

# PROMOTING ADMINISTRATIVE JUSTICE FOR PRESIDENTIAL PARDONS IN SOUTH AFRICA

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## SUMMARY

The President's power to grant pardons, remit fines, penalties or forfeitures and the nature of the accountability for the exercise of such power remains unclear. The question of accountability relates to whether the President has a constitutional obligation to disclose the reasons for his decision. The nature of the power is broadly formulated and should undergo reform to enhance the attendant accountability. Over the years, there were debates on whether the granting of pardons constitutes administrative action in terms of the Promotion of Administrative Justice Act (PAJA). Because it is a power that potentially has an adverse effect on rights enshrined in the Bill of Rights, it is submitted that it should be construed in terms of PAJA. Similarly, the role of Parliament in exercising oversight over the process is unclear and inadequate. The article submits that the President should exercise the power together with the relevant Cabinet Minister, and subject to legislative endorsement.

## 1 INTRODUCTION

South Africa is a country that for many decades underwent racial oppression and segregation.<sup>1</sup> Many crimes were committed against the Black majority, with no accountability for the perpetrators.<sup>2</sup> It is against this backdrop that in 1973, the United Nations declared apartheid a crime against humanity.<sup>3</sup> Following the constitutional transition that took place between 1990 and 1996, former President Nelson Mandela sought to achieve reconciliation between the victims of apartheid and those who engaged in criminal conduct against them during apartheid. To this end, the Truth and Reconciliation

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<sup>1</sup> Leal "Constitutional Scapegoat: The Dialectic Between Happiness and Apartheid in South Africa" 2016 22 *Fundamina* 297 298.

<sup>2</sup> Lingaas "The Crime Against Humanity of Apartheid in a Post-Apartheid World" 2015 2 *Oslo Law Review* 86.

<sup>3</sup> UN General Assembly *International Convention on the Suppression and Punishment of the Crime of Apartheid* A/9030 (1974) 1015 UNTS 243. EIF: 18/07/1976 [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.10\\_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf) (accessed 2023-02-06).

Commission (TRC) was established by legislative enactment, chaired by the late Archbishop Desmond Tutu.<sup>4</sup>

The TRC revealed the reality that post-apartheid South Africa would have to deal with issues pertaining to the pardoning of prisoners or the granting of amnesty to those incarcerated in the country's prisons. Following the adoption of the final Constitution in 1996,<sup>5</sup> the decision on whether to pardon prisoners vests in the President as Head of State. This is a crucial decision, which also has implications for the country's constitutional democracy. As a discretionary power bestowed on the President, it tests the independence of the judiciary and has implications for the criminal justice system. South Africa is founded on pillars of constitutional supremacy and the rule of law.<sup>6</sup> These principles can be undermined if the beneficiaries of early release from prison reoffend<sup>7</sup> owing to inadequate rehabilitation during their incarceration.<sup>8</sup>

In May 2002, the Pan Africanist Congress (PAC), Freedom Front Plus (FFP) and the Democratic Alliance (DA) called on former President Thabo Mbeki to release the names of 28 prisoners who were pardoned by the former statesman. The parties argued that the released prisoners' political affiliation to the governing African National Congress (ANC) played a part in securing their release from prison.<sup>9</sup> Allan Boesak's pardon is another instance in South Africa's history where the pardoning of an offender sparked debate among sectors of society. After his release, the DA demanded an explanation from then-President Thabo Mbeki, and called for the Justice Department to acknowledge that it made the recommendation to the former President to grant Allan Boesak a presidential pardon.<sup>10</sup> In response, the Justice Department argued that the decision to pardon inmates is the exclusive domain of the President.<sup>11</sup>

In April 2012, former President Jacob Zuma pardoned more than 35 000 prisoners in a bid to ease overcrowding in prisons. Of the prisoners, 14 600 were set to be released conditionally or unconditionally, with 20 000 of the offenders' parole or probation sentences dismissed.<sup>12</sup> In December 2019,

<sup>4</sup> Yadav "Nelson Mandela and the Process of Reconciliation in South Africa" 2007 63 *India Quarterly* 49 52.

<sup>5</sup> The Constitution of the Republic of South Africa, 1996 (Constitution).

<sup>6</sup> S 1(c) of the Constitution. For further reading, see The Conversation "How Pardoning Extremists Undermines the Rule of Law" (22 June 2023) <https://theconversation.com/how-pardoning-extremists-undermines-the-rule-of-law-207272> (accessed 2024-01-05).

<sup>7</sup> Bruggeman "Trump-Era Pardon Recipients are Increasingly Back in Legal Jeopardy" (22 December 2022) <https://abcnews.go.com/US/trump-era-pardon-recipients-increasingly-back-legal-jeopardy/story?id=95568587> (accessed 2024-01-05).

<sup>8</sup> McCourt and Ilminska "Pardons Are Not a Solution to Prison Overcrowding" (16 August 2012) <https://www.justiceinitiative.org/voices/und-27> (accessed 2024-01-05).

<sup>9</sup> IOL "Row Brews After Mbeki Pardons Prisoners" (13 May 2002) <https://www.iol.co.za/news/politics/row-brews-after-mbeki-pardons-prisoners-86507> (accessed 2023-02-20).

<sup>10</sup> Hartley "South Africa: DA Raises Tough Questions Over Boesak Pardon" (19 January 2005) <https://allafrica.com/stories/200501190142.html> (accessed 2023-02-20).

<sup>11</sup> *Ibid.*

<sup>12</sup> Jurist "South Africa President Pardons 25,000 Offenders to Ease Prison Overcrowding" (28 April 2012) <https://www.jurist.org/news/2012/04/south-africa-president-pardons-35000-offenders-to-ease-prison-overcrowding/> (accessed 2023-02-20).

current President Cyril Ramaphosa pardoned more than 14 000 prisoners.<sup>13</sup> Similarly, in May 2020, the President authorised the release of low-risk inmates to combat the spread of Covid-19. In a statement, the President explained that the release was not a pardon, but a remittal of sentence and parole. They therefore continued to serve their sentence under community supervision and could be rearrested if they violated the conditions of their release.<sup>14</sup>

Modern democracies entrust the President with the power to grant pardons. The power is often discretionary, as only the President may grant pardons to offenders. The nature of the limitations upon the power differs in each jurisdiction.<sup>15</sup> In South Africa, the exercise of the power is subject to foundational principles – *inter alia*, the rule of law, constitutional supremacy and legality.<sup>16</sup> There are no political oversight mechanisms in relation to the granting of pardons in South Africa. Like most of the President's powers in section 84(2) of the Constitution, which he exercises as Head of State and seemingly without an *ex facie* constitutional obligation to consult any public functionary or institution, the National Assembly is not empowered to curb the exercise of the power. Such powers include, *inter alia*, presidential pardons,<sup>17</sup> the establishment of commissions of inquiry<sup>18</sup> and the appointment of Cabinet members.<sup>19</sup> This is despite the fact that the President is individually and collectively accountable to Parliament for the exercise of his powers and the performance of his functions.<sup>20</sup>

As a consequence of the exercise of the pardon power, victims affected by the decision have a corresponding right to know the rationale behind the

<sup>13</sup> Maughan "News Analysis: Ramaphosa's Reprieve Paroles Two of SA's Most Contentious Prisoners" (17 December 2019) <https://www.businesslive.co.za/bd/national/2019-12-17-news-analysis-ramaphosas-reprieve-paroles-two-of-sas-most-contentious-prisoners/> (accessed 2023-02-20).

<sup>14</sup> Mitchley "Ramaphosa Authorises the Release of Low-Risk Inmates to Combat Spread of Covid-19 in Prisons" (8 May 2020) <https://www.news24.com/news24/southafrica/news/ramaphosa-authorises-release-of-low-risk-inmates-to-combat-spread-of-covid-19-in-prisons-20200508> (accessed 2023-02-20).

<sup>15</sup> In Zimbabwe, in terms of section 112 of the Constitution of the Republic of Zimbabwe 2013, the President exercises his pardon power after consultation with Cabinet and subject to the requirement to publish the decision in the *Gazette*. In South Africa, the requirement to publish presidential pardons is not expressly stated in the Constitution. In Angola, the President grants pardons in terms of article 119(O) of the Constitution of the Republic of Angola, 2010. In December 2022, he signed and approved a decree pardoning citizens convicted for celebrating Christmas. This decree, called the Amnesty Law, was approved by the National Assembly. See in this regard Verangola "President Grants Pardon to People Convicted for the Celebration of Christmas" (22 December 2022) <https://www.verangola.net/va/en/122022/Politics/33793/President-grants-pardon-to-people-convicted-for-the-celebration-of-Christmas.htm> (accessed 2023-03-14). In Tanzania, the President grants pardons in terms of article 45 of the Constitution of the Republic of Tanzania, 1977. Article 45(2) of the Tanzanian Constitution empowers Parliament to enact legislation that governs the procedure to be followed by the President in the process of granting pardons.

<sup>16</sup> For a discussion of the oversight mechanisms in relation to the power, see full discussion below.

<sup>17</sup> S 84(2)(j) of the Constitution.

<sup>18</sup> S 84(2)(f) of the Constitution.

<sup>19</sup> Ss 84(2)(e) and 91(2) of the Constitution.

<sup>20</sup> S 92(2) of the Constitution.

decision by the President. Restorative justice plays a crucial role in this regard, in that it “advocates for a victim-centred approach to criminal justice”.<sup>21</sup> For instance, prior to the January 2024 release of Oscar Pistorius on parole following his conviction for the murder of Reeva Steenkamp, the victim’s family participated in the deliberations by the parole board on whether to release him from prison.<sup>22</sup> While restorative justice places victims at the forefront of the decision on eligibility for early release from prison, the extent to which it applies to presidential pardons is not altogether clear. Equally, whether the President’s decision to pardon prisoners can be challenged based on the principles of restorative justice is also unclear.

Section 32 of the Constitution deals with the right of access to information that is in the possession of the State.<sup>23</sup> However, it is doubtful that this provision applies to the President’s power to grant pardons.<sup>24</sup> In addition, everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>25</sup> Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>26</sup> The Promotion of Access to Information Act (PAIA)<sup>27</sup> and the Promotion of Administrative Justice Act (PAJA)<sup>28</sup> were enacted by Parliament in 2000 to give effect to these rights.<sup>29</sup>

Despite these constitutional and legislative injunctions, the ambit of the President’s duty to give reasons in exercising his powers as Head of State is not altogether clear. In the early years of South Africa’s constitutional democracy, in *President of the Republic of South Africa v South African Rugby Football Union*<sup>30</sup> (SARFU), the Constitutional Court pronounced that the President’s section 84(2) powers cannot in general be construed as administrative action, whether in terms of the Constitution or PAJA. The latter contains detailed provisions on the right to receive (and the corresponding duty to give) written reasons. As will be seen later, questions remain over the nature and extent of the President’s constitutional obligation to give reasons when exercising his powers as Head of State, which includes presidential pardons.<sup>31</sup>

The principle of legality, as an incident of the rule of law, guides all exercises of public power.<sup>32</sup> Any impugned decision of the President can be

<sup>21</sup> Louw “Victims’ Participatory Rights in Parole Hearings: A South African Perspective” 2021 17 *British Journal of Community Justice* 42 45.

<sup>22</sup> Wicks “Pistorius Parole Hearing: Reeva’s Mom Speaks of Massive Hole Since Her Death” (24 November 2023) <https://ewn.co.za/0001/01/01/pistorius-parole-hearing-reeva-s-mom-speaks-of-massive-hole-since-her-death> (accessed 2024-01-05).

<sup>23</sup> S 32(1)(a) of the Constitution.

<sup>24</sup> See discussion below.

<sup>25</sup> S 33(1) of the Constitution.

<sup>26</sup> S 33(2) of the Constitution.

<sup>27</sup> 2 of 2000.

<sup>28</sup> 3 of 2000.

<sup>29</sup> As mandated by ss 32(2) and 33(3) of the Constitution.

<sup>30</sup> 1999 (10) BCLR 1059 (CC) par 142.

<sup>31</sup> Full discussion below.

<sup>32</sup> *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (*Fedsure*). Also refer to Okpaluba “Judicial Review of Executive Power: Legality, Rationality and Reasonableness (Part 1)” 2015 30 *Southern African Public Law* 122 123; Okpaluba “Judicial Review of Executive Power: Legality, Rationality and

tested against the rationality test.<sup>33</sup> The enquiry is whether, in pardoning prisoners, the means employed by the President correlates with the objectives sought to be achieved by the exercise of the power.<sup>34</sup> While this is a generally accepted principle, the exercise of the pardon power has implications for the doctrine of separation of powers.<sup>35</sup> It also has implications for the principle of judicial independence.<sup>36</sup> This is because it has the effect of nullifying the initial judicial determination by the court on the guilt of the prisoner. Post-1996, the high crime rates in South Africa are clearly relevant in any discussion on the President's pardon power.<sup>37</sup> Following the *dictum* in *Carmichele v Minister of Safety and Security*,<sup>38</sup> there is "a positive obligation on the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection".

There are often concerns that pardoning offenders poses a threat to public safety as the inmate may reoffend.<sup>39</sup> The debates often have to do with the socio-political realities currently bedeviling society. For instance, in 2020, there were calls to release Fees Must Fall activist Kanya Cekeshe, following his conviction on a charge of public violence and malicious damage to property.<sup>40</sup> He was sentenced to prison after participating in protest action against high tuition fees at university, and was part of a category of prisoners who were given a special remission of sentence by President Cyril Ramaphosa in December 2019, in recognition of Reconciliation Day.<sup>41</sup>

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Reasonableness" 2015 30 *Southern African Public Law* 379 380; Henrico "The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South African Administrative Law: Some Observations" 2021 42 *Obiter* 486 486; Freedman and Mzolo "The Principle of Legality and the Requirements of Lawfulness and Procedural Rationality": *Law Society of South Africa v President of the Republic of South Africa* (2019) (3) SA 30 (CC) 2021 42 *Obiter* 421 421.

<sup>33</sup> Tsele "Coercing Virtue in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem" 2016 8 *Constitutional Court Review* 193 205.

<sup>34</sup> *National Energy Regulator of South Africa v PG Group (Pty) Limited* 2019 (10) BCLR 1185 (CC) par 48.

<sup>35</sup> Bekink "Presidential Pardons: Constitutional Necessity or Political Nuisance? Some Points of Critique" 2003 18 *Southern African Public Law Journal* 371 386.

<sup>36</sup> Udofa "The Abuse of Presidential Power of Pardon and the Need for Restraints" 2018 9 *Beijing Law Review* 113 114.

<sup>37</sup> African News Agency "Presidential Pardons to Prisoners Slap in the Face to Victims-DA" (17 December 2019) <https://www.iol.co.za/news/presidential-pardons-to-prisoners-slap-in-the-face-for-victims-da-39350140> (accessed 2023-02-06). Also refer to Tamukamoyo "What Is the Value of the Recent Presidential Pardon of Inmates in South Africa"? (15 May 2012) <https://issafrica.org/iss-today/what-is-the-value-of-the-recent-presidential-pardon-of-inmates-in-south-africa> (accessed 2023-02-06).

<sup>38</sup> 2001 (4) SA 938 (CC) par 44. See also Nkoane "Deciding Non-Constitutional Matters of General Public Importance in South African: Can Constitutional Values Be Used"? 2021 25 *Law Democracy and Development* 604 610.

<sup>39</sup> African News Agency "Ramaphosa's Pardon of Inmates a Slap in the Face, Says IFP" (18 December 2019) <https://www.polity.org.za/article/ramaphosas-pardon-of-inmates-a-slap-in-the-face-says-ifp-2019-12-18> (accessed 2023-02-06).

<sup>40</sup> Mabuza and Savides "Very Happy: Fees Must Fall Activist Kanya Cekeshe is Paroled From Prison" (24 December 2019) <https://www.timeslive.co.za/news/south-africa/2019-12-24-feesmustfall-activist-kanya-cekeshe-is-paroled-from-prison/> (accessed 2023-02-06).

<sup>41</sup> Ngqakamba "Kanya Cekeshe: I Have No Regrets of Joining Powerful Fees Must Fall Movement" (22 February 2020) <https://www.news24.com/news24/southafrica/news/kanya-cekeshe-i-have-no-regrets-of-joining-powerful-fees-must-fall-movement-20200222>

In most democracies, there are two pathways for a prisoner to be released prior to the expiry of their period of incarceration. This can take place through parole<sup>42</sup> or a presidential pardon.<sup>43</sup> In *Walus v Minister of Justice and Correctional Services*,<sup>44</sup> the Constitutional Court set aside the respondent's decision to reject the applicant's application for parole. The court ordered the Minister to place the applicant on parole within 10 calendar days. The judgment was met with a backlash from various sectors of society, with the court accused, *inter alia*, of promoting white supremacy.<sup>45</sup> There was also the view that Janusz Walus had never apologised to Chris Hani's family, political parties and South Africans at large, and therefore did not deserve to be placed on parole.<sup>46</sup>

This article investigates the President's power to grant pardons, remit fines, penalties or forfeitures and accountability for the exercise of this power. Secondary to the probe is the nature and extent of the President's constitutional obligations to explain the rationale behind his decision. The central argument advanced is that, because it is a power that has the potential to affect the rights of citizens adversely, the President can no longer exercise it in his capacity as Head of State, but rather must do so

(accessed 2023-02-20). See further Rabkin "#FeesMustFall Activist Kanya Cekeshe Eligible for Immediate Parole" (17 December 2019) <https://mg.co.za/article/2019-12-17-feesmustfall-activist-kanya-cekeshe-eligible-for-immediate-parole/> (accessed 2023-02-20); Sobuwa "The Struggle Goes On for Kanya Cekeshe" (17 February 2020) <https://www.sowetanlive.co.za/news/south-africa/2020-02-17-the-struggle-goes-on-for-khanya-cekeshe/> (accessed 2023-02-20); Ngcobo "Fees Must Fall Activist Kanya Cekeshe Released From Prison" (24 December 2019) <https://www.iol.co.za/news/politics/fees-must-fall-activist-kanya-cekeshe-released-from-prison-39688085> (accessed 2023-02-20) and Qukula "Early Release of Prisoners Could Be Political Move, Says Criminal Reform Expert" (17 December 2019) <https://www.capetalk.co.za/articles/370038/early-release-of-prisoners-could-be-political-move-says-criminal-reform-expert> (accessed 2023-02-20).

<sup>42</sup> Louw and Luyt "Parole and Parole Decisions in South Africa" 2009 22 *Acta Criminologica: African Journal of Criminology and Victimology* 14. For further reading on the definition of parole, see Van Heerden "Parole Board Administrative Action: An Encroachment on the Judicial Decisions of the Courts of Law of South Africa" 2011 24 *Acta Criminologica: African Journal of Criminology and Victimology* 17; Watney "Assessment of the South African Parole System (Part 2)" 2018 1 *Journal of South African Law* 88 and Mujuzi "Victim Participation in Parole Proceedings in South Africa" 2019 34 *Southern African Public Law* 1. Also refer to the works of Louw and Luyt "Parole Revocation in South Africa: Perspectives of Adult Male Parole Violators" 2019 32 *Acta Criminologica: African Journal of Criminology and Victimology* 48.

<sup>43</sup> Mujuzi "Unpacking the Law and Practice Relating to Parole in South Africa" 2011 14 *Potchefstroom Electronic Law Journal* 206 240.

<sup>44</sup> 2023 (3) BCLR 224 (CC).

<sup>45</sup> See media statement by the South African Communist Party "SACP on the Sickeningly Disappointing Constitutional Court Judgment Releasing Janusz Walus the Murderer of Comrade Chris Hani" (22 November 2022) <https://www.polity.org.za/article/sacp-on-the-sickeningly-disappointing-constitutional-court-judgment-releasing-janusz-walu-the-murderer-of-comrade-chris-hani-2022-11-22> (accessed 2023-02-06). See further Nkosi, Sibanyoni and Koka "Chris Hani's Widow Lashes at Zondo for Walus's Ruling" (22 November 2022) <https://www.sowetanlive.co.za/news/south-africa/2022-11-22-chris-hanis-widow-lashes-at-zondo-for-walu-ruling/> (accessed 2023-02-06); Reader Letter "The Walus Judgment Flawed, Wrong" (23 November 2022) <https://www.sowetanlive.co.za/opinion/letters/2022-11-23-reader-letter-the-walu-judgment-flawed-wrong/> (accessed 2023-02-06).

<sup>46</sup> Africa News "S.A: Parole for Anti-Apartheid Hero Killer Causes Outrage" (24 November 2022) <https://www.africanews.com/2022/11/23/sa-parole-for-anti-apartheid-hero-killer-causes-outrage/> (accessed 2023-02-06).

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together with a Cabinet minister, in which case he would then be acting as Head of Cabinet. It is submitted that the power is too broad and should be curtailed in order to enhance presidential accountability. To this extent, the article also explores the National Assembly's constitutional obligation to exercise oversight over the President broadly when issuing pardons. Proposals are advanced for enhanced legislative oversight over the President's power to grant pardons. In the section below, the historical overview of the President's pardon power is explored in detail.

## 2 HISTORICAL OVERVIEW OF THE PRESIDENT'S PARDON POWER PRE-1994 AND DURING THE CONSTITUTIONAL TRANSITIONAL PHASE

The President's power to grant a pardon comprises a set of powers that were originally the royal prerogatives of the British monarch. In 1909, South Africa was declared a Union, and was led by a governor-general acting on behalf of the British monarch. Following this declaration, the Union of South Africa Act, 1909<sup>47</sup> was enacted. The monarch acted in person or through a governor-general acting as their representative.<sup>48</sup> The governor-general was appointed by the King and served at the latter's pleasure.<sup>49</sup> He exercised such powers and functions as were vested in him by the King,<sup>50</sup> and was assisted by an executive council in the exercise of his powers and the performance of his functions.<sup>51</sup> To this extent, those provisions of the 1910 Constitution referring to the "Governor-General in Council" were in reference to the governor-general, acting on the advice of the executive council.<sup>52</sup>

The 1910 Constitution was silent on whether the governor-general had the power to grant a pardon. Generally, there was no right of appeal from the Supreme Court of South Africa to the King in Council. However, the latter had the discretionary power to grant special leave to appeal from the Appellate Division.<sup>53</sup> Conversely, Parliament was empowered to enact legislation to limit the category of matters on which such special leave could be granted.<sup>54</sup> Therefore, the 1910 Constitution only contained reference to the King's powers of appeal.<sup>55</sup>

In 1961, South Africa became a republican state. This followed the adoption of the Constitution of the Republic of South Africa, 1961 (1961 Constitution).<sup>56</sup> For the first time since 1910, the Constitution contained express reference to the President's power to pardon offenders. The State President had the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he deemed fit, and to remit

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<sup>47</sup> Hereafter, the 1910 Constitution.

<sup>48</sup> S 8 of the 1910 Constitution.

<sup>49</sup> S 9 of the 1910 Constitution.

<sup>50</sup> *Ibid.*

<sup>51</sup> S 12 of the 1910 Constitution.

<sup>52</sup> S 13 of the 1910 Constitution.

<sup>53</sup> S 106 of the 1910 Constitution.

<sup>54</sup> *Ibid.*

<sup>55</sup> S 23 of the 1910 Constitution.

<sup>56</sup> Constitution of the Republic of South Africa, Act 32 of 1961 (1961 Constitution).

any fines, penalties or forfeitures.<sup>57</sup> The State President had such powers and functions as were immediately prior to the commencement of the 1961 Constitution possessed by the Queen by way of prerogative.<sup>58</sup> All matters relating to the administration of justice fell within the purview of the Minister of Justice.<sup>59</sup> The 1961 Constitution did not contain detailed guidelines on how the President could exercise the pardon power.

In 1983, South Africa adopted a tricameral constitution.<sup>60</sup> The provision governing the President's power to grant a pardon was similar in wording and structure to the 1961 Constitution. In terms of the 1983 Constitution, the President had the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures.<sup>61</sup>

From the early 1990s to 1996, South Africa underwent a period of constitutional transition. This resulted in the adoption of the 1993 Interim Constitution.<sup>62</sup> This was a period of great turbulence for the country owing to ongoing political violence, mainly between the Inkatha Freedom Party (IFP) and the ANC. In terms of the Interim Constitution, the President had the power to pardon or reprieve offenders, either unconditionally or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures.<sup>63</sup> In the exercise of this power, the President had the constitutional obligation to consult the Executive Deputy Presidents.<sup>64</sup>

In *Hugo v President of the Republic of South Africa*,<sup>65</sup> the President's decision to sign the Presidential Act No 7 (which granted a remission of sentence to all mothers in prison with minor children below the age of 12 years old) came before the court for consideration. This Act was promulgated in terms of section 82(1)(k) of the Interim Constitution, which provided that the President shall be competent "to pardon or reprieve offenders, either unconditionally, or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures". The applicant successfully challenged the Presidential Act before the High Court on the basis that it unfairly discriminated against him as a father to a son under the age of 12 years old. The President then took the matter on appeal in *President of the Republic of South Africa v Hugo*.<sup>66</sup> The approach followed by the Constitutional Court in the interpretation of the President's power to grant pardons is explored in detail below.

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<sup>57</sup> S 7(3)(f) of the 1910 Constitution.

<sup>58</sup> S 7(4) of the 1961 Constitution.

<sup>59</sup> S 95 of the 1961 Constitution.

<sup>60</sup> Constitution of South Africa Act 110 of 1983.

<sup>61</sup> S 6(3)(d) of the 1983 Constitution.

<sup>62</sup> The Constitution of the Republic of South Africa Act 200 of 1993.

<sup>63</sup> S 82(1)(k) of the Interim Constitution.

<sup>64</sup> S 82(2)(e) of the Interim Constitution.

<sup>65</sup> 1996 (4) SA 1012 (D).

<sup>66</sup> 1997 (6) BCLR 708 (CC) par 2.

### 3 THE APPROACH OF THE CONSTITUTIONAL COURT IN *HUGO*

In *Hugo*, the court was asked to determine whether the rights of male prisoners were violated by the President in exercising his pardon and reprieve power through the mechanism of the impugned Presidential Act.<sup>67</sup> The court acknowledged that the President's powers in terms of the Interim Constitution have their origin in the royal prerogatives of the British monarch. The court also held that, as a result, "there are no powers derived from the royal prerogatives which are conferred upon the President other than those expressed in section 82(1)(k)",<sup>68</sup> which are stated in wide and unqualified terms. They were only subject to the requirement to act in consultation with the Executive Deputy Presidents, seemingly without the concurrence of the Cabinet.<sup>69</sup> The court held the view that no prisoner has the right to be pardoned, reprieved or have a sentence remitted. Such a decision lies with the President. However, should the President abuse his power in the process by acting unlawfully, a court can intervene by correcting such action and declaring it unconstitutional.<sup>70</sup>

The Constitutional Court held that the Presidential Act does in fact discriminate against male parents on the basis of gender and parenthood of children below the age of 12.<sup>71</sup> It therefore had to determine whether the discrimination was fair. As a reason for his decision, the President stated that the special remission of sentence for mothers serves the interests of their minor children. According to the expert testimony advanced before the court, mothers bear the primary responsibility for the care of minor children in care. Notwithstanding the fact that no statistical data was made available to support this assertion, the Constitutional Court accepted this line of reasoning and stated: "The generalisation upon which the President relied is a fact which is one of the root causes of women's inequality in our society."<sup>72</sup> The court found that the President acted in good faith but that this was not sufficient to establish whether the discrimination was fair.<sup>73</sup> In order to determine the fairness of the discrimination, the nature of the power and the interests it affects were instructive.<sup>74</sup>

The Constitutional Court affirmed the President's power to pardon in terms of the Interim Constitution and held that the power is not subject to Cabinet concurrence or legislative control.<sup>75</sup> According to the court: "It is not a private act of grace in the sense that the pardoning power in a monarchy may be."<sup>76</sup> The power is a corollary of the recognition in the Interim Constitution that the President should in his view determine when "the public

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<sup>67</sup> *Hugo supra* par 30.

<sup>68</sup> *Hugo supra* par 8.

<sup>69</sup> *Hugo supra* par 14.

<sup>70</sup> *Hugo supra* par 29.

<sup>71</sup> *Hugo supra* par 33.

<sup>72</sup> *Hugo supra* par 38.

<sup>73</sup> *Hugo supra* par 42.

<sup>74</sup> *Hugo supra* par 43.

<sup>75</sup> *Hugo supra* par 44.

<sup>76</sup> *Ibid.*

welfare will be better served by granting a remission of sentence or some other form of pardon".<sup>77</sup> The court identified two instances in which the President's pardon power may be important. First, it may be used to correct mistaken convictions or reduce excessive sentences, and secondly, to confer mercy upon individuals if the President deems it in the public interest.<sup>78</sup> In summary, the President argued:

"The decision to grant special remission of the remainder of their sentences to the categories mentioned in the Presidential Act was not lightly taken. The power is a grave one which requires careful consideration of many competing interests. It is important that due regard be had to the integrity of the judicial system and the administration of justice. Whenever remission of sentences is considered, it is necessary to bear in mind that incarceration has followed a judicial process and that sentences have been duly imposed after conviction. A random or arbitrary grant of the remission of sentences may have the effect of bringing the administration of justice into disrepute. It is of considerable importance to take into account the legitimate concerns of members of the public about the release of convicted prisoners. The levels of crime is a matter of concern to the public at large and there may well be anxiety about the release of persons who have not completed their sentences."<sup>79</sup>

The court rejected with disapproval the *dictum* in *Kruger v Minister of Correctional Services*,<sup>80</sup> where the President was found to have acted in the exercise of a prerogative power, thereby rendering a court powerless to intervene even if *mala fides* could be proven. The reasoning advanced by the court was that the learned judge in *Kruger* had failed to appreciate that the President is obliged to comply with all the terms of the Interim Constitution, including the Bill of Rights.<sup>81</sup> In the judgment of Goldstone J, the Constitutional Court found that the President used his discretionary power to grant pardons and remission of sentences fairly and in a manner consistent with the Interim Constitution.<sup>82</sup>

In the minority judgment, Kriegler J acknowledged that the President granted the pardon in good faith, rationally and to the advantage of a section of the population who suffered past discrimination. However, he argued that the discrimination is inconsistent with the prohibition against gender discrimination contained in section 8(2) of the Interim Constitution. In addition, he posited that the discrimination was not shown to be fair and was therefore invalid. Despite his contrary finding on the discriminatory aspect of the President's power, Kriegler J agreed that the appeal should succeed.<sup>83</sup> The basis for the dissenting views were in relation to the provisions of section 8 of the Interim Constitution, which dealt with the right to equality. In terms of the provision:

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

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Hugo supra* par 45.

<sup>79</sup> *Hugo supra* par 46.

<sup>80</sup> 1995 (2) SA 803 (T) (*Kruger*).

<sup>81</sup> *Hugo supra* par 49.

<sup>82</sup> *Hugo supra* par 52.

<sup>83</sup> *Hugo supra* par 64.

- (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) This section shall not preclude measures designed to achieve the 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.
- (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.”

On a reading of the reasoning adopted by Kriegler J, the basis for his dissent was in relation to the equality provisions of the Interim Constitution. Broadly, the approach followed by the Constitutional Court should be commended. The realisation that mothers play a dominant role in society is consistent with a values-based approach to statutory interpretation.<sup>84</sup> Notably, the incumbent President, Nelson Mandela, did not argue against the furnishing of reasons for the exercise of the pardon power owing to its discretionary nature. However, his successors would later go on to contend that the President's Head of State powers are discretionary, and that they should not be compelled to disclose reasons for making decisions taken in terms of section 84(2) of the Constitution.<sup>85</sup> However, after the decision of the court in *President of the Republic of South Africa v Democratic Alliance*<sup>86</sup> (the *Cabinet Reshuffle* judgment), Rule 53 of the Uniform Rules of Court can be used to compel the President to furnish reasons for appointing and dismissing Cabinet members. The extent to which this *dictum* is applicable to the President's other section 84(2) powers remains unclear. This matter becomes more relevant in the context of the President's power to grant pardons.

#### 4 PRESIDENTIAL PARDONS AND THE PAJA DEBATE

Generally, there is a constitutional obligation on all public office bearers to give reasons for decisions taken in pursuance of their constitutional powers and functions.<sup>87</sup> This constitutional obligation applies to all forms of public power. However, other than in terms of section 33 of the Constitution and the provisions of PAJA, the extent of the President's duty to give reasons in exercising his powers as Head of State is unclear. Everyone whose rights have been adversely affected by administrative action has the right to be

<sup>84</sup> Devenish “The Theory and Methodology for Constitutional Interpretation in South Africa” 2006 69 *Journal for Contemporary Roman-Dutch Law* 238 238.

<sup>85</sup> See the *dicta* of the court in the *Democratic Alliance v President of the Republic of South Africa* [2017] 3 All SA 124 (GP) upheld by the Constitutional Court in *President of the Republic of South Africa v The Democratic Alliance* 2019 (11) BCLR 1403 (CC) (*Cabinet Reshuffle* judgment), relating to the President's power to appoint and dismiss Cabinet members. Also see Du Toit and Ferreira “Reasons for Prosecutorial Decisions” *Potchefstroom Electronic Law Journal* 2015 18 1507 1509.

<sup>86</sup> *Supra*.

<sup>87</sup> S 33 of the Constitution.

given written reasons.<sup>88</sup> This is because the duty to give reasons is generally applicable to administrative action that falls within the ambit of PAJA.

In *Albutt v Centre for the Study of Violence and Reconciliation*,<sup>89</sup> the Constitutional Court had to determine whether the President is required, before exercising his pardon power, to afford the victims of crimes a hearing.<sup>90</sup> The case arose as an appeal out of the judgment of the North Gauteng High Court in *Centre for the Study of Violence and Reconciliation v President of the Republic of South Africa*.<sup>91</sup> The applicants asked the court to declare section 1 of PAJA invalid. They sought this relief in the event that the court found that section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon in terms of section 84(2)(j) of the Constitution. The case arose from President Thabo Mbeki's announcement, resulting from the TRC, of a special dispensation of pardons for offenders who were convicted of politically motivated offences.<sup>92</sup> The President established a multiparty Pardon Reference Group (PRG) to assist him in considering requests for pardons. He would then seriously consider recommendations made by the PRG. However, he would form an independent opinion based on the facts placed before him.<sup>93</sup> The President stated that he would be guided *inter alia* by the values and principles enshrined in the Constitution, "including the objectives of nation-building and reconciliation".<sup>94</sup> The applicants argued that the President's power to grant a pardon in terms of section 84(2)(j) of the Constitution "is executive action and does not constitute administrative action".<sup>95</sup> They argued that properly construed, the definition of administrative action excludes the power to grant pardon.<sup>96</sup>

The court confirmed the well-established principle that the exercise of all public power must conform to the norms and standards of the Constitution, and to the doctrine of legality, which is part of the rule of law.<sup>97</sup> According to the court: "although there is no right to be pardoned, an applicant seeking a pardon has a right to have his application considered and decided upon rationally, in good faith, and in accordance with the principle of legality."<sup>98</sup>

<sup>88</sup> S 33(2) of the Constitution.

<sup>89</sup> 2010 (2) SACR 101 (CC).

<sup>90</sup> *Albutt supra* par 1.

<sup>91</sup> [2009] ZAGPPHC 35.

<sup>92</sup> *Albutt supra* par 4. Also see News24 "Mbeki Announces Pardons Deal" (21 November 2007) <https://www.news24.com/news24/mbeki-announces-pardons-deal-20071121> (accessed 2023-03-14); Mail and Guardian "New Presidential Pardons to Come" (15 November 2007) <https://mg.co.za/article/2007-11-15-new-presidential-pardons-to-come/> (accessed 2023-03-12); TimesLive "More Pardons For Political Crimes" (22 November 2007) <https://www.timeslive.co.za/news/south-africa/2007-11-22-more-pardons-for-political-crimes/> (accessed 2023-03-14).

<sup>93</sup> *Albutt supra* par 6.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Albutt supra* par 39.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Albutt supra* par 49. See further the *dicta* in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC); *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra*.

<sup>98</sup> *Albutt supra* par 49.

Therefore, the exercise of the pardon power must be rationally related to the objective sought to be achieved by it.<sup>99</sup> The executive has a wide discretion to achieve its constitutionally permissible objectives. Consequently, the courts may not interfere with the selected means because they dislike them, or because there are more appropriate mechanisms that could have been selected in the impugned decision.

The purpose of the enquiry should be to determine whether the means selected by the President are rationally related to the objective sought to be achieved by the exercise of the pardon power.<sup>100</sup> In reference to *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*,<sup>101</sup> the court held that victim participation is crucial to establishing what might have happened to their loved ones, and to attaining the twin objectives of nation-building and national reconciliation.<sup>102</sup>

*Hugo* illustrates why it is significant that the right to afford victims a hearing and to state their case as enshrined in the Constitution.<sup>103</sup> The court in *Hugo* left open the question of whether the President's pardon power constitutes administrative action. In addition, the court refrained from making a pronouncement on whether the definition of administrative action in terms of PAJA includes the President's pardon power.

Notably, the definition of administrative action in terms of PAJA does not expressly exclude the President's pardon power from the ambit of the definition of the Act.<sup>104</sup> However, decisions taken by the national executive authority are expressly excluded.<sup>105</sup> PAJA also excludes any decision taken in terms of PAIA from the definition of administrative action.<sup>106</sup> In terms of PAJA, "administrative action" means any decision taken, or any failure to take a decision by an organ of state,<sup>107</sup> when exercising power in terms of the Constitution or a provincial constitution.<sup>108</sup> The definition also includes an organ of state exercising a public power or performing a public function in terms of any legislation.<sup>109</sup>

The decisions referred to must adversely affect the rights of any person and have a direct, external legal effect.<sup>110</sup> Whether presidential pardons constitute administrative action is not the only crucial aspect of the debate. The Constitutional Court has not provided definitive guidance on whether the

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Albutt supra* par 51.

<sup>101</sup> 1996 (8) BCLR 1015 (CC) par 61.

<sup>102</sup> *Albutt supra* par 59. Also refer to par 61.

<sup>103</sup> S 33 of the Constitution, read together with the provisions of PAJA.

<sup>104</sup> Govender "Judicial Review of the Pardon Power in Section 84(2)(j) of the Constitution of the Republic of South Africa, 1996" 2012 23 *Stellenbosch Law Review* 490 496. Also see par (aa) of the definition of "administrative action" in s 1 of PAJA.

<sup>105</sup> Govender 2012 *Stellenbosch Law Review* 296. The definition of "administrative action" in PAJA excludes the executive powers or functions of the national executive, including the powers or functions referred to in ss 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution.

<sup>106</sup> Par (hh) of the definition of "administrative action" in s 1 of PAJA.

<sup>107</sup> Par (a) of the definition of "administrative action" in s 1 of PAJA.

<sup>108</sup> Par (a)(i) of the definition of "administrative action" in s 1 of PAJA.

<sup>109</sup> Par (a)(ii) of the definition of "administrative action" in s 1 of PAJA.

<sup>110</sup> See the definition of "administrative action" in s 1 of PAJA.

President has a duty to give reasons when granting pardons, on the legal provisions governing such a duty, and on whether the relevant institutions of oversight may compel him to furnish such reasons. It is submitted that such a duty should be rooted in the provisions of section 33 of the Constitution and the provisions of PAJA.

In the *SARFU* judgment,<sup>111</sup> in relation to the President's power to establish a commission of inquiry, the court held that the test to determine whether conduct constitutes administrative action "is not so much the functionary as the function". The focus of the enquiry should be on the nature of the power that the actor is exercising, not the arm of government to which he or she belongs.<sup>112</sup> According to the court: "action taken by members of Cabinet cannot be construed as administrative action for purposes of section 33 of the Constitution." Some acts of members of the executive will constitute administrative action within the meaning of section 33, but others will not.<sup>113</sup>

Regarding the President's section 84(2) powers, the Constitutional Court in *SARFU* held:

"The remaining section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow, the conferral of honours, the appointment of ambassadors, the reception and recognition of foreign diplomatic representatives, the calling of referenda, the appointment of commissions of inquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no action by the government. It is readily apparent that these responsibilities could not suitably be subjected to section 33."<sup>114</sup>

Seemingly, *SARFU* adopted the implementation of legislation as the test to determine whether the President's section 84(2) powers amount to administrative action within the meaning of section 33. This is troubling, given the fact that in 1996, when the Constitutional Court delivered the judgment, the Criminal Procedure Act<sup>115</sup> had already been in force since 1977. Similarly, the Promotion of National Unity and Reconciliation Act,<sup>116</sup> enacted a year earlier, was the statutory mechanism that would later go on to form the basis upon which, *inter alia*, former President Thabo Mbeki would pardon political prisoners.<sup>117</sup> As a matter of necessity, the President's pardon power also entailed the implementation of legislation. However, it is submitted that the legal uncertainty arises as a result of an incorrect classification of the true nature of the President's pardon power. The correct enquiry should focus on its discretionary nature and the extent of the limitations upon the exercise of the power. In *SARFU*, the court held that the President is subject to certain requirements when exercising his section 84(2) powers. He must:

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<sup>111</sup> *Supra* par 141.

<sup>112</sup> *Ibid.*

<sup>113</sup> *SARFU supra* par 142.

<sup>114</sup> *SARFU supra* par 146.

<sup>115</sup> 51 of 1977.

<sup>116</sup> 34 of 1995.

<sup>117</sup> Full discussion above.

- exercise the powers personally;
- not infringe a right in the Bill of Rights;
- abide by the principle of legality;
- act in good faith; and
- not misconstrue his powers.<sup>118</sup>

The President is also subject to the provisions of section 101(1) of the Constitution. In terms of the provision, a decision taken by the President must be in writing if it is taken in terms of legislation<sup>119</sup> or if it has legal consequences.<sup>120</sup> In addition, another Cabinet member must countersign a written decision by the President if the decision in question concerns a function assigned to the President.<sup>121</sup>

## 5 PRESIDENTIAL PARDONS AND THE DUTY TO GIVE REASONS

The values of accountability, responsiveness and openness enshrined in the Constitution mandate the President to explain the considerations he took into account in pardoning prisoners.<sup>122</sup> To this extent, everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>123</sup> In addition, everyone has the right of access to any information held by the State,<sup>124</sup> and any information held by another person that is required for the exercise or protection of any rights.<sup>125</sup> The Constitution mandates Parliament to enact legislation to give effect to this right, and may take reasonable measures to ease the administrative and financial burden on the State.<sup>126</sup>

Pursuant to the dictates of the Constitution, Parliament enacted the Promotion of Access to Information Act (PAIA) in 2000. This Act applies to the right of access to a record held by both a public<sup>127</sup> and a private body.<sup>128</sup> The Act was enacted to give effect to the constitutional right of access to any information held by the State<sup>129</sup> and to information held by another person that is required for the exercise or protection of any rights.<sup>130</sup> However, the Act does not apply to a record of the Cabinet and its committees.<sup>131</sup>

The nature of the President's constitutional obligation to give reasons in the exercise of his pardon power should be understood in view of the *dictum*

<sup>118</sup> SARFU *supra* par 148.

<sup>119</sup> S 101(1)(a) of the Constitution.

<sup>120</sup> S 101(1)(b) of the Constitution.

<sup>121</sup> S 101(2) of the Constitution.

<sup>122</sup> S 1(d) of the Constitution.

<sup>123</sup> S 33(2) of the Constitution.

<sup>124</sup> S 32(1)(a) of the Constitution.

<sup>125</sup> S 32(1)(b) of the Constitution.

<sup>126</sup> S 32(1)(c) of the Constitution.

<sup>127</sup> S 3(a) of PAIA.

<sup>128</sup> S 3(b) of PAIA.

<sup>129</sup> S 9(a)(i) of PAIA.

<sup>130</sup> S 9(a)(ii) of PAIA.

<sup>131</sup> S 12(a) of PAIA.

of the court in *President of the Republic of South Africa v M and G Media Ltd*<sup>132</sup> (*Mail and Guardian*). The facts relating to this judgment had to do with the appointment by former President Thabo Mbeki of two judges to head a commission to examine the legality of the 2002 election results in Zimbabwe. The commission led to a report on the Zimbabwe election results – known as the “Khampepe Report”<sup>133</sup> – which found that the 2002 election results were not free and fair. Pursuant to section 11 of PAIA, the applicants in the Constitutional Court sought access to the report, following an earlier refusal by the President.<sup>134</sup>

The refusal by the President was based on two grounds, namely that “disclosure of the report would reveal information supplied in confidence by or on behalf of another State or international organisation, contrary to section 41(1)(b)(i) of PAIA”. The President also argued that the report was prepared to assist him in formulating executive policy on Zimbabwe, as contemplated in section 44(1)(a) of PAIA.<sup>135</sup> The court affirmed the principle that the right of access to information held by the State gives effect to accountability, responsiveness and openness, and stated that it is impossible to hold a government that operates in secrecy to account.<sup>136</sup>

Relying on section 80 of PAIA, the court held that the provision permits it to examine the disputed record in secret, albeit in the parties’ absence.<sup>137</sup> This approach can be used to test claims of secrecy and facilitate rather than obstruct access to information.<sup>138</sup> The court agreed with the respondents’ assertion that judicial examination of the disputed record should be resorted to only in exceptional circumstances.<sup>139</sup>

The first reason for the court to agree was that a cautious approach to section 80 accords with the structure of PAIA. The statute stipulates the mechanism for obtaining access to information and enumerates instances where it may be refused. It also grants an overriding judicial power to examine the record, but then expressly states that the burden of proving an exemption to the disclosure of the record lies with the party claiming it. According to the court:

“If the objects of the statutes were to create a novel form of proceeding in access disputes and invest the courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of the information.”<sup>140</sup>

Secondly, the provisions of section 80 clearly state that the powers it confers should only be used on rare occasions. It makes the court a party to the

<sup>132</sup> 2012 (2) BCLR 181 (CC).

<sup>133</sup> Khampepe and Moseneke *Report on the 2002 Presidential Elections of Zimbabwe* (2002).

<sup>134</sup> *Mail and Guardian supra* par 1.

<sup>135</sup> *Mail and Guardian supra* par 2. In terms of s 44(1)(a)(i) of PAIA, the information officer may refuse access to the record of a public body if the record contains an opinion, advice, report or recommendation obtained for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.

<sup>136</sup> *Mail and Guardian supra* par 10.

<sup>137</sup> *Mail and Guardian supra* par 125.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

secrecy claimed and prohibits the disclosure of the record to any person, including the parties to the proceedings concerned.<sup>141</sup> The court ordered the release of the report. This means that a court can examine the basis upon which the President granted a pardon in terms of PAIA.

*Mail and Guardian* should be understood in light of a similar approach followed by the court in the *Cabinet Reshuffle* judgment.<sup>142</sup> Before the *Cabinet Reshuffle* judgment, it was unclear whether the President could be compelled to disclose the reasons for carrying out a Cabinet reshuffle. After the *dictum* of the court in the matter, Rule 53 of the Uniform Rules of Court could be used to compel the President to disclose the reasons for appointing and dismissing Cabinet members, despite the discretionary nature of such a power. However, this only applies to proceedings of a judicial nature. Whether parliamentary oversight mechanisms of accountability may be used to compel the President to furnish the reasons remains unclear. However, it is submitted that, using section 80 of PAIA and Rule 53 of the Uniform Rules of Court, a court can compel the President to disclose the reasons for granting pardons.

The constitutional and legislative provisions governing the President's pardon power are explored in detail below.

## **6 AN ANALYSIS OF THE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS GOVERNING THE PRESIDENT'S PARDON POWER**

The President has the powers entrusted to him by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.<sup>143</sup> The executive authority of the Republic is vested in the President,<sup>144</sup> which he exercises together with the other members of the Cabinet.<sup>145</sup> He exercises executive authority by implementing national legislation,<sup>146</sup> developing and implementing national policy,<sup>147</sup> coordinating the functions of state departments and administrations,<sup>148</sup> preparing and initiating legislation<sup>149</sup> and performing any other executive function provided for in the Constitution or legislation.<sup>150</sup>

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<sup>141</sup> *Mail and Guardian supra* par 128. For a general discussion by the courts on the duty to give reasons, see *Mphahlele v First National Bank* 1999 (2) 667 (CC); Brynard "Reasons for Administrative Action: What Are the Implications for Public Officials?" 2005 44 *Journal of Public Administration* 638 642; and *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) par 5.

<sup>142</sup> *Supra*.

<sup>143</sup> S 84(1) of the Constitution.

<sup>144</sup> S 85(1) of the Constitution.

<sup>145</sup> S 85(2) of the Constitution.

<sup>146</sup> S 85(2)(a) of the Constitution.

<sup>147</sup> S 85(2)(b) of the Constitution.

<sup>148</sup> S 85(2)(c) of the Constitution.

<sup>149</sup> S 85(2)(d) of the Constitution.

<sup>150</sup> S 85(2)(e) of the Constitution.

Despite any provision to the contrary and in terms of section 82(1)(a) of the Correctional Services Act,<sup>151</sup> the President may authorise the placement on correctional supervision, or the parole, of any sentenced offender, subject to such conditions as may be recommended by the Correctional Supervision and Parole Board. The President may also remit any part of the offender's sentence.<sup>152</sup> The provision does not affect the President's pardon power.<sup>153</sup> In pardoning or relieving offenders, section 327 of the Criminal Procedure Act<sup>154</sup> may also be applicable.

Upon conviction, and subject to exhausting all the recognised procedures pertaining to appeal or review, the Minister may upon receipt of a petition from the affected person direct that the petition and the relevant affidavits be referred to the court that made the conviction.<sup>155</sup> The convicted person may file such a petition and affidavits if they are of the view that further evidence has since become available to them, and that it materially affects their conviction.<sup>156</sup> The court assesses the value of the evidence, and then advises the President whether, and to what extent, the evidence affects the conviction in question.<sup>157</sup>

Upon consideration of the finding or advice of the court, the President may direct that the conviction in question be expunged from all official records by way of endorsement. The effect is as though the conviction had never occurred *ab initio*.<sup>158</sup> The President may also substitute the sentence imposed with any other punishment imposed provided by law.<sup>159</sup> In *Liesching v S*,<sup>160</sup> the Constitutional Court affirmed its earlier pronouncements that section 327 of the Criminal Procedure Act is not an appeal procedure, but may only be used once all other remedies have been exhausted. According to the court, it is not a substitute for an appeal, but acts as a safety net to prevent a grave injustice.<sup>161</sup>

In *Minister of Justice and Constitutional Development v Chonco*,<sup>162</sup> the question arose whether the Minister's failure to process pardon applications, the consideration of which vests exclusively in the President in terms of section 84(2)(j), amounts to a breach of a constitutional obligation in terms of section 85(2)(e) of the Constitution. The court held that the issues raised deal with the relationship between the President's powers as Head of State, *vis-à-vis* as head of the national executive authority, and the obligations that accrue to each.<sup>163</sup> The Minister and the President argued that the verification, assessment and evaluation of pardon applications is not a

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<sup>151</sup> 111 of 1998.

<sup>152</sup> S 82(1)(b) of 111 of 1998.

<sup>153</sup> S 82(1)(c) of 111 of 1998.

<sup>154</sup> 51 of 1977.

<sup>155</sup> S 327 of the Criminal Procedure Act.

<sup>156</sup> *Ibid.*

<sup>157</sup> S 327(4)(a) of the Criminal Procedure Act.

<sup>158</sup> S 327(6)(a)(i) of the Criminal Procedure Act.

<sup>159</sup> S 327(6)(a)(ii) of the Criminal Procedure Act.

<sup>160</sup> 2019 (1) SACR 178 (CC) par 54.

<sup>161</sup> *Liesching supra* par 21.

<sup>162</sup> 2010 (1) SACR 325 (CC).

<sup>163</sup> *Chonco supra* par 18.

national executive function. They averred that the processing of pardons is conferred exclusively on the President as Head of State.<sup>164</sup>

In support of their contention, they advanced four reasons. They argued that it would be incorrect to divide the constitutional power to pardon into the preparatory preliminary stage and the making of the decision, which is entrusted to the President.<sup>165</sup> That would result in a shifting of the elements of the President's exclusive Head of State powers to the Minister, acting as a member of Cabinet. It would also lead to uncertainty regarding the constitutional obligations imposed upon the President as Head of State as opposed to the Minister in her capacity as a member of the executive.<sup>166</sup> They further asserted that the power conferred on the President in terms of section 84(2)(j) is textually, and by way of application, unrelated to the executive power granted in terms of section 85(2)(e).<sup>167</sup> The President as Head of State pardons offenders alone, while he acts collaboratively with other members of Cabinet in performing his executive authority.<sup>168</sup> Thirdly, they averred that each minister has a separate and specialist function and assumes the relevant responsibility as a result.<sup>169</sup> However, the President can transfer functions and the attendant legal obligations to a different minister. In order for the transfer to be legally binding, it must be in writing, failing which it is void *ab initio*.<sup>170</sup> The Minister argued on this basis that the lack of a written request from the President meant that no legal responsibility passed on to a member of Cabinet.<sup>171</sup>

The last basis on which they relied was that, because only the Constitutional Court may decide whether the President has failed to honour a constitutional obligation, he should have been cited as a party to the proceedings.<sup>172</sup> On the other hand, the respondents argued that by assisting the President in the exercise of his Head of State power, the Minister was acting in terms of section 85(2)(e). On this point, the Minister's responsibility and obligation arose from a source of a power that is different from a section 84 power vested in the President. Once the President made the request to process the applications, a legal obligation upon the Minister arose.<sup>173</sup> In the alternative, Mr Chonco argued that the Minister's inaction amounted to a failure to take a decision in terms of section 6(2)(g) of PAJA.<sup>174</sup>

The court affirmed the principle that, although

“there is no right to be pardoned, the function conferred on the President entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of

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<sup>164</sup> *Ibid.*

<sup>165</sup> *Chonco supra* par 19.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Chonco supra* par 20.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Chonco supra* par 21.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Chonco supra* par 22.

<sup>173</sup> *Chonco supra* par 25.

<sup>174</sup> *Chonco supra* par 26.

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legality, diligently and without delay. That decision rests solely with the President.”<sup>175</sup>

Relying on section 84(1) of the Constitution, the court found that the President has the necessary functions that go beyond the principal decision-making power, known as “auxiliary powers”.<sup>176</sup> These powers are necessary to perform certain specific functional competencies, and where appropriate, can be relied upon by the functionary to justify legislative and executive action “necessary for the implementation of the functional competencies”.<sup>177</sup>

According to the court, the ambit of the auxiliary powers is narrow and denotes those competencies reasonably incidental to fulfilling the functions in section 84(2). They include the President’s power to request advice and initiate the processes needed to generate that advice, including the receipt and examining of pardon applications.<sup>178</sup> The court held that the responsibility for the preliminary process during pardon applications lies within the ambit of the President’s power to request assistance.<sup>179</sup> Regarding the Minister’s conduct in the matter, the court held that the Minister could not be held accountable for any unjust administrative action that may have occurred. This is because the question whether the impugned preliminary process amounted to administrative action was not argued before the court.<sup>180</sup>

While the court’s classification of the nature of the President’s pardon power is correct, the extent to which the President is answerable to both the offender and the victims regarding the granting of pardons remains vague. As alluded to in *SARFU*, when exercising his Head of State powers, the President may, *inter alia*, not infringe a right in the Bill of Rights. While the rationality test and the principle of legality may serve to ensure that the President complies with this constitutional mandate, it is submitted that they are inadequate for safeguarding the rights of both the victims and the offender. The discretionary nature of the President’s pardon power, weighed against the rationality test, means that if he is found to have exercised the power unlawfully, the court can at most set aside the decision, and order him to exercise the power *de novo*. In addition, there is no legislative oversight over the process, and no clear duty to give reasons for granting pardons or for exercising any of the President’s section 84(2) powers. It is submitted that sections 32(2) and 33(3) of the Constitution should be applicable to the President’s pardon power.

## **7 PROCEDURAL FAIRNESS AS AN ASPECT OF PRESIDENTIAL PARDONS**

The principles of procedural fairness are enshrined in section 33 of the Constitution and in PAJA, and have also been applied by the courts in

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<sup>175</sup> *Chonco supra* par 30.

<sup>176</sup> *Chonco supra* par 31.

<sup>177</sup> See further the *dictum* in *Fedsure supra* par 138.

<sup>178</sup> *Chonco supra* par 33.

<sup>179</sup> *Chonco supra* par 35.

<sup>180</sup> *Chonco supra* par 42.

various judicial determinations. *Masetlha v President of the Republic of South Africa*<sup>181</sup> presents an interesting perspective on the President's constitutional obligation to consider the views of those affected by his decision-making. In this case, former President Thabo Mbeki effectively dismissed the Director-General of the National Intelligence Agency, Billy Masetlha, by unilaterally amending the applicant's term of office. Consequently, the court had to determine whether the power to amend an employment term in terms of sections 209(2) of the Constitution, read together with 3(3)(a) of the Intelligence Service Act<sup>182</sup> and 12(2) of the Public Service Act,<sup>183</sup> is executive authority or administrative action and therefore reviewable in terms of PAJA. In addition, the court had to determine whether these provisions permit the President to amend the applicant's term of office unilaterally, and whether such a decision is constitutionally permissible.

The court found that the President's powers as head of the national executive authority are not reviewable in terms of PAJA.<sup>184</sup> In reference to the *dictum* in *SARFU*,<sup>185</sup> the court affirmed the *principium* in the latter judgment that "the meaning of executive action in section 1(i)(aa) of PAJA has the effect of excluding distinctively political decisions and not characteristically administrative tasks such as implementing legislation".<sup>186</sup>

The court noted that it would not be appropriate to confine executive power to the requirements of procedural fairness.<sup>187</sup> Citing the *dictum ad verbum* in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*,<sup>188</sup> it was found that "a court should be slow to impose obligations which will inhibit the government's ability to implement policy". According to the court, procedural fairness is not a requirement.<sup>189</sup>

However, procedural fairness is a central component in an enquiry such as whether the President has exercised his pardon power in accordance with the dictates of the Constitution. Post-1994, when interrogating the exercise of presidential powers and functions, the courts confine the enquiry to the rationality test and the principle of legality.

In *Albutt*, the court held that rationality as an aspect of legality required the victims of politically motivated crimes to be afforded a hearing before the President could pardon political prisoners. According to Murcott,<sup>190</sup> the court's finding had the effect of expanding the concept of legality. The author argues that the Constitutional Court merely confirmed the victims' rights to procedural fairness without clarifying the exact procedure to be followed, in

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<sup>181</sup> 2008 (1) SA 566 (CC).

<sup>182</sup> 65 of 2002.

<sup>183</sup> 103 of 1994.

<sup>184</sup> *Masetlha supra* par 76.

<sup>185</sup> *SARFU supra* par 141–143.

<sup>186</sup> *Masetlha supra* par 76 n39.

<sup>187</sup> *Masetlha supra* par 77.

<sup>188</sup> 1999 (2) BCLR 151 (CC) par 41.

<sup>189</sup> *Masetlha supra* par 78.

<sup>190</sup> Murcott "Procedural Fairness as a Component of Legality: Is a Reconciliation Between *Albutt* and *Masetlha* Possible"? 2013 130 *The South African Law Journal* 260 260.

addition to the exact nature and content of the rights.<sup>191</sup> Murcott posits that had PAJA been the basis for the court's finding, the exact nature of the victim's rights would have been reasonably clear.<sup>192</sup> She argues that a finding that the President's pardon amounted to administrative action would have influenced the applicable standard of procedural fairness.<sup>193</sup>

The correctness of Murcott's interpretation of the court's *dictum* is accepted, albeit for different reasons. Whenever the interpretation of presidential powers is at issue, it is important to distinguish between those powers he exercises as Head of State *vis-à-vis* as head of the national executive authority. Such a distinction is central to the *factum probandum* in *Masetlha* as opposed to *Albutt*. The effective dismissal of the Director-General of the National Intelligence Agency in *Masetlha* was an exercise of power by the President in his capacity as head of the national executive authority. Conversely, *Albutt* involved the President's legal status as Head of State. However, such a distinction does not negate the fact that the principle of legality leads to undue deference by the court. Procedural fairness as enshrined in section 33 of the Constitution and PAJA should be equally applicable to presidential pardons in the event that the President uses the power unlawfully. Extending the applicability of procedural fairness as enshrined in PAJA to the President's pardon power would be in accordance with section 8(1) of the Constitution. The latter affirms the applicability of the Bill of Rights to the legislature, the executive, the judiciary and all organs of state.<sup>194</sup> While it is settled law that no one has the right to a pardon, should the President decide to grant a pardon upon receipt of an application, the principles of procedural fairness apply *ab initio*.

Whether there is a duty to give reasons for the President's powers as Head of State remains unclear. The law should be reformed to expressly state Parliament's role in holding the President accountable for the exercise of his powers as Head of State. Legislation<sup>195</sup> that clearly deal with the access of information relied on by the President in decisions affecting personal rights should be enacted. Such legislation should also govern the President's duty to give reasons in the exercise of his powers as Head of State, including the power to grant pardons.

Under the next heading, the article proposes certain reforms to deal with the *lacuna* in the law identified above.

## **8 LEGISLATIVE OVERSIGHT OVER PRESIDENTIAL PARDONS**

### **8 1 Legislative oversight**

Except through the process of judicial review, there are no legal mechanisms to ensure reasons are given in the granting of pardons.

<sup>191</sup> Murcott 2013 *The South African Law Journal* 268.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> S 8(1) of the Constitution.

<sup>195</sup> Other than PAIA.

Besides the rationality test as an aspect of the principle of legality, there are no clear constraints on the President's pardon power. In addition, there are no express mechanisms in the Constitution or in legislation to compel the President to disclose the reasons relating to his decision to pardon prisoners. While the Constitutional Court in *Albutt* confirmed that the victims affected by the President's decision to pardon offenders are entitled to be heard in the process, it did not give clear mechanisms in terms of the Constitution or the legislation regarding how that would unfold. The lack of clarity on the President's duty to give reasons in granting pardons is also because the power is not rooted in PAJA, but forms part of a broader exercise of public power, which is subject to the broader constraints of legality review mechanisms. This is an anomaly, given the National Assembly's power to seek or obtain information from other organs of state.

It is submitted that the exercise of the President's pardon power should be subject to parliamentary endorsement. The National Assembly or any of its committees may summon any person to give evidence on oath or affirmation, or produce documents.<sup>196</sup> It may require any person or institution to report to it,<sup>197</sup> and compel, in terms of legislation, the rules and orders, any person or institution to comply with a summons issued in terms of section 56(a) and (b) of the Constitution.<sup>198</sup> The National Assembly may also receive petitions, representations or submissions from any interested persons or institutions.<sup>199</sup> This is also consistent with the autonomy conferred upon Parliament to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.<sup>200</sup>

From the foregoing, it is clear that the President may be summoned to appear before the National Assembly to explain the rationale behind the granting of pardons. However, where the President appears before Parliament but relies on the discretionary nature of the pardon power to furnish an explanation for the decision, the Constitution is silent on the legal position in such an eventuality. In practice, the President gives reasons for the decision to pardon offenders by way of a press release. However, the victims of the crimes committed by the perpetrators are not heard in the process.<sup>201</sup>

It is also submitted that the merits and demerits of the decision to grant pardons should be debated in the National Assembly before the President takes a final decision. Parliament should thereafter vote on the matter, and the resolution should then form the basis for the President's final decision. The issue of crime in South Africa is of national interest. Therefore, the decision to grant pardons can no longer be an absolute discretionary power vested in the President alone as Head of State.

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<sup>196</sup> S 56(a) of the Constitution.

<sup>197</sup> S 56(b) of the Constitution.

<sup>198</sup> S 56(c) of the Constitution.

<sup>199</sup> S 56(d) of the Constitution.

<sup>200</sup> S 57(1)(d) of the Constitution.

<sup>201</sup> See par 1.

## 8 2 Presidential pardons and Cabinet concurrence

It is submitted that the President should exercise his pardon power subject to Cabinet concurrence. As Head of State and head of the national executive authority, the President is individually and collectively accountable to Parliament for the exercise of his powers and the performance of his functions.<sup>202</sup> Should the President elect to seek advice from the relevant Minister in the process, this rule applies *mutatis mutandis* to the latter. As members of Cabinet, they must provide Parliament with full and regular reports concerning matters under their control.<sup>203</sup>

The President's pardon power should be construed in terms of the provisions of PAJA and PAIA. The President should grant pardons subject to advice received from the Minister, in line with the administrative fairness rights derived from the Constitution. To this extent, the power to grant pardons should qualify as administrative action for purposes of section 33 of the Constitution and the applicable provisions of PAJA.

It is also submitted that the exclusion of Cabinet records from the ambit of PAIA should be removed for purposes of granting pardons.

## 9 CONCLUSION

As alluded to earlier, the granting of pardons should be viewed against the backdrop of the high crime rate in the country. The broad manner in which the power is conferred upon the President easily lends itself to perceptions of abuse. As an original power derived from the Constitution and vested upon the President, it encroaches on the doctrine of separation of powers. It is submitted that the broad manner in which it is conferred upon the President encroaches on the authority of the courts.

The President's duty to give reasons when granting pardons remains an illusion. This applies *mutatis mutandis* to most, if not all, of his other powers as Head of State. Save for the requirements, *inter alia*, to exercise presidential powers in good faith and subject to the principle of legality, a judicial pronouncement setting aside the President's decision to grant pardons is likely to be met with accusations of judicial overreach on executive authority. Therefore, legislative oversight mechanisms over the President's pardon power should be enhanced, for improved accountability of presidential decision-making. While a court of law may interrogate the legality and rationality of the President's decision, it is submitted that detailed guidelines should be provided in the Constitution and legislation on how the President may exercise the power, and the exact limitations that should be imposed in the process.

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<sup>202</sup> S 92(2) of the Constitution.

<sup>203</sup> S 92(3)(b) of the Constitution.