitimate use of force under the Geneva Conventions of 1949 or the Additional Protocols of 1977.

104 Section 9 *NPA Act* compared to s 2(1)(b) *Attorney-General Act* 92 of 1992.

105 This was the case with regard to Ngcuka, Pikoli and Simelane.

106 Section 12(6) and (7) *NPA Act* contain lengthy procedures, all tilted to favour the executive, which circumvent the Constitutional Court as the state organ vested with the power to resolve such a dispute.

107 Section 12(6) and (7) *NPA Act* read with s 167(4)(a) *Constitution*.

108 Section 12(6)(e) *NPA Act* even justifies that a national director, who had been provisionally suspended by the president, should receive no salary whilst he contests his suspension. If he is lucky, the president may show some goodwill and determine his salary as he pleases. This is certainly not fair legislation and opens the back door to an abuse of power.

the executive.¹⁰⁹ Under these circumstances, prosecuting independence is a figment of the imagination.

The appointment of Simelane as Pikoli's successor solicited widespread criticism. It was suggested that he was not a "fit and proper person" to hold office because he allegedly lied to the Ginwala Commission of Inquiry.¹¹⁰ As Director-General of the Department of Justice and Constitutional Development, Simelane often encroached upon the domain of the National Director's powers and apparently even told prosecutors to spy on Pikoli.¹¹¹ The Democratic Alliance contested his appointment on the basis that he was not a "fit and proper person" to hold office but lost the case in the first instance.¹¹² This has nevertheless put the constitutional tenability of an executive appointment of the head of the prosecuting authority squarely on the table.

In *Glenister v President of RSA*, the majority judgment of the Constitutional Court required that an anti-corruption unit should be sufficiently insulated from political influence in its structure and functioning.¹¹³ The court held that executive appointments, the termination of office and the award of remuneration that is dependant on the Minister of Police were not a sufficient guarantee for their independence.¹¹⁴ Should the same then not also apply with regard to the head of the prosecuting authority and the prosecutors in relation to powers granted to the President as the head of the executive and the Minister of Justice and Constitutional Development to exert control, be that direct or indirect, over them?

109 Judge Hefer was appointed on 19 September 2003 to investigate allegations that Ncguka was an apartheid spy and whether or not he had "improperly and in violation of the law, directly or indirectly, taken advantage of or misused the prosecuting authority". See *Hefer Commission of Inquiry Report* 2004 para 3. Pikoli was suspended on 23 September 2007 and the Ginwala Commission of Inquiry was appointed under s 12(6)(a) of the *NPA Act* on 3 October 2007; see *Ginwala Report* (2008) para 2.

110 Patrick Ellis SC lodged a formal complaint to the Pretoria Society of Advocates about Simelane's fitness as an advocate and asked to have him struck from the roll of advocates: Ellis 2009 mg.co.za. Whether Simelane actually lied or simply covered for his superiors is debatable. Ginwala put the blame on him, but in terms of constitutional law the minister has the final responsibility for what happens in a state department and must bear the political consequences. See "How Ginwala blew it" *Mail & Guardian* (2008-12-12); "Ginwala absolves Mbeki" *Mail & Guardian* (2008-12-5).

111 "Meddlesome Menzi" *Mail & Guardian* (2008-8-15); "The incredible Mr Simelane" *Mail & Guardian* (2008-8-15); "How Menzi stymied arms probe" *Mail & Guardian* (2010-12-3).

112 *Democratic Alliance v President of the Republic of South Africa* 2010 ZAGPPHC 194.

113 *Glenister II (CC)* paras 178 ff.

114 *Glenister II (CC)* paras 207 ff.

Yet even if the National Director were to be appointed by the Judicial Service Commission in a way similar to that in which judges are appointed,¹¹⁵ this process might still fall short of internationally recommended standards to secure independence from political office holders due to the overweight of political appointees to the Commission.¹¹⁶

2.4.3 *Arbitrary nolle prosequis in service of the executive*

The power of the executive over prosecutors leads not only to a politicisation of the prosecuting authority but causes friction with experienced senior prosecutors who are dedicated to their work. Soon after Simelane was appointed as the successor to Pikoli he established his signature on the organisation by entering arbitrary *nolle prosequis* in the service of the executive.¹¹⁷ He derailed prosecutions and demoted senior prosecutors with years of experience.¹¹⁸ The most serious instance is the closure of the probe into the irregularities pertaining to the arms deal, which had

115 As suggested by former President Motlanthe. See "Transcript of Kgalema Motlanthe's media briefing" *Politicsweb* (10-2-2009). The Democratic Alliance supported the idea and tabled a private members' bill to amend ss 10 and 11 of the *NPA Act*. See "JSC should vet NDPP candidates – DA" *Politicsweb* (2009-2-19). However, to change the law in this regard would have required a constitutional amendment of s 179(1)(a) and not just an amendment of the enabling statute.

116 In constitutional states, the position of the head of a prosecuting authority is usually not filled by outsiders but by experienced prosecutors who worked their way up the ladder. Positions are advertised and from the best candidates, and recommendations are made by the staff section of the prosecuting authority. There are different models determining the further stages of such appointment procedures. In the past, justice ministers often presided over the final selection by an electoral body, which typically consisted of members representing all political parties in parliament. The justice minister as a member of the executive had no vote. The Council of Europe lately recommended that this model should be replaced by one where senior prosecutors should make up at least half of the members of the electoral body. See *Council of Europe Report* (2009) para 3 3 2.

117 "Why I let Fana Hlongwane off the hook - Menzi Simelane" *Politicsweb* (2010-3-21). In March 2010 Simelane ordered the Assets Forfeiture Unit not to pursue an attempt to seize millions of Rands held in Lichtenstein by Hlongwane, saying he was not convinced by the evidence against him. See "Hawks boss questions viability of arms-deal probe" *Mail & Guardian* (2010-9-8). Simelane also instructed Gauteng's Acting Deputy Director of Public Prosecutions, Gladstone Maema, to replace Gerrie Nel as prosecutor in Mphego's trial. Nel charged Mphego for defeating the ends of justice in the Selebi trial. Shortly afterwards the case was struck off the role. See "Why did Simelane protect Mphego?" *Politicsweb* (2010-5-24). See fn 16 for the latter's role in spying upon the prosecuting authority and making the tapes and software to decode that available to Zuma and his legal counsel.

118 "Simelane gags NPA staff" *Politicsweb* (2010-1-21); "Family shocked by death of 'demoted' law guru" *IOL* (2010-3-31); "Simelane backs down on demotions" *City Press* (2010-4-4); "Simelane must explain disbanding of SCCU – DA" *Politicsweb* (2010-5-11); "Silks split over NPA reforms" *Mail & Guardian* (2010-6-13).

been dragging on for more than a decade.¹¹⁹ Simelane's arbitrary entering of *nolle prosequis* and disregard for the principle of legality in criminal matters would be sufficient ground to challenge the constitutional tenability of the appointment and removal procedures relating to the National Director, his continued heading of the prosecuting authority, and the legality of the *nolle prosequis in casu*.

The most obvious spin-off effect of the current state of affairs is the lack of accountability of political office bearers in parliament and the executive as well as the state administration.¹²⁰ History has shown that a single incident setting a precedent might soon start to snowball. An Auditor-General investigation into government officials who moonlight as business executives found that more than 2,000 officials were involved in tender-rigging and corruption between 2005 and 2007.¹²¹

The circumstances under which a *nolle prosequi* was entered in favour of Jacob Zuma on two occasions could hardly be termed legitimate in terms of criminal or constitutional law.¹²² The case brought by the Democratic Alliance contesting the second *nolle prosequi* that secured the way for Zuma to run for president is comparable to the procedures under German criminal law to ensure that victims or parties affected by such a decision have access to the courts.¹²³ The role of the South African judiciary to guard the Constitution and the rule of law is similar to that

119 "What Dramat and Simelane said about the arms deal" *Politicsweb* (2010-9-10); "Arms deal probe (2000-2010)" *Mail & Guardian* (2010-10-15); "Hawks boss questions viability of arms-deal probe" *Mail & Guardian* (2010-9-8); "The Untouchables - the ANC remake" *The Daily Maverick* (2010-3-19). Parties with an interest in the prosecution of alleged corruption in the arms deal would nevertheless be able to approach the courts to grant them access to the courts on the basis of s 34 of the Bill of Rights. Although parliament would be able to grant amnesty by way of statute to politicians involved in alleged irregularities pertaining to the arms deal, it would amount to forsaking their duties under s 55(2) of the *Constitution*. The constitutionality of such legislation would obviously be subject to judicial review.

120 In *S v Yengeni* para 59 the court held that: "To state that corruption and other crimes of dishonesty on the part of elected office bearers and officials in the public service have become one of the most serious threats to our country's well-being, is to state the obvious. Their incidence may well be characterised as a pandemic that needs to be recognised as such and requires concerted and drastic efforts to combat it". See also *Glenister II (CC)* paras 172-173.

121 "How civil servants fleeced us of R600m" *The Times* (2009-6-14).

122 The list of charges against Zuma was set out in a charge sheet spanning 87 pages. See "The case against Jacob G Zuma" *Mail & Guardian* (2009-4-3). In rare instances a *nolle prosequi* could be entered in a *prima facie* case but this is the exception to the rule. Joubert *Strafprosesreg* 66 discuss two instances, viz the tragic personal circumstances of an accused where it would not be in the public interest to prosecute (eg a father whose young children died as a result of an accident which he caused negligently) and trivial matters.

123 *Democratic Alliance v Acting National Director of the Prosecuting Authority* 2011 ZAGPPHC 57 (cited as "*DA v Acting NDPP*"). This argument was not forwarded by the legal council of the Democratic Alliance, though.

of German judges, and they are in a position to uphold section 34 of the *Constitution* against undue decisions not to prosecute.

The reasons advanced by Zuma's legal counsel to fend off a future prosecution included the remarkable claim that it is unconstitutional to charge or prosecute a President in office, and furthermore, that one branch of the executive (the prosecuting authority) cannot lay another (the president) unable to function.¹²⁴ Even before Zuma was granted the second *nolle prosequi*, his legal advisors toyed with the Berlusconi option that a sitting president should have indemnity from criminal prosecution. The contention that a president in office cannot be charged or prosecuted is not supported by the Constitution and would openly undermine the rule of law.¹²⁵ In Berlusconi's case, however, the Italian Constitutional Court declared the indemnity statute unconstitutional.¹²⁶ As will be pointed out later, Zuma's legal advisors also considered the option that should he have to stand trial, he should pardon himself if he were convicted of corruption whilst serving as President.¹²⁷ Such political tactics can hardly be reconciled with the notion of the rule of law and executive accountability.

Surprisingly the Gauteng High Court did not address any of these issues and treated the discretionary power whether or not to prosecute as administrative action despite the fact that section 1(1)(ff) of the *PAJA* explicitly excludes prosecuting powers from qualifying as administrative action.¹²⁸ The court conflated discretionary powers relating to criminal prosecutions with administrative-law discretionary powers that fall within the ambit of the exercise of executive powers. Despite binding precedent of the Constitutional Court and the Supreme Court of Appeal that the discretion to prosecute relates to a reasonable prospect to prove the elements of a specific crime and that doctrines relating to administrative-law discretionary powers are not applicable in the exercise of prosecuting discretions, Ranchod J did not pay attention to that. The presiding judge furthermore failed to consider the demarcation of

124 "Jacob Zuma's replying affidavit to the DA" *Politicsweb* (2009-9-17); "Unconstitutional to prosecute Zuma – Kemp" *Politicsweb* (2010-6-10).

125 Sections 1(c) and (d), 2, 8(1), 9(1), 83(b) and 89 *Constitution*.

126 "Italian court rules Berlusconi's immunity law unconstitutional" *The Guardian* (2009-10-7).

127 "The 'Berlusconi principle'" *The Times* (2008-7-29); "Triple play to save Zuma" *Mail & Guardian* (2008-7-11); "Scramble to secure a Zuma presidency" *Mail & Guardian* (2008-8-9).

128 *DA v Acting NDPP* paras 27 ff.

constitutional powers of the prosecuting authority in relation to judicial powers and whether or not the entering of a *nolle prosequi* in a *prima facie* case unconstitutionally blocks access to the courts.

He did not elaborate on the presidential indemnity argument, but instead argued that the Democratic Alliance does not have *locus standi* to contest the dropping of corruption charges against Jacob Zuma, who was Deputy President when the first *nolle prosequi* was entered and the ANC's presidential candidate when the second *nolle prosequi* was entered. Since the Democratic Alliance is the official opposition and Parliament has an explicit constitutional mandate in terms of sections 55(2) and 92(2) to exercise oversight over the executive and to hold cabinet ministers accountable, the verdict of the presiding judge does not seem logical. If the arguments forwarded by the court should prevail, it would constitute a *carte blanche* for executive unaccountability that renders sections 1(d), 8(1), 92, 83(b) and 89(1)(a) of the *Constitution* null and void.

The inadequacy of the removal from office procedures under section 89 of the *Constitution* was already painfully illustrated in the Travelgate affair. A significant number of the members of Parliament were exposed as having defrauded Parliament of R36million. In an apparent bid to save his presidency after he lost power as president of the ANC in December 2007, President Mbeki issued a regulation in contravention of insolvency law, ordering the liquidators to stop the liquidation of a travel agency that was heavily implicated in the scandal. The regulation determined that the liquidators should "no further pursue any action as against the various members of Parliament in relation to the un-invoiced tickets, levies and services".¹²⁹ With this tactical move he bought time to continue serving his term. Parliament was only too happy, having benefitted from the presidential breach of insolvency law, and did not remove him from office although it clearly qualified as an instance that would have warranted his removal from office under section 89(1)(a). This is a cause for serious concern, especially in the light of a recent study,

¹²⁹ GG 31023 of 9 May 2008 113. Apparently, Parliament had to stand in for indemnifying the liquidators with roughly R6million in the cover-up.

which concluded that "the absence of leaders who distinctively set a good example" exacerbates the high rates of violent crime.¹³⁰

The removal from office of the president is currently restricted to a vote of two-thirds of the members of Parliament. This is related to the control powers allocated to Parliament to maintain oversight over the executive. The *Constitution* does not provide for an alternative route where such removal procedures could nevertheless proceed if Parliament refuses or fails to exercise its power in accordance with the *Constitution*. The *Constitution* also does not regulate what should happen if the President is convicted of a criminal offence.¹³¹ A very tangible situation could thus arise where a president is convicted of a criminal offence and Parliament nevertheless fails to initiate the removal from office or to muster a two-thirds majority to do so. There ought to be a clear regulation that, for example, the president should resign or automatically cease to hold office upon conviction of a criminal offence, and that section 89(2) applies to such instances as well. Unless the *Constitution* is amended to regulate such a potential deadlock between the judiciary and Parliament, the only way open to the Constitutional Court would be to develop constitutional common law in terms of section 173 of the *Constitution* to handle that.¹³² The Constitutional Court is obliged to uphold the rule of law and *Constitution* as the supreme law.¹³³

2.4.4 Prosecution-led criminal investigations

The model of the functional independence of prosecutors foresees a more limited role of prosecutors in criminal justice and usually restricts their role to court proceedings. This is not the case in constitutional states, where criminal

130 *Report of the Centre for the Study of Violence and Reconciliation* (2009) 9.

131 In terms of s 87 the President ceases to be a member of the National Assembly upon election, and thus not even s 47(1)(e) of the *Constitution* would bar him from continuing to hold office. The question is also whether the hurdle to still hold office as a member of Parliament should be as low as the one stated in s 47(1)(e). Even company law invokes stricter standards pertaining to the holding of office of company directors. (See fn 203.) Since members of Parliament are democratic representatives who are entrusted with the core competency of law-making, a higher standard of disqualification upon conviction of criminal offences ought to prevail.

132 This would be a typical case of "filling the gaps" through interpretation and would be in line with previous judgments of the Constitutional Court in *Du Plessis v De Klerk* 1996 3 SA 850 (CC), *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC), and *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) (cited as "*Masiya v NDPP*").

133 Sections 1(c) and 2 read with ss 165(2) and 167(3) *Constitution*.

investigations are also prosecution-led. The wording of section 179(2) supports an interpretation that the role of prosecutors under the 1996 *Constitution* was not conceived as being restricted to court action only. Prosecutors may "institute criminal proceedings on behalf of the state" and may "carry out any necessary functions incidental to instituting criminal proceedings". That means that as soon as a police docket has been opened, the matter must be passed on to the prosecutors to oversee criminal investigations and, if necessary, to prepare for a trial.

The ethical objections Redpath raises about prosecution-led criminal investigations are not justified.¹³⁴ Since prosecutors are trained lawyers, they are better equipped than the police to ensure that the human rights of alleged offenders are respected during criminal investigations. Practice has shown that the SAPS often transgresses the limits of their powers. Chief prosecutor Gerrie Nel was arrested late at night by a force of twenty police officers, apparently to intimidate him into not continuing the criminal investigations and prosecution for corruption of former police commissioner Selebi.¹³⁵ The journalist Wa Afrika who investigated political corruption in Mpumalanga was arbitrarily arrested and detained. Similar incidents of the abuse of power are no rarity. Civil lawsuits against the police cost the state R7.5billion in 2010.¹³⁶

Due to criminal investigations and prosecutions relating to the Travelgate scandal and alleged corruption of politicians involved in the arms deal,¹³⁷ the enthusiasm of members of Parliament and the executive for the Directorate of Special Operations ("Scorpions") waned substantially. Thus, it was decided to dissolve the only anti-corruption unit of the prosecuting authority with an independent forensic team and to incorporate it into the police force in order to bring it under the heel of executive control.

134 The observation of Redpath *Scorpions* 63 ff that prosecutors traditionally do not become involved in criminal investigations is not correct. That applies to the English criminal justice model only.

135 The arrest warrant charging him with fraud, defeating the ends of justice and perjury was signed on 22 November 2007 by a magistrate who could not be identified. See "Armed policemen arrest Scorpions boss" *Mail & Guardian* (2008-1-9). The charges were withdrawn without explanation. See "Charges against Gerrie Nel withdrawn" *Mail & Guardian* (2008-1-14). Apparently this was part of the SAPS' crime intelligence project "Operation destroy Lucifer".

136 Journalist's harrowing account" *Times Live* (2010-8-8); "Cele's brutal force" *Sunday Independent* (2011-3-22).

137 "How arms-deal 'bribes' were paid" *Mail & Guardian* (2008-12-5).

Ironically, the Scorpions were created in the first place to sidestep investigations into the arms deal by the special investigation unit headed by Judge Heath, even though he resigned from office as a judge in order to avoid a conflict of interest.¹³⁸ The "Scorpions" were then incorporated as a unit of the prosecuting authority.¹³⁹ The President was given the power to create up to two more such units by way of a simple executive proclamation,¹⁴⁰ which gives an indication that the prosecuting authority was regarded as part of the executive branch. A Ministerial Coordinating Committee, consisting of the Minister of Justice and Constitutional Development and the Ministers of Correctional Services, Defence, Intelligence, and Safety and Security, was given the power to determine policy guidelines for this prosecuting unit contrary to explicit constitutional provisions in section 179(5) that this is the domain of the National Director. Although section 179(2) makes it clear that criminal proceedings fall within the scope of powers of the prosecuting authority, the Ministerial Coordinating Committee was given the power to coordinate criminal investigations.¹⁴¹

Tensions soon arose when the executive attempted to exert undue influence over criminal investigations and prosecutions headed by the Scorpions. The findings of the Khampepe Commission stated that there were no constitutional objections to the Scorpions as a specialised crime investigating and prosecuting unit within the prosecuting authority.¹⁴² The findings were quite in tune with the practice in Continental constitutional states. Such specialised forensic units also exist in Germany, for instance.

138 In *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC), the Constitutional Court ruled that a sitting judge may not lead such investigations due to a conflict of interest. Justice Minister Maduna objected to Judge Heath's leading the investigations in a letter to President Mbeki dated January 2001 (Maduna 2001 www.info.gov.za). Instead of Judge Heath, President Mbeki appointed Willie Hofmeyr, a former ANC MP, to head the investigating unit, which was subsequently transformed into the Scorpions by the *National Prosecuting Authority Amendment Act* 61 of 2000. For an overview of the sequence of events, see "Maduna comments lead to SIU brain drain: Heath" *ANC Daily News Briefing* (2001-10-18); Redpath *Scorpions* 12-17; Feinstein *After the Party* 176-191.

139 Section 7 *NPA Act* as inserted by s 4 *National Prosecuting Authority Amendment Act* 61 of 2000.

140 Section 7(1A) *NPA Act*.

141 Section 31 *NPA Act* as inserted by s 14 *National Prosecuting Authority Amendment Act* 61 of 2000

142 *Khampepe Inquiry Final Report* (2006) para 57.

Glenister fought a tireless quest to save the Scorpions from being dissolved.¹⁴³ In the end, the Amendment Acts were adopted dissolving the Scorpions and incorporating their forensic experts in the Hawks (Directorate for Priority Crime Investigation) as part of the SAPS. The majority judgment of the Constitutional Court upheld the appeal that the Hawks did not satisfy the international law obligations to create an independent anti-corruption unit. The contested legislative provisions establishing the Hawks were declared constitutionally invalid to the extent that they do not secure adequate independence of the unit from political influence and interference. The declaration of constitutional invalidity has been suspended for a period of eighteen months to give Parliament the opportunity to remedy the deficit. The court did not prescribe where such an anti-corruption unit should be located. The only condition that it set was that such an anti-corruption unit should be sufficiently insulated from political influence in its structure and functioning.¹⁴⁴ In order to comply with these conditions, it is hardly conceivable that such a unit could be located anywhere but in the prosecuting authority. The court hinted at a possible Chapter 9 solution,¹⁴⁵ but it would be in conflict with section 179(2) to transfer or delegate the criminal investigation and prosecution of corruption to a state organ other than the prosecuting authority.¹⁴⁶ It should further be noted that the amendment acts that led to the dissolution of the Scorpions do not qualify as valid law in terms of section 81 of the *Constitution* and, strictly speaking, the Scorpions were therefore never abolished.¹⁴⁷ This deficit was unfortunately not addressed by the Constitutional Court and will be discussed subsequently under 6.

143 *Glenister v President* 2008 ZAGPHC 143; *Glenister v President* 2009 1 SA 287 (CC) (cited as "*Glenister I (CC)*"); *Glenister v Speaker of the National Assembly* 2009 ZAWCHC 1.

144 *Glenister II (CC)* paras 178 ff, especially paras 248-250.

145 *Glenister II (CC)* para 200.

146 Several countries which follow the Westminster criminal justice model such as Namibia, Kenya and India have such anti-corruption commissions. These anti-corruption commissions, like the Chapter 9 institutions under the South African *Constitution*, do not have the power to prosecute and enforce criminal law. This is one of the most important mechanisms, however, to ensure the rule of law and accountability. In terms of s 1(c) and (d) of the 1996 *Constitution* the rule of law and accountability are cardinal pillars upon which the constitutional state rests, which are entrenched and can be changed only in terms of s 74(2) of the *Constitution*. The enforcement of certain criminal laws by a state organ other than the prosecutors would chip away at both the formal and the substantive aspects of the constitutional state. For a comparison with how these concepts are viewed in German constitutional law, see Blaau 1990 *SALJ* 79-88 and fn 415.

147 Section 15 *National Prosecuting Authority Amendment Act* 56 of 2008 and s 9 *South African Police Service Amendment Act* 57 of 2008 both determine that the Acts should take force on a date determined by the President. The President may assent to and sign legislation (s 79 of the *Constitution*), but does not have the power to put parliamentary legislation into force. A bill enters into force either on the date when it is published or otherwise on a date determined in the Act

2.4.5 Delineation of prosecuting and policing powers

There appears to be some confusion about the role of criminal investigations by the SAPS. Section 205(3) of the *Constitution* sets out that the primary goal of the police force is to secure public safety and order. These functions are part of executive state administration. Although the police have powers of arrest, this should not be conflated with "law enforcement" in the sense of criminal prosecutions, convictions, and penalties upon conviction. The police undeniably also play an important role in assisting in the investigation of crime, but the *Constitution* has not conferred the power upon them to *lead* criminal investigations as part of criminal procedure. Section 179(2) of the *Constitution* conferred the power to institute criminal proceedings on the prosecuting authority. Section 13(5) of the *SAPS Act* 68 of 1995, which confers prosecuting powers upon members of the police force, is obviously unconstitutional.

In the past, a lack of clarity about the delineation of powers often gave rise to friction between the prosecutors and the executive. Reverend Chikane, Director-General of the Presidency during the Mbeki era, even espoused the extraordinary view that Pikoli would need the assistance of the President as commander-in-chief to get access to police dockets relating to the Kebble murder, which the SAPS refused to turn over to the prosecutors.¹⁴⁸

The term "law enforcement" in section 205 apparently refers to the arrest powers of the police in the sense of using force. The provision is confusing insofar as the police cannot "enforce" criminal law by instituting criminal proceedings. One must therefore clearly distinguish the administrative powers of the police to secure public safety and

itself. These provisions amount to an unconstitutional delegation of legislative powers in contravention of ss 43 and 44(1)(a)(iii) of the *Constitution*. See the discussion under 6.

148 "I was suspended over Selebi, says Pikoli" *Mail & Guardian* (2008-5-7). The criminal investigation and subsequent prosecution in the murder case suffered due to a lack of cooperation between the police and the now-disbanded "Scorpions". The prosecution was also transferred to another prosecutor during a critical phase. It has also not been clarified why the prosecuting authority did not apply for the extradition of a key witness. See "Nel taken off Agliotti case" *Mail & Guardian* (2010-5-7); "State: Prima facie case against Agliotti exists" *Mail & Guardian* (2010-11-18); "Agliotti ruling: 'Dining with the devil'" *Mail & Guardian* (2010-11-25); "Glenn Agliotti cleared of Kebble murder" *Mail & Guardian* (2010-11-25); "Miscarriage of justice marked by lack of will" *Mail & Guardian* (2010-11-6).

order from criminal investigations for the purposes of prosecuting crime. The power to secure public safety and order is subject to the rules of administrative justice under section 33 and susceptible to parliamentary oversight in terms of section 55(2), whereas criminal proceedings are not. Dramat as head of the "Hawks" and Simelane as National Director of the Prosecuting Authority were both required to report to the parliamentary watchdog committee Scopa on the progress of criminal investigations pertaining to the arms deal.¹⁴⁹ Whereas parliament may exercise oversight over the administrative powers of the SAPS, this is not warranted in relation to criminal investigations that fall in the scope of power of the prosecuting authority. The latter is subject to judicial control in criminal proceedings. The constitutionality of section 35 of the *NPA Act*, which subjects the prosecuting authority to parliamentary oversight, is therefore questionable.

Section 205(3) of the *Constitution* elevated the SAPS as the main executive organ to assist in criminal investigations. This has practical purposes because individuals seeking safety and protection would usually first contact the police or lay criminal charges at police stations. The police dockets must then be handed over to the prosecutors to ensure that criminal proceedings as stipulated in section 35 of the *Constitution* are complied with. The SAPS, however, is not the only executive organ that is obliged to assist the prosecutors in criminal investigations. Tax authorities, customs and excise, the national intelligence service and many other executive organs, like the SAPS, are all helping agents who are obliged to support the prosecutors in investigating crime in the specific area administered by them: with regard to the bulk of crimes relating to public safety and order, the police obviously play a prominent role; in case of tax evasion it would be tax officials; illicit smuggling will probably be addressed by customs officers; etc. All of these executive bodies are bound by the principle of legality and subject to the rule of law and accountability. They are therefore obliged to report and help to investigate criminal offences of which they become aware. The decision re whether or not there is a *prima facie* case to prosecute stands only at the end of the chain of investigations. Once the facts of a

149 "What Dramat and Simelane said about the arms deal" *Politicsweb* (2010-9-10).

case have been clarified and the prosecutors are satisfied that it merits a prosecution, the matter can go to court.

Since the clustering of executive state administration has become fashionable in public management systems, the notion of "crime intelligence" has emerged, which tends to shift the emphasis from the prosecution of criminal activity towards crime prevention. Crime intelligence is controversial because it has the effect of marginalising the role of prosecutors.¹⁵⁰ It is also often abused to create law-free zones that are exploited by the executive. It thus serves as a mechanism to legitimise inroads upon constitutionally guaranteed fundamental rights.¹⁵¹

These problems have surfaced in South Africa too. Shortly after the Khampepe report was tabled with the presidency,¹⁵² President Mbeki "urgently reactivated" the ANC's National Security Council (NSC) in a hush-hush manner without any enabling legislation.¹⁵³ The government then launched the "Justice, Crime Prevention and Security" cluster,¹⁵⁴ which is apparently coordinated by the NSC. The Khampepe report was kept under lock and key for more than two years.¹⁵⁵ The clustering of the functions of the police, intelligence service, and defence force in this project again

150 Fornauf *Dritten Staatsgewalt* criticises developments in constitutional and criminal law which marginalise constitutionalism and the power of the third branch of state power. The application of criminal law increasingly tends to be relatively unsophisticated and supportive of opportune consensus politics for crime prevention instead of cementing the rule of law. Crime prevention is geared too much towards efficiency and flexibility instead of the authorities' taking a principled stand on invoking criminal law and securing constitutionalism.

151 A person cannot be prosecuted and sentenced on the basis that the state wants to prevent him from committing a crime. This would constitute an inroad upon several rights guaranteed in the Bill of Rights. Another problem is that the methods of crime intelligence do not always conform to the strict standards of criminal investigations. As a result, it may happen that even if crime intelligence exposes criminal activities, criminal proceedings would not take place because the manner in which the information was collected does not meet the strict standards prescribed for criminal investigations. Such evidence could be barred in a court of law. Such processes could in fact undermine the criminal justice system, because criminals then get away on technical points. For a critical analysis, see Ambos 2003 *Jura* 647-682; Frank and Harms 2008 *Deutschen Richterzeitung* 126-131.

152 The Report was handed to the President on 3 February 2006.

153 The NSC was the ANC's mirror image of the apartheid regime's State Security Council, which was abolished in 1994. See ANC [no date] www.anc.org.za.

154 The first allusion to the "urgent reactivating" of the NSC was made in a cursory manner in updates of 7 March 2006 and 4 April 2006 about the government's "Programme of Action - 2006: Justice, Crime Prevention and Security Cluster" (JCPS). The March document is accessible under Justice, Crime Prevention and Security Cluster 2006 www.info.gov.za and is dated 7 March 2005, which obviously must be a typing error, since the JSCP was launched in 2006 only. Para 3.1.10 states that the urgent reactivation of the NSC took place in February 2006.

155 The report was released in response to public pressure only on 5 May 2008. See "Khampepe report: presidency defends delay" *The Mercury* (2008-5-5).

blurred the distinction between the state goals of public safety (the police) and national security (the defence force, the intelligence service) as had occurred in the apartheid era.¹⁵⁶ In this constellation, putative "national security" concerns are often invoked to trump the constitutional norm that all state action should be in the "public interest".¹⁵⁷

The *Protection of Information Bill* is a case in point where the limitation of rights in the service of national security becomes the norm rather than the exception.¹⁵⁸ When the access to information is restricted, law-free zones can be used to pull off dubious projects such as "Operation destroy Lucifer", where the security apparatus might be used to spy on political rivals, the judiciary, and the prosecuting authority.¹⁵⁹ Such illicit spying by the crime intelligence head, who made encrypted bugged telephone conversations with software to decipher them available to Zuma, was styled as "an abuse of power" which merits the dropping of charges against him. In fact, the question ought to have been what constitutional legitimacy police spying on other state organs has.

2.5 Summarising difficulties relating to prosecuting powers

It is evident from the discussion that executive interference in criminal justice is one of the main reasons for there being selective prosecutions. It can hardly be denied that the legitimacy of the criminal justice system has suffered a lot due to pre-trial

156 The JCPS cluster implemented a "national security strategy" on 23 November 2007, which entails that every single public servant needs to be "vetted" by the intelligence service; see www.dpsa.gov.za/ep_documents.asp.

157 The "public interest" as constitutional standard for state action evolved from different sources in South African law. In the Roman-Dutch tradition it had its foundation in the concept of the "salus publica" in Salic law, whereas English law referred to the "common weal" and African customary law to "ubuntu".

158 See ss 6(g), 20, 21(2) and 46(1) *Explanatory Summary of the Protection of Information Bill*, N 197 in GG 32999 of 5 March 2010. Crime intelligence, that is the investigation of criminal offences, is also classified as a matter of national security in terms of s 1(j)(b). This means that any such information could be withheld by the police from prosecutors, with the effect that criminal prosecutions could *de facto* be barred if the executive chooses to classify information relating to specific criminal offences as a matter of national security. This wide definition clearly goes beyond defensible state power that could legitimately limit fundamental rights such as the rights to personal safety and security as well as access to information in terms of s 36 of the *Constitution*. Attempts to bring the predecessor of this bill (N 376 in GG 30885 of 18 March 2008) through Parliament failed before. This legislative endeavour met with substantial public opposition as well.

159 "Inside Operation destroy Lucifer" *Mail & Guardian* (2009-6-19); "Zille, Kasrils meet over spying" *News24* (2008-2-14); "Did the NIA spy on judges?" *DA @Work* (2008-6-23).

unequal treatment. There is a definite need to demarcate prosecuting powers more clearly from executive powers.

Currently, the position of the courts is marked by conflicting decisions which cannot be logically reconciled. Whereas several judgments subscribe to a view that the prosecutors must be part of the executive because they are not part of the judiciary, the courts have been adamant that the power to decide whether or not to prosecute is not administrative in nature but depends on criminal law. Yet, if they were part of the executive, such a discretionary power must obviously be administrative in nature.

The discussion about the constitutional status of prosecutors and under which branch of state power they ought to resort has identified the main reason for the confusion as a lack of familiarity with how criminal justice systems function in other constitutional states. So far, the judiciary has not considered the logical option that the prosecutors could in fact be classified as a second organ in the third branch of state power, next to the judiciary. This is the way in which it was classified by Chapter 8 of the *Constitution*. From a Bill of Rights perspective on their functions, the prosecutors cannot resort under the executive branch, because the manner in which they should exercise their functions is regulated in terms of section 35, not section 33.

Another topic, which is becoming more important, is the self-administration of the judiciary and prosecutors.¹⁶⁰ In the times of absolutist rulers, parliaments used to withhold tax money to force the royal rulers to convene the popularly elected parliaments so that they could make legislation. The practice that tax money is allocated by Parliament on the basis of the budget presented to them by the executive has been perpetuated into modern times. In fact, there is no reason why the judiciary and prosecutors should not submit their own budgets to Parliament instead of having a minister from the executive power doing this on their behalf. If they were finally regarded as state organs of a different branch of state power, which

160 The German Society of Judges and Prosecutors has been lobbying for more independence to administer themselves. See Sennekamp 2010 *Neue Zeitschrift für Verwaltungsrecht* 214. Most justice ministers at a *Länder* level support the idea that the judiciary and prosecutors should administer their sphere of competence themselves. See "Besser unabhängig" *Frankfurter Allgemeine Zeitung* (2006-10-6). The notion of judicial self-administration is also gaining support in South Africa. See "New-look judiciary mooted" *Mail & Guardian* (2009-11-27).

were on a par with executive state departments and entitled to funding in their own right, this might actually put an end to the constant underfunding of the judiciary and the prosecuting authorities.

3 Post-trial equal treatment: a case study of Shaik's medical parole

In the post-trial phase of criminal justice, equal treatment with regard to the execution of sentences and the granting of parole is of particular importance. In Shaik's case, a special manifestation of parole, viz medical parole for the terminally ill, is at issue. It will be used as a case study in this section.

After protracted litigation, Shaik was convicted on two counts of corruption and one of fraud. He was sentenced to serve the minimum mandatory sentence of 15 years' imprisonment by the Durban High Court in June 2005.¹⁶¹ His application for leave to appeal the judgment was dismissed.¹⁶² Although Shaik used every possible legal remedy to get around serving the sentence, he finally went to prison on 6 November 2006.¹⁶³ From prison, Shaik unsuccessfully applied for leave to appeal the matter to the Constitutional Court. This was not part of the litigation, but it should be noted that some of the statutes in terms of which Shaik was convicted and sentenced did not commence in the manner prescribed by the *Constitution* under section 81 to qualify as valid law.¹⁶⁴ The maxim *nullum crimen, nulla poena sine praevia lege poenali*

161 *S v Shaik*, unreported, Case No. CC27/04, High Court of SA (DLD), judgment delivered by Squires J on 2 June 2005 and sentence passed on 8 June 2005.

162 *S v Shaik* 2007 1 SA 240 (SCA). At the time of the hearings there was a bomb scare and the court had to be evacuated. See "Bomb scare after Shaik ruling" *News24* (2006-11-6).

163 *S v Shaik* 2008 2 SA 208 (CC) recapitulates the whole road travelled during the litigation.

164 Shaik was convicted in terms of the *Corruption Act* 94 of 1992 and the *Prevention of Organised Crime Act* 121 of 1998. The *Corruption Act* was still in force in terms of ss 33-35 of the 1983 *Constitution*. This statute has meanwhile been repealed by the *Prevention and Combating of Corrupt Activities Act* 12 of 2004. S 37 of the new Act regulates the commencing of the statute ambivalently in the sense that it determines that the Act comes "into operation on 27 April 2004 or on such earlier date as the President may determine". Whereas the first part of this provision is in line with s 81 of the *Constitution*, the validity of the latter part of the provision is questionable. The validity of the *Prevention of Organised Crime Act* 121 of 1998 is equally questionable because s 81(1) of the Act specifies that it should come "into operation on a day fixed by the President", which does not comply with the conditions for valid law in s 81 of the *Constitution*. The trial judge further meted out a minimum mandatory sentence of fifteen years in terms of the *Criminal Law Amendment Act* 105 of 1997. S 54 of this Act likewise determines that it "shall come into operation on a date fixed by the President by proclamation in the Gazette". The statute was published in N 1659 in GG 18519 of 19 December 1997, whereas the President put this statute into effect by way of a proclamation (Proc R 43 in GG 18879 of 1 May 1998). Due to the difference between the date upon which the statute was published and the date on which it

states that there can be no crime committed, and no punishment meted out, without a violation of criminal law as it existed at the time. This maxim was incorporated in the Bill of Rights to ensure fair trials.¹⁶⁵ In reliance upon the untenable position taken by the Constitutional Court in interpreting section 81 of the *Constitution*, the trial judge invoked statutes on the presumption that they qualified as valid law. This has far-reaching consequences for the validity of the sentences meted out in thousands of criminal trials and will receive closer attention under 6.

3.1 *Brief overview of Shaik's condition after incarceration*

An analysis of Shaik's condition after his incarceration shows a pattern of multiple stress-related and psychosomatic illnesses. On the day that his sentence commenced, Shaik was treated for hypertension after he spent mere hours in the overcrowded Durban Westville prison. He was hastily moved to a new prison at Empangeni where he could have only one cellmate.¹⁶⁶ As the deadline to challenge his conviction and sentence in the Constitutional Court drew closer, he suffered from stomach cramps and diarrhoea.¹⁶⁷ On 25 November Shaik suffered a mild stroke and was admitted to St Augustine's, a private hospital in Durban.¹⁶⁸ Subsequently in January 2007 he was hospitalised for dental surgery, this time under a false identity.¹⁶⁹ The hospital stated that as long as Shaik pays his bills the hospital was in no position to ask him to leave. However, the medical aid company became concerned about the escalating costs and threatened to decline payment for further

was put into force, the courts ruled the stricter penalties could not apply retroactively. See *S v Willemse* 1999 1 SACR 450 (C) and *S v Hlongwane* 2000 2 SACR 681 (W). The Act was initially intended to be a short-term measure until April 2000, but its life has continuously been extended by way of executive proclamations after another amendment. See Terblanche 2003 *Acta Juridica* 194. The statutes that were adopted after the new *Constitution* commenced, which provide that the President can determine when legislation should take effect, have been adopted in conflict with the provisions of s 81 of the 1996 *Constitution*. See the discussion under 6.

165 Section 35(3)(l) *Constitution*. The maxim *nullum crimen, nulla poena sine praevia lege poenali* was further refined in *S v Willemse* 2008 ZAWCHC 77.

166 The Durban prison houses 75% more prisoners than it was built for. See "Shaik 'could be a prison asset'" *News24* (2006-11-9).

167 "Diarrhoea hits Shaik jail" *News24* (2006-11-16); "Shaik's desperate move to clear his name" *IOL* (2006-11-18).

168 "Shaik suffered stroke" *News24* (2006-12-3); "20 cops guard Shaik in hospital" *News24* (2006-11-27).

169 "Shaik undergoes facial surgery" *Sunday Tribune* (2007-1-7); "Shaik smuggled into cushy ward" *News24* (2007-1-12).

treatment.¹⁷⁰ On 15 February 2007, the Minister of Correctional Services Balfour ordered that Shaik should be removed from the private clinic of St Augustine's where he spent 83 days. He was transferred to the Durban Westville prison despite protests by his psychiatrist, professor Gangat, who maintained that Shaik was a suicide risk.¹⁷¹

In March 2007, first reports surfaced that the Shaik family was lobbying the Minister of Correctional Services in an attempt "to negotiate a deal to reduce his imprisonment term".¹⁷² In April the Department of Correctional Services requested Albert Luthuli Hospital to treat him for hypertension and depression.¹⁷³ A month later when Shaik's application to the Constitutional Court was due to be heard and public attention again focused on him, Minister Balfour quickly ordered that Shaik should be taken back to prison.¹⁷⁴ The court finally delivered judgment on 2 October 2007, refusing Shaik leave to appeal his conviction for fraud and corruption, but granting leave to appeal the forfeiture of his assets.¹⁷⁵ After this set-back, Shaik was said to have suffered another mild stroke but was discharged two weeks later.¹⁷⁶ On 1 April 2008 he was readmitted to hospital due to deteriorating blood-pressure and remained in hospital until he was released on medical parole.¹⁷⁷

170 On 20 January 2007, leading doctors and pharmacists in Durban estimated that the total cost of Shaik's treatment, surgery and medication were almost R300.000. Security companies estimated that his protection costs were nearing R200.000. See "Crooked patient, crooked docs" *News24* (2007-1-20). On 10 February, the medical aid scheme blocked all payments of Shaik's hospital bills and required that he should undergo medical tests to determine if he was indeed so ill that he must continue to stay in hospital. See "Discovery investigates Shaik" *News24* (2007-1-10); "Shaik 'too ill' to leave clinic" *News24* (2007-2-8); "Shaik to undergo medical test" *News24* (2007-2-12).

171 "Shaik sent back to prison" *News24* (2007-2-15); "Shaik's mental health 'a worry'" *News24* (2007-2-17).

172 In January 2007, the Shaik family still pretended that they were not interested in a medical parole deal, but by March they were actively lobbying the minister. See "Shaik medical parole 'absurd'" *News24* (2007-1-8); "Shaik 'won't try medical pardon'" *News24* (2007-1-9); "Shaik family 'wants to negotiate'" *News24* (2007-3-5).

173 "Shaik depressed - in hospital" *News24* (2007-4-16).

174 "Shaik was 'strictly confined' – report" *Cape Argus* (2007-5-23); "Shaik in last bid for freedom" *News24* (2007-5-22); "Schabir Shaik's last bid for freedom" *Mail & Guardian* (2007-5-22).

175 *Shaik v S* 2007 ZACC 19.

176 "Shaik suffers stroke" *News24* (2007-11-15); "It's hard to visit Shaik, family complains" *Mail & Guardian* (2007-11-16).

177 "Shaik moved to critical-care unit of Durban hospital" *Mail & Guardian* (2008-4-27); "Schabir Shaik still in hospital" *Mail & Guardian* (2008-4-23).

3.2 Controversy about the medical parole decision

In March 2009, Shaik was released on medical parole on the basis of an alleged terminal illness. By then Shaik had served 28 months of his fifteen-year sentence but had been in prison for only 84 days. The rest of the time was spent in private clinics and hospitals.¹⁷⁸ Medical doctors who treated him contested the statement that his condition was terminal.¹⁷⁹ Professor DP Naidoo, Head of Cardiology at Albert Luthuli Central Hospital and professor at the University of KwaZulu-Natal's Medical School, disclosed that he had discharged Shaik from hospital in November 2008. Professor Naidoo stated that the hospital board and Department of Correctional Services intervened and ordered that Shaik should stay on.¹⁸⁰ His discharge was preceded by a medical report, which Professor Naidoo and cardiologist Dr Khan sent to the Durban Westville prison in September 2008. The report made it clear that the hospital could not indefinitely accommodate Shaik even if the prison authorities might regard this as a comfortable solution. They argued that his blood pressure could easily be controlled in the prison clinic and if the prison authorities did not want to treat him, they should consider medical parole.¹⁸¹ The doctors did not maintain that Shaik was terminally ill and were obviously not acquainted with the strict legal conditions to qualify for medical parole.

Rumours about Shaik's impending release started to circulate in October 2008 although the prison authorities denied it.¹⁸² Shaik's application for medical parole was indeed considered in November 2008 at the time when Naidoo discharged him from hospital. The matter was adjourned and on 26 February 2009, the Durban Parole Board consulted correctional services practitioner Dr Mbanjwa and Shaik's psychiatrist Professor Gangat in the matter. Gangat had played a pivotal role in

178 "Doctors 'unanimous' on Shaik" *The Sunday Independent* (2009-3-4); "Shaik is gravely ill – family" *The Sunday Independent* (2009-3-3); "Is Shaik dying?" *The Sunday Independent* (2009-3-4).

179 "Shaik is not dying" *The Times* (2009-3-11).

180 "I discharged Shaik months ago from hospital" *IOL* (2009-3-8); "Shaik doctor expects fallout" *Daily News* (2009-3-9); "Shaik 'remained in hospital' until release" *Mail & Guardian* (2009-3-8).

181 A copy of the undated letter of Prof Naidoo and Dr Khan is available on the *Mail & Guardian* website: Naidoo and Khan 2009 mg.co.za. An incoming mail stamp on the letter indicates that it was received by the area commissioner of the Department of Correctional Services on 11 September 2008.

182 "'No truth' in rumours of Shaik release" *Mail & Guardian* (2008-10-2).

keeping Shaik in hospital before.¹⁸³ Gangat and Mbanjwa backed up Shaik's contention that his condition was "gravely serious". Yet a patient in the same ward as Shaik stated that he was surprised to learn that Shaik had been seriously ill at all.¹⁸⁴

Following the public outcry about the early release of Shaik the doctors were subject to a probe by the Health Professions Council of South Africa to determine if there had been any misconduct on their part. After considering the medical reports of the doctors concerned and Shaik's medical records at Albert Luthuli Hospital, the Council concluded that Shaik's condition had not been exaggerated.¹⁸⁵

Some observations should be made about the role of the Council. Firstly, the inquiry of the Health Professions Council about the possible misconduct of the medical practitioners involved is not a statutory part of the procedures to determine whether an incarcerated person should qualify for medical parole or not. Yet the Council saw itself fit to declare that Shaik qualified for medical parole. Secondly, none of the doctors who were consulted by the Parole Board went so far as to suggest that Shaik was indeed terminally ill or about to die. Shaik had suffered from high blood pressure and systemic hypertension since 2001, prior to his imprisonment in 2006, and after his release it became clear that his condition is all but terminal. What is in dispute is not whether Shaik is ill or even chronically ill, but whether the formal statutory requirements were met in that he is in the final stages of a terminal illness. Only once this much higher standard was satisfied could he qualify for medical parole for humanitarian reasons, to die a consolatory and dignified death. Finally, the Health Professions Council is not a body which can legitimately investigate and make findings about the legal requirements pertaining to medical parole. It is therefore astounding that the Council concluded that "none of the reports by the practitioners involved was as a result of a political consideration or relationship or status of Mr Shaik to the president of the ANC, Mr Jacob Zuma". Suffice it to say, one would hardly expect to find such information in medical records.

183 A newspaper later uncovered other instances which put a question mark behind the ethical standards of Gangat. See "Shady shrink saved Shaik" *Mail & Guardian* (2010-3-5); "A final journey" *Mail & Guardian* (2010-3-5).

184 "The big Shaik sham!" *The Times* (2009-3-8).

185 "Shaik doctors acted professionally – HPCSA" *Daily News* (2009-4-20).

3.3 *Shaik: an expensive political liability?*

There are several factors indicating that Shaik's medical parole was a matter of political convenience. He is well-connected to the ruling elite and was costing the state a lot of money. The September 2008 report of Naidoo and Khan to the Durban Westville prison apparently triggered political reaction. The Director General of the Department of Correctional Services, Vernie Petersen, defended his department's decision to allow Shaik to spend the previous six months in hospital, saying the state had an obligation to provide Shaik with the appropriate medical treatment. Petersen made it clear though that Shaik was chronically rather than terminally ill. He furthermore stated that Shaik's condition did not meet the statutory requirements for medical parole.¹⁸⁶ Minister Balfour's reaction did not follow any logical course. He was first satisfied with the medical reports that Shaik's condition was not so serious that it warranted hospitalisation. Shortly afterwards he accepted that Shaik was terminally ill.¹⁸⁷ It is common cause that the Minister belonged to the Mbeki camp and it is possible that once the tide turned he changed course also.¹⁸⁸

Members of Parliament's Portfolio Committee on Correctional Services were divided about medical parole as a solution for Shaik. Some argued that it would be too costly to keep Shaik in hospital for such a long time and espoused the view that the money could be better utilised on other worthy causes.¹⁸⁹ Some members were more concerned about a number of reports that were circulating, stating that Shaik was wandering the hospital grounds. This created the perception that Shaik was receiving preferential treatment instead of serving his sentence.¹⁹⁰ The portfolio committee's interest in the matter is understandable. However, it is indeed relevant to emphasise that the *Constitution* has not conferred any powers on the legislature that would empower its members to alter binding judicial sentences on the basis that an incarcerated person is costing the state money.

186 "Shaik not eligible for parole" *The Citizen* (2008-9-16).

187 See Balfour 2009 www.info.gov.za; "Balfour: Shaik's condition terminal" *Mail & Guardian* (2009-3-3); "Balfour 'vindicated' by Shaik reports" *Mail & Guardian* (2009-3-10); "Balfour welcomes clearing of Shaik's doctors" *Mail & Guardian* (2009-4-20).

188 The judgment of Nicholson J in *Zuma v NDPP (KZHG)* sparked off the recalling of Mbeki as president.

189 "Shaik's hospital costs could be R3m" *The Mercury* (2008-9-17).

190 "Parliament committee questions Shaik's hospital time" *Mail & Guardian* (2008-8-4); "Schabir Shaik's bid for freedom" *The Sowetan* (2008-9-17).

3.4 Mitigating factors against terminal illness

3.4.1 Three strategies to attain a release from prison

An assessment of the facts indicates that Shaik pursued three different strategies to attain his release from prison. The most viable option seemed to be that of medical parole because it is not linked to a minimum period of incarceration before which ordinary parole could be considered. The Shaik family actively lobbied the Minister from March 2007 to reach a deal on reducing Shaik's sentence.¹⁹¹ Soon after the Nicholson judgment in favour of Zuma, secret discussions allegedly got underway between Hofmeyr, Head of the Assets Forfeiture Unit, and Mo Shaik (Shaik's brother and current head of the Secret Service) about splitting the interest on Shaik's forfeited assets, reaching a deal on medical parole for Shaik, and dropping the charges against Zuma.¹⁹² The intertwinement of Shaik's and Zuma's fates has been documented in numerous court cases.¹⁹³ Shortly before Shaik was released, Zuma in his capacity as ANC president announced in an interview with *The Weekender* newspaper that if he should become President he would grant Shaik medical parole.¹⁹⁴ A few days later Shaik was indeed released on medical parole.¹⁹⁵

A second but less viable alternative explored by Shaik's lawyers was the conversion of Shaik's prison sentence into correctional supervision.¹⁹⁶ A 2008 judgment of the Supreme Court of Appeal in *Price v Minister of Correctional Services*¹⁹⁷ opened up

191 "Shaik family 'wants to negotiate'" *News24* (2007-3-5).

192 "Man behind the Zuma deal" *Cape Argus* (2009-3-20).

193 Zuma accepted millions between 1995 and 2005 from Shaik in what both men insisted were interest-free loans. In *S v Shaik*, unreported, Case No. CC27/04 High Court of SA (DLD), 2 June 2005 Squires J stated in his sentence that the payments Shaik made to Zuma over 5½ years were a sustained level of support designed to allow Zuma to pursue a lifestyle he otherwise could not afford on his ministerial salary, and to the point where it created dependence. The payments effectively constituted an "investment in Zuma's political profile and from which the accused could benefit".

194 "Shaik walks free" *The Star* (2009-3-3).

195 Public outrage to Shaik's release prompted Zuma to lash out at South Africans for wanting his former financial adviser Schabir Shaik dead. See "Zuma lashes out at those wanting Shaik dead" *Mail & Guardian* (2009-3-14).

196 On 10 January 2009 rumours started to circulate that Shaik might soon be a free man. See "Schabir Shaik could be a free man soon" *The Times* (2009-1-10).

197 *Price v Minister of Correctional Services* 2008 2 SACR 64 (SCA) (cited as "*Price v Minister of Correctional Services*").

possibilities for an early release for Shaik. In that case, the court ruled that section 276A of the *Criminal Procedure Act* 51 of 1977 allowed for the conversion of imprisonment into correctional supervision if a person has been sentenced for imprisonment for a period exceeding five years but the date of release was not more than five years in the future.¹⁹⁸ The court interpreted the "date of release" to mean the date on which a person qualified for parole or, alternatively, the date on which the sentence would end, whichever is first.¹⁹⁹ Shaik's earliest date of release would have been once he served seven and a half years of his 15-year imprisonment sentence.²⁰⁰ As Shaik had already served two years and three months, it was calculated that in three months' time from that point he would have served two and a half years. This meant that his earliest date of release would be less than five years in the future. The Shaik family indicated that they were aware of the possibilities that the judgment presented and that legal counsel for Shaik was studying it.²⁰¹

From a constitutional perspective, it is questionable that the interpretation attached to the "date of release" by the Supreme Court of Appeal is correct, because it negates the binding force of judicial decisions²⁰² and may create legal uncertainty in a number of other areas such as electability to Parliament and company law.²⁰³ It

198 Section 276A(3)(a)(ii) *Criminal Procedure Act* 51 of 1977 provides that when certain conditions are met a court can convert imprisonment into correctional supervision and *vice versa* for instances where imprisonment exceeds 5 years.

199 *Price v Minister of Correctional Services* paras 14-16.

200 Section 73(6)(a) *Correctional Services Act* 111 of 1998.

201 What Shaik's legal team did not consider is that the period of correctional supervision is limited to five years at the most. In *Price v Minister of Correctional Services* paras 8 and 13, the Court departed from statutorily prescribed minimum sentences before a sentence could be converted stipulated by s 73(7)(c)(iii) *Correctional Services Act*. If Shaik's sentence would have been converted into correctional supervision after two and a half years, the period of correctional supervision would have been twelve and a half years, not five years. It is doubtful that the calculation of Shaik's legal team took into consideration that in most instances where correctional supervision may be imposed the period for which it is to endure is limited to five years at the most. See *Price v Minister of Correctional Services* paras 8 and 13. The Court departed from statutorily prescribed minimum sentences before a sentence could be converted stipulated by s 73(7)(c)(iii) *Correctional Services Act* 111 of 1998.

202 Section 165(5) *Constitution*.

203 One such area is the disqualification from election to Parliament of a person convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine (s 47(1)(e) *Constitution*). If the "date of release" on parole replaces the original sentence for the purposes of a criminal record there is no point in specifying certain sentences as a bar to hold public office. It is extraordinary that the threshold to hold office as a member of Parliament is lower than that to hold office as a company director. S 218 *Companies Act* 61 of 1973 disqualifies anybody convicted of theft, fraud, forgery, or perjury from being a company director. Its successor retained the regulation in s 69(8)(b)(iv) *Companies Act* 71 of 2008. In Yengeni's case this meant that after his conviction he was barred from holding office as a director of

should be noted that when Shaik lodged his application for medical parole in November 2008, this coincided with an amendment of the *Correctional Services Act* that abolished minimum periods of incarceration before a sentence could be converted into a lesser one.²⁰⁴ The 2008 *Correctional Services Amendment Act* determines that the National Council, which is appointed by the Minister of Correctional Services, will in future determine such minimum periods of incarceration.²⁰⁵ Although the statute was published on 11 November 2008, it did not take effect on that day.²⁰⁶

A third option which the Shaik family considered was a presidential pardon in terms of section 84(2)(j) of the *Constitution*. Buoyed by the Nicolson judgment,²⁰⁷ the Shaik brothers immediately set things in motion to petition former President Mbeki for a presidential pardon in September 2008.²⁰⁸ Arguments that Shaik's trial was a "dry run" to prosecute Zuma were invoked as the reasons why Shaik should be entitled to a presidential pardon and released from prison.²⁰⁹

3.4.2 Contributory evidence

Further evidence that Shaik is not terminally ill came from the quarters of the Department of Correctional Services itself. The Director General of Correctional Services confirmed that Shaik was chronically rather than terminally ill and was therefore not eligible for medical parole. A number of independent medical experts lend substance to this view. The renowned cardiologist Professor Seftel maintained that the risks related to high blood pressure were usually controllable, even from inside prison. There were cases where treatment was difficult, but with today's modern advancements they were rare.²¹⁰ The Coordinator of the Civil Society Prison

companies but not from being a member of Parliament. See "Yengeni's illegal directorships: DA lays criminal charges" *Politicsweb* (2010-11-1); "Yengeni resigns directorships" *IOL* (2010-11-4).

204 Section 48 *Correctional Services Amendment Act* 25 of 2008 amending s 73 *Correctional Services Act* 111 of 1998.

205 Section 49 *Correctional Services Amendment Act* 25 of 2008 inserted s 73A in the original Act.

206 N 1221 in GG 31593 of 11 November 2008.

207 *Zuma v NDPP (KZHC)*.

208 "Appeals for Shaik pardon" *The Sunday Tribune* (2008-9-14); "Shaik family 'the most optimistic'" *The Star* (2009-9-15).

209 This argument was already rejected before by the Constitutional Court in *Shaik v S* 2008 2 SA 208 (CC) paras 25-30.

210 "Shaik is not dying" *The Times* (2009-3-11).

Reform Initiative, Muntingh, questioned the consistency of the medical parole decisions as imprisonment generally has adverse effects on people's health and prisoners cannot simply be released because they are subject to "suboptimal" prison conditions. The South African Human Rights Commission also queried the inconsistencies in the granting of medical parole to Shaik and suggested that the Parole Review Board should provide clarity on it.²¹¹ Judge Desai, chairperson of the Parole Review Board, made clear that there is no elasticity in the Act insofar as it concerns medical illnesses generally and that medical parole was meant for people who are indeed in the final stages of terminal illness only.²¹² Desai expressed the opinion that Shaik's medical parole damaged the credibility of the system and suggested that the law should be amended to make the parole process more transparent and credible.²¹³

Finally, if one considers Shaik's lifestyle before and after his release, one has to conclude that his present lifestyle hardly tallies with the condition of a terminally ill person. Compromising evidence surfaced that Shaik tried to buy a R10million home in one of Durban's prime suburbs just a week before he was released on medical parole – hardly something one would expect of a dying man. The luxury mansion was in close proximity to the official home of the president-in-waiting.²¹⁴ Once he was released, he went on a luxury safari holiday to an exclusive Zululand game lodge.²¹⁵ Shaik reportedly also enjoyed good food and dining out.²¹⁶ He was seen driving around shopping malls and playing golf at various clubs, looking the very picture of health. The official view is that Shaik is not under house arrest. He is allowed out of his home at specific times to go to the mosque and to run other errands.²¹⁷ Two years after his release, Shaik is all but dying. Recently he allegedly

211 "Experts slam medical evidence in Shaik's release" *Mail & Guardian* (2009-3-10).

212 "Parole only for terminally ill, says judge" *Mail & Guardian* (2009-3-3).

213 "Desai admits Shaik parole damaged credibility of system" *Mail & Guardian* (2009-11-04).

214 "Schabir Shaik and the R10-million house" *Mail & Guardian* (2009-3-13).

215 "Schabir Shaik's parole paradise" *Mail & Guardian* (2010-1-8).

216 "Schabir Shaik nears 100 days of freedom" *Sunday Tribune* (2009-6-7). Shaik's favourite pasta dishes are regularly brought to him by Spiga d'Oro owner, a close friend of Shaik. In June 2009, he was sighted at an upmarket French restaurant where a lunch party was held to celebrate his wife's birthday, see "Shaik well enough to dine out?" *Sunday Tribune* (2009-6-28).

217 "Terminal Schabir's midnight ride" *Mail and Guardian* (2009-8-15); "Shaik spotted driving around Durban" *The Times* (2009-8-10); "DA man seeks answers on Shaik" *Sunday Independent* (2009-8-10); "Schabir seen teeing off" *The Citizen* (2009-8-11); "Shaik spotted playing golf: report" *The Times* (2009-8-12). Shaik merely denied that he drove the car and this was accepted without further ado by the Department of Correctional Services; see "Schabir Shaik denies he was

assaulted a journalist and a fellow mosque-goer.²¹⁸ In conclusion, there is overwhelming evidence that Shaik's medical parole is a sham.

3.4.3 Executive footwork

The Parole Board of Durban Westville steadfastly countered that in terms of section 75(8) of the *Correctional Services Act* the decision of the board is final unless it is reviewed by the Correctional Supervision and Parole Review Board.²¹⁹ Despite considerable public pressure on former Correctional Services Minister Balfour to order a review of Shaik's medical parole, he refused to do so. Requests from opposition parties, several interest groups and the South African Human Rights Commission that former president Motlanthe should subject the medical parole decision for scrutiny to the Review Board were to no avail. The new Correctional Service Minister in the Zuma cabinet also refused a review of Shaik's medical parole.²²⁰

The pattern in the case of Shaik's parole shows similarities to the parole of Yengeni and Boesak. In all of these cases, an executive solution served as a last resort to prevent the convict's serving a normal sentence.²²¹ The length of Shaik's sentence, however, barred him from parole or a release under correctional supervision until he had served at least half of the sentence. His sentence could therefore not so easily be converted into a more lenient one, like those of Boesak and Yengeni. The only

driving in Durban" *Mail & Guardian* (2009-8-13); "Shaik is not under house arrest, says official" *Mail & Guardian* (2009-3-4).

218 "Schabir Shaik accused of assaulting journalist" *Mail & Guardian* (2011-2-27); "Shaik to meet parole board over golf course report" *Mail & Guardian* (2011-3-7); "Schabir Shaik arrested" *Mail & Guardian* (2011-3-14); "Govt mum on Schabir Shaik" *Mail & Guardian* (2011-3-16); "Shaik released on Wednesday afternoon" *Mail & Guardian* (2011-3-16); "Prosecutors look into assault complaint against Shaik" *Mail & Guardian* (2011-3-22). It seems that no charges are being pressed relating to the alleged assault incidents.

219 "No basis for review of Shaik parole, says department" *Mail & Guardian* (2009-8-11).

220 "Shaik parole not unprecedented: Surty" *The Times* (2009-3-5); "Shaiking up a storm" *Mail & Guardian* (2009-3-8); "Trapido: Balfour must fall on his sword over Shaik" *Thought Leader Mail & Guardian* (2009-3-25); "Sergeant at the Bar 'One law for the poor, another for the politically connected?'" *Mail and Guardian* (2009-3-10); "Shaik parole should be reviewed – Kollapen" *Sunday Independent* (2009-3-4); "Shaik's parole 'a strange thing'" *The Star* (2009-3-7); "DA versoek Motlanthe dat na Shaik se parool gekyk word" *Beeld* (2009-3-11); "Motlanthe asked to act on Shaik" *The Times* (2009-3-12); "Seeking the Shaik option" *The Citizen* (2009-3-11); "No basis for review of Shaik parole, says department" *Mail & Guardian* (2009-9-11).

221 Like Boesak, Shaik complained that he was a victim of the power tugs of political heavyweights. See "I'm the victim - broken Shaik" *News24* (2006-1-31).

other option that remained for an early release was that of medical parole. Alas, that required Shaik to be terminally ill – a stiff hurdle to jump.

3.4.4 *Timely statutory amendments*

In the flurry around the release of Shaik it was stated that Shaik was released on medical parole just weeks before a change in the law became operational that would have given the inspecting judge of prisons the power to refer the decision for review.²²² This is misleading. It would not have changed anything material with regard to Shaik's release, but would have made it easier and less risky for the Minister of Correctional Services to release him. Section 79 dealing with medical parole in the 1998 version of the *Correctional Services Act* reads:

Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or *the court*, as the case may be, to die a consolatory and dignified death. (Emphasis added.)

The amendment replaced the words "the court" with "the Minister".²²³ The provision thus scrapped the option that courts could scrutinise the circumstances for granting medical parole in an individual instance. Suffice it to say, the intended amendment did not affect the route taken by the Durban Westville Parole Board. It simply would have opened another route that would have enabled the Minister to grant Shaik medical parole directly.

Although the *Correctional Services Amendment Act* was adopted on 11 November 2008, section 87(1) of the Amendment Act specified that the Act should come "into operation on a date fixed by the President by proclamation in the Gazette".²²⁴ It is open to speculation whether or not the amendment was drafted with a view to solving Shaik's problems. It cannot be denied, though, that if things became critical the President had enough leeway to save him with a timely implementation of the Act. It might have reflected badly on the President, though, if he had put the statute

222 "Shaik got parole just in time" *The Star* (2009-3-6).

223 Section 55 *Correctional Services Amendment Act* 25 of 2008.

224 N 1221 in GG 31593 of 11 November 2008.

into effect amidst Shaik's pending release. The Amendment Act was put into force almost a year later by President Zuma and then only certain parts of the statute took effect on 1 October 2009.²²⁵ The provisions that would have abolished prescribed minimum periods of incarceration before parole or correctional supervision could be considered have not yet been put into effect.²²⁶

The amendment is undeniably aimed at strengthening the executive's grip on review mechanisms with an eye to curtailing them.²²⁷ Section 75(8) of the *Correctional Services Act* stipulates that unless the Minister or Commissioner refers a matter for review to the Parole Review Board, "the decision is final". The amendment of section 79 makes it possible that the Minister can personally grant medical parole and may decide whether or not the review board may review his decision. Under these circumstances, the constitutionally binding force of judicial sentences has become a fiction.

4 Judicial review of parole and pardons

Thus far, the executive has blocked all requests to refer the medical parole decision pertaining to Shaik to the Parole Review Board, but the matter is nevertheless subject to judicial review. The courts are empowered to scrutinise the constitutionality and legality of all state action.²²⁸ The case of Shaik is of particular interest because it illustrates deficits, in the matter of the execution of sentences, in the provision of equal treatment and benefit of the law to all. There are three options for judicial review: firstly, a review of the legality of the medical parole based on the current legislation; secondly, an administrative review of the viability of parole and pardons as a form of administrative action; and finally, a constitutional review of parole and pardons. The latter section of this paper focuses on the historical origins of the royal prerogative of pardon and the legal tenability of pardons as opposed to the binding force of judicial decisions.

225 N 68 in GG 32608 of 1 October 2009.

226 Sections 21, 48 and 49 *Correctional Services Amendment Act 25 of 2008* were excluded from "entering into force".

227 In numerous other provisions, the *Correctional Services Amendment Act 25 of 2008* also replaced control by the courts with regard to reducing or converting sentences with a ministerial decision.

228 Sections 2, 7, 8 and 36 read with s 165 *Constitution*.

4.1 *Legality of parole decisions*

The principle of legality empowers a court to examine whether the legislation was applied correctly – not only procedurally but also in a material sense. In terms of section 75(8) of the *Correctional Services Act*, the Minister or the Commissioner of Correctional Services has the power to refer a medical parole decision taken by the Parole Board to the Review Board. The statute does not provide that they may review the decision themselves. The discretion is therefore limited to a mere procedural formality. If there are apparent procedural irregularities or no clarity about the meaning of specific legal requirements to the granting of medical parole, the Minister has no leeway and must refer the matter for review.

In Shaik's case, former Minister Balfour therefore clearly exceeded the scope of his powers by reviewing the decision himself. In a press release, it was stated that the Minister "has looked at the report [ie the report of the Durban Westville Parole Board], applied his mind, and decided the matter is correct".²²⁹ It is not the *bona fides* of the Parole Board which is at stake, but whether or not the law was applied correctly. The idea that it suffices to prove the legality of administrative action once a minister contends that he has "applied his mind" is a remnant of the doctrine of parliamentary sovereignty of the Westminster era where the legislature could confer excessive powers upon cabinet ministers and where courts had relatively little leeway for administrative review. In a constitutional state, the scope of the Minister's powers is clearly delineated by law and he must remain within the ambit of the powers conferred upon him.

Of particular interest is the zigzag course of the Minister. On 15 February 2007, Balfour was convinced by three medical reports that Shaik was not ill enough to stay in hospital.²³⁰ After the Shaik family started lobbying him on a deal to reduce the length of Shaik's prison sentence, Shaik was transferred to Albert Luthuli hospital,

229 Balfour 2009 www.info.gov.za; "Shaik parole was legally correct – Wolela" *IOL* (2009-3-4). The minister explained his unwillingness to refer the matter for review in the following terms: "I also believe they [ie the members of the Parole Board] make huge sacrifices to serve in these bodies. I therefore view as malicious, irresponsible and vindictive the expressions made by various political parties on this matter".

230 "Shaik sent back to prison" *News24* (2007-2-15).

but as the Constitutional Court hearing approached, the Minister suddenly sent Shaik back to prison "where he belongs".²³¹ The abrupt change of the Minister's conviction that Shaik was dying and deserving of medical parole is not convincing. Another procedural mistake is that the Department of Correctional Services *de facto* conferred a review power upon the Health Professions Council to decide whether or not the statutory requirements for medical parole were met, although the statute does not confer such powers upon the Council.²³²

It is important and relevant to compare Shaik's medical parole with the parole decisions of other terminally ill prisoners from the perspective of post-trial equality in the execution of sentences. According to reports, Shaik's medical parole was one of the twenty-five that had been granted during the year preceding his parole. In practice, the Department of Correctional Services refused medical parole for prisoners who were HIV positive and gravely ill on the premises that they could, after being released on medical parole, receive treatment in the form of anti-retroviral drugs and would no longer be in danger of dying.²³³ This argument is just as applicable in Shaik's case. The correctional services medical doctor who recommended medical parole for Shaik apparently did not even examine Shaik personally but relied solely on reports by Shaik's personal physicians.²³⁴ As soon as Shaik was released it became clear that he is all but terminally ill.

It would seem fair to conclude that the inconsistent granting of medical parole has become extremely controversial. Despite the fact that the Minister of Correctional Services has tried to prevent legal scrutiny of Shaik's medical parole decision, the courts can nevertheless examine the legality of the parole decision. In terms of section 75(8) of the *Correctional Services Act*, the legal requirements to be released on medical parole are twofold: first, the sentenced prisoner must be "terminally ill", and secondly, the prisoner must be "in the final phase of such a terminal disease or condition". The humanitarian motivation for this exception is that a terminally ill person should be able to "die a consolatory and dignified death". In summary, there

231 "Shaik was 'strictly confined' – report" *Cape Argus* (2007-5-23).

232 For a record of the procedures that were followed, see "Shaik doctors acted professionally – HPCSA" *Daily News* (2009-4-20).

233 "Shaik's condition 'terminal' – Balfour" *Polity.org.za* (2009-3-4); "Shaik: DA demands records" *Cape Argus* (2009-3-6).

234 "Shaik's medical miracle" *Mail & Guardian* (2010-6-15).

is ample reason for the courts to review Shaik's medical parole. Another issue that will be addressed subsequently is that the *Correctional Services Act* does not comply with the requirements of section 81 of the *Constitution* to qualify as valid law.²³⁵

4.2 Review of the granting of parole as "administrative action"

4.2.1 Parole: an executive power?

Given the fact that the granting of parole is currently largely cast in the form of administrative action, the controversial medical parole of Shaik would technically be reviewable on that basis. The piecemeal nature of the legislation dealing with parole generally lacks a systematic separation of powers. The *Correctional Services Act* constantly mixes criminal and administrative law. Powers are haphazardly conferred upon correctional services office bearers and the courts to execute the same functions.²³⁶ The granting of medical parole, for example, was envisaged by section 79 before the last amendment to be a power of the Commissioner of Correctional Services, the Correctional Supervision and Parole Board, or a Court.

Under the Westminster Constitutions, the English law influence that linked administrative action to the exercise of a "public power" made it possible to classify aspects of criminal justice as a part executive state administration. The granting of parole falls in this category. In 1959 part of the judicial prerogative of the pardon and remission of sentence was cast in statutory form when parole powers were conferred upon the Minister of Justice.²³⁷ These powers were later transferred to the Minister of Correctional Services, the Commissioner of Correctional Services, and parole boards. This inevitably blurred the boundaries between administrative and criminal law. It would therefore be fair to state that the provisions of the *Correctional Services Act* which confer powers upon executive state organs to grant parole as if the administration of justice is the domain of the executive are not in line with the constitutional separation of powers. For this reason, judicial scrutiny of the medical

235 Section 138(1) *Correctional Services Act* 111 of 1998 determines that this Act "comes into operation on a date fixed by the President by proclamation in the Gazette". See the discussion under 6.

236 See also *Derby-Lewis v Minister of Correctional Services* 2009 6 SA 205 (GNP), where the court referred to this but did not critically analyse it with regard to the separation of powers.

237 *Correctional Services Act* 8 of 1959. For a detailed discussion, see 4.3.1.

parole granted to Shaik by executive organs only makes sense insofar as it would contest the constitutionality of the granting of parole and other remissions of sentence as an administrative power.

4.2.2 A critical appraisal of "public power" as the foundation for administrative action

It is therefore appropriate to review the definition of administrative action in the PAJA. The statutory definition of administrative action is unsatisfactory insofar as it departs from the premises that all "public power" is administrative in nature unless it is regarded as an exception to the rule.²³⁸ The notion of administrative action as the exercise of a "public power" can be traced to the English-law influence on administrative law in South Africa. The main problem is that the reference to public power in general precludes a proper structuring of the public-law relationship underpinning administrative action.²³⁹ Although it includes the exercise of executive power, it is more extensive. The more extensive concept of "public power" overrides the separation of powers and makes it possible to classify criminal justice functions as administrative action.

In the constitutional state model, which South Africa endorsed in 1994, executive power can be conferred upon a state organ either directly by the Constitution or indirectly by way of statute.²⁴⁰ Unlike executive power which is exercised internally in

238 Section 1(i)(a) *Promotion of Administrative Justice Act* 3 of 2000 (PAJA) refers to state organs in general and substantiates the administrative character of state action on the basis of the exercise of a power granted in terms of the *Constitution* or provincial constitutions or otherwise any "public power" or the "performing of public functions". Exceptions to the rule are listed under s 1(i)(aa)-(hh).

239 It reflects the age old schism between the Roman-Dutch law tradition, which tends to align itself with Continental European legal systems, and English public law, which was introduced by the Westminster constitutional system. Baxter was strongly influenced by English administrative law and focused on administrative action as the exercise of a public power, which includes the exercise of executive power but is more extensive. See Baxter *Administrative Law* 343 ff, 383 ff. By contrast, Wiechers, who studied in Paris, was strongly influenced by French administrative law, and thus structured the exercise of executive power in relation to individuals or legal persons as a public-law relationship regulated by administrative law. See Wiechers *Administratiefreg* 47-87. See also fn 90.

240 Chapter 5 of the *Constitution* confers executive power upon the national and provincial executives and Chapter 7 confers executive power upon local governments. Other state organs, whose executive powers are based on an enabling statute, would include autonomous institutions such as universities, the public broadcaster, etc, who may exercise such powers as are conferred upon them. In terms of German administrative law, one distinguishes between "direct administrative action" and "indirect administrative action" with reference to the enabling sources of the executive power concerned. See Maurer *Allgemeines Verwaltungsrecht* 194 ff,

a state department or other state organ wielding executive power, administrative action comes about when executive power is exercised in relation to individuals or legal persons and thus has a direct external effect. Administrative action has a regulating character with specific legal consequences attaching to that, such as rights or duties that are clarified or specified, confirmed, changed, suspended, or dissolved.²⁴¹ It regulates matters that fall within the scope of power of executive state organs; for example, the levying of rates and taxes, customs and excise, zoning, mining, social welfare, education and policing.²⁴²

The definition of administrative action in the *PAJA*, however, does not depart from the exercise of executive powers as the basis for administrative action. Instead it regards all public power exercised by a "state organ" as defined in section 239 of the *Constitution* as administrative action.²⁴³ Section 239 is problematic insofar as it constitutes a constitutional anachronism. In terms of this provision, a "state organ" includes executive state organs at a national, provincial and local government level,²⁴⁴ as well as all other functionaries or institutions "exercising a public power".²⁴⁵ The judiciary has been excluded by the definition from qualifying as a "state organ".²⁴⁶ Nothing in the wording of this provision gives any indication that it attempts to pinpoint state organs that would be empowered to take administrative action. Apparently it was originally conceived for a different purpose.²⁴⁷ This does not obscure the fact that this definition of a "state organ" is in direct conflict with central

199-200. For a more detailed exposition of "direct" administrative action, see Maurer *Algemeines Verwaltungsrecht* 552-574, and for "indirect" administrative action, see Maurer *Algemeines Verwaltungsrecht* 575-625. The direct or indirect nature of the sources of administrative power should not be confused with the direct external effect that the exercise of such executive power is required to have in order to qualify as administrative action. For a South African perspective on the administrative-law relationship, see Burns and Beukes *Administrative Law* 100 ff.

241 The administrative act must be formally communicated to the addressee. The latter further must be informed about legal remedies that are available in terms of the right to just administrative action.

242 The administrative act must contain legally relevant instructions or a declaration of intent in terms of statutory powers conferred upon the relevant executive state organ, eg setting deadlines, granting extensions, the assessment of taxes, the settling of accounts, granting respite, suspending execution, issuing licences, or amending previous administrative acts.

243 Section 1(i) and (ix) *PAJA*.

244 Section 239(1)(a) *Constitution*.

245 Section 239(1)(b) *Constitution*.

246 Section 239(2) *Constitution*.

247 It seems that this strange construct was motivated by considerations of how to determine which state organs should be subject to parliamentary oversight in terms of s 55 *Constitution*. See *In re Certification of the Constitution* paras 295-296. The rationale was to exclude the judiciary from parliamentary oversight.

provisions of the *Constitution*, which typifies the judiciary as a vital state organ. Thus the definition causes an unresolvable internal conflict in the *Constitution* which cannot be solved with ordinary rules of interpretation.²⁴⁸

The definition of "administrative action" in the *PAJA* is thus much broader than the exercise of executive power. It includes non-executive powers in its description of administrative action,²⁴⁹ whereas other powers that are indeed executive in nature and would obviously qualify as administrative action once they are invoked in relation to individuals or legal persons are excluded.²⁵⁰ Judicial and prosecuting powers, powers relating to the legislative process, functions exclusively exercised by the head of state, and the selection for judicial appointments by the Judicial Service Commission obviously have no bearing on administrative action. Yet, they have been ticked off as "exceptions" to the rule on the basis that practically all state action can qualify as administrative action because it concerns the exercise of "public power".²⁵¹

The definition basically enumerates a list of state functions that are disqualified as administrative action²⁵² instead of capturing the essence of administrative action. The definition essentially overlooks the fact that administrative action is just another form of exercising executive power. The definition further departs from the premises

248 A possible solution on how to resolve this difficulty is discussed under 7.

249 Chapter 9 institutions have not been included in the list of state organs whose functions are excluded from qualifying as administrative action by s 1(i)(aa)-(hh) *PAJA*. S 1(i)(aa) also includes the exercise of the powers of the head of state under s 84(2) *Constitution* as part of "the executive powers or functions of the National Executive", although the *Constitution* has not classified them as such. The definition then goes on to exclude all but two of these powers from having administrative character, viz pardoning and presidential appointments. Pardoning, however, is a former judicial prerogative power and not an executive power.

250 Executive functions under s 85(2)(e) *Constitution* have been excluded as a source for empowering administrative action. The latter provision refers to "any other executive function provided for in the *Constitution* or in national legislation" and could obviously also serve as a foundation for administrative action. S 1(i)(cc) *PAJA* further excludes the "executive powers or functions of a municipal council" as administrative action. Yet a large share of administrative action falls exactly into this category, eg zoning law, building law, the levying of municipal rates and taxes, and administrative action taken by the metro police or traffic police. S 1(i)(hh) further excludes any executive action with a direct external effect which might result from accessing information under the *Promotion of Access to Information Act 2 of 2000* from the scope of administrative action. This might in fact just serve the purpose of blocking administrative review in instances where access to information has been unduly blocked by the executive. The definition also excludes administrative action under the ouster clause of s 4(1) *PAJA*.

251 Section 1(i)(ee), (dd), (ff) and (i)(old) – the latter apparently substituting a former subsec (dd). The powers of executive bodies relating to the legislative process have also been excluded from qualifying as "administrative action".

252 Section 1(i)(aa)-(hh) *PAJA*.

that all administrative action is *per se* adverse.²⁵³ In other words, it conflates the adverse effect of administrative action that does not conform to the legal norm of just administrative action, which could be subjected to administrative review under section 33 of the bill of rights, with administrative action itself.

Three serious objections can therefore be raised against the *PAJA* definition of administrative action: first, it overrides the constitutional separation of powers by extending the exercise of executive power to state organs that do not wield executive power in contravention of section 41(1)(f) and (g) of the *Constitution*; second, the statutory definition restricts administrative action to instances which adversely affect persons and thus creates a legal vacuum with regard to valid administrative action with no adverse effects; and finally, since legitimate administrative action is excluded from qualifying as such by definition, this in itself may constitute an unconstitutional statutory limitation of the right to administrative justice.²⁵⁴

From this perspective, the granting of parole in the post-trial phase of criminal justice by executive state organs obviously cannot be reconciled with the separation of powers in a constitutional state. It does not concern the exercise of an executive power but the reduction of a judicial sentence.

4.3 Constitutional review of parole and pardons

The only explicit constitutional authorisation for the pardoning and remission of sentence is section 84(2)(j) of the 1996 *Constitution*, which accords this power to the President in the capacity of head of state. This provision has been cast in a form similar to that of its forerunners. Yet, whereas the *Republic of South Africa Constitution Act 32* of 1961 conferred the pardoning power upon the neutral nominal head of state, the *Republic of South Africa Constitution Act 110* of 1983 and the 1996 *Constitution* conferred it upon an executive president.²⁵⁵ Section 84(2)(j)

253 Section 1(i) *PAJA* defines administrative action as "any decision taken, or any failure to take a decision ... which adversely affects the rights of any person and which has a direct, external legal effect..."

254 Sections 6(1) read with ss 33 and 36 *Constitution*.

255 Section 7 *Constitution* 1961; s 6(3)(d) *Constitution* 1983. The powers under s 84(2) *Constitution* 1996 are all powers which the President exercises in his capacity as head of state and must be distinguished from the powers as head of the executive under s 85 *Constitution*.

determines that the President is responsible for "pardoning or relieving offenders and remitting any fines, penalties or forfeitures". The concepts in the provision have not been defined. Traditionally the concept of "reprieve" used to refer to a stay of execution of capital punishment.²⁵⁶ Since the death penalty was abolished in 1995,²⁵⁷ one could argue that this part of the pardoning power became obsolete. It is not clear why the Constitutional Court did not query the retention of the concept in the final *Constitution* a year later.

The following section of this paper will focus on the conflict between section 84(2)(j) and section 165(5) of the *Constitution*. Whereas the latter provision unequivocally states that judicial decisions are binding upon all state organs, the former creates an unrestrained presidential veto of judicial sentences. The origins of the prerogative of pardon will thus be explored in the light of the certification of pardoning by the Constitutional Court. The justiciability of mercy as a non-legal norm also receives attention. Finally, the tenability of royal pardons in a republican constitutional state will be critically assessed.

4.3.1 *Origins and reception of the prerogative of pardon in South African law*

Before the constitutional tenability of pardons can be considered, the origins of this power have to be explored. The prerogative of pardon became part of South African law when the *South Africa Act* of 1909 installed the Westminster system in the Union of South Africa. There are different kinds of royal prerogative powers, which cut across all spheres of state power, since these are residual powers of a constitutional monarch.²⁵⁸

256 Fowler, Thompson and Fowler *Concise Oxford Dictionary* offers the following meaning for the concept of reprieve: "postpone or remit execution of condemned person" or "give respite to".

257 *S v Makwanyane* 1995 3 SA 391 (CC).

258 In the British constitutional system a distinction is drawn between personal, ecclesiastical, political (ie executive and legislative), judicial and prosecuting royal prerogative powers. 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. Executive prerogatives include that the monarch appoints the leader of the strongest party as prime minister. Legislative prerogatives include that the monarch convenes and prorogues Parliament and assents to and signs legislation. The monarch also has the prerogative that criminal proceedings are instituted in the name of the Crown by the Attorney-General. See Jackson and Leopold *Constitutional and Administrative Law* 308-332; Joliffe *Constitutional History*; Keir *Constitutional History*; Maitland *Constitutional History*.

When it comes to judicial prerogatives, the independence of the judiciary was clarified by the *Act of Settlement* (1701) in terms of which the King renounced all claims to the prerogative to dispense justice.²⁵⁹ Two judicial prerogatives survived: Until very recently the Monarch could appoint judges to the higher courts.²⁶⁰ The Monarch could also veto judicial sentences by granting a pardon. Initially the Monarch could exercise the prerogative of pardon personally, according to his discretion. Unfortunately pardons were often granted in an arbitrary manner and basically depended on favour, religious or sacred mercy or compassion – often to correct the injustices of draconian laws made by these very rulers.²⁶¹ These powers were gradually curtailed and toned down as the constitutional monarchy developed. The discretion to grant pardons or to reprieve or grant other remissions was then limited by convention and thus the Sovereign could exercise this power only on the recommendation of the Home Secretary. It is expected that such instances should remain exceptional to remedy a miscarriage of justice or a legal error.

Under the *Act of Settlement* the Monarch retained a similar veto power with regard to legislation adopted by the Houses of Parliament. The Monarch could no longer make laws or levy taxes, but could refuse to assent to legislation.²⁶² This prerogative was

259 William III, 1700 and 1701: An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject, Chapter II Rot Parl 12 and 13 Gul III at 1, reprinted in Raithby (ed) *Statutes of the Realm* 636-638. See also Jackson and Leopold *Constitutional and Administrative Law* 418-420; Carpenter *Constitutional Law* 172.

260 Class-based judicial appointments by the Monarch, House of Lords and the Commons were linked to different tiers of courts in the past. The House of Lords appointed the Law Lords, who acted as the highest court of appeal, whereas the Commons (justice department) appointed magistrates to the lower courts. The royal appointment of judges to High Courts was curbed by convention in that it had to be done on the advice of the Lord Chancellor. This system was abolished by the *Constitutional Reform Act* 2005. Since 2006, judges are appointed by the Judicial Appointments Commission. The Commission consists of 15 members, mostly from the legal profession. The judiciary has 7 representatives and the barristers and solicitors one each. The six lay members may include law professors. The constitutional reforms in the UK that took place during the last decade may in fact constitute the most dramatic changes since the times of the Glorious Revolution of 1688. Interestingly many of these bold reforms may actually be a spin-off effect of Britain's being a member of the European Union, which forces its Member States to implement certain legal standards and to harmonise their systems.

261 Kallach 2009 *Harvard Law Record* points out that pardons were useful in those times because the death penalty attached to many small offences. Thus British judges would pass the death penalty but urge the monarch to commute the sentence. A similar practice existed with regard to unjustified seizures and forfeitures which helped British rulers to build a mercantile empire. Only British ships were allowed to transport goods between English ports and their colonies and transgressions were regarded as piracy, which resulted in forfeitures to the British Crown. The legislation conceived of a legal fiction that the ships contravened the law and they were then convicted on the basis of *in rem* actions. The British monarchs tried to oust their Dutch and other mercantile rivals in this manner. See Greek "History of Forfeiture" 109-137.

262 Carpenter *Constitutional Law* 173.

exercised for the last time in 1707. After that, it became defunct. For all practical purposes, the legislative veto is now excluded by convention from the scope of legislative prerogatives.²⁶³

A reason why the veto of judicial sentences probably survived so long is because lay persons could become judges or participate in juries and thus "legal errors" could lead to miscarriages of justice.²⁶⁴ Another explanation for the survival of the prerogative of mercy is undoubtedly that the death penalty was still the highest sentence that could be meted out. The power of reprieve, which constitutes one aspect of this prerogative power, thus functioned like a safety mechanism to halt the execution of capital punishment. The British parliament formally abolished the death penalty only in 1998.²⁶⁵ As a Member State of the Council of Europe, the United Kingdom signed the *13th Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* in 2003.²⁶⁶ This makes a reintroduction of capital punishment impossible.

Unlike the executive prerogatives where the Monarch exercises the power on the advice of the Prime Minister and his Cabinet, a different practice exists with regard to judicial prerogatives. It is understood that the Home Secretary (now the Minister of Justice) in the United Kingdom would not take a question relating to pardons or the

263 Birch *British System* 46; Bradley and Ewing *Constitutional and Administrative Law* 67. As for the legislative veto, slightly different rules applied to the colonies. The Governor, who represented the Crown, could withhold assent to a bill adopted by a colonial Parliament, reserve it for the Monarch's pleasure, or refer it back to Parliament in terms of the *Colonial Laws Validity Act* 1865. See Carpenter *Constitutional Law* 58.

264 Justice Kirby of the High Court of Australia and Commissioner of the International Commission of Jurists explained it as follows: "The training of judges, in a formal school or college, as a prerequisite to the commencement of judicial service, or as an accompaniment to years of service, was, in the old days, out of the question. In part, the resistance flowed from the fact that this had never been the way it had been done in England which, in the judiciary (as in so many other things) adored the gifted amateur. In part, doubtless, it was because the English way of doing things was cheap to the public purse and relatively efficient. The private sector, of the advocate's practice, was thought to give the judge the necessary preparation at no cost to the state." See Kirby 1999 www.hcourt.gov.au. In the Continental European tradition, all lawyers train to qualify for holding office as judges and take state examinations irrespective of whether they go into private practice or into prosecution afterwards.

265 The last executions in the United Kingdom, by hanging, took place in 1964, prior to capital punishment being abolished for murder (in 1969 in Great Britain and in 1973 in Northern Ireland). Although not applied since, the death penalty remained on the statute book for certain other offences such as espionage, arson, treason and piracy. The last remaining provisions for the death penalty were removed when s 21(5) *Human Rights Act* 1998 came into force on 9 November 1998.

266 On 10 October 2003, effective from 1 February 2004, the UK acceded to the *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (2002).

remission of sentences to the Cabinet, where the discussion would tend to be more political than legal.²⁶⁷ The assumption is that the Home Secretary "acts more judicially than politically in making any recommendations".²⁶⁸ Since 1997, the Home Secretary may also seek the assistance of the Criminal Cases Review Commission.

Like the British Monarch, the South African Governor-General in colonial times and later the State President under former Westminster constitutions could grant a pardon, reprieve capital punishment or grant a remission of fines, penalties or forfeitures only on the recommendation of the Minister of Justice. It is therefore clear that the power of mercy, which overrides judicial sentences, was not an executive but a judicial prerogative. The granting of parole fell under the prerogative to grant remission of sentences. Part of the prerogative of mercy was then "statutorily delegated" to the Minister of Justice in 1959 so that he could also formally grant parole to prisoners.²⁶⁹ In other words, the power to grant parole was conferred upon the watchdog, whose duty it was prevent an abuse of the pardoning power instead of taking the kind of prerogative power into consideration. The question could therefore rightly be posed if this power was indeed conferred upon the correct state organ when part of the common-law royal prerogative of mercy was abolished by regulating that in terms of legislation. The Minister of Justice belongs to the executive power and is not a judicial organ involved in sentencing.

In Britain similar parole powers were statutorily conferred upon the Home Secretary in 1948, 1967 and 1991, cutting back on the common-law royal prerogative to grant remission of sentences. This probably served as an example for the colonial governments. The legislature paid little attention to whether or not the Home Secretary was the appropriate state organ to review judicial sentences. It is no wonder that the statutory regulation caused havoc in adjudication.²⁷⁰

267 For a former Home Secretary's account of his task in reviewing death penalty cases, see Butler *Art of the Possible* 201 ff.

268 Brazier *Constitutional Practice* 108; Jackson and Leopold *Constitutional and Administrative Law* 418-20; Smith 1983 *Public Law* 398; *R v Foster* 1985 QB 115.

269 Section 65(5) *Correctional Services Act* 8 of 1959. This statute remained in force until it was replaced by a new Act with the same title in 1998.

270 *Criminal Justice Act* 1948; *Criminal Justice Act* 1967; *Criminal Justice Act* 1991. The prerogative of mercy was often incorrectly classified as an executive prerogative due to the watchdog function of the Home Secretary. See *R v Secretary of State for the Home Department Ex Parte Stafford* (AP), unreported judgment of the Law Lords, 23 July 1998 (cited as "*Ex Parte Stafford*")

In 1990 the European Court of Human Rights held that once the tariff of a discretionary life sentence prisoner ends, the European Convention on Human Rights requires that the person should be able to challenge the grounds of his continued detention.²⁷¹ This decision compelled the British Parliament to bring their law in line with European practice. Whereas this is regulated by Criminal Codes in other countries as the judicial review of sentences,²⁷² Britain stuck to the concept of royal prerogatives as it developed and conferred this power by way of statute upon the Home Secretary as the watchdog of the royal prerogative of mercy. He is advised by a parole board to consider releasing life sentence prisoners once they have served 15 years of their term of imprisonment. Some courts then classified the granting of parole as an executive power, since the Home Secretary is a cabinet minister.²⁷³

In Britain and some Commonwealth countries, the question of whether or not the exercise of the pardoning power is subject to judicial review further split the courts.²⁷⁴ Meanwhile the prerogative powers have been subjected to a parliamentary inquiry in Britain, due to the outmoded nature of these powers.²⁷⁵

where Lord Steyn presents the following argument: "But before legislative intervention the executive possessed the power, through the prerogative, to release life sentence prisoners: *A. T. Smith, The Prerogative of Mercy*, 1983 Public Law 398, at 425; S. McCabe, *The Powers and Purposes of the Parole Board* (1985) Crim.L.R. 489; Genevra Richardson, *Law Process and Custody: Prisoners and Patients*, 1993, at 194. This power came under the prerogative of mercy. The Home Office view was that 'a remission of the remainder of the sentence is the customary mode of authorising release from prison': *Reg. v. Secretary of State for the Home Department, Ex parte Bentley* [1994] Q.B. 349, at 357H, *per* Watkins L.J. acting on a Home Office memorandum of 1874. A formalised licensing system apparently developed later".

271 *Thynne, Wilson and Gunnell v United Kingdom* 1990 13 EHRR 666.

272 In Germany, for example, this is regulated by § 57a and b of the *Strafgesetzbuch* (German Criminal Code) as a judicial function.

273 In *Ex Parte Stafford*, Lord Steyn detected a significant difference between the functions of the parole board, which he classified as "judicial" in nature (although the members are not judges), and the review powers conferred upon the home secretary. Even though Lord Steyn concedes that this "power came under the prerogative of mercy", he found that, "Given that the Parole Board, unlike the Home Secretary, carries out its duties regarding the release of life sentence prisoners in a judicial fashion, the institutional difference is significant".

274 For an overview see *De Freitas v Benny* 1976 AC 239 (PC) 247; *R v Secretary of State for the Home Department, Ex Parte Bentley* 1993 4 All ER 442; *Reckley v Minister of Public Safety and Immigration* 1996 AC 527; *Lewis v Attorney General of Jamaica* 2000 3 WLR 1785; Thomas *Judicial Process* 174; Gelber 2003 *MLR* 572.

275 Public Administration Select Committee *Taming the Prerogative*. See also Ministry of Justice *Governance of Britain*. Meanwhile a draft bill has seen the light: see Maer and Gay 2008 www.parliament.uk.

4.3.2 Certification of presidential pardons and legal precedent

4.3.2.1 *In re Certification of the Constitution of the RSA 1996*

Despite serious reservations which were raised about the constitutional tenability of section 84(2)(j) of the *Constitution*, the Constitutional Court certified this provision in rather brief terms in *In re Certification of the Constitution of the RSA 1996* as compatible with the constitutional separation of powers.²⁷⁶ The court postulated the peculiar idea that regardless of the historical origins of the former royal prerogative of pardon, it is now an "original" presidential power by virtue of being listed in section 84, since the *Constitution* "proclaims its own supremacy".²⁷⁷ In fact, it was the duty of the court to scrutinise all of the provisions of the final *Constitution* for their compatibility with the 34 constitutional principles listed in Schedule 4 of the 1993 *Constitution*. These principles *inter alia* prescribed that there should be a proper separation of powers between the legislature, executive, and judiciary to ensure accountability,²⁷⁸ and that the judiciary should be independent.²⁷⁹ In its judgment the court did not consider if it is appropriate that the head of state, who doubles as the head of the executive, should be able to exercise the former judicial prerogative of pardoning in the sense of a veto of judicial decisions. The court further declined to entertain any options to preclude an abuse of the power of pardon to safeguard the rule of law and the binding force of judicial sentences.²⁸⁰ This unfortunate decision, which spans only four short paragraphs, has had serious repercussions for the constitutional separation of powers ever since.

276 *In re Certification of the Constitution* paras 114-117.

277 *In re Certification of the Constitution* para 116. This view was again endorsed in *President v Hugo* para 13, and *Minister of Justice v Chonco* 2010 1 SACR 325 (CC) para 30 (cited as "*Chonco I* (CC)").

278 Principle VI required: "There shall be a separation of powers between the legislature, executive, and judiciary, *with appropriate checks and balances to ensure accountability, responsiveness and openness*". (Emphasis added.)

279 Principle VII stated: "The judiciary shall be appropriately qualified, *independent* and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights". (Emphasis added.)

280 *In re Certification of the Constitution* para 115.

4.3.2.2 *The President v Hugo*

In *The President of the RSA v Hugo*²⁸¹ the Constitutional Court confirmed its stance on the issue. Even though the court postulated the idea that pardons were now an "original power" of the executive president, it nevertheless relied heavily on British precedent to interpret the prerogative of mercy.²⁸² Goldstone J on behalf of the majority held that the prerogative of mercy was never part of the powers of courts. As the pardoning power is also not legislative in character, it must be executive, since "there is no fourth branch of government".²⁸³ The misconception about the nature of prerogative powers as executive in nature dates back to the 1950s. In *Sachs v Dönges* the Appellate Division presumed that all prerogatives are executive powers even though the nominal head of state at the time was not a member of the cabinet. In *Hugo's* case the court uncritically relied on this misplaced classification.²⁸⁴ Even though there is no fourth branch of state power, the head of state is nevertheless a state organ in its own right. There are other state organs too, which do not form part of the legislature, executive and judiciary.²⁸⁵

Instead of distinguishing between the so-called executive and judicial prerogatives, the court implied that it is not the task of courts to second-guess the executive on pardons.²⁸⁶ The court relied on the incorrect classification of all prerogatives as

281 *President v Hugo* 1997 4 SA 1 (CC) (first cited and abbreviated in fn 81).

282 *President v Hugo* paras 18-24. S 39(1)(c) *Constitution* permits courts to consider foreign law when "interpreting the Bill of Rights". The *Constitution* has not extended this power to the separation of powers in foreign countries generally, though. Yet courts in South Africa seem to have interpreted this provision as a *carte blanche* to generally consider foreign law on a comparative basis - even with regard to the separation of powers relating to totally different constitutional systems. This has led to a trend to re-Westminsterise the constitutional state.

283 *President v Hugo* para 11. That the classification of pardons causes difficulties if it is detached from its historical origins has also been illustrated elsewhere. During the 1950s legal theorists tried to explain pardoning in Germany as a "non-separable state power" that should be seen as a "fourth state power". For a discussion of the literature and views at the time, see Mickisch *Gnade im Rechtsstaat* 26.

284 *President v Hugo* para 17. In *Sachs v Dönges* 1950 2 SA 265 (A) 306-307 the Appellate Division confirmed that the customary law of England with regard to prerogative powers was received into South African constitutional law. Schreiner JA espoused the view that an act done by virtue of the prerogative is "*simply an act done by the executive*, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us" (emphasis added). Although the word "discretionary" is sometimes used in describing the category of prerogative powers, the Court argued that this "only means that the exercise of the powers is not restricted within the limits of any statute".

285 Typical examples are Chapter 9 institutions and the Judicial Service Commission.

286 *President v Hugo* para 29. In a similar spirit Bekink 2003 *SAPL* 374 ff argues that the power to pardon is an executive power because it is based on "policy grounds and not on legal grounds".

executive in nature by the Appellate Division half a century before and classified the former prerogative powers as presidential discretionary powers, which the president exercises in an executive capacity.²⁸⁷ Goldstone J further contended that although the President must exercise this power in consultation with the Cabinet, he need not follow their advice since there is no obligation to take such action "in concurrence" with the Cabinet. The court concluded that insofar as these powers are not restricted by the immanent limits in the Bill of Rights,²⁸⁸ they are unfettered.²⁸⁹

The uncomfortable truth is that the court did not explain why the former royal legislative prerogative to veto parliamentary legislation by refusing to assent to bills was explicitly excluded by section 79, whereas the prerogative of pardon to veto judicial sentences was allowed to survive in section 84(2)(j).

4.3.2.3 The *Chonco and CSV* cases

In the aftermath of these judgments, Parliament adopted the *PAJA* and obviously tried to accommodate the views of the Constitutional Court in the definition of administrative action. Although other former prerogative powers under section 84(2) were excluded from the scope of administrative action, pardons are included.²⁹⁰ Based on this definition, the Supreme Court of Appeal in *Minister for Justice and Constitutional Development v Chonco* confirmed the view that pardoning is administrative action.²⁹¹ Farlam JA on behalf of a unanimous bench relied upon section 1(i) of the *PAJA* to argue that section 84(2)(j) has not been excluded by subsection (aa) of the definition from presidential powers that do not qualify as administrative action.²⁹²

The author did not contemplate that the conversion of judicial sentences is the essence of this power.

287 *President v Hugo* para 11. In a dissenting opinion Kriegler J (para 65) preferred "not to characterise the relevant power as executive, administrative, or as falling in a special category of discretionary powers of the head of state" as it didn't really matter.

288 On immanent limits as a restriction to curbing fundamental rights, see Blaauw-Wolf 1999 *SAPL* 190.

289 *President v Hugo* paras 14-17. In fact, the granting of pardons used to be limited by convention because the nominal head of state could exercise this power only on recommendation of the justice minister. It was not an unfettered power in English constitutional common law.

290 Section 1(i)(aa) *PAJA*.

291 *Minister of Justice v Chonco* 2009 6 SA 1 (SCA) paras 24 and 40 ff (cited as "*Chonco (SCA)*").

292 *Chonco (SCA)* para 43.

The *Chonco* decision was subsequently followed in *Centre for the Study of Violence and Reconciliation v The President of the RSA*.²⁹³ Seriti J invoked the rule *unius inclusio est alterius exclusio* to substantiate why the power to pardon constitutes administrative action.²⁹⁴ Unfortunately, this rule of interpretation is not helpful in the attempt to systematise state power in a modern constitutional state.

In September 2009 the Constitutional Court partly retracted the stance taken by Goldstone J in earlier decisions. In an appeal of the *Chonco* case, Langa CJ ruled that pardoning was a power of the head of state "rather than the head of the national executive".²⁹⁵ Though there is "no right to be pardoned", the function conferred upon the President to make a decision "entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay".²⁹⁶ The court argued that the power of pardoning, like other functions of the President under sections 84 and 85, is a public power.²⁹⁷ The powers under section 84(2), however, have a "solo character of Head of State powers" which cannot be transformed into "national executive powers".²⁹⁸ Although there is no clause explicitly allowing for the delegation of these powers that attaches to the office of the President in a personal capacity, the court reasoned that section 84(1) "gives the President the powers 'necessary' to fulfil the functions accorded to him".²⁹⁹ Since the function and obligation to consider pardon petitions rests with the president alone, the preparatory steps taken by the Minister of Justice and Constitutional Development can be classified as "auxiliary powers" falling within "the scope of President's power to request assistance".³⁰⁰

293 *Centre for the Study of Violence and Reconciliation v President of the RSA* 2009 ZAGPPHC 35.

294 *Centre for the Study of Violence and Reconciliation v President of the RSA* 2009 ZAGPPHC 35 para 8.

295 *Minister of Justice v Chonco* 2010 1 SACR 325 (CC) para 30; see also paras 36, 39, 41 (cited as "*Chonco I (CC)*"). The ruling was endorsed in March 2010 by Khampepe J in *Chonco v President of the RSA* 2010 ZACC 7 (cited as "*Chonco II (CC)*").

296 *Chonco I (CC)* para 30.

297 *Chonco I (CC)* paras 15, 29.

298 *Chonco I (CC)* para 39.

299 *Chonco I (CC)* para 31.

300 *Chonco I (CC)* paras 31-35. Such auxiliary powers include the power "to request advice as well as the power to initiate the processes needed to generate that advice" (para 33).

The court was of the opinion that these functions could be not be construed as executive powers exercised in terms of section 85(2).³⁰¹ The court did not address its previous view that pardoning constitutes executive action with administrative character since it has an external effect. The court instead reasoned that what distinguishes powers under section 84(2) from those under section 85(2) is that the latter "are performed collectively by the President and members of the Cabinet" whereas the President is individually responsible for the exercise of powers under section 84(2).³⁰² Since pardons do not fall within the ambit of the Cabinet's collective powers and responsibilities,³⁰³ the Minister of Justice and Constitutional Development could not be held accountable for not taking any decisions on the pardon applications. Consequently, Chonco's case must fail because he sued the justice minister instead of the President.³⁰⁴ Hence the court concluded that "the requirement within subsections 1(a)(i) and (ii) of PAJA that there be an exercise of public power in order to create administrative action is not met".³⁰⁵ The Minister did not fail to exercise a public power, and though there is a public power involved, it "was the President's, not the Minister's, to exercise".³⁰⁶

The gist of the court's argument that all executive power under section 85(2) is collective in nature is not supported by the *Constitution*. Section 92(2) explicitly stipulates that members of the Cabinet are "accountable collectively and individually to Parliament for the performance of their functions".³⁰⁷ The court further postulated the scenario that Parliament could hold the President accountable for fulfilling his functions to consider pardon applications under this provision.³⁰⁸ It was indicated earlier that pardons used to be a judicial prerogative and therefore do not resort under executive powers. Parliament thus cannot invoke section 92(2) of the Constitution to hold the President accountable for pardoning.

301 *Chonco I (CC)* para 36.

302 *Chonco I (CC)* para 37.

303 *Chonco I (CC)* para 38.

304 *Chonco I (CC)* paras 40 and 42.

305 *Chonco I (CC)* para 42.

306 *Chonco I (CC)* para 42.

307 Rautenbach and Malherbe *Constitutional Law* 193.

308 *Chonco I (CC)* para 41.

Apart from that, it is debatable whether the petition for presidential pardons in the *Chonco* case doesn't actually fall under the rubric of amnesty. Chonco and the 383 co-applicants boycotted or missed the deadlines of the Truth and Reconciliation Commission's amnesty procedures and *ex post facto* tried to overcome this impediment by applying for a presidential pardon of political offences. The difference between amnesty and pardons is that amnesty needs a legislative basis.³⁰⁹ In other words, it is a function of the legislature to regulate the granting of amnesty.

It is therefore doubtful that the head of state can extend his powers to pardon to encompass the granting of "amnesty pardons" in the manner that former President Mbeki did.³¹⁰ He transformed amnesty procedures into a matter of pardoning by way of administrative regulation. During a "window of opportunity", persons who had previously missed the amnesty deadlines could re-apply for an "amnesty pardon", a process over which the President presided and during which he was advised by a Presidential Reference Group.³¹¹ It would seem fair to conclude that a more appropriate way to deal with such applications would have been to reopen amnesty proceedings by way of legislation.³¹²

309 On the differences between amnesty and pardons, see Köhler *Strafrecht* 693; and Schätzler *Gnadenrecht* 208 ff. They argue that pardoning is restricted to *individual instances* of reducing or suspending a binding judicial sentence based on the exercise of mercy, whereas statutory amnesty is directed at a *specific abstractly defined group of persons*, where the legislature allows the suspending or mitigating of sentences or the granting of amnesty from prosecution subject to specified preconditions. This was the case with the legislation dealing with amnesty in the truth and reconciliation process. Amnesty is not a correction of criminal law; it suspends sentences or blocks further prosecutions for narrowly defined purposes. It always requires legislation to regulate it because it creates an exception to generally applicable criminal liability. There are different types of amnesty, ie the final-stroke amnesty dealing with mass violence/civil war in the aftermath, restorative amnesty after civil upheavals, and legal-correctional amnesty, which aims at extending the alleviation of penalties to a wider group of people. The concept of amnesty stems from the Greek word *amnesia* and means forgetting or forgiving, which explains the legal basis for such legislative measures.

310 Victim groups successfully prevented the granting of amnesty in this manner in *Centre for the Study of Violence and Reconciliation v President of the RSA* 2009 ZAGPPHC 35.

311 Mbeki 2007 www.info.gov.za; Dept of Justice and Constitutional Development 2008 www.info.gov.za. It should be noted that there was no empowering legislation and thus the action undertaken by the Presidential Reference group lacked legality.

312 The *Chonco* case's applicants lodged a new application to the President in compliance with the Court's ruling only nine days after the previous judgment. However, in *Chonco II (CC)* the court ruled they ought to have investigated viable alternatives for settling the dispute first. President Zuma subsequently considered the applications. Out of the 384 applications, he has decided to reject 230 applications. Of the 384 applicants, 146 lodged an application for pardon in terms of the special dispensation announced by former President Mbeki. A court order granted by the North Gauteng High Court on 6 April 2009 interdicted and prevented the President from making any final decision regarding these applications. Until judgment is delivered on the matter, the

4.3.3 *Justiciability of mercy as an "act of grace"*

In the *Hugo* case, a dispute arose because on the occasion of his inauguration President Mandela granted a pardon to all imprisoned mothers with children under the age of twelve and all young people and disabled prisoners.³¹³ The Constitutional Court found that the pardons for these categories of prisoners did not discriminate against Hugo, the father of a minor whose mother was deceased, because he had no right to be pardoned. Pardoning was an act of mercy.³¹⁴

In the same decision the court ruled out the possibility that an act of grace could be the basis for a pardon. In previous times monarchs usually granted a general pardon or a pardon to specific categories of incarcerated persons as an act of grace when they ascended to power. The court referred to American decisions that a pardon should no longer be understood to be a private act of grace of an individual happening to possess power.³¹⁵ The court instead argued that pardons now serve the function of reducing excessive sentences or of granting mercy when the President regards such an act to be desirable in the public interest. Hence, the court argued that it was desirable that mothers, minors and the disabled should be released in the public welfare,³¹⁶ but offered no justification why it should then be in the public interest to incarcerate these groups in future or why criminal law should be generally applicable. In a more recent judgment the Constitutional Court seems to have distanced itself from this view.³¹⁷

In fact, the court did not explain how an act of grace should be distinguished from an act of mercy. Apart from that, these were not the only groups that were released on the occasion of former President Mandela's inauguration.³¹⁸ The resemblance of

President was unable to make any final decision on these 146 applications. See "Zuma has considered IFP pardons – Presidency" *Politicsweb* (2010-2-4).

313 The three categories of persons that were considered for pardons in this instance might actually fall under the rubric of amnesty and not pardoning.

314 *President v Hugo* paras 32 ff.

315 *President v Hugo* para 24.

316 *President v Hugo* paras 44-46.

317 In *S v The State* 2011 ZACC 7 the Constitutional Court ruled that being the mother of minor children does not generally exclude an incarceration sentence upon conviction of a criminal offence that warrants such a sentence.

318 What the Court overlooked in the *Hugo* case is that the presidential pardons were not restricted to the roughly 440 persons falling in these three categories. Dissel *New Release Policy* recounts

these pardons and remissions to mass royal pardons on the occasion of the coronation of monarchs could hardly be denied. Interestingly the Indian Supreme Court ruled that such pardons on the occasion of commemorating celebrations of independence do in fact constitute unconstitutional acts of grace – ironically by citing the South African Constitutional Court's decision in the case of *Hugo*.³¹⁹

Furthermore, the court did not justify why the President should have the power to reduce excessive sentences if they could be appealed to higher courts. Courts are obliged to consider all mitigating factors that would justify a milder sentence and sentencing falls in their constitutional scope of powers. The court also did not substantiate why a person who lacks legal training and is not a judge should be able to determine if a sentence is excessive. Since the constitutionality of parliamentary legislation which prescribes excessive sentences can be contested in the courts on the basis that all state action must be in proportion to the object pursued,³²⁰ it is not clear why the rule of law should be sacrificed by allowing an executive president to overrule binding judicial sentences based on valid law and legal considerations of justice.

One of the arguments invariably offered in support of retaining pardons in South Africa is that many political activists who fought against the political repression of the apartheid era would not have survived if it were not for pardons. However, the system under which this was true was replaced by the establishment of a constitutional state and the abolition of the death penalty. It is therefore no longer a valid justification. In Germany similar arguments are offered in relation to the excesses of the Nazi dictatorship. In this instance the proponents of pardoning

that many thousands of prisoners received special remissions in the run-up to the inauguration of President Mandela.

319 The governor of Andhra Pradesh wanted to grant remissions to 1500 prisoners to commemorate the coming into power of the Congress Party upon its 60th anniversary. The pardoning order *inter alia* set aside the sentence of Congress leader Reddy, who was convicted on two counts of culpable homicide and sentenced to ten years' imprisonment. The Indian Supreme Court set aside the blind-axe pardoning order because it was motivated by political expediency and resembled an act of grace, which did not fit into the scheme of the constitutional system. The court stressed that the supreme quality of the rule of law is fairness and legal certainty. This may not be compromised on the grounds of political expedience. See *Sudhakar v Government of Andhra Pradesh WP (CrI) Case No 284-285/2006*. Also see "Andhra Pradesh move to free 1,500 prisoners halted" *Legal News India* (2006-8-16); "Politics can't be the factor in pardon: SC" *Indian Express* (2006-10-12); "Power of pardon subject to review" *The Hindu* (2006-10-12).

320 Blaauw-Wolf 1999 *SAPL* 193.

usually try to rationalise their stance by falling back on Radbruch.³²¹ Although Radbruch's sentiments were understandable in the post-war era one must bear in mind that his focus on justice and ethical standards was of a legal-philosophic nature. Radbruch was not a theorist on how the separation of powers could ensure the goals of justice and the rule of law in a mature constitutional state.

Another justification for the granting of pardons is that "mercy and law are both worthy cultural achievements" and thus the power to pardon should be retained.³²² However, in contrast to vague religious, cultural or other perceptions of mercy, *legal* norms are the metier of legislation regulating criminal justice.³²³ Courts have not been able to concretise the concept of mercy as a justification for pardons with any degree of certainty or to infuse it with legal norms.

The difficulty is that it is not possible to sever mercy from an act of grace because it is an inherent part of this royal prerogative, which in the way that it was conceptualised in the 18th century enabled the monarch to veto judicial sentences. Thus British courts took the following view. In *de Freitas v Benny*, Lord Diplock based the non-justiciability of the prerogative of mercy on the fact that there was no legal right to mercy.³²⁴ In *Reckley v Minister of Public Safety and Immigration* the Appeal Court confirmed the position taken in *de Freitas* and denied the potential for review of the prerogative of mercy.³²⁵ Although one must agree with Lord Diplock

321 Radbruch *Rechtsphilosophie* 276, 337.

322 See Dimoulis *Begnadigung* in general; Schätzler *Gnadenrecht* 5; Löwe, Böttcher and Riess *Strafprozeßordnung und GVG* 40.

323 Moore *Pardons* 46 ff and 55 ff.

324 In *De Freitas v Benny* 1976 AC 239 (PC) 247 Lord Diplock presented the following argument: "Mercy is not the subject of legal rights. ... A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function". Although Lord Roskil also excluded the prerogative of mercy from judicial review in *Council of Civil Unions v Minister for the Civil Service* 1985 AC 374 (HL) 418, he opened the door for judicial review of other categories of royal prerogatives. See also Harris 2003 *CLJ*.

325 *Reckley v Minister of Public Safety and Immigration* 1996 AC 527. Harsh critique followed and the view was expressed that the Parole Board failed to reconsider the issue in *De Freitas* afresh having regard to "significant developments that had taken place in administrative law". Thomas even called the decision in *De Freitas* "bad precedent" that should not be perpetuated because there is an "inexorable trend away from formalism". See Thomas *Judicial Process* 174; Gelber 2003 *MLR* 572.

that mercy is not based on legal rights, he glossed over the validity of this royal prerogative as a veto of judicial sentences in modern times.

By contrast, the South African Constitutional Court argued that pardons should be subjected to judicial scrutiny.³²⁶ Since pardoning is a public power, the court argues, it must be exercised "rationally, in good faith, and in accordance with the principle of legality". The legality of pardons would then be subject to judicial review.³²⁷ Yet how should bad faith be determined in relation to an act of mercy? Besides, could the court ever be in a position to review such pardons or arbitrarily granted parole? It is hardly conceivable that a convicted prisoner would care to contest his early release or a reduction of his sentence. The very idea that the "legality" of pardons could be tested by a court is inherently flawed because pardons are based on mercy and not on legal norms. Other courts have also tried to circumvent this outdated royal relic by arguing that it should no longer be interpreted to be a personal act of grace but should be construed in such a way that it fits into a modern constitutional scheme.³²⁸ They were neither able to distinguish mercy clearly from an act of grace nor to infuse it with legal norms.

4.3.4 *Uncritical retention of royal pardons in a republican state*

4.3.4.1 Presidential pardons: unbridled power on a silver platter?

In South Africa, the retention of the former royal prerogatives in a republican state received relatively little attention. A fair number of constitutional law scholars queried

326 *President v Hugo* para 28.

327 In *President v Hugo* para 29 the court took the view that administrative review of pardons would be possible, but in *Chonco I (CC)* para 30 the court seems to argue more in favour of constitutional review.

328 Leading American judgments espoused the same view, see *Biddle v Perovich* 274 US 480 (1927) 486 and *Schlick v Reed* 419 US 256 (1974) 266. In Commonwealth countries a similar view has been echoed. In New Zealand, Cooke P held in *Burt v Governor-General* 1992 3 NZLR 672 (CA) 678 that "any lingering thought that the prerogative of mercy is no more than an arbitrary monarchical right of grace or favour" should be excluded. This was endorsed by the Indian Supreme Court in *Sudhakar v Government of Andhra Pradesh* WP (CrI) Case No 284-285/2006. See also "Court: Remission not an act of grace" *The Hindu* (2006-10-12). A decision of the German Constitutional Court in BVerfGE 25, 352 at 358-60 (ie the decision of the first group) espoused a similar view. See also Löwe, Böttcher and Riess *Strafprozeßordnung und GVG* 39.

the retention of the prerogatives when the 1983 Constitution was adopted,³²⁹ but it was hardly discussed when South Africa adopted the constitutional state model in the 1990s. Royal prerogatives, however, are an inherent part of a constitutional monarchy and constitute the residual powers of a monarch not yet wrested from the Crown. The status of a republican head of state is very different. He is a *primus inter pares* and official representative of a democratic state based on popular sovereignty.

In a constitutional monarchy, by contrast, the Sovereign is at the pinnacle of a class-based system of government. The Westminster model of parliamentary sovereignty democratised the monarchy,³³⁰ but at the same time this novel 19th century doctrine shifted the possession of the unbridled power to make laws from the monarch to the Commons. Parliament could thus adopt unjust laws which could not be struck off the statute book by the judiciary. Although the royal powers to grant pardons arbitrary were effectively curbed by convention, the prerogative of mercy thus remained a useful tool to temper the harshness of criminal law. The Home Secretary in the Cabinet of the Commons was now in a position to recommend pardoning or the remission of sentences to ameliorate the harsh justice prescribed in terms of law.

The difficulty is that one cannot therefore simply transfer the royal prerogatives to a republican head of state. The royal prerogatives cut across the separation of powers and thus affect the functions of the individual branches of state power. In a republic state power is exercised on behalf of the people by all state organs, each with a specific function. An ill-considered transfer of royal prerogative powers that vest in the head of state becomes particularly critical where the office bearer doubles as head of the executive, for in this instance legislative and judicial prerogatives could be conflated with the exercise of executive power.

329 Basson and Viljoen *Constitutional Law* 58 ff; Booysen and Van Wyk '83 *Grondwet* 60 ff; Carpenter *Constitutional Law* 174; Carpenter 1989 *CILSA* 190; Van der Vyver *Grondwet* 16 ff. In a critical appraisal, Beukes 1993 *SAPL* foreshadowed that the release of prisoners is potentially open to manipulation by the executive and so it came.

330 Dicey *Law of the Constitution* 37 ff. The doctrine of parliamentary sovereignty is not based on the republican notion of popular sovereignty and personal equality. It merely signals a shift of power away from the monarch as sovereign and the aristocracy in the House of Lords towards the House of Commons. The leader of the strongest party in the House of Commons becomes the prime minister and can form a government.

The limitation of the absolute power of royal rulers was the great accomplishment of constitutional monarchies. After that, convention laid down that these powers could be exercised only on the recommendation or advice of other state organs. The unconsidered transfer of the former prerogatives into the hands of an executive president again fuses these powers in the hands of a single ruler in an unrestrained manner. The judgment in the *Hugo* case illustrates the point. It should come as no surprise, though, that where the power of pardon has been conferred upon a head of state who doubles as head of the executive (for example in South Africa and the United States), these presidents are often tempted to pardon their friends and executive comrades, or worse, might even consider pardoning themselves.³³¹

4.3.4.2 The hesitant transition in Germany

In Germany one of the most probing studies on prerogative leftovers dating back to the *Kaiserreich* was performed by Jesch in the 1960s. These prerogatives were linked to notions of sovereignty that prevailed in a bygone era when it was assumed that a monarch ruled by the grace of God – an idea which has become obsolete in modern parliamentary democracies. Whereas state power in constitutional monarchies emanated from the sovereign, such power is based on popular sovereignty in republican constitutional states. The separation of powers is based on law, and offices are linked to specific functions. In such a system there is no longer a place for royal prerogatives owing to the different concept of sovereignty and the separation of powers.³³² Yet in Germany, as in South Africa, the power to pardon was retained although the state had moved to republican constitutionalism. Like its South African counterpart, article 60(2) of the German *Constitution* was simply cast in the same format as its predecessor in the *Weimar Constitution*, which in turn

331 One of the first things that Gerald Ford did was to pardon Richard Nixon. On the topic of the executive abuse of the pardoning power in the USA, see Crouch 2008 *Presidential Studies Quarterly* 722; Love 2007 *Federal Sentencing Reporter*; Barcroft 1993 *HRLJ*. In South Africa, Boesak was pardoned after his conviction of corruption, which made his re-election to Parliament possible. Before the 2009 elections, Zuma's advisors suggested that if he were to be elected as President and had to stand trial he should pardon himself in case of a conviction. He also considered pardoning his former financial advisor Shaik, who was convicted of corruption and fraud.

332 Jesch *Gesetz und Verwaltung* 76 ff, 221 ff.

perpetuated the situation in the *Kaiserreich*.³³³ In both countries the focus during the drafting of their new constitutions was chiefly on how to deal with amnesty, and the power to pardon was retained rather uncritically. The similarity between the findings on the constitutionality of the pardoning power of one group of German judges in 1969 and its South African counterpart in the *Hugo* case is striking. That illustrates how difficult it is to advance constitutionally.

The 1969 decision of the German Constitutional Court was a 4:4 tied decision. The first group of judges held that the drafters of the Constitution would have omitted the pardoning power if it was not compatible with the new constitutional order.³³⁴ Although they conceded that the focus was more on amnesty during the drafting of the 1949 *Constitution*,³³⁵ they did not consider that the drafters of the *Constitution* might not have realised how pardons would impact on the separation of powers in the new constitutional order. Even though the first group accepted that pardoning was historically outdated and could no longer be interpreted as an act of grace, they argued that it should now be interpreted in a way that would be compatible with constitutionalism.³³⁶ They expressed the view that the granting or refusal of a pardon would not infringe upon any rights because there is "no right to be pardoned", and therefore judicial review was not applicable.³³⁷ They took note of the fact that the executive could override judicial decisions with pardons, because at a *Länder* level the pardoning power rests with the minister presidents as heads of government, but they shrugged this off as an anachronism that should simply be accepted, even though it did not fit into the scheme of the constitutional separation of powers. They further ruled that the legislature also could not restrict the power of pardon since the *Constitution* did not explicitly allow for that.³³⁸ Decisions to pardon were also not subject to judicial review because the decisions were based on the exercise of mercy and not on legal norms. They took the matter even one step further, saying that the

333 Article 60(2) *Grundgesetz* stipulates that: "The Federal President shall exercise the prerogative of pardon in individual cases on behalf of the Federal State."

334 BVerfGE 25, 352 at 359.

335 In BVerfGE 25, 352 at 358 the Constitutional Court refers explicitly to this background. In South Africa it was decided that the TRC should deal with amnesty.

336 BVerfGE 25, 352 at 359 ff.

337 BVerfGE 25, 352 at 362. Judicial review is regulated by a 19(4). The first sentence of the *Grundgesetz* stipulates: "Where rights are violated by public authority the person affected shall have recourse to the courts".

338 BVerfGE 25, 352 at 361.

pardoner should be able to "intervene to help and correct" judicial decisions where the possibilities under criminal law and procedure were insufficient.³³⁹

This line of argument is astonishing to say the least. It reminds one of the judgment of Rehnquist CJ in *Herrera v Collins* where the American Chief Justice relied on the pardon process of the president to administer justice where the courts had "failed".³⁴⁰ The reasoning of the first group of judges in this regard is as misplaced as that of Rehnquist CJ because it implies that politicians are better equipped to serve justice than legally trained judges. It cannot be overlooked how willingly the court restricted judicial review and legislative limitation of the pardoning power in order to uphold an outdated prerogative, and *vice versa*, how readily these four judges accepted executive inroads upon the sphere of competence of the judiciary in that they embraced a positivistic historical interpretation of this power. As a result criminal justice has been complicated unnecessarily. The first group also did not address the dichotomy of the classification of this power as a neutral power of the head of state at a federal level, and the overlapping of this power with executive powers at a *Länder* level. The court simply categorised it as executive although the federal president is a non-political office bearer.³⁴¹

In contrast, the second group of judges was adamant that the pardoning power constitutes an infringement upon judicial power and is not compatible with the separation of powers and the rule of law.³⁴² In their opinion, pardons constitute an arbitrary overturning of judicial sentences.³⁴³ The conversion of judicial sentences in the pardoning process cannot be reconciled with the notion that justice should be based on law. They also disagreed with the first group that pardons could not be

339 In BVerfGE 25, 352 at 358 the first group defined pardoning as the "competency to set aside a judicially binding sentence completely or partially, to convert the sentence or to prevent the execution of the sentence". Furthermore, this decision opens up the possibility of "correcting" a sentence, which can no longer be changed along judicial routes, along a "special route".

340 *Herrera v Collins* 506 US 390 (1993).

341 Subsequently the Administrative Supreme Court in BVerwGE 1971 *Neue Juristische Woche* 795 confirmed this argument but refined it insofar as the court maintained that the power of pardoning has been conferred upon the highest representative of the federal state or the *Länder* respectively, and therefore takes on a *sui generis* character within the broader scope of powers of the executive branch. Schätzler *Gnadenrecht* 121 takes a less subtle stance, arguing that pardoning cannot be classified either as adjudication or a legislative act and must therefore be executive in nature. (This is very similar to the arguments offered by Goldstone J in *President v Hugo*.)

342 BVerfGE 25, 352 at 363 ff.

343 BVerfGE 25, 352 at 366.

subject to judicial review since the *Constitution* does not foresee any law-free zones.³⁴⁴ Deserving as this judgment might be, article 60(2) GG remained as it was because it was a tied decision.

The problem with pardoning is that unlike the statutorily prescribed and generally applicable judicial review of sentences, there is no equality of post-sentencing treatment of prisoners when it comes to their release. Like the second group of judges in this 1969 judgement of the German Constitutional Court, Kriegler, Mokgoro and O'Regan JJ expressed concern in the *Hugo* case that the law should apply generally and that everyone should be entitled to equality before the law.³⁴⁵ This theme will be explored in the next part of the article.

5 Equal treatment in the execution of incarceration sentences

5.1 Substantive justice as a prerequisite for equality in sentence execution

The norm of material justice requires that sentencing should be fair and just and in proportion to the seriousness of the offence, not in an abstract sense but relative to other offences.³⁴⁶ Instead of the current four purposes of sentencing,³⁴⁷ the Law Reform Commission proposes that the judiciary should attempt to find an optimal combination of restorative justice, the protection of society, and a crime-free life for the offender.³⁴⁸ A careful balance is sought between retribution, which takes the grief suffered by victims and the harm caused by crime on the fabric of society into

344 BVerfGE 25, 352 at 365 ff. According to this group, pardons also have to conform to the legal norms laid down by a 1(3) *Grundgesetz* and the legal norms laid down by a 20(3) *Grundgesetz*.

345 See the dissenting opinions in the *President v Hugo* by Kriegler J at paras 66 and 73 ff, Mokgoro J at para 91 ff and O'Regan J at para 108 ff.

346 Haas *Strafbegriff* 171 ff, 235 ff stresses that the objective of securing material justice in criminal law ought to be the primary role of the courts and prosecutors. This also seems to be the general tenor in South Africa. See Terblanche *Sentencing Framework Bill* 9 ff.

347 In *S v Rabie* 1975 4 SA 855 (A) 862 four purposes of sentencing were laid down, ie deterrence, prevention, reformation and rehabilitation. This followed on a decision of the Appellate Division in *S v Zinn* 1969 2 SA 537 (A) where the court formulated the triad of the seriousness of the crime, the personal factors surrounding the criminal and the interests of society.

348 *Sentencing: A New Sentencing Framework* (2000) para 3(3); Terblanche *Sentencing Framework Bill* 12. Terblanche and Roberts 2005 SAJ CJ 187-202 discusses the case *S v Ferreira* 2004 ZASCA 29, where the court tried to arrive at a just sentence for a severely abused woman who hired killers to get rid of her tormentor. They vividly illustrate how the courts could deliver on justice by using their discretion to make an exception to a life sentence. Even though this might be seen as a form of mercy, it would resort under the rubric of proportionality in sentencing rather than the exercise of an act of mercy.

consideration, on the one hand, and rehabilitation, which is inspired by considerations of tolerance and forgiveness, trying to keep doors open for reintegrating offenders in society, on the other.³⁴⁹

Criminal justice therefore depends not only on the justness of sentencing but also on how these sentences are executed in the post-trial phase. Incarceration is the most serious sentence category available, but under specific circumstances this is a legitimate restriction of the fundamental right guaranteeing personal freedom. Particular care should be taken not to transgress upon other immanent limits of personal freedom and security set by section 12(1).³⁵⁰ It is also important to ensure that the execution of the sentence is in conformity with valid limitations as prescribed by section 36 of the Bill of Rights.

The remission of sentence after a specific portion of the original sentence was served – be that in the form of granting parole or converting incarceration into correctional supervision – remains an inherent part of judicial sentencing and is subject to the norms specified by section 35 of the Bill of Rights. Due to the historical legacy of the Westminster system the remission of incarceration sentences has unfortunately been turned into an untenable mélange of judicial and executive functions. Before that is discussed in more detail, a comparative view is offered on the way in which the remission of incarceration sentences is handled in Germany. Germany is confronted by similar difficulties in attempting to transcend the remnants of a separation of powers dating back to a constitutional monarchy.

5.2 *The unsatisfactory double-barrel approach in Germany*

There is a two-track system in Germany, which is not satisfactory either. The review of sentences for the purposes of the granting of parole by courts was judicialised

349 There is a wide-spread perception that an over-emphasis on the rights of convicts has led to an unbalanced situation where the harm caused to victims and society plays is treated as being less important than the rights of convicts who themselves have not respected the lives, personal integrity and property of their fellow citizens. In the USA this has led to a retributive backlash. See Moore *Pardons* 66 ff. Burchell 2002 *SALJ* 579 makes a similar point.

350 Section 12(1)(c)-(e) excludes all forms of violence, torture and cruel, inhuman or degrading punishment. Detention without trial is also forbidden (subsec (b)). These norms may not be infringed during imprisonment.

early on, but as explained before, the prerogative of pardon was unfortunately dragged along from the *Kaiserreich*. A distinction is therefore made between the statutorily prescribed review of sentences by the courts, which is generally applicable, and pardoning petitions. The courts and the president can exercise these powers concurrently.

5.2.1 Historical background

Parole was differentiated from pardons and judicialised early on. Anglo-American theories on an early release as an aid to rehabilitation caught on in Germany as early as in the *Kaiserreich* era. The concepts of parole (*Bewährung*) or suspended sentences (*Strafaussetzung*) were not incorporated in the *Criminal Code* (*Strafgesetzbuch*) of 1871 though, and the position remained unchanged until 1953. A provisional pardon (*bedingte Begnadigung*) was introduced in around 1895. The *Kaiser* required the justice minister to take preliminary decisions and to advise him in such matters. In 1909, a criminal justice reform was initiated to transfer this power to the judiciary, but before it could be finalised World War I broke out. After the war, the justice minister was empowered to delegate provisional probation orders to the courts. The review of sentences by courts was thus institutionalised along this route.³⁵¹

5.2.2 Judicial review of sentences

The discretion to grant parole or suspend a prison term on probation was officially incorporated in the *Criminal Code* in 1953 and later regulated in more detail with the reforms of 1969.³⁵² The suspension of sentences is regulated by § 56 of the *Criminal Code*. When a court passes a sentence of imprisonment of not more than a year, the court must suspend the sentence if it is convinced that the deterrent effect of a sentence is sufficient to deter the convicted person from committing a crime again.³⁵³ By way of exception, sentences of up to two years can also be suspended.³⁵⁴ However, when a sentence of more than six months has been meted out and it

351 Schätzler *Gnadenrecht* 189-191.

352 Schätzler *Gnadenrecht* 192.

353 § 56(1) *Strafgesetzbuch* (StGB) or *Criminal Code*.

354 § 56 (2) *StGB*.

would be in the public interest that the person should be incarcerated the sentence may not be suspended.³⁵⁵ The suspended sentence is linked to a probation term of not less than two years and not more than 5 years.³⁵⁶ The court may add correctional conditions and compensation for the victim, and may order correctional supervision.³⁵⁷

Parole is regulated in § 57 of the *Criminal Code*. When two-thirds of a prison term (but at least two months) has been served the court *must* consider if the rest of the term of imprisonment could be suspended and the prisoner let out on parole.³⁵⁸ First offenders could be granted parole after they had served half of their sentences, provided that a minimum of six months was served.³⁵⁹ If parole was granted the probation period might not be less than the original sentence.³⁶⁰ Since 1982 the courts may under specific circumstances also consider parole for prisoners with a life sentence after they have served 15 years.³⁶¹

The review of sentences is handled by a full time bench (*Vollstreckungsgerichte*) in criminal courts, that considers parole matters only. The prescribed procedures require that the judge must hear the prosecutors, the correctional officers responsible for the inmate and the prisoner before parole can be granted.³⁶² The *Criminal Code* does not provide for parole on medical grounds. Unfitness to undergo detention is regulated in the *Criminal Procedure Act (Strafprozeßordnung)*. The execution of a prison sentence can be interrupted (not suspended) in cases of mental illness, when the condition of a person is so critical that his life is in danger, or when the physical condition of the convicted person is of such a nature that he cannot be treated in the prison hospital any more.³⁶³ A terminally ill person therefore remains in prison unless his sentence is interrupted as a result of hospitalisation or he is granted a pardon or if the sentence is remitted on review.

355 § 56(3) *StGB*.

356 § 56a *StGB*.

357 § 56b-d *StGB*.

358 § 57(1) *StGB* stipulates the conditions that must be met before a prisoner could be let out on parole.

359 § 57(2) *StGB*.

360 § 57(3) *StGB*.

361 § 57a *StGB*.

362 § 454 *StPO*. See Schätzler *Gnadenrecht* 204 ff. An oral hearing is prescribed only with regard to the prisoner.

363 § 455 *StPO*.

5.2.3 Pardoning procedures

Pardoning procedures may run concurrently with the judicial review of sentences. Unlike the South African *Constitution*, which does not explicitly provide for a delegation of the power of pardon and remission, the German *Constitution* specifies that the federal president may delegate this power.³⁶⁴ The Department of Justice, prison authorities and the prosecutors all play a role in the procedures.³⁶⁵ Pardoning procedures are regulated extensively both at a federal and *Länder* level.³⁶⁶ A petition for a pardon must first be submitted to the state prosecutors who brought the matter before the trial court. Next correctional officers make recommendations, which are taken into consideration by the prosecutors. Their combined recommendations are then forwarded to the section in the Justice Department responsible for the further processing of petitions for pardon. If that section is of the opinion that a pardon should be recommended, the matter is forwarded to the Justice Minister, who may then recommend a pardon to the Federal President or the relevant Minister President as the case may be.³⁶⁷ If a pardon is granted, the Justice Minister must co-sign it. If a pardon petition is declined there is no legal remedy, but the petitioner may make counter-representations. Once a pardon has been granted it is not automatically permanent; it may be recalled or cancelled. As in the case of judicial parole, the pardon can set aside the rest of a prison term completely or partially, and may combine that with probation or correctional supervision. A pardon, however, does not affect a criminal record or any legal restrictions as a result of that, since it is based on mercy and cannot overturn judicial judgments based on legal norms.³⁶⁸ It simply implies that the part of the sentence that has been set aside may not be executed.

364 A 60(3) of the *Grundgesetz*. There are similar provisions in the *Länder* Constitutions.

365 Schätzler *Gnadenrecht* 170-185.

366 At a federal level the regulations are contained in the *Verordnung über das Verfahren in Gnadensachen* (Procedural Regulations for Granting Clemency) of 6 February 1935, reprinted in Schätzler *Gnadenrecht* 273. For a detailed discussion, see Mickisch *Gnade im Rechtsstaat* 75-156.

367 The president must exercise his discretion scrupulously, and may refuse to sign a pardon even if it is recommended by the justice minister. The minister can refuse to co-sign the pardon only when the pardon would be politically intolerable. See Sachs *Grundgesetz Kommentar* 1393.

368 See the decisions of the High Court (*Oberlandesgericht*) of Saarbrücken and Hamburg, viz OLG Saarbrücken NJW 1973, 2037; and OLG Hamburg MDR 1977, 771. See also Schätzler *Gnadenrecht* 199, 202. In BVerfGE 66, 337 the Constitutional Court dismissed an objection to the exclusion of an attorney from the legal profession after a criminal conviction.

In practice, pardoning procedures in Germany adhere to the rules laid down by the *Criminal Code* because the President and executive are wary of creating the impression that they indulge in arbitrariness or might "overrule" the courts. As a result, the pardoning procedures duplicate the review of sentences by courts under § 57 of the *Criminal Code*. In both instances, prosecutors and correctional officers make representations and the prisoner may be heard. The difference is that pardons are handled by Justice Ministers and the Federal President or Minister Presidents at a *Länder* level and are not subject to legal scrutiny.³⁶⁹

5.2.4 Tentative thawing of the impasse

Since the procedure for granting pardons duplicates that of the judicial review of sentences by the courts, it is difficult to see why pardons should be retained. For all practical purposes pardons could be abolished since the courts already exercise the same powers. This would be a much more satisfactory solution than the current constitutional impasse. Pardons are an anachronism of a bygone era and not compatible with the modern notion of the separation of powers.

Interestingly, the Constitutional Court in Germany began to clarify the issue in 1977. The court considered whether or not the execution of the sentences of life prisoners should be brought in line with the parole conditions for other prisoners. The court explicitly admonished the legislature for not having created uniformity with regard to the release of prisoners to ensure equal treatment. It did so with explicit reference to the pardoning practice as well.³⁷⁰ The legislature subsequently inserted § 57(a) and (b) in the *Criminal Code*, which stipulate that once life prisoners have served 15 years of their term the courts should review their sentences.³⁷¹ Unfortunately, the legislature did not use the opportunity to abolish the pardoning power. Although it is correct that there can be no "right to be pardoned" or even a "right to the same

369 Schätzler *Gnadenrecht* 195 ff.

370 BVerfGE 45, 187 at 243 and 252.

371 Other countries in Europe then followed suit and this was the reason why the European Court of Human Rights admonished Great Britain to align its law in this area with that of the rest of Europe - in *Thynne, Wilson and Gunnell v United Kingdom* 1990 13 EHRR 666. See 4.3.1 above.

mercy",³⁷² it can hardly be denied that pardoning inevitably infracts the principle that law should apply generally and that everybody should have the same benefit from the law. This results in a lack of equal treatment with regard to the execution of sentences and the release of prisoners.

Pardons have been a source of contention for decades in Germany and the topic has been discussed *ad nauseam*.³⁷³ There is a strong trend in favour of abolishing this outdated royal relic. It compromises judicial powers and infringes upon fundamental rights. As Bachof critically observed, the 1977 decision of the Constitutional Court actually affirmed what the dissenters had already said in 1969.³⁷⁴ The requirement of material justice, which is immanent to the concept of constitutionalism, does not allow for any law-free zones that are not subject to judicial scrutiny. The exception to the rule, viz that pardons are non-justiciable because mercy is not based on legal norms, as postulated by the first group of judges in 1969 decision, is not in accord with the *Constitution*. Like its South African counterpart, article 19(4) of the German *Constitution* does not provide for any exception to judicial scrutiny of action taken by a state organ and it is therefore not in the power of the judges to construe it like that.³⁷⁵ Judicial scrutiny of action taken by any state organ should test that against the legal norms of the *Constitution*. The argument of these four judges is not convincing, because then mitigating factors which could ameliorate a sentence would also not be subject to judicial review on appeal.

Moreover, the granting of a pardon is not based on generally applicable legal norms. It does not even aim at the same mercy for all prisoners.³⁷⁶ Apart from giving rise to deficits regarding equal treatment, the release policy directly affects the right to personal freedom and freedom of movement. Since sentencing and the alteration of sentences is the domain of criminal law and therefore falls within the sphere of

372 Merten *Rechtsstaatlichkeit und Gnade* 64.

373 Merten *Rechtsstaatlichkeit und Gnade* 80; Bachof 1983 *Juristenzeitung* 469.

374 BVerfGE 25, 352 at 363 ff. See the discussion under 4.3.4.2.

375 An English translation of a 19(4) *Grundgesetz* reads as follows: "Where rights are violated by state organs the person affected shall have recourse to law. Insofar as no other jurisdiction has been established such recourse shall be to the ordinary courts."

376 Bachof 1983 *Juristenzeitung* 471 ff.

competence of the state organs responsible for the administration of justice, any executive input ought to be excluded.

5.3 *Sentence remission as executive power in South African law*

5.3.1 *Marginalisation of the judiciary*

Even though there is no constitutional mandate to transform the power of pardon and remission into a power that would allow the executive to convert constitutionally binding sentences of the courts, this is exactly what is happening. The *Correctional Services Act* of 1998 confers such powers statutorily on executive state organs and treats parole and other remissions of sentence as administrative action although the review of criminal sentences is actually a judicial power.³⁷⁷ By contrast, section 276A of the *Criminal Procedure Act* subjects the conversion of a prison sentence into correctional service or *vice versa* to judicial scrutiny. Some remissions are therefore granted by the Department of Correctional Services and/or the parole boards and others need a court decision. The differentiation is not comprehensible and does not reflect any form of the separation of powers.

The origin of this confusion dates back to 1959. Instead of conferring the common-law judicial prerogative upon the courts when parole was regulated statutorily, the legislature conferred these powers upon the Minister of Justice.³⁷⁸ Parliament thus "statutorily delegated" the remission of sentences upon the erstwhile watchdog whose duty it was to prevent an abuse of the granting of pardons and remission of sentences. This obviously transgressed upon the sphere of competence of the judiciary. Once the 1996 *Constitution* came into force, this regulation was clearly in conflict with section 165(5) of the *Constitution*, which explicitly states that judicial decisions are binding upon all state organs.

377 Chapters II, VI and VII *Correctional Services Act* 111 of 1998 as amended by *Correctional Services Amendment Act* 25 of 2008. For the different types of conversion of sentences, see Giffard and Muntingh *Effect of Sentencing* 28-32.

378 In terms of s 63 *Correctional Services Act* 8 of 1959 the parole board was obliged to make recommendations about parole to the Commissioner of Prisons or directly to the Minister of Justice, to whom this part of the prerogative of mercy was statutorily delegated.

In terms of the 1998 *Correctional Services Act*, which replaced the one of 1959, the control over the granting of pardons, parole and other remissions of sentences is fully in the hands of the executive – not only in the sense of the powers conferred upon it but also through the bodies that it can appoint and control for these purposes.³⁷⁹ There is no judicial input relating to the decisions taken by parole boards. Although a judge and a director from the prosecuting authority may serve on the review board, to which the decisions of the parole boards may be referred, they are in a minority.³⁸⁰ It is in the sole discretion of the minister to refer a parole decision for review and he can thus block review without reason.³⁸¹ Members of the review board are appointed by the National Council, but the National Council itself is appointed by the Minister.³⁸² It is composed of 15 members, and its composition is such that members of the judiciary and prosecuting authority are outnumbered in a relation of 3:1.³⁸³ The latest amendments abolished even the limited input courts previously had with regard to the conversion of sentences.³⁸⁴ The legislation further intends to repeal all previous statutory limitations where the conversion of a sentence into parole or correctional supervision was not possible unless a specific portion of a prison sentence was first served.³⁸⁵ In terms of the new section 73A of the Act, which has not yet taken effect, it is envisaged that it should be left in the

379 Sections 75 and 79-82 *Correctional Services Act* 111 of 1998. The Correctional Supervision and Parole Boards are appointed by the Minister or the Commissioner of the Department of Correctional Services. Each board consists of a chairperson, and includes a correctional service official as well as members of the community. See s 74(2) and (3) *Correctional Services Act* 111 of 1998 as amended by s 50 *Correctional Services Amendment Act* 25 of 2008. The minister may delegate his powers to the commissioner in terms of s 97 of the Act. See also Anonymous 2009 www.dcs.gov.za 4.

380 Section 76(1) *Correctional Services Act* 111 of 1998 determines that the review board consists of a judge as chairperson, a director of the National Prosecuting Authority, a correctional service member, a person with knowledge of the correctional system and two members of the public.

381 Section 75(8) *Correctional Services Act* 111 of 1998.

382 Section 76(2) *Correctional Services Act* 111 of 1998. A majority of them constitute a quorum and may take a decision. It seems that if the judge or the director of the National Prosecuting Authority is not present, the other three may nevertheless review a parole decision.

383 Section 83 *Correctional Services Act* 111 of 1998 as amended by s 59 *Correctional Services Amendment Act* 25 of 2008. The three judges who serve on the National Council are selected by the Minister in consultation with the Chief Justice. That means that the Minister can actually hand-pick them.

384 Sections 51, 54, 55 and 84 *Correctional Services Amendment Act* 25 of 2008 amending ss 75, 78, 79 and 136 *Correctional Services Act* 111 of 1998.

385 Section 48 *Correctional Services Amendment Act* 25 of 2008 amending s 73 *Correctional Services Act* 111 of 1998.

discretion of the National Council to determine minimum periods of incarceration before a sentence can be converted.³⁸⁶

Parole also serves as a useful mechanism for the executive to reduce prison overcrowding.³⁸⁷ Yet, if the granting of parole or other remissions were administrative functions of the executive, this would mean that any imprisonment could be contested as unfair administrative action in terms of section 33 of the *Constitution*. This is nonsensical because the restriction of personal freedom through incarceration is the result of a criminal conviction by the judiciary and is justified for that reason. It does not have anything to do with administrative action.³⁸⁸

5.3.2 A "get out of jail free" card for the well-connected?

Parole also seems to serve the purpose of a "get out of jail free" card for politicians and their friends in the monopoly of politics. Although Boesak, Yengeni and Shaik all challenged their convictions unsuccessfully in the highest courts of the land, the sentences of these courts had no binding force as they were subsequently overturned by being converted into medical parole, ordinary parole, correctional supervision or pardons.

386 Sections 48 and 49 *Correctional Services Amendment Act 25 of 2008*. The statute was published on 11 November 2008 but did not take effect on that day. In terms of s 87 of the Act the President announced by way of proclamation in N 68 in GG 32608 of 1 October 2009 that parts of the statute would come in force on 1 October 2009, but excluded ss 21, 48 and 49 *Correctional Services Amendment Act 25 of 2008* from entering into force.

387 Terblanche "Sentencing in South Africa" 173 gives an overview of how prison overcrowding is affecting sentencing. See also O'Donovan and Redpath *Impact of Minimum Sentence* 62 ff; Giffard and Muntingh *Effect of Sentencing* 28 ff.

388 Section 12(1)(b) *Constitution* read with s 36 dealing with valid limitation. In *Thebus v S* 2003 ZACC 12 paras 37-39, the Constitutional Court, referring to Burchell and Milton *Principles of Criminal Law* 406, held that the restriction of personal freedom is a valid limitation of that right which is justified under the criminal justice system. In *Minister of Correctional Services v Van Vuren* 2011 ZACC 9 the Minister of Correctional Services contended that the previous order of the Constitutional Court to release Van Vuren under correctional supervision could not be complied with because any decision by the Minister for the placement of Van Vuren on parole "would be *ultra vires* and would constitute reviewable *administrative action*" because no recommendation was made to this effect by the National Council for Correctional Services (para 5). The Court ruled that "the notion that the implementation of the order of this Court will amount to unlawful administrative action must be firmly rejected" (para 9). Although the outcome of the judgment is correct, the judgement could have been clearer. The Court based its verdict on the inapplicability of the objection on an exclusion of retroactivity of the contentious provisions. Unfortunately the Court did not explicitly substantiate its ruling with a legal-systematic analysis of the constitutional powers of the relevant state organs.

5.3.2.1 Yengeni and Boesak

Tony Yengeni, a former Member of Parliament, was sentenced to four years imprisonment for fraud but was released after only four months. Although section 73(7)(a) of the *Correctional Services Act* prescribes that at least one sixth of such a sentence must be served before parole could be considered, ie at least 8 months in his case, this did not deter Minister Balfour from converting his prison sentence into parole and correctional supervision.³⁸⁹

Dr Allan Boesak, a former political activist and Member of Parliament who was found guilty of having embezzled funds,³⁹⁰ served only a year of his three-year sentence before his sentence too was converted into correctional supervision under section 276(3) of the *Criminal Procedure Act*.³⁹¹ He then petitioned former President Mbeki for a pardon. The petition was dismissed in 2003 because Justice Minister Maduna was not satisfied that he had showed enough repentance.³⁹² In the next round Boesak lodged a second petition which was granted in 2005.³⁹³ His criminal record was also extinguished in the process.³⁹⁴ This made re-election to Parliament possible for Boesak. A simple legislative measure was thus interpreted to overrule a constitutional provision to the contrary.³⁹⁵

389 Dept of Correctional Services 2007 www.info.gov.za.

390 In 1999 the Cape High Court found Boesak found guilty of fraud and theft. A sentence of six years imprisonment was imposed, which was reduced to three years on appeal in *S v Boesak* 2000 1 SACR 633 (SCA).

391 "Boesak's parole in national hands – directive" *IOL* (2001-5-16); "Boesak to walk free tomorrow" *The Star* (2001-5-21).

392 "Maduna dashes Boesak's pardon hopes" *IOL* (2003-8-22).

393 Ministry of Justice and Constitutional Development 2005 www.info.gov.za.

394 In practice the President often grants so-called "free pardons" under s 82 *Correctional Services Act* 111 of 1998. This provision, however, does not explicitly confer the power upon him to extinguish criminal records. This provision should be distinguished from the procedures under s 327 *Criminal Procedure Act* 51 of 1977. In terms of the latter provision, a "free pardon" or the replacement of a verdict applies to instances where subsequent evidence became available which may exonerate a convicted person. At the request of the justice minister, a court may consider such new evidence on review and may then advise the president to change the court's previous conviction. These provisions vividly illustrate how the legislature haphazardly allocates functions to state organs without paying heed to the constitutional demarcation of their functions.

395 Section 47(1)(e) *Constitution* disqualifies anyone, who "has been convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine".

5.3.2.2 Shaik's pardon petitions and AFU sharing the interest on his forfeited assets

It was alleged that Mo Shaik started negotiations with the Deputy Director of the Prosecuting Authority and Head of the Assets Forfeiture Unit (AFU) Hofmeyr to reach a deal on medical parole for his brother and splitting the interest on the forfeited Shaik millions shortly after the Nicholson judgment.³⁹⁶ Shabir Shaik also twice petitioned the President for pardons. The first petition concerned the annihilation of his criminal conviction for corruption, whereas the second petition related to a remission of the forfeited millions. In January 2009 the AFU announced that it was paying Shaik half of the R14 million in interest that had accrued to the forfeited assets.³⁹⁷ He was paid R5 million in cash and another R2 million covered his legal fees. What legal fees were paid is not indicated, and the possibility cannot be excluded that the AFU picked up the bill for Shaik's lawyers in the alleged secret deal between Hofmeyr and Shaik's brother Mo.³⁹⁸

The AFU justified the splitting of the interest with Shaik through the argument that "there was a relatively complex legal dispute about whether the AFU could claim interest on the amount of the confiscation order".³⁹⁹ The dubious deal begs the legal foundations of the rules regulating property law. Hofmeyr offered no explanation why the interest on confiscated assets should be excluded from being part of the benefits, either directly or indirectly, of corrupt activities for which Shaik was convicted. It was also not explained how interest that accrued to forfeited assets after ownership of the assets passed to the state could subsequently be split as if the person whose assets were forfeited would still have some kind of property rights in it.

Confiscations and forfeitures are mechanisms used for the deprivation of the instrumentalities and proceeds of crime respectively, based on the premise that a

396 It is not clear in how far the deal between Mo Shaik and Hofmeyr also extended to reaching a deal for the *nolle prosequi* of Zuma in which Hofmeyr also played a pivotal role. See "The high price of political solutions" *Mail and Guardian* (2009-4-27).

397 In 2006 the AFU seized R34.4 million in assets from Shaik and his three Nkobi companies after they were deemed to be the proceeds or benefits of corruption.

398 The press alleged that the agreement was done by way of a secret settlement. See "Shaik settlement 'normal' - National Prosecuting Authority" *IOL* (2009-1-22); "Shaik, state 'in R5-million deal'" *Mail and Guardian* (2009-1-22).

399 "Shaik windfall normal, says National Prosecuting Authority" *The Mercury* (2009-1-22).

person should not be allowed to benefit from his/her crime.⁴⁰⁰ This penal device is of particular importance in the field of organised crime and forms part of the criminal justice systems of most countries. The purpose of confiscation proceedings is to recover the financial benefit that the offender has obtained from his criminal conduct and to prevent such criminal proceeds from being reinvested in other forms of crime. It also serves the function of deterring criminal activity by depriving criminals of property used or acquired through illegal activities.⁴⁰¹

It is therefore clear that the arrangement to split the interest on the confiscated millions cannot be justified. It probably contravenes the court ruling in *Shaik v The State*.⁴⁰² Section 19 of the *Prevention of Organised Crime Act 121 of 1998* defines the proceeds of unlawful activities as the "sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time". The Supreme Court of Appeal considered the matter in terms of sections 18 and 21 the *Prevention of Organised Crime Act 121 of 1998* and ruled

400 South Africa's *Prevention of Organised Crime Act 121 of 1998 (POCA)* has been closely modelled on the controversial *Racketeer Influenced Corrupt Organisations Act (RICO)* of the United States. This is also the origin for the strange regulation of prescribing civil procedure for criminal forfeitures and confiscations (ss 13, 23 and 37 *POCA*). It should be noted that the manner in which confiscations and forfeitures have been regulated by some Anglo-American countries, whose constitutional systems have not been trimmed to suit the framework of a constitutional state, leaves much to be desired. In the USA all forfeitures start out as administrative action (making up 80% of the cases), and if contested, the prosecutors decide whether they are opting for civil or criminal proceedings. Whether the former administrative action now becomes a civil or a criminal action is a purely tactical choice where prosecutors weigh up the advantages or disadvantages of the choice of criminal versus civil procedure in a specific case, but they can also institute concurrent proceedings. This perplexing regulation has fittingly been referred to as the "secret weapon" of prosecutors. Usually they would opt for civil proceedings because of the lower onus of proof that makes it easier to get a forfeiture order. Anyone looking for a legal systematic orientation will be disappointed. Casella summed up the legal regulation of forfeitures quite accurately by stating that the "process has almost no rhyme or reason". See Casella 2007 *US Attorneys' Bulletin* 9. However, when the state prosecutors initiate such an action in the course of criminal proceedings it is neither a matter regulated by private law nor by administrative law. Some civil forfeiture in the USA is even based on the premise that the "criminal property" is charged (as if an object can have *locus standi*). The haphazard practice regarding forfeitures in the USA unfortunately often leads to unconstitutional expropriations of property. The confiscation and forfeiture of crime-related assets should therefore be clearly distinguished from expropriation, which takes place for a public purpose or in the public interest. The latter constitutes action which the executive branch may initiate and this is regulated by administrative law within the stipulated limitations set by ss 25 and 36 *Constitution*. Although both legal instruments fall within the scope of public law, it is regulated by criminal and administrative law respectively, and different state organs are involved.

401 Gaumer 2007 *US Attorneys' Bulletin* 59; Warchol, Payne and Johnson 1996 *Police Studies* 51; Greek "History of Forfeiture" 109-137; Casella *Asset Forfeiture Law* 31-33; and Offices of the United States Attorneys 1997 www.justice.gov (USAM) § 9-118.010 (Statement of Goals and Purposes).

402 *Shaik v S (2)* [2006] SCA 134.

that the forfeiture order of the trial court was justified. In an appeal to the Constitutional Court, the court made it clear that the definition of section 18 is wide enough to include dividends on shares.⁴⁰³ The definition of section 19 is certainly also wide enough to include the interest on such assets as the fruits from such property. In effect, this deal overturned three court decisions.

Following upon that, Shaik applied to former President Motlanthe for a remission of the principal amount of the forfeited R34 million. No decision had been taken on this petition at the time of writing this article. Apart from this petition, Shaik also lodged a pardon petition relating to his conviction for corruption. In October 2009 the Presidency stated that it was not under an "obligation to consider the pardon petition immediately".⁴⁰⁴ Later it transpired that President Zuma was considering pardoning Shaik and sweetening that with a pardon for Vlakplaas commander Eugene de Kock and 179 Inkatha Freedom Party (IFP) inmates who had applied for a pardon of political offences.⁴⁰⁵ Shortly before Christmas 2009, when Shaik was photographed shopping, he bitterly complained that he was under "house arrest" whereas Zuma and Thint were on free foot. He espoused the view that he was entitled to a pardon and should not even be required to ask for it.⁴⁰⁶ This makes clear just how controversial the power to pardon has become.⁴⁰⁷

Billy Downer and his prosecuting team worked for years to bring Shaik to justice. They vowed to clear the air on the "Shaik deal",⁴⁰⁸ yet nothing much happened. In Germany, neither parole nor a pardon would have been possible without the prosecutors being consulted in the matter. More importantly, parole could not be granted without a court decision. If the courts should overturn the parole decision of Shaik on review, that could mean that he might have to serve the rest of his 15-year term. If the hospital sojourns are treated as an interruption of the sentence, they would not count as a part of the sentence that he has already served. This would

403 *Shaik v S* 2008 5 SA 354 (CC) paras 56-62, 69-70 and 77-78.

404 "No deadline on Shaik" *The Times* (2009-10-20).

405 "Moontlike kwytskelding vir Eugene dalk sluier vir Shaik, IVP's se vryheid" *Rapport* (2010-1-9); "De Kock deal speculation mounts despite government denials" *Legalbrief* (2010-1-11).

406 "Shaik spits fire" *City Press* (2009-12-20); "I want my f*%#@!! pardon" *City Press* (2009-12-20); "Schabir's gambit" *Mail & Guardian* (2009-12-23).

407 "Shaik pardon would be 'unfortunate': Devenish" *The Times* (2009-10-20).

408 "National Prosecuting Authority vows to clear the air on Shaik deal" *Sunday Independent* (2009-1-22).

imply that he has served barely three months of his sentence, and the rest might still await him if his parole is overturned on review by a court.

5.3.3 Parole boards in practice

Past practice has shown that parole boards do not respect criminal law and even ignore the rules pertaining to retroactivity when it suits them. The arbitrary nature of the decisions taken by parole boards in less fortunate cases also deserves attention.

5.3.3.1 The case of Henry

Motsemme Henry was sentenced to 17 years imprisonment for robbery and unlawful possession of arms in 1996.⁴⁰⁹ At that time the *Correctional Services Act* of 1959 was still in force. Under that Act he might have been considered for parole once he had served half of his sentence. However, when the time came that parole could be considered the parole board applied the new *Correctional Services Act*, which had come into force in 1998. In terms of the latter Act, the portion of the sentence which would have to be served before he could be considered for parole was three-quarters of the sentence. Despite four rounds of litigation where judges expressly instructed the parole board to apply the law that was in force at the time when Henry committed the offence, the parole board ignored the courts. This happened despite a report by the case management committee that unequivocally recommended parole because the applicant's case happened to be one of the most successful rehabilitation endeavours in the history of the Department of Correctional Services.⁴¹⁰ It transpired that the chairperson of the parole board had a grudge against Henry because he consistently challenged the board's ever-changing decisions. The parole board members are mostly lay persons who are not trained in criminal law and often have very little understanding of the constitutional rights of inmates. Section 35(l) of the Bill of Rights contains an absolute prohibition on the retroactive application of criminal law, which was flagrantly ignored in Henry's case.

409 Sloth-Nielsen 2005 *Civil Society Prison Reform Initiative Newsletter* discusses the unreported case and the subsequent lawsuits relating to his parole.

410 Henry spent his time wisely acquiring an LLB as well as an LLM degree. He engaged in teaching other inmates and even financed a hand skills project for inmates. Although he won a prize for rehabilitation, his parole was blocked.

Although the court found that the parole board was "grossly incompetent",⁴¹¹ it failed to use its power to question the constitutionality of the legislation and such practices. It appears that the judiciary is still very much attuned to the Westminster notion of parliamentary sovereignty. Courts are reluctant to challenge the constitutionality of legislation unless it is pertinently contested, even when such legislation constitutes a gross infringement of the fundamental rights expressly guaranteed in the Bill of Rights.

5.3.3.2 The case of Derby-Lewis

Derby-Lewis also brought a lawsuit to be considered for parole in terms of the 1959 Act that was applicable at the time when he was sentenced.⁴¹² In terms of the 1959 *Correctional Services Act* he could be considered for parole after he had served fifteen years of the life sentence. The *Correctional Services Act* of 1998 then increased the minimum portion of a life sentence that must be served before parole could be considered to 25 years.⁴¹³ The court interpreted the transitional regulations under section 136 of the 1998 Act as valid to achieve a uniform release policy and thus Derby-Lewis was subjected to the new release policy.⁴¹⁴ However, such a provision can apply only *pro futuro*. The retroactive application of legislation is permissible under certain circumstances,⁴¹⁵ but the Bill of Rights strictly blocks the retroactivity of heavier criminal sentences or legislation creating additional burdens in

411 *Henry v Minister of Correctional Services*, unreported, Case No 04/2569, Johannesburg High Court, 14 October 2005.

412 In 1993 Derby-Lewis and Wallus murdered Chris Hani, the secretary general of the Communist Party, in a plot to prevent Hani from being part of the first post-1994 government. In the trial court, both of them received the death sentence. Their appeal was dismissed. See *S v Wallus* 1994 ZASCA 189. After the abolition of the death penalty their sentences were commuted to life sentence.

413 Section 78 read with s 73(6)(b)(iv) *Correctional Services Act* 111 of 1998.

414 *Derby-Lewis v Minister of Correctional Services* 2009 6 SA 205 (GNP). S 136(1) *Correctional Services Act* 111 of 1998 determined that the minister "may make such regulations as are necessary to achieve a uniform policy framework to deal with prisoners who were sentenced immediately before". The court interpreted the original provision (N 1543 in GG 19522 of 27 November 1998) before any amendments were made to it.

415 For example where it creates benefits or advantages such as tax breaks or welfare benefits, which do not create any burdens. With regard to criminal law, the reference in Blaauw 1990 SALJ 81 under (d) referring to the prohibition of retroactivity as an element of the formal aspect of the constitutional state must be seen in the context of law that creates new offences, heavier penalties or additional burdens relating to sentences.

criminal law.⁴¹⁶ Section 136 therefore cannot function as an ouster clause of provisions with constitutional ranking.⁴¹⁷ The court should have tested the constitutionality of the provision insofar as it implied the retroactivity of criminal law that creates additional burdens retroactively. Apart from that, the provision that inmates serving life sentences should be allowed out on parole once they turn 65 provided they have already served 15 years of their term constitutes an infringement of the norm of equal treatment in relation to other inmates.⁴¹⁸

If one compares the extremely lenient treatment of Shaik and the easy granting of medical parole to him with the medical condition of Derby-Lewis, who might indeed be deserving of medical parole, the lack of consistency in the granting of medical parole is flagrant. Derby-Lewis suffers from prostate cancer which has spread to other organs and to his face. He has undergone five operations but his condition continues to deteriorate and could probably be termed terminal.

He is also suffering from gangrene due to a lack of exercise, since he is chained to his bed. Such treatment in the execution of incarceration sentences is in direct conflict with section 35(2)(e) of the *Constitution*, which affords an incarcerated person the right to adequate exercise and human dignity. The question could be posed if such treatment does not constitute a form of torture.⁴¹⁹ Although South Africa signed and ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴²⁰ the ill-treatment of prisoners does not seem to be the exception to the rule in prisons⁴²¹ The Convention

416 Sections 35(3)(l) and (n) *Constitution*. This was also stressed by the Constitutional Court in *Masiya v NDP* paras 47 ff.

417 Fundamental rights can be restricted only by the immanent limits of a right, or by other rights, or in terms of s 36 of the Bill of Rights, but never completely ousted. On the methodology to determine valid limitation, see *Azapo v The President* 1996 4 SA 672 (CC) paras 9 ff per Mohamed DP. A similar checklist is set out in Blaauw-Wolf 1999 *SAPL* 190-191.

418 Section 73 (5)(b)(iv) *Correctional Services Act* 111 of 1998 in relation to s 9(1) *Constitution*.

419 "Derby-Lewis' cancer 'worse than expected" *Mail & Guardian* (2010-11-04).

420 The Convention was adopted on 10 December 1984 and entered into force on 26 June 1987. South Africa signed the Convention on 29 January 1993 and ratified it on 10 December 1998. On state duties in terms of the Convention, see Aragão *Strategien* in general.

421 There are reports of the widespread ill-treatment of inmates in South Africa by the police and correctional service officials. See "Minister fumes after oversight judge releases details of prisons report to press" *Sunday Independent* (2010-11-21); "Prison staff biggest killers" *Sunday Independent* (2010-11-22). Inspecting Judge Deon van Zyl submitted a report to Parliament in October 2010, which outlined shocking conditions of inhumane detention in prisons, and concerns about 55 "unnatural deaths" in prisons. Officials appear to have been involved in acts of violence against inmates who are alleged to have assaulted an official or other inmates. These

was cast into legislative form as part of the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.⁴²² It could therefore be enforced in terms of sections 39(1)(b) and 231 of the *Constitution*.

5.3.4 A de facto "High Court of the Executive"?

The manner in which pardons and parole are currently handled is not transparent and is characterised by a lack of equal treatment. The weaknesses of the system are exacerbated by the executive control of release procedures. The unrestrained presidential prerogative to overrule and veto judicial sentences is in direct conflict with section 165(5) of the *Constitution*. The constitutionality of the *Correctional Services Act* is also questionable insofar as it confers powers upon executive bodies to alter binding judicial sentences. The conversion of sentences by lay persons serving on executive-controlled parole boards is further not mandated by the Bill of Rights.⁴²³ The judiciary, which has been endowed with the competence to mete out sentences, is marginalised ever more with regard to the remission of sentences. It is therefore of serious concern that the legislation regulating the release from incarceration does not reflect a clear separation of powers.

Another problem is that the legislature prescribes severe mandatory minimum sentences to create the illusion of being tough on crime. The judiciary is thus obliged to mete out these sentences,⁴²⁴ but the sentences are then undercut during the post-trial execution of sentences by executive-controlled bodies that override or veto judicial sentences.⁴²⁵

actions often constitute a form of revenge in response to an attack on an official. The judge recommended that swift criminal prosecution should, in appropriate cases, ensue, particularly where the level of violence constitutes cruel and inhumane treatment of inmates, if not acts of torture. A further report by the UN Human Rights Committee severely criticised the department for failing to react to numerous requests concerning a 2005 incident in St Albans Prison in Port Elizabeth, where warders locked down the high-security facility for three days and allegedly inflicted horrific abuse on inmates.

422 Sections 2, 7 and 55 *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

423 Section 34 guarantees an accused the right to a fair public hearing in a court, and punishments should be meted out by courts in the manner prescribed by s 35(3)(l)-(n). Any review of a sentence, eg for purposes of parole, is also subject to the jurisdiction of a court under s 35(3)(o).

424 That is, insofar as they are not disproportional to the object pursued and thus unconstitutional.

425 Justice Fagan openly protested at these harsh mandatory minimum sentences. See Fagan 2004 *SA Crime Quarterly* 1. It should be noted that the judiciary has the power to strike down such legislation, which foresees disproportionate sentences. Parliament, like any other state organ, is

Under these circumstances it would be fair to conclude that the legislature has installed a *de facto* "High Court of the Executive". Such schemes are not new in South African history. As early as in the 1950s the Appellate Division struck down a statute that attempted to install politicians as a court with powers to overrule the judiciary.⁴²⁶

In the light thereof, one should consider which state organ is the appropriate one to manage incarceration and rehabilitation endeavours. Under the previous Westminster system, sentences used to be executed by the minister of justice on behalf of the judiciary. This was due to the fact that the minister managed the prisons on behalf of the judiciary, who had no infrastructure or budget of their own to dispose

subject to the constitutional norm that state action must be in proportion to the objectives pursued. See Blaauw-Wolf 1999 *SAPL* 193. However, if the judiciary does not fulfil its role as guardian of constitutional norms, the effect will be a gradual reversion to the notion of parliamentary sovereignty, where the legislature would be allowed to make laws which are not in compliance with the spirit of the *Constitution*.

426 In the 1950s the National Party government adopted the *Separate Representation of Voters Act* 46 of 1951 as one of the building bricks to cement the apartheid system. The government was successfully challenged by a group of Coloured voters led by Harris, and the statute was struck off the statute book in *Harris v Minister of the Interior* 1952 2 SA 428 (AD). The government responded by passing the *High Court of Parliament Act* 35 of 1952, which provided that any judgment of the Appellate Division invalidating an Act of Parliament was to be reviewed by parliament itself, sitting as a High Court of Parliament. After the statute had been passed the High Court of Parliament proceeded to set aside the decision in the case of Harris. This was again challenged by Harris. On Appeal, the *High Court of Parliament Act* was then also struck down by the Appellate Division in *Minister of the Interior v Harris* 1952 4 SA 769 (AD). In a very brave decision the Appellate Division ruled that the High Court of Parliament was not a court of law but "simply parliament in disguise". This decision is significant because only two years before in *Sachs v Dönges* 1950 2 SA 265 (AD) the Appellate Division confirmed that the customary law of England had been received into South African constitutional law. This would have included the conventions pertaining to judicial appointments. The House of Lords could appoint the Law Lords from among their number as part of the constitutional powers of the aristocracy. This court constituted the highest appeal court in Britain until very recently. Like the House of Lords, the Queen had the judicial prerogative to appoint judges to the Queen's Bench and other High Courts, whereas the Commons of the Lower House via the Home Secretary acting as justice minister could appoint magistrates to the lower courts. The different tiers of judicial appointment were thus linked to the corresponding hierarchy of class in the British constitutional monarchy. Whereas the Commons gained the upper hand in law-making, the aristocracy had the stronger position in controlling judicial appointments. The Law Lords were also members of the House of Lords and heard appeals in the Houses of Parliament. What might have helped the Appellate Division in the *Harris* case to deviate from British constitutional convention in this regard, was that peerage was not received as part of British customary law into South African constitutional law according to the terms of capitulation after the Anglo Boer War. See Carpenter *Constitutional Law* 21-25. Only the judicial prerogative of the head of state (representing the British Crown in the Union of South Africa) to appoint judges to the higher courts (on the recommendation of the Minister of Justice) and the justice minister's power to appoint magistrates to the lower courts were received into South African constitutional common law, whereas the Senate that replaced the House of Lords as Upper House had no such powers. Thus the creation of a court in Parliament was not possible.

of. It was regarded as a *sui generis* power and not as a part of ordinary executive powers. At that stage, however, it was already difficult to undertake a clear delineation of powers due to the parole powers that were statutorily delegated to the minister in the 1950s. In 1994 the justice department was split in two: the Department of Justice and Constitutional Development was put under the control of the prosecutors, and the execution of sentences was transferred to the Department of Correctional Services. With that the *sui generis* nature of the power to manage incarceration on behalf of the judiciary was lost and turned completely into an executive power.

Although the execution of sentences is part of the administration of justice, the 1996 Constitution is silent on the state organ that should be responsible for that. The only assistance, which the Constitution offers, comes from the Bill of Rights. It is obviously not an executive power, because then incarceration and the release from prison would be subject to section 33 of the Bill of Rights. Section 35(2) of the Bill of Rights, however, clearly regulates the post-trial criminal-law relationship in the execution of sentences as part of the administration of justice.

One should therefore consider whether it is possible to delineate the post-trial execution and remission of sentences in a similar manner like the administrative-law powers of the police to secure public safety and order, on the one hand, and their assisting function with regard to criminal investigations that are prosecution-lead in the pre-trial phase of criminal justice, on the other. Such a distinction is unfortunately not possible with regard to the execution of sentences. It falls completely under the rubric of the administration of justice and does not concern executive state administration in any form. If prisoners should be ill-treated by warders, this does not constitute an infringement of fair administrative action under section 33, but violates rights under section 35(2), which prescribes how prison sentences should be executed. Such an infringement upon the legitimate scope of limitation of personal freedom as a result of a criminal conviction is subject to judicial review of the proper execution of sentences in the post-trial phase. It does not concern executive action which could be subjected to parliamentary control in terms of sections 55(2) or 92(2) the *Constitution*.

What is therefore amiss is a third organ in the third branch of state power next to the judiciary and the prosecutors. Such an organ, however, is not explicitly mentioned by Chapter 8 of the *Constitution*. That alone is not a hindrance and there is no reason why such an organ cannot be created if this is the logical way to do it. In fact, this might be the biggest leap forward in the evolution of the constitutional separation of powers of the last 200 years since the office of the state prosecutors were split off from the judiciary in French criminal law. As stated before, there is also no reason why parliament should not budget to fund the organs of the third branch of state power directly.

The creation of a third organ in the branch of state power responsible for the administration of justice would mean that control over the procedures relating to the remission of sentences in the post-trial phase would shift to the executors of sentences in a manner comparable to the role of prosecutors in the pre-trial phase of criminal justice. If the review of prison sentences for the purposes of parole or conversion into correctional supervision were shifted to the courts, which would make sense because sentencing is a judicial power, this move would uphold the triangular criminal-law relationship. The judiciary would still hold the scales of justice in its hands, and the executors of sentences would be the corresponding state organ facing the sentenced, incarcerated person. Release procedures might include a hearing of both the victim and the prosecuting authority, but the latter is obviously not a dominant state organ in the post-trial phase. A convicted offender who tried to find his way back into society would still be the dominant party in the triangular relationship but would be in a much stronger position to assert his rights. In this constellation, prisoners would no longer be at the mercy of executive arbitrariness. They might have to face the fact that unless they actively participated in rehabilitation measures they would have to serve a full sentence.

The creation of a third organ which would be located in the branch of state power responsible for the administration of justice would obviously require a constitutional amendment of Chapter 8. The Constitutional Court's power to initiate such a constitutional development is restricted because it has to respect the constitutional powers of Parliament. Yet it is not powerless and can use its power to declare the current usurpation of judicial functions by the executive in terms of the powers

conferred upon it by legislature in the *Correctional Services Act* unconstitutional.⁴²⁷ It could also declare unconstitutional the execution of judicial sentences by an executive state organ, ie the Department of Correctional Services. In fact, the court would be able to strike the whole Act down as unconstitutional in its current form and could determine a transitional solution. Parliament would then be obliged to regulate anew the execution of sentences, the review of sentences for the purposes of parole or correctional supervision, and the release of prisoners. Parliament is likewise obliged to respect the separation of powers and obviously has to confer powers upon a state organ in the proper branch of state power. This would be the elegant solution to the problem of how the matter should be regulated.

6 The interpretation attached to section 81 of the *Constitution* and its consequences for the validity of criminal laws

In the course of the above discussion attention was drawn to the fact that several criminal-law statutes contain provisions that leave it to the President to determine the date upon which such a statute should commence.⁴²⁸ This is an unconstitutional practice. Section 81 of the *Constitution* specifies only two possible dates upon which a statute can take effect, viz the date "when [it is] published" or "a later date determined in terms of the Act".

Although the wording of the provision is quite clear, the Constitutional Court has not interpreted it in a straightforward textual manner. In the *Pharmaceutical Manufacturers* case, the court argued that the putting of legislation into effect was a public power which "lies between the law making and administrative process".⁴²⁹ In *Ex Parte Minister of Safety and Security: In re: S v Walters*, the court held:

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.⁴³⁰

427 The usurpation of the powers of another state organ is prohibited by s 41(1)(f) and (g) *Constitution*.

428 See the discussion under 2.4.4, 3 and 4.1.

429 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 79.

430 *Ex Parte Minister of Safety and Security: In re: S v Walters* 2002 4 SA 613 (CC) para 71.

The court thus inferred an implicit mandate to delegate legislative powers to a non-legislative state organ, although section 81 actually specified only two options with regard to the date when a statute takes effect. In *Marcus v The President* the court reaffirmed the view that it is permissible under section 81 that the legislature may authorise the president to fix a date on which an Act of Parliament is to come into force.⁴³¹ The argument of the court that a presidential proclamation putting an Act of Parliament into force provides "an important link between the law-making and the administrative processes" since the proclamations putting legislation into force "were intended to be a step in the legislative process" is not supported by the *Constitution*.⁴³² An Act of Parliament cannot be put into operation by way of executive proclamations.⁴³³ Executive regulations depend on valid legislation for their legality and not *vice versa*.⁴³⁴

The implication of such an interpretation is that it is constitutional to delegate legislative powers to the President. Sections 43 and 44 of the *Constitution*, however,

431 *Marcus v President* 2009 1 SA 417 (CC) para 9.

432 *Marcus v President* para 13.

433 In the USA, the UK and many Commonwealth countries one often incorrectly refers to "delegated legislation" or "subordinate legislation" when referring to administrative regulations. The concept of "judge-made law" is also used to refer to judicial precedent. Executive proclamations are thus put on a par with parliamentary legislation. Unfortunately, this misleading terminology has been taken over by many academics. Currie and De Waal *Constitutional Law* refer to "the delegation of lawmaking powers to the executive" (at 106) and "judicial lawmaking" (at 114). Burns and Beukes *Administrative Law* 153 ff refer to "legislative administrative action"; and Van Rensburg 2000 *PELJ* 26-83 refers to "legislative discretionary powers of the executive". In fact, a parliamentary statute may confer powers upon the executive to make administrative regulations, but that does not qualify as legislation since it is not adopted by Parliament in the manner foreseen by Chapter 4 of the *Constitution*. Likewise, the courts may fill gaps in statutes through interpretation and thus create precedents which are binding on other courts, but that is still part of adjudication and does not constitute legislation. If this terminology is accepted as legitimate, there would be no separation of powers any more and all three branches of state power would just be lawmakers in one sense or another. One should not confuse precedents, which indeed become part of common law, with legislation. The confusion came about during the 19th century when some Anglo-Saxon countries referred to themselves as "common law countries" in contrast to Continental European states whom they referred to as "civil law countries" due to the great codifications of law on the Continent. Since the codifications were not restricted to civil law (private law) and included criminal codes, the reference to "civil law countries" is actually a misnomer.

434 The German *Constitution* regulates this in detail in a 80(1) *Grundgesetz*. It determines that administrative regulations are valid only once certain conditions have been met, viz (i) that an enabling statute confers such powers upon the executive, (ii) that the scope, contents and objectives of such powers have been stipulated with the necessary clarity, (iii) that the regulations expressly refer to the legislative basis for them, and (iv) that the regulations have been officially and properly published. Because taxation is of such a sensitive nature, most taxation regulations are subject to the consent of the *Bundesrat* (ie the body representing the individual states at a federal level).

explicitly vest legislative powers at the national level solely in Parliament.⁴³⁵ Section 44(1)(a)(iii) further restricts the assignment of legislative powers to other legislative bodies. The President does not qualify as a legislative body – neither in the capacity as head of state nor as head of the executive. One must therefore clearly distinguish legislative power from legislative procedures.⁴³⁶ Although the executive and the president are involved in legislative procedures, only Parliament has been empowered to determine when a statute should commence.

Section 81 does not assign the power to the President to put legislation into force. Like section 79 it merely states that after the legislature has adopted a bill, it becomes an Act of Parliament when he assents to and signs it. It is a ceremonial power of the head of state, which signals that a bill has become a statute. This does not say anything yet about the date when it enters into force. The specification that a statute takes effect "when published" or "on a later date determined in terms of the Act" is not part of the legislative procedure. It is part of the contents (material law) of a statute. The German *Constitution* contains a similar provision, and precedent of the German Constitutional Court could be helpful to clarify the issue.⁴³⁷

Parliament may not leave it to the President to put parliamentary legislation into force at some unspecified future date, otherwise bills adopted by Parliament may never take effect or may take effect only on a piecemeal basis as the executive pleases. Such an interpretation of section 81 would be in conflict not only with sections 43 and 44 but with section 79(1) as well. The latter provision precludes a presidential veto of

435 It should be noted that s 239 *Constitution* defines "national legislation" and "provincial legislation" to "include" "subordinate legislation made in terms of an Act of Parliament". This causes an internal conflict with ss 43 and 44 *Constitution* because it equates administrative regulations (ie executive powers) with the parliamentary power to make and adopt legislation.

436 Legislative procedures include (i) the initiation of legislation by the cabinet, (ii) the deliberation and adoption of legislation by parliament; (iii) the assent and signing of bills by the President as head of state, (iv) consideration of its constitutionality by the Constitutional Court under specific circumstances as spelt out by s 79, and (v) its publication putting the legislation into force.

437 Article 82(2) *Grundgesetz* contains a similar provision, but is different insofar as it specifies that if Parliament does not specify a date upon which the statute should take effect it is deemed to enter into force fourteen days after the date on which it was published in the Government Gazette. A period of two weeks is afforded to the public to acquaint itself with new legislation. The German Constitutional Court underscored in numerous decisions that the date upon which a statute enters into force is part of material law and not the legislative process. See *inter alia* BVerfGE 34, 9 at 23; BVerfGE 87, 48 at 60. For a detailed discussion, see Sachs *Grundgesetz Kommentar* 1686-1693; Maurer *Staatsrecht* 560-562.

legislation.⁴³⁸ If Parliament leaves it to the President to put legislation into force it provides him with the option to refuse to put the legislation into force or to postpone it indefinitely, which would boil down to a veto of parliamentary legislation. Furthermore, once Parliament has adopted legislation, it is empowered by section 55(2)(b)(i) to maintain oversight of the executive to ensure that such legislation is properly implemented. This could hardly be attained if Parliament depended on an executive President to put its legislation into force.

In practice, the piecemeal way in which statutes have been put into force is causing serious difficulties in ensuring legal certainty. Legal practitioners and academics must now first hunt down presidential proclamations to see what parts of which statutes have already taken effect. They must constantly be on the alert that some provisions which had not been put into effect before have not meanwhile acquired the status of law. In the *Derby-Lewis* case, Van der Merwe J grappled with the difficulties this causes and aptly remarked that due to this practice the *Correctional Services Act* "has become a labyrinth where one can easily lose one's way".⁴³⁹

The problem is that the Constitutional Court declared these statutes to be valid law although the legislature had unconstitutionally delegated its law-making powers to the President. Since the Constitutional Court is bound to the *Constitution* and may not overrule the constitutional separation of powers, the court will have to devise a solution to rectify the commencing of legislation in terms of section 81. These "statutes" cannot be "turned into valid law" on an *ex post facto* basis by the Constitutional Court, though. That would amount to lawmaking and the Constitutional Court is barred from usurping legislative powers.⁴⁴⁰

Meanwhile the judiciary and the prosecutors have in response to the Constitutional Court's judgments relied on the legality of these statutes. Likewise, the legislature continues to adopt statutes in this manner because the Constitutional Court has condoned the process. The executive in turn has implemented dozens of statutes

438 S 79(1) and (5) *Constitution*. If the President has reservations about the constitutionality of legislation he may postpone his assent on certain conditions, but he may not refuse to assent to legislation in the sense of a veto.

439 *Derby-Lewis v Minister of Correctional Services* 2009 6 SA 205 (GNP) 213.

440 Section 41(1)(f) read with ss 43 and 44 *Constitution*.

and exercised powers which it presumed were legal. Purists would argue that since these statutes were not adopted properly and do not qualify as law, an *ex post facto* validation should be precluded. The reality is that such preclusion is easier recommended than actually performed. A constitutionally viable and realistic solution that would not upset the very tenets upon which the constitutional state rests is therefore needed.

The most practical solution would be if the Constitutional Court would overturn its previous decisions and make an order that Parliament should correct all commencing provisions in statutes that were not adopted in the manner prescribed by section 81. That would imply the retroactivity of criminal law, though, which is strictly precluded by the Bill of Rights in section 35(3)(l).⁴⁴¹ One therefore needs a more acceptable justification.

The German Constitutional Court has taken the stance that the retroactivity of legislation which creates unforeseen burdens and changes the position of a person for the worse is not permissible. A person must be able to rely on the statutory position as it was at the time when undertaking something or planning the future. Legislative measures which implement burdens retroactively or restrict previous advantages (eg advantageous tax levels) or benefits (eg subsidies) are therefore not allowed. However, statutes which simply enact the common-law position are not regarded as being retroactive in creating new burdens. The retroactivity of legislation that creates advantages or benefits people is obviously not forbidden.⁴⁴²

If the South African Constitutional Court would endorse a view similar to that of German courts, one could argue that such an order of the Constitutional Court would not endorse the retroactivity of criminal law, because the correction of the commencement dates would actually be comparable to the enactment of common law. All three branches of state power and the public have already relied upon these statutes as if they were valid law as would have been the case with regard to

441 The retroactive application of criminal law is strictly prohibited by the South African as well as the German *Constitution*. See s 35(3)(l) *Constitution* and a 103 *Grundgesetz*.

442 For a discussion of the relevant judgments, see Sachs *Grundgesetz Kommentar* 2038-2049; Maurer *Staatsrecht* 562-575; Götz *Bundesverfassungsgericht* 421 ff; and Stern "Zur Problematik rückwirkende Gesetze" 381.

common law. On that basis, one could argue that the Constitutional Court should be allowed to stabilise legal certainty by making such an order as suggested above on a once-off basis and by way of exception to prevent a flood of litigation contesting the validity of criminal trials where these statutes had already been invoked.

What is clear is that due to the seriousness and extent of the legal uncertainty that was created, the correction of the commencing dates ought to happen expeditiously. It would be in the interest of justice if the Constitutional Court would set a tight deadline for the correction of all of the flawed commencing provisions. It would probably be best to state the date when the statute was published as the date of commencement in all instances where the president has not yet "put a statute into force", and to use the dates in the flawed proclamations in other instances. Since many statutes were put into operation on a piecemeal basis, the court will have to determine which date should be used as the commencement date of the statute.

The position might be slightly different with regard to legislation that affects the separation of powers, like the statute that abolished the prosecuting authority's sole independent forensic-cum-prosecuting unit (the "Scorpions"). The separation of powers is an inherent part of the normative content of the constitutional state paradigm. One should therefore take note that The *National Prosecuting Authority Amendment Act* of 2008⁴⁴³ does not qualify as valid legislation because it did not take effect in the manner prescribed by section 81 of the *Constitution*. Section 15 of the Act determined that it should take effect on a date determined by the President in terms of an executive proclamation. Since a statute cannot take effect in this manner, the Scorpions were effectively never abolished. The Constitutional Court did not consider the validity of the dissolution of the Scorpions from this perspective in *Glenister II* and did not strike the statute down as "unconstitutional". That is also not necessary. From a constitutional perspective, this statute does not qualify as valid law and therefore never entered into force.

443 *National Prosecuting Authority Act* 56 of 2008.

7 *Ex post facto* revision of certified provisions that undermine the unity of the *Constitution* or cause irresolvable internal conflicts

During the heady time of the first years after the new *Constitution* was adopted in 1994, the extent of the effort that would be required to shift the state apparatus and all of the accumulated legislation on the statute book to be in line with the paradigm of a constitutional state was probably underestimated. Yet, it would be fair to say that the judiciary coped remarkably well with its task as guardian of the *Constitution*, given the enormous shift away from a century of Westminster constitutions that knew only limited review of the legality of administrative action but no constitutional review of legislation and all state action. Few people probably appreciate the difficulties and stress the transition caused for the judiciary. Most constitutional states underwent a steady evolutionary development spanning more than 200 years to create the systems they have today. In a sense, the process is never complete, for constitutional systems are improved all the time through judicial scrutiny, improving legislation and the process of refining the separation of powers.

The 1996 *Constitution* was the product of a long negotiation process. Unlike other *Constitutions* that were finalised after a constitutional assembly adopted them, the 1996 *Constitution* required more than just the backing of the country's democratically elected representatives for it to take effect. It faced a crucial test laid down in the *Interim Constitution*: the Constitutional Court had to certify that the new text complied with the 34 constitutional principles agreed upon in advance by the negotiators of the 1993 *Interim Constitution*.⁴⁴⁴ This was to be one of the court's most important early tasks.⁴⁴⁵ These principles *inter alia* prescribed that there should be a proper

444 Schedule 4 *Interim Constitution*, as amended by s 13 *Constitution of the Republic of South Africa Amendment Act 2 of 1994* and by s 2 *Constitution of the Republic of South African Second Amendment Act 3 of 1994*, sets out the 34 constitutional principles.

445 The final document had its origins in the *Interim Constitution*, which required the Constitutional Assembly to adopt the new draft within two years and by a majority of at least two-thirds of its members. The final text was adopted in May 1996. The Constitutional Court's hearings spanned 11 days from 1 to 11 July 1996. On 6 September, in the judgment *In re Certification of the Constitution of the Republic of South Africa 1996* the Court unanimously rejected certain clauses listed in Chapter VIII of the judgment and ruled that the text adopted in May 1996 could not be certified. (None of the clauses which allow for undue executive inroads upon the sphere of competence of the third branch of state power were among them though.) After the judgment the Constitutional Assembly reconvened to repair the queried flaws so that the Court would have time to certify the text that year. On 7 October the parties reached an agreement on all eight of the clauses that had been rejected by the Court and the Assembly approved an amended

separation of powers between the legislature, executive, and judiciary, and that the *Constitution* should ensure the independence of the judiciary.⁴⁴⁶ Furthermore, it was required that the "legal system shall ensure the equality of all before the law and an equitable legal process".⁴⁴⁷

With hindsight, it seems that the Constitutional Court might due to time constraints have certified certain provisions pertaining to the separation of powers on the premise that they were compatible with the constitutional state's paradigm of a separation of powers. Needless to say, the Constitutional Court certified several provisions which pave the way for executive inroads upon the scope of the powers of the state organs responsible for the administration of justice. This has been discussed above in detail. Both the certification and subsequent judgments bear testimony to the fact that the Constitutional Court was not aware of significant differences between the Westminster and constitutional state criminal justice systems in manner in which they deal with the separation of powers. Unfortunately, the certification of these provisions now leads to a re-Westminsterising of the constitutional state.

The main objection to the certification procedures is that the court tended to consider the provisions individually and not in the context of the normative power of the *Constitution* as a whole. Constitutional states function like highly complex Swiss mechanical watches where one cogwheel runs neatly in unison with the others to make the clockwork function precisely. By way of comparison, one can say that the separation of powers as certified by the Constitutional Court causes a confusion as to how these powers should be exercised in relation to individuals or legal persons in terms of the Bill of Rights. The difficulty is how best to remedy the dysfunctional cogs in the clockwork to make the constitutional state run as smoothly as it should. The question therefore is if the Constitutional Court can strike down constitutional provisions that are in conflict with the separation of powers in a constitutional state

Constitution for submission to the Court on 11 October. The Constitutional Court's second hearing began on 18 November. On 4 December 1996, in *Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996 1997 2 SA 97 (CC)* the Constitutional Court granted its unanimous approval. The Constitution was signed by former President Mandela on 10 December 1996 and entered into force on 4 February 1997.

446 Principles VI and VII of Schedule 4.

447 Principle V of Schedule 4.

on an *ex post facto* basis, or can this be done only via a constitutional amendment? Both options might in fact offer possible solutions to the problem.

The route South Africa followed in the adoption of the 1996 *Constitution* is utterly modern. It allowed for a balance between the branches of state power at the inception of the new state, in the process of creating a blueprint for constitutionalism. One could therefore argue that if the Constitutional Court had the power to reject certain provisions at that stage, the court should also be in a position to strike the contentious provisions down on an *ex post facto* basis. What would be required to legitimise such a far-reaching step is that the court should be able to substantiate its action in very concrete terms from a historical or systematic perspective. The court could argue that in practice the provisions it certified before have led to an irreconcilable normative conflict between constitutional provisions which directly affect the separation of powers, and that a perpetuation of the situation might lead to a complete breakdown of the constitutional state. An antinomy between constitutional provisions usually arises only once such provisions are concretised in a specific instance.⁴⁴⁸ If the court could not reasonably have foreseen such a conflict at the stage when the provisions were certified, a later correction might be justified.

One could also lend credence to such an *ex post facto* nullifying of provisions that cause an irreconcilable conflict among constitutional provisions (eg sections 84(2)(j) and 239) with the argument that the Constitutional Court would be able to strike down later amendments as unconstitutional on a similar basis. Section 167(4)(d) of the *Constitution* provides that the Constitutional Court is the final instance able to decide on the constitutionality of any amendments to the Constitution. From this perspective, there is no normative difference between the *ex post facto* nullifying of a provision that leads to a normative conflict of constitutional powers and one based on a later constitutional amendment.

Where remnants of former royal prerogatives or the unsystematic delegation of common-law constitutional powers in the superceded Westminster system have survived the adoption of the constitutional state model there can hardly be any

448 Müller *Juristische Methodik* 261.

objections to striking such provisions down on an *ex post facto* basis, especially not if their continued existence causes difficulties for individuals or legal persons in attempting to assert specific fundamental rights in relation to the applicable state organ. The intertwinement of fundamental rights and the relevant state competencies ties in closely with the notion that the *Constitution* should be interpreted as a holistic unity.⁴⁴⁹ In Germany, the Bill of Rights is no longer interpreted only as an expression of public-law rights (*subjective Berechtigungen*) *vis-à-vis* state organs, but as an expression of objective norms setting out their structural relation to state organs.⁴⁵⁰ In other words, the Bill of Rights concretises fundamental rights as well as the normative competencies of state organs in relation to these rights.⁴⁵¹ If the South African Constitutional Court would accept the validity of this approach, it could justify on this ground a correction of course back to the constitutional state model.⁴⁵²

In the particular case this would mean that the court would be able to declare sections 84(2)(j), 174(3) and (4), 175 and 179(1)(a) and (6) to be irreconcilable with the constitutional separation of powers. The substance of these sections dates back to the Westminster system and cannot be reconciled with the judicial and prosecuting independence stipulated in the constitutional state paradigm. These provisions allow the executive to exercise direct or indirect control over Chapter 8 state organs that are responsible for the administration of justice. The Constitutional Court could also proceed to strike down all provisions in the *National Prosecuting Authority Act* that allow undue executive influence on prosecuting competencies, be that direct or indirect via the appointment of prosecutors. The Court could use the opportunity to admonish Parliament to improve the constitutional protection of the judiciary and prosecutors. It might be worthwhile to consider a constitutional amendment in the context of legislative endeavours to curtail the constitutional powers of the third branch of state power, as was illustrated by the legislation

449 Ehmke *Verfassungsinterpretation* 77; Hesse *Grundzüge* 11; Müller *Einheit der Verfassung* 225 ff; Müller *Juristische Methodik* 257-260.

450 BVerfGE 1, 14 32; BVerfGE 49, 24 56.

451 BVerfGE 4, 7 at 15, 17; BVerfGE 12, 45 at 50. For a discussion, see Schneider "Verfassungsinterpretation" 31; Ehmke *Verfassungsinterpretation* 89 ff; Ossenbühl 1965 *DöV* 657, Müller *Juristische Methodik* 261 ff; Hesse *Grundzüge* 29. This link was made very early on by Smend *Verfassung und Verfassungsrecht* 88; Smend *Staatsrechtliche Abhandlungen* (1) 198, 318 ff; Smend *Staatsrechtliche Abhandlungen* (2) 190.

452 Section 39(1)(c) *Constitution* permits the courts to consider foreign law to interpret the Bill of Rights.

intended to abolish the Scorpions and with regard to purposed further legislation which intends to oust the jurisdiction of the courts and turn the Constitutional Court into an apex court.⁴⁵³ An amendment of sections 74 and 79 to the effect that all constitutional amendments and legislation affecting the third branch of state power should automatically be submitted to the Constitutional Court to test its constitutionality before the President may sign such legislation would also be appropriate.

8 Conclusions

The analysis of pre-trial criminal justice shows that executive interference is one of the main reasons for selective prosecutions which undermine equal treatment and the rule of law. The independence of the prosecuting authority is structurally flawed insofar as the Westminster model of functional independence within the executive branch has been perpetuated. The constitutional state model foresees that prosecutors are located as a second organ in the third branch of state power. Although the Constitutional Court certified sections 179(1)(a) and (6) as compatible with prosecuting independence, practice has shown that this leads to the blurring of state functions in the field of administrative and criminal law. This affects the legal remedies to assert fundamental rights under sections 33 and 35 respectively *vis-à-vis* the appropriate state organ. Post-trial equal treatment in the execution of sentences and with regard to release from incarceration also falls short of constitutional norms. This is primarily due to the fact that the remission of sentence (ie parole and correctional supervision) is regarded as an executive competence, although sentencing and the conversion of sentences is a judicial and not an administrative power. The royal prerogative of pardoning, which was conferred upon the head of state by the previous Westminster constitutions, survived in section 84(2)(j) of the 1996 *Constitution*. Historically the power to pardon granted a constitutional monarch a veto of judicial sentences. The presidential power to pardon

453 See the *Superior Courts Bill* (GG 33216 of 21 May 2010). For a critical analysis of the bill see "Should the ConCourt be our apex court?" *Politicsweb* (2011-4-13). The 2003 predecessor bill (Gen N 2067 in GG 25282 of 30 July 2003) was also met with substantial opposition – see "Proposed bill threatens constitutional supremacy – Dene Smuts" *Politicsweb* (2009-2-22). Both the former President of the Constitutional Court Arthur Chaskalson and the JSC member adv Bizos took a principled stand against the bill. See "Lawyers, NGOs, media urged to oppose judicial bills" *Legalbrief Today* (2006-2-22).

therefore constitutes a historical anachronism which cannot be reconciled with section 165(5) of the *Constitution*.

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AFU	Assets Forfeiture Unit
ANC	African National Congress
BGBI	Bundesgesetzblatt (German Government Gazette)
CILSA	Comparative and International Law Journal of Southern Africa
CLJ	Cambridge Law Journal
DöV	Die öffentliche Verwaltung
DSO	Directorate of Special Operations
ECHR	European Court of Human Rights
FL Rev	Federal Law Review
GVG	Gerichtsverfassungsgesetz
HRLJ	Human Rights Law Journal
MLR	Modern Law Review
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
NPA Act	National Prosecuting Authority Act
PAJA	Promotion of Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal
PMG	Parliamentary Monitoring Group
POCA	Prevention of Organised Crime Act
RICO	Racketeer Influenced Corrupt Organizations Act
SAJCJ	South African Journal of Criminal Justice
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPA	South African Press Association
SAPL	South African Public Law

SAPS	South African Police Service
SIU	Special Investigation Unit
StPO	Strafprozeßordnung
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
U Western Aust L Rev	University of Western Australia Annual Law Review
ZGS	Zeitschrift für die Gesamte Strafrechtswissenschaft