THE MEANING OF ‘ORGAN OF STATE’ IN SOUTH AFRICAN LAW

by

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SUMMARY

‘Organ of state’ as a constitutional concept was first introduced by the 1993 Constitution, in which it was defined as including any statutory body or functionary. In their interpretation of this notion, the courts and academic writers invoked the tests developed at common law in order to determine its meaning. The commentators, on the one hand, used a variety of tests. The courts, on the other hand, subscribed to what has come to be known as the ‘control test’. The 1996 Constitution followed with a comprehensive definition of ‘organ of state’. This notion is also employed in other laws by direct reference or incorporation of the definition in section 239 with slight adjustments. Regrettably, the limited approach developed by the court in their interpretation of the notion of ‘organ of state’ for the purposes of the 1993 Constitution has spilled over to the interpretation of the concept under the 1996 Constitution. The question is whether this is justifiable. The constitutional definition of ‘organ of state’ makes it clear that other institutions and functionaries are organs of state on the basis of what they are and others by virtue of the functions they are engaged in. Therefore strict adherence to the control test or any other test could unjustifiably limit the application of the Constitution.

KEY TERMS

Organ of state, public power, public function, the state, public body, state, governmental institution, statutory body, functionary, definition clause, public interest, control test, department of state, administration, constitutional power, constitutional function, public.
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ABBREVIATIONS

ILQ – International Law Quarterly
SALJ – South African Law Journal
TSAR – Tydskrif vir die Suid-Afrikaanse Reg
THRHR – Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
CILSA – The Comparative and International Journal of South Africa

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