

CHAPTER 1

STATEMENT OF THE PROBLEM, OUTLINE OF THE DISSERTATION, THE IMPORTANCE OF THE DEFINITION CLAUSE TO CONSTITUTIONAL INTERPRETATION AND DEFINING ORGANS OF STATE PRIOR TO 1994

1 STATEMENT OF THE PROBLEM

South African law has changed drastically over the years. The commencement of the 1993 Constitution,¹ which was later superseded by the 1996 Constitution,² marked an end to the constitutional system of parliamentary sovereignty which had characterised our law since 1910. It also signalled the beginning of a new era based on the supremacy of the Constitution. However, one issue that gave rise to divergent opinions under the erstwhile constitutional system, continues to be the subject of debate under both the interim Constitution and the 1996 Constitution, namely the meaning of organ of state.

Prior to 1994, various statutes were promulgated by Parliament which applied to ‘the state’ or to ‘organs of state’.³ In addition, the courts had judicial review powers in relation to the conduct of organs of state. Both these factors and many others⁴ ensured the continued importance of identifying organs of state. Since there was no overarching definition of organs of state, both the courts and academic writers approached the issue differently. Both the courts and legal writers recognised certain institutions as ‘obviously’ public, such as departments of state and provincial governments. However, as regards other institutions, various factors were used by the courts and the commentators to establish whether an institution formed part of the state for the purposes of some

¹ The Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the interim Constitution).

² The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter the 1996 Constitution).

³ See for example section 8A(2)(b) and 8B(1) of the Explosives Act 26 of 1956 and section 9E (8A)(a) of the Income Tax Act 58 of 1962. See also the discussion in paragraph 4.2 below.

⁴ See paragraph 4.3 below.

legislation or judicial review.

The disadvantage of this was that the state could define itself through parliamentary supremacy and could exclude judicial review of organs of state by the notorious ouster clauses.

Then came the interim Constitution. Amongst other changes, it introduced the notion of 'organ of state' to signify institutions of the state to which it applied. The definition of the expression 'organ of state' included statutory bodies or functionaries.⁵ This definition, particularly the concept of 'statutory body', was so ambiguous that the courts and the commentators had to consult factors outside the text of the Constitution to determine its meaning. Interestingly, the courts subscribed to what has come to be known as the 'control test' to identify organs of state for the purposes of the interim Constitution.

On the heels of the interim Constitution, came the 1996 Constitution with its peculiar definition of 'organ of state'. The definition of 'organ of state' in the 1996 Constitution includes departments of state or administration, institutions or persons exercising or performing constitutional powers, and bodies or functionaries exercising or performing statutory powers or functions but expressly excludes courts.⁶ However, despite this wide definition of 'organ of state' in the 1996 Constitution, the construction of the notion of 'organ of state' in the interim Constitution namely that 'organ of state' referred to institutions which formed part of the public service and that outside the public service, it referred to all institutions or functionaries that were under the control of the state, continues to be used by the courts in their interpretation of organ of state in the Constitution.

The basic question is: has the 1996 definition of 'organ of state' brought about a new dimension to the 'orthodox' view of organ of state developed by the courts in their interpretation of the concept

⁵ Section 233(1)(ix) of the interim Constitution.

⁶ Section 239 of the 1996 Constitution.

under the interim Constitution or does it effectively replicate the traditional view?

2 OUTLINE OF THE DISSERTATION

In the ensuing discussion the development of our jurisprudence as regards defining organs of state will be considered under four themes.

In this Chapter it will be shown that prior to 1994 a conclusion that an institution was an organ of state had serious implications for the institution concerned. It could mean, for instance, that it was bound by the provision of some statute or that it was subject to principles of administrative law developed by the courts to constrain the exercise of public power by the institution or functionary in question. It will further be shown that Parliament could define any institution as an organ of state in a statute. Moreover, it could use any concept in doing so. In those instances where no such definition could be found, it will be argued that both the courts and commentators used a variety of factors to determine the status of the institution concerned. It will further be shown that the courts, in difficult cases, relied heavily on the views of academic writers in this regard. I will emphasise what seems to be the most important feature of the jurisprudence developed at common law and through the interpretation of legislation, namely that the courts and writers did not confine themselves to a single criterion.

In Chapter 2 the notion of 'organ of state' under the interim Constitution will be examined. The construction of this notion will be preceded by reference to constitutional provisions which imposed duties on organs of state. Next, the extensive interpretation of this concept by writers on the subject will also be discussed. This will be followed by the judicial interpretation which restricted the scope of application of the provisions of the interim Constitution to institutions controlled by the state. I conclude that there was no consensus between the commentators and the courts as to which bodies and functionaries were bound by the provisions of the interim Constitution.

Chapter 3 looks at the ‘new’ definition contained in section 239 of the Constitution. Again, it is argued that whether an institution or functionary is an organ of state depends on whether it falls within the purview of the definition. Further, it is shown that the new concepts of ‘public power’ and ‘public function’ have long been used in English, American and Indian jurisprudence and that the interpretation of these concepts by the writers and the courts in these countries could prove invaluable in the development of our own jurisprudence in relation to these terms. As concerns decided cases, it will be shown that the courts are swinging like a pendulum between the restrictive ‘control test’ and the wide conception of organ of state contained in section 239. The conclusion I reach is that the ‘control test’ should not be used as a sole or decisive criterion for determining whether a power or a function is public.

Chapter 4 considers the incorporation of the notion of ‘organ of state’ or elements of the definition of ‘organ of state’ into (i) legislation mandated by or incidental to some or other provision of the Constitution and (ii) other legislation. It is argued here as well that the use of the ‘control test’ in the interpretation of these statutes could limit their scope of application unjustifiably and thus should therefore be avoided.

In Chapter 5 I conclude that the control or other tests are no longer the defining features when dealing with the notion of ‘organ of state’ in section 239 of the Constitution. It is argued that any institution or functionary that falls within one of the categories set out in the constitutional definition is an ‘organ of state’ for the purposes of the Constitution and that it is therefore unnecessary to impose other tests which may have some role but not a general one.

3 THE IMPORTANCE OF THE DEFINITION CLAUSE TO CONSTITUTIONAL INTERPRETATION

One of the important consequences of the inclusion of the definition of ‘organ of state’ in both the

interim Constitution and the 1996 Constitution relates to its effect on constitutional interpretation. Constitutional interpretation involves attaching meaning to the words and provisions of the Constitution. How should one interpret the Constitution? As a general proposition, constitutional interpretation should begin with the constitutional text. Since the constitutional text includes not only substantive provisions dealing with fundamental rights but also other provisions that may assist in its interpretation, for example, the preamble and the definition clause, these should be consulted first.⁷ The point is that the Constitution must be interpreted as a consistent whole (*ex visceribus actus*). Obviously, the usefulness of these intratextual aids to constitutional interpretation depends on the information they contain. The approach suggested here is not new, it has long been used in statutory interpretation. This brings us to another important issue – the application and usefulness to constitutional interpretation of rules of statutory interpretation relating to definition clauses developed prior to the advent of our new constitutional democracy. These rules apply to constitutional interpretation because (i) although the Constitution is a statute *sui generis*, it remains a legislative instrument and (ii) rules of statutory interpretation developed by the courts have not been rendered nugatory by the adoption of the Constitution, provided they are consistent with it.⁸ Next, we consider the jurisprudence relating to definition clauses in general.

3.1 Rules of statutory interpretation relating to definition clauses

Although the definition clause in the 1996 Constitution is shorter compared to the definition clause in the 1993 Constitution⁹ and that of most Acts of Parliament,¹⁰ it serves a similar purpose to the

⁷ Other provisions that may be included here are section 39(1) and (2), dealing with the interpretation of the Bill of Rights and legislation, and section 40 dealing with inconsistency between the texts of the Constitution.

⁸ See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 88; See also *S v Zuma* 1995 5 BCLR 401 (CC) at 17 where Kentridge J stated that rules of law which have been applied by the courts prior to the commencement of the interim Constitution continue to be useful and contain much of lasting value.

⁹ Section 233 of the interim Constitution contained fourteen definitions.

¹⁰ For examples see section 2 of the Interpretation Act 33 of 1957, which has 18 definitions, and section 213 of the Labour Relations Act 66 of 1995 with 40 definitions; for more recent examples see section 1 of the Promotion of Access to Information Act 2 of 2000, which contains 32 definitions and section 1 of the Promotion of Administrative Justice Act 3 of 2000, with a meagre 13 definitions.

definition clauses in other legislation, namely to delineate and define the words used in the Constitution. Definition clauses usually contain a proviso that unless the context indicates otherwise, the definition of the term applies. First, words that have been defined in legislation acquire a ‘new meaning’ or as Du Plessis calls it, a technical meaning, and are to be understood, not in their ordinary sense, but as defined.¹¹ This rule applies to the interpretation of a supreme Constitution as well.¹² A deviation from the meaning ascribed to a term or concept by the definition clause would be justified only if it is clear that the defined meaning is not the correct interpretation within the context of a particular provision. Further, a court may not completely ignore the definition of a term in a statute because it is vague or obscure. It is the duty of the court to give some meaning to it.¹³ These rules commend themselves when dealing with the definition clause in the Constitution.

Since the usefulness of the definition of a term in legislation or a Constitution depends on the information it contains, this may explain why the courts were readily prepared to go beyond the text of the 1993 Constitution when interpreting ‘organ of state’ in section 233(1)(ix). This definition provided very little assistance, if any, when dealing with this notion under the 1993 Constitution. As a result, the courts were forced to look outside the text of the Constitution to determine what was meant by ‘organ of state’ for the purposes of that Constitution. However, the same cannot be said of the definition of ‘organ of state’ in the 1996 Constitution. The definition of ‘organ of state’ in the 1996 Constitution is wider compared to its predecessor in the 1993 Constitution but, surprisingly, the courts continue to interpret it restrictively. They approach the concept almost as if it is not defined in the 1996 Constitution. Hence, it cannot be too strongly emphasised that the abovementioned rules should be adhered to when dealing with the definition clause in the Constitution. It is correct that the definition ascribed to a term or concept may not be a panacea for all the interpretive difficulties raised by a particular concept, as the definition may itself require

¹¹ See Du Plessis *Re-interpretation of Statutes* (2002) at 204, See also Devenish *Interpretation of Statutes* (1992) 115–6 and De Ville *Constitutional and Statutory Interpretation* (2000) 104–5.

¹² Du Plessis and Corder at 94.

¹³ Du Plessis at 204.

further definition. However, as stated, the courts have a duty to apply the definition provided. This could contribute to consistency and certainty in the approach of the courts. Thus key terms and concepts that have been defined in the Constitution should be understood in accordance with that definition; the courts cannot ignore the meaning attributed to a concept by the Constitution in favour of a more restricted or even a wider meaning; when it comes to constitutional interpretation, the first question should always be: what does the Constitution say about interpretation? This approach is necessary as it necessitates the consideration of intratextual factors to constitutional interpretation and also allows the courts to be guided by the Constitution itself during the process of interpretation. These rules should be adhered to by the courts when dealing with the concept of 'organ of state' in the 1996 Constitution.

4 DEFINING ORGANS OF STATE PRIOR TO 1994

4.1 Introduction

The difficult issue of identifying or defining organs of the state is not something new. Prior to 1994 both the courts and the legal writers grappled with the problem. The reasons for this are not hard to find. Despite the existence of a presumption that the state was not bound by its own legislation, there existed a number of statutes that specifically applied to or bound the state. Secondly, a variety of legal questions raised in the courts, such as who can institute an action on behalf of the state or which institutions are subject to administrative law review ensured the continued importance of distinguishing organs of state from other institutions. The doctrine of parliamentary supremacy added another dimension to the problem. Sometimes statutes contained a definition of the organs of state sought to be bound. In other statutes no such definition was included. It was therefore left to the courts to define the institutions of the state to which the statute applied. The views of academic writers had an important role to play in this process of interpretation.

In the following paragraphs it will be shown that under the erstwhile doctrine of Parliamentary supremacy (i) the state could define itself in any manner it chose, (ii) the commentators recognised certain institutions as organs of state by virtue of their nature and that in those cases where the institution concerned was not self-evidently governmental, they used a variety of criteria to ascertain the status of the institution concerned; and (iii) that the courts, too, did not subscribe to a single test when dealing with institutions such as parastatals, local government bodies and central banks.

4.2 The definition of organs of state in legislation

Between 1910 and 1994 South Africa followed the so-called Westminster constitutional system with its doctrine of legislative supremacy.¹⁴ This meant that Parliament could legislate on any matter and no other institution or person could override or set aside legislation made by Parliament. As far as the definition of organs of government was concerned, the doctrine of legislative supremacy had the effect that Parliament could define institutions of the state in any terms it chose. During this period, various statutes existed which applied to the state or whose provisions had a bearing on the state. The State Liability Act¹⁵ is the clearest example of the former and section 24 of the Eskom Act¹⁶ an example of the latter. In some statutes the concept of ‘the state’ was defined. In others it was not. To make matters worse, there was no consistency in the use of terminology relating to the state.¹⁷ The Rating of State Property Act¹⁸ clearly illustrates this. In this legislation, the purpose of which was to repeal certain Acts granting exemption in respect of certain state property from rates

¹⁴ The three South African Constitutions in this era, namely the South Africa Act of 1909, the Republic of South Africa Constitution Act 32 of 1961 and the Republic of South Africa Constitution Act 110 of 1983 all accorded superior status to Parliament. For a historical overview of the rise of legislative supremacy see Boule, Harris and Hoexter *Constitutional and Administrative Law* (1989) at 117–49 and Currie and Klaaren *The New Constitutional and Administrative Law Vol One* (2001) at 45–51.

¹⁵ The State Liability Act 20 of 1957.

¹⁶ Section 24 of the Eskom Act 40 of 1987 provided that ‘Eskom is hereby exempted from the payment of any income tax, stamp duty, levies or fees which would otherwise have been payable by Eskom to the State in terms of any law (excluding a law regarding customs and excise or sales tax)’.

¹⁷ See Baxter *Administrative Law* (1984) at 94–101. In this section of his book on administrative law, Baxter discusses the concept of ‘the state’, ‘the government’, ‘the administration’, and ‘public authorities’.

¹⁸ Rating of State Property Act 79 of 1984.

levied on immovable property by local authorities,¹⁹ the legislature used both ‘governmental institution’ and ‘state’ to identify organs of the state bound by this legislation. In addition, both concepts are specifically defined in section 1 as follows:

‘governmental institution’ means, subject to subsection 2(a), any board, commission, body, university, technikon, school, or other institution established by or under any Act of Parliament or ordinance of a province and controlling or being entitled to control by virtue of any such Act or ordinance funds accruing to it as a whole or partly from moneys appropriated by Parliament or provincial council for that purpose, and includes any institution declared under subsection 2(b) of this section as a governmental institution for the purposes of this Act.

‘State’, on the other hand, is defined as including (a) the department of Posts and Telecommunications and (b) a provincial administration.

Although the definition of ‘governmental institution’ is badly drafted, it distinguishes between five types of ‘government institutions’. The first category, the universities, schools, commissions et cetera are organs of state by virtue of their nature. Next, the Act casts the net wider. It provides that statutory bodies are also organs of state. So too, are institutions controlled by virtue of legislation or funded from the public purse. Furthermore, the Minister can declare any institution established by an Act of Parliament or ordinance of a province as a governmental institution.²⁰ Undoubtedly, this is a very wide definition of institutions of government. Most importantly, the lawgiver used three different tests to identify and bring other institutions within the purview of the Act. These tests are whether the institution concerned is a creature of statute, whether it is funded by the state and whether it is controlled in terms of legislation.

In our law, it had long been accepted that departments of state and provincial authorities exercise

¹⁹ ‘State property’ is defined in section 1 of the Act as immovable property the ownership of which vests in the State or a governmental institution.

²⁰ See section 1(2)(b) of the Act.

public power and are thus organs of state.²¹ The inclusion of the department of Posts and Telecommunications and provincial administration confirms this view.

4.3 The understanding of organs of state by common law writers

Before 1994, academic lawyers also contributed immensely to the understanding of institutions and persons which formed part of the state. They did this by examining the use of the concept of ‘the state’ for internal purposes as opposed to its use in international law. There were a number of reasons for the interest in the subject. First, as stated, statutes generally referred to the state and ascribed the conduct of certain persons and institutions to the state.²² Secondly, it was said that constitutional and administrative law regulated the relationship between the state and society.²³ Thirdly, changes in the functions of government, particularly the performance by the state of activities traditionally associated with the private sector, ensured the continued vitality of the question: which institutions form part of the state?²⁴ Lastly, and most importantly, the conduct of organs of state could be challenged in the Supreme Court by means of judicial review unless it was expressly excluded by legislation.²⁵

As mentioned above, for the purposes of domestic law the concept of the state was used in a generic sense to refer to all institutions of government. Obviously, this did not answer the question which institutions or persons formed part of the state. There was a consensus among public lawyers that the state comprised legislative, executive, and judicial organs.²⁶ However, as pointed out

²¹ See Baxter at 100; Boule, Harris and Hoexter at 247 and for a more recent version see Hoexter and Lyster (Currie ed) *The New Constitutional and Administrative Law Vol Two* (2002) at 92. See also *S v Twala and Others* below.

²² See Baxter “‘The state’ and other basic terms in public law’ 1982 *SALJ* 212 at 223. See also D’Oliviera ‘State Liability’ in *LAWSA* (1997) who analyses the concept ‘the state’ in the context of the State Liability Act 20 of 1957.

²³ Baxter *ibid* and Boule, Harris and Hoexter at 1.

²⁴ Boule, Harris and Hoexter at 247.

²⁵ See Boule, Harris and Hoexter at 241 and 246–7 and Hoexter and Lyster at 92.

²⁶ See D’Oliviera at 147 para 218 and 161 para 230. See also Currie and Klaaren at 4. These authors express a view that constitutional law is concerned with principal organs of state, namely the legislature, the executive, the

above, the complex nature of the contemporary state makes it more difficult to determine the form and nature of the variety of agents through which state functions are performed. For example, there exists a myriad of institutions such as public corporations, institutions performing functions in terms of an outsourcing agreement, regulatory bodies and so on. Are these institutions part of the state and if so on what basis? Even prior to 1994, administrative lawyers grasped the nettle and tried to answer these difficult questions.

4.3.1 Formal and material tests

The first detailed discussion of this issue is that by Wiechers.²⁷ In his discussion of the so-called ‘subjects’ of the administrative law relationship, Wiechers stated that one of the subjects in an administrative law relationship is an administrative government organ, which he defines as an organ of state vested with government authority.²⁸ According to Wiechers, a finding that an institution was an organ of state meant that one was concerned with an administrative-law relationship which in turn made administrative-law principles applicable to it. Further, he suggested a variety of tests that could be used to determine whether an institution or functionary was an organ of state or not. These tests can be divided into two broad categories, namely formal and substantive tests.

4.3.1.1 Formal tests

According to Wiechers, the first question to be asked was whether the organ had been created by statute.²⁹ If not, it was certain that the organ concerned was not an organ of government. The second formal test was to enquire whether the organ in question was integrated in some hierarchy of authority in the state, that is, whether it was closely linked with the administrative organisation as

administration and the judiciary.

²⁷ Wiechers *Administrative Law* (1985).

²⁸ Id at 66.

²⁹ Id at 67.

a whole.³⁰ To determine whether there was such a link, it was asked whether a superior administrative government organ had control over the internal operations, procedures and action of the organ in question.³¹ In addition, the nomination, appointment of officials, discipline and exercise of authority by a superior government body was considered to be indicative of the existence of such a link.³²

4.3.1.2 Material tests

The material tests looked at the nature of the activity performed by the body concerned: if the organ performed a public function, it was an organ of state.³³ Secondly, the fact that the body in question was the bearer of government authority was considered to be a strong *indicium* that it was an organ of state.³⁴

Wiechers did not confine his investigation to the tests that could be used to identify organs of state but also inquired into the status of controlling bodies of professions such as the law society. According to him, law societies are organs of state because they are vested with government authority, they regulate entry to the law profession and they are creatures of government.³⁵

4.3.2 The ‘public interest’ test

³⁰ Ibid.

³¹ Ibid.

³² Id at 68.

³³ Ibid.

³⁴ Id at 68–9.

³⁵ Id at 69–70. It is important to note that Wiechers also defines state authority as the power to act coercively.

Another significant contribution to the understanding of state organs was made by Baxter.³⁶ In his discussion of public authorities, Baxter stated that identifying organs of state should not be a problem, since many institutions had long been accepted as such.³⁷ With the ever-increasing involvement of the state in matters traditionally associated with private bodies, Baxter formulated three tests that could be used to distinguish between private and public bodies. First, he suggested that the fact that the institution is staffed or funded from public resources could shed light on whether it is an organ of state or not.³⁸ Further, he argued that none of the tests suggested by Wiechers was necessarily conclusive.³⁹ He then supplemented them with what he called the ‘public interest test’. According to him, this test required an inquiry whether the institution concerned was under a duty to act in the public interest and not simply in its own private interest.⁴⁰ He continues in a footnote to clarify that this ‘public interest’ test means a duty to advance the general interest of the community directly or indirectly.⁴¹

Again, the ‘public interest’ test must be seen against the wide meaning ascribed by Baxter to ‘the state’ for internal purposes. According to him, the state refers to all organs, instruments and institutions which manage the affairs of the public in the public interest.⁴² He further points out that such an expansive definition is necessitated by the existence of a myriad of institutions which operate in the public interest and which could therefore be considered to be part of the state.⁴³

This test was successfully used in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*⁴⁴ where it was held that a decision of the Johannesburg Stock Exchange (the JSE) was reviewable on the ground that the JSE was under a duty to act in the ‘public interest’. The question

³⁶ Baxter *Administrative Law* n 17 above.

³⁷ Id at 100.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid at n 51.

⁴² See Baxter “‘The state’ and other basic terms in public law’ n 22 above at 225.

⁴³ Ibid. See n 105.

⁴⁴ 1983 3 SA 344 (W).

raised in this case was whether the Stock Exchange Act 7 of 1947 imposed a duty on the JSE to adhere to its own rules and principles. Goldstone J identified four sections in the Stock Exchange Act from which an inference could be drawn that such a duty existed. First, the stock exchange could only be licensed in the public interest (s 4(1)). Secondly, the rules of the stock exchange had to be published in the *Government Gazette* so that the public as a whole could be given notice of such rules (s 8(4)). Thirdly, interested parties could object to such rules after publication thereof in the *Gazette* (s 8(6) and (7)). Lastly, the rules were designed to ensure that the stock exchange is carried on with due regard to the public interest (s 8(1)(n)).⁴⁵ This was so despite the fact that the stock exchange was not a statutory body. The existence of a duty to act in the public interest distinguished the stock exchange from other financial institutions and clearly brought it within the definition of organ of state.

The three tests suggested by Baxter supplemented those used by Wiechers, with the result that bodies funded by the state, whose employees were also employees of the state and those who were required to perform their functions in the public interest, were organs of state. Boule, Harris and Hoexter remind us, though, that the public interest test may beg the question in that the conclusion that a body is under a duty to act in the public interest could well be based on the fact that it had already been recognised as an organ of state.⁴⁶

Other commentators discussed the notion of the ‘state’ in other contexts as well, for example in the context of state liability.⁴⁷ D’Oliviera, for instance, argued that ‘the state’ as used in state liability refers to the executive branch of the state and excludes the other two branches of government.⁴⁸ The confusion arising when identifying institutions of the state can be illustrated by another assertion

⁴⁵ Id at 364B–D.

⁴⁶ Boule, Harris and Hoexter n 14 above at 247.

⁴⁷ D’Oliviera n 22 above.

⁴⁸ Id at 147 para 218.

made by D'Oliviera that the local level of administration⁴⁹ fell outside the scope of the State Liability Act because bodies at this level were considered to be ordinary juristic persons.⁵⁰ Further, he argued that when the state divests itself of the administration of an institution as is the case with public corporations, the institution concerned ceased to be part of the 'the state'.⁵¹ Moreover, according to him ministerial control and the obligation to submit reports to Parliament, did not signify organic connection with the state, particularly where the institution concerned used its own funds.⁵²

4.4 Judicial approach

A cursory glance at cases decided prior to 1994 reveals that the courts were not consistent in their treatment or understanding of 'organ of state'. In some cases the courts defined the notion of organ of state widely, in others, very restrictively. In other instances, the courts resorted to the tests discussed above to determine whether an institution was an organ of state. As will be shown shortly, this was particularly so in those cases dealing with public corporations. In this regard I propose to show that the courts did not subscribe to a single criterion in identifying organs of state.

The orthodox view that the state comprised the legislature, the executive and the judiciary was confirmed in *Die Regering van die Republiek van Suid Afrika v S.A.N.T.A.M Versekeringsmaatskappy Bpk.*⁵³ In this case the government of the Republic instituted an action against an insurance company for the recovery of a certain amount of money ceded to the state. An exception was taken on the basis that 'die regering' (the government) was not a juristic person but merely an organ of state exercising executive functions on its behalf. The money which the government sought to recover was due to the state and not to one of its organs. The argument

⁴⁹ D'Oliviera defines the third or local level of administration as it existed then as comprising divisional councils, regional services councils, town councils, health committees and other similar bodies. See 161 para 231.

⁵⁰ Id at 162 para 232.

⁵¹ Id at 163 para 233.

⁵² Ibid.

⁵³ 1964 1 SA 546 (W).

basically was simply that an organ of state could not be equated with the state.

The court rejected this argument, holding that, although the Government was an organ of state, it was a juristic person capable of suing and being sued.⁵⁴ The court emphasised that even though the state had juristic personality, it performed its functions through its organs, or, as the court put it:

The state has many facets, executive, legislative, and judicial, and accordingly where rights and duties arise similar to those of the ordinary juristic person, natural or otherwise, it is expedient that the Government, i.e. the executive power, should be considered as the embodiment of the State's position in such regard.⁵⁵

In *S v Tromp*,⁵⁶ a case dealing with the crime of contempt of court, the court held that the state had many departments, or as they had frequently been styled, manifestations.⁵⁷ According to the court, the erstwhile South African Railways and Harbours was such a department⁵⁸ and thus formed part of the state and so did the police. This is apparent from the conclusion reached by the court that criticism of the state in relation to a prosecution based upon information from the police might well be directed against the police in their capacity as servants of and thus as representatives of the state.⁵⁹

In *S v Twala and Others*⁶⁰ the court defined organs of state, in the context of the crime of sedition, widely. The court held that:

As regards the authority (*majestas*) of the State, one must bear in mind that in our constitutional set-up the Government's (or State's) authority in South Africa is exercised through its various organs, to wit,

⁵⁴ Id at 547E–F.

⁵⁵ Id at 548A–B.

⁵⁶ 1966 1 SA 646 (N).

⁵⁷ Id at 654B.

⁵⁸ Ibid.

⁵⁹ Id at 654E.

⁶⁰ 1979 3 SA 864 (T).

Departments of State, Provincial Administrations, local authorities, statutory bodies etc. Assailing the authority of any one of these organs in effect will therefore be to assail the authority of the Government/State.⁶¹

The court held that statutory bodies were organs of state. The term ‘statutory body’ relates to every institution created by statute. The problem with this type of reasoning is that it could bring all institutions created by legislation, for example, companies, the Bible Society established in terms of the Bible Society Act 15 of 1970, and so on, within the scope of the term ‘the state’. Various tests were used by the courts to limit the scope of the term and to distinguish between statutory bodies that formed part of the state and those that did not. These tests can be illustrated by reference to the decisions of the courts in *Banco De Moçambique v Inter-Science Research and Development Services*,⁶² *Greater Johannesburg Transitional Metropolitan Council v Eskom*⁶³ and *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* discussed earlier.⁶⁴

In *Banco De Moçambique v Inter-Science Research and Development Services*, the applicant sought an order setting aside the attachment of moneys standing to its credit in the books of account of the Bank of Lisbon. On behalf of the respondent it was argued that the applicant was an organ or department of government and that its assets could be attached in satisfaction of the debt of the government which created it.

Therefore, the question before the court was whether the Banco De Moçambique was an organ of state. The court, per Goldstone J, was of the view that in determining the nature of the relationship between the applicant and the Government of Moçambique, both South African and Moçambican law were relevant.⁶⁵ Although the court does not mention these principles of South

⁶¹ Id at 870G–H.

⁶² 1982 3 SA 330 (T).

⁶³ 2000 1 SA 866 (A).

⁶⁴ *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* n 44 above.

⁶⁵ Id at 335D–F.

African law, it seems they relate to the functions, activities and degree of control exercised by the government over the activities of the applicant.⁶⁶ The Moçambican law relevant to the enquiry was the Decree Law 2 of 1975 in terms of which the applicant was formed.

The court's initial remarks about the functions of the applicant and its relationship with the executive belied the final conclusion arrived at by the court as regards its status. First, the court held that the main functions of the applicant were that of a central bank and a Government Treasury and that in carrying out its functions, it was obliged to further the national interest of Moçambique in accordance with the broad government policy and to give advice to the government in relation to that policy.⁶⁷ In addition, the court found that the applicant was controlled by the government by virtue of its exclusive powers of appointment to the governing bodies of the applicant and by its power to veto the decisions taken by the applicant.⁶⁸ The court then turned to the question whether the bank was an organ of state. The paucity of judicial pronouncements on the issue forced the court to seek guidance elsewhere.

It referred to an article by Moorthy,⁶⁹ who had investigated whether the Malaysian Oil Corporation established by an Act of Parliament, was an agent or servant of the state. According to him, whether a corporation is an organ of state would depend on a variety of factors, such as the provisions of the constituent legislation, the degree of control exercised by the executive over the corporation concerned and whether the functions performed by the corporation are government functions.⁷⁰ Having said that, Moorthy then summarised the tests used by the courts to determine whether a statutory corporation was an instrumentality of the government. These were: whether the body had any discretion of its own; if it had, then the degree of control exercised by the executive became important; whether the property vested in the corporation was held by it for and on behalf

⁶⁶ Ibid. See 335F–H.

⁶⁷ Id at 337A–B.

⁶⁸ Id at 337D–338C.

⁶⁹ Moorthy VK 'The Malaysian Oil Corporation – is it a Governmental Instrumentality?' 1980 *ILQ* 638.

⁷⁰ Id at 639.

of the state; whether the corporation had financial autonomy; and whether its functions were governmental functions.⁷¹

Further, Moorthy pointed out that although the courts applied all these tests to resolve the issue, they have tended to regard the test of control as the most important factor which rendered the functional test less significant.⁷²

The court, strongly influenced by the views expressed in this article and the cases referred to by the author, held that although the Banco de Moçambique was under the control of the state and though its decisions could be vetoed by the state, it had a discretion in relation to all its activities; its property was held solely by it; it had limited financial autonomy in relation to its activities as a commercial banker and that at least some of its activities were non-governmental.⁷³ The court concluded, on the basis of these factors, that the Bank was an agent to which was entrusted a number of governmental functions, and not an organ of government.⁷⁴ The court further observed, *obiter*, that the commercial banking activities of the applicant made it less an organ of state than the South African Reserve Bank.⁷⁵

Subsequent to this decision, Goldstone J had opportunity to consider the status of another financial institution – the Johannesburg Stock Exchange – in *Dawnlaan Beleggings supra*.⁷⁶ In this case the court found that although the Stock Exchange was not a statutory body, its decisions were reviewable because it was required by legislation to perform its functions in the public interest.⁷⁷

Recently, the question whether a municipal council is part of the state was raised in the Supreme

⁷¹ Id at 640–1.

⁷² Id at 641.

⁷³ 344A–D.

⁷⁴ Id at 343G–H and 344D.

⁷⁵ Ibid.

⁷⁶ *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* n 44 above.

⁷⁷ For a discussion of this case see p 13–14 above.

Court of Appeal in *Greater Johannesburg Transitional Metropolitan Council v Eskom*.⁷⁸ In this matter the appellant, the Greater Johannesburg Metropolitan Council assessed the respondent, Eskom, to pay the regional establishment levy provided for in the Regional Services Council Act 109 of 1985. The respondent first objected to the assessment, which was disallowed. It then appealed to the Income Tax Special Court. The Special Court found that the degree of control exercised by the central government over the activities of regional services councils rendered it an organ of state or as the court put it 'a manifestation of the state'. The appellant, the Johannesburg Metropolitan Council, then appealed to the Supreme Court of Appeal challenging the finding of the court that it is an organ of state.

The Regional Services Council Act authorised the Central Witwatersrand Regional Services Council (the CWRSC) established pursuant to section 3 of the Act to levy and claim a regional establishment levy. When the appellant was established in terms of a Proclamation issued under the Local Government Transition Act 209 of 1993, it succeeded to the rights and duties of the CWRSC, including the right to claim a levy. Two issues had to be considered by the court: (i) whether the appellant and its predecessor, the CWRSC could be regarded as part of the state within the meaning of section 24 of the Eskom Act;⁷⁹ and (ii) whether the control test employed by the court *a quo* was the correct yardstick to apply to the matter at hand.

On the question whether the control test was the appropriate test to use in this case, the court first observed that this test was more suitable for the purpose of deciding whether the public corporation was an organ of state.⁸⁰ According to the court, the most important factor to be considered in this type of case is the relationship between the state and the corporation concerned.⁸¹ However, a

⁷⁸ 2000 1 SA 866 (A). This case is included here because it was decided under the common law; no mention was made of the notion of 'organ of state' in either the interim or the 1996 Constitution.

⁷⁹ Section 24 of the Eskom Act 40 of 1987 provides that 'Eskom is hereby exempted from the payment of any income tax, stamp duty, levies or fees which would otherwise have been payable by Eskom to the State in terms of any law (excluding a law regarding customs and excise or sales tax)'.

⁸⁰ See *Greater Johannesburg Transitional Metropolitan Council v Eskom* n 78 above at 875 para 12.

⁸¹ *Ibid.*

different approach was called for as far as the appellant and its predecessor were concerned. First, the court held that the appellant and its predecessor were statutory bodies entrusted with wide functions of government at a regional or local level; secondly, they were under a duty to use their income to supply essential services in the public interest.⁸² Therefore, concluded the court, in determining whether these bodies were organs of state, the control test was not decisive. The most important consideration was the function they were engaged in – whether they performed government functions at local level.⁸³

Turning to the meaning of ‘the state’, the court referred to the dictionary meaning and the definition attributed to the concept by Baxter⁸⁴ and concluded that for the purposes of domestic law, the concept referred to all institutions which are collectively concerned with the management of public affairs.⁸⁵ The court further observed that in this sense, the state may manifest itself nationally (through the executive or legislative arm of central government), provincially, locally and on occasion regionally.⁸⁶

The court then concluded that the Regional Service Council and the appellant were both authorities exercising a myriad of governmental functions at regional and local level and as such they are organs of state.⁸⁷

In addition, the court referred to two decisions in which it was decided that municipalities, although they were local, constituted a level of government.⁸⁸ The court further held that the expression ‘the state’ in section 24 of the Eskom Act includes the state in all its manifestations and that to hold

⁸² Ibid.

⁸³ Ibid.

⁸⁴ See Baxter “‘The state’ and other basic terms in public law’ n 42 above.

⁸⁵ See *Greater Johannesburg Transitional Metropolitan Council v Eskom* n 78 above para 15.

⁸⁶ Ibid.

⁸⁷ Id at 879 para 23.

⁸⁸ Ibid. The two cases referred to are *R v Bethlehem Municipality* 1941 OPD 227 and *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A).

otherwise would be to limit the scope of the concept for no obvious reasons.⁸⁹

4.5 Concluding remarks

In the preceding discussion it has been shown that prior to 1994, defining organs of the state was no easy matter. The legislature could define and bring within the purview of the notion of organ of state any institution or functionary.

In general, there was consensus among the courts and the commentators that the state comprised the legislature, the executive and the judiciary, as well as the administration. For the purposes of certain statutes, departments of state and provincial authorities were also considered to be organs of state. In some statutes the legislature went beyond the traditional organs of state and included institutions created by statute, bodies controlled by virtue of legislation and those that are funded by the state as organs of government.

Legal writers took this a step further and suggested a number of tests to be used in determining whether an institution was an organ of state and subject to judicial review. According to Wiechers, institutions created by statute, institutions integrated in the hierarchy of authority in the state, institutions performing public functions and institutions vested with government authority were organs of state.

Baxter added institutions that are funded by the state and those institutions that are required to perform their functions in the public interest as organs of state.

The courts also went beyond the traditional institutions of the state in defining organs of state.

⁸⁹ Ibid.

In *S v Twala and Others* the court included statutory bodies as organs of state.

In *Banco de Moçambique* the court held that the Bank of Moçambique was not an organ of state, because it had a discretion in relation to all its activities, was financially independent of the state and its functions were non-governmental. This was so despite the fact that it was controlled by the state, was obliged to further the national interest and served as an advisory body to the government and the government controlled it by appointment of members and the power to veto its decisions.

In *Dawnlaan Beleggings* the ‘public interest test’ was indicative that the institution was a public body – an organ of state subject to review.

In *Greater Johannesburg Metropolitan Council* the court held that the control test, although decisive in other situations, was not dispositive of the question whether a municipal council is an organ of state. According to the court, the functional test had to be used. The court found that the municipal councils perform governmental functions and thus form part of the state.

One thing is clear from all the cases and comments summarised above: organs of state comprised the national legislative, executive and the judicial bodies, departments of state and provincial or local government. As regards other statutory bodies, a variety of tests were used by both the courts and legal writers to determine whether the institution concerned was an organ of state. These included asking whether the body was a creature of statute; whether it was integrated into the other organs of state; whether it performed government functions; whether it possessed government authority or power to act coercively; whether it was funded by the state; whether its employees were also those of the state; whether it was required by legislation to perform its functions in the public interest; and whether it was controlled by the state. It is important to note that these tests were not mutually exclusive. Therefore, prior to 1994 the court, the legislature and the commentators all used some or all of these tests to determine whether an institution was an organ of state.

CHAPTER 2

THE MEANING OF 'ORGAN OF STATE' UNDER THE 1993 CONSTITUTION

1 INTRODUCTION

The 1993 Constitution¹ (the interim Constitution) which came into effect on 27 April 1994, brought about fundamental changes to South African law. It marked the end of an era of parliamentary supremacy, which had formed the basis of our law since 1910 and the beginning of a new era of constitutionalism. For the first time in the history of South Africa, we had a Constitution which proclaimed itself to be the supreme law of the Republic,² which contained a list of fundamental rights and which was justiciable by the courts. Most importantly, for our purpose, the interim Constitution introduced the constitutional concept of 'organ of state'.

The notion of 'organ of state' was used in a number of provisions in the interim Constitution, for example, in the supremacy clause, the application provision, provisions dealing with the powers of the President, provisions relating to the powers of the courts, the Human Rights Commission and so on.³ Whether these provisions applied to certain institutions or persons depended on the interpretation of the concept of 'organ of state'. This concept was defined in the interim Constitution as including any statutory body or functionary.⁴

This definition was ambiguous and required the consideration of other factors to determine the meaning of organ of state for the purposes of the interim Constitution.

¹ The Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the interim Constitution).

² Section 4(1).

³ These provisions of the interim Constitution are discussed fully in paragraph 2.

⁴ Section 233(1)(ix).

In this chapter it will be shown that the commentators and the courts interpreted the notion of ‘organ of state’ differently. The commentators, on the one hand, used a variety of tests to establish whether an institution or person was an ‘organ of state’. However, their views did not find support in the courts. The courts in general adopted a narrower view of the notion of organ of state. The result was that a number of institutions which could have been bound by the provisions of the interim Constitution, had the courts followed a wider approach, were rendered immune to the limitations imposed by, amongst other provisions of the Constitution, the Bill of Rights.

In the following paragraphs the importance of this constitutional notion of organ of state will be examined in the light of constitutional provisions which imposed obligations on organs of the state. Next, the contribution made by legal writers to our understanding of the meaning of organ of state under the interim Constitution will be discussed. This will be followed by a discussion of court decisions in which the courts construed the meaning of organ of state in concrete cases.

2 OBLIGATIONS IMPOSED BY THE INTERIM CONSTITUTION ON ORGANS OF STATE

For a proper understanding of the importance of the notion of ‘organ of state’ in the interim Constitution, it is necessary to refer briefly to the constitutional provisions which imposed duties on organs of state in the sense of requiring them to observe and adhere to the provisions of the Constitution. The first such provision was the supremacy clause, which provided that the interim Constitution bound all legislative, executive and judicial organs of state at all levels of government.⁵ However, there was no reference to the judiciary in the application provision of the Bill of Rights. Section 7(1) merely stated that the Bill of Rights bound all legislative and executive organs of state at all levels of government.

⁵ Section 4(2).

The obligations imposed on organs of state were not limited to the Bill of Rights. For example, the interim Constitution provided explicitly that organs of state should not interfere with judicial officers in the performance of their functions;⁶ a similar duty was imposed on organs of state in relation to the Public Protector;⁷ moreover, organs of state were required to ensure the independence, impartiality, dignity and effectiveness of the Public Protector;⁸ organs of state were also barred from interfering with the decisions of the tender boards⁹ or the Auditor-General;¹⁰ they were further required to assist the Auditor-General to ensure his independence, impartiality, dignity and effectiveness.¹¹

In addition to these provisions, the interim Constitution gave specific powers to certain functionaries or institutions when dealing with organs of state. For instance, the President could refer a dispute of a constitutional nature between organs of state at any level of government to the Constitutional Court, or any other institution, body or commission for resolution.¹² The Constitutional Court was designated as the court of final instance in relation to the conduct of any organ of state,¹³ as well as over any dispute of a constitutional nature between organs of state at any level of government.¹⁴ Furthermore, the decisions of the Constitutional Court bound all legislative, executive and judicial organs of state¹⁵ and could order organs of state whose executive or administrative conduct had been found to be unconstitutional to refrain from such conduct.¹⁶ The Human Rights Commission was empowered to request any organ of state to supply it with information on any legislative or executive measures taken by it relating to fundamental rights.¹⁷

⁶ Section 96(3).

⁷ Section 113(3).

⁸ Section 111(4).

⁹ Section 187(3).

¹⁰ Section 192(2).

¹¹ Section 192(3).

¹² Section 82(1)(d).

¹³ Section 98(2)(b).

¹⁴ S 98(2)(e).

¹⁵ Section 98(4).

¹⁶ Section 98(7).

¹⁷ Section 116(1)(e).

It seems clear from these provisions that ‘organ of state’ was used in both a qualified and an unqualified sense, which means that some provisions of the interim Constitution applied to specified organs of state and some to organs of state in general or to all organs of state. This simple conclusion belies the fact that the actual application of the definition was complicated by the nuances in meaning. This will become clear when we discuss section 7(1) of the interim Constitution.

3 ACADEMIC COMMENTS ON ‘ORGAN OF STATE’ IN THE INTERIM CONSTITUTION

Section 7(1), read with the definition of ‘organ of state’ in section 233 of the Constitution, gave rise to more questions than it answers. Some of these interpretive difficulties were highlighted by the legal writers. For example, they asked the question whether universities and the controlling bodies of professions were organs of state and, if so, on what basis. Further, they inquired whether these institutions functioned at any of the levels of government. Some commentators simply speculated as to which institutions would be bound by the Bill of Rights and explained why. Although these writers did not provide answers to all the difficult issues raised by the notion of organ of state and its peculiar definition, it is important to note that they all used different tests to identify those statutory bodies which were organs of state and thus bound by the Bill of Rights.

Venter¹⁸ was the first to ask whether universities were organs of state within the context of the interim Constitution. More specifically, he asked whether universities were organs of state for the purposes of section 4(2) and 7(1) of the interim Constitution, whether they operated at any level of government, and if so, at which level?¹⁹ Secondly, he asked whether there were tests which could be used to distinguish between statutory bodies which were organs of state and thus bound

¹⁸ Venter Francois ‘Die staat en die universiteitswese in Suid Afrika: nuwe wedersydse grondwetlike verantwoordelikeide, regte en verpligtinge’ 1995 (58) *THRHR* 379.

¹⁹ Id at 385.

by the interim Constitution and other statutory bodies.²⁰ Further, he asked a more crucial question, namely whether each institution that owed its existence to a statute should be considered an organ of state.²¹

Although Venter did not answer all these questions that he raised, he did provide some indication as to what was meant by 'organ of state' for the purposes of the interim Constitution. According to him, a statutory body or person, in the context of the interim Constitution, referred to an institution or person who/which could perform an authoritative action on behalf of the state.²² From this, he inferred that a yardstick that could be used to determine whether a statutory body could be regarded as an organ of state or not, was to ask whether the statutory body exercised state authority on behalf of the state.²³

Applying this test to universities, Venter pointed out that universities were historically private or non-statutory institutions and that it would seem strange if they were to be regarded as an organ of state by virtue of statutory incorporation. Moreover, the statutory functions of a university could not be construed as government functions performed on behalf of the state.²⁴ He thus concluded that universities were not organs of state.

Another legal writer to consider the significance of the words 'all levels of government' added to 'organ of state' and the tests to be used in distinguishing between statutory bodies which were organs of state and those that were not, was Van der Vyver.²⁵ Dealing with section 7(1) of the interim Constitution, Van der Vyver argued that the primary question to be considered was whether statutory bodies such as universities or the Association of Law Societies functioned on any of the

²⁰ Ibid.

²¹ Id at 386.

²² Id at 387.

²³ Ibid.

²⁴ Id at 388.

²⁵ Van der Vyver JD 'The private sphere in constitutional litigation' 1994 (57) *THRHR* 379.

levels of government, namely national, provincial or local.²⁶

He was of the view that in determining whether any particular institution operated at any of the levels of government, one was compelled to use the ‘functional test’, namely to ask whether the function in dispute was one that belonged to the government.²⁷ According to Van der Vyver, the difficulty with applying this test lay in defining ‘government functions’. He asked whether government functions should be limited to those functions traditionally falling within the category of functions relating to the administration of the affairs of state, or whether they should include all functions that government assumed as part of its responsibility.²⁸ He conceded that these were difficult questions to which there were no simple answers. However, he concluded that one thing was certain, and that was, statutory bodies performing government functions within the judicial confines were not bound by the Bill of Rights.²⁹

Du Plessis³⁰ construed the concept ‘organ of state’ as defined in the interim Constitution, broadly. According to him, determining whether an institution or functionary was an organ of state depended largely on the extent to which it was integrated into the structures of authority in the state rather than on the nature of the statutory source to which it owed its existence.³¹ Du Plessis considered the following institutions to be organs of state for the purposes of section 7(1): (i) bodies established by legislation as organs of state, such as the National Council on Indemnity and the Magistrates Commission;³² (ii) bodies established by statute but managed and maintained through private initiative, for instance, universities and controlling bodies of professions (because they perform

²⁶ Id at 391.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Id at 392.

³⁰ Du Plessis L ‘The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa’s transitional constitution’ 1994 *TSAR* 706. See also Du Plessis and Corder *Understanding South Africa’s transitional Bill of Rights* (1994) 110-11.

³¹ Du Plessis at 709.

³² Ibid. Both these institutions were established by Acts of Parliament namely section 5 of the Further Indemnity Act 151 of 1992 and section 2 of the Magistrates Act 90 of 1993.

public functions, depend on infrastructural support by the state and therefore function in close co-operation with structures of state authority);³³ (iii) private bodies or institutions not established by legislation but performing key functions under the supervision of organs of state, for example, private homes for the aged.³⁴ However, he excluded private companies because, in their day to day functioning, they are not integrated into the structures of authority of the state.³⁵

Another interesting and a more in depth analysis of section 7(1) is that of Woolman.³⁶ First, according to him, reference to legislative organs in this section meant that the chapter on fundamental rights applied to the exercise of all statutory power, whether or not the person was part of the legislature or the executive.³⁷ Secondly, the executive referred to in this section denoted the national, regional and local organs of state and officials, administrative agencies, and tribunals, police and other law enforcement officers and municipalities.³⁸

Turning his attention to the definition of ‘organ of state’ in section 233(1)(ix), Woolman argued that when dealing with those institutions which were not self-evidently governmental institutions, recourse could be had to the tests used in other jurisdictions, to wit, the ‘government control’ test, the ‘government entity’ test and the ‘government function’ test.³⁹ According to him, the control test entails asking whether the body forms part of the three branches of government. If not, whether it falls under direct control of the state.⁴⁰ The government entity test involves asking whether the body concerned performs its function pursuant to some statutory authority or in furtherance of government objectives.⁴¹ The government function test would require an inquiry whether the body

³³ Id at 709–10

³⁴ Id at 710.

³⁵ Ibid.

³⁶ Woolman S ‘Application’ in Chaskalson et al *Constitutional Law* (1996) Revision Service 2 (1998).

³⁷ Id at 10–33.

³⁸ Id at 10–34.

³⁹ Id at 10–35.

⁴⁰ Ibid.

⁴¹ Id at 10–36.

exercised power normally associated with the state or whether it has characteristics of the state.⁴² Lastly, and most importantly, Woolman emphasised that these tests were neither mutually exclusive nor did any one test necessarily subsume the other two.⁴³ Furthermore, an institution could be an ‘organ of state’ by complying with any one of the three tests.⁴⁴

3.1 Concluding remarks

It seems clear from the above discussion that the concept ‘statutory body’ referred to all institutions established by statute or established by virtue of a statute providing for the establishment of institutions of that kind. The question which arose was whether there were any yardsticks that could be used to distinguish between those institutions and functionaries which were organs of state and those which also owed their existence to a statute, but which were private institutions and thus not bound by the limitations in the interim Constitution.

In answering this question, a variety of tests were used by legal writers on the subject, namely: whether the body in question exercised government authority; whether the functions it performed were functions traditionally associated with or which the government had assumed as part of its functions; whether the institution or functionary was under the control of the state; and whether the institution concerned performed its functions in furthering some government objectives. These tests were not new; they had been used under the common law.⁴⁵

All these tests were considered relevant to the enquiry whether an institution was an organ of state as defined for the purposes of section 7(1) and, as pointed out above, the satisfaction of any one of them was a strong indication that one was dealing with an ‘organ of state’. It is also noteworthy

⁴² Id at 10–37.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ See chapter 1.

that almost all the legal writers cited above asked the question whether universities and controlling bodies of professional bodies such as law societies were organs of state for the purposes of the interim Constitution. Interestingly, they all answered this question in the affirmative.

The question which arises in the light of the approach adopted by legal commentators is whether a similar attitude was followed by the courts. Put differently, whether the courts adopted such a generous approach in their construction of section 7(1) of the interim Constitution. It is to this issue that we turn our immediate attention.

4 JUDICIAL INTERPRETATION OF THE NOTION OF 'ORGAN OF STATE' IN THE INTERIM CONSTITUTION

The question of which institutions or persons were bound by the interim Constitution was soon raised in the courts. With one exception, most of these cases dealt with the application of the Bill of Rights to a particular institution. The courts were invited to pronounce on the question whether the following institutions created by statute were organs of state for the purposes of section 7(1): universities; parastatals or public corporations; controlling bodies of professions; private schools and other statutory bodies. In their construction of the notion of organ of state, the courts followed both a narrow and a wider approach. At the one end of the spectrum, the courts used a variety of tests to determine whether an institution was an organ of state as contemplated in section 7(1), read with section 233. At the other end, a number of cases subscribed to the view that an organ of state is any institution that forms part of the public service or that is controlled by the state. In the following paragraphs we analyse these decisions.

4.1 A wider approach

The first and only case to consider the status of universities and to adopt the wider conception of

the notion of ‘organ of state’ for the purposes of the interim Constitution was *Baloro v University of Bophuthatswana and Others*.⁴⁶

In this case the applicants, all academics of foreign extraction in the employ of the University of Bophuthatswana, challenged the decision of the University to place a moratorium on their promotions. They argued that they were being discriminated against on the basis of national origin and that this violated section 8 in general and section 8(2) and (4) in particular.⁴⁷ The response to this averment was that the Constitution did not apply to disputes between private parties. It applied, so went the argument, only vertically – between organs of the state and individuals. Essentially, the argument was that a university was not an organ of state and was therefore not bound by the provisions of the Bill of Rights in Chapter 3.

In the absence of judicial authority dealing with the meaning of organ of state for the purposes of the interim Constitution, the court sought guidance from an article written by Du Plessis.⁴⁸ After a thorough analysis of the jurisprudence of the courts and academic writers in other jurisdictions on the question of horizontal or vertical application of their respective constitutions,⁴⁹ Friedman JP turned to the application provisions in the interim Constitution.

⁴⁶ 1995 4 SA 197 (B).

⁴⁷ Section 8 of the interim Constitution read: ‘Equality

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established’.

⁴⁸ See Du Plessis n 30 above.

⁴⁹ See *Baloro v University of Bophuthatswana* n 46 above at 213–224. The various jurisdictions considered by the court were those of the United States, Germany, Canada, India, Namibia and Sri Lanka.

First, the court referred to the meaning attributed to the concept by Du Plessis.⁵⁰ Then it stated:

It is essential that the words ‘organs of state’ in section 7(1), as Professor Du Plessis has pointed out, be given an extended meaning. They must include (i) statutory bodies; (ii) parastatals; (iii) bodies or institutions established by statute but managed and maintained privately, such as universities, law societies, the South African Medical and Dental Council, etc; (iv) all bodies supported by the state and operating in close co-operation with structures of State authority; and (v) certain private bodies or institutions fulfilling certain key functions under the supervision of organs of the state.⁵¹

The court held that all these institutions could be grouped under the extended meaning of organ of state.⁵² What the court does not tell us, is on what basis these institutions were regarded as organs of state. Perhaps one should assume that the court regarded these bodies as organs of state for the same reasons as those expressed by Du Plessis, namely that they performed public functions, received funding from the state, and performed their duties under the supervision of organs of state.⁵³

The court concluded, on the basis that the respondent was a statutory body, the extended definition attributed to the concept for the purposes of section 7(1), and the fact that it is subject to control by the Minister and the Executive Council, that the University of Bophuthatswana was an organ of state and bound vertically to the rights in the interim Constitution.⁵⁴

This was the only case in which the court construed the notion of ‘organ of state’ in section 7(1) extensively. As pointed out above, Du Plessis suggested a number of yardsticks that could be used to identify organs of state. In this case the court relied heavily on his views in its construction of ‘organ of state’ in the interim Constitution. One could therefore infer from this decision that any

⁵⁰ Id at 230F–231E. For the views expressed by Du Plessis see n 30 above.

⁵¹ Id at 235J–236B.

⁵² Id at 236B.

⁵³ See p 30–31 above.

⁵⁴ See *Baloro v University of Bophuthatswana* n 46 above at 246E–F.

institution that performed public functions, which received funding from the state, which was controlled by the state (and so on) were organs of state. Interestingly, the court never referred to Venter.

4.2 A narrower approach

The next case in which the court was required to grapple with the interpretative difficulties occasioned by section 7(1) read together with section 233, is *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*.⁵⁵ In this case the applicant, a company providing consultancy services to advertisers and prospective advertisers in the telephone directories published by Telkom, sought information from Telkom relating to the time when directories would be published, the price list with the cost of advertisement and records of the installation of new telephones. In this regard the applicant relied on the right of access to information held by the state or any of its organs at any level of government, the right to administrative justice and the right freely to engage in economic activity. It was averred that Telkom was an organ of state and therefore bound by the rights entrenched in Chapter 3. Therefore the preliminary issue before the court was whether Telkom was indeed an ‘organ of state’.

In answering this question, the court dealt with an array of issues such as what was meant by an organ of state, whether the approach followed by the court in *Baloro* was correct, and what was meant by statutory body and functionary as contemplated in section 233. The court’s response to all these questions can be summarised as follows:

- An organ of state is an institutional body by means of which the state governs, it is not an agent of the state but part of government at any of its levels.⁵⁶

⁵⁵ 1996 3 SA 800 (T).

⁵⁶ Id at 809E–H.

It was on the basis of this reasoning that the court could not support the proposition made by Du Plessis and endorsed in *Baloro v University of Bophuthatswana* above that an old age home, the law society or the Medical and Dental Council were organs of state. The reason put forward by the court was these bodies could not be said to be functioning at a level of government.⁵⁷

- A statutory body in the context of section 233 referred only to those bodies that had characteristics of the state in that they acted authoritatively in their exercise of government functions. The court added that those who perform such functions had to be subject to state control.⁵⁸
- A functionary in the context of organ of state could only be a functionary of the state, a civil servant or someone under the control of the state at all levels of government.⁵⁹

The court then concluded that the test to be used to determine whether an institution or a functionary was an ‘organ of state’ and not a private institution was the ‘control test’. To have a better understanding of the court’s description of the ‘control test’, the words of the court are quoted in full:

The concept as used in s 7(1) of the Constitution must be limited to institutions which are an intrinsic part of government – ie part of the public service or consisting of government appointees at all levels of government – national, provincial, regional and local – and those institutions outside the public service which are controlled by the state – ie where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such an extent that it is effectively in control. In short, the test is whether the State is

⁵⁷ Id at 809H–J.

⁵⁸ Id at 810C.

⁵⁹ Id at 810D.

in control.⁶⁰

Furthermore, the court explained what it meant by ‘control’. According to the court, ‘control’ denotes the right to prescribe what the function is and how it is to be performed.⁶¹ The court unequivocally held that inspection and supervision in respect of the quality of the service did not amount to ‘control’.⁶²

The court held that Telkom passed the control test and was therefore an executive organ of state. Although the court did not say so explicitly, it seems it inferred the element of control from the express provisions of the Act upon which Telkom was founded.⁶³ This view is bolstered by the fact that the court observed, after an analysis of the Post Office Act, that there was a strong connection between Telkom and the State.⁶⁴

Despite a finding by the court that Telkom was an ‘organ of state’ because it was ultimately controlled by the state, this decision may be criticised for the following reasons:

(i) There were no textual constraints which compelled the court to adopt such a narrow view of ‘organ of state’. This conclusion is bolstered by the fact that, although the court found Telkom to be an organ of state, it did not deal with the issue of the qualification ‘at any level of government’ in section 7(1).

(ii) As mentioned, various tests were used at common law to determine whether an institution was an ‘organ of state’.

⁶⁰ Id at 810F–G.

⁶¹ Id at 810E.

⁶² Id at 810D.

⁶³ The Post Office Act 44 of 1958. See 807I–808E for a discussion of the provisions of this Act.

⁶⁴ Id at 808E.

(iii) This test excluded from its purview bodies established by legislation, exercising public power or performing public functions but not controlled by the state (such as the controlling bodies of professions), as the next decision clearly shows.

(iv) Finally, it also shows an approach to the interim Constitution which might not have been foreseen by the drafters, given our history. As a result, the violation of rights entrenched in the interim Constitution by bodies which were not controlled by the state could not be challenged as a matter justiciable under it. However, despite these shortcomings, the control test seems to have gained wide acceptance under the interim Constitution, as the following cases show.

It will be remembered that the question whether the controlling bodies of professions were organs of state under the interim Constitution was addressed *obiter* in both *Baloro v University of Bophuthatswana* and *Directory Advertising*, with the courts reaching different conclusions.⁶⁵ However, the issue came squarely before the court in *Mistry v Interim National Medical and Dental Council of South Africa and Others*.⁶⁶ In this case, the officers in the employment of the Interim Medical and Dental Council of South Africa (the legal officer and a medical practitioner, both in the employ of the Medical and Dental Council) and the chief medicines control officer in the employ of the Ministry of Health, acting in terms of section 41A of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974 and section 28(1) of the Medicines and Related Substances Control Act 101 of 1965 respectively, seized various items belonging to the applicant, a medical practitioner, during an investigation. The applicant sought an order directing the respondents to return to him all the items seized during their investigation at the applicant's practice. In this regard, two issues relevant to the matter under discussion were raised. The first is that the applicant alleged that the legal officer and the medical practitioner, acting under the auspices of the Medical and Dental Council, had violated his right to privacy entrenched in the interim

⁶⁵ See n 51 and 57 respectively.

⁶⁶ 1997 7 BCLR 933(D).

Constitution.⁶⁷ Secondly, he argued that section 28(1) of the Medicines and Related Substances Control Act, in terms of which the chief medical inspector purportedly acted, was unconstitutional.⁶⁸

In dealing with the first issue, the court inquired whether the Medical and Dental Council fell within the purview of section 7(1), that is whether it was an ‘organ of state’. In this regard the court referred with approval to the views earlier expressed by Booysen J, who delivered judgment for interim relief. Booysen J held:

The constitution of the Council is determined by section 5 of the Act. A variety of bodies is represented on the Council and the Minister appoints some of the persons but not the majority. The Council is funded by annual fees payable by every medical practitioner and dentist in terms of section 13(1) and 62. It is therefore not funded by the State. The Council also employs its own staff in terms of section 12(1) of the Act and such staff are not State employees.⁶⁹

The court concluded on the basis of this reasoning that the Medical and Dental Council was not an ‘organ of state’.⁷⁰ As regards the chief medicine inspector, the court held that it was common cause that the Constitution applied to him and his employer, the Minister of Health.⁷¹ The court therefore held that it was clear that section 28(1) violated section 13 of the interim Constitution.⁷² The

⁶⁷ Section 13 of the interim Constitution read: ‘Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications’.

⁶⁸ Section 28(1) of this Act provided that ‘An inspector may at all reasonable times—

- (a) enter upon any premises, place, vehicle, vessel, or aircraft at or in which there is or is on reasonable grounds suspected to be any medicines or scheduled substance;
- (b) inspect any medicine or scheduled substance, or any book, record, or document found, in or upon such premises, place, vehicle, vessel or aircraft;
- (c) seize any such medicine or scheduled substance, or any books, records, or documents found in or upon such premises, place, vehicle, vessel or aircraft and appearing to afford evidence of a contravention of any provision of this Act;
- (d) take so many samples of any such medicine or scheduled substance as he may consider necessary for the purpose of testing, examination or analysis in terms of the provisions of this Act’.

⁶⁹ See *Mistry v Interim National Medical and Dental Council of South Africa and Others* n 66 above at 947I–948B.

⁷⁰ Id at 948B–C.

⁷¹ Id at 946A.

⁷² Id at 963C–E.

constitutionality of section 28(1) of the Medicine and Related substances Control Act was then referred to the Constitutional Court for a decision.⁷³ It is important to emphasise that the only matter referred to the Constitutional Court was section 28, in terms of which the chief medicine control officer in the employ of the third respondent (the Minister of Health) purportedly acted. As stated, the court had no difficulty in finding that the interim Constitution applied to this inspector. Thus it was an organ of state.

All the factors considered by the court point to one thing, namely, that the Medical and Dental Council was not under the control of the state. It seems that in this case the lack of control was decisive in the finding that the Medical and Dental Council was not an organ of state. This conclusion finds support when one looks at the following considerations, which were not considered by the court:

- (i) the Medical and Dental Council is a statutory body;
- (ii) the inspectors acting in terms of the Medical, Dental, Health Supplementary Act exercised statutory authority;
- (iii) furthermore, these inspectors performed typical government functions such as search and seizure and;
- (iv) they exercised these functions in the public interest.

Perhaps, if the court had based its finding on the fact that this body did not perform its functions at any of the levels of government, this decision could not have been faulted. This factor was not, however, considered by the court.

Another case in which the meaning of ‘organ of state’ for the purposes of section 7(1) was at issue and in which the ‘control test’ was decisive, is *Wittmann v Deutcher Schulverein, Pretoria and*

⁷³ Id at 964I.

Others.⁷⁴ In this case the applicant, the mother of a minor child, sought to have her child exempted from attending religious instruction classes at the German School, a private school, which she attended in Pretoria as early as 1992. The view of the school was that religious instructions is offered as supra-denominational and that attendance was therefore compulsory. The matter had not been resolved when the interim Constitution came into operation. The applicant then challenged the decision of the school on the basis that it violated the provisions of section 14(2) of the interim Constitution.⁷⁵ It was argued on behalf of the plaintiff that a German school registered in terms of section 2 of the Private Schools Act (House of Assembly) 104 of 1986, was an ‘organ of state’ and therefore bound by section 14(2) of the interim Constitution. In support of this proposition it was argued that the school performed a public function in educating children and that the state exercised control on the strength of criteria for registration and subsidy.⁷⁶

In response to this assertion, Van Dijkhorst J observed that the test to identify organs of state laid down in *Directory Advertising* was not being challenged as being incorrect.⁷⁷ The judge then proceeded to apply this test to the issue at hand. In this regard he stated:

It was common cause that the persons controlling the association and the school are not appointed by the State. The state is not effectively in control of this school. The fact (if such it is) that the entry age of pupils, educational standards, standards in respect of buildings, qualifications of teachers, hours of schooling, the school calendar are determined by the State, that the constitution has to be approved and that annual financial statements have to be submitted upon sanction of deregistration, does not constitute that type of control as to render the school an organ of state.⁷⁸

According to the court, the wide regulatory powers conferred on the Minister by the Act did not

⁷⁴ 1998 4 SA 423 (T).

⁷⁵ Section 14(2) of the interim Constitution provided that ‘Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary’.

⁷⁶ See *Wittmann v Deutscher Schulverein, Pretoria and Others* n 74 above at 454A.

⁷⁷ Id at 454A–B.

⁷⁸ Id at 454B–D.

constitute the type of control that could render a private school subject to the strictures of the interim Constitution.⁷⁹ It seems that the fact that the state cannot prescribe what is to be taught and how it is to be taught by the school meant that the state was not in control.⁸⁰ In addition, the court held that the fact that the state could not be held vicariously liable for the delicts of the private school, was another indication that it was not an 'organ of state'.⁸¹ The court then concluded that a private school was not an executive organ of state.⁸²

Interestingly, the court in this case never considered the question whether educating children was a government function which rendered a private school an organ of state for the purposes of section 7(1) of the interim Constitution. Neither did the court consider the question of funding or subsidy which private schools received from the government. Instead the court confined its enquiry to the element of control. The control test was, once again, decisive.

Another case in which the question arose whether a statutory body was an 'organ of state' is *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another*.⁸³ The applicant in this matter, a private company carrying on business as granite miners, sought an order granting it access to all relevant documentation relating to applications for mineral leases in possession of the respondent, the Lebowa Mineral Trust, following an unsuccessful application for mineral leases. The applicant relied on section 23 of the interim Constitution.⁸⁴ It was argued on behalf of the respondent that it was not an 'organ of state'.⁸⁵ The first question to be considered by the court was therefore whether the Lebowa Mineral Trust was an 'organ of state'.

⁷⁹ See section 9 of the Private Schools Act.

⁸⁰ See p 38 above for the meaning of 'control'.

⁸¹ See *Wittmann v Deutscher Schulverein, Pretoria and Others* n 74 above at 454D.

⁸² Id at 454D–E.

⁸³ 1999 8 BCLR 908 (T).

⁸⁴ Section 23 provided that 'Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights'.

⁸⁵ The mineral rights at issue in this case vested in the respondent by virtue of the Lebowa Mineral Trust Act 9 of 1987. Prior to November 1991 they had vested in the Lebowa Government.

The court referred with approval to the ‘control test’ laid down in *Directory Advertising*.⁸⁶ Further, the court observed that this test was consistent with the views expressed by Woolman, namely that in defining ‘organ of state’, the control test, the government entity test and government function test are relevant.⁸⁷ In this regard it is submitted that the court erred in holding that the views put forward by the court in *Directory Advertising* are similar to those expressed by Woolman. As stated above, according to Woolman, three tests may be used in identifying organs of state and these tests were neither mutually exclusive nor did one subsume the others.⁸⁸ According to the court in *Directory Advertising*, the most important element was that of control.

Next, the court considered the provisions of the Lebowa Mineral Trust Act and concluded that it was clear from the provisions of that Act that the respondent was subject to the direct control of the state and that it was bound to perform its functions for the benefit of the inhabitants of Lebowa.⁸⁹ The court therefore found the Lebowa Mineral Trust to be an organ of state.

The Lebowa Mineral Trust appealed to the full bench of the Transvaal Provincial Division against the decision, contending that the court *a quo* had erred in finding that it was an ‘organ of state’.⁹⁰ Writing for the court, Van Dijkhorst J first referred to all cases decided under the interim and subsequently under the 1996 Constitution, in which the ‘control test’ was followed, and commented that the control test is generally accepted by the courts.⁹¹ Next, the court considered the provisions of the Act to which the Lebowa Mineral Trust owed its existence, and inferred that the board that administered the trust was appointed by the government and that its tenure existed at the pleasure of the government; in addition, the accounts of the trust had to be audited annually by the Auditor-General, and the Minister could make regulations relating to the conduct of the business of the

⁸⁶ See *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another* n 83 above at 913B–C.

⁸⁷ Id at 914C–E.

⁸⁸ See the discussion on p 31–2 above.

⁸⁹ See *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* n 83 above at 914E–F.

⁹⁰ This decision is reported as *Lebowa Mineral Trust v Lebowa Granite* 2002 3 SA 30 (T).

⁹¹ Id at 35E–36A.

trust.⁹² These indicated that the trust was an ‘organ of state’. The court thus confirmed the decision of the court *a quo*.

There are, however, cases dealing with the meaning to be attributed to the notion of ‘organ of state’ in which the courts used neither of the two approaches mentioned above. In the *President of the Republic of Bophuthatswana and Another v Milsell Chrome Mines (Pty) Ltd and Others*,⁹³ the meaning of ‘organ of state’ was dealt with in the context of section 101(3) of the interim Constitution. In this case, Mr Mangope, the President of the former Bophuthatswana, and the Bafokeng tribe launched an application for a declaratory order to the effect that the respondent’s rights held under an agreement with Mr Mangope in his capacity as the Trustee of the tribe’s land, had expired. It was the desire of the tribe to award these rights to a third party. Before the application could be heard, Mr Mangope was deposed as President and in October 1994 the respondents were informed that Mr Molefe, the premier of North-West Province, desired to be substituted for Mr Mangope. The respondent opposed the substitution and made an application *in limine* for its setting aside.

One of the issues dealt with by the court was whether it had jurisdiction to adjudicate upon the substance of the point taken *in limine*. In this regard the court held that it had jurisdiction, over and above its original jurisdiction, conferred on it by section 101(3) of the interim Constitution. The court further observed that an ‘organ of state’ was defined in the interim Constitution as including any statutory body or functionary. According to the court, a premier was not a statutory body but a functionary.⁹⁴ Since the concept ‘functionary’ was not defined in the interim Constitution, the court resorted to the dictionary to ascertain the ordinary meaning of the word and concluded that, since the premier performed a variety of functions under the interim Constitution, he was a functionary

⁹² Id 36H–37B.

⁹³ 1995 3 BCLR 354 (B).

⁹⁴ Id at 359F–G.

and could properly be considered an ‘organ of state’ for the purposes of section 101(3)(b).⁹⁵

5 SUMMARY OF THE APPROACH TO ORGANS OF STATE UNDER THE INTERIM CONSTITUTION

The concept of organ of state was used extensively in the interim Constitution. The definition of this notion in section 233(1)(ix) merely stated that it included a ‘statutory body or functionary’. This definition gave rise to further difficult issues of interpretation. Questions arose as to whether this definition included all institutions created by statute or only some of them. If it included some statutory bodies, a further question was how one would establish whether the statutory body was an organ of state. These were difficult issues. It was generally accepted by both the courts and legal writers that the notion of organ of state referred to the legislature, the executive and the judiciary. However, the state performs its functions via a number of different institutions. For instance, the state out-sources many of its functions to private institutions; it also participates in the economy, and so on. Were these institutions organs of state for the purposes of the interim Constitution and if so on what basis? Both the courts and legal writers provided answers to these questions.

Legal writers, on the one hand, were in favour of a more expansive reading of the notion of ‘organ of state’:

- Venter dealt with the question whether universities were organs of state. According to him, a statutory body was an organ of state if it exercised state authority on behalf of the state.
- Van der Vyver was in favour of a ‘functional approach’, that is, whether the institution performed a government function. He conceded that defining functions of government was not easy.
- According to Du Plessis, the most important factor was not so much the statutory source to which the institution owed its existence, but the extent to which it was integrated into the

⁹⁵ Id at 359F–H.

structures of authority in the state. In addition, the fact that the institution performed public functions, depended on infrastructural support by the state, or performed functions under the supervision of the state, were all indications that one was dealing with an organ of state.

- Woolman suggested the government control test, government entity test and the government function test as pointers to the conclusion that an institution or functionary was an organ of state.

The courts, on the other hand, with the exception of the decision in *Baloro v University of Bophuthatswana*, followed a restrictive approach .

- In *Baloro* the court endorsed the views expressed by Du Plessis in dealing with the notion of organ of state. Despite its finding that the university was an organ of state because it was ultimately under the control of the state, the court held that diverse institutions referred to by Du Plessis were organs of state, probably for the same reasons as Du Plessis.
- In *Directory Advertising* the court held that the most important factor in determining whether an institution was an organ of state was control. According to the court, any statutory body controlled by the state or one of its organs was an organ of state.

The latter was subsequently applied in the following decisions:

- In *Mistry v Interim Medical and Dental Council of South Africa* the court held that the Medical and Dental Council was not an organ of state because it was not controlled by the state. By implication neither were the law societies.
- In *Wittmann* the court also held that private schools were not controlled by the state and thus were not organs of state.
- The *Lebowa Mineral Trust* case rendered the Lebowa Mineral Trust an organ of state for the purposes of the interim Constitution. The court found that the board that

administered the trust was under the control of the state. On appeal this decision was confirmed.

In conclusion, it is clear that there was no clear definition of organ of state under the interim Constitution. Furthermore, the qualifications used with the concept, such as 'at any level of government', further restricted the application of this notion. This qualification does not seem to have played any significant role in the decisions of the courts dealing with the meaning of organ of state as envisaged in section 7(1) read with section 233. However, two approaches emerged. The legal writers on the subject subscribed to diverse tests in defining the notion of organ of state. On the other hand, the courts generally subscribed to the control test to identify organs of state for the purposes of section 7(1) of the interim Constitution.

CHAPTER 3

THE NOTION OF 'ORGAN OF STATE' IN THE 1996 CONSTITUTION

1 INTRODUCTION

The commencement of the 1996 Constitution¹ reaffirmed South Africa's commitment to establish a society different from that which existed prior to 1994. The Constitution seeks to create a society based on democratic values, social justice and fundamental human rights.² To ensure the realisation of this ideal, the Constitution provides that South Africa is founded on the rule of law; proclaims itself to be the supreme law which, if not observed, would render law or conduct inconsistent with it invalid;³ contains a Bill of Rights; and designates the judiciary as the prime upholder of the rights and values entrenched therein.⁴ The Constitution also establishes a variety of institutions supporting our new constitutional democracy.⁵ All these features are aimed at limiting the exercise of state power by organs of the state.⁶ Moreover, the Constitution contains a number of specific provisions expressly imposing duties on organs of state.⁷

This raises the question: what constitutes an 'organ of state' for the purposes of the Constitution? This is an issue of the utmost constitutional importance. The application of the provisions of the Constitution enumerated above depends entirely on it. Unfortunately, the answer to this question is not as straightforward as it appears.

¹ The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter the Constitution). The Constitution came into operation on 4 February 1997.

² See the preamble of the Constitution.

³ Section 2.

⁴ Section 172.

⁵ For a discussion of these institutions, see n 20 below.

⁶ The 1996 Constitution goes a step further than traditional in that the limitations in the Bill of Rights apply to private individuals as well. See section 8(2).

⁷ See paragraph 2 below.

‘Organ of state’ as a constitutional concept was first introduced by the 1993 Constitution, in which the notion was defined as including any statutory body or functionary.⁸ As discussed above, this definition gave rise to divergent approaches. The commentators, on the one hand, interpreted the concept expansively. The courts, on the other hand, construed the notion of ‘organ of state’ for the purposes of the interim Constitution restrictively. Generally the courts subscribed to the views strongly advocated by Van Dijkhorst J in a number of cases decided under the interim Constitution that ‘organ of state’ referred to institutions or persons under the control of the state.⁹

Regrettably, this limited approach has spilled over to the interpretation of the notion of ‘organ of state’ under the 1996 Constitution. This results in a lack of consistency about the precise meaning of ‘organ of state’ for the purposes of the Constitution. This inconsistency raises the question whether the definition of ‘organ of state’ in the 1996 Constitution is wider than or merely replicates the meaning ascribed to this concept by the courts under the 1993 Constitution. This is a question that will be addressed in this chapter.

In addressing this issue, I propose to (a) analyse the definition of ‘organ of state’ in section 239 of the Constitution; (b) examine the approach of the courts when dealing with this notion; and (c) consider the views of academic writers on the issue. This will be followed by my own concluding remarks.

For perspective, it is necessary to consider the extent to which the Constitution imposes duties on organs of state to get a clear picture why it is important to determine whether an institution or person is an organ of state or not.

⁸ Section 233(1)(ix).

⁹ See Chapter 2.

2 CONSTITUTIONAL INJUNCTIONS RELATING TO ‘ORGANS OF STATE’

Organs of state are subject to certain constraints, some of which are implicit in the Constitution, such as the separation of powers. In addition, the Constitution contains a number of provisions that seek to constrain the exercise of state power by imposing duties on organs of state. ‘Organs of state’ are referred to in a number of provisions in the Constitution. In some of these the concept is not qualified, while in others it is qualified by the adjective ‘executive’. In some provisions it is used together with other words which limit the application of those provisions to some but not all organs of state. However, these provisions have one thing in common: they all impose duties on organs of state in the sense of requiring them to do something or not to do something, as the following provisions clearly illustrate.

In the context of the Bill of Rights, organs of state are required to respect, protect, promote and fulfil the rights in the Bill of Rights.¹⁰ Moreover, section 8(1) provides that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. Beyond the Bill of Rights, the Constitution prescribes how organs of state should relate to one another. All spheres of government and all organs of state within each sphere are enjoined, for example, to observe and adhere to the principles of co-operative government and intergovernmental relations in Chapter 3 of the Constitution.¹¹ In addition, organs of state involved in an intergovernmental dispute must make every reasonable effort to settle the matter before approaching the courts.¹² The National Assembly, an organ of state, must provide a mechanism to ensure that executive organs of state in the national sphere of government are accountable to it.¹³ It must also maintain oversight

¹⁰ Section 7(2).

¹¹ In terms of section 41(1) these principles include providing an effective, transparent, accountable and coherent government for the Republic as a whole; loyalty to the Constitution, the Republic and its people; and co-operating with one another by assisting and supporting one another and avoiding legal disputes against one another.

¹² Section 41(3).

¹³ Section 55(2)(a). This provision must be read together with section 92(2) which provides that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

over other organs of state.¹⁴ A similar obligation is placed on provincial legislatures.¹⁵ Chapter 8, dealing with the independence of the courts, prohibits organs of state from interfering with the functioning of the courts.¹⁶ Organs of state are also enjoined, through legislative and other measures, to assist and protect the courts to ensure their independence.¹⁷ The Constitution further provides that a decision of a court is binding on all persons and organs of state to which it applies.¹⁸ Only the Constitutional Court has jurisdiction to adjudicate a dispute between organs of state in the national or provincial sphere of government.¹⁹ Organs of state are also required, as in the case of the courts, through legislative and other measures, to assist and protect the institutions supporting constitutional democracy²⁰ to ensure their independence, impartiality, dignity and effectiveness.²¹ Again, as in the case of the courts, organs of state are prohibited from interfering with the functioning of these institutions.²² The Human Rights Commission is given specific powers to demand that certain organs of state furnish information about the measures they have taken towards the realisation of socio-economic rights in the Constitution.²³ Organs of state are also required to observe and adhere to the principles governing public administration.²⁴ These principles include transparency, accountability, accessibility to information, responding to the needs of people and the provision of services impartially, fairly and equitably.²⁵ The Constitution further provides that when an organ of state in the national, provincial or local sphere of government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-

¹⁴ Section 55(2)(b).

¹⁵ Section 114(2)(a) and 114(2)(b)(ii).

¹⁶ Section 165(3).

¹⁷ Section 165(4).

¹⁸ Section 165(5).

¹⁹ Section 167(4).

²⁰ In terms of section 181(1) these institutions are: the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, The Gender Commission, the Auditor-General and the Electoral Commission.

²¹ Section 181(3).

²² Section 81(4).

²³ Section 184(3).

²⁴ Section 195(2)(b).

²⁵ See in general section 195(1).

effective.²⁶

In addition to the above, there are provisions which, although applicable to organs of state, do not impose duties on the state. For example, section 172(2)(d) provides that an organ of state may appeal directly to the Constitutional Court against an order of the Supreme Court of Appeal, the High Court or a court of similar status concerning constitutional invalidity. Another provision that possibly fits into this category is section 238, which provides that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised to any other executive organ of state.

3 WHEN IS A BODY OR A PERSON AN ‘ORGAN OF STATE’ FOR THE PURPOSES OF THE CONSTITUTION?: AN ANALYSIS OF SECTION 239

Section 239 of the Constitution defines ‘organ of state’ in the following terms:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution –
 - (i) exercising a power of performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power of performing a public function in terms of legislation, but does not include a court or a judicial officer.

The description of ‘organ of state’ in the Constitution distinguishes between three types of ‘organ of state’. The first category – state departments and the administration in the three spheres of government – are organs of state by virtue of their nature. Next, the institutions or functionaries exercising or performing constitutional powers or functions are organs of state. Lastly, institutions

²⁶ Section 217(1).

or functionaries exercising public powers or performing public functions in terms of legislation are also organs of state. In respect of the latter two categories, the emphasis is on the nature of the power or function that the institution or functionary is engaged in.

3.1 State departments or administration in all spheres of government

Paragraph (a) of the definition of ‘organ of state’ tells us that state departments in the three spheres of government are organs of state.²⁷ Institutions and functionaries tasked with the implementation of legislation and government policies (the administration) in the three spheres of government are also organs of state in terms of this paragraph. Therefore, included in this paragraph in the national sphere of government, are the President and members of the Cabinet when implementing national legislation and national policy;²⁸ and all the officials in the employ of the administration. In the provincial sphere, this part of the definition includes the Premier and other members of the Executive Council²⁹ and all officials in the service of provincial administrative bodies or provincial departments. At local government it includes the municipal council in whom executive authority is vested by the Constitution,³⁰ and all officials in its service.

It is important to note that these institutions or functionaries are ‘organs of state’ by virtue of what they are, regardless of the source or the nature of the power they are exercising.³¹

3.2 Institutions or functionaries exercising power in terms of the Constitution or a provincial constitution

²⁷ Departments of state in the national and the provincial spheres of government are listed in Schedule 1 and 2 to the Public Service Act 1994. Section 51(g) of the Local Government: Municipal Systems Act 32 of 2000 states that municipality performs its functions through departments. However, these are not listed in the Act.

²⁸ See sections 85(2)(a) and (b) of the Constitution.

²⁹ See sections 125(1) and (2).

³⁰ See section 156(1).

³¹ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) at 50.

Subparagraph (b)(i) of the definition tells us that any functionary (person) or institution (body) exercising a power or performing a function in terms of the Constitution or a provincial constitution is an 'organ of state'.³² These bodies are easily identifiable. A closer examination of the provisions of the Constitution reveals that there exists in our constitutional democracy a number of institutions or persons that exercise or perform constitutional powers or functions. The first such institutions are the legislative bodies in the national, provincial and local sphere of government. Various provisions of the Constitution deal expressly with the functions and duties of these institutions.³³ Persons in whom the executive authority is vested by the Constitution can also be included under this paragraph. The Constitution sets out the powers of the President and the functions of the national executive.³⁴ The powers and functions of the Premiers of the respective provinces and the provincial executive are also declared.³⁵ Powers and functions of the third sphere of government are also listed.³⁶

This component of the definition further includes Chapter 9 institutions supporting constitutional democracy, namely the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission and the Independent Broadcasting Authority. All these institutions perform their functions in terms of the Constitution.³⁷ One could also add the Public Service Commission,³⁸ the Financial and Fiscal

³² So far there is one provincial constitution, that of the Western Cape.

³³ The Constitution vests national legislative authority in the National Assembly and the National Council of Provinces and confers certain powers on these bodies, such as the power to amend that Constitution and to pass legislation. (See section 44(1)(a) and (b) and section 44(2) and section 68.) Powers of Provincial Legislatures are set out in section 114(1) and (2) of the Constitution. Powers and functions of municipalities are stated in section 156(1)–(5).

³⁴ Section 84(1) and 85(2) respectively.

³⁵ See sections 125 and 127 respectively.

³⁶ Section 156(1)–(5).

³⁷ See sections 182; 184; 185; 187; 188; 190; 192.

³⁸ See section 196(4).

Commission³⁹ and the Central Bank,⁴⁰ when performing functions in terms of the Constitution.

3.3 Institutions or persons exercising public powers or performing public functions in terms of legislation

Any person or institution exercising a public power or performing a public function in terms of legislation is also regarded as an ‘organ of state’ in terms of this subparagraph. Determining whether an institution or functionary is an organ of state under this subparagraph entails a two-stage inquiry. The first stage of the inquiry relates to the nature of the power exercised or function performed. The power or function must be of a public nature. However, a finding that the power or function is public does not end the inquiry. There has to be a determination whether the power or function derives from legislation. Put differently, there has to be statutory authority for the exercise of the power or the performance of the function in question.

3.3.1 The meaning of ‘public power’ or ‘public function’

An institution or functionary will qualify as an organ of state in terms of this subparagraph if its power or function is of a public nature. The Constitution does not define ‘public power’ or ‘public function’, but the word ‘public’ is used in a number of provisions of the Constitution. In the Bill of Rights, for instance, we find ‘public sources’,⁴¹ ‘public authorities’,⁴² ‘public purpose’,⁴³ ‘public interest’,⁴⁴ ‘public educational institutions’,⁴⁵ and ‘public trials’.⁴⁶ Outside the Bill of Rights one

³⁹ Section 220.

⁴⁰ Section 225.

⁴¹ Section 12(1)(c).

⁴² Section 15(2)(a).

⁴³ Section 25(2)(a).

⁴⁴ Section 25(3) and section 25(4)(a).

⁴⁵ Section 29(3).

⁴⁶ Section 35(3)(c).

comes across ‘public prosecution’,⁴⁷ ‘public administration’,⁴⁸ ‘public liability’ and ‘public debt’.⁴⁹ ‘Public power’ and ‘public function’ are referred to only once in the Constitution, and that is in section 239.

What is meant by ‘public power or public function’? The courts have treated the meaning of public power or function as so obvious that in some decisions no attempt is made to define these concepts. This is apparent in two seminal decisions of the Constitutional Court. In *President of the RSA v SARFU and Others (SARFU)*,⁵⁰ the Constitutional Court set out different ways in which the Constitution controls the exercise of *public power*.⁵¹ In *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA*⁵² the Constitutional Court held that the exercise of *public power* must be consistent with the Constitution and the principle of legality which is part of the Constitution.⁵³ The Constitutional Court also inquired whether the common law principles developed by the courts in the past to regulate the exercise of *public power*, existed side by side with the Constitution.⁵⁴

In these decisions the Constitutional Court did not define ‘public power’. In my view, it did not have to, since the functionary whose conduct was impugned in these cases was ‘obviously’ an organ of state exercising public power. Both cases concerned the exercise of power by the President namely the appointment of a commission of inquiry and bringing an Act of Parliament into operation respectively. There can be no doubt that in these two cases the President exercised public power.

In those cases in which the institutions concerned are not self-evidently public, how does one

⁴⁷ Section 179(1)(a).

⁴⁸ Section 195(1).

⁴⁹ Section 215(3)(c).

⁵⁰ 1999 10 BCLR 1059 (CC).

⁵¹ Id at paras 132–153, especially paras 132–134.

⁵² 2000 2 SA 674 (CC).

⁵³ Id at para 20.

⁵⁴ Id at paras 33–46.

determine whether their powers or functions are public? On this question guidance may be sought (i) in *SARFU*, where the court grappled with the meaning to be attributed to the notion ‘public’ in ‘public concern’ and (ii) in other jurisdictions where the meaning of ‘public power’ or ‘public function’ had been considered. Attention will be focused on the United Kingdom, United States of America and India, on which sources are readily available.

3.3.1.1 The meaning attributed to ‘public’ in *SARFU*

In *SARFU* the Constitutional Court considered the meaning of ‘public’ in the phrase ‘public concern’ in section 1 of the Commissions Act.⁵⁵ The Court held:

The use of ‘public’ to qualify concern makes it clear therefore that the concern must not be a private or undisclosed concern of the President. It must be a concern of members of the public and which is widely shared. The word ‘public’ needs to be construed in its context and with common sense. It would be quite inappropriate to require the concern to be one shared by every single member of the South African public, for that would be to create a condition that could, arguably, never be met. However, the concern must be one shared by a significant segment or portion of the public.⁵⁶

In interpreting the concept ‘public’, the Constitutional Court further referred to two decisions; one of these emphasised the context within which the concept is used,⁵⁷ and the other stressed that ‘public’ does not mean the public as a whole but could also refer to a portion, section or class of the community.⁵⁸

3.3.1.2 ‘Public power’ or ‘public function’ in the United Kingdom, the United States of America and the Indian jurisprudence

⁵⁵ The Commissions Act 8 of 1947.

⁵⁶ See *President of the RSA v SARFU* n 50 above at para 175.

⁵⁷ *Argus Printing and Publishing Co (Pty) Ltd v Darby’s Artware (Pty) Ltd* 1952 2 SA 1 (C) at 8H.

⁵⁸ *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd* 1948 4 SA 480 (W) at 488.

❑ Public function in the United Kingdom

In the UK system, the meaning of ‘public power’ or ‘public function’ comes into play when a determination has to be made whether an institution is amenable to judicial review⁵⁹ or whether it is the type of institution to which the Human Rights Act of 1998 applies.⁶⁰

When determining whether an institution is subject to judicial review, a distinction is often made between public authorities *strictu sensu*, for example departments of state, and those institutions that do not formally form part of government but which are clothed with state authority in the sense that they exercise regulatory authority over a particular area.⁶¹ The former category of institution unequivocally exercises public power.⁶² With regard to the latter category, the source of the institution’s power is considered in determining whether it exercises ‘public power’. If that power derives from statute, then the body is presumptively public.⁶³

However, in recent years the courts have moved from the source-based approach when determining whether an institution is sufficiently public to be subject to the judicial review powers of the courts. The courts now also consider whether the body in question performs a ‘public function’.⁶⁴ According to De Smith, Woolf and Jowell, a body performs a ‘public function’ when it seeks to achieve some collective benefit for the public, or a section of a public and is accepted

⁵⁹ The legal basis for bringing an action for judicial review in the United Kingdom is section 29, 31 and 43 of the Supreme Court Act of 1981 and Order 53 which was part of the rules of the Supreme Court. It now forms part of the Civil Procedure Rules that apply in all litigation in county courts, the High Courts and Court of Appeal (Civil Division). See for a discussion of these rules De Smith, Woolf and Jowell *Principles of Judicial Review* (1999) at 561.

⁶⁰ The Human Rights Act of 1998.

⁶¹ See Craig PP ‘What is public power?’ in Corder and Maluwa *Administrative Justice in Southern Africa* (1997) at 25.

⁶² Ibid.

⁶³ Id at 27.

⁶⁴ See *Regina v Panel on Take-Overs and Mergers, Ex Parte Datafin PLC and Another* [1987] Q.B. 815 at 847–9; see also De Smith, Woolf and Jowell n 59 above at 65.

as having authority to do so⁶⁵ or when the institution concerned participates or intervenes in the social or economic affairs in the public interest.⁶⁶

Obviously, public authorities *strictu sensu* such as departments of state, perform their functions for the collective benefit of the public and in the public interest. How would one determine whether an institution which is not self-evidently an institution of state is performing a public function? De Smith, Woolf and Jowell provide the following guidelines which point to the public nature of the institution:⁶⁷

- whether, but for the existence of the institution, the government would itself have intervened to regulate the activity in question.
- whether the government has acquiesced in or encouraged the activity by providing underpinning for its work, has woven the body into the fabric of public regulation or whether the body was established under the authority of government.
- whether the body was exercising extensive or monopolistic powers by for instance regulating entry into a trade.
- whether the aggrieved party has consensually agreed to be bound by the decision-maker.

In addition to the common law powers of review, the United Kingdom recently adopted the Human Rights Act which incorporates the provisions of the European Convention.⁶⁸ The provisions of the Act apply to ‘public authorities’. As will be shown shortly, the definition of ‘public authorities’ incorporates the notion of ‘public function’. Therefore, the approach to the interpretation of this notion in English law may be very instructive in the interpretation of section 239(b)(ii) of the Constitution.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ De Smith, Woolf and Jowell n 59 above at 68–70.

⁶⁸ The Human Rights Act came into operation on 2 October 2000.

The Human Rights Act of 1998 provides that it is unlawful for a public authority to act in a manner inconsistent with the Convention right.⁶⁹ The Act further defines ‘public authority’ thus:

Public authority includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either a House of Parliament or a person exercising functions in connection with proceedings in Parliament.⁷⁰

This Act further provides: ‘In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private’.⁷¹

In dealing with this definition, academic writers distinguish between public bodies *stricto sensu* or ‘pure public bodies’, and bodies that fall within the purview of the Act by virtue of the public nature of their functions.⁷² A popular view, advocated by Craig and also by Wadham and Mountfield, is that pure public bodies are bound by the Human Rights Act, whether they act in public or private and that section 6(3)(b) bodies are bound only if the nature of their action is public.⁷³

In determining whether a body falls within the scope of section 6(3)(b) and carries out functions of a public nature, various tests are suggested. Craig suggests that the courts could resort to the factors developed by the courts in determining whether a body is subject to review for the purposes of Order 53.⁷⁴ Craig then refers to the tests mentioned by De Smith, Woolf and Jowell above.⁷⁵

Craig observes that these tests could bring the BBC and the Press Complaints Commission within

⁶⁹ Section 6(1) of the Human Rights Act.

⁷⁰ Section 6(3).

⁷¹ Section 6(5).

⁷² See Craig *Administrative Law* (1999) at 564–5; Wadham and Mountfield *Blackstone’s Guide to the Human Rights Act 1998* (2001) at 40.

⁷³ Craig *Administrative Law* at 563–4; Wadham and Mountfield at 40–1.

⁷⁴ Craig *Administrative Law* at 566.

⁷⁵ See n 67 above.

the purview of section 6(3)(b) of the Human Rights Act.⁷⁶

Wadham and Mountfield aver that the reach of the Act will depend very much on how the courts interpret the concept of a 'public function'.⁷⁷ According to them, the statutory source of the power to undertake a function is an important indicator that one is dealing with a body that performs a public function.⁷⁸

❑ Public function in the American jurisprudence

In American law, the notion of 'public function' comes into play when a determination has to be made whether the conduct of an institution which is not traditionally an organ of state amounts to 'state action'.⁷⁹ As will appear shortly, it seems that the American courts, in general, interpret the notion of 'public function' restrictively. The following decisions of the Supreme Court clearly illustrate this:

In *Marsh v State of Alabama*,⁸⁰ a case dealing with a company owned town, the Supreme Court interpreted the notion of 'public function' widely. The court held that the owners of privately owned bridges, ferries, turnpikes and railroads may not operate them as freely as they please, since these facilities are operated primarily to benefit the public and their operation is essentially a public function.⁸¹ Therefore, according to the court, any function that is aimed at benefiting the public is a 'public function'.

⁷⁶ Craig *Administrative Law* at 567.

⁷⁷ Wadham and Mounfield at 41.

⁷⁸ Ibid.

⁷⁹ In American law, state action issues arise only when an institution or person alleged to have violated the constitutional provision is not acting on behalf of government. Government as used in this context refers to the legislature, the executive or the judiciary. See Nowak and Rotunda *Constitutional Law* (1991) at 452.

⁸⁰ 326 U.S 501, 66 S.Ct. 276, 90 Led 265 (1946).

⁸¹ Id at 278.

However, a restrictive interpretation was applied to this notion by the Supreme Court in *Jackson v Metropolitan Edison Company*.⁸² In this matter, a public utility company terminated electricity supply to the petitioner. The petitioner alleged that the termination constituted a state action depriving her of property in violation of due process guaranteed by the Fourteenth Amendment. She argued further that, since the privately owned electricity company provided an essentially public service, it performed a 'public function'. The court referred to previous decisions in which it held that state action was present in the exercise by a private entity of powers traditionally exclusively reserved for the state.⁸³ The court then held that if the electricity company exercised delegated power which was traditionally associated with sovereignty, their case would be different.⁸⁴ The court thus rejected the contention that the electricity company performed a public function.

Justice Marshall dissented. He first observed that the electricity company provided an essential service which was provided by the government in many communities.⁸⁵ According to him, the utility service is traditionally identified with the state through universal public regulation or ownership to a degree sufficient to render it a public function.⁸⁶ Therefore according to him there was state action.

The restrictive approach endorsed by the court in *Jackson v Metropolitan Edison Company* was later followed in *Flagg Bros Inc v Brooks*.⁸⁷ Here the United States Supreme Court reiterated that 'public functions' referred only to those functions traditionally exclusively performed by the state. In this case Brooks was evicted from her apartment and her furniture was then stored by Flagg Bros in its warehouse. After failure by Brooks to pay storage charges, she was informed that the furniture would be sold. She then instituted an action, alleging that such a sale pursuant to legislation would violate the Fourteenth Amendment. The question before the court was whether the purported

⁸² 419 U.S. 345, 42 L Ed 2d 477, 95 S.Ct 449 (1974).

⁸³ Id at 485.

⁸⁴ Ibid.

⁸⁵ Id at 496.

⁸⁶ Ibid.

⁸⁷ 436 U.S. 149, 98 S.Ct. 1729, 52 L Ed 2d 185 (1978).

sale was an action that could be attributed to the state.

The court held that, while many functions have been traditionally performed by government, very few had been exclusively reserved for the state.⁸⁸ The court held that two such areas were the conduct of elections and the performance of municipal functions by a company town.⁸⁹ According to the court, one feature common to both branches of public function is 'exclusivity'.⁹⁰ The court held that the settling of disputes between creditors and debtors was not traditionally an exclusively public function. The court observed that there are other cases of public functions which are not covered by the two examples mentioned above, namely education, fire and police protection, and tax collection.⁹¹

In *Rendell-Baker v Kohn*,⁹² the issue before the court was whether a private school, funded and regulated by the state, was acting under the colour of law when it dismissed an employee. The decision was challenged on the basis that it was made in violation of the due process clause. In support of this contention it was argued that the school performed a public function. The court held that the determining factor was whether the function in question is one performed exclusively by the state.⁹³ The court was of the view that providing education to a maladjusted high school student was without any doubt a public function.⁹⁴ But, that was only the beginning of the inquiry. As regards the further issue to be addressed, the court held that this was not exclusively a state function and thus did not give rise to a state action.⁹⁵

Justice Marshall with whom Justice Brennan agreed, dissented. According to Marshall J, the

⁸⁸ Id at 1734.

⁸⁹ Id at 1734–1735.

⁹⁰ Id at 1735.

⁹¹ Id at 1737.

⁹² 457 U.S 830, 73 L Ed 2d 418, 102 S Ct 2764 (1982).

⁹³ Id at 428.

⁹⁴ Ibid.

⁹⁵ Ibid.

provision of education is an important task of government and ranks at the apex of state functions.⁹⁶ The judge went on to state that the performance of a public function is by itself enough to justify treating a private entity as a state actor.⁹⁷ The judge further noted that when a state actor is not only regulated and funded by the state but also provides service that the state is required to provide, there is a very close connection with the state.⁹⁸ Therefore the judge would have found that state action was involved.

It appears from the decisions discussed above that the courts first attributed a wide meaning to the notion of ‘public function’. For example the court in *Marsh* interpreted the notion to mean any function that is performed to benefit the public. However, in later decisions the courts restricted the wide interpretation by stating that ‘public function’ refers only to those functions that are traditionally and exclusively performed by the state. According to the court, this would include elections; performance of municipal functions; education; fire; police protection and tax collection.

❑ The meaning of public function in the Indian jurisprudence

The Indian Constitution contains a definition of ‘the state’.⁹⁹ However, this definition applies only to the interpretation of Part III, containing fundamental rights, and Part IV dealing with the directive principles of state policy.¹⁰⁰ The meaning of ‘State’ in the Indian Constitution has been raised in a variety of contexts before the courts.¹⁰¹

⁹⁶ Id at 432.

⁹⁷ Id at 433.

⁹⁸ Ibid.

⁹⁹ Article 12 of the Indian Constitution provides that:

‘In this Part, unless the context otherwise requires, ‘the State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India’.

¹⁰⁰ See article 36 of the Indian Constitution.

¹⁰¹ For a discussion of cases dealing with this notion see Seervai *Constitutional Law of India* 4th Ed (1991) at 370–89 and Basu *Constitutional Law of India* (1998) at 13–4.

Most importantly for our purposes, the Supreme Court has had the opportunity to decide whether certain statutory bodies were ‘other authorities’ within the meaning of article 12. In these cases the Supreme Court laid down the criteria that could be used by the courts in interpreting the meaning of ‘other authority’. These tests include the public function test.

The meaning of ‘other authority’ was raised in *Sukhdev Singh v Bhagatram*¹⁰² where the court had to decide whether the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation, all statutory bodies, were authorities within the meaning of article 12 and thus part of the state.

Ray CJ’s response contributes to our understanding of the meaning of ‘public function’. First, the Chief Justice observed that in a welfare state the State undertakes both commercial and governmental functions. According to him, the distinguishing feature of governmental functions is that they are authoritative, which in turn, means that they are of a binding character.¹⁰³ Secondly, the Chief Justice went on to hold that a public authority is a body which has a public or statutory duty to perform and which performs those duties for the benefit of the public and not for private profit.¹⁰⁴ He then considered the statutory provisions of statutes to which these bodies owed their existence and held that, since all these institutions had the power to make rules and regulations binding on others, they were authorities within the meaning of article 12.

Mathew J in his concurring judgment made a deeper investigation. According to him, the power to make rules and regulations binding on others is not the only test that may be used to determine whether an institution is an authority. The judge was of the view that state financial support plus an unusual degree of control over the management and policies of the institution concerned¹⁰⁵ and tax

¹⁰² (1975) A. SC. 1331.

¹⁰³ Id at 1342 para 35.

¹⁰⁴ Ibid at para 39.

¹⁰⁵ Id at 1354 para 96.

exemptions and monopolistic status¹⁰⁶ could also assist in determining whether the institution formed part of the state for the purposes of article 12. Another test, which is equally important, is whether the body performs public functions.¹⁰⁷ According to Mathew J, if the function is of such public importance and so closely related to governmental functions, then even the presence or absence of financial support might be irrelevant.¹⁰⁸ But what constitutes a governmental function or a function of public importance? Mathew J's response to this question is that distinguishing between governmental and private activities is difficult because modern states operate a multitude of public enterprises.¹⁰⁹

The public function test laid down by Mathew J in *Sukhdev Singh* was further refined in *Ramana v International Airport Authority of India*.¹¹⁰ In this case the court held that the distinction between governmental and non-governmental functions was no longer valid in a social welfare state.¹¹¹ Referring to the reasoning of Mathew J in *Sukhdev Singh*, the court held that the contrast is between governmental activities which are private and private activities which are governmental.¹¹² However, according to the court the fact that a department of government has been transformed into a corporation could be a strong indication that such a corporation performs public functions and thus forms part of the state.¹¹³

3.3.1.3 A summary of comparative research

It appears from the jurisprudence of the United Kingdom, United States of America and India that the notion of 'public function' is difficult to define. However, the following principles can be distilled

¹⁰⁶ Ibid at para 98.

¹⁰⁷ These tests have been used by the Supreme Court in *Ramana v International Airport Authority* (1979) A.SC.1628 and *Ajay Hasia v Khalid Mujib* (1981) A. SC. 487 at 495.

¹⁰⁸ Id at para 97.

¹⁰⁹ Id at 1355 at para 103.

¹¹⁰ (1979) A. SC. 1628.

¹¹¹ Id at 1641 at para 18.

¹¹² Ibid.

¹¹³ Ibid.

from these jurisdictions in relation to this concept:

Public power refers to power that derives from legislation. Public function, on the other hand, is any function performed for the benefit of the public or performed in the public interest.

The following factors indicate that the function is public: (i) if the state would have regulated the activity had the body performing the function not existed; (ii) if the state provides underpinning for the body concerned or has woven it into the fabric of public regulation; (iii) if the body exercises extensive or monopolistic powers by regulating entry into a trade and (iv) if the body derives its powers from legislation or the body performs functions that are traditionally and exclusively performed by the state such as collecting tax; (v) if the institution concerned performs functions performed by a government department; and (vi) the unusual degree of control by the state.

3.3.2 What then is meant by public power or function in section 239(b)(ii)?

Having regard to the above mentioned principles, it seems ‘public power’ or ‘public function’ refers to powers or functions that affect members of the public. The public so affected does not have to be the public as a whole. Therefore, ‘public’ could mean a class or section of the community.

Furthermore, any power or function that derives from legislation is of a public nature. However, if there is still uncertainty about the nature of power or function exercised or performed by an institution, it may be useful to inquire whether the power or function concerned is one traditionally and exclusively performed by the state, such as education, police protection, the conduct of elections, fire fighting and so on. If it is, then the power or function is public. Even if the power or function is not one traditionally and exclusively performed by the state it may still amount to a public function or power if:

- the state would have regulated the activity in question had the body not existed

- the body concerned is required to perform its functions in the public interest
- the institution is funded by the state
- the body performs functions that are provided by the state in other areas
- the state has woven the body into the system of public regulation
- the body has monopolistic powers such as regulating entry into trade
- the body has the power to make binding rules and regulations, non-compliance with which is a punishable offence
- the body performs its functions for the benefit of the public and not for private profit
- the body performs functions previously performed by a government department
- the body is controlled by the state

3.4 Public power or function must derive from legislation.

The next question that needs to be asked is: what is legislation? Legislation obviously refers to (i) laws made by elected legislative bodies in all spheres of government and (ii) administrative legislative acts, also known as delegated legislation, such as regulations and proclamations.¹¹⁴ This view is confirmed in the Interpretation Act 33 of 1957. Although the Constitution is supreme, it is generally accepted by the courts¹¹⁵ and by legal writers¹¹⁶ that the Interpretation Act applies to the interpretation of the Constitution. In the Interpretation Act, the word ‘law’ is defined as including any law, proclamation, ordinance or any other enactment having the force of law.¹¹⁷ Therefore, legislation refers to Acts of Parliament and provincial legislation, municipal by-laws, proclamations and regulations.

¹¹⁴ See Baxter *Administrative Law* (1984) at 74.

¹¹⁵ See for example *Zantsi v The Council of State (Ciskei) and Others* 1995 4 SA 615 (CC), 1995 10 BCLR 1424 (CC) at para 36–37 where the Constitutional Court resorted to this Act to construe the meaning of the concept ‘Act of parliament’. See also *Ynuico v Minister of Trade and Industry* 1996 6 BCLR 798 (CC) at 803E–G, and Du Plessis *Re-interpretation of Statutes* (2002) at 205–6.

¹¹⁶ Du Plessis and Corder *Understanding South Africa’s Transitional Bill of Rights* (1994) at 94. The authors in support for their view rely on the Canadian jurisprudence where the federal and provincial interpretation Acts are used to interpret the Constitution. See footnote 163.

¹¹⁷ Section 2 of the Act.

There is one aspect of the subparagraph that needs to be emphasised. An institution may be an organ of state without being a creature of statute. All that is required, is that it should derive its powers or functions from legislation. A commission of inquiry is one example. Commissions of Inquiry are not statutory creatures, they are appointed by the President in whom the power to do so is vested by the Constitution.¹¹⁸ However, the President may decide to make the provisions of the Commissions Act¹¹⁹ applicable to a commission of inquiry, in which event it would exercise statutory powers. The exercise of power by the commission in terms of the Commissions Act would make it an organ of state under this subparagraph. However, if the President decides not to make the provisions of the Commissions Act applicable, the commission would not have statutory powers and would therefore not be an organ of state in terms of this subparagraph.

The conclusion that an institution or functionary derives its powers or functions from legislation does not end the inquiry. This paragraph of the definition further requires that the function or power concerned must have a public character.

3.5 The courts: why the exclusion?

It is important to note that the courts and judicial officers are expressly excluded from the definition of 'organ of state'. The courts contemplated are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrate's Court and any other Court that may be established or recognised in terms of an Act of Parliament or any other court of similar status to the High Court or Magistrate's Court.¹²⁰ The concept 'judicial officer' is not defined in the Constitution but it apparently refers to judges¹²¹ and magistrates.¹²² The exclusion of the courts and judicial officers

¹¹⁸ Section 84(2)(f) and 127(1)(e) in respect of Premiers.

¹¹⁹ The Commissions Act 8 of 1947.

¹²⁰ Section 166.

¹²¹ For example, the heading to section 174(1)–(6), dealing with the appointment of the Justices of the Constitutional Court and the judges of all other courts is entitled 'appointment of judicial officers'.

¹²² See the definition of 'judicial officer' in the Magistrates' Court Act of 1944.

must be seen in the context of the new role that the Constitution envisages for the courts. First, in accordance with the doctrine of separation of powers and checks and balances, the Constitution designates the courts as the guardians of the values entrenched in the Constitution. To ensure that the courts are able to constrain the exercise of power by other organs of state, the Constitution provides that the courts are independent, subject only to the Constitution and the law.¹²³ The judiciary would be unable to perform its constitutional duties if they were organs of state for the purposes of the Constitution. It has been shown that the Constitution requires organs of state to assist and support one another.¹²⁴ If this provision were to apply to the judiciary, it would be unable to act as an effective check and balance on the exercise of state power by other organs of state. The Constitution envisages an independent judiciary that is not bound by these provisions.

Another issue that is relevant here is whether tribunals and forums referred to in section 34 and section 39 of the Constitution¹²⁵ are courts of law or organs of state as contemplated in the definition of ‘organ of state’. Although these institutions closely resemble courts of law, it is generally accepted that they are ‘organs of state’ as defined in section 239. In *Mkhize v Commission for Conciliation, Mediation and Arbitration*,¹²⁶ the Labour Court held that the Commission for Conciliation, Mediation and Arbitration is a tribunal as envisaged in section 39 and that, since it exercises public power and performs public functions in terms of legislation, it is an organ of state as defined in section 239(b)(ii) of the Constitution.¹²⁷ Therefore adjudicative tribunals are organs

¹²³ Section 165(2) of the Constitution.

¹²⁴ See n 11 above.

¹²⁵ Section 34 of the Constitution provides:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum’; and section 39 reads ‘(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law;
- (c) may consider foreign law

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

¹²⁶ 2001 1 SA 338 (LC).

¹²⁷ Id at paras 17, 18 and 20 respectively.

of state for the purposes of the Constitution.

4 LEGAL WRITERS ON 'ORGAN OF STATE'

All standard textbooks on constitutional and administrative law published after the commencement of the 1996 Constitution contain a commentary on the notion of 'organ of state'.¹²⁸ The treatment of this concept in these works can be broadly divided into two categories: those who discuss the concept of 'organ of state' briefly and those who subject the definition of 'organ of state' to a more detailed analysis. In the following passages the views of these writers will be examined, starting with those who discuss the concept cursorily.

4.1 Brief discussions of the concept by academic writers

In their commentary on the application provisions of the Constitution, Davis, Cheadle and Haysom¹²⁹ note that the concept 'organ of state' in the interim Constitution was qualified by the adjectives 'legislative and executive' with the result that the section (section 7(1)) bound only certain organs of state, namely those that performed legislative and executive functions.¹³⁰ Turning their attention to the definition of 'organ of state' in section 239, the authors observe that the new definition makes no reference to the ambiguous concept 'statutory body'. According to them, the new test is whether the institution exercises public power or performs a public function in terms of the Constitution, provincial constitution or legislation, or whether the functionary or institution

¹²⁸ Davis, Cheadle and Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997), Devenish *A Commentary on the South African Constitution* (1998), Devenish *A commentary on the South African Bill of Rights* (1999), Burns *Administrative Law under the 1996 Constitution* (1999), De Waal, Currie and Erasmus *The Bill of Rights Handbook 4th Ed* (2001), Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001), Hoexter and Lyster (Currie ed) *The New Constitutional and Administrative Law Vol Two* (2001), Rautenbach 'General introduction to the Bill of Rights' in *The Bill of Rights Compendium* (1996) Issue 9, Rautenbach and Malherbe *Constitutional Law* (1999), Woolman 'Application' in Chaskalson et al *Constitutional Law* (1996) Revision Service 5 1999.

¹²⁹ Davis, Cheadle and Haysom at 44.

¹³⁰ Ibid.

exercises a public power.¹³¹ Institutions such as banks and bargaining councils, although created by legislation, are not included because they do not perform public functions.¹³² Unfortunately they do not say what public functions are.

Devenish, in his *Commentary on the South African Constitution*, merely quotes without discussing the definition of ‘organ of state’ in the Constitution.¹³³ However, in another work,¹³⁴ when dealing with the application provisions in the Constitution, Devenish quotes Davis, Cheadle and Haysom above and Du Plessis and Corder.¹³⁵ Later, in the section on the right of access to information, he states that the definition of ‘organ of state’ is wide and includes the SAPS, the Receiver of Revenue, Transnet and Telkom.¹³⁶ Interestingly, Devenish does not refer to any authority in support of his propositions.

Burns¹³⁷ also examines the definition of ‘organ of state’ in the Constitution. First, in the context of section 7(1), she make the following observations: (i) state departments and their officials are organs of state and easy to identify; (ii) the test is no longer ‘control’ but whether the public body, functionary or parastatal exercises a public power or performs a public function in terms of the Constitution or legislation.¹³⁸ Secondly, she asks whether the law society is an ‘organ of state’ and concludes, on the basis of the fact that a law society is a statutory body, regulates the legal profession on behalf of the state and therefore exercises public power and performs a public function, that it is an ‘organ of state’.¹³⁹ However, she later suggests that the ‘control test’ laid down by the court in *Directory Advertising* confirms the definition of organ of state in the Constitution.¹⁴⁰

¹³¹ Ibid.

¹³² Id at 45.

¹³³ Devenish *Commentary on the South African Constitution* at 333.

¹³⁴ Devenish *Commentary on the South African Bill of Rights* at 29.

¹³⁵ See Chapter 2.

¹³⁶ Devenish n 134 above at 452.

¹³⁷ Burns *Administrative Law under the 1996 Constitution*.

¹³⁸ Id at 16–7.

¹³⁹ Id at 17.

¹⁴⁰ Id at 55.

Lastly, Burns discusses the concept in the context of ‘legal subjects’ of the administrative law relationship. First, she lists the tests used at common law to identify organs of state. Next, she refers to the definition in the interim Constitution and lastly she tells us what the definition includes at national, provincial and local level of government.¹⁴¹

Hoexter and Lyster¹⁴² infer, on the basis of contradictory views expressed by the courts in *Baloro v University of Bophuthatswana* and *Directory Advertising*, which was followed by the courts under the interim Constitution,¹⁴³ that in our law it is not clear what constitutes an organ of state or what qualifies as public powers or public function.¹⁴⁴ To emphasise the point, they further observe that as far as section 239 is concerned, opinions are divided as to whether this definition widens or restates the ‘control test’ used in *Directory Advertising*.¹⁴⁵ In support of their argument they refer to the opposing views in *Inkatha Freedom Party v Truth and Reconciliation Commission* and *Korf v Health Professions Council of South Africa*.¹⁴⁶

According to Rautenbach, the phrase ‘and all organs of state’ in the application provision of the Bill of Rights is intended to cover organs of state that might not formally form part of the legislature, the executive or the judiciary.¹⁴⁷ Secondly, he states that the definition of ‘organ of state’ in section 239 covers all instances in which public power is exercised or a public function is performed regardless of whether the person or institution performing such function or is formally recognised as an organ of state.¹⁴⁸ Furthermore, Rautenbach points out that institutions created by statute but not performing public functions are not organs of state and the same applies to institutions performing

¹⁴¹ Id at 93.

¹⁴² Hoexter and Lyster *The New Constitutional and Administrative Law Vol Two*.

¹⁴³ Id at 117.

¹⁴⁴ Ibid.

¹⁴⁵ Id at 118.

¹⁴⁶ Ibid. Both decisions are fully discussed below.

¹⁴⁷ Rautenbach *The Bill of Rights Compendium* at para 1A30. See also Rautenbach IM ‘The Bill of Rights applies to private law and binds private persons’ 2000 *TSAR* 296 at 306.

¹⁴⁸ Ibid. In a footnote the author argues that the Canadian case of *McKinney v The Board of Governors of the University of Guelph* (1991) 76 DLR (4th) 545 can no longer be used in support of the contention that South African universities are not directly bound by the Bill of Rights.

public functions but not in terms of legislation.¹⁴⁹

4.2 In-depth analyses of 'organ of state' in the Constitution

There are legal writers who go a step further in their analysis of the constitutional concept of 'organ of state'. These writers, like those referred to above, concede that the control test has been replaced by the public power/function test. Most importantly, they suggest tests that could be used to determine whether a function or power is public.

One such writer is Woolman.¹⁵⁰ First, he correctly observes that the courts were strongly influenced by the narrow 'control test' set out by Van Dijkhorst J in *Directory Advertising*.¹⁵¹ Secondly, he also points out that the test now on offer is whether the institution or person exercises public power or performs public functions regardless of whether such person or institution forms part of 'government' or is subject to control of legislative or executive bodies of state.¹⁵² This new test, according to Woolman, will have the effect that the state will not be able to delegate responsibility for certain activities and thereby immunise itself from any responsibility for the actions of its creation.¹⁵³ But what constitutes 'public power' or 'public function'? According to Woolman, performing a function pursuant to some statutory authority or performing a task in furtherance of some government function constitutes public power.¹⁵⁴ The question whether an institution or person exercises a public function turns on whether it exercises power normally associated with government or whether it possesses the *indicia* of government.¹⁵⁵ Lastly, Woolman makes the following remarks about the concept of 'organ of state' in the Constitution: (i) the definition makes no reference to the ambiguous concept of 'statutory body'; (ii) organs of state should expect to be

¹⁴⁹ Id at para 1A30.

¹⁵⁰ Woolman 'Application' in Chaskalson et al *Constitutional Law of South Africa* Revision Service 5 1999.

¹⁵¹ Id at 10–62.

¹⁵² Id at 10–62A.

¹⁵³ Id at 10–63.

¹⁵⁴ Id at 10–64.

¹⁵⁵ Ibid.

treated differently by the courts; and (iii) the exclusion of the judiciary is designed to permit judicial officers to act in a manner which does invest them with the trappings of public office.¹⁵⁶

De Waal, Currie and Erasmus¹⁵⁷ distinguish clearly between the three categories of organs of state defined in section 239 of the Constitution. As regards the first category (department of state or administration in the national, provincial and local spheres of government) these authors are of the view that they are bound by the Bill of Rights whether they exercise a power in terms of legislation or in another capacity, for example when they enter into contracts.¹⁵⁸ As regards the second category, they opine that the inclusion of the exercise of constitutional powers as the conduct of an organ of state resolves the debate about whether the exercise of constitutional powers by the executive may be challenged as being inconsistent with the Bill of Rights.¹⁵⁹ Lastly and most importantly, De Waal et al deal with that part of the definition which relates to institutions or functionaries exercising public powers or performing public functions. First, they observe that such an institution must derive power from a statute as opposed to merely being incorporated pursuant to a statute such as all companies. Secondly, they point out that the power or function must be of a public nature. The authors point out that distinguishing between public and private functions is not easy. They distinguish between the two: public functions are performed in the public interest and private functions for private gain.¹⁶⁰ According to them, state funding may be an indication that the function is public.¹⁶¹

In an article on the privatisation of state-owned enterprises in the light of the 1996 Constitution, Malherbe¹⁶² subjects the ‘control test’ to rigorous scrutiny and offers some insight as to what is meant by the various components of the definition of ‘organ of state’ in section 239. The discussion

¹⁵⁶ Id at 10–65.

¹⁵⁷ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001).

¹⁵⁸ Id at 50.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Id at 50–1.

¹⁶² Malherbe ‘Privatisation and the Constitution: some explanatory observations’ 2001 *TSAR* 1.

of the meaning of ‘organ of state’ in the Constitution is preceded by a brief reflection on the definition attributed to the notion of ‘organ of state’ in the interim Constitution. In this regard, the author states that the meaning of organ of state for the purposes of section 7(1) and the different interpretations attributed to it by both the courts and legal writers have to be seen against the background of the debate on the horizontal application of the Bill of Rights.¹⁶³ Malherbe correctly observes that two opposing views emerged as to the meaning of this concept under the interim Constitution: a narrow view advocated by Van Dijkhorst J and Venter on the one hand, and a wider conception of the notion set out in *Baloro v University of Bophuthatswana*, on the other hand.¹⁶⁴

Turning his focus to the definition of ‘organ of state’ in the Constitution, Malherbe observes that the question of what constitutes an organ of state is of utmost importance because a number of provisions apply to the organs of state.¹⁶⁵ According to him, the following institutions are organs of state as defined in section 239:

- All departments and administrations and all their agencies and officials.¹⁶⁶
- Any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution. Included under this subparagraph would be the

¹⁶³ Id at 6 and 7. The view that the meaning attributed to concept of organ of state was largely dictated by the preference of a particular commentator or judge for the horizontal or vertical application of the Bill of Rights, in the interim Constitution is debatable. It seems that the author is conflating two different issues. The question whether the Bill of Rights in the interim Constitution applied to private individuals inter se (horizontally) was a different issue altogether which was finally answered in the negative by the Constitutional Court in *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC). There was no doubt that the Constitution applied vertically, that is, it regulated the conduct of the state vis-à-vis the private person. The difficulty was determining whether an institution that was connected to the state in one way or another was an executive organ of state. As I have shown in the previous chapter, the question often arose in relation to statutory bodies such as public enterprises and controlling bodies of professions. In this regard, the courts had to determine whether these institutions were organs of state and, if so, on what basis. In a nutshell, the courts were concerned in these cases with the vertical operation of the Bill of Rights.

¹⁶⁴ Id at 6 and 7.

¹⁶⁵ Id at 5.

¹⁶⁶ Id at 7.

President and the Cabinet, Parliament, the premiers and provincial legislatures and executive councils, municipal councils and the institutions supporting democracy.¹⁶⁷

- Any other institution or functionary exercising a public power of performing a public function in terms of legislation. According to him both requirements must be satisfied, namely that there must be statutory authority for the exercise of the power or performance of the function and that the institution or person must exercise public power or perform public function. Institutions such as churches would normally not qualify because they do not exercise their functions in terms of legislation.¹⁶⁸ Also, private hospitals, or private organisations for the protection of the environment or promotion of tourism would, likewise, not qualify as organs of state because although they perform public functions, they do not do so in terms of legislation.¹⁶⁹

But what is meant by ‘public power’ or ‘public function’ in section 239(b)(ii)? In a footnote Malherbe provides the following answers: (i) ‘power’ refers to the capacity to act coercively or to enforce rules of law; and (ii) a function is an act performed in the exercise of a power.¹⁷⁰ In addition, he avers that a public power or function refers in the first place to the powers or functions to be exercised in respect of the functional areas allocated to the state in terms of the Constitution.¹⁷¹ Secondly, public functions, according to him, refer to powers appropriated by the state in terms of legislation as a public function.¹⁷² Further, institutions such as Transnet, Eskom, Denel and the SABC perform their functions in terms of legislation in respect of matters that could be considered public powers or public functions and thus could be considered organs of state.¹⁷³ The same applies to the controlling bodies of professions, because they exercise public functions

¹⁶⁷ Ibid.

¹⁶⁸ Id at 8.

¹⁶⁹ Ibid.

¹⁷⁰ Id at 8 footnote 41.

¹⁷¹ Id at 8.

¹⁷² Id at 8–9.

¹⁷³ Id at 9.

by regulating these professions for the benefit of the public.¹⁷⁴

Criticising the approach adopted by Van Dijkhorst J in *Korf v Health Professions Council*,¹⁷⁵ Malherbe argues that if the court in *Korf* is correct that paragraph (b)(ii) covers the same institutions as those mentioned in paragraph (b)(i), the drafters of the Constitution would not have included it.¹⁷⁶ He also argues that it is not correct that the definition of ‘organ of state’ in section 239 merely restates the ‘control test’. According to him, reference to ‘public power or function’ refers to government function and not the control test.¹⁷⁷

Malherbe concludes his interesting analysis of organ of state in the Constitution by telling us that the government control test as the sole criterion for determining whether an institution is an ‘organ of state’ has been replaced by a much wider test set out in section 239 of the Constitution.

These views are shared by Malherbe and Rautenbach.¹⁷⁸ But unlike Malherbe, these authors equate organ of state with government bodies. However, it is clear that the notion of ‘organ of state’ is used in a generic sense to include institutions which traditionally form part of the state and also functionaries and institutions that perform public powers or functions in terms of legislation.

4.3 A summary of the views of academic writers

There seems to be consensus among academic writers that the definition of ‘organ of state’ in the Constitution is wider in the sense that it includes institutions and functionaries that do not traditionally form part of the state. There is also general agreement that it is not the control test advocated by the courts which is the deciding factor but whether the institution or functionary concerned exercises

¹⁷⁴ Id at 10.

¹⁷⁵ For a discussion of this decision see p 87 below.

¹⁷⁶ Id at 10.

¹⁷⁷ Id at 11.

¹⁷⁸ Rautenbach and Malherbe n 128 at 78–79 and 334.

public power or performs a public function. But what constitutes public power or public functions? It appears from the views of Woolman, De Waal, Currie and Erasmus and Malherbe that the following institutions or persons exercise public power or perform public functions and thus qualify as 'organs of state': institutions or functionaries (i) deriving authority from legislation; (ii) furthering government objectives; (iii) possessing state powers in the sense that they can enforce rules of law; (iv) performing their functions in the public interest; (v) relying on the state for funding; and (vi) performing functions that are allocated to the state by the Constitution in Schedules 4 and 5.

These factors should not be considered a *numerus clausus*. There may be other factors that point to the exercise of public functions or public powers.

5 WHICH INSTITUTIONS OR PERSONS QUALIFY AS ORGANS OF STATE UNDER THE CONSTITUTION?: THE APPROACH OF THE COURTS

In a number of cases decided after the commencement of the 1996 Constitution, the courts have been required to pronounce on the question whether public enterprises, institutions established by the Constitution to support democracy, and the controlling bodies of profession are organs of state under the Constitution. In dealing with these institutions, individually, the courts had to apply the definition of 'organ of state' in section 239 of the Constitution. Divergent opinions emerge in this regard. In some cases the courts have held that the definition of organ of state introduces an approach different to that followed under the interim Constitution. In other cases, however, the courts expressed the view that section 239 merely restates the control test used by the courts in their interpretation of 'organ of state' for the purposes of the interim Constitution. In the ensuing paragraphs, cases decided to date dealing with the concept of organ of state will be discussed in chronological order; next it will be shown that, although in some cases the courts used a variety of factors to identify organs of state, the courts in general are still profoundly reluctant to use tests other than the control test.

In the two very first cases dealing with the concept of ‘organ of state’, the courts had to decide whether Transnet, a public enterprise, is an ‘organ of state’ and thus bound by the provisions of the Constitution.

In *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*,¹⁷⁹ Transnet called for tenders for the printing and publication of a leisure magazine supplied to the customers of the South African Airways flying on domestic and international flights. The applicant company, a printer and publisher which had published this magazine in terms of a contract for 16 years submitted its tender together with three other companies. These were considered and evaluated by the tender board of Transnet which awarded the tender to a company other than the applicant company. The applicant then sought reasons why its tender had not been successful. The response to this request was that Transnet did not bind itself to accept the lowest tender and that it would not furnish any reasons for the rejection of a tender, as was stated in the tender conditions which was given to all the applicants. Relying on the right of access to information,¹⁸⁰ the right to just administrative action¹⁸¹ and the constitutional injunctions in section 217,¹⁸² the applicant approached the court seeking an order (i) declaring that the conditions of tender were inconsistent with these provisions of the Constitution and (ii) giving it access to the copies of all documents relating to the tender in question, including any contract concluded with the party whose tender was successful.

¹⁷⁹ 1998 2 SA 109 (W).

¹⁸⁰ Since the matter was heard before the enactment of the legislation envisaged in section 32(2), section 32 had to read as follows in terms of item 23(2)(a) of Schedule 6 of the Constitution:

‘(1) Every person has the right of access to information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights’.

¹⁸¹ This section also had to be read together with item 23(2)(b) of Schedule 6 which read thus: ‘Every person has the right to –

- (a) lawful administrative action where any of their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened’.

¹⁸² See n 26 above.

Had it not been for the concession made on behalf of Transnet, the first question to be considered by the court would have been whether Transnet was an organ of state. In this regard it was conceded for the purposes of argument that Transnet is an organ of state.¹⁸³ However, Transnet reserved the right to challenge the correctness of that concession in subsequent proceedings.¹⁸⁴

Besides this concession the court observed that Transnet was a successor in title to the erstwhile South African Transport Services which was in turn part of a government department – the Department of Transport. The court remarked further that although Transnet was registered as a public company in terms of the Companies Act, it remained wholly *controlled* and owned by the state.¹⁸⁵ Transnet was thus considered an organ of state to which the provisions of the Bill of Rights applied.¹⁸⁶ The court found it unnecessary to deal with the argument based on section 217 of the Constitution.¹⁸⁷ Transnet was then ordered to provide the applicant company with all documentation relating to the evaluation and determination of the tender and to provide it with reasons for the rejection of its tender.

Less than a year after the decision in *ABBM Printing*,¹⁸⁸ Transnet was once again in court for its refusal to furnish reasons to an unsuccessful tenderer for the rejection of its tender. In *Goodman Bros (Pty) Ltd v Transnet*¹⁸⁹ an unsuccessful tenderer sought reasons from Transnet for the rejection of its tender on the basis of the right of access to information, the right to just administrative action and section 217 of the Constitution. However, *Goodman Brothers* differed from *ABBM Printing* in two important respects. First, the concession made in *ABBM Printing* that Transnet was an organ of state was not repeated. In fact, this was one of the issues between the

¹⁸³ See *ABBM Printing and Publishing Pty Ltd v Transnet Ltd* n 179 above at para 2.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.* (my emphasis).

¹⁸⁶ See para 12.

¹⁸⁷ *Id* at para 26.

¹⁸⁸ The decision in *ABBM Printing and Publishing v Transnet* was delivered in July 1997 and *Goodman Bros* below in April 1998.

¹⁸⁹ 1998 8 BCLR 1024 (W).

parties. Secondly, the court approached the matter somewhat differently by asking whether Transnet was an organ of state as envisaged in section 217, a provision outside the Bill of Rights.

In dealing with the question whether Transnet is an organ of state, the court referred with approval to the views expressed by Van Dijkhorst J in *Directory Advertising* and found that Transnet, like Telkom, is controlled by the state and that therefore it is an organ of state.¹⁹⁰ In contrast to the decision in *Directory Advertising*, the court went further and inferred from the provisions of the Legal Succession to the South African Transport Services Act of 1989, in terms of which Transnet was formed, that it was anything but a free agent in the conduct of its business¹⁹¹ and that it is required by the Act to conduct its business in the *public interest*, which brought it within the definition of ‘organ of state’ in section 239 of the Constitution in that it performs public functions in terms of the Act referred to above.¹⁹²

It would therefore be incorrect to refer to this decision as authority for the proposition that the control test is now generally accepted as the sole criterion to determine whether an institution is an organ of state for the purposes of the Constitution. As stated, the matter was disposed of on the basis of section 217 of the Constitution. This provision contains a qualification that it applies only to organs of state in the national, provincial and local spheres of government. In its judgment, the court did not deal with this qualification at all. Perhaps Transnet is an organ of state in the national sphere of government because it is ultimately controlled by a member of Cabinet?

Transnet appealed against this decision of the High Court. In *Transnet v Goodman Brothers (Pty) Ltd*,¹⁹³ two judges of the Supreme Court of Appeal, Olivier JA and Schutz JA, wrote separate judgments dismissing the appeal. Both judges decided the appeal on the basis of section 33 and

¹⁹⁰ Id at 1031B–E.

¹⁹¹ Ibid.

¹⁹² Ibid. In particular 1031D–E.

¹⁹³ 2001 1 SA 853 (A).

thus also avoided dealing with the most awkward issue, namely whether Transnet is an organ of state as contemplated by section 217 and if so, whether it performs its functions in any of the levels of government.

The first issue considered by Olivier JA was whether section 33(1) and (2) was applicable. Put differently, he considered the question whether, in calling for tenders and awarding tenders, Transnet performed an ‘administrative action’ as envisaged in these sections. In dealing with this issue the judge, relying on the views of common law writers on the subject, observed that the main characteristic of administrative action is seen to be the exercise of a public function by a public authority affecting rights or legitimate expectations of individuals.¹⁹⁴ Secondly, the judge considered cases decided under both the interim and the 1996 Constitution in which the Constitutional Court emphasised the role of administrative law in regulating and controlling the exercise of public functions.¹⁹⁵ Lastly, he considered the definition of ‘administrative action’ in the Promotion of Administrative Justice Act of 2000 which had not yet commenced, and noted that administrative action could be taken by a person other than an organ of state *when exercising a public power or performing a public function*.¹⁹⁶ The judge then went on to consider whether Transnet performed an administrative action. In his opinion, the threshold requirement was the exercise of a public power or performance of a public function.¹⁹⁷

In determining whether Transnet performed public functions or exercised public powers, Olivier JA considered the provisions of the Succession Act and drew the following inferences: (i) all the powers and functions of the former Transport Services were transferred to Transnet and therefore the latter performs public service and public functions; (ii) Transnet exercises all the powers of a government department; (iii) the state is the only member of Transnet and controls it; (iv) Transnet

¹⁹⁴ Id at para 30.

¹⁹⁵ Id at para 34.

¹⁹⁶ Id at para 35 (emphasis original).

¹⁹⁷ Id at 36.

provides services in the public interest.¹⁹⁸

Then Olivier JA found on the basis of these provisions of the Succession Act that Transnet performs public functions and exercises public powers and in doing so, it performs administrative action for the purposes of section 33.¹⁹⁹

Schutz JA, writing for the majority, also considered the question whether Transnet, in calling for tenders, performed an ‘administrative action’. In this regard, he held that it did.²⁰⁰ As regards the nature of Transnet, Schutz JA held that although it was a limited company, the government still owns all of its shares and thus has ultimate control; it provides services to the public; and lastly, it has near monopoly over rail transport.²⁰¹

As stated earlier, neither of the two judges considered the provisions of section 217 of the Constitution and therefore did not decide whether Transnet is an ‘organ of state’ for the purposes of that section.²⁰²

In *De Lille and Another v Speaker of the National Assembly*,²⁰³ the issue before the court was whether the exercise of parliamentary privilege was subject to the provisions of the Constitution. The court first remarked that the Constitution is the supreme law of the Republic.²⁰⁴ Furthermore, the court continued, the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state, and thus any privilege inconsistent with the Constitution is invalid.²⁰⁵ Most importantly the court held that the National Assembly is an organ of state subject to the

¹⁹⁸ See para 36 and 37 of the judgment.

¹⁹⁹ Id at para 38.

²⁰⁰ Id at para 7.

²⁰¹ Id at para 8.

²⁰² See paras 44 and 14 dealing with the approach of Olivier and Schutz JJA respectively on the application of section 217.

²⁰³ 1998 3 SA 430 (C).

²⁰⁴ Id at para 22.

²⁰⁵ Ibid.

supremacy of the Constitution and the Bill of Rights which forms part of it.²⁰⁶

The next case considered whether an adjudicative tribunal²⁰⁷ is an organ of state. In *Mkhize v Commission for Conciliation Mediation and Arbitration*,²⁰⁸ the applicant sought an order setting aside the arbitration award issued against him by the Commissioner of the CCMA. The events leading to the dismissal of the applicant were briefly as follows: the applicant was found guilty of removing a container placed in the custody of his employer without authorisation. As a result he was dismissed. Subsequent appeal and conciliation proceedings at the CCMA failed. The applicant then submitted the dispute for arbitration. During the arbitration proceedings, the applicant's attorney submitted that a telephone conversation was inadmissible because it had been obtained in violation of the applicant's constitutional right to privacy. The Commissioner refused to consider this constitutional challenge on the basis that he had no jurisdiction to consider constitutional arguments. Hence the challenge at the Labour Court.

The question before the Labour Court was therefore whether the Commissioner ought to have considered the constitutional argument raised by the applicant and, if so, on what basis. In answering this question, the court made comments relevant to the inquiry under discussion, namely, the meaning of organ of state under the Constitution. The court found that the Commissioner should have considered the constitutional challenge. The court based its finding in this regard on two grounds. First, the court found that the Commission for Conciliation, Mediation and Arbitration was a tribunal as envisaged in section 39 of the Constitution.²⁰⁹ As a result, it is required to promote the

²⁰⁶ Id at para 25.

²⁰⁷ For differences between executive, adjudicative and policy-implementing tribunals, see Baxter *Administrative Law* 180–3.

²⁰⁸ 2001 1 SA 338 (LC).

²⁰⁹ Section 39 reads thus:

‘Interpreting the Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law;
- (c) may consider foreign law.

spirit, purport and objects of the Bill of Rights when it performs arbitral functions.²¹⁰ Secondly, and most importantly for our purpose, the court found that section 41(1)(d) of the Constitution requires all organs of state to be loyal to the Constitution.²¹¹ The court further considered the definition of ‘organ of state’ in section 239 and came to the conclusion that the Commission for Conciliation, Mediation and Arbitration is an organ of state as envisaged in section 239(b)(ii) because it exercises public power or performs public functions in terms of legislation.²¹²

In *Korf v Health Professions Council of South Africa*,²¹³ the notion of ‘organ of state’ was subjected to a more detailed and critical analysis. In this case the applicant, relying on the provisions of section 32 of the Constitution, sought access to the respondent’s file containing documents relating to an investigation of a complaint lodged by the applicant against a medical doctor.

The facts giving rise to this action are briefly as follows: the applicant consulted Dr H at a clinic when she was five months pregnant. Dr H performed a sonar investigation and told her that she was fine. Later that evening the applicant noticed that something was wrong and on the instructions of Dr H she was admitted at a public hospital. Dr H arrived and looked at the sonar report and once again assured her that everything was in order. Next, he told her that the baby would not live and that the foetus had to be removed. This he did, putting the foetus on a trolley without ascertaining whether it was alive. After few minutes when Dr H was informed that the child was alive, he responded by saying that those were final spasms. He then went to the baby, ascertained that there was life and ordered an incubator. At this stage the child was already blue and as a result of this medical neglect, the child became a quadriplegic.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

²¹⁰ Above n 208 at para 18.

²¹¹ This provision provides that ‘all spheres of government and all organs of state within each sphere must be loyal to the Constitution, the Republic and its people’.

²¹² Above n 208 at para 20.

²¹³ 2000 1 SA 1171 (T).

The applicant then lodged a complaint with the South African Medical and Dental Council, the predecessor of the Health Professions Council, against Dr H on the basis of medical negligence. An inquiry was held and the applicant was informed that the explanation given by Dr H had been noted and no action would be taken.

The applicant then sought to institute an action on behalf of her child against Dr H and the public hospital that she went to. To be able to do this, she needed copies of the content of the file. This application was opposed by the Health Professions Council on the basis that the respondent is not an organ of state and that the information was not required by the applicant for the exercise of her rights.

In dealing with the concept of ‘organ of state’, the court referred to the understanding of ‘organ of state’ in *Directory Advertising*, namely that an organ of state is not an agent of the state and that the test to be used in determining whether an institution is an organ of state is the control test.²¹⁴ The court also referred to all the decisions decided under the interim and the 1996 Constitution in which the control test was decisive.²¹⁵ The first question considered by the court was whether the definition of ‘organ of state’ in section 239 is wider than that contained in the interim Constitution. In this regard, the court held that ‘statutory body or institution’ has not become ‘any other functionary or institution’.²¹⁶ The second question considered by the court was whether the description set out in subparagraph (b) of the definition extended the meaning of organ of state. The court held that it does not. The remaining question was whether reference to ‘public function’ takes the definition of ‘organ of state’ out of the ‘control test’. According to the court, the answer depended on the meaning to be given to the words ‘public function’.²¹⁷

²¹⁴ Id at 1176C–H.

²¹⁵ Id at 1176H–1177A.

²¹⁶ Id at 1177D–E.

²¹⁷ Id at 1177F–G.

The court then dealt with each of the subparagraphs of the definition of ‘organ of state’ in section 239 and held that (i) the executive arm of government is expressly mentioned in subparagraph (a) and (ii), the legislative arm falls under subparagraph (b)(i) which also includes, for instance, the Auditor-General and the Public Protector.²¹⁸ According to the court, all these institutions are part of the machinery of the state. So are institutions or functionaries exercising public power.²¹⁹ Turning its attention to subpara (b)(ii), the court held that there is no reason to give the words ‘public’ when used together with ‘function’ a meaning that would take it outside the context of ‘engaged in the affairs or service of the public’ and give it the meaning of ‘open to or shared by all the people’.²²⁰

The court then concluded that the precise definition of organ of state in section 239 was not intended to differ materially from the 1993 definition.²²¹ The judge therefore decided to adhere to the control test developed under the interim Constitution.²²²

The court then went on to apply this test in deciding whether the Health Professions Council is an ‘organ of state’. In this regard, the court followed *Mistry v Interim National Medical and Dental Council of South Africa*, where it was held that the predecessor of the respondent was not an organ of state for the purposes of the interim Constitution because it was not controlled by the state.²²³ Therefore, the applicant could not demand access to the records in the possession of this body. The court held, however, that the applicant should be given access to that part of the file emanating from the public hospital since this institution is an organ of state.²²⁴

²¹⁸ Id at 1177G–H.

²¹⁹ Id at 1177H.

²²⁰ Id 1177H–I.

²²¹ Id at 1177I.

²²² Id at 1177J.

²²³ Id at 1178C–D. For a commentary on this case and what would have happened had the matter been decided in terms of the Promotion of Access to Information Act 2 of 2000, see Gaum L ‘The right to access to information: *Korf v Health Professions Council of South Africa* 2001 1 SA 1171 (T)’ 2001 *THRHR* 146.

²²⁴ Id at 1178F–G and 1179D–E.

In *Inkatha Freedom Party and Another v Truth and Reconciliation Commission*,²²⁵ the application of the definition of ‘organ of state’ in the context of section 32 came under the spotlight. In this matter the Truth and Reconciliation Commission, a statutory body mandated by the postscript of the interim Constitution to establish as accurate a picture as possible of the causes, nature and extent of the gross violation of human rights, made adverse findings about the activities of the applicant, the Inkatha Freedom Party and its President. Basing its claim on the provisions of section 32 read with item 23(2)(a) of Schedule 6, the applicant sought access to the information upon which these findings were made. This application was opposed on the basis, inter alia, that although the Truth and Reconciliation Commission is an institution that exercises public functions in terms of legislation, it does not fall within the category of an organ of state constituted as a sphere of government.

In dealing with this issue, the court distinguished between two inquiries required by section 32, as it read at the time. The first inquiry was whether the Truth and Reconciliation Commission formed part of the state. In this regard the court observed that it would be wrong to regard the state as an abstract entity. According to the court, the concept of the state appears to represent a condensation of a variety of institutions that make up the body thereof.²²⁶ The court also held that the concept of state itself must presuppose that an element of the state constitutes the state for the purposes of section 32(1).²²⁷ In other words, an ‘organ of state’ is the state. In deciding whether the Truth and Reconciliation Commission formed part of the state, the court turned to the provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995 to which the Commission owed its existence. The court concluded from the following provisions of the Act that the Commission formed part of the state: the conditions of employment of the Commissioners who were not employees of the state were determined by the Minister responsible for the Act together with the Minister of Finance; the commissioners were appointed by the President acting in consultation with

²²⁵ 2000 5 BCLR 534 (C).

²²⁶ Id at 544E–F.

²²⁷ Id at 544G.

the cabinet; the State Liability Act applied to the Commission.²²⁸ In any event, continued the court, the Truth and Reconciliation Commission was mandated by the interim Constitution.²²⁹

The court then dealt with the question whether the Truth and Reconciliation Commission constituted an organ of state in any sphere of government. The argument was that since the Truth and Reconciliation Commission was not controlled by the state it would not constitute a sphere of government.²³⁰ Responding to this argument the court held that the definition of ‘organ of state’ in section 239 encompassed institutions or functionaries beyond those that exist in any of the spheres of government, to include those that exercise public powers.²³¹ The court further held that the fact that section 32(1) of the Constitution applied to the State or its organs in any sphere of government was aimed at ensuring that institutions exercising public powers, which did not exist in any sphere, would not fall outside the ambit of this section.

The court decided that the Truth and Reconciliation Commission, even though it was not controlled by the state, was bound by the provisions of section 32 of the Constitution because it formed part of the state.²³²

In *Esack NO and Another v Commission on Gender Equality*,²³³ the issue that was addressed *obiter* by Davis J in *Inkatha Freedom Party*, namely whether an organ of state can be equated to the state itself, was an issue between the parties. In this case an unsavoury relationship had developed between the applicant, the Chief Executive Officer of the Commission on Gender Equality, and other commissioners which ultimately led to her offer to resign. This offer to resign was accepted by the Commission, but before it was conveyed to the applicant, she withdrew her offer and refused to vacate her office. The Commission, having accepted the offer to resign,

²²⁸ Id at 544G–J.

²²⁹ Id at 545A.

²³⁰ Id at 545G.

²³¹ Id at 545H–546C.

²³² Id at 546E.

²³³ 2000 7 BCLR 737 (W).

prevented the applicant from gaining access to the premises of the Commission, leading to the application under discussion.

Since the matter concerned labour issues, it was governed by section 157(2) of the Labour Relations Act 66 of 1995, which set out the jurisdiction of the Labour Court which it exercises concurrently with the high court. The relevant provisions read thus:

The Labour Court has concurrent jurisdiction with the Supreme Court–

- (a) in respect of any alleged violation or threatened violation by the State in its capacity as employer of any fundamental right entrenched in Chapter 3 of the Constitution; and
- (b) in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct by the State in its capacity as employer.

The first argument raised in this matter was that the Commission was not an organ of state. In the light of the provisions of section 181 which lists the state institutions supporting democracy, the definition of ‘organ of state’ in the Constitution, and the provisions of the Commission on Gender Equality Act of 1996, it was conceded by the Commission that it is an ‘organ of state’. However, another contention was made on behalf of the Commission, that an ‘organ of state’ cannot be equated with the state itself²³⁴ and therefore, was not bound by this section which applied to ‘the State’ in its capacity as the employer. Answering this argument the court held, using the language used by Van Dijkhorst J in the *Directory Advertising* decision, that the Commission is an intrinsic part of government and the fact that it is independent did not detract from this.²³⁵ In addition, the court found that the Commission performs government functions in order to eradicate discrimination and to ensure that the values of the Constitution relating to non-discrimination become a reality.²³⁶

²³⁴ Id at 744E.

²³⁵ Id at 744H–J.

²³⁶ Id at 744J–745A.

The court then concluded that the Commission is ‘the state’ and was therefore the employer of the applicant.²³⁷

The Attorneys Act of 1979 provides that aspirant notaries must sit and pass an examination conducted by two or more examiners appointed by the Judge President of the division concerned for the purposes of arranging, controlling and conducting examinations.²³⁸ The applicant in *Ngubane v Meisch NO and Another*²³⁹ wrote his examination pursuant to these provisions and failed. He then approached the court in terms of section 32 of the Constitution for an order directing the examiners to furnish him with a copy of his marked examination paper. The respondents opposed the application on various grounds, including the fact that the respondent is not an ‘organ of state’ or any of its organs in any sphere of government.

In considering the constitutional status of the examiners, the court first referred to the control test set out in *Directory Advertising* and followed in *Goodman Bros.*²⁴⁰ Applying this test to the issue at hand, the court held that the examiners did not mark the paper under the control of the State, neither were they under the control of the Law Society; they acted independently.²⁴¹ The court also held that the examiners did not perform public functions as required by section 239(b)(ii) of the Constitution when marking examination scripts.²⁴² The basis upon which the court made this finding is not clear. The reason could probably be that the examiners were not under the control of the state.

Therefore, the applicant’s case failed in this preliminary inquiry in terms of section 32 of the Constitution.²⁴³

²³⁷ Id at 745A.

²³⁸ Section 14(d) of the Attorneys Act 53 of 1979.

²³⁹ 2001 1 SA 425 (N).

²⁴⁰ Id at 429D–F.

²⁴¹ Id at 429I.

²⁴² Id at 429G–H.

²⁴³ For a commentary on this decision, see Wessels J ‘Failed? Accessing your exam paper’ 2000 *De Rebus* 29.

In *Nextcom (Pty) Ltd v Funde NO and Others*,²⁴⁴ Nextcom, a bidder for a third mobile cellular telecommunications service licence, made an urgent application to be provided with information by the South African Telecommunication Regulatory Authority (SATRA) relating to a final recommendation made to the responsible Minister as to whom the licence should be awarded to. The court held that Nextcom would be entitled to such information if SATRA was an organ of state. Applying the test laid down by Van Dijkhorst J in *Directory Advertising*, the court held that SATRA was an organ of state because:

- it was established by statute
- its Council was appointed by the President
- it functions in the executive sphere by providing telecommunications services
- it is financed by the state
- its activities are prescribed by legislation
- its employees are civil servants
- it is obliged to furnish the Minister with annual reports
- it is under the control of the state²⁴⁵

From the above, it is clear that the control element was but one of a number of tests applied by the court which pointed to SATRA being an organ of state.

As in the case of notaries, anyone who wants to practise as an accountant or auditor must pass an examination prescribed by the Public Accountants' and Auditors' Board, a juristic person established in terms of section 2(1) of the Public Accountants and Auditors Act 80 of 1991. In addition, the Board is given powers by the Act to prescribe qualifications which would entitle the person to exemption from the requirements to be complied with by a person desiring to be

²⁴⁴ 2000 4 SA 491 (T).

²⁴⁵ Id at 503D–504B.

registered as an accountant or auditor, including passing the examination.²⁴⁶ The applicant in *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board*²⁴⁷ submitted an application to the Board for the recognition of its examination so that a persons who has passed that examination would be exempted from writing an examination set by the Board as well. This application was turned down by the Board. The applicant then sought to have the decision set aside on the basis that it was an unlawful administrative action. The application was opposed by the Board. One of the grounds relied upon by the Board was that section 33 could not be invoked as the basis for judicial review of administrative action. Essentially, the argument was that section 33 did not apply.

Responding to this argument, the court held that the Board was bound by the provisions of section 33 as it stood at the time.²⁴⁸ The court based its conclusion on the following factors: (i) the Board is an organ of state in the sense that it exercises public power or performs public functions in terms of legislation; (ii) it is a creature of statute and derives its power from the Public Accountants' and Auditors' Act; (iii) it also appears to perform public functions in terms of the Act; (iv) it is a regulatory body entrusted with the task of ensuring that proper standards are maintained in the accounting and auditing profession; (v) it functions in close co-operation with structures of state authority; (vi) its members are appointed by the Minister and include people who hold public office as state functionaries; and (vii) it depends on the state for infrastructural support.²⁴⁹ The court inferred from all these factors that the Board exercises public power and therefore found it unnecessary to decide whether it also performs public functions.²⁵⁰

The thorny issues raised by the definition of 'organ of state' in section 239, such as whether this definition is wider than the definition contained in the interim Constitution, are yet to be raised at the

²⁴⁶ Section 13(1)(g) of the Public Accountants' and Auditors' Act of 1991.

²⁴⁷ 2001 2 SA 980 (W).

²⁴⁸ Id at 996B.

²⁴⁹ Id at 996B–E.

²⁵⁰ Id at 996F.

Constitutional Court. In *Hoffmann v South African Airways*,²⁵¹ the Constitutional Court considered the nature of Transnet, of which the South African Airways is a part. At issue in this matter was whether the refusal of the South African Airways to employ a person on the basis of his HIV status violated any of his rights entrenched in the Constitution. The court considered the provisions of the equality clause in the Constitution, particularly section 9(3),²⁵² and observed:

Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such it is an organ of state and is bound by the provisions of the Bill of Rights in terms of section 8(1), read with section 239, of the Constitution. It is, therefore, expressly prohibited from discriminating unfairly.²⁵³

The Constitution provides that government in the Republic is constituted at national, provincial and local spheres of government.²⁵⁴ Organs of state in these spheres are obliged to observe and adhere to the rules and principles of co-operative governance set out in Chapter 3 of the Constitution. In *Independent Electoral Commission v Langeberg Municipality*,²⁵⁵ the Constitutional Court considered what constitutes organs of state in the national sphere of government. The facts in this case were that the Stilbaai town council brought an urgent application before the High Court for an order directing the Electoral Commission to provide it with a separate voting station for the local government elections of 2000. The High Court ordered the Electoral Commission to provide a mobile voting station to the Stilbaai Community. The Commission went further than ordered and set up a separate voting district in Stilbaai. Despite this, the Electoral Commission appealed against the decision of the High Court. One of the bases of their challenge was a finding by the High Court

²⁵¹ 2000 11 BCLR 1211 (CC).

²⁵² Section 9(3) provides that ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

²⁵³ *Hoffmann v South African Airways* above n 251 at para 23 (footnotes omitted).

²⁵⁴ Section 40(1).

²⁵⁵ 2001 3 SA 925 (CC).

that the Electoral Commission was not an organ of state within a sphere of government and therefore section 41(3) of the Constitution did not have to be complied with by Stilbaai before bringing the matter to court.²⁵⁶

Although the Constitutional Court decided that the issue between the parties was moot in the sense that there was no longer a live controversy between the parties since elections had passed, the question whether the municipality had to comply with section 41(3) before instituting an action against the Electoral Commission, was on a different footing.²⁵⁷ Therefore the issue was whether the Commission is an organ of state and, if so, whether it is an organ of state within a sphere of government.

In dealing with the first issue, the Court held that the Commission exercises public powers and performs public functions and is therefore an organ of state as defined in section 239 of the Constitution.²⁵⁸ The Court then considered what is meant by ‘national sphere of government’. It held that the legislative authority in the national sphere of government vests in Parliament and that the national executive authority is vested in the President.²⁵⁹ The institutions in question, the court held, comprise organs of state in the national sphere of government and are within it.²⁶⁰ The court went on to state that these organs of state are not section 239 organs of state because they are neither departments nor administration within the national sphere of government.²⁶¹

The Court then addressed the question whether the Electoral Commission is an organ of state within the national sphere of government. The Court held that it is not for the following reasons: (i) the

²⁵⁶ Section 41(3) reads thus:

‘An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute’.

²⁵⁷ *Independent Electoral Commission v Langeberg Municipality* above n 255 at para 17.

²⁵⁸ *Id* at para 22.

²⁵⁹ *Id* at para 25.

²⁶⁰ *Id* at paras 25 and 26.

²⁶¹ *Id* at para 25.

Electoral Commission is not a department of state or administration in the national sphere of government; (ii) the Commission is described as an institution supporting constitutional democracy; and (iii) it would be a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent on and interrelated to all other spheres of government.²⁶²

Therefore, the dispute between the Commission and the municipality was not an intergovernmental dispute requiring adherence to the provisions of section 41(3) of the Constitution.

6 A COMMENT ON DECIDED CASES

South African courts have considered the notion of ‘organ of state’ in a number of different contexts. The decisions considered above can be divided into two groups. The first category deals with an institution that is ‘obviously’ an organ of state. The clearest example of such an institution is Parliament. *De Lille* falls within this category and raises no difficult issues.

The second category comprises what one may call statutory bodies that were created by either the Constitution or an Act of Parliament. These may be further divided into four groups: those where the ‘control test’ was considered to be the sole test in determining whether they form part of the state; those where the courts considered the control test together with other factors to come to a conclusion that the institution concerned is an organ of state; those dealing with the question whether an organ of state can be equated with the state; and those that deal with the words that qualify the naked meaning of ‘organ of state’.

The control test which was strongly advocated by the courts in their interpretation of the interim Constitution, has had a profound influence on the interpretation of the notion of ‘organ of state’ in

²⁶² Id at para 27.

the 1996 Constitution by some of our courts. Although the approach has proved helpful in some decisions, strict adherence to it, especially if used as a sole criterion, could render certain institutions that exercise statutory powers in a coercive manner, immune to the limitations imposed by the Constitution. *Korf* and *Ngubane* are cases in point. In these two decisions, the court's inquiry was limited to establishing whether the state had control over the activities of the institution or functionary concerned. Lack of control had the effect that the provisions of the Constitution did not apply to these institutions.

In both cases the institution was neither a department of state nor an administration. It was also not created by the Constitution. Therefore, the body or functionary concerned could only be an organ of state as contemplated in section 239(b)(ii). In both cases there is a statute underpinning the powers or functions of the body or functionary concerned.

The Health Professions Council, for example, is created by the Health Professions Act 56 of 1974. Its objects are set out in the Act and include determining strategic policy and making decisions in terms thereof relating to education, training, disciplinary conduct, maintenance of professional competence and so on.²⁶³ The powers of the Council are also set out in the Act and include doing everything the Council may deem necessary to achieve the objects of the Act.²⁶⁴ Further, if this body had not existed, the state would have intervened to regulate the health profession. It has a monopoly in the sense that it regulates entry into the profession. All these factors point to one conclusion, namely that the Health Professions Council exercises public power and performs public functions in terms of legislation.

The same argument could be made in relation to *Ngubane*. The Attorneys Act of 1979 makes provision for the appointment of two or more examiners for the purposes of arranging, controlling

²⁶³ See section 3 of the Health Professions Act.

²⁶⁴ Section 4 of the Health Professions Act.

and conducting examinations in respect of the practice, functions and duties of a notary.²⁶⁵ Can it not be argued that marking the examination scripts forms part of conducting examinations as contemplated in the Act? Can it not further be argued that conducting examinations is a statutory function aimed at ensuring that standards are maintained in the notaries' profession? Although the function of the examiners affect only a portion of the community, namely people aspiring to practise as notaries, it remains a public function aimed at regulating entry into the profession. The examiners, undoubtedly perform a public function when marking examination scripts.

In the second category of cases the courts considered the 'control test' together with other factors in determining the status of certain statutory bodies. In all these cases the courts relied on express provisions of legislation to which these institutions owed their existence.

The first of these cases is *Goodman Bros*, which is often cited²⁶⁶ as authority for the proposition that the 'control test' is now generally accepted by the courts. As shown above, another factor which weighed with the court in its conclusion that Transnet performs public functions as contemplated in section 239(b)(ii), was the fact that Transnet is required to conduct its business in the public interest.

On appeal, Olivier JA considered the control exercised by the state over the activities of Transnet, the fact that it replaced a government department, and that it provides services in the public interest, as an indication that it performs public functions or powers.

Nextcom v Funde No also falls within this category. The court did not confine itself to the element of control, but considered funding, that employees of SATRA are civil servants, and that they report to the Minister as an indication that it is an organ of state.

²⁶⁵ Section 14(1)(d) of the Attorneys Act.

²⁶⁶ See *Korff v Health Professions Council* n 213 above at 1176J–1177A and *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 3 SA 30 (T) at 35H.

In *Association of Chartered Accountants*, the court considered the constitutional status of a controlling body of the accounting profession and held that it is an organ of state because it is aimed at ensuring that standards are maintained, functions in close co-operation with the state and is a creature of statute.

The Constitutional Court also considered other factors in *Hoffmann* to support its finding that Transnet is an organ of state.

The third category includes those cases dealing with the question whether an organ of state can be equated to the state. In *Esack* the court held that an organ of state is the state.²⁶⁷ Similar reasoning was followed by Davis J in *Inkatha*, when the court said that an element of the state constitutes the state for the purposes of section 32(1) of the Constitution.²⁶⁸ These cases dealt with the meaning of 'the state'.

The fourth category consists of cases dealing with the phrase *organ of state in the national, provincial or local sphere of government*. In *Mkhize* the court stated that the Commission for Conciliation, Mediation and Arbitration (the CCMA), was bound by section 41 of the Constitution, which applies to spheres of government and all organs of state within each sphere. The question whether the CCMA functioned in any of the spheres of government was left open. The matter was not raised in argument either. However, in *Langeberg* the Constitutional Court provided some answers as to what constitutes an organ of state in the national sphere of government. These are, according to the court, Parliament and the national executive. Are these the only institutions that perform functions in the national sphere of government? Can it not be argued that institutions that are funded by the national government, that are accountable to Parliament, that are controlled by members of the national executive, are organs of state in the national sphere of government? A

²⁶⁷ For a similar decision prior to 1994 see *Die Regering van die Republiek van Suid Afrika v SANTAM* in chapter 1.

²⁶⁸ *Inkatha Freedom Party v Truth and Reconciliation Commission* n 225 above at 544G.

similar argument can be raised regarding institutions funded, controlled and operated by provincial governments.

7 CONCLUDING REMARKS ON ORGANS OF STATE UNDER THE 1996 CONSTITUTION

The Constitution requires organs of state, when interacting with individuals and when dealing with one another, to observe, adhere and promote certain constitutional principles or values. These principles seek to constrain the exercise of power by the state. Organs of state thus bound by these limitations are defined in the Constitution. These organs of state include departments of state or administration and institutions or persons exercising constitutional functions or powers. The Constitution further provides that bodies or persons exercising public powers or performing public functions are also organs of state even if they do not form part of the legislative, executive or judicial organs of state.

Although the phrases ‘public power’ and ‘public function’ are fairly new in South African law, these concepts have long been used in other jurisdictions. As discussed above, ‘public power’ is governmental power, the power to act coercively. Therefore any institution that has the power exercised by the state, such as the power to enter and search and to seize property belonging to persons, is an organ of state. ‘Public function’ refers to governmental function. These need not be functions performed exclusively by the state. Any function that the state has appropriated as a government function will suffice. However, the power or function performed must derive from legislation. If it does not, the institution concerned will not qualify as an organ of state for the purposes of section 239 of the Constitution. Examples would be institutions performing government functions in terms of outsourcing contracts.

In determining whether a power or function is public, recourse may be had to a variety of factors

such as whether the function concerned is listed in the Constitution as one of the functions of government, whether the government controls the body concerned, whether it is funded by the state and so on.

It has been argued in some of the cases that the definition of ‘organ of state’ in the Constitution is merely a restatement of the ‘control test’. The academic writers do not agree. According to them, the ‘control test’ has been replaced by the ‘public power/function’ test in the Constitution. A majority of decisions have also moved away from the ‘control test’ as the only test for determining organs of state. In most decisions, control is considered together with other factors in determining whether an institution exercises public powers or performs public functions. In any event, if the drafters of the Constitution wanted the ‘control test’ to be decisive they would have said so expressly.²⁶⁹

The above survey shows that the element of control has not lost all its relevance. It is one thing to argue that control is determinative and quite another to see it as one of a number of factors that point to the public nature of the power or function.

Institutions or functionaries not controlled by the state are also bound as organs of state if they exercise public powers or functions. Whether this is the case would depend on a variety of factors, some which were used prior to 1994 and some of which are used in other jurisdictions such as the United Kingdom, India, and the United States.

²⁶⁹ See for example section 12 of the Indian Constitution which provides that unless the context otherwise requires ‘the State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all other local authorities within the territory of India or under the control of the Government of India.

CHAPTER 4

‘ORGAN OF STATE’ IN OTHER LEGISLATION

1 INTRODUCTION

The notion of ‘organ of state’ is not confined to the Constitution. It is also employed in other laws.¹ Yet, others do not refer explicitly to the notion of ‘organ of state’ but use the elements of the definition in the Constitution. Some other laws even use the ‘permutations’ of the Constitutional definition of ‘organ of state’. While this may enrich our understanding of the relationship between ‘the state’ and the many ways in which the state operates, it also adds to the complexity of understanding exactly what an ‘organ of state’ is, as the following brief exposition will show.

2 ‘ORGAN OF STATE’ IN LEGISLATION MANDATED BY OR INCIDENTAL TO THE CONSTITUTION

Various provisions of the Constitution require the enactment of legislation to give effect to the provisions contained therein.² Such legislation has been enacted. In this section I will consider the use of the notion of ‘organ of state’ in these statutes. It will be shown that in some of this legislation ‘organ of state’ bears the meaning assigned to it by section 239 of the Constitution; in some the definition ascribed to this notion by the Constitution is modified either by excluding institutions or functionaries that are organs of state in terms of section 239 or by including institutions that have

¹ Some of the legislation considered in this chapter was promulgated prior to 1996 but the notion of ‘organ of state’ has been inserted by amending Acts to these statutes.

² See section 9(2) which makes provision for legislative and other measures to be taken to protect or advance categories of persons, disadvantaged by unfair discrimination; section 9(4) which states that national legislation must be enacted prevent or prohibit unfair discrimination; section 32(2) which makes provision for the enactment of national legislation to give effect to the right of access to information; section 33(3) which makes provision for the enactment of national legislation to give effect to the right to just administrative action; and section 217(3) which states that national legislation must prescribe a framework within which the procurement policy referred to in section 217(2) may be implemented.

been included in the constitutional definition of ‘organ of state’. It will further be shown that in some of the legislation mandated by the Constitution the notion of ‘organ of state’ is not used at all but the content of the definition is used to describe other concepts.

2.1 The Employment Equity Act

In the Employment Equity Act (the EEA)³ the notion of ‘organ of state’ forms part of the definition of ‘designated employer’.⁴ In the EEA ‘organ of state’ bears the meaning assigned to it by section 239 of the Constitution.⁵ However, in the definition of ‘designated employer’ the local sphere of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service are expressly excluded from the definition of section 239.

Interestingly, local government is excluded from the definition of ‘organ of state’ for the purposes of the EEA but a municipality referred to in Chapter 7 of the Constitution is expressly included in the definition of ‘designated employer’. The Constitution tells us that local government consists of municipalities,⁶ which renders the exclusion of local government meaningless.

On the other hand, there is no doubt that the defence force, intelligence agency and the secret service are organs of state in terms of section 239. However, for the purposes of this Act these

³ The Employment Equity Act 55 of 1998.

⁴ ‘Designated employer’ is defined in section 1 of the Act as

(a) a person who employs 50 or more employees;
(b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 of this Act;
(c) a municipality, as referred to in Chapter 7 of the Constitution;
(d) an organ of state as defined in section 239 of the Constitution; but excluding local sphere of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
(e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

⁵ See the definition in section 1.

⁶ See section 151 of the Constitution.

institutions are expressly excluded from the purview of ‘organ of state’.⁷ Therefore, the scope of ‘organ of state’ in section 239 has been reduced for the purposes of this legislation.

2.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

In the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act)⁸ the concept ‘organ of state’ is not used at all. Instead, the content of the definition of ‘organ of state’ contained in section 239 of the Constitution is used to describe ‘the State’.

In the Equality Act the concept ‘the State’ is used and defined as follows:

‘the State’ includes—

(a) any department of State or administration in the national, provincial or local sphere of government;

(b) any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;

(ii) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition[.]

Undoubtedly, the content of the definition of ‘the State’ in the Equality Act closely resembles that of ‘organ of state’ in the Constitution. The only difference is that the notion of ‘the State’ is wider in that it includes persons or institutions exercising a public power or performing a public function not only in terms of legislation but also under *customary law or tradition*.⁹

⁷ The reason for the exclusion of these institutions could be that they are not defined as ‘employees’ under the Labour Relations Act. See footnote 1 of the Act.

⁸ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁹ Bekker *Seymour’s Customary Law in Southern Africa* (1989) at 11 defines customary law as an established system of rules which evolved from the way of life of people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases which were retained in the memories of the chief and his counsellors, their sons and their sons’ sons until forgotten or until they become part of the immemorial rules. See also Thomas and Tladi ‘Legal pluralism or a new repugnancy clause’ 1999 *CILSA* 354 at 356.

2.3 The Promotion of Administrative Justice Act

Another Act mandated by the Constitution in which the concept ‘organ of state’ is used, is the Promotion of Administrative Justice Act (PAJA).¹⁰ In PAJA the notion of ‘organ of state’ forms part of the definition of ‘administrative action’.¹¹ In this definition we are told that the first category of persons or institutions capable of performing an ‘administrative action’ are organs of state as defined in the Constitution,¹² namely departments of state or administration in the three spheres of government; institutions or persons exercising or performing constitutional powers or functions; or institutions or functionaries exercising powers or performing functions in terms of legislation. In addition, the content of the definition of ‘organ of state’ is used to describe the circumstances under which organs of state would perform administrative action, namely when exercising a power in terms of the Constitution or a provincial constitution; or when exercising a public power or performing a public function in terms of legislation.

2.4 The Promotion of Access to Information Act

The right of access to information applies to the state and therefore binds organs of state.¹³ Interestingly, in the Promotion of Access to Information Act (PAIA)¹⁴ which seeks to give effect to the right of access to information in the Constitution, the concepts ‘the state’ or ‘organ of state’ are not used at all. Instead the notion of a ‘public body’ is used.

¹⁰ The Promotion of Administrative Justice Act 3 of 2000.

¹¹ Section 1(i) of the Promotion of Administrative Justice Act defines ‘administrative action’ as ‘any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...’.

¹² In PAJA the notion of ‘organ of state’ bears the meaning assigned to it by section 239 of the Constitution.

¹³ Section 32(1)(a) read with section 8(1) of the Constitution.

¹⁴ The Promotion of Access to Information Act 2 of 2000.

In PAIA ‘public body’ means—

- (a) any department of state or administration in the national, provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when—
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;
 - (ii) exercising a public power or performing a public function in terms of any legislation[.]

Although the wording used here is slightly different, the content of the definition of ‘public body’ is similar to that of ‘organ of state’ in section 239 of the Constitution. The only difference is that the courts and judicial officers are not expressly excluded as is the case with the definition of ‘organ of state’ in the Constitution. However, in terms of section 12, PAIA does not apply to the Cabinet and its committees; the judicial functions of a court, a special tribunal,¹⁵ a judicial officer of such a court or tribunal; or an individual member of Parliament or of a provincial legislature.¹⁶ These institutions and functionaries are not ‘public bodies’ for the purposes of PAIA, but they are ‘organs of state’ for the purposes of the Constitution and are therefore bound by the right of access to information in section 32 of the Constitution with the exception of the courts and judicial officers.

2.5 The Preferential Procurement Policy Framework Act

Another Act in which the notion of ‘organ of state’ is used is the Preferential Procurement Policy Framework Act.¹⁷ In the Preferential Procurement Policy Framework Act¹⁸ ‘organ of state’ means:

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);

¹⁵ Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

¹⁶ See section 12(a)–(c) of PAIA.

¹⁷ The Preferential Policy Framework Act 5 of 2000.

¹⁸ See n 8 above.

- (b) a municipality as contemplated in the Constitution;
- (c) a constitutional institution defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- (d) Parliament;
- (e) a provincial legislature;
- (f) any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies.

It seems that the drafters of the Preferential Procurement Policy Framework Act intended to limit the application of this Act to institutions. This is so because paragraphs (a) to (e) refer only to institutions and only that part of the definition of 'organ of state' in the Constitution referring to institutions has been included. However, it is worth mentioning that all the institutions mentioned in paragraph (a)–(e) fall within the definition of 'organ of state' as defined in section 239 of the Constitution. Perhaps they have been included in this definition as a result of excessive caution.

2.6 Summary

It is clear from the preceding discussion that the notion of 'organ of state' is used in different ways in the legislation mandated by or incidental to the Constitution. In the EEA it forms part of the definition of 'designated employer'. Further, 'organ of state' bears the meaning given to it in the Constitution. However, the definition in section 239 is restricted by the exclusion of the National Defence Force, the National Intelligence Agency and the Secret Service.

In the Equality Act and PAIA, the content of the definition of 'organ of state' is used to mean different things, namely 'the state' and 'public bodies'. In the Equality Act certain words have been added which widen the scope of 'the state' for the purposes of the Act compared to 'organ of state' in the Constitution. In PAIA the exclusion of members of Parliament and provincial legislatures, the cabinet and its committees, and the special tribunals limits the scope of the definition 'public body'. However, as stated above, these institutions or functionaries are still bound by the

right of access to information because they are organs of state as defined in the Constitution.

In PAJA, the notion of ‘organ of state’ has been manipulated to describe circumstances under which organs of state as defined in the Constitution would be bound by the provisions of PAJA.

In the Preferential Procurement Policy Framework Act organs of state to which the Act applies are set out. There is no doubt that these institutions are organs of state as defined in section 239 of the Constitution. In addition, institutions included in the definition of organ of state would fall within the definition of ‘organ of state’ for the purposes of the Act only if they were recognised by the Minister as institutions to which the Act applies. Interestingly, the different categories institutions mentioned in the definition do not have to be recognised by the Minister as institutions to which the Act applies.

3 ‘ORGAN OF STATE’ IN OTHER LEGISLATION

The notion of ‘organ of state’ is also used in other legislation. As is the case with legislation mandated by the Constitution, the use of ‘organ of state’ in these statutes varies from statute to statute. In the following paragraphs, some examples of legislation in which ‘organ of state’ is used will be examined.

3.1 Legislation where ‘organ of state’ is used but not defined

There is a myriad of statutes in which ‘organ of state’ is used but not defined.¹⁹ For the purposes of these statutes the concept of ‘organ of state’ must be given its ordinary meaning. As shown in the previous chapters, the notion ‘organ of state’ is difficult to define. Therefore, the courts dealing with these statutes could opt for either a restrictive or a wider approach to the meaning of ‘organ of state’. It is submitted that the use of the restrictive approach should be avoided in the interpretation of these Acts.

3.2 Legislation in which the notion of ‘organ of state’ bears the meaning in section 239 of the Constitution

Some legislation incorporates the meaning of ‘organ of state’ in section 239 of the Constitution by reference.²⁰ Legislation where the notion of ‘organ of state’ bears the meaning assigned to it by the Constitution does not present interpretative difficulties. A court grappling with the problem whether an institution or functionary is an ‘organ of state’ for the purposes of this legislation, would turn to the definition in section 239 and if the institution or functionary concerned falls into one of the categories mentioned in that section, namely a department of state or administration in the three spheres; an institution or functionary exercising powers or performing functions in terms of the Constitution or a provincial constitution; or exercising public powers or performing public functions in terms of legislation, then it will be an organ of state for the purposes of these statutes. As has

¹⁹ These include the Electoral Commission Act 51 of 1996; Special Pension Act 69 of 1996; National Prosecuting Authority Act 32 of 1998; Electoral Act 73 of 1998; State Information Technology Agency Act 88 of 1998; National Veld and Forest Fire Act 101 of 1998; National Nuclear Regulator Act 47 of 1999; Rental Housing Act 50 of 1999; Financial Intelligence Centre Act 38 of 2001; Division of Revenue Act 5 of 2002; and Land and Agricultural Development Bank Act 15 of 2002.

²⁰ See for example Restitution of Land Rights Act 22 of 1994; Pan South African Language Board 59 of 1995; Financial and Fiscal Commission Act 99 of 1997; Higher Education Act 101 of 1997; Marine Living Resources Act 18 of 1998; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Local Government: Municipal Demarcation Act 27 of 1998; National Water Act 36 of 1998; Ship Registration Act 58 of 1998; Competition Act 89 of 1998; Housing Consumers Protection Measures Act 95 of 1998; Further Education and Training Act 98 of 1998; National Land Transport Transition Act 22 of 2000; Construction Industry and Development Board Act 38 of 2000; Adult Basic Education and Training Act 52 of 2000; and Immigration Act 13 of 2002

been shown in the previous chapter, the only hurdle presented by the definition of ‘organ of state’ lies in defining the concepts of ‘public power’ and ‘public function’.

However, in other legislation the meaning assigned by section 239 of the Constitution to the notion of ‘organ of state’ is modified, either by the exclusion of institutions or functionaries that would fall within the definition of ‘organ of state’ as defined in the Constitution or by including institutions or functionaries that are in any event organs of state as defined in section 239.

One such statute is the Private Security Industry Regulation Act.²¹ In this Act the notion of ‘organ of state’ is used and bears the meaning assigned to it by the Constitution. However, the Security Services referred to in section 199 of the Constitution are expressly excluded in the definition of ‘organ of state’.²² Therefore, the ambit of ‘organ of state’ as defined in section 239 has been restricted for the purposes of this legislation.

In other statutes institutions which fall within the definition of ‘organ of state’ are expressly included *ex abundante cautela* (as a result of excessive caution). This is clearly illustrated by the Financial Advisory and Intermediary Services Act.²³ In this Act ‘organ of state’ forms part of the definition of ‘person’.²⁴ The relevant part of the section reads:

in this Act ‘person’ means ...

(a) any organ of state as defined in section 239 of the Constitution of the Republic of South Africa [.]

However, section 42 of the Act dealing with the disclosure of information provides that the registrar

²¹ Private Security Industry Regulation Act 56 of 2001.

²² See the definition of ‘organ of state’ in section 1 of the Act.

²³ Financial Advisory and Intermediary Services Act 37 of 2002.

²⁴ In section 1 of the Act ‘person’ means any natural person, partnership or trust, and includes

(a) any organ of state as defined in section 239 of the Constitution of the Republic of South Africa. 1996 (Act 108 of 1996);

(b) any company incorporated or registered as such under any law;

(c) any body of persons corporate or unincorporate.

may disclose information to *any department of state or organ of state as defined in section 239 of the Constitution of the Republic of South Africa*.

It is beyond doubt that departments of state are included in the definition of ‘organ of state’ in section 239. It seems that departments of state are included to make doubly sure that the section applies to them as well.

3.3 Legislation in which the meaning of ‘organs of state’ or some other concept used in the legislation concerned resembles the meaning of ‘organs of state’ in the Constitution

In a handful of statutes the concept ‘organ of state’ is used and defined. The definition of this concept closely follows that in section 239 although no mention is made of the latter.

One such statute is the National Forests Act.²⁵ In this Act ‘organ of state’ means (a) any department of state or administration in the national, provincial or local sphere of government; and (b) any other functionary or institution exercising a public power or performing a public function in terms of legislation but excluding a court or judicial officer.²⁶

Although institutions or functionaries exercising or performing constitutional powers are not included, this definition tracks that of ‘organ of state’ in section 239 of the Constitution.

In the Statistics Act the definition of ‘organ of state’ replicates that in section 239 of the Constitution.²⁷ In the Protected Disclosures Act²⁸ ‘organ of state’ is defined as –

²⁵ National Forests Act 84 of 1998.

²⁶ See the definition of ‘organ of state’ in section 2 of the Act.

²⁷ Section 1 of the Statistics Act 6 of 1999 defines ‘organ of state’ as

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution–

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution;
or;

- (a) any department of state or administration in the national, provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when–
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of legislation[.]

This definition also tracks that contained in section 239 of the Constitution. Although a slightly different wording used, the two definitions mean the same. However, in this Act the courts or judicial officers are not expressly excluded.

In the Reconstruction and Development Programme Fund Act²⁹ the content of the definition of ‘organ of state’ is used to define ‘spending agency’ and defined as

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other institution–
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation[.]

This definition also tracks that of ‘organ of state’ in section 239 of the Constitution. The only difference is that ‘spending agency’ does not include functionaries. Therefore, it is more limited than that of ‘organ of state’ as defined in the Constitution.

‘Organ of state’ is also defined in the Institution of Legal Proceedings Against Certain Organs of

(ii) exercising a public power or performing a public duty in terms of any legislation but does not include a court or a judicial officer.

²⁸ See section 1 (vii) of the Protected Disclosures Act 26 of 2000.

²⁹ Reconstruction and Development Programme Fund Act 7 of 1994. This definition was added by section 1 of Act 79 of 1998.

State Act³⁰ as follows:

- (a) any national or provincial department;
- (b) a municipality contemplated in section 151 of the Constitution;
- (c) any functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution referred to in section 142 of the Constitution;
- (d) the South African Maritime Safety Authority established by section 2 of the South African Maritime Authority Act, 1998 (Act No. 5 of 1998);
- (e) the South African National Roads Agency Limited contemplated in section 3 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998); and
- (f) any person for whose debt an organ of state contemplated in paragraphs (a) to (e) is liable.

No mention is made of section 239 in this Act. It cannot be disputed that institutions and functionaries included in paragraphs (a) to (c) are included in the definition of organ of state in section 239 of the Constitution. Institutions mentioned in paragraph (d) and (e) exercise public powers and perform public functions in terms of legislation and therefore also fall within the definition of organ of state in the Constitution. The definition of 'organ of state' in this Act includes any person for whose debt an organ of state is liable. This person would not be an organ of state in terms of section 239 of the Constitution.

4 Summary

It is clear from the preceding discussion that the use of the notion of 'organ of state' differs from statute to statute. In some it is left to the courts to give content to the notion of 'organ of state'. In others it bears the meaning assigned to it by the Constitution. However, in some statutes, the scope of organ of state as defined in the Constitution has been reduced by the exclusion of institutions or functionaries that would fall under the definition in section 239 of the Constitution. In other statutes, institutions which are organs of state as defined are expressly included as a result of excessive

³⁰ Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

caution. In some statutes the content of the notion of 'organ of state' in section 239 of the Constitution is used to define other concepts, while in others no mention is made of the definition of 'organ of state' in section 239 of the Constitution but the definition of 'organ of state' in those statutes closely resembles that of 'organ of state' in the Constitution.

What also seems clear from the preceding discussion is that (i) the notion of 'organ of state' can be used in variety of ways, and (ii) the definition of the concept in the Constitution can be modified for the purposes of ordinary legislation.

As stated, although the use of the notion of 'organ of state' in other laws contributes to our understanding of the nature of the state and the different institutions and persons through which the state performs its functions, they are likely to lead to interpretative conundrum. However, it is hoped that the courts when dealing with these statutes will not invoke the restrictive control test.

CHAPTER 5

BRIEF SUMMARY AND CONCLUSIONS

It is trite that the state performs its functions through a variety of institutions and functionaries. However, the complex nature of a modern state sometimes makes it difficult to distinguish these institutions from private institutions. In the preceding chapters the constitutional and statutory definitions of organs of state have been examined; the courts' understanding of organs of state under the system of legislative supremacy; under the 1993 Constitution; and the 1996 Constitution has also been considered. The contribution made by academic writers to our understanding of organs of state prior and subsequent to 1994 was discussed in some detail.

The development of our jurisprudence in this regard can be summarised as follows:

- Prior to 1994 the legislature identified certain institutions as constituting organs of state for the purposes of some statutes. The courts, on the other hand, in their development of the common law jurisprudence relating to 'the state' identified a variety of bodies as constituting organs of state namely the legislature, the executive and the judiciary. Further, they recognised state departments, provincial and local government as falling within the category of organs of state. These are 'obviously' organs of state and the courts and commentators had no difficulty in identifying them as such.

The problem is that there existed a variety of statutory bodies to whom the state had delegated some of its functions; institutions exercising powers or performing functions in terms of out-sourcing agreements; private bodies (i) exercising regulatory powers, for example controlling bodies of professions and (ii) performing functions performed by the state such as private hospitals, private schools and so on. In determining whether these

institutions were organs of state the following indicators were used: whether the body was created by legislation; whether it had a link with other organs of state, for example if it was controlled by the state or where the executive had the power to appoint its employees; whether it performed government functions; whether it had the power to act coercively; whether it was funded by the state and so on.

- Then came the 1993 Constitution which introduced the constitutional concept of ‘organ of state’. As stated, this concept did not add to the substance of understanding organs of state. It merely clarified that the notion of organ of state for the purposes of the 1993 Constitution signified not only institutions and persons that were organs of state in the normal sense of the word but also statutory bodies and functionaries. It was thus permissible for the courts to resort to extra-textual aids, for example the common law tests, in their interpretation of the notion of ‘organ of state’ for the purposes of the 1993 Constitution.
- The 1996 Constitution followed with a comprehensive definition of ‘organ of state’. This resulted in the notion of ‘organ of state’ becoming a term of art. Therefore, for constitutional purposes, before an institution or functionary can be considered an ‘organ of state’, it has to comply with the definition in section 239. Other laws emulated in different ways the definition of organ of state in the Constitution namely by (i) direct reference or (ii) incorporation of section 239 with slight adjustments. In all these cases the notion of ‘organ of state’ has become a term of art, in other words to be interpreted according to the definition.
- However, the simplicity of the definition of organ of state in section 239 of the Constitution is not echoed by the courts (with exceptions). From an examination of cases decided after the commencement of the 1996 Constitution, especially the judgments of the Transvaal

Provincial Division, it would appear that the definition of organ of state in terms of section 239 is not merely what it says as the 'ghost' of the control test still hovers over it.

- The question is whether this is justifiable. The answer to this question lies in the approach to the notion of 'organ of state'. Some organs of state are institutional (e.g. state departments, institutions supporting democracy, legislative bodies and the executive). State control is inherent in relation to these bodies. Other organs of state are functional (e.g. depending on what they do – regardless of their institutional nature). Section 239 of the Constitution combines them under the notion of 'organ of state'. The important thing to remember is that according to this 'extended' definition, some bodies/functionaries can be organs of state for certain purposes without being organs of state for other purposes.

The plea is that the courts and all else should apply the definition of 'organ of state' as it stands. It is unnecessary to impose 'old' tests on the notion of 'organ of state' which may have some role but not a general one.