Re-visiting the rule of law and principle of legality: judicial nuisance or licence?

RADLEY HENRICO*

> "The fact is that few activities are more in the public domain than adjudicating on the lives of our fellow human beings, and few have more public significance than exerting control over the government that pays our salary"**

1 *Introduction*

A constitutional democracy is required to embrace a discordancy of concerns in attempting to attain harmony and toleration of differently tuned instrumental values, interests and principles. Daily local and international news editorials testify to overreach of public and private power or functions that impacts unlawfully or unfairly upon the rights and interests of citizens. Our law reports are replete with examples of the latter fact. The proper and lawful exercise of public or private power, irrespective of the nature of the functionary, depends essentially on what is reasonable. Proportionality and rationality must serve as essential ingredients informing reasonableness. Axiomatic to the aforesaid is the role played by the rule of law in general and in particular the principle of legality – a necessary incident of the rule of law. The purpose of this article is to argue first that the principle of legality, employed at its best, offers rich impetus to our administrative law jurisprudence, second, that the improper application thereof poses a risk to subverting the principle of subsidiarity and, finally, examining the possibility of a commodious balance, if any, being struck between the elasticity offered by legality and the requirement of not bypassing national legislation.

2 *Regne de la loi*[1]

Despite being referred to as "a doctrine deriving from antiquity",[2] the rule of law, not unlike the enigma of Mozart's Requiem,[3] continues to brook debate as to its precise meaning.[4] Section 1(c) of the Constitution of the Republic of South Africa,

* Senior lecturer in Public and Procedural Law, University of Johannesburg.

** Sachs *The Strange Alchemy of Life and Law* (2009) 35.

1 French translation for "rule of law" per Blaau "The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights" 1990 *SALJ* 76 n 3.

2 Baxter *Administrative Law* (1984) 78 and the authorities cited at n 40.

3 See *eg* Steen *The Lives and Times of the Great Composers* (2003) 167-169 and Wade-Matthews and Thompson *The Encyclopedia of Music* (2007) 331.

4 See *eg* Walker *The Rule of Law: Foundation of Constitutional Democracy* (1988) ch 1; Trebilcock and Daniels *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008) 12-37; Sellers and Tomaszewski (eds) *The Rule of Law in Comparative Perspective* (2010) ch 1, 2 and 6; Mathews *Freedom State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) 1-30; Hutchinson "The rule of law revisited: democracy and the courts" in Dyzenhaus *Recrafting the Rule of Law* (1999) 196; Murphy "Lon Fuller and the moral value of the rule of law" 2005 *Law and Philosophy* 239; Zywick "The rule of law, freedom, and prosperity" (http://www.law.gmu.edu/assets/files/publications/working-papers/02-20.pdf) (13-02-2014); Stewart "Men of class:

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1996 provides: "The Republic of South Africa is one, sovereign, democratic state founded on the supremacy of the constitution and the rule of law."

The definition section[5] of the constitution provides no guidance as to what is meant by the rule of law. This may be defensible on the basis that the rule of law does not of itself rely upon a definition for its purpose or functionality. It may mean different things to different people?[6] In a state of the union address,[7] president Bush referred to the rule of law as one of the "non-negotiable demands of human dignity".[8] Of no less significance is the observation that the rule of law occupies some special place in the "triumph of human rights".[9] The rule of law is also no stranger to globalisation and the dynamics of the international arena.[10] Capitalism and the rule of law have been likened unto "love and marriage".[11] Global administrative law depends for its recognition and development on a "body of law which lives up to the ideals of the rule of law…".[12]

Homage to the rule of law is inexorably linked to the sagacity of Socrates,[13] Plato,[14] Aristotle,[15] and Cicero.[16] Aristotle espoused the rule of law in favour of the rule of man[17] given the abuse of power and corruption to which the latter is susceptible.[18] It has been argued that a common denominator to the understanding of the rule of law is its purpose or function of protecting people against anarchy; allowing people to plan their affairs with confidence and certainty with knowledge of what the law requires and sanctions and protecting people from the arbitrary or capricious exercise of power wielded by officials.[19] Coinage of the phrase "rule of law" has been attributed to the nineteenth century lawyer Dicey[20] who advocated

Aristotle, Montesquieu and Dicey on 'separation of powers' and 'the rule of law'" 2004 *Macquarie Law Journal* 9; Heydon "What do we mean by the rule of law" ch1 in Ekins *Modern Challenges to the Rule of Law* (2011) 15-45; and Frank "Democracy, legitimacy, and the rule of law: linkages" in Dorsen and Gifford (eds) *Democracy and the Rule of Law* (2001) 173-174.

5 s 239.

6 Stromseth *et al Can Might Make Rights? Building the Rule of Law after Military Interventions* (2007) 58-59.

7 29-01-2002.

8 Stromseth (n 6) 57.

9 Stromseth (n 6) 59.

10 Powel "The role and limits of global administrative law in the security council's anti-terrorism programme" in Corder (ed) *Global Administrative Law: Innovation and Development* (2009) 32 = 2009 *Acta Juridica* 32.

11 Stromseth (n 6) 58. See also De La Rochère "Fundamental rights in the global and European law order" in Anthony *et al* (eds) *Values in Global Administrative Law* (2011) 297.

12 Dyzenhaus "Accountability and the concept of (global) administrative law" in Corder (ed) (n 10) 10.

13 Dias *Jurisprudence* (1976) 80-81.

14 Dias (n 13) 81. See also Gagarin and Cohen (eds) *The Cambridge Companion to Ancient Greek Law* (2005) 405-411.

15 Fallon "'The rule of law' as a concept in constitutional discourse" 1997 *Columbia Law Review* 1.

16 Cicero is said to have stated: "Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. … The origin of justice is to be found in law, for law is a natural force; it is the mind and reason of the intelligent man, the standard by which justice and injustice are measured" Morrison *Jurisprudence: From the Greeks to Post-Modernism* (2000) 55.

17 Not unlike Jalil's reference to: "the liberation of all Libya from the rule of slain leader Muammar al-Gaddafi…" *The WorldPost* (http://www.huffingtonpost.com/2011/10/23/libya-liberation-gaddafi_n_1027138html) (10-04-14).

18 Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 10.

19 Fallon (n 15) 7.

20 Dicey *Introduction to the Study of the Law of the Constitution* (1956) 187; Trebilcock and Daniels (n 4) 15 n 37; and Walker (n 4) 128-139. *Cf* Mathews (n 4) 15 n 2 where it is argued that the phrase "rule of law" was first used by Hearn in 1876 and subsequently disseminated by Dicey.

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the supremacy of parliamentary sovereignty based on the rule of law. For Dicey, the rule of law comprised certain core values: nobody is above the law – meaning that all persons, civilians and government officials alike were equal before the law;[21] no person can suffer punishment save for breaching the law which breach and punishment is determinable and imposed respectively by the ordinary courts of the land;[22] and that a constitution, written or unwritten, is "pervaded by the rule of law" given that it is reflective of the judicial pronouncements on "personal liberty" and the "rights of persons, in other words, a "judge-made constitution".[23]

For Dicey, if the rule of law were to have meaning, its values had to be realised in the actual workings of the legal system and not a mere adornment of a written constitution.[24] South African administrative law has been largely influenced by the English Westminster constitutional system incorporative of the Diceyan theory and the judicial review of administrative decisions.[25] Whilst a legitimate concern about Dicey's theories may have been the protection of citizens against unjust governmental interference,[26] the overarching concern for Dicey was "parliament's right to make or unmake any law whatever. Moreover, no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[27] Regrettably, Dicey's legal positivism, borne out by the principle that judges were charged with merely interpreting the will of parliament by stating what the law was and not concerning themselves with policy considerations,[28] did more to galvanize draconian legislation and less to advance the ambit of judicial review of executive acts of the political party of the day through the imposition of ouster or privative clauses.[29] The rule of law, to have meaningful value in a legal system, as allegedly contended by Dicey, without the ability of appropriate judicial review, subject to reasonable constraints of *trias politika*,[30] was predisposed to being used as a tool for endorsing an unjust legal system in which the law of parliament, as regulated by a minority electorate,[31] could be upheld and applied regardless of consequential moral

[21] Dicey (n 20) 194.

[22] *ibid* 193. Expressed in the Latin maxim *nulla poena sine culpa* or *nullum crimen sine lege*. See Hallevey *A Modern Treatise on the Principle of Legality in Criminal Law* (2010) 8.

[23] Dicey (n 20) 195-196; Sampford *Retrospectivity and the Rule of Law* (2006) 42-43 and Stewart (n 4) 11-12; and Mathews (n 4) 16.

[24] Sampford (n 23) 44.

[25] Baxter (n 2) 30-32; Hoexter *Administrative Law in South Africa* (2007) 60-61; and Elliot (ed) *Administrative Law: Text and Materials* (3 ed) 9.

[26] See Mathews (n 4) 15-16 where Dicey is criticised for his "liberty of the individual" concern as being aligned too closely to "basic civil rights" and not sufficiently liberal to lend expression and support to socio-economic and political justiciable rights. For further reading see Stewart (n 4); Dyzenhaus (n 12) 190; and Gordon and Bruce "Transformation and the independence of the judiciary in South Africa" (http://www.csvr.org.za.docs/transition/3. pdf (2007)) (18-02-2014).

[27] Dicey (n 20) 406-414. Dicey refers to the supremacy of law being of such a nature that it requires parliament to be sovereign in the sense that it "no doubt often does give a certain narrowness to the judicial construction of statutes. It contributes greatly, however, both … to the authority of the judges and to the fixity of the law" (408). See also Stewart "The rule of law and the Tinkerbell effect: theoretical considerations, criticisms and justifications for the rule of law" 2004 *Macquarie Law Journal* 7 10.

[28] Hoexter (n 25) 131 and Burns and Beukes *Administrative Law under the 1996 Constitution* (2006) 21.

[29] Moseneke "Oliver Schreiner memorial lecture: separation of powers, democratic ethos and judicial function" 2008 *SAJHR* 341 346-347.

[30] For further reading on the doctrine of *trias politika* see White "Separation of powers and legislative supremacy" 2011 *Law Quarterly Review* 456 464 and Irving "Advisory opinions, the rule of law, and the separation of powers" 2004 *Macquarie Law Journal* 6 11.

[31] Davis "Administrative justice in a democratic South Africa" 2006 *Acta Juridica* 21 25.

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considerations.[32] Such a system would be anathema to a democratic legal order.[33] Embracing the rule of law in this sense cannot be equated with justice;[34] this is "rule by law" rather than "rule of law". Law used to sustain the holocaust, apartheid or a system of governance currently manifesting itself in places like Zimbabwe or the Democratic Republic of the Congo is fundamentally incompatible with the basic principles of freedom, equality and fairness. It is out of kilter with the vibrancy and fluidity of law referred to by Hoexter JA in *Minister of Justice v Hofmeyr*.[35] In this sense, the rule of law may be steeped in regulations but sorely lacking in justice.[36]

In Germany, the rule of law has been described as "Rechtsstaat", readily translated into Afrikaans as "regstaat",[37] or "legal state".[38] *Rechtsstaat* has undergone a jurisprudential metamorphosis.[39] It proved a dexterous vehicle in advancing the repressive powers of Nazi Germany from 1933-1945.[40] Today, the rule of law in Germany is expressed as the *Rechtsstaatsprinzip*[41] and finds itself enshrined in the constitution or basic act of Germany[42] which recognises human dignity[43] as the most fundamental of all rights.[44] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[45] the court referred to the supreme court of Canada[46] where it has held: "Simply put, the constitutionalism principle requires that all governmental action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution …." Kant advocated the idea of *Rechtsstaat* signifying governmental rule based on the exercise of sound reason guaranteeing the fundamental freedom of the citizen[47] as opposed to a dispensation of governance by means of wielding arbitrary power, namely *Obrigkeitsstaat*.[48]

[32] Corder (n 10) 4-5 and Blaau (n 1) 85.

[33] De Ville "Deference and difference: judicial review and the perfect gift" 2006 *Potchefstroom Electronic Journal* (*PER*) 17, 32-33 37 and Evans "Deference with a difference: of rights, regulation and the judicial role in the administrative state" 2003 *SALJ* 322 329.

[34] De Ville "The rule of law and judicial review: re-reading Dicey" 2006 *Acta Juridica* 62 69 ff.

[35] 1993 3 SA 131 (A).

[36] Murphy (n 4) 260-261 and Tamanaha (n 18) 93. This is not, however, to suggest in any way that the principles advocated by Dicey, namely equality and *nulla poena sine culpa*, do not continue to play a helpful and useful role in judicial review.

[37] Blaau (n 1) 76 79-80.

[38] Baxter (n 2) 79. Arguably the term could also refer to "state of justice", "state of rights", "state of law", "state of integrity", "state of conscience" or "state of morality".

[39] Cornel "Bridging the span toward justice: Laurie Ackerman and the ongoing architectonic of dignity" in Barnard-Naude *et al* (eds) *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2008) 19 and 2008 *Acta Juridica* 19.

[40] Dyson *The State Tradition in Western Europe* (1980) 36.

[41] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 56.

[42] a 20(3) *Grundgesetz*.

[43] For a contention equating human dignity to the *Grundnorm* of the totality of all other values, especially equality, see Wood "Human dignity, right and the realm of ends" in Barnard-Naude (n 39) 47-65.

[44] Tamanaha (n 18) 108-109, 113.

[45] (n 41) par 56.

[46] In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* 53.

[47] Eberle "The German idea of freedom" 2008 *Oregan Review of International Law* 19 n 37 and 49. See also Kuzmicz "The Kantian model of the state under the rule of law" 2009 *Studies in Logic, Grammar and Rhetoric* 13 26.

[48] German translation for authoritarian state per Kjaer "Constitutionalism in the global realm: a sociological approach" (http://weblaw.haifa.ac.il/he/Events/evefile/ConstitutionalismKjaer.pdf) (11-04-14).

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Requiring government action to comply with the law *inclusive* of the constitutional prerequisites appears somewhat tautological. However, *the law* as referred to in the *Fedsure* case, is, it is submitted, law in the notional, open-ended sense embracive of, yet not limited to, the judiciary taking an informed and collective account[49] of all fundamental values and norms of a legal system that informs the fairness and justice aspects of law and not merely the positivistic aspect of law expressing and asserting law for the sake of law *per se*. What bodes well for the posterity of future jurisprudential development has been the ongoing recognition our courts have accredited to the invaluable role of the rule of law in our constitutional democracy.[50]

Whilst Hobbes and Locke advocate the rule of law as a means to "govern the governors",[51] Fuller asserts that the rule of law comprises moral values that inform the way in which a legal system is optimally politically governed.[52] For Raz, the importance of the rule of law rests on the extent to which subjects obey the law and legal enforcement mechanisms available to the state. It is easier for law to be understood and serve as a guide and thereby be obeyed if it is seen for what it is, namely the law, as opposed to legal rules imbued with moral values.[53] As such, the rule of law can serve as much a virtuous as a malevolent purpose.[54] The inexorable link between morals and law is such that the rule of law for Dyzenhaus imposes an ethical and principled duty on judges to reject openly any law – even one passed by parliament – which is an affront to the underpinning principles and values of the common law of a legal system.[55] This is important on account of the fact that in a constitutional dispensation – according to Dyzenhaus - individuals must be protected from "arbitrary action by the state".[56] Dworkin argued that the rule of law is consistent with "intellectual" as opposed to "political discipline" in which we constantly strike, as best we can, a balance between law being grounded on integrity, consequently translating into the imperative that judges should merely act with greater integrity[57] and inherently underscoring the power of judicial review. For the past twenty years of our democracy our law reports are testimony to a judiciary capable of delivering the necessary principled judicial reasoning that invokes the rule of law for the realisation of civilian rights[58] in a constitutional democracy.

[49] See Reeves "Judicial practical reason: judges in morally imperfect legal orders" 2011 *Law and Philosophy* 319 334 and Mikva "The need for an independent judiciary: implications for South African reform" (http://www.avilr.org/pdf/8/8-23-23-23.pdf) (21-02-2014).

[50] See *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the RSA* 2000 2 SA 674 (CC) par 17, 35, 40 and 85; *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) par 62 and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2006 11 *BCLR* 1255 (CC) par 29.

[51] Rodriguez *et al* "The rule of law unplugged" (http:///www.law.emary.edu/fileadmin/journals/elj/59/59.6/McCubbinsRodriguez_Weingast.pdf) (21-02-2014) 1457.

[52] Murphy (n 4) 242-243. *Cf* Luban "The rule of law and human dignity: re-examining Fuller's canons" 2010 *Georgetown Law: Faculty Publications* (http://scholarship.law.georgetown.edu/facpub/369) (22-02-2014).

[53] Murphy (n 4) 246-247.

[54] Luban (n 52) 9-10.

[55] Murphy (n 4) 259; Dyzenhaus (n 12) 2-3; and De Ville (n 33) 10-11.

[56] Criddle "Mending holes in the rule of (administrative) law" 2010 *Northwestern University Law Review* 1271 1273.

[57] Dworkin *Freedom's Law* (1999) 82-83.

[58] See *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par 39-40; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) par 33-34 and par 114; *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2006 2 All SA 175 (E) par 78; *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) par 25 and 43; and the *Zondi* case (n 50) par 58-64.

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A delineation must be made between *Rechtsstaat* as borne out in a constitutional state wherein the exercise of governmental power is constrained by the law and mere emphasis placed on what is just in terms of ethics, morality, righteousness or principles of rationality as viewed through the lens of the Anglo-American tradition of the rule of law.[59]

The constitution provides that the judicial authority of the Republic is vested in the courts that are independent and subject only to the constitution and the law which they must apply impartially and without fear, favour or prejudice.[60] Underscoring the independence of the judiciary is the oath or solemn affirmation of judicial officers[61] in terms of which it is sworn or affirmed to "uphold and protect the Constitution and the human rights entrenched in it".[62] An attempt at reaching a decision sustained by relevant value-laden principles which does not usurp the functions of the other two democratically elected arms of government calls for a balance to be struck by means of the principle of proportionality as articulated by Beatty who states that:

> "Making proportionality the critical test of whether a law or some other act of state is constitutional or not separates the powers of the judiciary and the elected branches of government in a way that provides a solution to the paradox that has confounded constitutional democracy for so long."[63]

By adopting such a test, due regard is had not only to deferring to the doctrine of *trias politika* but also to the fact that proportionality proximates an approach to arriving at a decision that is neutral insofar as it is able to give effect to constitutional imperatives with regard to notions of "rationality" (legitimacy) and "necessity" which are the constituent parts of proportionality.[64] Stripped to its simplest form, it is a test in terms of which a law will not be countenanced if it cannot pass muster by lacking in legitimate reason(s) and hence cannot be justified and would also be lacking in necessity where to impose same would cause an unwarranted "infringement of a person's constitutional rights". Hence, such a test would ensure that government would need compelling and strong reasons for decisions or the exercise of public power or functions imposing irrational or unnecessary burdens on the rights of individuals.[65]

The judiciary, has been pointed out by former state president Mandela, as a solitary forum in South Africa where the rule of law applies.[66] Mandela defines this law as one which is inclusive of equal protection of all groups of society with the purpose of establishing an intact united South Africa.[67] In contrast, president Zuma whilst addressing a joint sitting of parliament bidding farewell to former chief justice Ngcobo stated: "The powers conferred on the courts cannot be regarded as superior to the

[59] See Gosalbo-Bono "The significance of the rule of law and its implications for the European Union and the United States" 2010 *University of Pittsburgh Law Review* 229 274-278. See also Ohnesorge "The rule of law" 2007 *Annual Review of Law, Society and Science* 99 101-102; Rosenfield "The rule of law and the legitimacy of constitutional democracy" 2001 *Southern California Law Review* 1307 1314 and 1318-1329; and Chesterman "An international rule of law" (http://www.iilg.org.research/documents/chesterman.aninternationalruleoflaw.draftarticle.pdf) (10-04-14).

[60] s 165(1).

[61] the constitution sch 2, item 6.

[62] item 6(1).

[63] Beatty *The Ultimate Rule of Law* (2005) 160 ff.

[64] Beatty (n 63) 163.

[65] Beatty (n 63) 164-165.

[66] Fitzpatrick "'The new constitutionalism': the global, postcolonial and the constitution of nations" 2006 *Law, Democracy and Development* 1 5.

[67] Fitzpatrick (n 66) 5. See also Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1995) 1-3.

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powers resulting from a mandate given [to the executive] by the people in a popular vote."[68] In a divergent view, a parliamentary representative for the Cope, Lekota, has been resolute in referring to the judgments handed down by the constitutional court, albeit against the government,[69] as evidence of "South African democracy at work" in a system in which a law which is not aligned to the constitution will be declared invalid irrespective of the frustration thereof for government.[70]

Kaleidoscopic descriptions of the rule of law flout the possibility of its meaning or concept being consigned to any rigid juridical boundaries of a universal definition. It would seem that the meaning and concept of the rule of law is more likely to be conceived of by its absence than presence. That the rule of law plays a meaningful and pivotal role in our constitutional democracy has been aptly described:

> "Whenever power and naked self-interest can prevail against reason and the common good, the rule of law is not complete. Government will always be needed to protect liberty against aggression and to secure the many social goods that require large-scale collective action, but the rule of law constrains those in power to the purposes that justify their authority… but no one can deny that every departure from the rule of law is a denial of justice. The ultimate goal of every society and every legal system should be equal and impartial justice for all. *Imperia legum potentiora quam hominum esto*."[71]

One accentuating of this description articulated by Paton is that "[t]he Rule of Law is the greatest political achievement of humankind. The Rule of Law is a miracle; it is nothing less than man protecting himself against his own cruelty."[72]

A fortiori the rule of law must have meaning and significance for the way in which civilians in society are protected against the potential disproportionate exercise of governmental power that unfairly and illegally impinges the rights and liberties of persons in a constitutional democracy.

On the other hand, can it be taken for what it purports to be – governance by law, alternatively – regulation by law, further alternatively – the power of law? Precisely what constitutes the rule of law continues to be the focus of much jurisprudential debate.[73] What significance, if any, ought to be attached to the preposition "of", as opposed to the counter-preposition "by" as the nexus between "rule" and "law? It is submitted that the meaning of the rule of law underscores the argument made in this article, namely that the rule of law, as purpose and function, must be infused and instilled with inherently fundamental moral values to play any meaningful role in a constitutional democracy.[74] A government in which private and public affairs are conducted consistent with a common understanding of what is morally, reasonably and lawfully justified rings true of the rule of law. Since "law is not a static thing.

[68] See "Executive superior to courts, says Zuma" *Business Day* (2-11-2011) 1. *Cf* counter-argument raised by opposition Democratic Alliance parliamentary leader Mazibuko that the constitution was drafted to "limit power abuse" and prevent a "recurrence of tyranny" by making sure that "the law would never again be used by the strong to oppress the weak".

[69] With reference to the Glenister challenge to the abolition of the Scorpions and opposition to the attempt by Zuma to reappoint Ngcobe CJ.

[70] *Business Day* (n 68).

[71] The powerful superior principle of the law is there for all persons, Sellers and Tomaszewski (n 4) 9.

[72] Abel "Law under stress: the struggle against apartheid in South Africa, 1980-1994, and the defence of legality in the United States after 9/11" 2010 *SAJHR* 217 218 n 3.

[73] See, in general: Penner *et al* (eds) *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (2005); Freeman *Lloyd's Introduction to Jurisprudence* (2008) 33-44 and 386; Adams *Philosophical Problems in the Law* (2000) 46-69 75-90; and Coleman and Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 206 268 ff.

[74] Hampton "Democracy and the rule of law" in Shapiro (ed) *The Rule of Law* (1994) 32-38.

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It is forever changing and being adapted to novel conditions",[75] we must expect nothing less of the rule of law. The change we seek is an organically evolutionary legal change addressing the adaptions of a non-static society.[76]

Rational societal communities[77] organize themselves in a manner conducive to advancing personal, cultural, social, economic and political interests within parameters set by morally acceptable laws. A legal order is thereby established, netted by the principle that respect for the law is entrenched in a fundamental reasoning, common to members of such communities that law is something "which commands what should be done and forbids the contrary".[78] The full extent and purport of the laws to which they are subject may generally go unnoticed since the *corpus* of law roping together the socio-economic and political threads of society are at times as innately commonplace as oxygen inadvertently inhaled.[79] Difficulties arise, however, when we find that the oxygen we so readily rely upon suddenly diminishes in quality or vanishes *in toto*.[80] Put differently, the importance of what was once vital to us as the rule of law[81] is only grasped upon realisation of its diminution[82] or absence.[83] A system of government[84] depends for its integrity and legitimacy on the rule of law.[85]

[75] Hoexter JA in the *Hofmeyr* case (n 35) 157D.

[76] See Sypnowich "Utopia and the rule of law" in Dyzenhaus *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 179-180.

[77] West "Cicero's teaching on natural law" (http://www.vindicatingthefounders.com/author/cicero.pdf) (25-02-2014).

[78] Van Zyl *Cicero's Legal Philosophy* (1986) 43. See also Tamanaha (n 18) 92 and Hampton (n 74) 41.

[79] Obvious exceptions come to mind such as clamant calls from public interest groups for environmentally-friendly legislation. See "Special report: Heroes of the environment" in *Time International* (5-10-2009) 53-78 and "Wasting our watts" in *Time International* (12-01-2009) 20-24. Alternatively concerns over the use of torture as a means of interrogation. See "How to make terrorists talk" in *Time International* (8-06-2009) 25-27.

[80] Ewald "Norms, discipline and the law" in Golder and Fitzpatrick (eds) *Foucalt and the Law* (2010) 125 ff.

[81] Corder "Crowbars and cobwebs: executive autocracy and the law in South Africa" 1989 *SAJHR* 1 2.

[82] It has been correctly argued how "South Africa [after the National Party took power in 1948] had long proclaimed fidelity to the law" against the somewhat less felicitous reality of parliamentary sovereignty wherein repressive and unfairly discriminatory laws were passed; judicial appointments were predominantly weighted in favour of the ruling party and the period of the 1980s saw the greatest increase of hostilities between human rights advocates and government. See Abel "Legality without a constitution: South Africa in the 1980s" in Dyzenhaus (n 12) 68-69; Mathews (n 4) 62-97; 192 ff; and 219-268; Hoexter "The principle of legality in South African administrative law" 2004 *Macquarie Law Journal* 165 167-169 (http://www.law.mq.edu.au/html/MqLJ/volume4…) (25-02-2014); Hoexter "Administrative justice and dishonesty" 1994 *SALJ* 700 713 and O'Regan "Breaking ground: some thoughts on the seismic shift in our administrative law" 2004 *SALJ* 424 429.

[83] A practical example is the plight of modern day countries propelled into a state of chaos through political unrest, terrorism, economic turmoil and human rights atrocities where clearly lawlessness prevails such as Pakistan, see "The nation that failed itself" in *Times International* (25-05-2009) 10-15. Other examples are the crises in countries such as Sierra Leone, Afghanistan or East Timor. See Stromseth (n 6) 249.

[84] Meaning "government" in the sense ascribed to it by Baxter (n 2) 96 as "the activity of governing and the institutions which perform that activity".

[85] Pursuant to the demise of former Libyan leader, Gaddafi, Libya's transitional leader, Jalil has urged the people of Libya to embrace a spirit of reconciliation and forgiveness and stated: "There are properties and lands that were illegally seized (under Gadaffi). Let law be our judge to resolve these issues." See "Liberation of Libya proclaimed as world demands answers" *The Star* (17-10-2011) 4. The recent appointment by Zuma of a commission of enquiry into the arms deal debacle has been commended by public protector, Madonsela, as evidence of Zuma's "highest office in the land's respect for the rule of law". See 0289 *Legalbrief Forensic* (27-10-2011).

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Overseeing the system of the exercise and functions of public and private power in our legal system is section 33 of the constitution[86] as read with the Promotion of Administrative Justice Act (PAJA).[87] Its enshrinement in the constitution is also consistent with international law. The Universal Declaration of Human Rights[88] declares "that human rights should be protected by the rule of law".[89] Quintessential elements of the rule of law are located in the European Convention on Human Rights,[90] the Freedom Charter[91] which states that our country will never be prosperous or free until all our people live on brotherhood, enjoying equal rights and opportunities and the African Charter on Human and Peoples Rights.[92] The International Covenant on Civil and Political Rights[93] considers that "in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[94] whilst the International Covenant on Economic, Social and Cultural Rights[95] echoes the aforesaid wording of the International Covenant on Civil and Political Rights[96] and also refers to the principle of mutual benefit of international law.[97] Moreover, the European Convention on the Law Applicable to Contractual Obligations[98] has a generic provision, in instances where specific governing law has not been chosen, that states "the contract shall be governed by the law of the country with which it is most closely connected".[99] In recognition of globalization influences the International Labour Declaration on Social Justice for Fair Globalisation[100] (the declaration) states that "the fundamental values of freedom, human dignity, social justice, security and non-discrimination are essential for sustainable economic and social development and efficiency".[101]

3 *The principle of legality*

The court in the *Fedsure* case[102] referred to the principle of legality as a fundamental principle of constitutional law.[103] The principle, it explained, was premised on the notion that the legislature and executive "in every sphere" are constrained by the

86 Which provides for "just administrative action".
87 3 of 2000, its aim is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. See Currie *The Promotion of Administrative Justice Act: A Commentary* (2007).
88 10-12-1948.
89 A two-fold noteworthy aspect of the Universal Declaration of Human Rights is its preambulatory express recognition that "the inherent dignity and … equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" as well as the fact that "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women have determined to promote social progress and better standards of life in larger freedom".
90 26-06-1955
91 26-06-1955.
92 27-06-1981.
93 07-07-1994.
94 preamble.
95 16-12-1966.
96 also in its preamble.
97 part 1, a 1.2.
98 19-06-1980.
99 a 4.1.
100 10-06-2008.
101 the declaration 7.
102 n 41.
103 par 68.

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principle that they may exercise no more power than that which has been conferred upon them by law.[104] To exercise more power than what has been conferred in terms of the law would be *ultra vires*. The latter doctrine was a common-law ground of review in administrative law in our pre-constitutional dispensation.[105] However, the constitutional dispensation subsequently adopted former common-law grounds of review leaving the common law to inform the relevant provisions of the Promotion of Administrative Justice Act and the constitution[106] as it is developed on a casuistic basis in respect of administrative[107] and other areas of our law respectively.[108]

Even where power does not constitute administrative action, to the extent that the exercise thereof arises from the constitution, the court in *President of the RSA v South African Rugby Football Union*[109] (*SARFU*) stated that such power is constrained by the principle of legality.[110] It is seen as an implicit part of the constitution.[111] Significantly, the court pointed out that powers constrained by the principle of legality arise from provisions of the constitution other than the administrative justice clause and went on to point out that whereas in the pre-constitutional era the prime constraint on the exercise of power was in terms of what was provided by administrative law, powers can now be constrained "throughout the constitution" by the principle of legality in addition to the right to just administrative action.[112] In the *Pharmaceutical*[113] matter, and with reference to what had been stated in the *Fedsure* and *SARFU* cases, the constitutional court affirmed the constitutional control and restraint that flowed from the principle of legality.[114] As Chaskalson P stated: "The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law"[115] and "[w]hat would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality."[116]

We no longer have the common law as well as a constitutional law system for purposes of determining the exercise and constraints of public and private power. However, with reference to the constitution itself it would appear that the exercise of such power falls to be gauged by the express provisions of the rule of law which is a foundational value of the constitution[117] in addition to an over-arching imperative flowing therefrom, namely the principle of legality. If the rule of law is an express requirement and the principle of legality an implicit *essentiale* thereof then fundamentally the lowermost of enquiries should be whether the exercise of

[104] par 58.
[105] Hoexter (n 82) 116 and Baxter (n 2) 301-304.
[106] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 22. See also Devenish *et al Administrative Law and Justice in South Africa* (2001) 36-37 and 50-55.
[107] See the *Zondi* case (n 50) par 99.
[108] See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) par 54; *Barkhuizen v Napier* 2007 5 SA 323 (CC) par 29 and *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C) 85C-H.
[109] 2000 1 SA 1 (CC).
[110] par 148.
[111] par 148.
[112] par 148.
[113] (n 50).
[114] par 17.
[115] par 20. See also *Minister of Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) par 27.
[116] par 50.
[117] par 17. See also O'Regan (n 82) 434.

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public or private power[118] is consistent with the principle of legality. In point of fact, administrative law in South Africa has always been characterised by the notion that administrative tribunals are subject to the principle of legality to be determined by the ordinary courts of our land.[119] For actions of power, which have the effect of compromising rights and interests of others, to be legal (legitimate) they must be exercised in accordance with valid law.[120]

The constitutional principle of legality functions as a fount of basic norms informing the regulation of all public power, administrative and non-administrative and thereby gives expression to the non-administrative provisions[121] and specifically the administrative action provision[122] of our constitution.[123] In *Minister of Health v New Clicks SA (Pty) Ltd*,[124] Chaskalson CJ was explicit in stating that a litigant was not at liberty to side-step the provisions of the Promotion of Administrative Justice Act and rely directly on section 33(1) of the constitution or the common law.[125] The rationale appears expressly from the preamble to the Promotion of Administrative Justice Act, namely "to give effect to" the right to administrative action that is lawful, reasonable and procedurally fair since section 33(1) is not self-executing.[126] Not dissimilar reasoning appears in *SANDU v Minister of Defence*[127] wherein the court made it clear that litigants could not rely on the constitution to seek to enforce labour rights where such rights already existed in terms of the Labour Relations Act.[128] The right for an employee to seek a remedy against an employer for an alleged unfair labour practice is confined to a closed list of unfair labour practices under the act.[129] Significantly, and in a somewhat unfair vein, the employer is given no remedy to proceed against an employee who by way of action or omission commits an unfair labour practice. However, section 23 of the constitution provides that everyone is entitled to fair labour practices. To allow an employer the right to pursue a claim of unfair labour practice against an employee by relying on section 23 must surely be permitted as being consistent with the ethos underlining section 34 of the constitution, not to mention the right to equal treatment. Even where the Labour Relations Act does provide a spring-board for the pursuit of litigants' rights, legal precedent[130] has shown that due to the inherent constraints of the wording of the act, litigants have instead resorted to relying on section 23 of the constitution. Section 23 has had to be relied upon for the simple reason that the restrictive and narrow statutory provisions of the act fail "to give effect to" the realisation of rights.

[118] See the *AAA Investments* case (n 50) and the authorities cited therein.
[119] Barrie "The state administrative tribunal of Western Australia: an example to follow?" 2010 *South African Public Law* 630 632.
[120] Blaau (n 1) 83.
[121] *eg* s 8(1), 9, 10, 23, 24, 25, 26, 27 and 34.
[122] s 33.
[123] Hoexter (n 82 (2004)) 183.
[124] 2006 2 SA 311 (CC).
[125] par 96.
[126] Asinow "Toward a South African Administrative Justice Act" 1998 *Michigan Journal of Race and Law* 1 and Devenish (n 106) 142-143.
[127] 1999 6 BCLR 615 (CC).
[128] 66 of 1995.
[129] s 186(2)(*a*)-(*d*). See also *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 10 BLLR 1364.
[130] In this regard, see *Murray v Minister of Defence* 2008 11 BCLR 1175 (SCA) where in dealing with a matter of constructive dismissal, although catered for in terms of s 186(1)(*f*) of the LRA, Cameron JA stated that all contracts (falling within and outside the ambit of the LRA) are still subject to constitutional scrutiny since the law and the constitution impose certain obligations, especially the right to "fair treatment in the workplace". See par 8-10; *Discovery Health Ltd v CCMA* 2008 7 BLLR 633 (LC) and *Kylie v CCMA* 2010 4 SA 383 (LAC).

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Conceptual difficulties and intricacies of the Promotion of Administrative Justice Act[131] do more to obfuscate than inspire an action in terms of the Promotion of Administrative Justice Act for judicial review of administrative action and the basic protection sought against the invalid exercise of power. Dealing with administrative law in the context of constitutional considerations as read with the Promotion of Administrative Justice Act is no easy task, regard being had of the complex and convoluted definition of administrative action.[132] Practical impediments encountered by citizens, legal practitioners, academics and our courts in having to grapple with the juristic muddle of the intricacies of the act[133] foisted upon administrative law and the mere exercise of public power has been slated as follows: "If the misfortunes of [PAJA] were set to music it would have to be the blues. Close your eyes and you might hear, for an instant, the late great John Lee Hooker sing his unforgettable 'I'll never get out of these PAJA blues alive'."[134]

How do we get out of these the Promotion of Administrative Justice Act blues alive? It is correct, as pointed out by Chaskalson CJ in the *New Clicks* case[135] that the Promotion of Administrative Justice Act addresses, in codified form, the issues of lawfulness (legality), reasonableness, procedural fairness and the providing of reasons in administrative action under review. Nevertheless, a hurdle to cross before examining the aforesaid requirements is the onus on a litigant of proving what constitutes administrative action as prescribed in terms of the definition of s 1 of the act.[136] In concurring with Chaskalson CJ, Ngcobo J dispels any notion of the development of "two parallel systems of law" in a scenario where national legislation such as the Promotion of Administrative Justice Act had been enacted "to give effect to" the constitutional right to just administrative action. In the event, a litigant has no alternative but to found an action based on the act.[137]

A novel-tuned approach is forthcoming from Sachs J. Whilst arguing for a more expansive reading of section 33 and agreeing that the act cannot simply be side-stepped,[138] Sachs J advances the argument of approaching the issue of dealing with administrative and regulative bodies exercising public power with reference to the act and section 33 as the "micro-management of public power"[139] due to their formalistic focus, whereas the principle of legality operates in a constitutional democracy "at the macro level"[140] having as its purpose and aim "to ensure that the processes of rule-making are consistent with the way public power should be articulated in an open and democratic society envisaged by the Constitution".[141] Sachs J levels criticism against the act being the commencement point of the enquiry, saying that whilst the act may provide a refined mechanism, "it cannot define" what section 33 envisages. Thus section 33 should be the starting point of

131 See remarks by Moseneke J in the *New Clicks* case (n 124) par 719-724 and especially the authorities cited at n 489.
132 O'Regan (n 82) 437.
133 Assented to on 3-02-2000 and placed into commencement on 30-11-2000.
134 Currie "What difference does the Promotion of Administrative Justice Act make to administrative law?" 2006 *Acta Juridica* 325.
135 par 143.
136 par 132.
137 par 436-438. Ngcobo J (par 437) does point out the exception where the statute in question is deficient in the remedies provided.
138 In itself this is indicative of Sachs J's deference to judicial precedent, one of the ingredients to the rule of law.
139 par 583.
140 par 583.
141 par 583.

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the analysis in assessing the "overall manner in which the constitution deals with the functioning of public administration".[142] In finding that neither section 33 nor the act applied to the general regulatory scheme relating to the pricing system for the sale of medicines by the minister of health, which constituted the judicial review of subordinate legislation, Sachs J reasoned that the scheme was nevertheless subject to judicial review in terms of the principle of legality.[143] To this end, Sachs J states:

> "Legality … draws its life-blood from multiple texts of the Constitution and lies at the structural heart of our constitutional democracy.…[144] Legality [moreover] is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner."[145]

Clearly, section 33 and the act have self-imposing measures of restriction in terms of which the exercise of power constitutes administrative action. The greater concern is not always whether the act in question is administrative, but rather the extent to which the public or private power being exercised violates rights in terms of the bill of rights, even where such power may not be formally designated "administrative action" for purposes of the act or section 33.[146] The principle of legality is instrumental in addressing such *lacunae*.

It is submitted that to argue for the repeal of the act for want of lack of complying with section 172 of the constitution for its failure "to give effect to" section 33(1) or simply to amend the act to be more user-friendly would be far-fetched and unrealistic. Currently the act is the only gateway for purposes of judicial review of administrative action. Posed, yet unanswered in the *Fedsure* case, was the question whether the rule of law has greater content than the principle of legality.[147]

Observance of the rule of law forms part of the impasse; the Promotion of Administrative Justice Act is too confined and restrictive to lend itself as a rich interpretive tool to be used by our courts to regulate the exercise of public power.[148] A constitutional democracy based on human dignity, equality and freedom is as much reliant on the rule of law as it is on the principle of legality. Legality may not be expressly stated in our constitution as the rule of law is per section 1(c) yet its intrinsic nexus to the rule of law makes it an imperative crammed with values that must be drawn upon in order to determine the legitimacy and propriety of the exercise of power on the part of the executive and legislature. The conceptual distinctiveness between the rule of law and principle of legality is not an impediment to them operating as a duet in which they share a jurisprudential symbiotic relationship, the one sustaining the other as a means from which to make informative and balanced decisions, balanced in the sense that they are both reasonable and proportional.[149]

[142] par 587.

[143] par 612. Moseneke J, notwithstanding acknowledging the debate pertaining to PAJA and s 33 (n 126) assumes in favour of PAJA being applicable (par 671). Madala J, Mokgoro J, Skweyiya J and Jacoob J (in a separate judgment from par 792-841) concur in the judgment of Moseneke J. Langa DCJ concurs with Chaskalson CJ and Ngcobo J (par 842). O'Regan J concurs in the main with Chaskalson CJ's reasoning (par 846) and Van der Westhuizen J concurs with the conclusion of Ngcobo J that PAJA applies (par 851).

[144] 508A.

[145] par 614.

[146] Relevant cases in this regard are: *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); the *Pharmaceutical* case (n 50); and the *SARFU* case (n 109).

[147] par 58.

[148] An example is Sachs J having to rely on the principle of legality in the *New Clicks* case as a means of justifying review of subordinate delegated legislation.

[149] Hoexter (n 25) 184.

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As to its content, the legality aspect of the rule of law, according to Fuller, is said to be "a notion central to the very concept of the legal order" and is given a pivotal role to play in the lives of lawyers and judges alike.[150] Compelling considerations of political morality are also to be taken into account.[151] A noteworthy distinction between the rule of law and principle of legality is that the latter, as a result of its inherent implicitness, can be employed as a flexible tool to address unwieldy and cumbersome complexities, such as where we may encounter the chasm in our law pointed out by Sachs J in the *New Clicks* case.[152] Difficult cases court difficult decisions. In the absence of being able to rely on the trusted instruments of the rule of law in finding an appropriate means of arriving at a suitable decision, there is no reason why the principle of legality cannot function as a panacea. To this end, and for reasons articulated below, legality has greater content than the rule of law.

When summoned by Du Plessis J to give evidence in his capacity as state president,[153] Mandela explained his actions as:

> "symbolic and important because it underscored the rule of law and the principle that all are equal before the law. He also explained that it is the Constitution that requires of all of us to obey, respect and support courts, not because judges are important or entitled to some special deference but because the institution they serve in has been chosen by us collectively, in order to protect the very vital interests of all and in particular those who are likely to fall foul of wielders of public or private power."[154]

The institution referred to is the judiciary. Entrusting the maintenance and functioning of a system to a judge wherein human dignity, equality and freedom is upheld against the exercise of political machinations of the government gives expression to how Sypnowich refers to Locke's insistence of the role to be played by the judiciary when referring to the advantage to society of having "established, settled, known law, applied by a judge who is both "known and indifferent", who does not produce judgments that are "varied in particular cases, but to have one rule for the rich and poor, for the favourite at court, and the country man at plough".[155]

Anathema to the notion of democracy for some is the idea that the judicial arm of government is given power to regulate the powers of the duly elected arms of government.[156] Our constitutional dispensation weighs in equal balance the need to "lay the foundations for a democratic society based on the will of the people" as it does the fact that "the people and every citizen is equally protected by law".[157] The equilibrium to be struck is how to respect the will of the people by permitting their duly elected political representatives from executing their functions under the auspices of parliament and the executive and at the same time protecting the same persons, or unrepresented or minority citizens of our society from the exercise of power of such institutions that may prove or show themselves to be inimical and self-serving.

Such balance is achieved in general by the rule of law through the relative application of the doctrine of *trias politica*. For reasons already mentioned, the principle of legality is also required to be invoked. That the legality with regard to

[150] Mathews (n 4) 298.
[151] Reeves (n 49) 336 and Dworkin (n 57) 103.
[152] par 580.
[153] the *SARFU* case (n 109).
[154] Moseneke (n 29) 352.
[155] Sypnowich (n 76) 181 n 4.
[156] Raina (ed) *AV Dicey: General Characteristics of English Constitutionalism* (2009) 12-13 74 ff.
[157] preamble to the constitution.

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the executive and legislative powers, as determined against the bill of rights, would be negated should the doctrine of separation of powers not be upheld, was recognised by Chaskalson P in *SA Association of Personal Injury Lawyers v Heath*.[158] It is the task of the courts to "ensure that the limits to the exercise of public power are not transgressed".[159] The *essentialia* of administrative law, as expressed by Chaskalson P in the *Pharmaceutical* case are, after all, "an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government".[160] Dealing with how the courts, in executing their tasks of judicial review, should treat the decisions made by government with respect, O'Regan J in the *Bato Star Fishing* case confirmed that such respect was premised on *trias politica*[161] and went on to say that a court should not merely "rubber-stamp an unreasonable decision"[162] but determine the reasonableness thereof in terms of certain listed factors.[163] In our constitutional democracy the doctrine of separation of powers has to be upheld as an integral aspect of the rule of law. However, the extent of its application is relative and not absolute.[164] As integral as *trias politica* is to the rule of law is the principle of legality. As such, if our courts are given power to regulate all forms of power by a judicious ease of the doctrine of separation of powers and apply the principle of legality to inform their reasoning as to the propriety of the exercise of such power, it is submitted that the principle of legality is sufficiently flexible to inform the reasoning of courts as to how far they can and ought to be permitted to regulate the exercise of power. Conversely, legality imposes self-restraining principles upon a court and the exercise of its discretion.

Goldstone J, in delivering a lecture,[165] referred to the prescient remarks made in a previous lecture by Corbett CJ on "guaranteeing fundamental freedoms in a new South Africa" that:

> "A justiciable bill of rights provides no infallible guarantee that human rights will be respected or that, if infringed, the infringement will be addressed. It all depends on the attitude of the people. If they accept the concept of human rights and their enforcement by the courts and if all those in positions of power, legislators, government executives, administrators, are willing to bow to the superior authority in this sphere of the courts, that is, if the courts enjoy the power of legitimacy…"[166]

If the judiciary is the ultimate guardian[167] of the constitution to ensure neither of the other two branches of government flout any constitutional imperatives, surely this must be taken to be the "hope" which is provided to all people of South Africa

[158] 2001 1 SA 883 (CC) par 26.
[159] par 25.
[160] (n 50) par 45.
[161] (n 106) par 46.
[162] par 48.
[163] par 45.
[164] In this regard see *The Department of Correctional Services v POPCRU* (case no CA 6/2010 (unreported) 27-09-2010 (LAC)) par 43; the *Kyalami* case (n 58) par 36; Weinrib "Constitutionalism in the age of rights – a prolegomenon" 2004 *SALJ* 278 286; Ngcobo "South Africa's transformative constitution: towards an appropriate doctrine of separation of powers" 2011 *Stell LR* 37; Van der Walt "Constitution-making as a learning process: Andrew Arato's model of post-sovereign constitution-making – editor's introduction" 2010 *SAJHR* 1 13; Corder "Without deference, with respect: a response to justice O'Regan" 2004 *SALJ* 438 441-442; Blaau (n 1) 95; Moseneke (n 29) 348; Tamanaha (n 18) 102-105; and Beatty (n 63) 121-122.
[165] The 36th Alfred and Winifred Hoernlé Memorial Lecture on 10-02-1993.
[166] Goldstone "Do judges speak out?" 28 (http;//www.disa.ukzn.ac.za/webpages/DC/boo/9930210.028.058/boo19930210.028.058.pdf) (25-02-2014).
[167] See *S v Dodo* 2001 3 SA 382 (CC) par 41 and *Glenister v President of the RSA* 2009 1 SA 287 (CC) par 33.

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that their rights and interests are capable of appropriate protection against the unreasonable and unjust exercise of public and private power. On the other hand, given that the judiciary is an independent unrepresented bench presided over by an array of judges drawn from diverse political backgrounds, each one a free-thinking autonomous individual with a particular jurisprudential point of reference,[168] begs the question, who or what determines the extent and limitation, if any, to which judges are capable of exercising their reign? How do we deal with this "fear"? In what manner can legality impose self-restraint mechanisms? Dworkin contends that intellectual discipline, as opposed to political power, is a relevant factor informing an independent decision based on integrity which in turn is grounded upon matters of principle.[169] Adjudication is consequently influenced by principled reasoning[170] and recognition of the principle of legality.[171] Whether a court should intervene in the business and affairs of the elected branches of government is something that needs to be determined on a case-to-case basis.[172] Courts are alive to the ambit of their business as guardians and are in fact reluctant to poke their judicious noses into the affairs and business that fall under the umbrella of the other branches of government.[173] Realistically, there is a *de facto* consistent recognition of the separation of powers and the court being required to be persuaded to interfere with either of the other two arms of government.[174] Significantly, a self-imposing restraint is section 41 which codifies the separation of powers, and which when read with section 165 of the constitution, delineates the judicial powers and restraints of the court. A judge executing her duty may be urged to exercise a Dworkinian "best interpretive approach",[175] but in doing so will no doubt be alive to the restraints imposed not only expressly by the terms of the constitution but the principle of legality which flows from the rule of law which recognises the importance of a separation of powers in a constitutional democracy.

4 *Conclusion*

Rule by law in terms of draconian legislation which expels judicial review of the exercise of governmental power through privative or ouster clauses is a legal reality to which the South African judicial and political system has borne witness. It is a reality to which many countries are currently held ransom. A system in terms of which courts function as institutions with deference to rightful functions entrusted to the executive and legislature by their representatives is a foundational cornerstone of any society that can lay claim to embrace the rule of law. If the embracement thereof is more readily achieved through a written than an unwritten constitution

168 See O'Regan "From form to substance: the constitutional jurisprudence of Laurie Ackermann" in Barnard-Naude (n 39) 1-5.

169 (n 57) 82-83.

170 O'Regan (n 168) 16.

171 O'Regan (n 168) 15.

172 the *Glenister* case (n 167) par 35. See also Du Bois "Rights trumped? Balancing in constitutional adjudication" in Du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African Law* (2004) and 2004 *Acta Juridica* 155 164-166.

173 the *Fedsure* case (n 41). See also Whittington *et al* (eds) *The Oxford Handbook of Law and Politics* (2008) 110-116.

174 Beatty "Constitutional labour rights: pros and cons" 1993 *ILJ* 1 14 and Davis "Dworkin: a viable theory of adjudication for the South African constitutional democracy" in Du Bois (n 172) 96 109-110.

175 Roux "Transformative constitutionalism and the best interpretation of the South African constitution: distinction without a difference?" 2009 *Stell LR* 258 266.

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falls outside the purview of this article. A crucial role played in the enforcement of the rule of law is the nature of judicial activism on the bench. To describe a judge as conservative, liberal or moderately liberal may be a self-defeating task. This is so, because, irrespective of the "label" one seeks to attach, the hope is that the judge will apply the best possible matured reasoned and enlightened and creative jurisprudential intellectual skills to the task at hand in unpacking the values comprising the rule of law.

An especially important value flowing from the rule of law is the principle of legality. This principle instils hope[176] in the fact that our courts are able to deal with the exercise of all types of power and measure their integrity against the values and norms of the constitution, thereby making no case "too difficult".[177] Employment of the principle of legality also enables the bench to dispel fears that they are improperly transcending the boundaries of their duties as watch-guards of our constitutional dispensation. It is clear that judges have enough of their own judicial work proper – their aim, whilst questioning and regulating the exercise of governmental power, is not to subsume the role of executive or legislative. Decisions handed down by our courts, which are also internationally recognized, contribute to the constant evolution of our rich common law which breathes jurisprudential life and sustenance into the values and norms used to interpret the ultimate law of our land, namely the constitution. In this regard, the flexibility and agility of the principle of legality is manifested. In as much as it operates to regulate conduct on the part of the other arms of government, by necessary implication, given its inexorable bond to the rule of law, it restrains the functions of our bench to do what they are required to do, namely ensure that the rights to human dignity, equality and freedom are not compromised by the undue exercise of all power. To believe that this will always be a harmonious exercise would be unwise.[178] The challenge, however, in administrative law, is for our judges to rise to the occasion, as they have so often proven themselves capable of doing, and to continue to do, in order to write masterful judgments that will serve as classical masterpieces for the future development and sustenance of administrative law and its important reliance on the principle of legality.

SAMEVATTING

HEROORWEGING VAN DIE OPPERGESAG VAN DIE REG EN LEGALITEITSBEGINSEL: GEREGTELIKE ERGERNIS OF LISENSIE?

Die eenvoudige uitoefening van openbare en private mag hang af van wat redelik is. Proporsionaliteit en rasionaliteit moet as noodsaaklike bestanddele van redelikheid dien. Intrinsiek gekoppel aan voorgenoemde is die rol wat deur die oppergesag van die reg en die legaliteitsbeginsel vervul word, wat 'n onderdeel van die oppergesag van die reg is. As 'n fundamentele beginsel van grondwetlike reg, beperk die legaliteitsbeginsel die magte wat in die besonder deur die uitvoerende gesag en wetgewer uitgeoefen word op so 'n wyse dat hulle geen mag kan uitoefen behalwe wat aan hulle verleen is ingevolge die reg nie – om anders te handel, is om *ultra vires* op die tree. Administratiefreg en die hersiening van die uitoefening van mag maak op die legaliteitsbeginsel staat.

Artikel 33 van die 1996-grondwet verseker die reg op regverdige administratiewe optrede. Die Wet op die Bevordering van Administratiewe Geregtigheid 3 van 2000 gee gevolg daaraan. Die outeur redeneer dat konseptuele probleme en ingewikkeldhede van die Wet op die Bevordering van Administratiewe Geregtigheid meer gedoen het om hersieningsaansoeke kragtens die Wet op die Bevordering van Administratiewe Geregtigheid te benewel as inspireer, wat veroorsaak dat litigante,

[176] Stromseth (n 6) 310-312.
[177] Gearty and Mantouvalou *Debating Social Rights* (2011) 116-130.
[178] Cockrell "Rainbow jurisprudence" 1996 *SAJHR* 1 36-38.

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akademici en regters na die meer soepel en minder gekompliseerde regsmiddele wat aangebied kan word, kyk deur hulle op die legaliteitsbeginsel te beroep. Die doel van die artikel is om op die soepel aard van die legaliteitsbeginsel te fokus en die mate waarin dit in administratiefregtelike hersiening aangewend kan word. Indien egter onbehoorlik toegepas, betoog die outeur, kan dit ook gebruik word om die beginsel van subsidiêriteit te ondermyn.

Die outeur ondersoek sekere sake wat beklemtoon het dat nasionale wetgewing nie ontduik kan word nie en dat vertroue regstreeks in die grondwet geplaas word om regte af te dwing. Dit word herhaal deur die bepalings van die Wet op die Bevordering van Administratiewe Geregtigheid "ten uitvoer te bring". Ten slotte ondersoek die artikel die moontlikheid van ruim balans, indien enige, wat tussen die elastisiteit wat deur die legaliteitsbeginsel gebied word en die vereiste om nie nasionale wetgewing te ignoreer nie, bereik kan word.

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