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CAN JUDGES (AND OMBUDS) OVERREACH?

Can judges overreach? Taking a recent judgment by our Chief Justice at face value, the answer is an emphatic 'Yes'. He said about a majority judgment of his colleagues that it is 'a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament'. He went on to describe an order by the majority prescribing the procedural steps to be taken in Parliament in the event of a motion to impeach the President of South Africa as 'an unprecedented and unconstitutional encroachment into the operational space of Parliament by Judges.'[1] That is considerably stronger language than that used by Chief Justice Roberts in dissent in *Obergefell v Hodges,*[2] when saying:

'… for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. … Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.'

A more moderate tone perhaps, but the complaint is the same. This is judicial overreach. In the judicial context it is of course always the complaint of the disappointed minority view, but in the broader social context the complaint also arises – perhaps more frequently – in relation

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[1] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2017] ZACC 47; 2018 (3) BCLR 259 (CC) paras 223 and 254. Not surprisingly this brought forth a slightly pained response on behalf of the majority.

[2] *Obergefell v Hodges* 576 US … (2015)

to judicial decisions that generate strong public feelings. Obvious examples that spring to mind are the United States decisions in *Brown v Board of Education* and *Roe v Wade*, but the history of US constitutional law shows that it is a charge frequently made against the Supreme Court. President Jackson is reputed to have said about one order: 'John Marshall has made his decision: Now let him enforce it.'[3] The order was disregarded.

What about ombuds? Again I must answer 'Yes'. In 1985 one of our large banks was given financial assistance by the Reserve Bank, when a small subsidiary ran into financial difficulties. It was thought that this imperilled the financial system. Although the matter had been investigated at least twice before and related to issues before her office was constituted, our current Public Protector undertook a fresh investigation and recommended that the money – in excess of R1 billion – be recovered from a different bank that had acquired the original bank. Over and above that she recommended that the Constitution be changed so as to nationalise the Reserve Bank and confer upon it the power to promote balanced and sustainable growth and protect the socio-economic well-being of the citizenry. In effect the power to run the economy. In extraordinary proceedings the Reserve Bank itself challenged this by way

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[3] *Worcester v Georgia* 31 U.S. (6 Pet) 515 (1832).

of an urgent review and the recommendation was set aside on the grounds that it: 'trenches unconstitutionally and irrationally on Parliament's exclusive authority' and 'would pervert the separation of powers'. It was set aside as violating the doctrine of the separation of powers.[4] The review by the bank of her recommendation in regard to the recovery of the money was likewise successful.[5] The Public Protector in her personal capacity was ordered to pay some of the costs.

It would be easy to multiply examples. At one level one must accept that in marginal cases judicial views will differ, but when we speak of overreach we surely mean more than mere disagreement. It is a challenge to our concept of the fundamental role of the judge in a society structured, as all of ours are, on an understanding that there is an essential separation of powers between the judiciary and the other arms of government, the legislature, the executive and the administrative. There are countless judicial statements to this effect from many jurisdictions. I quote only one from South Africa. In the words of former Deputy Chief Justice Moseneke:

'It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of

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[4] *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) paras 43 to 46.
[5] *Absa Bank Ltd and Others v Public Protector* [2018] SAGPPC 2.

government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.'[6]

We read and agree with the first sentence in that quotation, but the problem lies with the second. Do we know the limits of judicial power or is there a proper normative framework that will enable us on a case-by-case basis to identify that boundary when the issue arises? Without that any decision on those limits will be ad hoc and the claim that it has a logical basis condemned as casuistic.

In recent years South Africa has experienced enormous pressure on the boundaries between the judicial on the one hand and the legislative, executive or administrative on the other because of the fractured and febrile state of our politics. The courts have become an arena for the determination of the political disputes of the day. There have been two successful challenges to presidential appointments to the office of National Director of Public Prosecutions. The first succeeded on the basis that the President failed to have regard to information that his choice suffered from a lack of integrity and had given dishonest evidence to a court and to a commission of enquiry.[7] The second succeeded on the basis that the resignation of the incumbent had been procured unlawfully

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[6] *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 93. See also Lord Hoffmann's statement cited with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 46.

[7] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).

and that the current incumbent was unlawfully appointed.[8] A similar challenge to a ministerial appointment as the Chief Executive of a state-owned enterprise likewise succeeded.[9] We have an appeal before us next term in which the former President was ordered to provide his reasons for firing the Minister and Deputy Minister of Finance, Messrs Pravin Gordhan and Mcebisi Jonas, on 3 March 2017, which led to South African bonds being downgraded to sub-investment grade, ie, junk. That order was made pending a review of those decisions, so, the decision potentially opens the path to judicial review of Cabinet dismissals and, one would assume therefore, Cabinet appointments. If that turns out to be the legal position, Donald Trump's cabinet members will look on South Africa with envy.

The Constitution says that it is the President who appoints the National Director of Public Prosecutions. However, in the second case involving that office, the court ruled that then President Zuma was conflicted because the new appointee would have to decide whether he should be prosecuted on historic corruption charges. It ordered that the deputy president should make the new appointment. The Constitutional Court has reserved judgment on whether to confirm this order. The

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[8] *Corruption Watch RF and Another v The President of the Republic of South Africa and Others; Council for the Advancement of the Constitution v The President of the Republic of South Africa and Others* [2017] ZAGPPHC 743; [2018] 1 All SA 471 (GP).

[9] *Democratic Alliance v Minister of Public Enterprise and others; Economic Freedom fighters v Eskom Holdings Ltd and Others; Solidarity Trade Union v Molefe and Others* [2018] ZAGPPHC 1.

criminal charges against former president Zuma have now been reinstated, but only after a protracted court battle resulting in an order by the Supreme Court of Appeal that their withdrawal by one of President Zuma's previous appointees was unlawful.[10] In a recent decision the High Court set aside the president's approval of an international treaty.[11]

Leaving the executive aside and turning to the legislature the issues around President Zuma have led the Constitutional Court to rule that Parliament failed to take steps to give effect to recommendations by the previous Public Protector that the President repay amounts spent on the upgrading of his private residence.[12] The case that led to the Chief Justice's comments quoted at the outset involved the Constitutional Court instructing Parliament to establish a procedure for impeaching the President. An earlier decision had held that the Speaker of Parliament had the power to conduct a secret ballot on a vote of no confidence, but did so on terms that clearly pointed in favour of her doing so.[13]

Failures in administration have also provided fertile ground for court interventions that press upon the boundary between legitimate judicial intervention and overreach. Most dramatically, since the

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[10] *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* [2017] ZASCA 146; 2018 (1) SA 200 (SCA).
[11] *Law Society of South Africa and others v President of the Republic of South Africa and Others* [2018] ZAGPPHC 4.
[12] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC).
[13] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC).

Constitutional Court ruled in 2013 that a contract for the distribution of social grants was unlawful,[14] it has been engaged in overseeing the processes, initially for a failed new tender,[15] and subsequently, for the takeover of responsibility for the distribution of social grants by the Post Office.[16] Throughout this process the contract that was set aside as invalid has continued to be performed, now long past its expiry date. Even the Constitutional Court has acknowledged that in undertaking this task it is 'pushing at its limits' its powers to grant just and equitable relief.[17]

These are not isolated instances. In the coming term we have a case challenging an order that the Eastern Cape government devise a programme for the rehabilitation and upgrading of rural roads, failing which various private bodies are authorised to do the work themselves and recover the cost from the provincial government. There are reports of decisions in the high court ordering government departments to build houses, repair schools, appoint teachers and in other ways remedy dysfunctional administration. A third one facing us next term is an endeavour to compel the Minister of Finance to publish a proclamation reducing the import duties on certain commodities.

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[14] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC).
[15] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC).
[16] *Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC intervening)* 2017 (3) SA 335 (CC).
[17] *Black Sash Trust* para 52.

It is not my purpose to criticise the outcome of any of these cases and in regard to those that are still wending their way through the courts it would be inappropriate for me to do more than describe them in order to illustrate how separation of powers issues are confronting the courts in South Africa. I express no view on how they should be resolved. But the fact that there are so many of them warrants us examining whether we have devised an adequate normative framework for adjudicating these issues.

The realm of public law here and internationally in the period since the end of the Second World War has been transformed, first by the Universal Declaration of Human Rights and since then by the adoption of a vast number of national and international human rights instruments. We have become so accustomed to this that we tend to overlook the fact that review on grounds of rationality, legality, proportionality and reasonableness, to use the common expressions one finds in most cases dealing with such issues, always raises separation of powers issues. Whenever a court is asked to decide a challenge on these grounds it is stepping into areas that under our constitutional arrangements are allocated to the other arms of government and to examine them to at least some degree on their merits.

Most jurisdictions around the world have relaxed the strict rules of standing that formerly restricted the ability to challenge the actions of

public bodies and government's exercise of public power. That probably started for most of our jurisdictions with the House of Lords decision in *GCHQ*,[18] but it is certainly so in South Africa under s 38 of our Constitution and it seems to reflect a wider trend.[19] In addition the 'off-limits' signs that previously existed, saying that matters of state security, foreign affairs and the exercise of prerogative powers were beyond the reach of the courts have been removed. In our case the Constitutional Court has ruled that all exercises of public power are justiciable, at least on the grounds of rationality. Initially that meant that every exercise of public power had to be rationally connected to the purpose for which the power was conferred[20] – a substantive rationality involving an objective decision, that is, it is for the court to decide if it regards the standard of rationality as having been met. That has now been extended to procedural rationality in the manner in which the decision has been made.[21] I add that review, at least of administrative action, is now available on the lesser ground of reasonableness.[22] So the scope for judicial intrusion into the affairs of government is very great.

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[18] *Council of Civil Service Unions v Minister for the Civil Service* [1983] AC 374; [1983] 3 All ER 935 (HL).
[19] *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552 at 562 on the basis of the applicant's sincere concern for constitutional issues. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1994] EWHC 1; 1995 (1) All ER 611; *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 para 170.
[20] *Pharmaceutical Manufacturers Association of SA and Another: in re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras 85-86.
[21] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC).
[22] Constitution s 33(1).

Probably because of our past and the need to redress past injustice and transform a severely fractured society, there has been little critical engagement with the scope of these exercises of judicial power from the academic world in South Africa, and that seems largely true of the academic community in other countries. Some voices raise questions about the appropriateness of this approach – a number of those voices being judges – but in general the lawyers, for whom it provides a ready source of work, and the academics, for whom it provides grist for articles, books and conferences, welcome it.

If there is criticism it tends to be that the courts do not go far enough in their decisions. That in turn reflects the fact that judicial review and human rights litigation has moved away from being viewed as existing to protect citizens against procedural abuses of state power and to protect against incursions into existing rights, to a position where they are merely tools in the armoury of those pursuing political ends or particular causes. Litigants turn to the courts with increasing frequency because they are unable to prevent policies with which they disagree from being implemented, or because they do not believe that they are able to garner sufficient political support for a particular cause. Recasting the matter as a challenge to policy on the grounds of rationality or lack of proportionality, or as the assertion of a right not hitherto perceived as being protected under the broad language of Bills of Rights, is seen as a

way of circumventing the political process and achieving goals more rapidly. A clear example of that occurred in Canada when the Supreme Court of Canada reversed its earlier decision on the constitutionality of the legislation criminalising assisting a suicide[23] and gave the government a year to amend the legislation setting out clear guidelines as to the nature and content of the amendments.[24] Unsurprisingly, the legislation tracked the judgment. What is to happen when a legislature says an emphatic 'No', as has occurred in the United Kingdom in regard to the same issue, when the campaigners for change turn to the courts to bring that change about?

It is difficult to see where the notion of the separation of powers setting limits to judicial action fits into this brave new world. That is said to be its purpose, as Justice Moseneke said in the passage I quoted earlier. But, when everything is justiciable, how can one speak of judicial limits? If everything is within the proper province of the judiciary, to be assessed against substantive standards such as rationality or proportionality or reasonableness, there seems little point in speaking of judicial limits. Once the matter is justiciable it either meets those standards or it does not. That is not a matter of the separation of powers, but is the result of applying the relevant standard of review to the problem at hand. True

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[23] *Rodriguez v Attorney-General of Canada* [1993] SCR 519 at 587-8.
[24] *Carter v Canada (Attorney General)* 2015 SCC 5; [2015] 1 SCR 331.

there is much talk of judicial deference in this regard, but that expression, when detached from its home in the United States of America, where it determines whether the decisions of administrative bodies on legal issues are reviewable on their merits, ie as being either right or wrong, is a meaningless banality. Outside its original context, which also extends to Canada, no case is ever decided because the court decides to defer to the decision-maker.

Absent any defined norms or a framework of reference that will enable courts to determine in a conventional judicial manner when they are precluded by separation of powers considerations from intervening in the decisions of the legislature, the executive or the state administration, the doctrine of the separation of powers is at risk of being one of those convenient explanations, bereft of practical content, plucked off the legal shelf to justify decisions, without anyone being able to tell when it applies and when it does not. If it is to be of assistance, I suggest that it requires us to revisit the idea that all exercises of public power are within the remit of the courts. Some concept of non-justiciability needs to be evolved to enable judges to identify when it is legitimate for the courts to involve themselves with the affairs of the other branches of the state and when they should hold that they are beyond judicial purview. Ad hoc decision-making is not good enough and abandonment of the principle would I suspect draw a strong reaction from the legislature and executive.

I raise this not simply as a jurisprudential puzzle. I have two major concerns. For some years now there have been repeated attacks on the courts in this country on the basis that they are intruding impermissibly in the political arena and especially that they are siding with opposition political parties to run a government by court order. That is a recipe for political interference with the judiciary, which, in view of the majority that the governing party has in the composition of the Judicial Service Commission, must be a cause for concern. It is also a concern that is not confined to this country. Recent events concerning the judiciary in Poland, Hungary, Venezuela and Kenya all highlight the scope for political action against the judiciary.

My other concern derives from the fact that many of the cases I have referred to stem from what a moment ago I referred to as 'the fractured and febrile state of our politics'. Those of you who have travelled to this conference from other jurisdictions may well have a general idea of the problems surrounding the alleged conduct of our former president and allegations of 'state capture' by a well-connected family, but the problems go deeper than that. Disputes over the alleged corrupt allocation of public tenders have been a staple of our courts since before the Zuma era. Our public services are in many areas in disarray, or simply dysfunctional, as we try to grapple with the challenges of a grossly unequal society in need of reform and transformation. It is

tempting for a court to step into this situation and trying by its orders to provide direction and assist in resolving these problems. Stretching the boundaries of the judicial function may seem to serve the greater good in those circumstances, but it does not address the problem of what is to happen as society begins to improve. Those broad and generous legal provisions will then be equally available to hinder, block and stultify change that is necessary. Government can be hamstrung as it struggles to address problems. Are we creating a rod for our own backs by ignoring the need to formulate a clear approach to separation of powers issues? Will we look back with regret on what were once hailed as legal advances? Not being equipped with a suitable crystal ball I cannot say, but I do say that the potential problems that are apparent need to be debated not ignored. If not we run a real risk of the courts being used to prevent us from reaping the democratic dividend of which one of our earlier speakers spoke with such passion this morning.

Thank you.