

The *Glenister* Case: A journey of discovery for institutions and the separation of powers with the help of international law

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‘[A] significant safeguard ... is section 17B which ... expressly requires that the need to ensure that the DPCI has the necessary independence must be taken into consideration in applying the provisions of the impugned laws. What this means, in effect, is that in determining and approving the policy guidelines relating to the functioning of the DPCI, overseeing the functioning of the DPCI, exercising the powers of oversight over the Ministerial Committee, and in dealing with complaints relating to undue influence, all branches of government, including the officials who administer the provisions of the impugned laws, must apply the provisions of the impugned laws in a manner that will promote the independence of the DPCI.’¹

‘The new provisions contain an interpretive injunction: in their application “the need to ensure” that the DPCI “has the necessary independence to perform its functions” must be recognised and taken into account. But this injunction operates essentially as an exhortation. It is an admonition in general terms, containing no specific details. It therefore runs the risk of being but obliquely regarded, or when inconvenient, disregarded altogether.’²

In *Glenister v President of the Republic of South Africa and Others*,³ the Constitutional Court had to determine the constitutionality of the national legislation that disbanded the Directorate of Special Operations (the so-called ‘Scorpions’) and created the Directorate for Priority Crime Investigation in its stead (the latter known as the ‘Hawks’).

In a joint judgment by Moseneke DCJ and Cameron J,⁴ the majority found the new anti-corruption structure unconstitutional on the basis that it did not create a corruption-fighting body with sufficient independence from the executive branch of government. It found in the Constitution an obligation on the State to establish and maintain an independent body to combat corruption and organised crime. This obligation is not stated expressly in the Constitution; however, the majority drew it from the scheme of the Constitution as a whole. The main provisions which were seen, cumulatively, as the sources of the obligation were section 7(2) (imposing a

¹ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) para 154 (Ngcobo CJ, for the minority) (footnotes removed).

² *Glenister* (n 1) para 231 (Moseneke DCJ and Cameron J, for the majority) (footnotes removed).

³ See n.1.

⁴ Froneman J, Nkabinde J and Skweyiya J concurred.

duty on the state to ‘respect, protect, promote and fulfill’ the rights in the Bill of Rights), section 8(1) (which provides that the rights in the Bill of Rights bind all branches of government), section 39(1)(b) (which provides that Courts must consider international law when interpreting the Bill of Rights) and section 231 (which provides that an international agreement that Parliament approves ‘binds the Republic’).

In addition, the majority saw in s 7(2) an implicit requirement of reasonableness; a requirement which would not be met if the anti-corruption unit was not adequately independent. Their vision of reasonableness was informed by international instruments, binding on South Africa but not yet incorporated, which require that states parties create independent anti-corruption entities.

There were two main disputes between the majority and the minority judgments:⁵ whether the new unit was, in fact, adequately independent, and whether our constitution requires the creation of an independent corruption-fighting unit. The latter disagreement seems fundamental, and entails a discussion of the role of international law in constitutional interpretation. While the majority emphasised that it had located the requirement of independence in the Constitution itself, it backed up this requirement and fleshed out its contours by reference to a range of anti-corruption treaties.⁶

Despite the obvious conflict on the role of international law in this case, I would argue that international law, and even its process of incorporation into South African domestic law, are not central to this judgment. It offers a useful insight, to be sure, but more because of the relatively fluid relationship it envisages between the various organs of state. This is important because the judgment is fundamentally about institutional design – about how the specific institution in question should be designed, but also about the theory which should underpin the design of any organ which exercises public power. The other aspects of the judgment demonstrate particular understandings of the doctrine of separation of powers which inform institutional design. Similarly, the different depictions of the kind of independence which the law requires of the anti-corruption unit shows us those two different understandings at work in institutional design.

This judgment brings two understandings of separation of powers, and through it, of institutional design, into sharp relief. The first understanding has dominated the jurisprudence on institutions since the earliest cases before the Constitutional Court, and is revealed in the somewhat piebald case law which the Constitutional Court has produced on institutions. Certain features of these judgments suggest that an underlying theory is simply missing, particularly a theory on how institutional design affects function. For ease of reference in this paper, I refer to this understanding of

⁵ Brand AJ, Mogoeng J and Yacoob J concurred with Ngcobo CJ.

⁶ Ngcobo op cit (n 1) paras 88-103.

separation of powers as a ‘thin’ understanding, both of separation of powers and of institutional design.

The first feature of such a thin understanding is a tendency to accept the design of a particular institution on the basis that this design is found elsewhere, in some other country which is considered democratic.⁷ There is, in other words, no consideration of how the design affects the function of an institution in a particular factual context. The second feature is related to the first: jurisprudence in the ‘thin’ tradition focuses on a narrow, textual reading of the relevant provisions, ignoring the wider context. Thirdly, the thin understanding includes a particular vision of separation of powers, one which tends to see the division between the three branches of government as absolute and watertight. While acknowledging that the personnel of these branches may occasionally overlap, this conception of separation of powers divides the functions of the branches strictly: the judiciary interprets the law, the executive creates policy, and the legislature both creates law and oversees the executive. As a result, law – particularly when it is being interpreted by the judiciary – has a definite boundary, and stops where ‘politics’ begins.

The firm boundary between law and politics leads to the fourth feature of a thin understanding of institutional design: an ‘apolitical’ approach to the judicial function itself, following the judiciary’s location in law and not in politics. Under this approach, judges avoid making comments on the political aspect of a legal problem, even if this means ignoring relevant facts. Such an approach results in judgments which can be strangely detached from the actual circumstances of the case. Furthermore, the refusal to recognize or address a factual situation which threatens the achievement of a legislative goal can produce a surprising naiveté, which tends to regard legislative injunctions as their own fulfillment. Judgments in this vein jettison questions of design and assume an institution will fulfill the function which legislation has assigned to it on the very basis of that assignment. As a result, the courts become the only source of relief when an institution does *not* fulfill its assigned function. An institutional failure can thus be addressed only *ex post facto* and only when it is of such a nature as to be visible to outsiders and provable in a court of law⁸.

⁷ See *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) at para 162 and *United Democratic Movement v President of the RSA and others* 2002 (11) BCLR 1164 (CC) par 11-14; 28-54. In these cases, there was no separate explanation in this case of why the countries taken as ‘democratic’ in fact met the requirements of democracy, and no discussion of how democracy itself should be conceived of.

⁸ Perhaps the best example is provided by *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC). In this case, the Constitutional Court dismissed many incidents of executive control over the magistracy with the argument that occasions of undue influence could be addressed and reversed on review before higher courts. See this case at paras 21-4, 87, 100, 128, 213, 234 and 238 and ‘The meaning of Institutional Independence in *Van Rooyen v S*’ (co-written with J Franco) (2004) 121 *South African Law Journal* 562

The fifth and final feature of a thin understanding of institutional design can briefly be described as a ‘static’ view of the applicable law and sometimes of the institution itself. Where law is concerned, the judiciary pronounces on the law that exists; it does not make the law or participate in its development. This ‘still life’ vision persists even though the process of judicial interpretation, and the existence of the common law, make it clear that the judiciary can develop and change the law as well. There is, in other words, no vision of law as a work in progress. Similarly, there is often little focus on the processes within the institutions themselves, but rather on a snapshot of the particular legislative provisions set up the institutions and empower them.

The minority judgment of Yacoob in *Glenister* demonstrates a number of these features of a ‘thin’ understanding of institutional design. Most striking is its vision of separation of powers, which divides the branches of government strictly by their function, and excludes the judiciary from the ‘political’ world of the other two branches:

Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts. As has been said, “[i]t is not for the court to disturb political judgments, much less to substitute the opinions of experts.”⁹

Similarly, Ngcobo’s argument on the place of international law in South African law draws expressly on the doctrine of separation of powers:

The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. ...The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa’s intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement. ... An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane.... [It] does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.¹⁰

In this passage, the decision to sign a treaty is presented as a policy decision, fully within the discretion of the executive and, in itself, still fairly free from legal meaning. Presumably within its oversight role – or perhaps to ensure the support of the people

⁹ *Ngcobo op cit* para 67, citing *S v Lawrence*; *S v Negal*; *S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 42, which quotes the Canadian constitutional lawyer Hogg with approval. Other footnotes have been removed.

¹⁰ *Ngcobo op cit* paras 89-93.

through their elected representatives – the consent of Parliament is required before the agreement becomes binding at the international level. But to have legal effect within the republic, the treaty must be made into a law by the only body which has this power – the legislature.

Similarly, Ngcobo's narrow textual reading of the obligations of the state reflect the thin understanding described above. Resisting the argument that s 7(2) requires positive anti-corruption measures, Ngcobo reduces the state's obligations against crime to those set out in section 205 of the Constitution:

'The obligation of the state, under section 7(2) to prevent and combat corruption must be informed by the provisions of section 205. Section 205 of the Constitution requires the state to establish a national police service whose objects include preventing, combating and investigating crime, which would include corruption, and protecting and securing the person and property of the inhabitants of the Republic. There is no requirement that the state must use the best method possible or the most effective methods to combat crime including corruption. While this is an ideal to strive for, it is not a constitutional requirement. The state must "enable the police service to discharge its responsibilities effectively". That is all that the obligation entails.'¹¹

Apart from its reliance on the exact wording of s 205, and its refusal to allow other provisions of the Constitution (such as s 7(2)) to extend the meaning of this provision, Ngcobo's passage above is also notable for its vision of the sphere of policy-making as a sphere of wide discretion, with almost no legal constraints. The executive (and legislature) may choose any crime-fighting method it likes, providing that the police service is able to live up to its obligations effectively. Presumably, law would play a role in determining the minimum threshold of 'effective' crime-fighting; this aspect is not, however, considered by Ngcobo and he does not suggest a definition of 'effective' in his judgment.¹²

I suggested above that one of the features of a 'thin' understanding of institutional design was an 'apolitical' reading of the law, even when the substance of the law refers to a current factual or political problem that should, ideally, be understood before the law can be usefully interpreted. This case deals with corruption, which is a crime of those who have power to abuse for personal gain. Ngcobo acknowledges this implicitly when he quotes international authorities who point out the inevitable link between corruption and high office.¹³ Corruption is therefore, by nature, likely to be committed by the very people to whom the impugned legislation gave authority over the anti-corruption mechanisms – viz the executive. In addition, the party system within South Africa, and, in particular, our closed list proportional

¹¹ Ngcobo *op cit* para 111. Footnotes have been removed from the passage.

¹² He does accept that the effectiveness of the crime-fighting body will be compromised if it is exposed to undue influence, but he does not define undue influence either.

¹³ Ngcobo *op cit* (n 1) para 98.

representation electoral system, means that the a large majority of the members of Parliament who are meant to oversee the executive need the executive's support for their very place in Parliament. Ngcobo ignores these factual and political concerns in a depiction of South African government which is almost touching in its innocence. He explains that the Minister of Police will not exercise undue influence over investigations because he or she is acting under guidelines drawn up by a ministerial committee, and approved by Parliament. Moreover, these guidelines are required by the South African Police Act to "ensure that the [DPCI] . . . has the necessary independence to perform its functions"¹⁴ and by the Constitution to "discharge its responsibilities effectively".¹⁵ He remarks:

There is no reason to believe that the policy guidelines will not comply with this requirement, but if they do not, Parliament, in the exercise of its power to approve the policy guidelines, will no doubt not approve them under section 17K. And if they should pass through Parliament unchallenged, they may well be challenged in court as being inconsistent with the provisions of the impugned laws, in particular, section 17B.¹⁶

He then rejects the suggestion that the Ministerial Committee, being a political body, will exercise undue influence over by labelling this suggestion as 'highly speculative' with 'no factual basis.'¹⁷

The majority, on the other hand, consider it 'common sense' that 'our law demands a body outside executive control to deal effectively with corruption'.¹⁸ They draw the obligation to establish the anti-corruption unit by reading various constitutional provisions together, particularly s 7(2), which creates a positive duty on the state to promote the rights in the Bill of Rights, and the provisions dealing with international law. In this regard, the majority emphasise that they have to consider international law in interpreting not only the Bill of Rights (s 39) but also any legislation, and they use it, fairly uniquely in this case, to help shape institutions rather than to interpret rights. They devote some thought to the meaning of independence and undue influence, insisting that the unit must be perceived as independent in the eyes of the public.¹⁹ They draw this last criterion from *Van Rooyen*, that is; from the Constitutional Court's decision on the independence of the magistracy,²⁰ but they also draw guidance from the independence which the Constitution awards to the chapter nine institutions, such as the Public Protector, and from the independence enjoyed by the now-disbanded DSO (Scorpions). In the light of Ngcobo's insistence

¹⁴ Section 17 B of the South African Police Act.

¹⁵ Section 205 of the Constitution.

¹⁶ Ngcobo *op cit* (n 1) para 138.

¹⁷ Ngcobo *op cit* (n 1) para 142.

¹⁸ Moseneke and Cameron *op cit* (n 2) at para 200.

¹⁹ Moseneke and Cameron *op cit* (n 2) at para 207.

²⁰ In doing so, they acknowledge that the level of independence required of the anti-corruption unit will not be the same as that required for the magistracy. *Loc cit*.

that the state is not obligated to create the ‘best’ method of combatting corruption,²¹ the majority’s reasons for comparing the DPCI with any other South African institutions are illuminating. First, they argue that stark differences in the independence enjoyed by the new body would affect public perception of its independence, but, second, they also point out that these other bodies, together, create the South African sense of what independence is. Ngcobo, who builds much in his judgment on the fact that the international instruments require independence ‘within our legal conceptions’, uses a strict schematic picture of separation of powers to depict what our legal conceptions are. Moseneke and Cameron, on the other hand, examine the institutions which are actually in operation or still in the public mind to garner a sense of what independence might mean in South Africa.

The majority treatment of the independence of the DPCI is thorough and damning, but they achieve it without making any adverse findings on specific members of the executive or referring to any current scandals. They canvass the indicia of independence from our case law, and find that the members of the DPCI have inadequate security of tenure and inadequate protection against changes in their remuneration.²² They find the level of involvement of the executive in the running of the DPCI unacceptably inhibitory. This enquiry involves another profoundly practical turn: they look at the day-to-day functioning of the DPCI to see whether the parliamentary oversight provided for in the legislation will, in fact, protect the DPCI against political interference. They note that the ministerial committee will have a hands-on, ongoing role to play in the work of the DPCI,²³ while Parliament is given a range of widely spaced and sometimes optional mechanisms to review the work of this body:

We note, in considering how far parliamentary oversight counter-weighs these limitations of structure, that the phrase “oversee the functioning of the Directorate” occurs in relation to the duties of both the Ministerial Committee and Parliament, except that in the latter case it is preceded by the word “effectively”. While the Ministerial Committee must “oversee the functioning” of the DPCI, Parliament must “effectively oversee” its functioning. Despite this verbal emphasis on Parliament’s oversight, no timelines or minimum standards are set for what it does in this regard. necessary, but not less than four times annually.” It is plain, as we indicated earlier, that it is the Ministerial Committee’s oversight that is intended to be hands-on.²⁴

Given the minority’s view that the doctrine of separation of powers forbids this level of judicial interference in the choices of the legislature and executive, how are we to understand the bold claim which the majority make in this case? Do they have another theory of separation of powers? They do not expressly claim another

²¹ Ngcobo op cit para 111.

²² Moseneke and Cameron op cit (n 2) paras 213-227.

²³ Moseneke and Cameron op cit (n 2) paras 234-239.

²⁴ Moseneke and Cameron op cit (n 2) para 240.

theory; if anything, they seem, in this regard, to view their difference from the minority's approach as one of degree:

The second general point we make is that adequate independence does not require insulation from political accountability. In the modern polis, that would be impossible. And it would be averse to our uniquely South African constitutional structure. What is required is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.²⁵

I would argue that the difference between the two judgments is qualitative, not one of degree, and it is rooted in a fundamentally different understanding of both separation of powers and institutional design.

Moseneke and Cameron's approach can be supported by an alternative theoretical framework which, I would argue, has, at its basis, the 'culture of justification' – the term used by Etienne Mureinik to describe South Africa's legal culture under democracy. Mureinik depicted South Africa's shift from parliamentary supremacy to a constitutional democracy as a shift from a 'culture of authority' to a 'culture of justification'. In the former, he explained, government is obeyed without question; in a culture of justification, 'every exercise of power is expected to be justified', and 'the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command'.²⁶

Most lawyers would see the courts as the chief conduit of this justification. Together, the courts constitute the body through which those affected by the exercise of power may call the power-wielder to account. The judiciary also provides a forum for that account by the government, and pronounces whether the account is acceptable or not. To see the courts as the chief – or sole – mediator of the process of justification also gels comfortably with the notion that the judiciary is the body responsible for interpreting the law. However, some lawyers, and perhaps constitutional lawyers in particular, are aware that the process of justification can and should be carried out through all public bodies, in their interaction with the public, but also in their interaction with one another. And this view of the process of justification acknowledges that all public bodies have to work with, interpret, apply, and justify themselves through law. Thus, for example, Mureinik included within the primary interpretive responsibility of the non-judicial decision maker the responsibility to interpret the law of the relevant statute – including those issues which judges, should they disagree with them, would regard as serious, material or jurisdictional errors of law.²⁷

²⁵ Moseneke and Cameron op cit (n 2) para 216.

²⁶ Mureinik, E, 'A Bridge to Where?' (1994) 10 *South African Journal on Human Rights* 10, 31–32.

²⁷ Dyzenhaus on Mureinik 28-9.

David Dyzenhaus elaborates on such a vision of a culture of justification in his discussion of judicial deference and his proposal of 'deference as respect'. For him, all organs of government have the responsibility to justify their action, a responsibility intricately connected to their capacity to decide and interpret the law. Furthermore, in considering the reasons which an organ of government gives to justify its actions, the judge has to respect the particular expertise of the official appointed by government to make the decision. The duty to give reasons assumes that those reasons are actually important, and that the officials have a legitimate role in determining what the law is. The officials are therefore entitled to deference 'as respect' when they carry out this role.²⁸

Law, therefore, is not the exclusive domain of one branch of government. Everybody 'does' law – every institution²⁹ has the responsibility to interpret it and, with that responsibility, an 'onus of justifying why that decision represents a reasonable interpretation of the law'.³⁰ Secondly, the obligation to justify is owed not just to the judiciary but to other branches as well – and these branches have a corresponding duty to demand account. Commenting on the *Belmarsh*³¹ case and, in particular, the UK executive's claims to emergency powers, Dyzenhaus notes what a proper, justificatory relationship would look like between the legislature and the executive:

[T]he Government would have to be prepared to treat Parliament as more than a rubber stamp for legislation when the Government thinks it needs more powers to confront an alleged crisis. The Government would not only have to forego its standard ... line that there is no time to debate properly the emergency and the appropriate responses to it. [To the extent that it cannot allow into the public domain more detailed information about the threat] the Government or Parliament itself would have to devise some system within Parliament whereby that part of the Government could meet their justificatory responsibilities ...

If law is the province of all branches of government, what happens to the boundary between the courts and other branches of government? Can the doctrine of separation of powers be reformulated to allow for separate roles for the three branches of government, when they are all carrying out the role which we tend to associate with the judiciary along?

One possibility is to admit that law is omnipresent but still cordon off a particular space for policy and politics. We see this approach in South Africa's case law whenever courts warn against an intrusion into the 'political' domain. While Ngcobo

²⁸ Dyzenhaus deference 131; 141.

²⁹ Including the legislature: "[W]ithin a culture of justification the members of a legislature are not merely representatives of political parties but also legal officials who have, like all other legal officials, an obligation of fidelity to law in the expansive sense." Dyzenhaus deference 143.

³⁰ Dyzenhaus on Mureinik 29.

³¹ *A v Secretary of State for the Home Department* [2005] 2 WLR 87.

provides several examples of this approach in his *Glenister* judgment, it is perhaps best exemplified by the case of *Kaunda*.³² Speaking for the majority in this case, Chaskalson³³ refused to find that the South African executive was under a duty to extend diplomatic protection to South African citizens in foreign countries in order to safeguard their human rights. Emphasising that international law affords states a right, but not a duty, of diplomatic protection, Chaskalson saw the decision to exercise diplomatic protection as a ‘political’ decision, solely within the discretion of the executive. He also argued that the sovereignty of other states would be infringed should South Africa engage with them on their human rights standards in this manner

In the minority, O’Regan³⁴ pointed out that the other states involved in this case (Zimbabwe and Equatorial Guinea) had already ratified the international human rights instruments on which the applicants were relying. Therefore, in her view, there was no danger of the infringement of the sovereignty of other states: if carrying out a court order to protect its nationals, South Africa would merely be exercising a right granted by international law and holding the other states to a standard which they had already accepted. Under international law, South Africa had a right to protect its nationals, and, under domestic constitutional law, it had the duty to promote and fulfill the rights of its nationals. In O’Regan’s view, there was nothing to preclude a ruling that ordered the South African government to protect their nationals in Zimbabwe.

O’Regan’s approach reflects that of Mureinik and Dyzenhaus set out above. She addresses the *legal* aspects of the actions which the executives have taken in the exercise of their ‘executive discretion’. Furthermore, she accepted that role of both the courts and South Africa’s own executive in holding these bodies to a process of justification in terms of the law they had adopted.

International law forms the appropriate background to this discussion, and alerts us to an additional feature of O’Regan’s stance which domestic lawyers might miss. Customary international law is built on state practice, and any organ of government – including the legislature and the courts – can provide instances of state practice. Had her view gained majority support in *Kaunda*, O’Regan would have helped to spearhead a developing trend in international law, namely, that some rights which states enjoy may, over time, be converted to duties – an argument which has already been applied to the domain of the punishment of international crimes and the right of humanitarian intervention. The court had an open choice in law: international law allowed South Africa, but did not mandate it, to protect its nationals abroad. Had the Court used its Constitution to compel the executive to represent its nationals in Zimbabwe and Equatorial Guinea, South Africa would, through the voice of the

³² *Kaunda v President of the RSA 2004 (10) BCLR 1009 (CC)*

³³ Langa DCJ, Moseneke J, Skweyiya J, van der Westhuizen J and Yacoob J concurred with Chaskalson CJ.

³⁴ Mokgoro J concurred in this minority judgment.

Court, have strengthened a rule of international law which could better protect human rights worldwide.

This possibility alerts us to the fact that the domain of politics and policy is not hermetically sealed either; by her judgment, O'Regan would have participated in the creation of international law – a process which is often reserved for the executive and carries strong implications for South Africa's foreign relations and policy.

We seem to have come to a complete relinquishment of the doctrine of separation of powers, but I would argue that it has been transformed rather than removed. As Dyzenhaus points out:

On its best understanding, the separation of powers is not so much about formal divisions between the competences of the legislative, the judicial, and the executive. Rather, it concerns their roles in ensuring that public power is exercised in accordance with the substantive and procedural values of the rule of law.³⁵

The majority in *Glenister* seems not so much to drop separation of powers as to transcend it – how, for example, are we to classify its use of chapter nine institutions when it evaluates the independence of the Hawks? At a deeper level, it is protecting the values of the rule of law by demanding justification from institutions which exercise public power. This does not mean the judiciary has usurped the role of the other institutions, because it takes these institutions' own view of their obligations under law seriously. However, it does not allow them avoid the process of justification by reference to factors which remove the question from the purview of the courts completely (such as 'political decision' or 'national security'). All institutions have to make a credible attempt to justify themselves through law.

Similarly, courts which engage with other institutions, and with international law, recognise that they are part of the process by which law becomes itself. Even though this process may have political ramifications, it is preferable to a strained and unsustainable view of law as static and their role as purely interpretive. Once judges – and all institutions – accept their function within the process of law, their engagement with it is better aligned to the political and factual circumstances in which the law is applied. This short summary does not do justice to the gains which I believe the majority in *Glenister* made, but I welcome further ideas and debate on a more nuanced and flexible approach to separation of powers; one which will insist on institutions that are designed to ensure the work for which they were created.

³⁵ David Dyzenhaus 'The Rule of (Administrative) Law in International Law' 2005 *Law and Contemporary Problems* 131.