THE 'TREADMILL APPROACH' IN SOUTH AFRICA'S CONSTITUTIONAL ADJUDICATION PROCESS

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1 INTRODUCTION

The multi-party character of South Africa's democracy[1] has put enormous pressure on the manner in which the process of constitutional adjudication is exercised. The pressure emerges from the centrality of the process of adjudication in shaping the enforcement of the implementation of the policies and programmes that are designed to advance the democratic character of the state. The pressure also emanates from the executive conduct that produces 'political questions' that have to be translated into 'judicial questions' through the process of constitutional adjudication. Constitutional adjudication is a system of checks and balances designed to determine the constitutionality and legitimacy of government conduct against the underlying constitutional norms and standards. This is framed within the decentralised system of the division of state authority, which is inherent in addressing constitutional issues settling disputes about compliance with constitutional norms.[2] In essence, the division of authority is a system of control in ensuring the regulation of government conduct in a more effective and meaningful way. It is this process that captures the fundamental role of the adjudicative process in constitutionalising the democratisation of executive conduct.

This paper reviews what the author characterises as being a 'treadmill approach' in constitutional adjudication. This is driven by South Africa's constitutional culture that has brought a paradigm shift in the process of adjudication in ensuring conformity with the Constitution as being the highest law of the land.[3] The constitutional status has put South Africa in a unique position to produce constitutionalised jurisprudence that will provide an

[1] Section 1(d) of the Constitution of the Republic of South Africa 1996, hereinafter referred to as the Constitution, provides that: "The Republic of South Africa is …, democratic state founded on … a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[2] The doctrine of separation of powers, although not explicitly entrenched in the Constitution but determined by the manner in which it is structured, is the foundation of the decentralised system of state authority.

[3] Dugard "International Law and the South African Constitution" 1997 *EJIL* 77-92. Dugard classifies the Constitution as the foundation stone for the new South Africa, 92.

independent frame of reference in assessing its approach in determining the manner in which it exercises its adjudicative process.

The paper starts by providing a conceptual framework of the system of constitutional adjudication for purposes of coherence and the better understanding of the argument. This is followed by identification of the selected cases where the 'treadmill approach' is evident – notwithstanding the clearly defined boundaries of authority in the Constitution. It is in this section that lessons are drawn, with the argument limited to the impact of this approach on the general system of constitutional adjudication.

2 CONSTITUTIONAL ADJUDICATION IN A NUTSHELL

21 The General Overview of the System of Constitutional Adjudication

> "[Constitutional adjudication] is a regulative principle which attempts to define the nature of law and the conditions under which [the executive should adhere to the regulation of state authority]. Laws, for the constitutionalist, should be a framework of known, predictable and established rules which … must be general, equally applicable to all and applied without fear or favour. The ultimate purpose of this [process] is to uphold or defend [the meaningful application of the laws of the country]."[4]

As mentioned above, the system of constitutional adjudication is the constitutional determinant of the legitimacy of governmental power in the regulation of state authority. Constitutional adjudication encompasses its application in the political system, impact on governance and society, and its functional elements in the political complexity of the state.[5] It is classified into two categories which entail the determination of the distribution of executive authority and the limitations that are placed by the Constitution on the execution of such authority.[6] Mahomed CJ in *S v Makwanyane*[7] held that the process involves the engagement with the:

> "…relevant provisions of the Constitution, their text and their context, interplay between the different provisions, the legal precedent relevant to the resolution of the problem both in South Africa and abroad, domestic common law and public international law impacting on its possible solution, factual and historical considerations bearing on the problem, the significance and meaning of the language used in the relevant provisions, content and the sweep of the ethos expressed in the structure of the Constitution, and balance to be struck between different and sometimes potentially conflicting

[4]Pisani "State and Society Under South African Rule" 49-76 http://www.kas.de/upload/auslandhomepage/na (last accessed 21-03- 2015).
[5]Badinter *The Nature and Function of Judicial Review* (1986) 1.
[6]*Ibid* page 10.
[7]1995 (6) BCLR 665.

> considerations reflected in its text, and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits."[8]

These factors were given credence by Mokgoro J in the same judgment, when the judge held that the "process is not a political [instrument but a measure that is designed] to protect and uphold the principles of democratic governance".[9] Hence, Froneman J in *Albutt v Centre for the Study of Violence and Reconciliation*[10] further emphasised that constitutional adjudication is a process that is

> "built on the fundamental understanding of the Constitution in accordance with the prescripts of the new democracy by determining its impact and meaning in the context of our recent history – the political strife that preceded and accompanied the birth of our democracy."[11]

It is against this history that has seen South Africa's maturing democracy make a spectacular growth in constitutional adjudication in the advancement and shaping of the principles of the new dispensation.[12] The framework for the growth of constitutional adjudication was endorsed in *Pharmaceuticals Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*[13]– when the Court held that:

> "[Constitutional adjudication] is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of [all] aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was

[8] *Makwanyane* para 266.
[9] *Makwanyane* para 305.
[10] 2010 (5) BCLR 391 (CC).
[11] *Albutt* para 88.
[12] Cappelletti *The Judicial Process in Comparative Perspective* 1989 161 – quoted in Hautamaki "REASONS FOR SAYING: NO THANKS! Analysing the discussion about the necessity of a Constitutional Court in Sweden and Finland" 2006 *EJCL* 1-12. Capellatti points out that the importance of the history is a "pivotal tool for the protection of [South Africa] against the return of the evil – the horrors of dictatorship and the consequent trampling on of fundamental rights by legislators subservient to oppressive regimes", 1. Hautemaki also acknowledges that although the history cannot be generalised as the only reason for the constitutionalised system of adjudication, it could be argued that it envisages an appropriate model for the democratisation of executive authority, 2.
[13] 2000 (3) BCLR 241 (CC).

> developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."[14]

It is the above context that underpins the system of constitutional adjudication by, among other things,

> "the independence of the judiciary and the rule of law as foundational values that buttress the democratic society, significant interventions and steps that have been taken to enhance the independence and effectiveness of the judiciary, the impact of South African jurisprudence on the transformation of society, the assessment of the impact of the decisions of the Constitutional Court on the reconstruction of society and the state."[15]

This is an affirmation of the close relationship that exists between constitutional adjudication and the foundational values as entrenched in s 1 of the Constitution. These values were given effect in the *United Democratic Movement v President of the Republic of South Africa* judgment.[16] The Court endorsed the significance of these values and held that "[they] have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid".[17] They were also reinforced in *Economic Freedom Fighters v The Speaker of the National Assembly*[18]when the Court held that these values are:

> "…a majestic proclamation of that which we hold to be best in our society. They proclaim the foundation of South African society to be constructed from the plans of the Constitution that is a democracy which is informed by core values of human dignity, equality, freedom, universal suffrage, multi-party democracy, accountability, openness and transparency of government. These are not values upon which we should give up lightly. These are values for which generations of South Africans fought and died for. As a nation they are our autobiography. They must be taken with the utmost seriousness by all South Africans, no matter their political persuasion. They call on all who live in this country to see these values as trumps over any and all political affiliations."[19]

[14]*Pharmaceuticals* para 45.
[15]Department of Justice and Constitutional Development "Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state" 2012 para 2.4.3 17 http://www.justice.gov.za (last accessed 13-4- 2015).
[16] 2002 (11) BCLR 1179 (CC).
[17]*UDM* para 19.
[18]Number 21471/2014, Western Cape High Court Division, in Cape Town.
[19]*EFF* page 27.

The interjection of these values in constitutional adjudication supports their application in advancing the system of checks and balances in ensuring the advancement of the distinguishing features of a vital democracy in:

- conveying a sense not only of what the parties were able to agree to, but a significant domain of considerations that may prove integral to the survival of democracy;
- guaranteeing an emergency of the realised commitment to the democratic processes;
- playing a delicate bargaining balance by giving rise to democracy; and
- giving due recognition to the incomplete fulfilment of the project of the constitutional compromise.[20]

The above principles were consolidated in *Helen Suzman Foundation v Minister of Police*.[21] The matter emanated from the provisional suspension of Mr Anwa Dramat, who subsequently voluntarily resigned[22] as the National Head of the Directorate for Priority Crime Investigation (DPCI). This followed the alleged rendition of Zimbabwean nationals in 2010/2011 and the appointment of General Ntlemeza as the Acting Head of the DPCI by the National Minister of the South African Police Service. The Zimbabwean nationals were allegedly fugitives of the crimes of robbery and murder committed in Zimbabwe. The applicant (*HSF*) applied for a declaratory and ancillary relief against the respondent (*Minister of Police*).[23] The Court was required to determine whether the:

- Minister had the power to suspend the National Head in the light of the [*Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa*[24]]judgment, [dated 27 November 2014], which declared s 17DA(2) of the South African Police Service Act invalid and unlawful;
- appointment of the Acting Head was also unlawful; and

[20]Issacharoff "The governance problem in aggregate litigation" 2013 *FLR* 3165-3191.
[21] (1054/2015) [2015] ZAGPPHC 4 (23 January 2015), hereinafter referred to as *HSF*.
[22]Ferreira "Hawks Boss Dramat Quits SAPS" http://www.iol.co.za/news/courts-crime/halks-bo (last accessed 22-4- 2015).
[23]*HSF* paras 1-11.
[24]2015 (1) BCLR 1 (CC), hereinafter referred to as *2014 Judgment*.

- Minister is not empowered to suspend other than in accordance with s 17DA(3) of the Police Act.[25]

The Court had to go through a painstaking exercise in trying to resolve and give content, meaning and convey the impact of the *2014 Judgment* on the powers of the Minister to suspend the Head of the DPCI and appointment of the Acting Head of the DPCI. It found that both the suspension and the appointment were invalid to the extent of their nullity because Mr Dramat's suspension was unlawful and since the suspension was unlawful, the appointment of the Acting Head was also never in existence.

Without focus on the motive behind the suspension of Mr Dramat, the Court is highly commended for rescuing the adjudicative process from the dramatic constitutional adjudication which could have done more damage to the "manageable standards in undertaking independent resolution without expressing the lack of disrespect to the other branches".[26] It is worth noting that of grave concern in the *HSF* judgment is the contemptuous approach that the respondent (*Minister*) adopted in advancing the argument in the consolidation of the process of constitutional adjudication. The contention is drawn from the reliance on s 17DA2 of the South African Police Service Amendment Act 10 of 2012 – which was declared invalid and unconstitutional in the earlier judgment in *HSF v President (2014 Judgment).*[27]

The reliance on the invalidated provision undermines the process of constitutional adjudication which produces jurisprudence that settles the law under the doctrine of *stare decisis* (let the decision stand). Although the doctrine is attributed to the courts having to follow their decisions (legal precedents) until such time they are overturned by them, the reliance on the invalid provision was an indirect weakening by a litigant of the crux of constitutional adjudication on the meaning of the developed jurisprudence which strives to "foster unity, consistency, stability, and predictability"[28] in the regulation of government conduct. Furthermore, the reliance downplayed the importance of jurisprudence in enhancing the legitimacy of the content and scope of the executive conduct in the light of the

[25]*HSF* para 14.
[26] Gillen "The Rebirth of the Political Question Doctrine" 2008 *NR&E* 23-28, 23.
[27]Moegoeng CJ in *HSF* para 112.
[28]Burton "The Conflict Between *Stare Decisis* and Overruling in Constitutional Adjudication" 2014 35 *Cardozo Law Review* 1687-1713, 1687.

Constitution which, in turn, should enable the determination of compliance with appropriate constitutional norms and standards.[29] This means that it undermined the influence of the jurisprudence in advancing the "values of the rule of law, constitutionalism [which equally constrains the exercise of arbitrary power by the courts themselves] and the provision of the framework for the justification of legal reasoning in the adjudicative processes".[30]

In essence, the reliance on an invalid provision minimised the significance of the jurisprudence in guiding government conduct, which is required to be "transparent, coherent, reliable and reasonable"[31] in the exercise of its authority in order to ensure adherence to the principles of the new dispensation. It amounted to a reckless abuse of the exercise of executive power and legal grandstanding, which should find no space in constitutional adjudication.[32] It projected the influence of jurisprudence as the weakest link in the adjudicative processes, and further developed an uncertainty on the importance of litigation as an assessment tool and the determination of the influence of the translation of the laws into substantive reality by the courts.[33] It almost clouded with suspicion the centrality of the process of constitutional adjudication which is designed to enforce the people's expectations as entrenched in the Constitution to prevent the abuse not only of the adjudicative process as in this case, but also of the manipulation of the executive itself.[34] Hence the Court in the *2014 Judgment* held that:

> "courts should not lightly allow vitriolic [arguments] of this kind to form part of the [process of constitutional adjudication]. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of [advancing the adjudicative process]."[35]

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> "[The courts]must not shirk their responsibility of ensuring that organs of State, including the legislative branch, operate "*within a constitutionally compatible framework.*"[36]

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[29] Wright "Two Models of Constitutional Adjudication" 1991 40 *TAULR* 1357-1388, 1357. Cooper "Stare Decisis: Precedent and Principle in Constitutional Adjudication" 1988 *Cornell Law Review* 401-410.
[30]Burton (note 28 above) 1700.
[31]*Ibid* 1709.
[32]*2014 Judgment* para 29.
[33]Issacharoff (note 20 above).
[34] Federal Judicial Center "Judicial Independence and the Federal Courts – Talking Points" http://www.fjc.gov.history/home.nsf/page/talking_ji_tp.html (last accessed 22-4- 2015).
[35]*2014 judgment* para 30.
[36]*Malema v Chairman of the National Council of Provinces* (1289/2014) [2015] ZAWCHC 39 para 46.

THE 'TREADMILL APPROACH' IN SOUTH AFRICA'S CONSTITUTIONAL ADJUDICATION PROCESS

South Africa's maturing process of constitutional adjudication is confronted by the "battle for power that is simply the struggle for the ability to carry out conflicts of the past in the name of the regulation of state authority".[37] The courts are put in an untenable situation when they have to pronounce on questions which are considered to have political ramifications. The interface between constitutional adjudication and the policy terrain that is the purview of the executive is delicate in the South African situation. The strain in constitutional adjudication is evidenced by the development of the 'treadmill approach' on the pronouncements relating to matters of public policy in government. This is not easy to define, but it can be classified as an approach that provides a foundation for the development of a principle or rule that constrains the process of constitutional adjudication from deciding matters which are presumed to have political connotations. Such connotations are likely to develop from what Tushnet terms is a "political question doctrine".[38] Without a focus on this doctrine, which is defined as the "abstinence of the adjudication process from resolving constitutional issues that are considered to be better placed within the executive arm of government",[39] the 'treadmill approach' is contentious for the process of constitutional adjudication in South Africa.

South Africa's constitutional history has – since 1994 – produced voluminous jurisprudence on the exercise of executive authority. The history will make it difficult for the process of constitutional adjudication to be subsumed under the political doctrine approach.[40] As mentioned above, this is borne by the interrelationship of the foundational values of the Constitution and constitutional adjudication, which is endorsed by the supremacy of the Constitution. The interrelationship of the two entrenches the:

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[37]Issacahroff "Constitutional Courts and Democratic Hedging" 2011 99 *GLJ* 961-1010, 965; Besselink "The Proliferation of Constitutional Law and Constitutional Adjudication or How American Judicial Review Came to Europe After All?" 2013 *ULR* 19-35.

[38]Tushnet "Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine" 2001, Working Paper No 283464 Georgetown University Law Center http://www.papers.ssrn.com/abstract=283464 (last accessed 25-4- 2015).

[39]Choper "The Political Question Doctrine: Suggested Criteria" 2005 54 *DLJ* 1457-1523. Choper supports the political question doctrine by arguing that:

(a) The Court should refrain from deciding questions when the Constitution itself is interpreted as clearly referring the resolution of a question to an elected branch.
(b) Pursuant to a functional rather than a textual approach, when judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme, the Court should decline to exercise its interpretive authority.
(c) The Court should not decide issues for which it cannot formulate principled, coherent tests as a result of a "lack of a judicially discoverable and manageable standards".
(d) Constitutional injuries that are general and widely shared are also candidates for being treated as political questions, 1462.

[40]See for example, *Minister of Police v Premier of the Western Cape* 2013 12 BCLR 1365 (CC).

> "..legitimacy of the government conduct which requires it to act rationally and not to make naked preferences that serve no legitimate governmental purpose that would be inconsistent with the rule of law as the state is bound to function in a rational manner."[41]

However, the constant reiteration by the courts on how the constitutional relations should be managed among the branches– despite the constitutionally drawn boundaries– is a worrying factor for the process of constitutional adjudication. The reiteration advances the 'treadmill approach', which is drawn from the principle laid by the Constitutional Court in *Bato Star Fishing v Minister of Environmental Affairs.*[42] The Court held that it "should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution".[43]The Court further contended that it gives due recognition to the role of the executive within the Constitution:

> "A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."[44]

This was further consolidated in *Albutt*, when the Court held that:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[45]

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[41] *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 25.
[42] 2004 (7) BCLR 687 (CC).
[43] *Bato Star* para 45.
[44] *Bato Star* para 48.
[45] *Albutt* para 51.

The application of this approach was further endorsed in the *Lekota*[46] judgment with reference to *Bato Star*, when the Court held that it should "be careful not to attribute to itself superior wisdom in relation to matters entrusted to [the executive arm] of government".[47] This was furthered in the *Mazibuko v Sisulu*[48] judgment when Jafta J held that

> "Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution".[49]

The 'treadmill approach' is difficult to comprehend, because those political matters can be translated into judicial questions by simply applying the provisions of the Constitution. The fact that the alleged action to execute a particular action falls within the powers of another branch does not mean that courts should limit their authority merely because it is assumed to raise a political question. The courts should further not 'enclave' themselves because there is a disagreement on the interpretation, meaning and content of powers in relation to the functional areas as prescribed by the constitutional boundaries which are entrenched in the Constitution. The approach creates confusion on the legitimacy of the process of constitutional adjudication because it raises questions on the determination of the criteria used to identify those matters that fall within the purview of the executive, and which may be classified as political questions. It furthers the question on whether the courts are paving the way for the creeping of the political doctrine into constitutional adjudication in South Africa.

The constant reiteration of the 'treadmill approach' which may also be referred to as a guards up approach minimises the importance of constitutional adjudication. For example, in the *Mazibuko* judgment, the matter of concern arose in relation to the non-tabling of the motion of no-confidence against the President of the Republic of South Africa: Mr Jacob Zuma, as entrenched in s 102 of the Constitution, where the focus was on the determination whether:

(a) The Speaker had the power to schedule a motion of no confidence on his own authority.

(b) The Rules are inconsistent with the Constitution to the extent that they do not provide for motions of no confidence in the President, as envisaged in s 102(2).

[46] *Lekota v Speaker, National Assembly* (14641/12) [2012] ZAWCHC 385.
[47] *Lekota* para 22.
[48] *Mazibuko v Sisulu* 2013 (11) BCLR 1297 (CC).
[49] *Mazibuko* para 83.

(c) Parliament has failed to fulfil a constitutional obligation, in terms of s 167(4) of the Constitution, by failing to schedule a motion of no confidence in the President for debate and vote in the Assembly within a reasonable time.[50]

The Democratic Alliance – the second largest political party in South Africa and which was at the forefront of the motion – cited the following reasons, that under President Zuma:

- The justice system has been politicised and weakened;
- Corruption has spiralled out of control;
- Unemployment continues to increase;
- The economy is weakening; and
- The right to access quality education has been violated.[51]

These concerns touch on the impact of the Constitution in relation to the substantive conception of good governance which requires the 'so-called' political questions to be translated into judicial ones when a need exists, as required by the Constitution. The genuine concerns relating to compliance with constitutional norms and standards cannot be relegated to political questions – otherwise it undermines the whole system of constitutionalism which South Africa attained in 1994. As argued elsewhere, the Court cannot red-card its authority to other bodies when it is confronted by sensitive and delicate matters of constitutional adjudication.[52]

The 'treadmill approach' is a measure of plunder which shapes and derails the progress made in constitutionalising the system of constitutional adjudication itself.[53] The approach undermines the process of giving effect to the "technical and legal issues that produce a legitimate, effective and broadly supported government by its citizens".[54] It is likely to promote the system of governance that is assisted by the Court in furthering the politicisation of those political questions that need to be translated into judicial ones in order to constitutionalise the entire structure of good governance within the general framework of the

[50] *Mazibuko* para 3.
[51] *Mazibuko* para 7.
[52] Ntlama "The Deference of Judicial Authority to the State" 2012 *Obiter* 135-144; Diescho "The Paradigm of an Independent Judiciary: Its History, Implications and Limitations in Africa" 19 in Horn &Bosl *The Independence of the Judiciary in Namibia* (2008).
[53] Mbaku "The Separation of Powers, Constitutionalism and Governance in Africa: The Case of Modern Cameroon" 2013 http://works.bepress.com/john_mbaku/7 (last accessed 5-2- 2015).
[54] Johnston *Good Governance: Rule of Law, Transparency, and Accountability* Paper CU, 2015.

system of adjudication. It further endorses the promotion of the political will by the governor, and undermines the whole system of the democratisation of the executive arm of government in ensuring that the "society in its entirety has an interest in upholding the Constitution".[55]

Considering South Africa's infancy in constitutional adjudication, the approach causes confusion on the substantive conception of the "dire need" for the meaningful and clear understanding of the dominant roles of each branch in the regulation of state authority.[56] In essence, it insulates the system of constitutional adjudication from the political whims of executive authority.

4 CONCLUSION

As expressed by Budlender:

> "South Africa in 1994 was not a promising place for constitutional [adjudication]. Virtually none of the population, none of the judiciary and none of the legal profession had any experience of constitutional [adjudication]. We had no practical experience of how a genuine constitutional [adjudicative system] operates. We had to learn while the system was being constructed and operating. The achievements of the last [decades] are genuinely remarkable, and we do ourselves a disservice if we fail to recognise that."[57]

This paper has provided insight into some of the lessons learned as South Africa progresses to inculcate the affirmation of the foundation of the new constitutional dispensation. It identified the 'treadmill approach' as a factor that is likely to compromise the centrality of the process of constitutional adjudication in entrenching a constitutional culture that is intended to permeate every decision of the other branches. However, as Budlender has argued– and notwithstanding the argument in this paper – the progress that has been made to date in South Africa cannot go unnoticed.

[55] *Pikoli v President* (8550/09) [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP) 4.
[56] *Ibid.*
[57] Budlender "20 Years of Democracy: The State of Human Rights in South Africa" 2014 3 *SLR* 439-450, 450.