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THE BURGEONING CONSTITUTIONAL REQUIREMENT OF RATIONALITY AND THE SEPARATION OF POWERS: HAS RATIONALITY REVIEW GONE TOO FAR?

By

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ABSTRACT

This thesis presents an analysis of three recent judgments of our apex courts which collectively illustrate a maximising of the ‘minimum threshold requirement’ of rationality through the seemingly inexhaustible constitutional principle of legality. The question sought to be addressed is whether, in extending this baseline requirement to cover procedural fairness, reason-giving and something akin to proportionality, in the context of non-administrative action and in the absence of any meaningful engagement with the doctrine of separation of powers, the courts are going too far. In addressing this question, my paper proceeds as follows. First, the tenets of the doctrine of separation of powers are expounded, and in particular the theory is juxtaposed with the usefulness of this doctrine in practice. The role of the judiciary, notably through judicial review, is highlighted as the crucial ‘check’ against abuses of state power which gives this doctrine its lasting relevance. In examining how the courts ought to strike the ‘delicate balance’ in exercising their power, the paradoxes inherent in judicial review, and its defensible limits, are explored. Against this backdrop, the rationality requirement is elucidated and juxtaposed with the more searching requirement of reasonableness. Finally, the analysis of the case law reveals that although the conclusions reached are to be hailed, the courts’ failure to engage meaningfully with the prescripts of separation of powers in expanding the frontiers of rationality review, is indicative of a worrying trend that may ultimately compromise our courts’ crucial institutional integrity.
1 INTRODUCTION

1.1 Background and research question

Writing in 2004, Cora Hoexter predicted the exponential expansion of the constitutional principle of legality – an aspect of the rule of law\(^1\) and supple device for the review of the exercise of all public power – to cover the full scope of quintessential review grounds under administrative law. She noted the following:

‘The Constitutional Court’s principle of legality does not yet cover procedural fairness, and has not yet been made to require the giving of reasons by an administrator. Nor does it seem to demand proportionality, which is the other half of reasonableness…. Nevertheless the principle is already an extensive one; and who knows where it might go in the future?’\(^2\)

The apt prediction implicit in this rhetorical question has come to pass. In a recent trilogy of judgments – \textit{Albutt v Centre for the Study of Violence and Reconciliation};\(^3\) \textit{Judicial Service Commission v The Cape Bar Council}\(^4\) and \textit{Democratic Alliance v President of the Republic of South Africa}\(^5\) – delivered by our ‘twin apex courts’,\(^6\) the ‘constitutional baseline’\(^7\) requirement of rationality has been invoked under the principle of legality in order to extend, respectively, the prescripts of procedural fairness, reason-giving and an expansive notion of rationality proper, uncannily reminiscent of the justifiability enquiry (‘code for the broader notion of reasonableness’\(^8\)) so neatly encapsulated by Froneman DJP in \textit{Carephone (Pty) Ltd v Marcus NO},\(^9\) to non-administrative action and, in each case, action with an executive element. The \textit{Albutt} and \textit{Simelane} judgments deal with executive action of the highest order: policy decisions, with a high discretionary content, on the part of the President. The \textit{JSC} judgment deals with the unique and ‘pivotal’\(^10\) hybrid function of the Judicial Service Commission – an organ of state\(^11\) subject to the constitutional

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\(^1\) \textit{Fedsure Life Assurance v Greater Johannesburg Metropolitan Council} 1999 (1) SA 374 (CC) para 56.
\(^3\) 2010 (3) SA 293 (CC), ‘Albutt’.
\(^6\) FDJ Brand ‘The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution’ (2009) 126 \textit{SALJ} 71 at 73.
\(^7\) Alistair Price ‘The content and justification of rationality review’ (2010) 25 \textit{SAPL} 347.
\(^8\) Hoexter (n 2) at 172.
\(^9\) 1999 (3) SA 304 (LAC) paras 31-7.
requirements that govern the ‘public administration’12 – which is partly ‘adjudicative’ and partly ‘executive’ in nature, given that ‘the executive makes or participates in the appointment of Judges.’13

TRS Allan has noted that, ‘[j]udicial review of executive action raises important questions about the separation of powers’.14 In this thesis, I seek to explore the developments evidenced in this trilogy of cases, in light of the tenets of our ‘distinctively South African model of separation of powers’15 and in particular, the ‘special role’16 of the courts in exercising their review function in our constitutional democracy. My aim is to determine whether these cases collectively reveal a striking of the requisite ‘delicate balance’17 between the competing ideals of ensuring judicial supervision and accountability of the political branches of state on the one hand, and yet ensuring respect for the ‘popular mandate and imperatives to govern’18 on the other. I conclude that, on balance, these cases are a fair attempt at ensuring the right equilibrium between the tensions inherent in our constitutional order and they certainly seem to address the question, ‘what does justice require in the circumstances?’19 However, my concern is that they equally represent an arguably dangerous trend on the part of the courts to dilute the principle of legality, and in particular its requirement of rationality, in a manner reminiscent of the way in which our pre-constitutional administrative law was ‘spread too thinly’.20 The temptation to use this flexible principle to bring the requirements of administrative justice to bear whenever the circumstances demand may give effect to our general constitutional commitment to ‘accountability, responsiveness and openness’21 in a manner compliant with the prescripts of variability, but arguably at the expense of reliability and certainty – which are equally requirements of the rule of law;22 albeit

12 Ibid at chapter 10.
13 Certification Judgment (n 10) para 123.
15 De Langa v Smuts NO 1998 (3) SA 785 (CC) paras 60-1.
17 De Langa (n 15) para 60.
21 Section 1(d) of the Constitution (n 11).
22 See Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) para 108 and Kruger v President of the Republic of South Africa 2009 (1) SA 417 (CC) para 64, regarding the value of reasonable certainty as a formal requirement of the rule of law.
‘formal’ rather than ‘substantive’ requirements.23

The concomitant result of the tempting flexibility of this principle, and its seemingly malleable rationality requirement, has not only been a subversion of the Promotion of Administrative Justice Act, 2000,24 and its underlying scheme as laid down in section 33 of the Constitution, through trending ‘parallelism’25 under the principle – it has in addition resulted in something of a possibly more fundamental concern. The principal claim of my thesis is thus that in developing such an expansive substantive conception of rationality review26 – in the absence of meaningful engagement with the prescripts of the separation of powers doctrine – and thereby increasing their reservoir of judicial power,27 the courts may arguably be perceived to be expanding their supervisory review jurisdiction in such a way as to amount to an affront to this doctrine.

In particular, given our current political climate and the repeated onslaught of disconcerting attacks against the judiciary for allegedly being counter-majoritarian,28 the extension of the more onerous review grounds, designated for the carefully crafted realm of administrative action, to decisions of a discretionary nature in the political realm, may lead to the gradual chipping away of our courts’ fiercely guarded institutional security and thus the ‘authoritative legitimacy’ that lies at the heart of their power.29 This concern does not flow from the conclusions reached in these judgments, which arguably accord with both justice and principle, but rather from the courts’ seemingly flippant failure – in particular, in the JSC and Simelane judgments – to engage with the prescripts of the separation of powers as part of the reasoning process in reaching these conclusions. As Price has noted, ‘the court would do well to develop its conception of the constitutional separation of powers… by expressly recognising and reasoning with the considerations of

24 The Promotion of Administrative Justice Act, 3 of 2000, ‘the PAJA’.
25 See Cora Hoexter Administrative Law in South Africa 2ed (2012) at 124 where she notes that the principle of legality is evolving into a ‘complete parallel universe of administrative law’. Note that a full discussion of this issue is beyond the purview of this thesis.
27 Ibid.
28 See for example on this periodical criticism of the judiciary by the African National Congress: Dyzenhaus (n 23) at 754; Ngcobo (n 16) at 6; Murray Wesson & Max Du Plessis ‘Fifteen years on: Central issues relating to the transformation of the judiciary’ (2008) 24 SAJHR 187 at 188 and Theunis Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 International Journal of Constitutional Law 106 at 107, and the references at fn 6.
29 Roux (n 28) at 108-9.
democratic principle and institutional competence. This would promote judicial transparency. This has most obviously been done in the category of socio-economic rights, but as rationality review burgeons into something quite unlike the ‘minimum threshold requirement’ originally articulated by Chaskalson P in *Pharmaceutical Manufacturers*, it seems this level of engagement may equally need to be done in the context of constitutional rationality review of public power that falls outside the realm of ‘administrative action’. O’Regan recently warned that:

‘It is important that the test of rationality remains a “no rhyme or reason test” and is not tightened to require a closer connection between the government purpose and the legislation or action in question. Setting a tighter test for rationality may well constitute an unwarranted intrusion into the legitimate constitutional space accorded to the legislature and the executive.’

While I do not think the recent trio of cases constitutes such an unwarranted intrusion, it does suggest that going forward the courts ought better to heed this warning by fully engaging with the balancing enquiry necessitated by the separation of powers doctrine; particularly where politics seeps into the judicial arena. I turn now to summarise how my thesis proceeds and thus how I reach this conclusion.

1.2 Structure of thesis

In part 2, I consider what our constitutionally-entrenched version of the doctrine of separation of powers entails and its implications for our notion of judicial review. I juxtapose separation of powers theory with the pitfalls of this doctrine in practice in the fraught South African context which is riddled by the malady of ‘one-party-dominance’ and an executive stranglehold over the legislative branch. I briefly consider what the main causes of this ‘malady’ are by elucidating the constitutional ‘design flaws’ that have inadvertently rendered our so-called ‘People’s Parliament’ impotent at the hand of our...
increasingly monolithic executive. Given the oversight failings of our dysfunctional Parliament, the judiciary has proven itself to be the timeless ‘fulcrum that balances the needs of the current majority against the constitutional limits on public action.’ In part 3, I then consider the nature and scope of the judiciary’s ‘special role’ in our tripartite system of government. I attempt to elucidate what makes this role qualitatively different to that of the political arms of state, and thus warrants and reinforces the judiciary’s sacred place in our constitutional order, as well as the omnipresence of judicial review. Part 4 canvasses the paradoxes inherent in the process of judicial review. In particular, in this section, I explore the unrelentingly prevalent debate of constitutional theory: the so-called ‘counter-majoritarian dilemma’. In doing so, I pose two key counter-arguments that rest upon an exploration of the notion of a ‘dialogic model’ of separation of powers and our constitutional version of democracy respectively. Part 5 presents an elucidation of what I understand to be the formal and flexible limits to judicial review which guide the courts in ensuring that they strike the requisite balance and do not overreach. In part 6 I then assess what the ‘minimum’ constitutional requirement of rationality entails before illustrating, in part 7, how these recent cases have sought to ‘maximise’ it in the absence of meaningful and candid engagement with the tenets of separation of powers. I thus conclude, in part 8, that although the outcomes reached in the judgments accord with principle and the ‘interests of justice’ standard, they are tainted by a thinness of reasoning and concomitant lack of analytical clarity that leave one wondering whether the ‘means justify the ends’.

2 OUR UNIQUELY SOUTH AFRICAN DOCTRINE OF SEPARATION OF POWERS AND ITS IMPLICATIONS FOR OUR CONCEPT OF REVIEW

2.1 Separation of powers: First principles

Barber has described the doctrine of separation of powers as a ‘distinctively constitutional tool’ which enjoins the authors of a constitution to ‘match function to form in such a way to realise the goals set for the state by political theory’. It is, in essence, a method of ‘limited government’ – an institutional arrangement designed to produce ‘a spirit of

moderation’ that proceeds from two seemingly contradictory premises. On the one hand it necessitates the separation of governmental power through the recognition of the ‘functional independence of branches of government’. Yet, on the other hand, through an endogenous system of reciprocal ‘checks and balances’, it simultaneously necessitates a kind of ‘joinder’ by enabling the ‘intrusion of one branch on the terrain of another’ in order to ensure that the constitutional order as a totality functions effectively, efficiently and in compliance with the Constitution. This broad ‘legitimating ideal’ is sought to be realised through the fulfilment of two particular aims which were the original impetus for the development of this doctrine.

The primary aim is the curtailment of the exercise of political power to prevent its abuse and thereby ensure the maintenance of individual liberty and the protection and enhancement of fundamental rights. As the French political philosopher, Montesquieu – who is credited for expounding the modern formulation of this doctrine in the seminal piece *L’Esprit des Loix* (1748) – famously asserted:

> ‘When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.’

The second aim – albeit one which remains the subject of some dispute – is the enhancement of efficiency in government functioning; the theory being that by attributing the correct function to the correct institution, the collective constitutional

40 Certification Judgment (n 10) paras 108-9.
41 Phillip B Kurland ‘The rise and fall of the “doctrine” of separation of powers’ (1986) 85 *Michigan LR* 592 at 593.
42 Certification Judgment (n 10) para 109.
43 Ibid.
45 Ibid.
46 Montesquieu *The Spirit of the Laws Book XI* (1878) at 163.
47 See, for example, Candace H Beckett ‘Separation of powers and federalism: Their impact on individual liberty and the functioning of our government’ (1988) 29 *William and Mary Law Review* 635 at 635-6: ‘[f]or two centuries, critics have pointed out that the system results in stalemate and confrontation, denies accountability, and inhibits the government in formulating and sustaining coherent policy.’
48 Kate O’Regan ‘Checks and balances – Reflections on the development of the doctrine of separation of powers under the South African Constitution’ (2005) 8 *PELJ* 120 at 124.
project of a state can better be served.\textsuperscript{49} Sunstein puts it thus: ‘[s]eparation of powers also helps to energise government and to make it more effective, by creating a healthy division of labour.’\textsuperscript{50}

Despite it being a guiding principle in almost all democracies,\textsuperscript{51} in the \textit{Certification Judgment}, our Constitutional Court emphasised that, ‘there is no universal model of separation of powers’.\textsuperscript{52} However, in order to understand the value of our domestic conception of this constitutional norm and assess just how congruent its practical worth is with its theoretical underpinnings, it is necessary to unpack the basic principles that it originally comprised. Van der Vyver\textsuperscript{53} succinctly summarises these four principles as conceived of by Montesquieu, and as supplemented by the American influence initiated by John Adams.\textsuperscript{54}

The first principle is that of \textit{trias politica} in terms of which state authority, or government, is divided up into three distinct components: legislative, executive and judicial authority. Flowing from this principle is the correlative principle of separation of personnel functions pursuant to which each of these three branches of government is to be staffed with different officials who may not serve simultaneously for more than one branch. Thirdly, each of these branches is tasked with separate core functions; namely making the law, executing and enforcing the law, and adjudicating on questions of law, respectively. The fourth principle of checks and balances, in terms of which each branch is empowered to exercise some form of oversight over the others, represents the addition of John Adams who drafted the Massachusetts Constitution of 1780. The Declaration of Rights proclaimed that, ‘all people are born free and equal, and have certain natural, essential and unalienable rights.’\textsuperscript{55} The question Adams faced was how to secure these rights in a structure of government in which an all-powerful parliament and a potent executive would stand in the way of any human right being truly unalienable. The answer he came up with was the fundamental notion of an independent judiciary staffed with impartial judges to serve as a crucial check on the political branches of government.\textsuperscript{56}

Pursuant to Adams’s influence, Kurland notes that, ‘the judiciary lost its inferior status’

\textsuperscript{49} Barber (n 37) at 65.
\textsuperscript{52} \textit{Certification Judgment} (n 10) para 107.
\textsuperscript{53} JD Van der Vyver ‘The separation of powers’ (1993) \textit{SAPL} 177 at 178.
\textsuperscript{54} Marshall (n 36) at 10.
\textsuperscript{55} Ibid at 11.
\textsuperscript{56} Ibid.
and the overarching principle of balanced government was borne.\footnote{Kurland (n 41) at 595.}

This overarching principle found its way into our constitutional dispensation pursuant to Constitutional Principle (‘CP’) VI which proclaimed that, ‘[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’ Our Constitutional Court has recently reiterated the importance of separation of powers as a fundamental – albeit implied\footnote{South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) para 19.} – component of our ‘constitutional architecture’,\footnote{International Trade Administration Commission v SCAW South Africa (Pty) Ltd [2010] JOL 25115 (CC) para 91.} and the crucial review role of the courts in ensuring the maintenance of the right equilibrium of power as contemplated by this doctrine. In the case of\footnote{Unreported case no. 38/12 [2012] ZACC 18 (20 September 2012).} National Treasury v Opposition to Urban Tolling Alliance,\footnote{Ibid para 44.} Moseneke DCJ emphasised the importance of this doctrine as a ‘vital tenet of our constitutional democracy’\footnote{Ibid para 44.}.

The manner in which this principle has been given effect to in our constitutional design and its implications for the practical functioning of our government, are matters that have been well-traversed in the ‘steady trickle’\footnote{ITAC (n 59) para 91 and see the cases cited at fin 92.} of case law and literature\footnote{See, for example, the following thorough academic contributions on the topic and the cases discussed therein: O’Regan (n 48); Labuschagne (n 51); Pieterse (n 31); Sebastian Schedorf & Sanele Sibanda ‘Separation of powers’ in Woolman et al (eds) Constitutional Law of South Africa 2ed (2008) 12-3; Pius N Langa ‘The separation of powers in the South African Constitution’ – A delicate balance: The place of the judiciary in a constitutional democracy (2006) 22 SAJHR 2 and Sandile Ngcobo ‘South Africa’s transformative Constitution: Towards an appropriate doctrine of separation of powers’ (2011) 22 Stell LR 37.} canvassing the evolution of our so-called ‘distinctively South African design of separation of powers’.\footnote{ITAC (n 59) para 91.} Suffice it therefore simply to note that, as the Constitutional Court emphasised in the Doctors for Life case,\footnote{Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC).} the principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers.\footnote{Ibid para 37.} I wish to focus on two interrelated aspects of this structural design that continue to dominate the separation of powers discourse – and not only on the ‘native soil of South Africa’,\footnote{Devenish (n 38) at 98. Note that for the purposes of this thesis, however, I shall be focussing on how these aspects play out in practice in our South African context.} but also abroad. The first is the fusion...
between the legislative and executive arms of government and the second is the concomitantly crucial role of the judiciary in serving as the check against abuses of political power. I address these features of our model of separation of powers in turn and in doing so, I illustrate why the doctrine has lasting value notwithstanding the fact that its theory and usefulness in practice have to a large extent failed to align.

2.2 Theory versus practice

2.2.1 ‘Separation’ – a misnomer?

The critics have long expressed scepticism about the practical usefulness of the doctrine of separation of powers. In 1947 Professor Robson described the doctrine as, ‘that antique and rickety chariot… so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas’.68 Perhaps the most obviously ‘fallacious’ idea is that of true separation between the branches of government. As Kurland notes, given the exponential expansion of government and the complexity of its ‘multi-functional business’ 69 ‘to resort to the idea that there is a tripartite division of powers… is to deal with phantasms’.70 In practice, therefore, there has been an increasing disintegration of separation of powers in the operation of contemporary democratic government.71 This ‘disintegration’ has most obviously manifested itself in the fusion of the legislative and executive branches of government – a problem which is by no means novel, but which has certainly been exacerbated in recent times. De Vries notes the following:

‘The legislature and the executive have not been truly separated in modern history. In most democratic states, executives have direct or indirect input in the legislature… [T]his perpetual fusion … is of course contrary to the separation of powers doctrine.’72

The doctrine’s value in practice has been further thwarted by the ‘rise of national political parties’73 which, as Kurland emphasised in 1986 already, ‘[e]ven the most informed of the Founding Fathers did not anticipate’.74 This has been both caused and

68 WA Robson *Justice and administrative law* 2ed (1947) at 14.
70 Kurland (n 41) at 603.
71 Devenish (n 38) at 85.
72 ID De Vries ‘Courts: The weakest link in the democratic system in South Africa; A power perspective’ (2006) 25 *Politieia* 41 at 47.
73 Kurland (n 41) at 599.
74 Ibid.
perpetuated by the worrying trend of ‘creeping’ centralisation of executive power.\textsuperscript{75} As the ‘modern, powerful executive\textsuperscript{76} continues to burgeon, given the contemporary commitment to (party) politics,\textsuperscript{77} the legislature becomes increasingly impotent and thus unable to fulfil meaningfully its executive oversight function which flows from the principle of checks and balances. This reality of executive centralisation, and its unfortunate side-effects, is particularly stark in South Africa’s political climate given our affliction of ‘one-party dominance’,\textsuperscript{78} and sadly it is a practical outcome that our Constitutional Court did not anticipate, and one which ironically stems, to a large extent, from our Constitutional design itself.

2.2.2 The constitutional ‘design flaws’ that have rendered our legislature – the purported primary ‘check’ over the executive – a mere paper tiger

‘Relations between the Parliament and the Executive depend to a large extent on the constitution and the general legal framework.’\textsuperscript{79} Our carefully-crafted constitutional framework for executive oversight is unfortunately rendered insufficient when considered in light of the Constitution as a whole. On the one hand, it does indeed provide for the requisite ‘parliamentary checks’ on executive power. For example, section 55(2) requires the National Assembly to ‘provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of – (i) the exercise of national executive authority, including the implementation of legislation…’. Section 92(2) makes members of the Cabinet (the apex of the executive branch) ‘accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.’ Yet, on the other hand, our constitutional design has undercut the separation of powers doctrine and enabled a skewing of power in favour of the executive. This has been caused by three distinct, yet interrelated, institutional features.

\begin{itemize}
\item \textsuperscript{75} Catherine Albertyn ‘Judicial independence and the Constitution Fourteenth Amendment Bill’ (2006) 22 \textit{SAJHR} 126 at 132.
\item \textsuperscript{76} Lobel (n 39) at 598.
\item \textsuperscript{77} John C Reitz ‘Politics, executive dominance, and transformative law in the culture of judicial independence’ (2008) 5 \textit{University of St Thomas Law Journal} 743 at 749.
\item \textsuperscript{78} See Sujit Choudhry ‘He had a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy’ (2009) 2 \textit{Constitutional Court Review} 1, for an excellent analysis of this pathology.
\end{itemize}
2.2.2.1  **Our constitutional model of separation of powers does not require the legislative and executive branches to be ‘hermetically sealed from one another’**

In the *Certification Judgment*, the court had to consider whether CP VI, which mandated the separation of powers between the three arms of government, had been breached. The main objection that was raised was directed at the fact that the Constitution enables members of the executive also to be members of the legislature at all three levels of government.\(^8^1\) This, so it was argued, would result in an increase in the power reserve of the executive and concomitant undercutting of the ‘representative basis of the democratic order’.\(^8^2\) Unfortunately this warning was not heeded, with the Constitutional Court ironically remarking that this blurring of the line would in fact ‘make the Executive more directly answerable to the elected Legislature’.\(^8^3\) Our practical experience – as so poignantly epitomised by the notorious ‘Arms Deal’ scandal\(^8^4\) – has sadly revealed this to be mere wishful thinking with executive dominance having rendered our Parliament akin to a ‘poodle-like-lapdog which … is obsequious and subservient to its (party) master.’\(^8^5\)

The following quote from a previous Member of Parliament (MP) is illustrative of this disappointing reality:

> ‘I think when we look at the relationship between [parliamentary] committees and the Executive, it’s essentially a matter of power… it’s about power and whose views prevail. According to my experience… it tends to be the view of the Executive that prevails.’\(^8^6\)

2.2.2.2  **Our electoral system has resulted in the creation of a ‘partycracy’ in which loyalty is to the Party, not the People**

Hug and Martin note that, ‘[a] consensus seems to exist in the literature that electoral systems affect the way in which interests are represented in parliaments. More precisely, the rules under which...MPs are elected influence the attention they pay to either broad-

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\(^8^0\) O’Regan (n 48) at 125.
\(^8^1\) *Certification Judgment* (n 10) para 106.
\(^8^2\) Ibid para 107.
\(^8^3\) Ibid para 111.
\(^8^4\) See Devenish (n 38) at 89, where the details of this ‘political debacle’ are summarised.
\(^8^7\) André Mbata B Mangu ‘Who really governs South Africa’s constitutional democracy: parties or “we the people”?’ (2003) 44 *Codicillus* 2.
based constituency preferences or more narrow-based special interests.' Our Constitution provides for ‘an electoral system that… results in general in proportional representation.’
The ‘multi-party system’ endorsed in our Constitution is that of closed-list proportional representation (‘CLPR’) pursuant to which the appointment of permanent delegates in both Houses of Parliament must be done in accordance with the nominations of the parties as reflected on so-called ‘party lists’. By virtue of this system, we do not vote for particular public representatives; rather, ‘we vote for a slate of candidates chosen by the internal machinery of the party concerned.’ Our Constitutional Court has thus recently highlighted – in a welcome judgment for our democracy – that this system of CLPR enables political parties to ‘occupy centre stage’ in our democracy.

This reality has in turn caused two interrelated and equally unfortunate results. First, as Bowen and Rose-Ackerman point out, ‘the strongest parties will be produced by… CLPR because party leaders have a high level of control over the rank and file since the leadership determines rank on the party list.’ Thus, the power is placed in the hands of party bosses who further the agenda of expanding the party’s power reservoir and in turn, ‘the voting rule… put[s] partisan party interests at the forefront of the legislative process.’ This strengthening of ‘the party’ thus has a second knock-on effect of causing an ‘accountability dilemma’ insofar as loyalty goes to the party first and not to the people, which in turn undercuts our constitutional commitment to a truly ‘democratic government… based on the will of the people’. The following explanation proposed by Carey and Reynolds is worth emphasising:

‘The accountability dilemma in such systems is aggravated because as a politician advances within the party leadership, her access to power and perks increases dramatically, but her electoral vulnerability decreases because leaders occupy the top positions on party electoral lists. This mitigates the leadership’s susceptibility to electoral punishment…. As a result, the leaders who stand to gain the most from violating public trust and pillaging state resources stand to suffer the least electoral punishment.’

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89 Sections 46(1)(d) and 105(1)(d), read with Schedule 6A, of the Constitution (n 11).
90 Ibid at section 1(d).
91 Ibid.
92 Geoff Budlender ‘People’s power and the courts’ – Bram Fischer Memorial Lecture (2011) 27 SAJHR 582 at 583.
95 Ibid.
96 Mangu (n 87) at 7.
97 Preamble of the Constitution (n 11).
indignity if their party, collectively, is punished by voters’.98

As a result of the design of our electoral system, power is shifted from the constitutional structures into the party structures outside the system, thereby upsetting the delicate power balance in a way that defeats the very fundamentals of our constitutional system – including our commitment to the separation of powers. As Budlender emphasises: ‘[a]ny shift of power away from the institutions of government and towards the ruling party should be a matter for concern.’99 The executive-minded party becomes increasingly monolithic resulting in the legislature (with the net diminished resources, capacity and voice) becoming increasingly hamstrung and incapable of fulfilling, *inter alia*, its executive-oversight role. This, in turn, can lead to ‘the decline of democracy’.100

**2.2.2.3 Our Constitution gives the parties (not their members) the right to seats in Parliament thereby endorsing a system of strict party discipline**

This third factor is directly related to our choice of electoral system, but warrants separate discussion as an additional cause of the oversight failings of our Parliament. In terms of section 37(3)(c) of the Constitution, ‘[a] person loses membership of the National Assembly if that person… ceases to be a member of the party that nominated that person as a member of the Assembly.’ Our Constitution thus contains the requisite ingredients to make an unsavoury system of party partisanship. In the Report of the Independent Panel Assessment of Parliament, 2009, it was noted that, ‘[t]he influence of political parties on the ability of Members of Parliament to freely express themselves is further strengthened by the unconditional power of political parties to remove their members from Parliament.’101 The constitutional ‘resignation provision’ and system of strict party discipline has been criticised for restricting MPs’ rights to free speech and obliging them to ‘toe the party line’.102 Driven by fear and enticed by the benefits of party loyalty, our MPs (willingly or unwilling) compromise their integrity and in turn the independence of Parliament, rendering it ineffective at fulfilling its role of holding the executive to account despite having an explicit constitutional mandate, and the necessary ‘powers’ to do so.

As a result of these three weaknesses in our constitutional scaffolding, the most fundamental mechanism of partisan oversight contemplated by the separation of powers

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99 Budlender (n 92) at 585.
100 Ibid.
101 The Panel Report (n 86) at 36.
102 Ibid.
doctrine – that of parliamentary scrutiny over the action of today’s ‘Most Dangerous Branch’\textsuperscript{103} the executive – has been rendered somewhat meaningless in practice in our South African context. This undercutting of the separation of powers doctrine through a skewing of power in favour of the executive shows the theoretical principles of separation of functions and personnel to be of little significance in practice. It also calls into question the value of partisan oversight as an incidence of the principle of checks and balances, given that in this respect our Parliament has been rendered a mere ‘paper tiger’ – ‘with a ferocious capacity to snarl and roar but no teeth with which to bite’.\textsuperscript{104} In light of the foregoing, the practical worth of the doctrine is less than congruent with its theoretical aims. However, it has certainly not been rendered redundant. The most fundamental check against abuses of power – the independent judiciary – remains alive and well. Where our Parliament has failed to hold the ever-expanding executive to account, the courts have consistently stepped into the breach pursuant to their fundamental role as conceived of through the prism of separation of powers.

\subsection{2.2.3 The importance of an independent judiciary: ‘The ultimate shield against that incremental and invisible corrosion of our moral universe’\textsuperscript{105}}

Not all hope is lost for the doctrine of separation of powers. Although the constitutional mechanisms for partisan oversight continue to malfunction in practice, the key underlying principle of checks and balances remains practically significant. This principle evolved pursuant to John Adams’s invention\textsuperscript{106} of the third independent and only non-political arm of state: the judiciary.\textsuperscript{107} And to him we owe an eternal gratitude, for it is the judiciary that continues to fulfil its crucial role as a ‘bulwark against executive excesses and misuse or abuse of power, or transgression of constitutional or legal limitation by the executive as well as the legislature’.\textsuperscript{108} It is the role of the judiciary, as conceived of through the doctrine of separation of powers, which gives this doctrine its undying value in a constitutional democracy such as ours, which is committed to constitutional supremacy and the inviolability of a fundamental Bill of Rights.

The judiciary provides the most crucial check against abuses of state power and this

\begin{footnotesize}
\begin{enumerate}
\item Lobel (n 39) at 598 and the authorities cited at fn 20.
\item I Mahomed ‘The independence of the judiciary’ (1998) 115 SALJ 658 at 661.
\item Ibid at 666.
\item See De Vries (n 72) at 45 where the author notes that Montesquieu did not allocate the same status to the judiciary as the other branches of government. This development was due to the American influence.
\item Marshall (n 36) at 11.
\item Vyas (n 69) at 132.
\end{enumerate}
\end{footnotesize}
is most obviously done through the ‘potentially awesome power’\(^{109}\) of judicial review of legislative and executive action, which, so Pieterse notes, ‘is the most common and dramatic instance of … checks and balances’.\(^{110}\) To this extent, it is vital that the judiciary ensures that in exercising this power it is constantly aware of the importance of striking the delicate balance between the need to control government and the need to prevent state power from being diffused ‘so completely [such] that the government is unable to take timely measures in the public interest.’\(^{111}\) This balancing act is necessary in order to ensure that the independence of the judiciary – which is a vital manifestation of the *trias politica*\(^ {112}\) – remains firmly intact by preventing the erosion of its institutional security.\(^{113}\) It is furthermore necessary insofar as the principle of checks and balances does not allow the courts to have the proverbial cake and eat it, for although they are duty-bound to safeguard the Constitution, the separation of powers demands that they are *equally* required not to encroach on the legislative and executive domains. This is, in and of itself, a check against abuses of judicial power.

I turn now to consider the nature and scope of the role of the courts – and in particular, the Constitutional Court – and I focus primarily on their judicial review function. In doing so, I attempt to elucidate what makes the judicial role qualitatively distinct from that of the other arms of government and thus, considered against the backdrop of our Parliament’s failings and our executive’s dangerous expansion, reinforces the judiciary’s special place in our constitutional order.

**3 THE SPECIAL ROLE OF THE COURTS AS CONCEIVED OF THROUGH THE PRISM OF SEPARATION OF POWERS**

Writing in 1990, Edwin Cameron emphasised that, according to the separation of powers, ‘The constitutional responsibilities of the judiciary differ from those of the legislature and the executive…. [T]he separation of powers… emphasizes that judging is different from the execution of government policy and from law-creation by the legislature.’\(^ {114}\)

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109 Mahomed (n 104) at 660.
110 Pieterse (n 31) at 386.
111 De Langa (n 15) paras 60-1. See also Heath (n 58) para 26 regarding the crucial role of the courts in ensuring this balance.
113 See, for example, Ngcobo (n 16) and Roux (n 28) regarding the importance of public confidence in the judiciary to secure its institutional security.
The fundamental difference is *qualitative* in nature. It flows from the crucial commitment to judicial independence and it manifests in two particular, yet interrelated, ways. The first is in the judicial role, or decision-making function, itself, and the second is in the nature of the actual decisions produced by the courts. I deal with each of these in turn.

### 3.1 The judicial role and crucial, yet elusive, dichotomies

The judiciary is the only non-political branch of government – a significant qualitative difference. The legislature’s members are directly elected by the public – albeit through our somewhat fraught system of CLPR – and it is thus the most directly accountable political branch of government.\(^{115}\) The executive – albeit only indirectly accountable to the citizenry – has an ‘intertwined relationship’\(^ {116} \) with the legislature and is also political in nature. The judiciary, in comparison, is and must be, insulated from ‘the vagaries of politics’\(^ {117} \) by virtue of the fact that the ‘hallmark of a true constitutional democracy is the independence of its courts’\(^ {118} \). Thus, section 165(2) of our Constitution proclaims that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.’\(^ {119} \) Furthermore, section 165(3) prohibits any person or organ of state from interfering with the functioning of the courts and, rather tellingly, the judiciary is explicitly excluded from the constitutional definition of ‘organ of state’\(^ {120} \) and the requirements applicable to our public administration.\(^ {121} \) Wallis, in a recent paper, emphasises, in particular, the starkly different roles of judges and civil servants, as conceived of in our constitutional order, and notes that, ‘[t]heir separateness is central to the doctrine of separation of powers.’\(^ {122} \)

That the judiciary, and the judicial task, is given a distinctive and significant place in our constitutional schema is thus clearly apparent from the textual *indicia* in the Constitution. It is by virtue of the fact that the Constitution places the judiciary above ‘the

\(^{115}\) Pieterse (n 31) at 387.

\(^{116}\) O’Regan (n 48) at 126.


\(^{118}\) Murray & Du Plessis (n 28) at 212.

\(^{119}\) This fundamental commitment is largely mirrored in the oath of judicial officers as set out in item 6(1) of Schedule 2 to the Constitution: ‘I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law’.

\(^{120}\) Section 239 of the Constitution (n 11).

\(^{121}\) Ibid at chapter 10.

\(^{122}\) Malcolm Wallis ‘Judges: Servants of justice or civil servants?’ (2012) 129 *SALJ* 652 at 676.
political fray' by securing its independence that it is able to carry out its crucial and unique function: the elaboration of the principled basis of the Constitution. As our Constitutional Court proclaimed in the seminal TAC case, ‘[t]he primary duty of Courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice”’. This overarching duty – a reaction to our hellish apartheid past – entails two particular and distinctive roles that only the courts, as guardians of our Constitution and final, independent and authoritative arbiters of legal issues, can fulfil in exercising their constitutional review jurisdiction over all ‘law and conduct’.

3.1.1 The protection of minority interests

The first cardinal and defining function of our courts is the protection and prioritisation of fundamental rights in order to secure ‘vulnerable groups, individuals, beliefs and ideas vis-à-vis the potential tyranny of political majorities’. The stamp of our history shows that in the absence of a fiercely independent judiciary that acts in pursuit of a higher constitutional mandate, this function cannot meaningfully be fulfilled. Thus, Chaskalson P (as he then was) noted the following in the benchmark Makwanyane judgment:

‘The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation [and public power more broadly] in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.’

Thus, aside from its role as arbiter of legal disputes between private parties inter se, the judiciary fulfils the vital role of ensuring the ‘majority juggernaut’ does not ride roughshod over the rights of the individual. It does this by ensuring, inter alia, that ‘the limits to the exercise of public power are not transgressed.’

124 Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) para 113.
125 Du Plessis (n 112) at 199.
126 Section 172(1) of the Constitution (n 11).
127 Dikgang Moseneke ‘Striking a balance between the will of the people and the supremacy of the Constitution’ (2012) 129 SALJ 9 at 18.
128 Ibid at 12.
129 S v Makwanyane 1995 (3) SA 391 (CC) para 88.
131 Heath (n 58) para 25. See part 5.1.2 below.
3.1.2 The resolution of disputes involving the constitutional division of powers

The second role to highlight that emphasises the significance of the judiciary’s qualitatively defining feature as a non-partisan arm of government, is its function of mediating disputes between the other branches or sectors of government.\(^{132}\) It is crucial that the separation of powers between the political arms of state and the judiciary is upheld in order to enable the latter to fulfil this role. As Chaskalson P remarked in the *Heath* judgment,

> ‘The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined.’\(^{133}\)

Thus, the doctrine of separation of powers entails that, pursuant to the supremacy of the Constitution, the courts are mandated to ensure that, ‘all branches of Government act within the law.’\(^{134}\) The *proviso* to the exercise of this expansive judicial power is that ‘the courts in turn must refrain from entering the exclusive terrain of the Executive and Legislative branches of Government unless the intrusion is mandated by the Constitution itself.’\(^{135}\) In exercising their extensive review powers, our courts are thus to be guided by the prescripts of the Constitution itself. The Constitutional Court, in particular, must exercise this duty with special care, given its ‘exceptional position’\(^{136}\) in our transformative constitutional order. As O’Regan has noted, ‘[t]he closer an issue comes to the sensitive relationship between the branches of government, the more likely it is to require a decision by the Constitutional Court.’\(^{137}\)

Our apex court in constitutional matters is vested with sweeping and exclusive powers, *inter alia*, to decide disputes between organs of state, to have the final say on the constitutional validity of Acts of Parliament and provincial legislation, and to declare legislation and conduct of the President invalid.\(^{138}\) Given the breadth of these powers and their political sensitivity, it is vital that the ‘defensible limits of judicial review’\(^{139}\) are

\(^{132}\) Ngcobo (n 16) at 9.
\(^{133}\) *Heath* (n 58) para 26.
\(^{134}\) *National Treasury* (n 60) para 44.
\(^{135}\) Ibid.
\(^{136}\) Seedorf & Sibanda (n 63) at 12.3(b).
\(^{137}\) O’Regan (n 33) at 129.
\(^{138}\) Section 167(4) of the Constitution (n 11).
carefully delineated and observed by our courts. In part 5 below, I consider what these particular limits are given our conception of separation of powers, but first it is necessary to address the significant and overarching, yet somewhat elusive, dichotomy that so poignantly distinguishes the judicial function from that of the other arms of government: the principle / policy dichotomy. This dichotomy serves as the courts’ guiding compass in exercising their function of monitoring the separation and exercise of public powers.

3.1.3 The ‘law / politics dichotomy’ and the concomitant ‘principle / policy divide’

Delineating the apposite role of the courts in exercising their constitutional review jurisdiction has been a preoccupation of constitutional theory for some time. Steinberg defines this seemingly insurmountable ‘task’ as follows:

‘To define the most effective and appropriate role for the judiciary, taking into account both pragmatic and principled considerations including the inherent limitations of the process of adjudication and the place of other institutions.’

For present purposes, I wish to simplify the enquiry and highlight the following basic and irrefutable premise: arguments about pragmatism and so-called ‘judicial politicking’ aside, the law is the pre-eminent business of the courts and politics is the pre-eminent business of the political arms of state. In this respect, the role of the judiciary is fundamentally different in a qualitative sense: the courts serve as fora of principle, whereas the legislative and executive branches engage in the function of deciding questions of political preference and questions of a policy and / or polycentric nature.

As Dworkin so aptly put it,

‘We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally become questions of justice… I call it law.’

The law / politics dichotomy, which flows from the separation of powers itself, thus translates into the central question which consistently preoccupies our courts: is it a

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141 Roux (n 28).
142 See for example, François Venter ‘Judges, politics and the separation of powers’ (2007) 1 Speculum Juris 60 at 65, who talks of the ‘political dimensions of adjudication’ and Dlamini (n 130).
143 JR De Ville ‘Deference as respect and deference as sacrifice: A reading of Bato Star Fishing v Minister of Environmental Affairs’ (2004) 20 SAJHR 577 at 593. Note that I discuss the meaning of ‘polycentricity’ at 5.2 below.
145 De Ville (n 143) 590-1.
matter of principle or is it a question of policy? This distinction is ‘notoriously difficult to draw and [is]… easily subject to manipulation.’\(^{146}\) The courts’ task is to give effect to the principled basis of our legal order as encapsulated in our Constitution – with which all laws must be congruent – but in doing so they must ensure that they do not slip into fulfilling a policy-making role, for this function belongs to the political realm. Davis and Klare point out that, ‘[t]he core concepts of separation-of-powers theory – … what is a “policy question” and what is a “juridical question” – are not self-defining [and] [a]pplying these concepts involves significant choices with significant social and political consequences.’\(^{147}\) These questions thus understandably preoccupy our courts.

O’Regan has recently noted that, ‘[t]he question of the proper role of the courts, and the Constitutional Court, in relation to policy is a recurring question in our democracy.’\(^{148}\) This question is a ‘serious’\(^{149}\) one that often riddles our courts given their complex task of showing the utmost fidelity to the Constitution – with its host of extensive rights, including those of a socio-economic nature – and yet simultaneously guarding their own institutional security by not encroaching upon the legitimate domain of the other branches of government, as a matter of ‘democratic principle’.\(^{150}\) The question is particularly perplexing given the fact that the notion of ‘policy’ itself seems to defy precise definition. Dworkin posited the following in his seminal work, *Taking Rights Seriously*: ‘it is that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community.’\(^{151}\)

O’Regan, noting that ‘policy’ is not defined in the Constitution and instead relying on the dictionary definition – ‘a course of action adopted and pursued by a government’\(^{152}\) – proposes a less esoteric explanation by providing some useful examples:

‘Different legal tools can be used to implement policy. So policy may be encapsulated in legislation, or through regulations made in terms of legislation, or it may take the form of executive instructions to bureaucrats or it may be pursued through the conduct of officials.’\(^{153}\)

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\(^{146}\) Ibid.

\(^{147}\) Dennis M Davis & Karl Klare ‘Transformative constitutionalism and the common and customary law’ (2010) 26 *SAJHR* 403 at 508.

\(^{148}\) O’Regan (n 33) at 119.

\(^{149}\) Ibid.

\(^{150}\) Price (n 26) at 588. Note that I discuss this separation-of-powers consideration as an aspect of the deference enquiry at 5.2 below.

\(^{151}\) Ronald Dworkin *Taking rights seriously* (1977) at 22.

\(^{152}\) O’Regan (n 33) at 126.

\(^{153}\) Ibid.
Whichever form it takes, it epitomises the exercise of a political discretion — which typically has polycentric implications and was thus made pursuant to a careful cost / benefit analysis — and the courts are wary of the fact that, ‘[d]iscretion [is]… the hole in the middle of the “doughnut” filled with policy and politics, and into which… [they should not] enter.’ The principle / policy dichotomy thus highlights a crucial difference between the judicial task and that of the political arms of state: it highlights the difference in their institutional competencies.

Thus, in the case of Du Plessis v De Klerk, Sachs J emphasised the following:

‘The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative / enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic and political questions requires.’

Such enquiries and analyses are appropriately the tasks of the political arms of government. The task placed in the lap of the courts is “entirely different” in nature. It is simply to determine ‘what the Constitution permits and what it prohibits’ through the ‘judicious interpretation’ of its provisions and of the law more generally, through the application of the doctrine of stare decisis. It is an interpretive task – albeit with a transformative element – that requires fidelity to the law; not to the political whims of the majority. The following poignant statement by Justice Jackson, which was relied upon in Makwanyane, sums up the reason for the qualitatively different nature of the judicial role thus:

‘The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts…. [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.’

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154 See Kurland (n 41) at 603, quoting Marshall.
156 See 5.2 below regarding how this separation-of-powers consideration is factored into the deference analysis.
158 Makwanyane (n 129) para 266.
159 Ibid.
160 Ibid.
161 See, for example, Brand (n 31) at 622, who notes that the ‘transformative duty… is one that rests also on the courts’.
162 See Mahomed (n 104) at 663 for a lucid and eloquent exposition of the detailed aspects of this judicial function.
163 Makwanyane (n 129) para 89, citing West Virginia State Board of Education v Barnette 319 US 624 (1943) at 638.
I turn now to highlight briefly aspects of the actual judicial decision-making process, and court decisions themselves, that further distinguish the courts from the other branches of state and thus strengthen the argument for the recognition of the judiciary’s distinctive and sacred role in our tripartite system of government.

3.2 **Three defining aspects of the judicial decision-making process**

A full comparative analysis of the specific functions of each branch of government is beyond the purview of this thesis.\(^\text{164}\) I wish simply to highlight what I consider to be three defining features of the judicial decision-making process, and of actual court decisions, that serve to emphasise the judiciary’s qualitative uniqueness.

First, unlike the political arms of government, ‘the judiciary is the most immediately available resource.’\(^\text{165}\) Our Constitution proclaims that through a system of ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government’,\(^\text{166}\) government shall be based on ‘the will of the people’\(^\text{167}\) and shall be ‘accountable’ and ‘responsive’ to the people it represents.\(^\text{168}\) The vote epitomises democracy. It is a ‘badge of dignity and of personhood… [that] says that everybody counts.’\(^\text{169}\) But as experience has shown, the vote alone is insufficient, and individuals who wish to express their voice and vindicate their rights, cannot afford to wait for the next election. They thus increasingly turn to the courts for more immediate relief of their individual problems.\(^\text{170}\) Writing in 1969, United States Judge McGowan noted the following:

‘This [resort to the courts] implies a deepening disillusionment with both the efficacy and the speed of achieving reform through direct political action, by appeals to legislators or to executive officeholders backed up by the threat of the vote. The mood seems to be to seek relief immediately in court and not to wait for the next election…. [T]he ordinary citizen appears to like the idea that there is one branch of the government which can and will deal [relatively] quickly and effectively with

\(^{164}\) See Seedorf & Sibanda (n 63) for a detailed comparative analysis of these respective roles in the South African context; Conrado Hübner Mendes ‘Is it all about the last word? Deliberative separation of powers I’ (2009) 3 *Legisprudence* 69, for a broad comparison between the review function of the court versus the role of the legislature; and Patrick Lenta ‘Democracy, rights disagreements and judicial review’ (2004) 20 *SAJHR* 1 for a theoretical analysis of the arguments for and against these respective roles.

\(^{165}\) Dlamini (n 130) at 414. Emphasis added.

\(^{166}\) Section 1(d) of the Constitution (n 11).

\(^{167}\) Ibid; the Preamble.

\(^{168}\) Ibid at section 1(d).

\(^{169}\) *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17, cited at para 69 of *Ramakatsa* (n 93).

\(^{170}\) Kurland (n 41) at 610.
shortcomings in laws or obtuseness in their administration.'¹⁷¹ This ‘mood’ certainly has not changed, and in fact, in our local context in which the legislature is riddled by, inter alia, inertia, a skills deficit and a starkly apparent inability to minimise executive excesses,¹⁷² a judicial order continues to be the order of the day.

Secondly, unlike the general, ‘broad-brush-stroke’ policy-based decisions of the political branches of government, judicial decisions display the noteworthy characteristic of particularity. Separation of powers theory requires that function be matched to form. The institutional position and role of the courts enables them to exercise their ‘judicial power’ of applying ‘the general law to particular cases.’¹⁷³ The case of the individual occupies centre stage in the courtroom, where the focus is on providing ‘individualised remedies to aggrieved claimants’¹⁷⁴ Unlike the policy-making function of the executive, and the function of the legislature which tends to ‘produce prospective and abstract rules… [which] thus overlook the moral nuances of intricate rights’ cases’,¹⁷⁵ adjudication involves a different methodology ‘that operates in a bottom up fashion, allowing more sophisticated generalizations for the protection of rights.’¹⁷⁶ By handling real cases, judges are best equipped to test effectively the ‘particular implications of abstract principles and discover problems that the political arms of state could not have predicted.’¹⁷⁷ As Michelman has noted, this institutional advantage of the judiciary, ‘may not be magical, but perhaps neither [is it]… negligible’.¹⁷⁸

Finally, judicial decisions bring about finality, for ‘[t]he function of the court is conflict resolving; it brings closure to disputes.’¹⁷⁹ The judiciary is the only member of the trias politica that can finally uphold individual freedom,¹⁸⁰ by virtue of its institutional right and, indeed, duty, to act as the ‘final arbiter of the meaning of the Constitution.’¹⁸¹ This is a significant qualitative attribute that distinguishes the courts from the other arms of state, but it should not be construed as implying that the courts necessarily have ‘the

¹⁷¹ Ibid.
¹⁷² Pieterse (n 31) at 395.
¹⁷³ Barber (n 37) at 60.
¹⁷⁴ Pieterse (n 31) at 395.
¹⁷⁵ Mendes (n 164) at 88.
¹⁷⁶ Ibid.
¹⁷⁸ Frank I Michelman Brennan and democracy (2005) at 60.
¹⁷⁹ Barber (n 37) at 73.
¹⁸⁰ De Vries (n 72) at 43.
last word’,\textsuperscript{182} in our tripartite system of government. The courts certainly bring closure to individual disputes and in this way play an important role in ensuring finality and certainty for individuals, in accordance with the rule of law. However, as I illustrate in part 4.2.1 below, this does not make the courts counter-majoritarian, for although the judiciary – and in particular, the Constitutional Court – ‘has the last word on the meaning of the Constitution’\textsuperscript{183} and is the final authority on the constitutionality of legislation and acts of the President,\textsuperscript{184} such decisions do not finally dispose of the matter in a broader sense and thus do not muzzle the political arms of state. Rather, they commence a ‘constitutional dialogue’\textsuperscript{185} by encouraging a sound legislative and / or executive response.\textsuperscript{186}

In this part of my thesis, I have sought to illustrate the qualitative features of the judicial branch and its functions that distinguish it from the other branches of government and thus cement its sacred and unique place – a place that is, and must be, off-limits from political encroachment – in our constitutional order. The courts, with their ‘inherent power to protect and regulate their own process’\textsuperscript{187} are – along with the other branches of government – responsible for guarding their own institutional integrity. In doing so, they must ensure that, inter alia, in exercising their ‘enormous power’\textsuperscript{188} of judicial review, they tread carefully in order to maintain the fine equilibrium contemplated by our doctrine of separation of powers. I turn now to consider the paradoxical nature of the judicial review function before elucidating its limits.


The adoption of the trias politica as a constitutional principle confirms the ‘omnipresent importance of judicial review in South Africa’.\textsuperscript{189} It is thus important to note that the perplexing paradoxes and requisite limits of judicial review do not detract from the value of judicial review itself: it is a necessary corollary of constitutional supremacy. As Mosekene has noted, ‘judicial review is a necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing the limits that the

\begin{footnotes}
\item 182 Conrado Hübner Mendes ‘Not the last word, but dialogue: Deliberative separation of powers II’ (2009) 3 Legisprudence 191.
\item 183 Iain Currie ‘Judicious avoidance’ (1999) 15 SAJHR 138 at 158.
\item 184 Section 167(5) of the Constitution (n 11).
\item 185 Ngcobo (n 63) at 39
\item 186 Ibid at 42.
\item 187 Section 173 of the Constitution (n 11).
\item 188 Cameron (n 114) at 252.
\item 189 Labuschagne (n 51) at 91.
\end{footnotes}
Constitution itself imposes on governmental power.'\textsuperscript{190} These aims are laudable, but given the inherent tensions in our constitutional architecture, their attainment is not always an easy feat. This flows from the paradoxical nature of judicial review as a prerequisite of the separation of powers. This paradox is twofold.

4.1 ‘The least dangerous branch’?

Hamilton famously asserted in \textit{Federalist} No. 78 that, ‘the judiciary is beyond comparison the weakest of the three departments of power’.\textsuperscript{191} Yet today, practice reveals that this ‘curious institution’\textsuperscript{192} seemingly possesses an extensive reservoir of power – albeit of a more intangible kind. How is this so? As Mahomed CJ (as he then was) so aptly noted, despite the potentially awesome breadth of the power of judicial review, it is exercised by the branch of government with neither the power of the purse, nor that of the sword, to exercise its will.\textsuperscript{193} Thus, although by virtue of the doctrine of separation of powers, the judiciary ‘stands on an equal footing with the executive and legislative pillars of State’,\textsuperscript{194} in the absence of ‘political, financial [and] military power it cannot hope to compete’\textsuperscript{195} and in this respect it is indeed the weakest of the three arms of government. However, it is certainly not powerless. The real power that the judiciary possesses is simply of a more intangible form; it is a kind of ‘moral authority’\textsuperscript{196} which flows from ‘its independence and integrity and… the esteem which it generates within the minds and hearts of the people affected by its judgments.’\textsuperscript{197}

Public confidence is thus an essential condition for realising the judicial role. As Aharon Barak has remarked: ‘all [a judge] has is the public’s confidence in him [or her]. This fact means that the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content.’\textsuperscript{198} And herein lies the real source of the judiciary’s power. However, by virtue of the fact that it is sourced in the public trust or confidence – ‘confidence in judicial independence, fairness, and impartiality’\textsuperscript{199} – this somewhat amorphous power can more easily be subverted than that of the sword or purse. Trust is, after all, something that can easily be broken. The flipside of the judicial power is thus that

\begin{footnotesize}
\textsuperscript{190} Moseneke (n 127) at 17.
\textsuperscript{191} Kurland (n 41) at 599, quoting Hamilton.
\textsuperscript{192} Cameron (n 114) at 254.
\textsuperscript{193} Mahomed (n 104) at 660.
\textsuperscript{194} \textit{S v Mamabolo} 2001 (3) SA 409 (CC) para 16.
\textsuperscript{195} Ibid.
\textsuperscript{196} Ibid.
\textsuperscript{197} Mahomed (n 104) at 661.
\textsuperscript{198} As quoted by Ngcobo (n 16) at 6.
\textsuperscript{199} Ibid at 8.
\end{footnotesize}
it can, in certain circumstances, be rendered a weakness and this is what makes it paradoxical in nature. It is also what makes the judiciary deserving of special protection – given its unique and sacred role in our constitutional order – insofar as its efficacy depends upon ‘the acceptance of its role by the wider legal, cultural and political system.’ Klug thus notes that this strangely paradoxical power is to a large extent rooted in the judiciary’s ‘ability to insinuate itself institutionally in conflicts over the separation and distribution of powers’. 

Given the paradoxical nature of the somewhat nebulous, yet expansive, judicial power, ‘as a general rule, courts elect to proceed slowly.’ In sensitive cases that call for the delicate balancing mandated by the separation of powers, our judges are required to pause and hold their breath and ask: will our decision constitute an unwarranted encroachment into the political realm and thus, ‘will our decision be perceived in ways that will strengthen or weaken the ability of the courts to function well.’ To this extent, ‘[a]cademic and public criticism of their conduct clearly… constitute a break on judges’ apparent freedom of action in the exercise of their power’. This is a powerful accountability measure that along with other institutional checks – such as the judicial appointment procedures, the constraining effects of the doctrine of precedent, the public and deliberative nature of judicial proceedings and the duty to justify decisions through sound judicial reason-giving – answers the age-old and seemingly unanswerable question: who guards the guardians (quis custodiet ipso custodies)?

The ‘peculiar institutional character and function of the judiciary’ necessitates its own peculiar form of accountability that certainly does not entail, nor permit, ‘subjugation to the views of the majority in a democratic sense’. Given the special role of our courts, this notion is a plainly unacceptable basis for judicial accountability and the worrisome string of remarks by members of the executive intimating that there should be ‘government oversight of the judicial process’ indicate that ‘the stakes could not be

200 Steinberg (n 140) at 274.
201 Klug (n 181) at 206.
202 Marshall (n 36) at 18.
203 Ibid.
204 Cameron (n 114) at 253.
205 Pieterse (n 31) at 391.
206 Taggart (n 155) at 453.
207 O’Regan (n 33) at 143.
208 Cameron (n 114) at 253.
209 Wallis (n 122) at 655.
higher”\textsuperscript{210} for our judiciary. It is pursuant to the reality that the judicial power can easily be rendered a weakness, that these unwarranted attempts have been made by our burgeoning executive to undermine the judiciary by relying on the second paradox inherent in the notion of judicial review. This onslaught essentially takes the form of the ‘democracy versus juristocracy debate’.\textsuperscript{211}

4.2 \textbf{Democracy versus juristocracy: ‘the most prevalent debate in constitutional theory’}\textsuperscript{212}

What does this second paradox implicit in judicial review entail? On the one hand, by virtue of the separation of powers, the courts are mandated to exercise their review power to hold government accountable to the standards set in the Constitution; yet, on the other hand, this power may be used to ‘thwart the very right to political participation by withdrawing debate from the public arena to the domain of the courts.’\textsuperscript{213} This conundrum was famously dubbed ‘the counter-majoritarian difficulty’ by Alexander Bickel,\textsuperscript{214} and this notorious expression has left an indelible mark in the books of constitutional theory ever since. The dilemma arises because, by virtue of the power of judicial review, unelected judges are empowered to overturn the decisions of democratically-elected representatives of the majority. Democratic theory and constitutional supremacy thus appear to find themselves in polar opposition. However, as extensive scholarship has shown, this so-called counter-majoritarian problem is not intractable. I turn now to canvass briefly two key counter-arguments that illustrate this.

4.2.1 Judicial review is not illegitimate insofar as it instigates a ‘democratic dialogue’ between the courts and the other branches of government\textsuperscript{215}

‘[G]overnment consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it is often the sweaty intimacy of creatures locked in combat’.\textsuperscript{216}

The latest constitutional ‘buzzword’ making an appearance in our jurisprudence is

\begin{footnotesize}
\begin{enumerate}
\item Wesson & Du Plessis (n 28) at 188
\item McLean (n 211) at 447.
\item Alexander M Bickel \textit{The least dangerous branch – The Supreme Court at the bar of politics} (1962) 16-23.
\item Brand (n 31) at 620.
\item Bickel (n 214) at 261.
\end{enumerate}
\end{footnotesize}
‘dialogue’ – a word which, despite its ambiguities\textsuperscript{217} is being postulated as the metaphoric answer to our transformative constitutional mandate to develop an ‘appropriate doctrine of separation of powers’\textsuperscript{218} that enhances the overall effectiveness of our constitutional project.\textsuperscript{219} More generally, ‘theories of constitutional dialogue’ are emerging in various constitutional democracies as ‘principal contenders in the quest for a satisfactory theory of judicial authority in constitutional decision-making’\textsuperscript{220} The word ‘dialogue’ itself is a Canadian import. It was originally posited by Peter Hogg and Allison Bushell in a seminal paper entitled, ‘The Charter dialogue between courts and legislatures (Or perhaps the Charter of Rights isn’t such a bad thing after all)’.\textsuperscript{221} This paper immediately captured the Canadian judicial and academic imagination with the Canadian Supreme Court noting the following in the 1998 case of \textit{Vriend v Alberta}:\textsuperscript{222}

‘[T]he Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some. In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches… [M]ost of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the legislature responds to the courts; hence the dialogue among the branches.’\textsuperscript{223}

The idea of a constitutional dialogue was propounded by Hogg and Bushell in order to challenge the counter-majoritarian objection to the legitimacy of judicial review under the Canadian Charter of Rights and Freedoms (‘the Charter’). Their thesis – which has subsequently been elaborated upon in a second instalment,\textsuperscript{224} – is essentially that various structural features of the Charter, together with the empirical record of legislative responses to ‘every court case in which a law had been declared contrary to the Charter by

\textsuperscript{217} See Carissima Mathen ‘Dialogue theory, judicial review, and judicial supremacy: A comment on “Charter dialogue revisited”’ (2007) 45 Osgoode Hall Law Journal 125 at 128, who criticises the choice of metaphor on the basis that the word dialogue, ‘suggests cooperation, exchange, and… the possibility of mutual moderation’ – a dangerous notion given the importance of the courts’ ‘special place’ and their independence. The advocates of dialogue theory, however, refute this literalist interpretation insofar as the word has always meant to operate as a ‘loose marker’ to describe the interaction between the courts and the other arms of state. For further criticism on dialogue theory see Andrew Petter ‘Taking dialogue theory much too seriously (or perhaps Charter dialogue isn’t such a good thing after all)’ (2007) 45 Osgoode Hall Law Journal 147.
\textsuperscript{218} Ngcobo (n 63) at 37.
\textsuperscript{219} See also Davis & Klare (n 147) at 500.
\textsuperscript{220} Bateup (n 117) at 1118.
\textsuperscript{221} (1997) 35 Osgoode Hall Law Journal 75.
\textsuperscript{222} [1998] 1 SCR 493 para 138.
\textsuperscript{223} Cited with approval by Ngcobo (n 63) at 42.
the Supreme Court of Canada’, indicate that ‘the majoritarian objection to judicial review has been exaggerated’, as the courts do not really have the last – or at least, the only – word on big-picture constitutional issues. Rather, such cases usually leave room for – and usually receive – a response from the political arms of state. This response, the authors clarify in their second piece, is not the result of some informal conversation between the branches of government: by dialogue, they ‘did not mean that the courts and legislatures were literally “talking” to each other’. Rather, the increasingly ubiquitous dialogue metaphor is used to illustrate that the institutional process, pursuant to which decisions as to the constitutionality of legislative and executive action are made, involves a structured, but ‘shared elaboration of constitutional meaning between the judiciary and other actors.’

This notion of a ‘constitutional dialogue’ does indeed diffuse the purported force of the counter-majoritarian attack by providing a ‘normative response to questions about the legitimacy of judicial review’, and it certainly seems to have taken root in our South African context. As elucidated in part 2 above, our ‘distinctively South African model of separation of powers’ anticipates a degree of ‘intrusion of one branch on the terrain of another’ and thereby ‘engenders interaction’. This interaction is what, Ngcobo CJ (as he then was) in a seminal paper on the topic, explains as the ‘constitutional dialogue’ pursuant to which the branches of government ‘are engaged in a continuing conversation about their respective constitutional roles… to uphold our shared [Constitutional] mission’. This dialogic theory of separation of powers requires that ‘the judiciary should view itself as being in partnership with the elected branches inasmuch as both branches are...

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225 Ibid at 3.
227 Hogg et al (n 224) at 4, where the authors refer specifically to the ‘legislative response’ such cases solicit. See Kent Roach ‘Sharpening the dialogue debate: The next decade of scholarship’ (2007) 45 Osgoode Hall Law Journal 169 at 181 who notes that dialogue theory is ‘not simply about the respective roles of courts and legislatures, but also the role of the executive and the need for increased supervision of the executive by both the judicial and legislative branches of government.’
228 Ibid.
229 Bateup (n 117) at 1118.
230 Mathen (n 217) at 130.
231 De Langa (n 15) para 60.
232 S v Dodo 2001 (3) SA 382 (CC) para 16.
233 Ibid.
234 Ngcobo (n 63) at 40.
involved in the project of creating democratic conditions.\textsuperscript{235} Ngcobo provides a useful explanation of our constitutional features that enable this dialogue – such as the power to strike down unconstitutional legislation and conduct – together with several case law illustrations in respect of each feature,\textsuperscript{236} that show how the courts and the political arms of government interact ‘in a specialised, structured way’.\textsuperscript{237} For example, in the T\textit{AC} case,\textsuperscript{238} the court found to be invalid the government policy that prevented the supply of nevirapine to public hospitals outside the areas in which the government’s pilot project was being conducted. This was not, however, the end of the matter as, ‘[i]n response to the ruling, the government committed to a comprehensive AIDS strategy that included the distribution of anti-retroviral drugs at public health facilities in 2003.’\textsuperscript{239} And so the ‘constitutional conversation’\textsuperscript{240} continues. However, as Yacoob J has recently emphasised in a speech addressing the ANC’s attempts to misconstrue the nature of this conversation: it is a conversation of a particular kind. ‘It is not about branches of government talking to each other privately and secretly to obtain a common understanding of the needs of our country.’\textsuperscript{241} For if the branches aim to speak in unison in this way it would surely amount to the dangerous ‘gleichschaltung’ – ‘the process of bringing into gear or synchrony all organs of state so as to ensure an efficient machine for the unchecked implementation of the regime’s policy’\textsuperscript{242} – that Dyzenhaus cautioned us about in 2007. Rather, the constitutional dialogue is, and must be, ‘open, structured and designed to ensure that judges are able to perform their functions independently and without fear, favour or prejudice.’\textsuperscript{243} This type of ‘conversation’ confirms and supports the judiciary’s special role in it.

4.2.2 \textbf{What’s in a name – democracy as more than the pursuit of majority rule?}

Extensive scholarship\textsuperscript{244} has shown that the ‘strength’ of the counter-majoritarian argument against judicial review rests on a particularly thin, and thus misguided, notion of

\begin{itemize}
\item Lenta (n 139) at 575. Emphasis added.
\item Ngcobo (n 63) at 43-8.
\item T\textit{AC} (n 124).
\item Ngcobo (n 63) at 47.
\item Steinberg (n 140) at 269.
\item Yacoob (n 237) at 8.
\item Dyzenhaus (n 23) at 753.
\item Yacoob (n 237) at 8.
\end{itemize}
democracy – something akin to what Mureinik suitably dubbed ‘snap-shot democracy’ – rather than the rich version of democracy necessitated by our ‘[constitutional] culture of justification’. Constitutional democracy in South Africa affords citizens something far more than the right to vote in elections every five years and thereafter leave it to the elected representatives to get on with governing in-between. As Lenta notes, democracy has both a procedural and a substantive component in that it is concerned not only with the idea of popular sovereignty, but also with the protection of substantive rights. It is concerned not only with listening to the voice of the majority, but also with giving a voice to those in the minority. As Gandhi so brilliantly put it: ‘democracy is not the “acquisition of authority by a few” but the “acquisition of the capacity by all to resist authority when it is abused”.

Our particular constitutionally-entrenched version of democracy is thus furthermore one which gives effect to the ‘normative constraints on majoritarian politics’ prescribed by the Constitution itself. It is thus meant to be truly representative, deliberative and participatory in nature, and give real meaning to our constitutional commitment to responsiveness, accountability and openness. The courts have been tasked with preserving these ‘constraints’ through the mechanism of judicial review which is thus in fact a necessary tool for achieving the prerequisites of democracy, as conceived of in the Constitution itself.

The recent Constitutional Court judgment of Ramakatsa serves as an apt, and indeed welcome, illustration of how the courts preserve the requisite elements of our constitutionally-entrenched democratic vision – in this case, the element of meaningful participation. The judgment is, in fact, an answer to Quinot’s plea in 2009 for the

\[\text{Ibid at 35.}\]
\[\text{Etienne Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 \textit{SAJHR} 31 at 32.}\]
\[\text{Geo Quinot ‘Snapshot or participatory democracy? Political engagement as fundamental human right’ (2009) 25 \textit{SAJHR} 392 at 392-3.}\]
\[\text{Lenta (n 139) at 560.}\]
\[\text{See the recent judgment of Oriani-Ambrosini, \textit{MP v Sisulu MP, Speaker of the National Assembly}, unreported case no. 16/12 [2012] ZACC 27 (9 October 2012) para 43 at which Mogoeng CJ notes that, ‘[o]urs is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless, listen.’}\]
\[\text{Moseneke (n 127) at 17.}\]
\[\text{Doctors for Life (n 65) paras 110-7.}\]
\[\text{Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) paras 74-6.}\]
\[\text{Matatiele Municipality v President of the Republic of South Africa 2006 (5) SA 47 (CC) para 110.}\]
\[\text{Moseneke (n 127) at 17.}\]
\[\text{Ramakatsa (n 93).}\]
rectification of the ‘deficit in the legal treatment of [the]... dimension of political participation’ in relation to ‘political party conduct prior to and underlying elections and subsequent political office’. Quinot noted the following: ‘[i]f party political processes are not fair and democratic it seems of little use from a participatory democracy perspective to have free choice between parties during elections’. The *Ramakatsa* judgment directly addresses this concern with Moseneke DCJ and Jafta J emphasising the following for the majority: ‘[i]t bears repeating that political parties may not adopt constitutions which are inconsistent with section 19 [of the Constitution]. If they do, their constitutions may be susceptible to a challenge of constitutional invalidity.’ The court declared the Free State provincial elective conference of the ANC to be void and unlawful on the basis of procedural irregularities within the internal democratic processes of the party which showed there to be, *inter alia*, a lack of true participation through the ‘disenfranchisement of several members of [various] branches’ of the ANC. This judgment is a welcome victory for our notion of democracy and a step in the right direction insofar as it endorses a richer and more nuanced version of democracy than that which was previously propounded in earlier judgments of the court. It also serves as an apposite epitome of the way in which judicial review can in fact *enhance* democracy and in this respect it serves to strengthen the rebuttal against the counter-majoritarian attack. As Mendes puts it, judicial review is ‘an institutional technology that stimulates a widespread practice of justification’ – a so-called ‘republic of reasons’. It should, however, be emphasised that the vast power of judicial review – which is equally susceptible to being exercised in a way which is destructive for our democracy – must thus be exercised with sensitivity to the inherent tensions within our constitutional order. This sensitivity translates not only into the formal limits of judicial review as crafted by our courts through the lens of the Constitution, but also into the level of

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257 Quinot (n 247) at 400.
258 Ibid.
259 *Ramakatsa* (n 93) para 74.
260 Ibid para 124.
261 Ibid para 112.
262 See, for example, the conservative majority decision in the case of *New National Party of South Africa v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC).
263 Mendes (n 182) at 221.
264 See *Glenister v President of the Republic of South Africa* [2008] JOL 22590 (CC) para 33: ‘our courts… not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so…. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, the courts must observe the *limits of their powers.*’ Emphasis added.
scrutiny the courts apply within these limits in terms of the twin notions of deference and variability.

5 THE DEFENSIBLE LIMITS OF JUDICIAL REVIEW – FORMAL AND FLEXIBLE RULES OF ‘RESTRAINT’

5.1 Formal rules of restraint

5.1.1 The review / appeal dichotomy

The first formal limit to judicial review is an age-old remnant in our law which stems from our unrelenting Diceyan heritage of the rule of law or ‘watchdog’ theory of government. This limit flows from review’s definitional demarcation from the process of appeal. Both of these court processes are ways in which to reconsider a decision. However they flow from contrary premises and thus have fundamentally different aims. In terms of this dichotomy, the appeal process is about determining the correctness of a decision, through an assessment of its substantive merits. It is thus considered to be a more searching court process in the sense that it requires a court to make a finding as to whether the decision-maker in question was right or wrong. Review, on the other hand, is considered a milder court procedure in terms of which the court solely considers the decision-making process in order to determine whether the outcome was arrived at in an acceptable fashion, for example, in an unbiased and rational manner.

In 1982, Lord Brightman writing for the House of Lords in *Chief Constable of the North Wales Police v Evans*, highlighted the importance of this distinction in the following terms:

‘Judicial review is concerned, not with the decision, but with the decision-making process. Unless [this] restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.’

This distinction is thus plainly a manifestation of the separation of powers, which requires that the courts ‘not substitute judgment on the merits of discretionary determinations.’

Thus, Kriel noted back in 1998 that, ‘a collapse of the distinction between appeal and review is a most radical step which, if it were to be done properly, would require a

265 Lenta (n 139) at 548.
266 Hoexter (n 25) at 109.
267 Ibid at 109.
268 [1982] 3 All ER 141 (HL) at 154d.
fundamental rethinking of our notion of separation of powers.\textsuperscript{270} In light of this concern, the courts\textsuperscript{271} – in reliance on this purported ‘bright-line distinction’\textsuperscript{272} – have continued to trot out similarly dogmatic statements to that of Lord Brightman and fall back on the ‘ritual incantation of the modest role of the judge’\textsuperscript{273} in review proceedings; notwithstanding the recurrent recognition of the fact that review in our constitutional dispensation has a (subtle) ‘substantive as well as a procedural ingredient’.\textsuperscript{274} For what it’s worth, this definitional distinction thus continues to serve as a limitation on the courts’ powers of review.

5.1.2 The constitutionally prescribed ‘judicial job description’

The second main formal limit to the courts’ review jurisdiction flows from their constitutional ‘job description’, which is primarily twofold: it requires the courts to uphold zealously the tenets of our Bill of Rights and it demands that every exercise of public power be subjected to constitutional control.\textsuperscript{275} In scrutinising the conduct of the other arms of state, and public power more generally, these are the courts’ guiding principles – they are the judicial terms of reference. The courts ought to do no more and no less; this much is demanded by the separation of powers. With this in mind, our Constitutional Court, at the dawn of our democracy, was faced with the daunting task of giving meaning to the administrative justice right – in both its constitutional guises\textsuperscript{276} – in a way that would accord with the general prescripts of this doctrine.

The court made a trailblazing effort in this regard and through something akin to a process of elimination, in the famous trilogy of cases – \textit{Fedsure, SARFU}\textsuperscript{277} and \textit{Pharmaceutical Manufacturers} – the court began concretising a constitutional concept of administrative action, premised on the separation of powers, by delineating which acts (such as those of a legislative and executive nature) fall outside this definition. This was done in light of the fact that it was recognised that a more searching form of review was to be applied to the acts of the public administration – especially given the constitutional

\textsuperscript{270} Kriel (n 18) at 96.
\textsuperscript{271} See Hoexter (n 25) at 109, fn 11-12.
\textsuperscript{272} Davis & Klare (n 147) at 501.
\textsuperscript{273} Ibid.
\textsuperscript{274} \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs} 2004 (4) SA 490 (CC) para 45.
\textsuperscript{275} O’Regan (n 33) at 126.
\textsuperscript{276} Under section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) and section 33 of the Constitution (n 11), respectively.
\textsuperscript{277} \textit{President of the Republic of South Africa v South African Rugby Football Union} 2000 (1) SA 1 (CC).
commitment to certain democratic values and principles to govern the administration – rather than to those exercises of public power that are of a highly discretionary nature and involve the formulation of policy rather than its mere implementation. The latter category of public power is not above reproach, however, and a crucial feature that emerged from this seminal trio of cases is the supple constitutional principle of legality which has proven to be a significant safeguard for the review of non-administrative action.

O’Regan has recently re-emphasised the two main constitutional constraints that flow from this principle: legality and rationality, and it would seem that our highest court in constitutional matters is now lumping these requirements together by rebranding the principle as, ‘the constitutional principle of legality and rationality.’ However, as the case law discussed below indicates, the principle of legality has come to require so much more than ‘mere’ legality and rationality, which makes one wonder whether the initial efforts of the Constitutional Court – which were in essence subsequently mirrored in the PAJA exclusions – were all in vain. As Hickman cautions, ‘public law belongs to the judges in a way that private law does not...’ So it is in its very essence an assertion of judicial independence as a check on government. The stakes are therefore high as ‘it is open to the courts to paint over what has gone before and re-draw the contours... afresh’, in accordance with the demands of our so-called living or ‘dynamic constitution’. Separation of powers theory demands that the courts thus proceed cautiously, candidly and respectfully in redrawing the boundaries of public law, for a ‘contextual [adjudicatory] approach’ too loosely conceived of ‘rubs out the distinctions between categories of case that have been painstakingly drawn in administrative law’. The latest trio of cases on rationality review seems to achieve just this: the gradual erasing of the painstakingly drawn categories of public power that fall outside the purview of administrative action. This has in turn resulted in a subversion of the PAJA and its underlying constitutional right. I deal briefly with this issue below, but first I must

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278 Section 195 of the Constitution (n 11).
279 SARFU (n 277) para 143.
280 Hoexter (n 19) at 56.
281 O’Regan (n 33) at 126.
282 Masethla v President of the Republic of South Africa 2008 (1) SA 566 (CC) para 78.
284 Ibid.
285 Yacoob (n 237).
286 Hickman (n 283) at 307.
287 Ibid.
elucidate the second form of constraint on the power of judicial review.

5.2 Due deference: the ‘flexible’ constraint on the courts’ power of judicial review

This form of constraint is essentially self-imposed by the courts and is less formal and more intangible in nature than the ‘formal rules of restraint’ canvassed above. As Lord Hoffman remarked in the case of *R (on the application of ProLife Alliance) v British Broadcasting Corporation*, ‘the Courts themselves often have to decide the limits of their own decision-making power.’

As Taggart notes, ‘[I]love the word or hate it, everyone is talking about deference.’ The notion of deference is a somewhat intangible constraint that has been described as ‘a highly impressionistic concept which is not open to scientific analysis.’

It is thus a flexible counter-weight to strong-form judicial review, in that there is no clear formula for precisely what it entails in every given case, despite academic pleas for such a ‘theory of deference’ to ‘guide judicial intervention and non-intervention’. As Sachs has so aptly put it:

‘There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but when; I would love to see a theory of when….’

The oscillation in the conception of deference – as either strict restraint (in the sense of submission) or simple respect – flows from the ‘democracy versus juristocracy debate’ and is an inescapable consequence of our legal and socio-political heritage. Thus, as O’Regan has remarked, during the darkest days of our apartheid state, the courts showed a ‘supine attitude… in the face of domineering state power’. This was patently conveyed in the judgment of Rabie CJ, writing for the majority of the Appellate Division in *Omar v Minister of Law and Order* on the question of whether, to the extent that the regulations

288 [2003] 2 All ER 977 (HL) paras 75-6.
289 Corder (n 20) at 441.
290 Taggart (n 155) at 454.
291 Ibid, quoting Beloff.
293 Brand (n 31) at 632, quoting Cockrell.
294 Cited in Lenta (n 139) at 555.
295 Kate O’Regan ‘Breaking ground: some thoughts on the seismic shift in our administrative law’ (2004) 121 *SALJ* 424.
296 1987 (3) SA 859 (A).
in question prevented detainees from consulting their legal advisors, they were *ultra vires*. He held that,

‘This indicates that Parliament contemplated the need to ensure the safety of the public… might necessitate the taking of extraordinary measures which might make drastic inroads into the rights and privileges normally enjoyed by individuals.’

As O’Regan has noted, this set the tone for judicial complicity in the massive curtailment of human rights during the emergency era, ultimately culminating in the infamous *UDF* case – which represents the ‘lowest point of our pre-democratic jurisprudence’. Given this unfortunate history, it is not hard to see why judicial deference got a bad reputation for being synonymous with a form of judicial ‘passivity’ or complaisance indicative of collusion with the political arms of state. In this respect, deference came to be associated with authoritarianism on the part of the political branches of government and a concomitant judicial ‘surrendering to political pressure’. The notion of deference as submission, or even ‘gracious concession’ therefore simply does not suffice.

Yet, deference too loosely conceived of may allow the courts to overreach in ‘no-go areas’ in breach of the separation of powers and, given the need for the judiciary to ‘insinuate itself institutionally’, it needs to avoid being ‘castigated for overreaching’. It is for this reason that Bickel spoke of the importance of certain ‘passive virtues’ in constitutional adjudication, for, inter alia, ‘[t]he task of not deciding’ is just as crucial as that of deciding and it ‘demands a subtle acuteness, an ability to know whether, when and how much to decide.’ The courts thus find themselves in the unenviable position of having to strike the right balance – of having to ensure that they display neither a ‘failure of nerve’, nor too eager a form of judicial activism. A ‘theory of deference’ – or ‘deference lite’ as Davis has put it – has been proposed as the solution to this dilemma.

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297 Ibid at 892A.
298 O’Regan (n 295) at 426.
299 *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).
300 Hoexter (n 25) at 270, fn 110.
303 *British Broadcasting* (n 288) para 75.
304 Steinberg (n 140) at 274.
305 Lenta (n 139) at 544.
306 Mendes (n 182) at 198, referring to Bickel.
307 Lenta (n 139) at 544.
308 Davis (n 301).
The particular notion of deference adopted is thus a direct correlative of how expansive a role the court will play in a given case. ³⁰⁹ Corder raised the salient point in 2004 already that the theory of deference adopted will ‘animate the drawing of the line between executive action and administrative action.’ ³¹⁰ In this respect, this ‘theory’ will either serve to limit or expand the frontiers of judicial review. Fortunately we need not fuss too much about the apposite conception of deference anymore. The Constitutional Court in Bato Star confirmed what Corder called for in the very same year: ‘let us just call it respect’ ³¹¹ This notion of deference-as-respect was originally championed by David Dyzenhaus as demanding, ‘respectful attention to the reasons offered or which could be offered in support of a decision, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency.’ ³¹² O’Regan J’s lucid judgment ³¹³ in Bato Star echoed these exact sentiments.

First, she endorsed Schutz JA’s approval, in the court a quo, ³¹⁴ of Hoexter’s eloquent account of this ‘sort of deference we should be aspiring to’ ³¹⁵ as requiring the following:

‘[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues, to accord their interpretations of facts and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped by… a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.’ ³¹⁶

Due deference thus demands that, at a minimum, the ‘formal limits’ to judicial review be respected; and all the more so in those categories of action – such as executive action with a high policy-content – that fall outside the realm of administrative action and are thus

³¹⁰  Corder (n 20) at 442.
³¹¹  Ibid at 441.
³¹³  Cf De Ville (n 143) for a criticism of the judgment on the basis that it is, inter alia, ‘a formalistic and economic reduction of plurality’, at 579.
³¹⁴  Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 (2) All SA 616 (SCA) para 47.
³¹⁶  Ibid at 501-2 and cited with approval in Bato Star (n 274) para 46.
meant to be subject to less searching grounds of review. This notwithstanding, O’Regan J then went on to note that,

“Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function”…. The use of the word “deference” may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of separation of powers itself.”

O’Regan J then elucidated what is in essence a flexible two-pronged litmus test for determining the degree of deference warranted in a particular case. Given that our doctrine of separation of powers is the starting point, the test flows from the ‘classical separation of powers requirements’ themselves. The first key element involves a recognition of the proper role of the executive and legislature within the Constitution. This is akin to what has been dubbed in the literature as the requirement of ‘democratic principle’ in terms of which the decisions of these arms of state ought to be respected insofar as they are ‘clothed with democratic legitimacy’. Jowell elucidated this requirement as necessitating ‘a normative assessment of the proper role of institutions in a democracy’. Thus, in the English Appeal Court decision of *R v Director of Public Prosecutions, ex parte Kebilene*, Lord Hope of Craighead noted the following:

‘It will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the [ECHR].’

The second element of the test for the appropriate degree of deference is that of ‘institutional competence’, which O’Regan J explains as follows: ‘a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to the other branches of government.’ This second consideration thus necessitates ‘a practical evaluation of the capacity of decision making bodies to make certain decisions’, and the

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317 *Bato Star* (n 274) para 46. Emphasis added.
318 Brand (n 31) at 616.
319 *Bato Star* (n 274) para 46.
320 See, for example, Price (n 26) at 588.
321 Ibid.
324 Price (n 26) at 588. See also Taggart (n 155) at 457 where he cites ‘comparative institutional competence’ together with ‘democratic principle’ as the ‘reasons for deference’.
325 *Bato Star* (n 274) para 48.
326 Jowell (n 322) at 330.
‘comparative institutional competence’ of the courts, relative to the other branches of
government, is a critical factor in their assessment of whether they ought to defer or not.327
As Hlophe warned at the dawn of our constitutional era, ‘[a] court cannot be a jack of all
trades’,328 and, given the institutional nature of the courts and the distinctive task of
judging, a court certainly cannot be a jack of trades that are polycentric in nature.329 This
second consideration in the ‘deference determination’ is thus directly related to the
notorious ‘polycentricity’ concern330 – a phrase coined by Lon Fuller331 to describe
decisions that affect an unknown but potentially vast number of interested parties and
which may have numerous, unpredictable and complex social and economic knock-on
effects, that will vary based on the nuances of the decisions taken. Fuller thus used the
analogy of a spider’s web to explain what makes an issue polycentric in nature: when one
strand is plucked, the whole web changes.332 Thus, as Davis notes, ‘[e]ven without a
constitutionally entrenched system of separation of powers, the complexity of
polycentricity should caution a judiciary against involving itself in the hurly burly of
polycentric tasks.’333 Such tasks are quintessentially matters that fall within the domain of
the political arms of state.

The particular considerations invoked by these two key elements, in light of the facts
of a given case, will determine the appropriate balance to be struck and thus the extent of
the court’s review jurisdiction. In this regard, deference’s twin aspiration of ‘variability’ –
a term memorably espoused by Hoexter334 – will ensure that the intensity of the judicial
scrutiny varies according to the context.335 The notion of ‘variability’ or ‘flexibility’
emphasises the importance of context. As Lord Steyn put it in the House of Lords decision
in Daly,336 ‘[i]n law context is everything’.337 The notion of variability recognises this. It
requires that, ‘[t]he depth of judicial review and the deference due… vary with the
subject-matter.’338 McLean thus propounds ‘the nature of the subject matter’ as a third

327 McLean (n 211) at 451, citing Lord Steyn.
328 John Hlophe ‘Judicial control of administrative action in a post-apartheid South Africa – Some realities’
329 Barber (n 37) at 76.
330 O’Regan (n 295) at 436.
332 Ibid.
333 Davis (n 292) at 323.
334 Hoexter (n 315) at 502.
335 Ibid.
336 R (on the application of Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (HL).
337 Ibid para 28.
338 Ibid para 32, per Lord Cooke of Thorndon.
consideration relevant in ascertaining the degree of deference warranted in a given case.\textsuperscript{339}

This in turn requires that the applicable grounds of review not be assumed to be ‘self-evident or monolithic’, but rather that, given the nature of the impugned action or inaction, and the particular legal and administrative context of it, they be applied in a nuanced or variable manner.\textsuperscript{340}

Variability has come to play a crucial role in the development and application of the prescripts of the principle of legality. In particular, ‘[t]he application of the constitutional principle of rationality varies in intensity depending on the context in which it is applied’.\textsuperscript{341} However, as the cases discussed below indicate, the ‘malleability’\textsuperscript{342} of rationality review can be both a virtue and a vice. I turn now to consider briefly what the rationality requirement is meant to entail.

6 \hspace*{1em} \textbf{RATIONAILITY: A ‘MINIMUM THRESHOLD REQUIREMENT’?}

6.1 \hspace*{1em} \textbf{Mere rationality or a ‘flexible meta-principle of substantive review’?}\textsuperscript{343} – The dangers of runaway rationality

What does rationality require? One would think this a simple question which warrants a simple answer. However our case law – particularly the recent trilogy of cases under discussion – would seem to suggest otherwise.\textsuperscript{344} Despite being a ‘constitutional baseline concept’\textsuperscript{345} – a requirement that has been advanced as ‘the most minimal of constitutional limitations’\textsuperscript{346} – that applies across the board to all exercises of public power\textsuperscript{347} irrespective of the context, rationality is seemingly becoming somewhat of ‘an accordion term’\textsuperscript{348} that invokes a variable level of judicial scrutiny pursuant to a ‘value-judgment’\textsuperscript{349} based on the circumstances. It is therefore – somewhat incongruously – accruing a

\textsuperscript{339} McLean (n 211) at 457.
\textsuperscript{340} John M Evans ‘Deference with a difference: Of rights, regulation and the judicial role in the administrative state’ (2003) 120 SALJ 322 at 323, elucidating how he understands Hoexter’s notion of ‘variability’.
\textsuperscript{341} Price (n 26) at 588.
\textsuperscript{342} Michael Bishop ‘Rationality is dead! Long live rationality! Saving rational basis review’ (2010) 25 SAPL 312 at 335.
\textsuperscript{343} Hickman (n 283) at 312.
\textsuperscript{344} For a comprehensive discussion on the confusing case law dealing with rationality review, see Price (n 7) and Bishop (n 342). Bishop (at 312) points out that given this confusion, rationality review has been criticised for being, ‘empty, toothless, inconsistent and incoherent’.
\textsuperscript{345} Price (n 7) at 346.
\textsuperscript{346} Bennett (n 123) at 1049.
\textsuperscript{347} \textit{Bel Porto School Governing Body v Premier, Western Cape} 2002 (3) SA 265 (CC) para 164.
\textsuperscript{348} Geoff Airo-Farulla ‘Rationality and judicial review of administrative action’ (2000) 24 Melbourne University LR 543 at 560.
\textsuperscript{349} Price (n 26) at 582.
This is not necessarily a bad thing – in fact many authors have readily anticipated this development350 – but it does create confusion and thus uncertainty. As Bennett notes, [c]onsistency in the use of the rationality requirement is important... because the court is no more entitled to exercise arbitrary power than [the political arms of state].351 Inconsistent and unprincipled use of the rationality requirement can thus potentially undermine the rule of law, which judicial review itself is meant to instantiate.352 This overarching principle of our constitutional order is intended, inter alia, 'to tackle arbitrary power and [it] demands rational justifications for... decisions'.353 In relation to the exercise of judicial discretion, this necessitates, at a minimum, a degree of coherence, without which the law will become 'chaotic, unprincipled and result-oriented'.354 It is for this very reason that – notwithstanding the cogency of the conceptualism / parsimony critique of our 'old administrative law',355 -administrative lawyers have endeavoured to give effect to the rule of law by creating categories or spectra, 'with a view to limiting disagreement as to the applicable principles and judicial responses to arguments and proof... and thereby restraining, somewhat, judicial choice'.356 Within the reasonableness spectrum – or 'rainbow of review', as aptly dubbed by Taggart357 – rationality review makes an appearance insofar as it is indeed a component of reasonableness;358 but it does so at the beginning of this spectrum as a minimum requirement that invokes a less searching degree of judicial scrutiny than full-blown reasonableness which is by now uncontroversially accepted to require, in addition to rationality, proportionality. However, the latest trilogy of rationality review cases seems to situate rationality closer to the end of the 'rainbow of review' – it has, to extend the same metaphor, apparently become the judge’s pot of gold.

Thus, as rationality review seemingly tends towards something more akin to full-blown reasonableness review – itself somewhat of a ‘mixed bag’ – it is accruing a

350 See, for example, Hoexter (n 2).
351 Bennett (n 123) at 1099.
352 Taggart (n 155) at 453.
353 Mendes (n 164) at 85.
354 Taggart (n 155) at 453.
355 Hoexter (n 2) at 167.
356 Taggart (n 155) at 453.
357 Ibid at 451.
358 Hoexter (n 315) at 511. See also the case of Head of Western Cape Education Department v Governing Body of Point High School 2008 (3) All SA 35 (SCA) para 15, where the court explained the relationship between rationality and the wider concept of unreasonableness.
‘substantive’ element and this is a ‘site of some controversy’\textsuperscript{359} for it draws the courts into the murky terrain of the merits, and thereby seems to render nugatory our purportedly crucial appeal / review dichotomy which is a leitmotif of the separation of powers itself. The extension of this now seemingly vacuous label does not end here, however, as this purportedly ‘non-invasive standard’\textsuperscript{360} has furthermore been extended to cover the prescripts of procedural fairness and reason-giving as well.

Given the aforesaid, the case law discussed at part 7 below suggests that the rationality requirement may be ‘masking’ and thus, in many ways exaggerating, ‘the fundamental problems of reconciling “democracy” with the role of the courts in constitutional review’.\textsuperscript{361} These cases thus not only belie the limited view of the function of rationality review originally contemplated by our Constitutional Court, but also, given their thinness of reasoning, raise more fundamental separation-of-powers concerns – despite their laudable conclusions which accord with the increasingly invoked so-called ‘interests of justice’ test.\textsuperscript{362}

The other more general complication to highlight is that, on the whole, our jurisprudence represents a somewhat frustrated grappling with slippery and thus confusing labels and interrelated concepts such as reasonableness, proportionality and justifiability.\textsuperscript{363} Thus, although a full discussion of these concepts is beyond the purview of this thesis, it is necessary to discuss them briefly in elucidating what rationality review is not. In doing so, I focus solely on the meaning of these terms in the administrative law, and broader public power review, context. But let me first return to first principles regarding rationality review under the umbrella principle of legality.

6.2 The essence of rationality

At the dawn of our new millennium, Chaskalson P in the benchmark judgment of Pharmaceutical Manufacturers authoritatively confirmed that,

> ‘It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are

\textsuperscript{359} Jeff King ‘Proportionality: A halfway house’ 2010 New Zealand Law Review 327 at 329.

\textsuperscript{360} O’Regan (n 295) at 435.

\textsuperscript{361} Bennett (n 123) at 1050.

\textsuperscript{362} Taggart (n 155) at 463.

\textsuperscript{363} See for example, regarding the conflation of rationality and reasonableness in the administrative law context, the cases of Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC) and Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2010 (5) SA 457 (SCA).
in effect arbitrary and inconsistent with this requirement.\(^{364}\)

Rationality is thus, in essence, the very converse of arbitrariness – a concept which, particularly given our apartheid scar, is abhorrent to our constitutional democracy. Ackermann J’s eloquent exposition of this reality in *Makwanyane* is worth emphasising:

‘In reaction to our past, the concept and values of the constitutional State, of the “regstaat”, and the constitutional right to equality before the law are deeply foundational to the creation of the “new order”… of reason and justification…. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future… where State action must be such that it is capable of being analysed and justified rationally.’\(^{365}\)

In this respect, the rationality requirement is a cornerstone of our constitutional state and its importance therefore should not be underestimated for, *inter alia*, it is ‘a powerful force in support of accountability, and… good government.’\(^{366}\) But nor should it be overstated, for its significance stems in large part from its simplicity: its practical usefulness flows from the fact that it is meant to serve as a ‘constitutional baseline’; not some ‘empty vessel’\(^{367}\) to be filled to capacity through the unstructured exercise of judicial discretion. For then we should perhaps call it by another name for it would surely not be rationality in the true sense after all?

According to Chaskalson P, ‘[r]ationality in this sense is a *minimum* threshold requirement applicable to the exercise of all public power’\(^{368}\) – irrespective of the *fides* of the decision-maker – and thus it does *not* offend the separation of powers.\(^{369}\) It is what is commonly referred to as a ‘bounded rationality’\(^{370}\) and its test thus involves ‘restraint on the part of the Court.’\(^{371}\) This test is a ‘relatively low one’\(^{372}\) that has as its purpose a determination of whether there is a rational connection, or nexus, between the purpose sought to be achieved (the ‘end’) and the decision or conduct pursued to achieve this purpose (the ‘means’). It thus necessitates a basic two-staged objective enquiry that

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\(^{364}\) *Pharmaceutical Manufacturers* (n 32) para 85.

\(^{365}\) *Makwanyane* (n 129) para 156. Emphasis added.

\(^{366}\) Mureinik (n 244) at 42. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25, where the court emphasised that the rationality principle is necessary ‘to promote the need for governmental action to relate to a defensible vision of the public good’.

\(^{367}\) Hickman (n 283) at 318.

\(^{368}\) *Pharmaceutical Manufacturers* (n 32) para 90. Emphasis added.

\(^{369}\) Ibid.

\(^{370}\) Airo-Farulla (n 348) at 570.

\(^{371}\) *Affordable Medicines* (n 22) para 86.

\(^{372}\) *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 67.
focuses on the structure of the decision-making process rather than the decision itself.373 First, it requires an assessment of whether the conduct or decision in question furthers a legitimate government purpose. This requirement is often referred to as ‘the legitimate purpose limitation’.374 Secondly, it requires an assessment of whether the means chosen to achieve this purpose are objectively capable of furthering it based upon the information before the administrator and any reasons given for the decision.375 This requirement is the ‘rational nexus component’ of the test and it demands just that: that there be some ‘rational objective basis’ pursuant to which the action was taken that illustrates ‘a sense of fitness of things’.376 In other words, it must be apparent that the law or conduct in question is generally fit to serve its aim and this ‘nexus’ is evidenced by the structure of the decision-making process.

Respectfully, this test thus requires less than what Price suggests. He denotes this second requirement, ‘the effect requirement’,377 and explains it as requiring that the law or conduct in question, ‘serve... that purpose sufficiently well to merit the description of bearing a “rational connection”... to it’.378 With respect, this explanation conflates the rationality test with that of proportionality insofar as it is the latter that is primarily concerned with the actual effects of the conduct,379 and thus involves a ‘substantive’ balancing analysis.380 The rationality test does not require an assessment of the correctness of the decision itself. It is not concerned with whether the means chosen serve the purpose ‘sufficiently well’. It requires solely that it be shown that the decision was made pursuant to a constitutionally legitimate ‘rhyme or reason’.381

6.3 Rationality distinguished from reasonableness

In comparison with rationality, reasonableness (or ‘justifiability’ as it was termed under

374 Bennett (n 123) at 1077.
375 This test was succinctly explained by Van der Westhuizen J in the context of legislative action in Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA 171 (CC), as follows: “[w]hat is required, in so far as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved”. This test was then again endorsed in Poverty Alleviation Network v President of the Republic of South Africa 2010 (6) BCLR 520 (CC) paras 65-6.
376 Bennett (n 123) at 1080.
377 Price (n 7) at 355.
378 Ibid. Emphasis added.
379 Hoexter (n 373) at 153.
380 Steinberg (n 140) at 278.
381 O’Regan (n 33) at 127.
the Interim Constitution\(^{382}\), which is specifically reserved for the realm of administrative action,\(^{383}\) requires something more.\(^{384}\) Despite some initial judicial timidity in hammering out precisely what this ‘something more’ is – given the review / appeal dichotomy – it is by now fairly well-settled that this supplementary enquiry is one of proportionality.\(^{385}\) This more vigorous judicial assessment requires more than a simple determination as to whether the means are rationally linked to the ends – it demands an assessment of whether the chosen means actually justify the ends pursued. In Froneman J’s celebrated formulation, this ‘extended scope of review… goes beyond mere procedural impropriety… or irrationality only as evidence [thereof]’ – it requires that ‘the action must be justifiable in relation to the reasons given’.\(^{386}\) The ‘fashionable’ and ‘flexible’\(^{387}\) principle of proportionality thus essentially requires that it be shown that the means chosen were indeed necessary and the most appropriate in the circumstances, and to this extent, ‘involves a substantive assessment’ of the action in question.\(^{388}\)

This test is aimed at avoiding ‘an imbalance’ between the adverse and beneficial consequences of an action and to encourage… [the decision-maker] to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end.\(^{389}\) It is often explained using the metaphorical claim that a sledgehammer should not be used to crack a nut.\(^{390}\) Or, to put it differently, sledgehammers should only be used ‘when nutcrackers prove impotent’.\(^{391}\) Thus, in the words of Wade and Forsyth, proportionality ‘ordains that… [the chosen] measures must not be more drastic than is

\(^{382}\) Cora Hoexter ‘Standards of review of administrative action – Review for reasonableness’ in J Klaaren (ed) A delicate balance: The place of the judiciary in a constitutional democracy (2006) 61-72 at 63 fn12: “[j]ustifiable” may have sounded safer than “reasonable”, but in fact it was widely thought to mean exactly the same thing.’

\(^{383}\) As opposed to non-administrative action such as executive action, which invokes a ‘lighter touch’ review. See Hugh Corder ‘Reviewing “executive action”’ in J Klaaren (ed) A delicate balance: The place of the judiciary in a constitutional democracy (2006) 73-78 at 75.

\(^{384}\) Note that a full discussion of development of reasonableness review in our administrative law and the nature and nuances of reasonableness review under the PAJA is beyond the purview of this thesis.

\(^{385}\) Hoexter (n 25) at 343-4 & 349 regarding the Bato Star factors giving ‘scope to the element of proportionality’. See further on proportionality JR de Ville ‘Proportionality as a requirement of the legality in administrative law terms of the new Constitution’ (1994) 9 SAPL 360 especially at 365ff. See also Clive Plasket The fundamental right to just administrative action: Judicial review of administrative action in the democratic South Africa (unpublished PhD thesis, Rhodes University, 2002).

\(^{386}\) Carephone (n 9) para 31.

\(^{387}\) Mendes (n 182) at 211.

\(^{388}\) Steinberg (n 140) at 278.

\(^{389}\) Hoexter (n 382) at 64. Emphasis added.

\(^{390}\) S v Manamela 2000 (3) SA 1 (CC) para 34.

necessary for attaining the desired result.\textsuperscript{392}

The proportionality ingredient is what distinguishes review for reasonableness from rationality review simpliciter. As Corder has so succinctly noted: ‘rationality plus (at least) proportionality equals reasonableness’.\textsuperscript{393} These concepts – despite overlapping and despite both flowing from the animating constitutional principle of accountability – thus cannot mean the same thing.\textsuperscript{394} Or so one would think.

7 A TRILOGY OF CASES THAT REVEALS RATIONALITY IN A NEW GUISE

7.1 The ‘principle of legality and rationality’ as a pathway to review – the yellow brick road?

The principle of legality evolved as a constitutional safety net to enable the review of the exercise of public power that falls short of administrative action. It was intended to, and indeed has, served as a crucial ‘backstop’ in this regard.\textsuperscript{395} But it was never intended to become ‘administrative law by another name’,\textsuperscript{396} for this would not only render the legislative efforts in enacting the PAJA as well as the constitutional right underpinning it redundant, but would also run counter to the very essence of our doctrine of separation of powers. What is the point of carefully delineating a realm of action subject to a higher standard of review if in fact all forms of public power, irrespective of their discretionary and policy content, stand to be reviewed in terms of the same standards? What is the point of having carefully crafted ‘limits’ to judicial review anchored within the prescripts of our constitutional order? The answer is of course that separation of powers is but one prescript of our constitutional order with all its inherent tensions – accountability, transparency and, according to Ngcobo J, the principle of ‘fundamental fairness’\textsuperscript{397}– and these principles require a more rigorous rationality analysis when the circumstances so demand in accordance with the notion of variability.

This may be so, and it is not necessarily a bad road to be heading down – in fact, given that our courts\textsuperscript{398} and academics alike have embraced this path it clearly has its

\textsuperscript{392} Ibid at 178, quoting Wade and Forsyth.
\textsuperscript{393} Corder (n 20) at 443.
\textsuperscript{394} Pillay (n 309) at 420.
\textsuperscript{395} Hoexter (n 25) at 248.
\textsuperscript{396} Plasket (n 385) at 164.
\textsuperscript{397} Masethla (n 282) para 179.
\textsuperscript{398} Hoexter (n 25) at 356 aptly describes the principle as ‘the judges’ darling’.
benefits – but it is equally a path not free of potholes. It is not the yellow brick road. This ‘parallel universe’\(^{399}\) of administrative law results in uncertainty for lay persons and civil servants alike. The purported simplicity of this additional ‘pathway to review’\(^{400}\) is seemingly resulting in its own form of complexity. Its failing is ironically the opposite of the PAJA: where the latter has been too narrow in scope, the principle of legality risks becoming too broad. Given this risk, when invoking it by straining the rationality requirement to cover the more onerous yet quintessential administrative law grounds, the courts must at the very least engage in the requisites of reasoning from separation of powers as canvassed above. The factors necessitated by this enquiry (‘democratic legitimacy’ and ‘institutional competence’)\(^{401}\) must at least meaningfully form part of the court’s analysis. This flows from the fact that, particularly in cases (such as those under discussion) which have an inescapably ‘political dimension’,\(^{402}\) judges must, in the course of adjudication, ‘keep in mind the nature of the judicial role as it relates to questions of separation of powers’\(^{403}\) for, as Lenta notes, ‘there is a difference between judicial supremacy and judicial sovereignty’.\(^{404}\) As the rationality requirement burgeons into something quite unlike that which it was originally intended to be, a judicial self-awareness of the courts’ appropriate role in rationality review becomes all the more important. Bennett thus noted the following, in the American context, in 1979:

> ‘The rationality requirement poses all the recurrent questions of the proper place of the judicial veto in our scheme of government. And it poses those questions in extreme form because the tasks the requirement demands of the Court are relatively undefined.’\(^{405}\)

The latest trilogy of cases epitomises the rationality requirement’s lack of definitional clarity and evidences the fact that the courts are, to a large extent, themselves to blame for this. Where rationality review invokes the separation of powers, and thus necessitates a balancing, or contextual, adjudicatory approach flowing from our notion of deference, the courts need to proceed with ‘self-awareness and candour’.\(^{406}\) Their reasoning must display analytical clarity by rendering ‘more transparent or intellectually

\(^{399}\) Ibid at 124.  
\(^{400}\) Ibid at 114.  
\(^{401}\) See the discussion at 5.2 above on these ‘classical separation of powers requirements’, as per Brand (n 31) at 616.  
\(^{402}\) Venter (n 142) at 65.  
\(^{403}\) Lenta (n 139) at 575.  
\(^{404}\) Ibid.  
\(^{405}\) Bennett (n 123) at 1088  
\(^{406}\) Davis & Klare (n 147) at 497.
honest the legal standard that is being applied’,407 for, ‘[c]ourts should after all, articulate the reasons for their decisions with the greatest possible precision.’408 As Corder has noted, ‘our climate of constitutional justification requires justification for the exercise of judicial power as much as any other sort of power.’409 Against this backdrop, I turn now to consider the maximising of this so-called ‘minimum’ requirement of rationality, in the recent trilogy of apex court judgments.

7.2 Maximising ‘mere’ rationality review

7.2.1 An extension of rationality to procedural fairness: Albutt v Centre for the Study of Violence and Reconciliation

Before I turn to discuss the Albutt judgment, it is necessary to canvass briefly the salient aspects of its precursor in which Ngcobo J laid the groundwork for what was to come. Justices Moseneke and Ngcobo appear to be at loggerheads regarding the link between rationality and procedural fairness. Writing for the majority of the court in the 2008 decision of Masethla411 – a case which concerned then President Mbeki’s decision to dismiss Mr Masethla from his position as head of the National Intelligence Agency – Moseneke DCJ vehemently emphasised that ‘procedural fairness is not a requirement [of the constitutional principle of legality]’412 and thus the President’s executive decision could not be reviewed on this basis. He insisted that, ‘[i]t would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action.’413 How then did Ngcobo J, writing for the minority, find the very opposite to be the case? He essentially employed the founding constitutional value of the rule of law which he elucidated as having a ‘procedural component’414 by virtue of its implicit requirement of non-arbitrariness. This latter requirement, so he reasoned, which ‘is not limited to non-rational decisions… refers to a wider concept and deeper principle: fundamental fairness.’415

What supported this argument? According to Ngcobo J, the use of the notion of

407 King (n 359) at 334.
408 Jowell (n 250) at 127
410 Albutt (n 3).
411 Masethla (n 282).
412 Ibid para 78.
413 Ibid para 77.
414 Ibid para 178.
415 Ibid para 179.
fairness throughout our Constitution, which notion he purportedly elevated to a free-standing requirement. This approach, it is respectfully submitted, may accord with what justice demands in a given case and it is certainly strengthened in the public law context, but it does not seem water-tight.\footnote{Cf Krüger (n 23) at 486, who praises this approach on the part of Ngcobo J.} Our courts have emphasised – albeit in a different context – that although fairness ‘runs like a golden thread throughout the Bill of Rights’,\footnote{\textit{Nyandeni Local Municipality v Hlazo} 2010 (4) SA 261 (ECM) para 78. Note that this case arises out of a distinguishable factual setting. It deals with fairness in the context of an employment contract between a municipality and the erstwhile municipal manager, Mr Hlazo.} it is used merely as an adverb or adjective and ‘is not an independent or substantive constitutional right’.\footnote{Ibid.} Fairness is at best an ‘overarching’ constitutional norm rather than a specific stand-alone constitutional requirement.\footnote{See \textit{Bredenkamp v Standard Bank of South Africa Ltd} 2010 (4) SA 468 (SCA), which also arises in the contractual context, and echoes the views expressed in \textit{Hlazo} by emphasising that fairness is a mere overarching principle in our Constitutional order; not a free-standing requirement.} Nonetheless, Ngcobo J – an avid supporter of the principle of legality and frequently at the expense of the PAJA\footnote{Hoexter (n 25) at 136.} – boldly sought to use principle to further justice and this should be commended. Reasoning in the language of the common law he used the ‘obverse facet’\footnote{Ibid at 122.} of the common law principle of legality – the ‘descriptively dubious’\footnote{O’Regan (n 295) at 431.} \textit{ultra vires} doctrine – to read in the common law requirements of natural justice, thus concluding that the maxim of \textit{audi alteram partem}, ‘is essential to rationality, the sworn enemy of arbitrariness’.\footnote{\textit{Masethla} (n 282) para 187.} This principle is triggered, so he reasoned, ‘whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.’\footnote{Ibid.}

This is common law parlance in its truest form and while its application in this case may seem to accord with what ‘justice demands’, one cannot but wonder whether this approach is really apposite given our fully-fledged and carefully crafted Bill of Rights and given Chaskalson P’s stern reminder in \textit{Pharmaceutical Manufacturers} that the dawn of the constitutional era was a ‘legal watershed [that] shifted constitutionalism, and with it all aspects of public law, from the realm of the common law to the prescripts of a written constitution which is the supreme law’.\footnote{\textit{Pharmaceutical Manufacturers} (n 32) para 45.} Ngcobo J’s judgment is arguably indicative of a judicial tendency to hover in a ‘common-law time warp’ – a somewhat worrisome trend,
given that although ‘the principles of our common law… continue to be of relevance… we should neither overstate nor understate their value’. Currie attributes this tendency to, *inter alia*, a judicial reticence to embrace the PAJA – what he aptly calls, a case of the ‘PAJA blues’. Ngcobo J’s jurisprudence is seemingly becoming symbolic of a severe case of these blues. Nonetheless, given that the PAJA exclusion in question removed the impugned conduct from its purview in this case, Ngcobo J cannot be faulted for his actual choice of ‘pathway to review’. The learned Judge thus adamantly concluded that, ‘the rule of law imposes a duty on those who exercise executive powers, not only to refrain from acting arbitrarily, but also to act fairly when they make decisions that adversely affect an individual.’

In *Albutt*, Ngcobo – now in the position of Chief Justice – adopted a somewhat more restrained approach. This case also concerned an executive decision of then President Mbeki, who, acting pursuant to section 84(2)(j) of the Constitution sought to introduce a special pardoning dispensation to enable political prisoners to apply for a presidential pardon. The dispensation was aimed at addressing the ‘unfinished business’ of the Truth and Reconciliation Commission (‘TRC’) to promote nation-building and national reconciliation and ‘make a further break with matters which arise from the conflicts of the past’. Despite these commendable aims, none of the relevant documents pursuant to which this dispensation was sought to be introduced, made reference to the victims of the crimes and in particular their right to be heard in the process. In fact, correspondence from the Office of the President indicated that he had decided that ‘the victims were not going to be allowed to make representations’. On appeal from the high court, the Constitutional Court had to decide whether the tenets of procedural fairness found application in this instance and, if so, whether they had been breached. Unsurprisingly, given his judgment in *Masethla*, and building on the foundations laid in the case of

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426 O’Regan (n 295) at 437.
427 Iain Currie ‘What difference does the Promotion of Administrative Justice Act make to administrative law?’ 2006 *Acta Juridica* 325.
428 See the discussion below (n 437) on his obvious avoidance of the PAJA in *Albutt*.
429 *Masethla* (n 282) para 76.
430 Ibid para 180.
431 *Albutt* (n 3) para 4.
432 Ibid para 7.
433 Ibid para 45.
434 *Centre for the Study of Violence and Reconciliation* v *President of the Republic of South Africa* unreported case no. 15320/09 [2009] ZAGPPHC 35 (29 April 2009).
Chonco, Ngcobo CJ held this to be the case – although he was more conservative than in Masethla in that he strictly, and explicitly, limited audi as an element of rationality to the unique factual matrix in question.

Without engaging the PAJA enquiry – this time unapologetically and, as Hoexter notes, unwarrantably – Ngcobo CJ employed the principle of legality and in particular, its rationality requirement, to subject the President’s decision to what he felt was the appropriate level of scrutiny in these specific circumstances. This level of scrutiny was more onerous than that required by the ‘minimum threshold test’ of rationality in two key respects and thus the rationality requirement was expanded in two ways. First, by virtue of the constitutional values of accountability, responsiveness and openness, and given the context-specific features of the special dispensation, which was analogous to the TRC process, victim participation was essential and thus, ‘as a matter of rationality… the victims… [had to] be given the opportunity to be heard in order to determine the facts on which pardons… [were] based.’ Rationality was thus expanded to include procedural fairness – and in the context of executive action of the highest order. One cannot help but feel that, in the circumstances, this outcome accords with what Hoexter explains should be a guiding consideration when it comes to the exercise of public power: the interests of justice. Price, however, argues that the extension of rationality to cover procedural fairness ‘was in no way compelled as a matter of logic, by the relevant constitutional rules, principles and values. Instead it was the result of a decisive exercise of judicial discretion which ran directly counter to the wishes of the President and the Minister’.

Secondly, Ngcobo CJ reasoned that given the specific purposes of the special dispensation, which were evidently akin to those of the TRC process, the means chosen

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435 Minister for Justice and Constitutional Development v Chonco 2010 (4) SA 82 (CC) para 30, where the court held that the President’s power to confer pardons ‘entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay’.

436 Albutt (n 3) paras 75-6.

437 See Hoexter (n 25) at 136, where the author cites this case as, ‘an example of explicit and deliberate avoidance of the PAJA and its definition of administrative action.’ Hoexter goes on to criticise the judgment on the basis of its ‘blunt and unapologetic… avoidance of the PAJA… expressed in [the] characterisation of the PAJA inquiry as an “ancillary” issue’. Ngcobo CJ’s judgment in Albutt is thus an apt epitome of ‘the PAJA blues’.

438 Albutt (n 3) para 71.

439 Ibid para 72.

440 Hoexter (n 19) at 64: ‘Reliance on a general doctrine [like the principle of legality] takes the courts back to first principles and encourages them to ask the most fundamental question: What does justice require in these circumstances?’.

441 Price (n 26) at 587.

442 Albutt (n 3) para 55.
to pursue these ends had to, at the very least, involve victim participation. Ngcobo CJ thus held that,

‘The principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process…. As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.’

This type of reasoning is more akin to a fully-fledged proportionality analysis rather than a mere ‘rhyme or reason enquiry’ and in this respect the rationality requirement appears to have been further extended. Hoexter thus notes that, ‘the focus on the means selected apparently extends the notion of rationality to process as well as outcome’, in that the court seemed intent on requiring more suitable means to achieve the desired end. Although Ngcobo CJ engages the separation of powers issue, his doing so is almost superfluous given his reasoning on the merits. He notes 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.’

This lucid reasoning notwithstanding, Ngcobo CJ appears not to practice what he preaches for in mandating victim participation he seems to have more ‘appropriate means’ in mind than those contemplated by the presidency. Again it should be emphasised that although the outcome in this decision accords with our constitutional commitment to a ‘culture of justifiability’ and our sense of what justice requires, Bishop’s concern nonetheless seems an apposite criticism in this case: ‘there is a massive gap between the rhetoric of courts which emphasises the mechanical nature of the [rationality] test, and the degree of discretion courts in fact exercise. The lack of transparency is an evil in itself.’

It would seem Ngcobo CJ did not, however, have the last word on procedural fairness in the context of rationality review, for in the case of Law Society of South Africa v The Minister for Transport, which was handed down by the Constitutional Court a few months later, Moseneke DCJ again reiterated that, ‘fairness is not a requirement in the rationality enquiry’.

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444 Hoexter (n 19) at 61.
445 Albutt (n 3) para 51.
446 Bishop (n 342) at 337.
448 Ibid para 39.
7.2.2 An extension of rationality to the duty to give reasons: *The Judicial Service Commission v The Cape Bar Council*\(^{449}\)

In this appeal from the Western Cape High Court (‘WCHC’), the Supreme Court of Appeal, had to tackle, *inter alia*, the question of whether the rationality requirement, under the principle of legality, entails a general duty to give reasons. This question arose pursuant to the JSC’s failure to produce reasons for its decision not to recommend any of the unsuccessful candidates for appointment to the two remaining vacancies on the bench of the WCHC, notwithstanding the fact that the shortlisted candidates were strongly supported by the General Council of the Bar on the basis that they were ‘fit and proper’ persons as contemplated by section 174(1) of the Constitution.\(^{451}\) In a strongly worded unanimous judgment delivered by Brand JA, this apex court answered this question in the affirmative and thereby seems to have heeded Hoexter’s plea ‘to generate’ the duty to give reasons ‘in respect of non-administrative action’.\(^{452}\) This finding also addresses the criticism that has been levelled against the JSC on the basis that its confidential deliberations have frequently led to ‘the JSC’s reasons for preferring one candidate over another… not always [being] clear.’\(^{453}\) The conclusion reached in this case is therefore a victory for our constitutional commitment to openness and accountability.

In reaching this conclusion, the court essentially proceeded as follows. First, it noted that the JSC’s powers flow from, *inter alia*, the Constitution itself and as such it is under a ‘constitutional duty to exercise its powers in a way that is not irrational or arbitrary.’\(^{454}\) Secondly, by virtue of the fact that the JSC is an organ of state for the purposes of section 239(b) of the Constitution, it is bound to fulfil its important public function in accordance with the ‘values of transparency and accountability’ as contemplated by section 195 of the Constitution.\(^{455}\) Given these two premises, the inescapable ‘inference of an obligation to give reasons’\(^{456}\) could not be avoided: a ‘constitutional right’ to rational decision-making is redundant if one is unable to know the reasons for such decisions and ‘it is difficult to think of a way to account for one’s decisions other than to give reasons’.\(^{457}\) Thus, the twin

\(^{449}\) *JSC* supra note 4.

\(^{450}\) *Cape Bar Council v Judicial Service Commission* [2012] 2 All SA 143 (388).

\(^{451}\) *JSC* (n 4) para 37-9; this was accepted as common cause between the parties.

\(^{452}\) Hoexter (n 19) at 62. See also Plasket’s call for this general duty in *Wessels v Minister for Justice & Constitutional Development* 2010 (1) SA 128 (GNP).

\(^{453}\) Wesson & Du Plessis (n 28) at 193.

\(^{454}\) *JSC* (n 4) para 43.

\(^{455}\) Ibid.

\(^{456}\) Ibid para 44.

\(^{457}\) Ibid.
aspirations of rationality and accountability respectively, necessitated the recognition of a ‘general rule’ in terms of which the JSC is ‘obliged to give reasons for [a]… decision not to recommend a particular candidate if properly called upon to do so’.  

The court was fortified in adopting this approach based on the reasoning in two earlier cases – both of which dealt with the duty to give reasons in the context of administrative decision-making. First, the court referred with approval to the minority judgment in the case of Bel Porto in which the duty to give reasons was hailed as ‘an indispensable part of a sound system of judicial review’. And secondly, the court relied upon the lucid three-pronged analysis of Schutz JA in Transnet Limited v Goodman Brothers (Pty) Ltd, in which it was emphasised that, ‘the duty to give reasons entails a duty to rationalise the decision’. The JSC’s meek assertions that none of the candidates obtained a majority vote and that its voting procedure necessitated voting by secret ballot could not avail the JSC, for, so Brand JA held, this crucial public body ‘is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment.’ It is thus, as a ‘matter of general principle’ obliged to give reasons for its decisions not to do so and its failure, in this case, to do so was irrational and unlawful.

And so, the rationality requirement under the principle of legality was further expanded – interestingly beyond even the prescripts of what is required in terms of the rationality test under the PAJA. On balance, the development of the constitutional rationality requirement to include the general duty to give reasons is a laudable development. In particular, in relation to the JSC’s decision-making process, it is to be welcomed given that ‘a key underlying rationale for the creation of the JSC was to establish a more open and independent appointment process.’ However, it is submitted that this development – however laudable it may be – has been made without any

458 Ibid para 45.
459 Bel Porto (n 347) para 159.
460 2001 (1) SA 853 (SCA) para 5.
461 Ibid.
462 JSC (n 4) para 38.
463 Ibid paras 47-50.
464 Ibid para 51.
465 Ibid.
466 Section 6(2)(f)(ii) of the PAJA requires, inter alia, that the administrative action be rationally connected to ‘the reasons given for it by the administrator’. The rationality test itself does not mandate the actual giving of reasons, which is a separate requirement under section 5. Hoexter notes that the rationality test under the PAJA is ‘a thorough and searching ground of review that gives generous effect to the element of rationality required by s 33 of the Constitution’. See Hoexter (n 373) at 158.
467 Wesson & Du Plessis (n 28) at 193.
engagement with the requisites of our doctrine of separation of powers and is thus not sufficiently nuanced. The unique and ‘pivotal’\textsuperscript{468} public power exercised by the JSC is clearly of a hybrid nature – its process is one of ‘adjudication of the highest order’,\textsuperscript{469} yet aspects of this process (evidenced in part by the composition of this body) are clearly linked to the policy formulation function of the executive. It is surely for this reason that our legislature saw fit to exclude its functions from the purview of the PAJA.\textsuperscript{470} Given this reality, the court ought at least to have engaged with the tenets of our ‘theory of deference’ as canvassed above. Its failure to do so undermines its own commendable conclusion.

7.2.3 Rationality as proportionality: Democratic Alliance v The President of the Republic of South Africa\textsuperscript{471}

This Constitutional Court judgment has brought a close to the soap-opera-like saga and disturbing sequence of events surrounding the ejectment of Mr Pikoli from his seat as National Director of Public Prosecutions (‘NDPP’) and President Zuma’s dubious appointment of Mr Simelane in his stead, notwithstanding the broad factual matrix irrefutably pointing to the latter’s lack of fitness for the office. Aside from bringing this debacle to a close, it is a benchmark judgment – albeit one not without shortcomings – for all kinds of reasons. A full discussion of all these ‘highlights and lowlights of Simelane’ is beyond the purview of this thesis. Suffice it to note briefly the following.

The case is an apposite example of the pathology of one-party dominance, for a simple reading of the facts reveals President Zuma’s decision to appoint Mr Simelane to be plainly absurd in the circumstances and thus certainly not one that would have been made in the absence of this executive (ANC) dominance. This judgment thus, in turn, epitomises the crucial role that our courts have to play in, \textit{inter alia}, holding the executive to account. It thereby serves as a firm reminder that the judiciary’s sacred place in our constitutional order must be protected. It is also a victory for the rule of law which, as Advocate Trengrove SC’s gruelling witness cross-examination so patently reveals, was under threat of being ‘seriously violated by the [questionable] actions of the national executive’.\textsuperscript{472} This judgment, read together with that of the SCA \textit{a quo},\textsuperscript{473} serves as a

\begin{footnotesize}
\begin{enumerate}
\item Certification Judgment (n 10) para 120.
\item Cape Bar Council (n 450) para 90.
\item JSC (n 4) para 19.
\item Simelane (n 5).
\item Venter (n 23) at 641.
\item Democratic Alliance v President of the Republic of South Africa 2012 (1) SA 417 (SCA).
\end{enumerate}
\end{footnotesize}
strong admonition that no-one is above the law – not even the President\(^{474}\) – insofar as ours is a government of laws; not of men or women.\(^{475}\) It serves as a firm reminder that corruption is abhorrent to our constitutional ethos and will not be tolerated, and it elucidates what will no doubt going forward serve as the litmus test for determining fitness and propriety for the purposes of the appointment of the NDPP.\(^{476}\)

For present purposes, this case is salient insofar as it deals directly with various key aspects of the constitutional requirement of rationality under the principle of legality. \textit{Inter alia}, Yacoob ADCJ – in something of an about-face given his highly deferential approach to rationality in the \textit{New National Party} case\(^{477}\) – tackles four key issues pertaining to rationality. In assessing whether the President’s decision to appoint Mr Simelane was rational – which he holds it was not – he addresses the following:

\begin{quote}
‘(i) The distinction between reasonableness and rationality and the relationship between means and ends; (ii) whether the process as well as the ultimate decision must be rational; (iii) the consequences for rationality if irrelevant factors are ignored; and (iv) rationality and the separation of powers.’\(^{478}\)
\end{quote}

Regarding the first issue, Yacoob ADCJ notes that, ‘it is useful to keep the reasonableness test and that of rationality conceptually distinct\(^{479}\) despite the inevitable ‘overlap’ between these two enquiries. Where reasonableness review is generally concerned with the decision itself, rationality review requires a mere ‘evaluation of a relationship between means and ends’ in order to determine whether a \textit{link} exists between the two which evidences ‘a rational relationship’.\(^{480}\) This is all that is required for an executive decision to be constitutional in this regard. \textit{This conclusion notwithstanding}, as to whether the irrationality ground covers ‘irrationality in \textit{process} and in merits’,\(^{481}\) Yacoob ADCJ openly, and somewhat incongruously – given the aforegoing conclusion – holds that it indeed does: ‘[i]t follows that both the process by which the decision is made and the decision itself must be rational.’\(^{482}\) He relies on the \textit{Chonco} and \textit{Albutt} decisions in

\(^{474}\) Ibid para 44, where the following worrisome remark by President Zuma is quoted: ‘I am the person, as the President of the Republic, to be satisfied that the person is fit and proper.’ This statement is indicative of an unfortunate inclination on the part of the executive to view itself as being above the law.

\(^{475}\) Ibid para 66.

\(^{476}\) \textit{Simelane} (n 5) paras 21-6.

\(^{477}\) \textit{New National Party} (n 262). See Roux (n 28) at 126 for an interesting comparison between Yacoob J’s somewhat timid analysis of the rationality requirement (given the fact that it was engaged in relation to the fundamental right to vote) with the bold approach adopted by O’Regan J in her ‘powerful dissent’.

\(^{478}\) \textit{Simelane} (n 5) para 12b.

\(^{479}\) Ibid para 29.

\(^{480}\) Ibid para 32.

\(^{481}\) Ibid para 33.

\(^{482}\) Ibid para 34. Emphasis added.
support of this finding. But it is by no means apparent how the extract he quotes from Chonco, shows that this conclusion necessarily ‘follows’. This thinness of reasoning is disappointing. As Botha cautions, judges should avoid ‘sloppy interpretive work’ which usually stems from the false assumption that ‘the meaning of words and phrases is somehow transparent… [so] there is no need to spell out how the court arrived at its conclusion’.  

Interestingly, Yacoob ADCJ takes this conclusion one step further by holding that in assessing whether the process chosen is rational ‘everything done in the process of taking that decision’ stands to be assessed and if a single step in the process ‘as a whole’ bears no relation to the purpose for which the power is conferred, the absence of this connection will colour the entire process and hence the ultimate decision with irrationality.  

Regarding the question whether a failure to ignore relevant considerations vitiates the decision with irrationality, Yacoob J continues to move boldly in favour of expanding the frontiers of rationality review. He holds that,

‘If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.’

Finally, in dealing with how the separation of powers affects rationality review, Yacoob ADCJ bizarrely holds, without more, that it simply does not. Despite having developed a rationality test under the constitutional principle of legality uncannily familiar to the justifiability (ie proportionality) – test elucidated by Froneman J in Carephone, he nonetheless holds that ‘it is evident that a rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions’. On this basis he concludes that it is ‘difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry’. Given the content he actually gives to this enquiry this conclusion seems, with respect, somewhat absurd, rather than ‘evident’. He reaches this conclusion insofar as the case is premised on ‘mere’ irrationality grounds –

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484 Simelane (n 5) para 36. Emphasis added.
485 Ibid para 37.
487 Corder (n 20) at 442.
488 Carephone (n 9) paras 31-7.
489 Simelane (n 5) para 42.
490 Ibid para 44.
yet they have clearly been ‘dressed up in proportionality clothes’ and as Hickman notes, this cannot be done ‘without making them look more than faintly ridiculous’.

Yacoob ADCJ then proceeds to refute the claim that the rationality enquiry in the context of executive decision-making involves a lower threshold than in the administrative context and concludes simply that ‘[r]ationality does not conceive of differing thresholds.’ This finding is also counterintuitive given his initial conclusion, based on our ‘rhyme or reason’ rationality jurisprudence, that this ‘minimum threshold test’ aims to achieve the proper balance between the role of the courts and that of the political arms of state. Hoexter has noted that we should pay attention to what judges do rather than what they say. What Yacoob ADCJ seems to do is expand the rationality requirement to something more akin to the ‘hard look review of reasonableness’ despite initially holding that they are conceptually distinct, in a way which clearly ought to invoke meaningful engagement with the separation of powers. Yet what he says is quite the contrary. This is disappointing.

One empathises with the court, however, given that the case came before it not pursuant to a trial in which the fitness and propriety of Mr Simelane were directly assessed based upon hard legal criteria. Rather, all the surrounding facts – evidenced by, for example, the extracts from the Ginwala Commission Report and as so poignantly canvassed in the extensive quotes from Advocate Trengrove SC’s cross-examination – clearly showed him to be the very opposite of fit and proper. The court thus found itself between a rock and a hard place, for although Yacoob ADCJ did not hesitate to point to ‘Mr Simelane’s [lack of] credibility, honesty, integrity and conscientiousness’, given how the case evolved and was pursued a quo, the court was hamstrung by the process and could not in this instance make a finding in law against Mr Simelane. Instead, in what appears to be an exercise in judicial pragmatism – arguably to protect our substantive conception of democracy itself – Yacoob ADCJ employs a kind of ‘rationality review on steroids’ to examine the process pursuant to which President Zuma appointed Mr

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491 Hickman (n 283) at 323.
492 Ibid.
493 Simelane (n 5) para 44.
494 Ibid para 42.
495 Hoexter (n 315) at 512.
497 Simelane (n 5) para 86.
Simelane and *thereby* concludes that this ‘rendered the ultimate decision irrational’.498

King has noted that judges often tend to act like Humpty Dumpty who, in the Lewis Carroll classic, remarked: ‘When *I* use a word… it means just what I choose it to mean – neither more nor less.’499 This cannot be so with judging, which requires *meaningful* justification – in the form of sound reason-giving – just as administrative, legislative and executive decision-making requires justification. By repeatedly emphasising that he is applying a non-invasive ‘mere’ rationality standard, when Yacoob ADCJ is clearly applying a more invasive standard, does not enhance his reasoning – on the contrary, it seems to call it into question by highlighting its thinness. Thus, given Hoexter’s sage advice, that judges’ ‘actions’ speak louder than their words, perhaps we ought simply to see this judgment for what it is: an expansion of the rationality requirement to include a form of proportionality and, sadly, in the absence of any meaningful engagement with the separation of powers.

8 CONCLUSION

Over a decade ago and in the wake of the disappointment on the part of South African administrative lawyers faced with the ‘lost opportunity’500 of the PAJA, Hoexter, in her typically prophetic manner, predicted the following: ‘[t]he judicial control of public power is likely to flourish… in spite of the narrow definition of administrative action: one way or another, the courts will be able to impose principles of legality on officialdom.’501 I have sought to illustrate in this thesis that this prediction has come to pass due to the burgeoning and seemingly inexhaustible principle of legality, through its rationality requirement, and the corresponding expansion of the frontiers of judicial review. On the one hand, the cases discussed show this to be a blessing: abuses of political power cannot seep through the cracks and will be struck down with boldness in the name of constitutional supremacy. In this respect they highlight the crucial role of our courts, within the separation of powers – given the worrying trend of creeping executive dominance and the concomitant impotency of parliamentary oversight – to serve as the vital check against such abuses. Yet, on the other hand, the irony of this boldness is that it is in part indicative of a lack of sensitivity to the tenets of our doctrine of separation of powers and the type of deference required by it. Such laudable outcomes ought not to be

498 Ibid.
499 King (n 359) at 344, quoting from Lewis Carroll’s *Through the looking-glass* (1977) chapter 6.
500 Hoexter (n 315) at 495.
501 Ibid at 519.
coloured by penetrable judicial reasoning. Particularly where politics seeps into the courtroom, an effort must be made to ensure that the court shows it is engaging with the requisites of striking the ever-delicate balance and not engaging the ‘jurisprudence of exasperation’.502 A year ago, O’Regan predicted that such a jurisprudence, ‘might result in the requirements of rationality being unduly tightened’.503 The cases canvassed above indicate that these requirements have indeed been tightened, and arguably not unduly, but in the absence of the kind of rigorous and honest separation of powers analysis that our Constitution demands. Do the means justify the ends? We shall have to wait and see.

502 O’Regan (n 33) at 133.
503 Ibid.
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