

DIE AARD VAN WETGEWENDE DISKRESIES BY DIE SUID-AFRIKAANSE UITVOERENDE GESAG

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SUMMARY

This article focuses on the nature of legislative discretions in the hands of the executive authority of the state.

Relevant concepts are analysed, followed by an exposition of the position regarding delegation of legislative authority to the executive under the previous constitutional dispensation when the country had a sovereign Parliament. This is followed by a discussion of the legal position in Germany, which shows similarities to the situation in South Africa. It appears that differences in approach to the problem exist worldwide, but one similarity is to be found in all, namely that a complete parliamentary abdication of legislative authority is always disallowed. What follows from this is that South African law seems to follow the German example regarding the delegation of legislative powers. It seems that the South African Constitutional Court considers the delegation of essential legislative authority as undesirable. Limits have to be placed on the extent of Parliament's competencies pertaining to legislative delegation. Furthermore the manner and form requirements in the Constitution must be met when legislation is adopted. This however does not occur in all instances of legislative delegation to the executive authority. When legislative delegation takes place, it is consistently done by granting the executive the authority to adopt subordinate legislation, which in any event has the same legal effect as legislation of Parliament itself.

Next the Transitional Constitution of 1993 is considered against the background of relevant case law. It appears that the legal position was not changed by the promulgation of the ("final") Constitution of 1996. Empowering legislation that delegates any legislative authority must lay down guidelines providing direction regarding the exercise of the delegated authority. Delegated legislation may of course not contain substantive norms.

Like the German Bundesverfassungsgericht, the South African Constitutional Court seems to require empowering legislation to lay down the content, extent and purpose of the empowering provisions before it will enjoy legal effect. This content, extent and purpose will not primarily be evident from the delegated legislation, but must be contained in the empowering legislation itself. If this is not the case, the delegation of authority will have exceeded constitutional limits. Therefore, a wide delegation of legislative authority without limitations regarding its exercise, at least as far as content, extent and purpose are concerned, will without doubt be unconstitutional.