

RULE OF LAW IN SOUTH AFRICA

BY

MBHAMBHALI PATSON MASWANGANYI

LLB [UL]

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SUPERVISOR: DR. MW MHLABA

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ABSTRACT

This study investigates the operation and application of the rule of law in South Africa from the colonial era to the new constitutional dispensation.

The study also investigates the relationship between the rule of law and the modern conception of constitutionalism.

DECLARATION

I declare that the thesis hereby submitted to the University of Limpopo for the Degree of Masters of laws has not been previously submitted by me for a degree at any other University, that it is my own work in design and execution, and that all materials contained therein have been duly acknowledged.

M.P. Maswanganyi

DEDICATION

To all my ancestors from Muzamani and Nwamezani, Mbhambhali, Shihupani, Maswanganyi and down the ancestral line, to the Lord Almighty

To my late father Elias Nuikinga Mukhachani Maswanganyi.

To my mother Mthauini N'wa Misisinyani Maswanganyi

To the late younger brother Reckson Gezani Maswanganyi

To my (eldest) sister Esther Mamayila Gingirikani Maswanganyi-Mitileni.

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TABLE OF ABBREVIATIONS

ANC – African National Congress

B.G – British Government

CA – Constitution Assembly

CC – Constitutional Court

MPNF – Multi – Party Negotiating Forum

MPNP – Multi – Party Negotiating Process

NUR – National Unity and Reconciliation

SA – South Africa

SALJ – South African Law Journal

US – United States

ZIM – Zimbabwe

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3. The High Court of Parliament Act 35 of 1952
4. Supreme Court Act 59 of 1959
5. The Republic of South Africa Act 32 of 1961
6. The Republic of South Africa Act 110 of 1983
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Exparte chairperson of the Constitutional Assembly in Re: Certification of the
Constitution of the Republic of South Africa 1996, 1996 (4) SA 744 (CC).

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of South Africa 2000 (2) SA 674 (CC)

President of the Republic of South Africa v Hugo 1997 (4) SA 1(CC)

R v Ndobe 1930 AD 484

S v Adams 1979 (4) SA 793(T)

S v Makwanyane and another 1995 (3) SA 391

S v Shaik and others 2007 (1) SA 240 SCA

Speaker of the National Assembly v Delille 1999 (4) SA 863 (SCA)

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1. Introduction

1.1 Introduction

The study examines the application of the rule of law in South Africa from the colonial period to the present constitutional dispensation. Consequently the study includes the Union Constitution (the South Africa Act, 1909), the Republican Constitution (the Constitution of the Republic of South Africa, Act 32 of 1961), the South African Constitution Act 110 of 1983 (Bicameral constitution), the interim constitution of 1993, and the final (1996) Constitution (The Constitution of the Republic of South Africa) Act 108 of 1996

Although there has been research on the rule of law, as will be observed below, the research did not extend sufficiently to cover aspects of different historical periods. The study is intent on showing the elasticity of the concept.

The research is organized under the following headings:

1.1 Introduction, 1.1.1 The idea of the rule of law, 1.1.2 The intelligibility of the rule of law, 2 An overview of the general historical background and development of the rule of law, 2.1 Political theory and the rule of law, 2.2 Democracy, The rule of law and the role of the judiciary, 2.3 The rule of law and justice, 2.4 Adjudication and changing values, 3 The rule of law and justice under South Africa's parliamentary sovereignty system, 3.1 The rule of law and justice under colonial era, 3.2 The rule of law and justice under apartheid period, 3.3. The tension caused by dual application of parliamentary sovereignty and the rule of law. 4 The operation of the rule of law under South Africa's new constitutional dispensation, 4.1 Rule of law and justice, 4.2 The relationship between the rule of law and constitutionalism, 4.3 The compatibility of the rule of law, constitutionalism and justice under the new dispensation, and 5 Conclusion, 5.1 Findings, 5.2 Synthesis.

1.1.1 The idea of the rule of law

The concept of “Rule of Law” refers to a state in which people are governed according to laws that are just and fair, and which apply to all people equally – and not a government decree disguised as law¹. Hence Adetokunbo Ademola has this to say:

The rule of law is not a western idea, nor is it linked up with any economic or social system.... As soon as you accept that man is governed by law and not whims of men, it is the rule of law²

*Dicey*³ on the other hand, describes the term “rule of law” in terms of three main principles. The first principle is the absolute supremacy of law as opposed to arbitrary power. This implies that no person could be punished unless there has been a breach of the law – a principle with particular application to criminal law. Second principle is equality before the law. This implies that everyone (including the state’s officials) should be subject to the same laws and to the jurisdiction of the ordinary courts. The third principle is that the constitution should be the results of the ordinary law of the land. This implies that constitutional principles such as personal liberty and freedom of speech should be the product of the ordinary remedies of common law provided by the courts, and not of the enforcement of the Bill of Rights.

There are several other versions of the doctrine beside those of *Dicey* and Ademola above. A narrow and formalistic version as used by parliamentary sovereignty systems of governance reduces the rule of law to the bare requirement that the government must have authority provided by a law for everything it does, regardless of the substantive qualities of that law. This version was frequently propagated by the old regime in South Africa, which attempted to justify its racist and authoritarian actions by pointing out that they were authorized by law.

There is also a more sophisticated version of the rule of law, known as the principle of legality which requires, in addition to legal authority for state action, that the law in terms of which the state acts must be general, prospective, clear and relatively stable.

¹English K and Stapleton A(1997) *The Human Rights Handbook*.14

² Adetokunbo, former chief of Nigeria, Cited by Stepleton: *The Human Rights Handbook*,15

³ A.V Dicey *Introduction to the study of the Law of the constitution* [1885] 10 ed (1959) xcvi- cli

Further, various procedural standards must be met in the enforcement of the law: In brief, the law should be impartially enforced by independent courts or tribunals according to fair procedures. The principle of legality does not directly address the content of most laws or their human rights implications. For many writers this is a fundamental short coming. Some writers then began to argue that the rule of law does not simply oblige everyone to respect the law regardless of its content.

During the apartheid years, academic lawyers used the term “rule of law” to indicate respect for political rights but the international commission of jurist went even further and has defined the rule of law in terms of a range of substantive economic, educational, and social rights which are required for the individual to realize his or her aspiration and dignity as stated above. It is not surprising that the South African courts avoided referring to the concept altogether in the pre-democratic era.

The term therefore means that State must act in terms of law and be limited by law. In other words, the law is both the instrument whereby the State and its institutions are established, and the instrument with which a court limits and controls the exercise of power by the state. “The rule of law” principle therefore elevates law above party political interests, and Judges are independent and impartial arbiters, protecting citizens’ rights and guarding against tyranny and arbitrariness in government. Consequently the Judiciary should assume a watchdog function.

After the Second World War, the rule of law concept came to be identified with the doctrine of human rights as the term “Rule of Law” was used in the universal declaration of human rights of 1948. Rule of law has since become accepted as a collective term for all these principles which signify democratic governance, and therefore in constitutional states, the rule of law has been incorporated as part of the constitutional imperatives

From the above, it is apparent that the rule of law is a rare and protean principle of our political tradition. Unlike other principles, it has withstood the ranges of constitutional time and remains a contemporary clarion – call to political justice. The rule of law’s central core comprises the enduring values of regularity and restraint, embodied in the

slogan of “a government of laws, and not men”. Its very generality is the reason for its durability and contestability. It therefore, became an item of high priority on the agenda of political and legal theory. This concern has been particularly acute in Canada, with the enactment of the Charter of Rights and Freedom, whose preamble tells us that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”⁴ As a result, judges and lawyers find themselves in the eye of the political storm, struggling with issues as diverse and divisive as cruise missile testing and mandatory retirement laws.

The rule of law therefore is a maxim of moral political action and not a perception or just ethical reflection. Kennedy⁵ is a leading figure in the controversial “critical legal studies movement.” He challenges the existence and authority of any professional knowledge of the rule of law. The implication of Kennedy’s critical assault on legal objectivity is to expose the value – laden and potentially radical character of the judicial role. Examining the “Rule of Law” – even at the risk of discovering that it is entirely illusory – is a necessary step toward a society that can satisfy the aspirations that make it hold to the concept so tenaciously.

1.1.2 The intelligibility of the rule of law

If law inescapably implies the rule of some men over others, can a notion of the rule of law with its implicit contrast to the rule of men be in any sense intelligible or coherent?⁶ The paradigmatic function of law is the ordering and directing of the external relations among persons. If the possibility of a non-instrumental understanding of law is to be sustained, the direction which law provides cannot be regarded as an exclusively extrinsic imposition upon human interaction, because if it were only this, law would not be understandable except in terms of the purpose of those in whom this extrinsic imposition originated. Rather, the content of judicial relationships must be expressions of the forms of interaction which they govern.

⁴ E.P. Thompson, *Whigs and Hunters* (London, 1975), pp 258 - 269

⁵ Kennedy C. Davis, *Discretionary Justice* (urban university of Craig, pp “Decay” unity, self connecting Democracy and public law (1990) 106 *Quarterly Review*, 105

⁶ T. Lowi “American Business, policy: case studies and political theory world politics: xvi (4) (1964): 677 – 715; and T. Lowi “Four system of policy politics and choice: public administration Review: xxxii (4) 1972): 298 - 310

According to Hayek⁷ the rule of law is necessary not because there are recurrent dangers of oppression and persecution, such as Montesquieu and even Dicey feared, but because of Mankind's irreducible ignorance. Since it is impossible for us to predict the consequences or the form of the actions of each one of the members of society at any given time, it is also utterly impossible for us to plan out collective existence. The rule of law is designed to cover all social conduct and its "inner morality" is due entirely to its defining characteristics. Law must be generally promulgated, not retroactive, clear consistent, and not impossible to perform and people must abide by their rules. In a liberal society in the modern age, slavery is irrational no matter how rigorously and impartially it is imposed upon one section of the population and however free and secure the other section may be under a partial rule of law. Without the rule of law, it will be easy for people to commit crime and they will take law into their own hands. It is necessary for us in South Africa to have and respect the rule of law as outlined in the Constitution of the Republic of South Africa Act⁸.

⁷ Hayek. *The Constitution of the Liberty* (1960) pp 231 ff

⁸ Act 108 of 1996

Chapter Two

2. An overview of the general historical background and development of the rule of law

British constitutional history is characterized by the struggle for a balance between the sphere of an unquestionable power of the monarchy on one hand, and the protection of the rights of those who are not in power, on the other. In 1215 for example, the Barons compelled King John to sign the *Magna Carta* at Runnymede. The *Magna Carta* is the most famous English constitutional document. For the first time in British History, according to *Carpenter*,⁹ the protection of lives, liberty, and property, was constitutionally guaranteed. From the time of the *Magna Carta*, power seems to have gradually shifted from the monarch to parliament; parliament became sovereign. Since the eighteenth century, the British parliament has been the dominant organ of the British state. This dominance is expressed in the doctrine of parliamentary sovereignty. Parliament now exercises unlimited powers to make and change the law so long as it remains within the procedural constraints.

The classic formulation of the doctrine of parliamentary sovereignty, proposed by Albert Dicey, as observed above, consists of two essential propositions. The first is that parliament has the right to make or unmake any law whatsoever. *Dicey*, asserts that there is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.¹⁰ Absolute power of this nature is called parliamentary Omnipotence. The second proposition is that no person or body may override or set aside legislation made by parliament. This may be termed the parliamentary monopoly of power. This shows that there is no other constitutional authority whose powers can prevail over those of parliament. While there are other legislative bodies, and organs of state with other kinds of power, they are all

⁹ Carpenter G "Strengths and Limitations of a new National Government" in Licht RA & De Villiers B (eds) *South Africa's crisis of constitutional democracy* (1994) 169

¹⁰ A.V Dicey *Introduction to the study of the law of the constitution* [1885] 10ed (1959) xcvi-cli

subordinate to parliament. Parliamentary sovereignty therefore means that all other organs of state, including the courts, are subservient to parliament.

Parliamentary sovereignty is best understood as the absence of substantive constraints on power of parliament. In the normal course of events, parliament can enact, amend and repeal legislation as and when it pleases. It is not limited by a Bill of Rights, and its legislation cannot be repudiated by the courts even if it is in conflict with human rights. The doctrine of parliamentary sovereignty also includes the idea that no parliament can bind itself or a future parliament; for to do so would mean that the parliament in the future would not be sovereign. Thus, any law, no matter how fundamental in theory, can be repealed by ordinary parliamentary procedure at any time in the future.

The role of the courts in relation to statutes enacted by parliament is to interpret and apply them rather than to pass judgment on their merits or wisdom. This fact distinguishes the British constitutional structure from that found in many other jurisdictions, in which a written constitutional document (such as a Bill of Rights), is the fundamental law providing the basis for the courts to invalidate legislation should it trample, for examples, on the rights and freedoms guaranteed in the constitution.

Judicial deviations from rule of law standards are not unknown but seem to be exceptional. A startling example of judicial inadvertence to legality in Britain is to found in the case of *Mc Eldowrey v Forde*¹¹ in which the House of Lords, held that a ministerial order banning “Republican Clubs” or any like organization howsoever described, was not too vague to be enforced. Hence the following salutary observations from an Irish commentator on this finding:¹²

Since the political cliques learned how to control parliament in the nineteenth century the citizen’s only protection against tyranny has been those marvelous be-gowned, be-wigged and fearless freedom fighters on the bench. When they start to capitulate, even moderate men may start looking to the streets¹³.

¹¹ (1969) 2 ALLER 1035 (ITC). Lord Diplock in his dissenting judgment, expressed the legality rule in relation to delegation of power in the following word: “A regulation whose meaning is so vague that it cannot be ascertained with reasonable certainty cannot fall within the words of delegation” (at 1074). This gives proper effect to the requirements of legality.

¹² (1969) 2 ALL ER 1035 (ITC) P 13

¹³Ibid,p.14

South Africa was a British colony and its constitutional setup was therefore modeled along the Westminster system¹⁴. Westminster constitutionalism has had a profound influence in South Africa. South Africa's first constitution, the Union Constitution of 1909, was a solidly Westminster-style document, and it was not until the Tricameral constitution of 1983 that South Africa began to move away from the British constitutional model of parliamentary sovereignty.¹⁵

Before the 1993 constitutional dispensation, South African courts have also deviated from proper application of the rule of law. The judiciary has neglected the application of basic rights, due process and legality. Obvious examples are *Rossouw v Sachs*,¹⁶ in this case, the court held that the detainee held was not entitled to reading and writing materials even though legislation was silent on this issue; and in *Minister van Justice v Alexander*,¹⁷ here too, the court held that a banned person seeking to set aside his banning order was not entitled to a "discovery order" listing by description, the papers on which the minister allegedly ruled in imposing the order, and in a similar vein, in the case of *S v Mee*¹⁸ the requirements of legality were ignored by a unanimous court. The court upheld the prohibition on attending social gatherings¹⁹ even though there was manifestly no clear guide as to what constituted criminal conduct.

Lamentable though these departures from the rule of law may be, they were not gross as to make the judiciary an inappropriate instrument for achieving basic rights and due process in South Africa. They called instead, for renewed commitment in all branches of the profession to the values associated with the rule of law and for an educational effort designed to reinforce the propriety of judicial concern with striving towards legality and due process. There are judgments in which the validity and appropriateness

¹⁴ The Westminster Constitutionalism, is used to refer to that system which developed in Britain and which has been exported, in various forms, to those countries that were British colonies

¹⁵ This is one of the foundational principles of the German constitution: Germany is a *rechtstaat*, a democracy and a welfare state. The *rechtstaat* principle requires the state's power to be exercised through law which is in line with the constitution and which strives to protect freedom, justice and legal certainty.

¹⁶ At 177 per Beyers JA

¹⁷ 1964 (2) SA 551 (A)

¹⁸ 1981 (4) SA 604 (A). See also as Mathews "A Meer debacle – The Law and social gatherings" (1982) 99 *SALJ*

¹⁹ Social gathering were defined as any gathering to have social intercourse with one another. It was manifestly that no clear guide as to what constitutes criminal conduct

of that concern is recognised. The most important among these decision are *Hurley v Minister of law and order*²⁰ and *S v Ramqobin*²¹ which have done wonders to revive the flagging faith in the judiciary. These judgments illustrate that the judiciary at its best, was the most hopeful instrument in the idea of the *rechtsstaat* in South Africa.

Of course, there is little point in proclaiming the virtues of an independent judiciary unless it actually possesses jurisdiction over disputes concerning basic rights. The South African habit of excluding the courts from these traditional judicial concerns has already been mentioned as a violation of the rule of law. A more insidious practice is to retain court jurisdiction but to limit the powers of the judges in such a way that their control becomes ineffectual. An example of this was found in a provision of the Criminal Procedure Act²² which authorised 180 days detention after application to the court by the attorney-general, but made no provision for representations to the court by the detainee. This law required the court to act contrary to the basic rule of *audi alteram partem* (hear the other side) and offered the illusion rather than the substance of court protection. Banning orders imposed under the Internal Security Act of 1950 could theoretically be challenged if the victim was able to show that the minister had acted *mala fide* or for improper considerations.

The near-impossibility of proving such official misconduct is poignantly illustrated in the case of *Kloppenbergh v Minister of Justice*²³, in which the minister of justice declared that he had valid reasons for banning the application, but could not disclose for fear of injuring public policy. The court upheld both the refusal to give reasons and the banning order. Though the *Kloppenbergh* ruling on record is no longer valid in the light of *Mkondo and Gumede v Minister of Law and Order*,²⁴ the burden of proving that the minister has acted in bad faith remains for bedding. Where the court can only interfere upon proof of bad faith or improper purpose, and where it cannot examine all the evidence because the executive has the final say on what evidence may be excluded for

²⁰ 1985 (4) SA 709 (D). Since confirmed on appeal in *Minister of law and order v Hurcey*, 1986 (3) SA 568 (A)

²¹ 1985 (3) SA 587 (N)

²² Act 51 of 1977

²³ At 362H

²⁴ 1986 (2) 756 (A)

reasons of State Security²⁵, the rule of law requires that the citizen be entitled to have his basic right judged by the regular courts, however this was still far from being met by the enacted Internal Security Act.²⁶ This reduction of jurisdiction over basic rights was a serious rule of law violation.

The role of the rule of law in relation to the effect of parliamentary sovereignty was that government should have authority provided by the law for everything it does, regardless of the procedural or substantive qualities of that law. The rule of law means that the government is required to act in accordance with valid law.²⁷ The notion is best illustrated by an anecdote. Many years ago the minister of the ruling National Party government was being questioned at a political meeting about a restriction on the liberty of an individual by arbitrary government action. The interlocutor asked him whether the government had acted in accordance with the rule of law in this instance. The minister replied: "Of course we did."²⁸ A proposition is simple that because the government's action was authorized by a valid law, it may be described as conforming to the rule of law.

It should however be acknowledged that during the apartheid era, the white South African legal community was divided on what constituted the rule of law along predictable lines. A liberal minority criticized the government for non-compliance with the doctrine of the rule of law and criticized the courts for not defending the rule of law. The international commission of jurists declared in 1959 that the rule of law is not only safeguard and advance civil and political rights of the individual in a free society, but also to establish social, economic, educational, and cultural conditions under which an individual's legitimate aspirations and dignity may be realized²⁹

²⁵ Section 66 (1) of the Internal Security Act 74 of 1982 makes the minister the final arbiter on this question

²⁶ Roberts S summers Lon L Fuller, (Supra), 104

²⁷ The rule of law is a doctrine of public law and concerns primarily the relationship between the government and subjects to the state. Nevertheless, its prescriptions are binding on private citizens as well and it is a consequence of this theory that private as well as official action should be authorised by law.

²⁸ Norman S Marsh in "The Rule of Rule as a Supra-National Concept" (Supra) 248, has expressed this proposition in more legalistic language: The The of Law in its most direct and literal application means that all action taken by the authorities of the, as much as by individuals, must be based on and traceable back to an ultimate source of lagal authority

²⁹ International commission of jurist South African: Human Rights and the Rule of Law (1988) 144.

2.1 Political theory and the rule of law

Is there any point in continuing to talk about the rule of law? Not if it is discussed only as the rule that govern courts or as a football in a game between friends and enemies of free-market liberalism. If it is recognized as an essential element and of representative democracy, then it has an obvious part to play in political theory. It may be invoked in discussions of the rights of citizen and beyond that of the ends that are served by the security of rights. If one then begins with the fear of violence, the insecurity of arbitrary government and the discrimination of justice, one may work one's way up to finding a significant place for the rule of law, and for the boundaries it has historically set upon these most enduring of our political troubles. It is as such both the oldest and newest of the theoretical and practical concerns of political theory.

It would not be very difficult to show that the phrase "the rule of law" has become meaningless, thanks to ideological abuse and general gratulatory rhetorical devices to the public utterances of Anglo-American politicians. The rule of law did, after all, have a very significant place in the vocabulary of political theory once, so important in fact that it may well be worth recalling.

The most influential restatement of the rule of law since 18th century has been Dicey's³⁰ unfortunate outburst of Anglo-Saxon parochialism. In his version, the rule of law was both traditionalized and formalized. Not entirely without encouragement from Montesquieu, but wildly exaggerated, he began by finding the rule of law inherent in the remote England past, in the depth of the early middle ages.

As observed above, the rule of law originally had two quite distinct meaning. It referred either to an entire way of life or merely to several specific public institutions. The first of these models can be attributed to Aristotle, who presented the rule of law as nothing less than the rule of reason. The second version sees the rule of law as those institutional restraints that prevent governmental agents from oppressing the rest of the

³⁰ A.V Dicey Lectures on the Relation between law and public opinion in England during the nine tenth century (1905) 55, quoted in PP Craig 'Dicey: unitary, self-correcting democracy and public law' (1990) 106 Law quarterly Review 105, 111

society. Aristotle's sense of the rule of law has an enormous ethical and intellectual scope, but it applies to only very poor persons in the polity.³¹ Montesquieu's³² account is of a limited number of protective arrangements which are, however, meant to benefit every member of the society, though only in a few of their mutual relations.³³ It is not the reign of reason, but it is the spirit of the criminal law of a free people. Aristotle's sense of the rule of law is, in fact, perfectly compatible not only with the slave society of ancient Athens, but with the modern "dual state".

In contrast to Aristotle's rule of reason, Montesquieu's rule of law is designed to stand in mark contrast not only to simple "oriental" despotism but also to the dual State with which he was well acquainted, as his remarks on modern slavery contains types of human conduct entirely out of public control, because they cannot be regulated or prevented without physical cruelty, arbitrariness and the creation of unremitting fear in the population. The co-ercive government must resort to an excess of violence when it attempts to effectively control religious belief and practice consensual sex and expressions of public opinion. The rule of law is meant to put a fence around the innocent citizen so that he/she may feel secure in these and all other legal activities. That implies that public officials will be hampered by judicial agents from interfering in these volatile and intensely personal forms of conduct. The judicial magistracy will, moreover impose rigid self-restraints upon itself which will also enhance the sense of personal security of the citizenry. They will fear the office of the law not its administrators.

In Aristotle's account, the single most important condition for the rule of law is the character one must impute to those who make legal judgment. – Justice is the constant disposition to act fairly and lawfully not merely the occasional performance of such actions. It is part of such a character to reason syllogistically and to do so his passions must be silent. In the course of forensic argument, distorted syllogism will, of course, be argued upon those who must judge. That indeed is in the nature of persuasive reasoning, but those who judge, be they few or many, must go beyond it to reason their way to a

³¹ Aristotle, NEV 1132 a2

³² The French philosopher Montesquieu (1755 – 1969) p159

³³ Carpenter G "Strengths and limitations of a new national government" in Licht RA and De Villiers B (eds) *South African crisis of constitutional democracy* (1994) 169

logically necessary conclusion. To achieve that they must understand exactly just how forensic rhetoric and persuasive reasoning work, while their own notion is free from irrational imperfections. For that a settled ethical character is as necessary as is intelligence itself. The benefit to society of judgments made by men of such character is considerable, without such justice no one is secure in his material possessions and even in his social values.

Without Aristotle's confidence in syllogistic reasoning this picture of perfect judgment would not make sense, nor would it claim to rationally stand. It is, however, part of a very powerful psychology as well. The powers of reasoning are part of the whole mentality of a man who has the capacity and inclination to see all claims impartially. That is not only required for judges, but of anyone who engages in fair exchanges, but it is clear that the supremely just activity on which everyone in society depends is epitomized by judging in courts of law. For it is therefore that justice is activated into legality. The rationality of this procedure is made specially plausible since is a form of social control that applies to only a very limited part of the population and then to only some human relationship. Women and slaves were during Aristotle's time, not governed by the norms of either justice or law. The different picture of the rule of law one cannot do better than to look at Montesquieu's version. While Aristotle's rule of law as reason served several vital political purposes, Montesquieu has only one aim, to protect the ruled against the aggression of those who rule. Procedure in criminal cases is what this rule of law is all about. This is what makes the imperative of the independence of the judiciary also comprehensible.

The idea is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests, and perspective indignations upon the judiciary. The judicial officer can then be perceived as the citizen's most necessary, and also most likely, protector. This whole scheme is ultimately based on a very basic dichotomy. This version of the rule of law is evidently quite compatible with a strong theory of individual rights.

The institution of judicial citizen protection, exist in order to avoid what Montesquieu took to be the greatest of human evils, constant fear created by the threats of violence and the actual cruelties of the holders of military power in society.

2.2 Democracy, the rule of Law and the role of the Judiciary

The principle of democracy stipulates that those who govern should do so in accordance with and on the sufferance of the will of the majority of the people. The rule of law on the other hand is more concerned with and committed to individual liberty than democratic governance; it has stood as a constitutional barrier between the governors and the governed, between power and people. Notwithstanding its protean nature, the rich historical tapestry of the rule of law has been loosely connected by a strong liberal thread: it has been used as a seductive slogan in the struggle to establish or preserve individual liberty and action. On many occasions, this appeal to liberty has amounted to nothing more than moralistic window-dressing for otherwise naked attempts to seize political power, a rhetorical gambit in a continuing power-play.

Over the last millennium, the rule of law has occasionally proved to be an effective principle to check the indulgent abuse of power by the few over the many. However, over the long haul, the rule of law has been activated as a “principled” counter in the shuffling of power among elite groups. It has served to inhibit the flourishing of any government system of direct democracy. The existence and extent of democratic governance is only justified insofar as it better serves the enhanced liberty of individuals: it is a recent recruit on the proclaimed march to the truly liberal state.

The rule must be by law and not discretion. Also, and especially, the law making itself must be under the law. In this “thin” form, the rule of law is targeted against arbitrary government. The rule of law requires that fundamental issues of political morality be debated as issues of principle and not simply issues of political power.³⁴

In a democratic state that adhere to the rule of law, there is always a tension between the judiciary on one hand, and the legislature and the executive on the other , it arises because the judiciary is empowered to a greater or lesser extent, to decide on the

³⁴ Burns y (2001) Communication law, 7

legality of the conduct of the other two branches of government. Indeed, if the rule of law is to mean anything, the executive and legislature must accept judges peering over their shoulders.

In a constitutional state the constitution requires that the rule of law be observed. Once it has been accepted that no person or institution has a divine right to govern others, it follows that a government can only be legitimate in so far as it rests on the consent of the citizen. Therefore, in a constitutional democratic system of government, the relationship between the state and citizens is not just simply a power relationship but the consent of the governed is the defining characteristic of the relationship.

Where the courts have constitutional enforcement powers, they have the last word on the meaning of a constitutional text and its application to a particular area and can overrule any law that is inconsistent with the constitution as the court has interpreted it. Recognising that the exercise of the power of judicial review to strike down Acts of a democratically elected legislature 'thwarts the will of the people', scholars have produced a range of justification either discounting the difficulty or justifying the role of judicial review in upholding democracy and individual rights against the wishes of majorities. In resolving the Madisonian dilemma³⁵, the court is therefore energetic in protecting the rights of individuals while being equally scrupulous to respect the rights of majorities to govern.

In the Indian case of *Kesavananda a State of Kerala*³⁶, the court, by a majority of seven to six, adopted the view that democracy proceeds on the basic assumption that representative of the people in parliament will reflect the will of the people and that they will not exercise their powers to betray the people or abuse the trust and confidence in them by the people. The minority, on the other hand, expressed complete distrust of parliamentary majoritarianism:

Human freedom is lost gradually imperceptivity and their destruction is generally followed by authoritarian rule. That is what history has taught us. The struggle between liberty and power is

³⁵ Madisonian Dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty

³⁶ AIR 1973 SC 1461

eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our constitution³⁷.

In South Africa, the apparent tension between the power of courts under the Bill of Rights and an understanding of democracy as the rule of the majority is illustrated by the decision of the Constitutional Court in *S v Makwanyane and another*³⁸ to invalidate the death penalty in the face of overwhelming public opinion supporting its retention. According to Kleyn and Veljoen, opinion polls in South Africa showed that the majority of the people from all race groups favour the retention of the death penalty.³⁹

2.3 The rule of Law and Justice

One of the striking observations in the history of government is the antinomy between the two forces, power and law. In their pure form, power and law are polar opposites, the former standing for arbitrary might, the latter for a system in which power is checked by institutions or individuals rights and channel in such a way as to conform with a people's values and established patterns of expectations. Neither of these two forces by itself, can found a stable system of government, one because it is capricious, coercive and unpredictable, the other because, in practice, it can be influenced and may adapt only with difficulty to changing conditions; both tend to lead to the buildup of pressures that produce their down fall.

The rule of law is that of "government under law" or what Ronald Dworkin calls the "rule – book approach"⁴⁰. This means that the organs of government must themselves operate not only through the law, but also under the law, in the sense that the legality of their actions may be tested by independent courts of law and that the law therefore operates as a limitation or constraint upon the actions of government itself. The rule of law in this sense must also address itself to whether there are any groups of people who in theory or in practice are able to disregard the law, and whether both the substance and

³⁷ At 1629

³⁸ 1995 (3) SA 391 (CC)

³⁹ Kleyn and Veljoen p154

⁴⁰ Dworkin R 'Law as interpretation' (1982) Critical Inquiry 179

the administration of the law are able to command the respect and obedience of the people.

There is also a third sense in which the term is used. This sense embodies among other things, a broad range of legal and social presuppositions. Thus, if government is to operate under the law and merely through it, the doctrine must have something to say about the substantive content of the enactments that issue from the legislative arm of government. In short, it imports limits on legislative power. Otherwise government will be able simply to alter and redefine the law in whatever way suits its purposes. Law may thereby not only cease to be a limit or constraint on the powers of government, but may degenerate into a positive implement of oppression.

The general introduction to the international commission of jurists recommendations, for example, contains a preliminary description of the concepts that is worth setting out in full, subject to cram too much into the rule of law concept:

The rule of law summarize a combination of ideals and practical legal experience and to some extent inarticulate form, a consensus of opinion among the legal profession. The practical experience of lawyers in many countries suggests that principles and procedures are important safe guards of the ideals underlying the rule of law. Lawyers do not however claim that such principles, institutions and procedures are the only safeguards of these ideals and they recognize that in different countries different weight well is attached to particular principles, institutions and procedures⁴¹.

The rule of law doctrine is not in itself a rule of law, neither is it a mere principles of political action, as some critics suggest. It is more a statement of constitutional and juridical principle, a juristic rescue, an idea of a profound legality superior, and possibly anterior, to positive law.

2.4 Adjudication and changing values

In the process of adjudication, the court applies law directly and practically to persons. It is in court where collision between law and real world events takes place. The adjudicator must in every event/case encounter discrete predicaments of specific persons and how the law affects them. The court has, in certain instances, to give effect

⁴¹ M Perry, *the constitution, the courts and human rights: an Inquiry into the legitimacy of constitutional policy making by the judiciary* (1992), p 45-91

to some changing community values in the absence of any law governing a particular issue. For example, in *S v Ncwanya*⁴² the accused was charged with the crime of rape. It appears from indictment that as at date of the commission of crimes the complainant and the accused were husband and wife. They were married to each other in community of property on 3 July 1980, but the relationship between them had gradually deteriorated until they become estranged. At the time of the alleged commission of the crimes they were no longer staying together in the common home. The Legal question was whether a husband can in law rape his own wife.

The High court found the accused guilty of raping his own wife and was consequently sentenced him to three years imprisonment on the charge of rape and 18 months imprisonment on the charge of assault with intent to do grievous bodily harm. On appeal the accused's conviction of rape was set aside. The legislature however intervened by enacting the Prevention of Family Violent Act.⁴³ The Prevention of family Violence Act, popularly known as Domestic Violence Act includes sexual abuse. The Prevention of Family Violent, afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of State is committed to the elimination of domestic violence. Domestic relationship means relationship between a husband and wife married to each other, including marriage according to any law, custom or religion. In this new constitutional dispensation the law is more rigorous in the prevention of sexual abuse. Women are more protected than any time before.

Another case dealing with changing community values is the case of *Nwamitwa v Shilubane and Others*.⁴⁴ In this case a dispute was over the right to succeed as hosi (chief) of the Valoyi Tribe in Limpopo. The dispute was between first applicant, Tinyiko Lwandhlamuni Phillia Nwamitwa-Shilubana, oldest daughter of hosi Fofozza Nwamitwa ("Hosi Fofozza") and respondent, Sedwell Nwamitwa, son of hosi Mahlathini Richard Nwamitwa ("Hosi Richard"). Fofozza died in 1968 without a male heir, to succeed to the

⁴² 1992 (1) SACR 209 (CK)

⁴³ Act 116 of 1998

⁴⁴ (2007) ZACC 14

Position of Hosi of the tribe. According to tradition only a male heir can be a successor to the position of Hosi of the tribe. Therefore, first applicant, Hosi Fofeza's eldest daughter, was not considered for the position. Instead, Hosi Fofeza's younger brother, Richard, succeeded him. Hosi Richard died in October 2001. During his reign, the tribal institutions seemingly decided to appoint first applicant as hosi, relying on the constitutional principle of equality. The relevant government officials approved the appointment, of Phillia as Hosi of the Valoyi tribe. However the appointment was contested, by the deceased Hosi Richard Nwamitwa's eldest son, Sedwell

The respondent Sedwell approached the High Court in 2002 for a declaration that he and not the first applicant, was the rightful heir to be the Hosi of the Valoyi Tribe. Now the legal question was whether Phillia was entitled to become a Hosi of the Valoyi tribe

The High Court held in respondent's favour. An appeal to the Supreme Court of Appeal confirmed judgement of the High Court. Applicants then approached the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal

The Constitutional Court unanimously granted the application for leave to appeal and upheld the appeal against the decision of the Supreme Court of Appeal. The Constitutional Court found that both the High Court and Supreme Court of Appeal failed to acknowledge the power of the traditional authorities to develop custom law. The application to declare Sedwell Nwamitwa a Hosi was dismissed and Tinyiko Lwandhlamuni Phillia N'wamitwa-Shilubana, eldest daughter of Hosi Fofeza Nwamitwa became a Hosi of the Nwamitwa tribe.

The case of *Riggs v Palmer*⁴⁵ also deals with changing values. In this case Elmer Palmer murdered his grandfather, knowing that he was the beneficiary under his grandfather's will. The question that presented itself to the New York Court of Appeals was whether Palmer could none the less inherit under the will. This was a hard case for judges, as there was no statutory provision dealing with issue, namely whether someone named in a will could inherit if he or she had murdered the testator. The court denied Palmer inheritance and was convicted and sentence to ten years imprisonment. Dworkin⁴⁶ argues that in denying Palmer the inheritance, the judges used a non-rule

⁴⁵ 115 NY 506, 22 NE 188 (1889)

⁴⁶ Dworkin "Law as Interpretation" (1982) *Critical Inquiry*, 179

standard, namely, the principle that no one should profit from her/his own wrong, the case provides a good example once again, because the judges sought the best solution by examining the statute law which is silent in this case and inherited principles of common law in order to reach the best for the case.

Chapter Three

3 The rule of law and justice under South Africa's parliamentary sovereign system

3.1 The rule of law and justice under the colonial era

The first wave of colonial penetration into South Africa began in the late seventeenth century. The colony that emerged from the Dutch settlement was to provide a basis for later colonial conquest of the entire region.⁴⁷ When the British captured the Cape in 1806, Roman-Dutch law remained the common law of Cape,⁴⁸ but as far as constitutional law is concerned, the Dutch did not leave much of a legacy and after the British colonization, English systems of government and constitutional principles were soon firmly entrenched at the Cape and later in Natal.

The constitutional form of British colonial rule in the Cape and Natal closely tracked developments in other British colonies with large European settler populations, such as Canada and Australia. Initially, the colonies had an executive government (a British – appointed Governor with an advisory council of settlers). Later, they had a form of representative government (an appointed Governor with an elected legislature) and, finally, responsible government (a Governor – General with an Executive Council which needed the support of an elected legislature). For the British colonies, responsible government was a significant step towards autonomy from the colonial power since the governor – General became the representative of the British Crown as head of state, leaving it to the locally elected Executive to govern the colony. The Governor-General however had to assent to legislation and his assent was no formality. He could reserve bills for the attention of the British Crown, who acted on the advice of the British government and could within a period of one year after the bill was passed, “disallow” them, effectively nullifying the statute. In practice, however, these powers were only used to ensure that the local government respected British interests, and not to interfere with the internal affairs of the colony. The two Boer Republics, a brand of

⁴⁷ See the constitution of liberty(1960) and the political ideal of the rule of Rule of Law (1955)

⁴⁸ In accordance with the Rule of English constitutional Law laid down in *Campbell v Hall* 98 EL 1045 (H1774) that “the laws of the conquered country continue in force, until they are altered by the conqueror”

constitutionalism was adopted with some significant departures from the Westminster system and the union parliament was free to amend the constitution by ordinary procedures, except for a small number of measures which required a special procedure.

The 1909 Union of South African Constitution (an Act of the British Parliament) introduced a sovereign parliament along the lines of the Westminster model, in terms of which the constitution was not supreme and an omnipotent legislature was placed in the hands of a racial minority.

Racial legislation intended to exclude the large majority of the citizen of South Africa, namely the indigenous people, from political participation and other social intercourse seems to have started during colonial era. In some instances, the judiciary, far from being a human rights catalyst, was instead, an accomplice in the violation of such fundamental human rights. For example, in *Keimoes school committee*⁴⁹ the Appellate Division held that although the relevant statute did not explicitly require school segregation on racial grounds (but only referred instead, to ‘origin’) such segregation was legally permissible.

Similarly, in racial segregation, and a archetypal ‘hard case’⁵⁰, the statute in question was silent on whether the postmaster-general could establish racially segregated post offices. The Appellate Division (by three Judges to one judge) held that such discrimination not only accorded with the history of the Transvaal⁵¹, but also with ‘accepted principle and good sense’.⁵²

The above case seems to be indicative of a discrimination configurative nature of the governance. It was an exclusively white judiciary which applied repressive laws, legislated by an exclusively white legislature to an unconsenting (indigenous) majority of South African people. One of the hallmarks of a repressive law is its subordination to the requirements of government. In consequence, law, in a repressive legal system

⁴⁹ 1911 AD 635

⁵⁰ Minister of posts and telegraphs v Rassol 1934 AD 167

⁵¹ AT 177, per Beyers JD

⁵² *Expert Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC). (First Certification Judgment)

remains largely undifferentiated from discrimination, administration, and moral order. Courts inevitably became the instruments of governmental power.⁵³

Looking back to the history of the formation of the union of South Africa earlier in the century, which excluded participation by indigenous people of South Africa, and their further exclusion from participation in all genuine court decision – making processes of the country, it is not surprising that the court endeavored to strenuously defend human rights and the rule of law.

Constitutionally, parliament in a Westminster system of government, is only limited by certain procedural constraints, in that it must follow the procedures laid down by the constitution before it can be said to have enacted a law, and the courts may pronounce on whether these procedures have been correctly followed or not. Parliament is thus bound by the rules regulating its composition and procedure. Other than procedural matters, the court is powerless to pronounce on the validity of an Act of Parliament on the substantive basis such as fairness or justice.⁵⁴

The principle of parliamentary sovereignty or legislative supremacy as pointed out, is the most important characteristic, if not the single outstanding feature of the Westminster system. Parliament, consisting of the elected representatives of the people, is the supreme legislative authority in the country. However, it should be acknowledged that in a Westminster system of government, the authority of parliament is practically wielded by the executive, since members of the executive are also members of parliament, and are consequently able to influence parliamentary directions. Nevertheless, despite the powerful position occupied by the executive, the cabinet remains accountable to parliament, at least in theory, and the judiciary has no power to invalidate parliamentary legislation which has been duly passed. The South African Act of 1909 emanated from a pact among the political leaders of the four colonies that were to constitute the union of South Africa.

⁵³ Basson D (1994) *South Africa's interim constitution: text and notes*, xx.

⁵⁴ Dicey AV. Lectures on the relation between law and public opinion in England during the nineteenth century (1905) 55, quoted in Craig P.P “Unitary, self-correcting democracy and public law”. (1990) 106 Quarterly reviews 105, 108: The absence of constitutional review and the Dicey and conception of sovereignty are therefore firmly embedded within a conception of self-correcting majoritarian democracy.

The union of South Africa was proclaimed on 31 May 1910. In these time 'racial issues' were mostly perceived by whites as referring to relation between Dutch and British; the compromise reached at the 'National Convention' permitted the colonies to retain its own franchise arrangements. The clauses dealing with the franchise and those dealing with the equality of English and Dutch as official Languages were entrenched in the constitution, being amenable to amendment only by a two thirds majority of both the House of Assembly and Senate, sitting together, at a third reading.

In the Transvaal and Orange Free State provinces the franchise was limited to white males only. In the Cape Province, the franchise was extended to all males residing in the province and who owned property of a certain value, or earned a certain sum of money; irrespective of race. However in practice, this qualification excludes most African males. Natal had a similar non-racial franchise as that of the Cape. The non-racial franchise of the Cape and Natal colonies were observed and protected by the entrenched section in the then new Union Constitution.⁵⁵

3.2 The rule of law and justice under apartheid period

During apartheid, pro-executive and legislative attitude by the judiciary continued, although some courts were sometimes anxious to safeguard the judicial function against attempts by the executive and the legislative organs to take over its function. This is clearly evidenced in the number of administrative law cases, where the courts have interpreted statutes not 'to oust their jurisdictions'. In effect the South African courts have, on several occasions, attempted to disregard provisions which appeared to preclude judicial review of administrative decisions. However, it has been a common practice for parliament to use its legislative supremacy to explicitly exclude the judicial review of administrative action, via the so-called 'ouster clause'. The courts were nevertheless generally reluctant to accept the exclusion of their powers of administrative review despite an express statutory exclusion where there was proof of gross excess of power, mala fides or fraud. One common justification for these ruling was that there

⁵⁵ The Transvaal, Orange Free State, Cape Province and Natal

was a presumption that parliament did not intend the courts' jurisdiction to be excluded, so the courts 'were giving effect to the will of the legislature'. The legislature however, was also resolved to use its supreme legislative authority to eventually subdue and thereby 'disciplining' the judiciary. This showdown led to the 1952 open confrontation between these two organs of the state – a confrontation which today is known as the constitutional crisis of the 1950s.

In 1948 the National Party, won the election, and immediately started implementing the programme of apartheid. The system of parliamentary sovereignty made implementation of the programme relatively easy. However, although the Union Constitution followed the Westminster system of parliamentary sovereignty, the South African legislature was not altogether free of external restraints. Until the adoption of the statute of Westminster in 1931 by the British parliament, the Colonial Laws Validity Act of 1865 continued to restrict the sovereignty of the union parliament. The Act prohibited dominion parliaments from legislating extraterritorially or in a manner which had been made applicable to a particular dominion. As one of the British dominions, South Africa was also subject to the provision of the colonial laws validity Act⁵⁶. These external constraints were removed in 1931 by the statute of Westminster, which repealed the Colonial Law Validity Act after 1931, the South African parliament was free to adopt any legislative measures, but still remained bound by the procedures imposed by the entrenched sections of the union constitution.⁵⁷

The entrenched provisions in the South African Act of 1909 were to be amended in accordance with the entrenched provision. Legislation amending or repealing the voting

⁵⁶ The statute of Westminster 1931, which was passed by British parliament

- (a) Prohibited British Parliament from legislating for a dominion, unless there was an express declaration in the Act, that it did so by request and with the consent of the dominion
- (b) Provided that the dominions could repeal or amend any British statute applicable to them
- (c) Provided that the dominions be permitted to legislate extra territorially

The statute of Westminster therefore added to the power of the union parliament

- (a) A power to make laws repugnant to the law of England or to an imperial statute,
- (b) A power to amend or repeal a statute of the imperial parliament in so far as it was part of the law of the dominion
- (c) A power to legislate with extra-territorial effect

⁵⁷ The statute of Westminster 1931, which was passed by British parliament that prohibited British parliament from legislating for a dominion, unless there was an express declaration in the Act, that it did so by the request and with the consent of the dominion.

rights of the ‘non-Europeans’ in Natal and Cape (section 35) or the equality of English and Dutch languages (section 137) could be passed only by members of parliament sitting together, or unicamerally⁵⁸. There had to be a two thirds majority of all the members sitting together at a third reading of the bill. The section prescribing this procedure (section 152) also, could only be amended by the same entrenched procedure.

The case of Ndoke⁵⁹ was the first to deal with the entrenched sections, and was decided before the adoption of the British Native of Westminster in 1931. The case arose in 1925, after the department of Native Affairs established a process to standardize title among African landowners. The appellant’s fears were aroused by a draft proclamation which, if implemented would substitute his rights of ownership with a form of title ‘deemed to be...communal tenure’⁶⁰. This would have the effect of excluding him from the calculation of the value of property held by a potential African voter under the Cape franchise.⁶¹

The Appellate Division rejected the appellant’s objection on the grounds that proposals directly attacking the Cape franchise had not been promulgated, and that interference with property rights ‘cannot be construed as an alteration of the qualifications of voters. The courts however had no difficulty in finding that a statutory provision which conflicted with section 35 of the Union Act (1909 South African Constitution), and had not been adopted by two thirds majority in a joint sitting of parliament, was invalid. When interpreting the entrenched provisions of the 1909 South African Constitution, the court, *Per De Villiers CJ* stated *obiter*, that ‘these entrenched provisions were binding on parliament.’ This judgment was, as pointed out earlier, delivered before the adoption of the statute of Westminster. There were some people, who took the view that since the union’s subordination to the British parliament had fallen away, the entrenched sections were no longer of any force and effect⁶².

⁵⁸ Normally parliament use to set bicamerally or separately, as the House of Assembly and the Senate.

⁵⁹ 1930 AD 484

⁶⁰ AT 496 Ibid

⁶¹ Ibid 48

⁶² Hostern et al (1995) introduction to South African Law and legal theory, 964

The nationalist government was determined to remove all Africans from the common system. Government's efforts to remove African voters from the common voter's roll began in the 1920s. The passing of the Native Administrative Act⁶³, which implemented the system of bureaucratic governance over African communities. This move was, as observed, challenged by a registered African voter as an illegal attack on the Cape franchise in 1936. However, the government managed to place African voters on a separate voters' roll in the Cape province in terms of the Representation of Natives Act (RNA), which was adopted in accordance with section 35 of the 1909 South African constitution,⁶⁴ but other 'non-Europeans' such as coloured remained, at that time, on the common roll.

The validity of the amendment was challenged in *Ndlwana v Hofmeyr*⁶⁵ The applicant in this case was an African who at the commencement of the RNA was registered as a voter. The applicant's bone of contention was that the RNA was *ultra vires* the South African constitution, because it was passed by a joint sitting of both houses of parliament and was not a law which fell within the provision of section 35 (1) of the constitution⁶⁶ There was an alternative contention attacking the validity of the RNA on the ground that the joint sitting of the two houses at which the statute was passed, was not duly convened to consider this statute but another bill which was neither proceeded with nor withdrawn. The Appellate Division rejected these arguments and held that:

⁶³ Act 38 of 1927, this Act was later renamed "British Administration Act", and today it is known as the "Black Administration Act".

⁶⁴ Ibid 51

⁶⁵ At 238

⁶⁶ Section 35 provided that: "(1) parliament may be law prescribes the qualifications which shall be necessary to entitle persons to vote at the election of members of the house of assembly, but no such law shall disqualify any person in the Cape of Good Hope who, under the laws existing in the colony of the Cape of Good Hope at the establishment of the union, is or may become capable of being registered as voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the bill be passed by both houses of parliament sitting together and at a third reading be agreed to by not less than two-thirds of the total number of members of both houses. A bill so passed at such joint sitting shall be taken to have been duly passed by all houses of parliament. (2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the voters roll

Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit, the procedure express or implied in the South African Act is so far as courts of law are concerned, at the mercy of parliament like everything else⁶⁷

The court concluded that, after the passing of the statute of Westminster in 1931, it would not be necessary to observe the procedure, as described in the union constitution. The court did not find it necessary to refer to the *Ndobe* case, since this decision had been delivered before the passing of the statute of Westminster of 1931, and it concluded that:

Parliament's will, therefore, as expressed in an Act of parliament cannot now in this country, as it cannot be in England, be questioned by a court of law whose function it is to enforce that will, not to question it⁶⁸.

The judgment in *Ndlwana v Hofmeyr* was generally accepted as a correct reflection of the law and when the nationalist government started in 1949 to set in motion legislation to place the coloured voter on a separate voters' roll, it did not anticipate any legal problems. After the adoption of statute of Westminster, the nationalist government therefore decided to follow the advice of its legal advisers, who held the view that the union parliament was no longer bound by the entrenched sections, particularly in view of the decision in *Ndlwana v Hofmeyr* case. The nationalist government therefore went ahead with its plans to remove the coloured voters from the common voters' roll by entrenched one. The Separate Representation of Voters Act (SRVA)⁶⁹ was accordingly enacted. The purpose of the SRVA was then to separate Cape Coloured and European voters from a common voters' roll. To amend section 35 of the union constitution, a Bill had to be passed by the unicameral parliament and agreed to at a third reading of the Bill by not less than two-thirds of the total number of members of both houses. Lacking the necessary parliamentary support to secure the required two-thirds majority, In that manner, the SRVA was instead, passed bicamerally and by a simple majority in each house of the legislature.

⁶⁷ *Ndlwana v Hofmeyr*

⁶⁸ Act 237

⁶⁹ Act 46 of 1951

Four coloured voters promptly applied to the Cape Provincial Division of the Supreme Court in *Harris v Minister of the Interior*⁷⁰ for a declaration that the new SRVA was invalid. The court felt bound to follow the judgment in *Ndlwana v Hofmeyr* and refused the application. The case was then taken on appeal. The general constitutional question was whether the entrenched clauses of the constitution were, in view of the passing of the statute of Westminster, still entrenched or whether parliament sitting bicamerally was free by a bare majority in each house to amend any constitutional provision even if entrenched. In other words, the issue which was to be decided was whether the SRVA was enforceable in a court of law.

The Appellate Division held that the entrenched provisions were still binding and that the court had the power to declare invalid any legislation not passed in accordance with the provisions of the constitution. Thus, this legislation was unanimously held to be invalid by the Appellate Division of the Supreme Court, which refused to follow its earlier opinion in *Ndlwana v Hofmeyr*. The essence of the decision was that unless parliament passed legislation (including a constitutional amendment) according to procedures laid down in Union Constitution the statute passed could not be recognised as a valid parliamentary enactment. Parliamentary supremacy meant that there could be no restrictions on the substance of any legislation that parliament may pass, but this did not mean that the constitution could not impose procedural restrictions. The so called ‘manner and form’ restrictions served as rules of recognition which always needed to discover whether something is indeed legislation passed by parliament.⁷¹

The Appellate Division found that the statute of Westminster had not altered or amended but had left the entrenched clauses of the 1909 South African constitution intact, and that the courts consequently had the power to declare a legislation invalid on the ground that it was not passed in conformity with the provision of section 35 and 152 of the South African Act⁷². The court therefore declared the SRVA invalid since it was passed bicamerally instead of unicamerally as required by the constitution. Having been thwarted by the court in its attempt to change the franchise, the nationalist government

⁷⁰ 1952 (3) SA 800 (1)

⁷¹ AT 437 D - G

⁷² AT 428

then passed bicamerally the High Court of Parliament Act.⁷³ This legislation provided that, where the Appellate Division had declared any Act of parliament invalid, a cabinet minister could bring a case before parliament sitting as a High Court, consisting of all members of both houses sitting together. They would refer the matter to a judicial committee of ten of its members, who need not be legally qualified, who would then investigate the case and report to the High Court of Parliament, which could then by a simple majority confirm any or set aside the Appellate Division's decision. The speaker of the House of Assembly was appointed president of the High Court of Parliament, and he/she in turn appointed the judiciary committee, with the minister of justice as chairman. The Prime Minister then brought the *Harris* case before the High Court of Parliament.⁷⁴ The High Court of Parliament then putatively declared the Appellate Division's decision in *Harris v Minister of the Interior*⁷⁵ invalid, and attempted to uphold the validity of the SRVA. The purported ground for the invalidation of the Appellate Division's decision by the High Court of parliament was that the entrenched procedure was no longer binding since the enactment of the statute of Westminster in 1931.

The Appellate Division in *Minister of the Interior v Harris*⁷⁶ then unanimously declared the High Court of Parliament Act itself to be invalid, since, although it interfered with the entrenched procedure, it had not itself been passed by the entrenchment procedure. Centlivres CJ noted that:

The method employed by s152 to entrench the rights conferred by s 35 and s137 was the sanction of invalidity. This can only mean invalidity as determined by courts of law... the so called High Court of Parliament is not a court of law but is simply parliament functioning under another name...parliament cannot, by passing an Act giving itself the name of a court of law, come to any

⁷³ Act 35 of 1952

⁷⁴ It should be noted in this regard, that in Britain, the House of Lords, the Upper House of the British parliament, is also the highest court of appeal, and the lords chancellors, the speaker of the House of Lord, is a member of this court. It is only by a convention of the British constitution that only the Law Lords sit to decide cases, and these law lords do sit and vote in the House of Lords its ordinary parliamentary business.

⁷⁵ 1952 (2) SA 428 (A)

⁷⁶ 1952 (4) SA 769 (A)

decision which have the effect of destroying the entrenched provision of section 152 of the constitution,⁷⁷

Having suffered another defeat, parliament then passed other statute, namely, the Senate Act,⁷⁸ which altered the composition of the senate so as to give the nationalist government the necessary majority to pass legislation by the entrenched procedure. The government also passed the South African Amendment Act⁷⁹ amending the Union Constitution. The Senate Act (passed by normal bicameral procedures) amended the composition of the senate, thereby ensuring that the nationalist party had the required two-thirds majority to amend the entrenched sections of the union constitution. Under the Union Constitution, senators were elected on the basis of proportional representation by a province's members of parliament and members of the provincial legislature sitting as an electoral college. After the amendment, the election was by simple majority, which meant that the majority party in a province could appoint all the senators for that province.⁸⁰ The practical results was that the old senate of 48 members which had consisted of 29 government and 19 opposition supports was replaced by a new senate with 89 members, of whom 77 supported the government and only 12 the opposition⁸¹. The South Africa Amendment Act⁸² was then passed by the entrenched procedure, which placed the Cape Coloured on a separate voters' roll, and disentrenched franchise rights relating to race or colour.

The validity of the Senate Act and South Africa Amendment Act was challenged in *Collins v Minister of the Interior*.⁸³ The basis of the challenge was that, although in form the senate Act merely provided for the restructuring of the senate and therefore could validly be passed by the ordinary procedure, and although the South African

⁷⁷ At 784

⁷⁸ Act 53 of 1955

⁷⁹ Hutchinson A C and Monahan P (1987) Introduction to South African Law Legal Theory, Butterworth Durban

⁸⁰ Currie I and De Waal J (2005): The Bill of Rights Handbook, Juta, Cape Town

⁸¹ Ibid 48

⁸² Act 9 of 1956

⁸³ 1957(1) SA 552 (A)

Amendment Act had amended section 35 and 152 in accordance with the entrenched procedure, in substance the two measures together constituted a single legislative scheme. The purpose and effect of the scheme was to amend section 35 and 152 by parliamentary sitting bicamerally. The quorum of eleven judges required for any decision involving the validity of an Act of parliament by the Appellate Division Quorum Act⁸⁴ decided by ten to one, that the Senate Act was valid although it had not itself been passed by the entrenched procedure. While the High Court of Parliament had not been a court, the restructured Senate was a Senate. Centlivres CJ⁸⁵ observed that even if the Senate Act had reconstituted the Senate by enacting that it should consist entirely of government supporters whose names were set forth in the Act, it would still statute was have been a valid senate. He further held that the motive behind the statute was not something into which the court could enquire, and that as each legislation had been passed in accordance with the procedures prescribed by the constitution, they had to be accepted as being valid.⁸⁶

The court's conclusion was unfortunate under the circumstances, since it was powerless to declare parliamentary enactment invalid on substantive grounds, such as unfairness or unjustness. The court could only do so, where the prescribed procedure were not followed in passing a particular legislation.

Although some judges were determined to 'stick to their guns' in maintaining the rule of law many colluded with the apartheid regime. In *Minister of the Interior v Lockhat*⁸⁷ for example, the Appellate Division of the Supreme Court was faced with a challenge as to the validity of a proclamation dividing the city of Durban into Group Areas on the ground that whites had been given the best areas while only the poorer areas were available to Indians, and that suitable accommodation in this area would not be available for some time. *Lockhat*, an Indian argued that the effect of the division was to discriminate to a substantive degree against Indians, and that to be valid, such unreasonable discrimination had to be authorized expressly by an enabling legislation.

⁸⁴ Act 27 of 1955

⁸⁵ AT 567

⁸⁶ South African constitution 32 of 1961 (Republican Constitution)

⁸⁷ 1961 (2) SA 587 (A)

In the court a quo, *Hanochsberg J*, acknowledged that the enabling statute did contemplate some degree of differentiation, but that he could find no express authorization in the statute of discrimination coupled with partiality and inequality to such a substantial degree. He thus upheld the challenge because, in the absence of specific authority in the statute to the contrary, common law presumption should prevail. He said that:

The exercise of a power to proclaim Group Areas can and should... be exercised without the inevitable results that members of different races are treated on a footing of partiality and inequality to a substantial degree⁸⁸.

During apartheid era, many judges, as observed above, chose to adopt the view that their duty lay in the plain fact approach because that approach is most likely to determine what in fact law is in accordance with the actual intentions of the majority of the legislators who voted for the statute. But the legitimacy of that approach depended on a democratic theory of elected parliamentary representatives. In other words, the legitimacy of an approach which requires judges to ignore in their interpretation of the law their substantive convictions about what the law should be, requires a substantive commitment at a deeper level of the intrinsic legitimacy of that law. However, the apartheid parliament did not represent the majority of the South African citizens but only a white minority, and therefore failed to meet the majority rule requirement. Parliament, whose status they interpreted was therefore illegitimate by criteria of any democratic theory or standard, and so the substantive justification for their absent.

The South African Constitution Act⁸⁹ (The Republic Constitution) was an example of a flexible constitution. Although it contained a few entrenched provisions which required a certain procedure for amendment, it could be amended quite easily in most respects. The 1983 Constitution⁹⁰ (The “Tricameral” constitution) was less flexible with more entrenched clauses, but could still be classified as a flexible constitution.⁹¹

⁸⁸At 602

⁸⁹ Act 32 of 1961

⁹⁰ Act 110 of 1983

⁹¹ Constitution 110 of 1993 (The Tricameral Constitution)

3.3 The tension caused by dual application of parliamentary sovereignty and the rule of law

Parliamentary sovereignty may, as pointed out above, be described as the competence of parliament to enact laws with any content (area of power) whatsoever (both regarding the subject of legislation and people that are affected by it), and also that no other body has higher legislative competence than parliament (the Judicial included) to challenge the laws of parliament⁹². When the Union of South Africa was founded in 1910, the constitutional structure of the system included the principle of parliamentary sovereignty; it should be remembered however, that the legislature in the Westminster system of government was originally entrusted with sovereignty for the sole purpose of protecting the rights and freedom of individuals against undue executive interference.

It is clear that the values cherished by the doctrines of popular democracy and the rule of law, are contradicting each other, the former is based on the principle of majority rule and the latter on protection of the individual. The tension between the rule of law and parliamentary supremacy is consequently apparent in the British parliamentary system of government. Parliamentary supremacy, as a constitutional principle, intuitively seems to have idea of the rule of law. The fact that parliament conceivably can do just about anything it likes would seem extremely dangerous to the idea of a society governed by law. An adherence to the rule of law requires that the exercise of power of government be conditioned by law and that a subject shall not be exposed to the arbitrary will of the ruler. It is for this reason that the court resisted the arbitrary removal of the colours from the common voter's role in the 1950s. Devenish argues that in a parliamentary system of government however it would seem the rule of law provides for a weak form of constitutionalism, since no English court would strike down a legislation that introduces, for example, punishment without trial or a statute with retrospective effect.

This historically based calling of a sovereign parliament also served to confine, more or less, the exercise of the power of legislature to the ambit of its predestined objective. The structural principle of representing supplemented these conventional restraints upon

⁹² Dicey DV (1959) *An introduction to the study of the law of the constitution*, 10 ed xxxiv and also at 39-40 see also Basson DA and Veljoen HP (1988) *South African constitutional law*, 190-1

the abuse of parliamentary power in two important respects: regular elections afford the people an opportunity to oust those repositories of legislative authority whose views and votes no longer reflected the opinion of popular demand.

Before 1994, parliament was therefore deprived of its proper historical design of resisting administrative excesses in the interest of individual rights and liberties and had dispensed with the democratic substructures of a truly representative institution. The South African sovereign parliament was 'disfigured by favouritism, partiality and sectional bias founded on the distinct interest of its privileged white constituency'⁹³. The judicial authority in South Africa has also been constitutionally subordinate to the sovereign parliament as is in England constitutional law from which South African constitutional law had developed. The courts, consequently, have not had a testing power regarding the substance or content of a parliamentary enactment until the introduction of a justiciable constitution in April 1994, parliament was sovereign and there was no check on the limits of state power. The legislature could adopt any law it pleased and the courts had no substantive power of review, except only procedural reviewing power. To the ruling National Party establishment, however, this notion of parliamentary sovereignty was almost sacred. Parliament could enact retrospective legislation which in essence ignore the rule of law and interfered with the independence of the judiciary. Thus in *Nxasana v Minister of Justice and another*,⁹⁴ *Discott J*, as he then was, lamented:

[U]nder a constitution like ours, parliament is sovereign our courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it, and then implement it in accordance with the interpretation of it.

⁹³ Van nder Vyver Ibid, 571

96 Act 32 of 1961

97[1996] (3) SA AT p 745

98 1979 (4) SA 1

99 AT 801 A-B per King J

Section 59 (2) of the 1961 Constitution⁹⁵ provided explicitly that except for the competence to pronounce judgment on the question whether the special prescribed procedures of the entrenched provisions had been observed, no court of law was competent to settle the matter of the validity of a parliamentary enactment.

Some South African judges however have, during apartheid, an excellent understanding of justice and the operation of the rule of law. The intolerable position in which they were put by the unjust legislation of parliament and executive was clearly recognized by these judges. In the case of *S v Adam*⁹⁶ the court explained its dilemma and its apparent powerlessness as follows:

An Act of parliament creates law but not necessarily equity. As a judge in a court of law, I am obliged to give effect to the provisions of an Act of parliament. Speaking for myself and if I were sitting as a court of equity. I would have come to the assistance of the applicant⁹⁷

Chapter Four

4 The operation of the rule of law under South Africa's new constitutional dispensation

4.1 Rule of Law and Justice

The coming into force of the interim constitution on 27 April 1994 marked a constitutional revolution, which brought about a number of fundamental changes. It created a new fundamental legal order based on the principle of constitutional supremacy, in which all branches of government are bound by a constitution that includes a Bill of Rights, designed to bring to an end centuries of state sanctioned abuse of human rights. Rule of Law is also recognized in this new dispensation.

The parliamentary monopoly of power of the Westminster system was replaced by a system in which legislative and executive power is divided among national and provincial spheres of government. Westminster's first-past-the post electoral system⁹⁸ was abandoned and replaced with a system based on proportional representation. The most significant change from the perspective of a constitutional lawyer is that the interim constitution brought to an end the reign of parliamentary sovereignty. No longer could a mere majority of members of the national legislature write and rewrite without restraint.

The impact of the new constitutional order on the rule of law is that section 2 of the constitution provides that the constitution is the supreme law of the land and any law or conduct which is inconsistent with it is invalid to the extent of its inconsistency. The constitution is now the ultimate source of all lawful authority in the country. No parliament, however bonafide or eminent its membership, no president, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the constitution. Any citizen adversely affected by any decree, order, or action of any official or body, which is not properly authorized by the constitution is entitled to the protection of the courts. The fundamental rights have been established and section 9 of the constitution prohibits unfair discrimination.

The importance of the equality to the post-apartheid constitutional order is obvious. The apartheid social and legal system was squarely based on inequality and discrimination. Apartheid system actually discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even, residing in areas classified as "Whites" which constituted nearly 90 per cent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society

⁹⁸ *August v Electoral commission* 1999 (3) SA 1 (CC) para 3

The new dispensation established the Constitutional Court which would also protect the rule of law. The first decision in which the court directly relied on the rule of law to assess the constitutional validity of legislation was *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*. In this case, the Constitutional Court stated that:⁹⁹

[I]t is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law it seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then the principle of legality is implied within the terms of the interim constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim constitution is a principle of legality... There is of course no doubt that the common law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to “administrative action” the principle of legality is enshrined in s 24 (a) [i.e.] in relation to legislation and to executive Acts that do not constitute “administrative action”, the principle of legality is necessarily implicit in the constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question¹⁰⁰.

According to the court in *Fedsure* case, the rule of law includes, at a minimum, the principle of legality. Legality requires the executive, the legislatures and the courts to act in accordance with the legal principles and rules that apply to them. It also demands that laws be so formulated that they will constitute a clear guide to human conduct and be evenly administered in practice under the control of independent courts or tribunals.

The principle of legality means not only that the state may not act *ultra vires* but also that the state must derive its power from the law. In other words, there are no extra-legal powers in a state founded on the rule of law. Whenever a branch of the state exercise power, it must be legally authorized to do so, either by the constitution or other constitutionally valid laws of the country. The Supreme Court of Appeal put the point this way:

⁹⁹ 1998 (2) SA 374 (CC)

¹⁰⁰ *Ibid* para 56-5

[The constitution] is the ultimate source of all lawful authority in the country. No parliament, however bona fide or eminent its membership, no president, however formidable be this reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the constitution. Any citizen adversely affected by any decree, order, or action of any official or body, which is not properly authorized by the constitution is entitled to the protection of the courts.¹⁰¹

By bending the state to the law, the principle of legality prevents organs of state from using their coercive power without being authorized to do so by the law, and in the process subjecting themselves to control by the courts. The Constitutional Court of the Republic of South Africa recently made it clear that, in this sense; the rule of law applies not only to organs of state but to everyone within it¹⁰². The court stated categorically that “no one is entitled to take the law into his or her own hands”¹⁰³. In other words, the rule of law imposes an obligation on the state and other individual to resolve their disputes through the application of law. The court said is inimical to self help practice in a society in which the rule of law prevails.¹⁰⁴ Any constraint upon a person or property must therefore be authorized not only by the law but also by the court of law. It remains for the courts to give further content to the rule of law. The rule of law means more than the value-neutral principle of legality. It also has implications for the content of the law. In this regards it contains both procedural and substantive components¹⁰⁵.

The procedural component of the rule of law forbids arbitrary decision making. It also contains a more general requirement, the legislative and the executive organs may not act capriciously or arbitrarily; for example, in *New National Party v Government of the*

¹⁰¹ *Speaker of the National Assembly v Delille* 1999 (4) SA 863 (SCA) para 14

¹⁰² Currie, I, and De Waal, J (2005): *The Bill of Rights Handbook*, Juta, Cape Town

¹⁰³ *Chief Lesapo v North west Agricultural Bank* 2000 (1) SA 409 (CC) para 11

¹⁰⁴ *Ibid.* see also Ackerman J in *S v Makwenyane* (note 35 above) para 168 explaining that in principle, in a constitutional state individuals agree not to report self-half to protect their obligation to protect the state assumes the obligation to protect those rights. Ultimately the courts need the co-operation of the other branches of government to ensure respect for the rule of law. The courts have no control over the spending of public money and they have no command over the police and the other armed forces. The said sequence of recent event in Zimbabwe following invasions of privately – owned farms illustrates how vulnerable courts are in a situation where a government tolerates unlawful activities and ignores court orders to enforce the law. See the brave attempts by the Zimbabwean courts to prevent the disintegration of the rule of law in judgments such as *Commissioner of Police v Commercial Farmers Union* 2000 (9) BCLR 956 (2); *Commercial Farmers Union v Minister of Land, Agriculture and Rural Resettlement* 2000 (12) BCLR 1318 (25).

¹⁰⁵ *Pharmaceutical Manufacturers* para 36

Republic of South Africa,¹⁰⁶ the Constitutional Court dealt with provisions of the *electoral Act*¹⁰⁷, which required voters to prove their identity and citizenship with a particular type of Identity Document (ID).¹⁰⁸ According to the statistic accepted by the court about 80 percent of eligible voters were in possession of the required ID and 10 percent of eligible voters had no ID at all, while 10 percent had an otherwise valid ID but not the bar-coded ID used after 1986 that the electoral Act required¹⁰⁹. The Constitutional Court held that parliament is empowered by the constitution to require potential voters to identify themselves. This is in order to comply with the constitution's insistence (in s 1 (d) and s 19) on a national common voter's roll and free and fair elections. But the constitution places constraints on parliament in the exercise of its power. It requires a rational relationship between the scheme which parliament adopts and the achievement of a legitimate government purpose. Parliament cannot act capriciously or arbitrarily¹¹⁰. To do so would be inconsistent with the rule of law, which the court described as a "core value" of the constitution. The absence of a rational connection will result in the measure being unconstitutional in applying this test to the facts. The court found that it was indeed rational for parliament to insist on the bar-coded ID since the use of a single type of ID would lead to less confusion amongst electoral officers, while the presence of the bar-code made it easier and quicker to use.

The prohibition of arbitrary treatment applies also to conduct of the executive organ of state. As stated by Chaskalson P for the Constitutional Court in the *pharmaceutical manufactures* case:¹¹¹

It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decision must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by constitution for such action.¹¹²

¹⁰⁶ 1999 (3) SA 191 (CC)

¹⁰⁷ Act 73 of 1998

¹⁰⁸ The Electoral Act 73 of 1998

¹⁰⁹ Ibid para 19

¹¹⁰ Ibid para 24

¹¹¹ 2000 (2) SA 674 (CC) para 5

¹¹² Para 5

Vague laws (or laws directed at specific individuals) may also be declared invalid on the basis that they violate the procedural aspect of the rule of law¹¹³. Similarly, retrospective laws violate the principle since they make it impossible for individuals to confirm their conduct to the law. Mokgoro J summarized these aspects of the rule of law in her concurring opinion in *President of the Republic of South Africa v Hugo*.¹¹⁴

The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to confirm his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individual.¹¹⁵

The substantive aspect of the rule of law dictates that the government must respect the individual's basic rights. It is not clear what kinds of basic rights will qualify for protection under the rule of law. Respect for human dignity, equality and freedom are repeatedly emphasized in the Bill of Rights. It seems logical that these ought also to be the rights protected by the rule of law. The inclusion of the rule of law in the founding provisions of section 1 of the 1996 constitution, therefore super-entrenches a 'mini-constitution'.¹¹⁶

However, as stated above, the specific provisions which concretise and implement the rule of law must be applied in legal disputes before the general norm is invoked. For example, as far as arbitrariness is concerned, section 9(1) of the constitution¹¹⁷ requires differentiation to be rationally connected to a legitimate government purpose. In so far as a law differentiates, thus provision of the Bill of Rights should therefore be applied before the principle of the rule of law. This means that the substantive aspects of the rule of law are unlikely to feature in the judgments of the courts, that is unless the more specific provisions that give effect to them are abolished.

4.2 The relationship between the rule of law and constitutionalism

Section 1 of the constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on supremacy of the constitution and rule of law.

¹¹³ But see *National coalition for gay and lesbian equity v Minister of justice* 1998 (6) BCLR 726 (W), 741 (referring to foreign authority illustrating the reluctance of courts hold a law void for vagueness)

¹¹⁴ 1997 (4) SA 1(CC)

¹¹⁵ Para 39-40

¹¹⁶ "Super entrenches" because s 1 is more difficult to amend than any provision of the constitution.

¹¹⁷ Act 108 of 1996

Constitutional supremacy dictates that the rules and principles of the constitution are binding on all branches of the state and have priority over any other rules made by the executive, the legislatures or the courts. Any law or conduct that is not in accordance with the constitution, either for procedural or substantive reasons, will therefore not have the force of law.

The idea or essence of constitutionalism and the rule of law overlaps, and so closely linked that they are often used interchangeably. Constitutionalism, as pointed out, is defined as the idea that government should derive its authority from a written constitution and that its powers should be limited to, and therefore cannot exceed those set out in the constitution. The main reason for the emergence of the notion of a government limited by substantive and procedural restraint seems to emanate in human being's painful experience of mankind's lack of compassion toward his fellow human being. This capacity of being inhuman, is directly related to the authority of man – whether an individual ruler or parliament over others. *Devenish*¹¹⁸ observes that a moral belief in human dignity is an essential ingredient of constitutionalism. The normative premise upon which constitutionalism emanate is therefore seen as a triumphant confirmation of the powerless, the oppressed, persecuted minorities and individuals.

In a constitutional state, democracy also encompasses limitation of majoritarian power. The binding effect of the provisions of a superior and entrenched constitution serves as the limiting framework within which the majority may exercise its authority. The operation of democracy in constitutional state is correctly described; it is submitted, by the following statement:

The consent of the governed is a value that is basic to our understanding of a free and democratic society yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the sovereign will is to be ascertained and implemented. To be accorded legitimacy, democratic institution must rest ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institution created under the constitution...a political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to

¹¹⁸ Devenish, GE (1998): A commentary on the South African constitution, Butterworths

legitimacy also rest on an appeal to moral values, many of which are embedded in our constitutional structure.¹¹⁹

Section 2 of the Constitution¹²⁰ gives expression to the principles of constitutional supremacy. It states that the constitution is the supreme law of the republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Section 8 further provides that the Bill of Rights has supremacy over all forms of law and that the Bill of Rights binds all branches of the state in addition to private individuals. For a supreme constitution to be effective, the judiciary should have the power to enforce it. Section 172 of the Constitution¹²¹ provides that, a court must declare any law or conduct that is inconsistent with the constitution invalid to the extent of its inconsistency. The court orders must be obeyed by the other branches of the state; according to section 165(5) an order or decision issues by a court binds all persons to whom and organs of state to which it applies. When the court uses its powers of judicial review to strike down an Act of Parliament, it is thought that in so doing it thwarts the will of the people.

According to *Dicey*,¹²² the purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with pre – announced, clear and general rules that is enforced by impartial courts in accordance with fair procedures. The rule of law requires states institutions to act in accordance with the law. It also means that the various organs of state must obey the law. The state cannot exercise power over anyone unless the law permits it to do so. This means that there must be a law authorizing everything the state does. Since the twentieth century, the meaning of the rule of law has been considerably developed, and currently some are using the term to indicate respect for civic and political rights or even social and economic rights. Others are concerned with the substance of law and argue that the essence of the rule of law is to be found in the “principle of legality” which requires decisions to be made by the application of known and general principle of law.

¹¹⁹ *Pharmaceutical Manufacturers Association of SA: in re: exparte president of the Republic of South Africa* 2000 (2) SA 674 (CC) para 79

¹²⁰ Act 108 of 1996

¹²¹ Act 108 of 1996

¹²² AV Dicey *An Introduction to the Study of the Constitution* 10 ed (1959) xxxv

The conception of Constitutionalism is bolstered by the specific entrenchment of the rule of law in the founding provisions of the constitution.¹²³ To a large extent, constitutionalism and the rule of law overlap. This has led some authors and judges to talk about the “constitutional state” in an attempt to combine the two principles.¹²⁴

A constitution limits the power of government, and a government may not use its power in such a way as to violate any of a listed of fundamental rights, instead it has a corresponding duty to use its power to protect and promote those rights. The rule and principles of the constitution are binding on all branches of the state. Any law or conduct that is not in accordance with the constitution, either for procedural or substantive reason, will therefore not have the force of law. The purpose of the rule of law, is as is constitutionalism, to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures. The rule of law requires state institutions to act in accordance with the law. The state must obey the law. The Rule of Law and the constitutionalism protect the individuals.

4.3 The compatibility of the rule of law, constitutionalism and justice, under the new dispensation

The idea of a rule of law, constitutionalism, and justice overlap, and so closely linked that they are often used interchangeably. Constitutionalism, as pointed out, is defined as the idea that government should derive its authority from a written constitution and that its powers should be limited to, and therefore cannot exceed those set out in the constitution.

The present South Africa is the product of negotiation and consensus by not less than twenty-six (26) political parties. The final constitution give power to the courts to review legislative and executive Acts. judges have not only the powers but also the duty to intervene when the majorities infringes unduly on individual or minority rights. Where the constitution does not explicitly confer reviewing power, the court has

¹²³ Act 108 of 1996

¹²⁴ A.V Dicey introduction to *the Study of the Law of the Constitution*+[1885] 10 ed (1959) xcvi-cli

nevertheless, on occasions, asserted its authority to do so. The new constitutional dispensation has introduced a constitutional state and democracy which encapsulates guarantees of minority and individual rights, and empowers the courts to review not only executive (as is the case in a majoritarian democratic setup) but legislative enactment as well.

The new constitutional dispensation has introduced a constitutional state and democracy, which departs radically from the old order of parliamentary sovereignty system of majoritarian democracy. A constitutional state is defined as a state in which constitutionalism prevails – in other words, a country in which the law is supreme and it embodies the following principles: the principle of legality and access to independent courts. The courts are the watchdog, they make sure that rule of law prevails. The main reason for the emergence of the notion of government limited by substantive and procedural restraint seems to lie in human being's painful experience of mankind's lack of compassion toward his fellow human being. Constitutionalism, as is the rule of law, provides a check upon the exercise of authority by the democratically elected majority. It also prohibits arbitrary exercise of power by a majoritarian government.

Before the 1993 constitutional dispensation, there was substantial debate in South Africa about the ethics of judicial service in a deeply unjust legal and political order. Many critics of apartheid argued that the legal system was so fundamentally flawed that judges with any sense of morality should have no choice but to resign. They argued that South African judges, whose hands were effectively tied by the doctrine of parliamentary sovereignty, had little power to do justice in the face of such repressive laws, while their service lent legitimacy to the racist, repressive system. The most prominent academic advocate of this position – the resignation of judges – was Raymond Wacks.

Despite the moral appeal of this position, other critics of the South African political and legal order defended judicial service and continued to look to the law for the protection of human rights. Their argument in favour of a judicial service, however necessary hinges on the assumption that judges were in fact to dispense justice, at least even if in the margins.

Chapter five

5 Conclusions

5.1 Findings

The study found that during (colonial)British rule, the courts were powerless, had no authority to pronounce on the validity of an Act of Parliament even where such Act violated the principle of the rule of law. Parliament had unlimited power to make and unmake any law. The parliamentary omnipotence was not limited by any bill of rights and its legislation could therefore not be tested by courts of law even if in conflict with fundamental rights.

During apartheid such violation of the rule of law and fundamental human rights escalated, and unfortunately many judges connived with the executive, in that they chose to adopt the view that their duty lay in the plain fact approach, because that approach was most likely to determine what in fact law was in accordance with the actual intentions of the majority of the legislators, who voted for the statute. But the legitimacy of that approach depended on a democratic theory of elected parliamentary representatives.

The rule of law did not apply to all citizens of South Africa during apartheid era, the laws were in the hand of minority only, and protected specific people. Parliament acted capriciously and arbitrarily, for example, the rule of law was violated when a non-judicial officer (e.g the executive) is given the power to order someone to be detained, as observed above. The rule of law, as applied or practised in the British parliamentary system of government affected South Africa as a British colony. South Africa adopted a British parliamentary system of government. The system undermined the proper operation of the idea of the rule of law, since absolute powers were given to parliament which in turn was controlled by the executive. Before 1994 the rule of law therefore provided little or no inhibition to the power of parliament. The apartheid government

ignored the rule of law and has continued legislating lamentable and draconian laws which grossly violated Human Rights.

The study also found that coming into force of the interim constitution on 27 April 1994, marked a constitutional revolution, which brought about a number of fundamental changes. It created a new fundamental legal order based on the principle of constitutional supremacy to which all branches of government are bound by, a constitution that includes a Bill of Rights designed to bring to an end centuries of state sanction abuse of human rights. The rule of law is also recognized in this new dispensation¹²⁵.

Today therefore, the noble ideas and principles encapsulated in the rule of law doctrine has found cogent expression in the constitution. Section 1(c) of the 1996 constitution as printed out above, provides that:

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

5.2.Synthesis

During colonial and apartheid period the application of the rule of law was thought of as having been satisfied once a particular action was performed in accordance with validly enacted law. The law was considered to be validly enacted when it has been enacted according to the prescribed procedures. The law could not be said to be invalid on substantive ground, that is, on the basis that the law was unjust or unfair. So the conception of the rule of law then differs from the current understanding of what it encapsulates. The current understanding of the application of the rule of law is that it encompass fairness and justice. It is apparently for this reason that now the rule of law and constitutionalism are sometimes used interchangeably.

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¹²⁵ See Section 1 of the constitution

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