

THE MEANING OF 'ORGAN OF STATE' IN SOUTH AFRICAN LAW

by

MOSES FANYANA MDUMBE

submitted in part fulfilment of the requirements for  
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF DH VAN WYK

JUNE 2003

## **ACKNOWLEDGEMENTS**

I owe a significant debt of gratitude to my supervisor Prof Dawid van Wyk for his scholarly guidance, support and for reading the drafts with a critical and discerning eye at various stages of the writing of this thesis. Working with Prof Van Wyk was a great honour and privilege.

I am also enormously grateful to my colleagues and friends in the Department of Constitutional, International and Indigenous Law at Unisa with whom I discussed and debated my ideas. Prof Margaret Beukes and Mr Dire Tladi require specific mention.

My thanks is also due to Prof Gretchen Carpenter and Mrs Isabeau Southwood who took time to read and comment on the manuscript. I benefited immensely from their feedback.

Thanks also to Prof Neville Botha for his unwavering support.

Grateful thanks to Ms Thea De Villiers for her typesetting expertise.

Lastly my family and friends for their support and encouragement.

Any mistakes in the text are mine.

Moses Fanyana Mdumbe

Pretoria

2003

## **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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