NAVIGATING THE STRAITS OF DEFERENCE: DEFINING THE APPROPRIATE JUDICIAL ROLE IN A TRANSFORMING SOUTH AFRICA

Hugh Corder*

Abstract: Judicial review of the constitutionality of the exercise of public power in South Africa has brought with it inevitable tensions between the different branches of government. The Constitution does not expressly set out the limits of the doctrine of the separation of powers, so the courts have developed them over the last 24 years. It is argued that this jurisprudence can best be understood if analysed in two periods: from 1994 to 2009 and from 2009 to the present. The primary avenues through which the doctrine has been developed have been based on litigation seeking first to enforce socioeconomic rights, and second to curtail unconstitutional and sometimes corrupt official conduct. The judiciary has inevitably been forced into an activism which could threaten its independence, but it is argued that the courts have remained overwhelmingly faithful to the constitutional project. The resultant content of the doctrine of the separation of powers is thus relatively exceptional.

Keywords: South Africa; deference; socioeconomic rights; lawfare; judicial activism

I. Introduction

“There shall be a separation of powers between the Legislature, the Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness …”

* BCom LLB (Cape Town), LLB (Cantab), DPhil (Oxon); Professor of Public Law, Faculty of Law, University of Cape Town.
He has been the Dean of Law (1999–2008), Advocate of the High Court of South Africa, Fellow of the University of Cape Town (2004–till date) and Technical Adviser in the drafting of the first Bill of Rights for South Africa in 1993. Some of the first section was written for the Geoffrey Sawer Memorial Lecture which he delivered at the Australian National University on 12 November 2009, which was not published. He is indebted to Calli Solik for her expert research and editorial assistance.
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1 Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution) Sch.4, Constitutional Principle VI.
"I think that there is a danger of the Judiciary entering into the field of the Executive, but vice versa there are signs of the Executive encroaching on the Judiciary. They should both mind their steps."  

Many of those who analyse and write about public governance in South Africa lay claim to an “exceptionalist” stance. This stance posits, in other words, that the South African experience of the past 25 years should be assessed against a special, if not unique, set of benchmarks, given the appallingly unjust legality which characterised colonialism and apartheid and given the epic status of the transformative constitutional compact which spared South Africans some of the worst destruction and suffering that may have emanated from continued state violence faced by armed resistance and popular anarchy. Furthermore, the “exceptionalist” stance posits that critical appraisals should be tempered by the magnitude of the inequality and injustice inherited by the post-apartheid government, and thus that government practice and achievements ought not to be too harshly reviewed.

Whether one subscribes to this approach or not, no one can justifiably argue that, in the light of the way in which public governance has developed in democratic South Africa since 1994, a more prominent role for the judicial branch of government has become both expected and necessary to assist not only in effectively regulating the exercise of public power by the other two branches of government but also in advancing the transformative ethos of the Constitution. This development tracks the trend internationally. In the discussion that follows, I examine the way in which these imperatives have shifted the emphasis in the judicial approach to the doctrine of the separation of powers. In particular, I study the effects of the pursuit of the realisation of socioeconomic rights promised in the Constitution, as well as the resort increasingly taken to litigation by those seeking to hold Parliament and the executive to the required constitutional values of “accountability, responsiveness and openness”. I do this in the context of the past, described very briefly; I then attempt to sketch the expression given to the doctrine of the separation of powers in the Constitution through a number of leading judgments in two periods and analyse critically how the doctrine has been interpreted generally. But with particular regard to the enforcement of socioeconomic rights and the increasing resort to “lawfare” to hold the government to account for its constitutional duties, I argue that the nature of the South African transition, added to the desperate need for judicial activism in the face of lethargy, incompetence and corruption in the other branches of government, make it an exceptional case study indeed. Almost inevitably,


4 Constitution of the Republic of South Africa, 1996 (Constitution 1996) s.1(d), which lists this as one of its “founding values”.

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I argue that the judicial message has not been well received by those wielding public power, which has resulted in both veiled and open attacks on the courts.

II. The Past and Current Formal Context

Few need reminding about South Africa’s horrific record of racist abuse of the basic rights of the majority of its citizens. It may be less widely appreciated that, with the exception of the dying years of the apartheid regime, such widespread denial of human dignity was typically pursued and achieved through the formally lawful grant of authority by the legislature to the executive and its administrative infrastructure. Formal adherence to the “rule by law” and the guarantee of judicial independence inevitably opened up avenues for those who resisted injustice to seek relief before the superior courts. South African judicial history provides vivid evidence of starkly contrasting approaches to the upholding of basic rights, even in the absence of a bill of rights, through creative interpretation of statutes in favour of individual liberty. This in turn influenced the development of the doctrine of the separation of powers.

This doctrine, which has for more than 250 years informed the constitution-making task in those societies aspiring to democratic government, is one of the most common constitutional devices for ensuring respect for “limited government”. It is trite that the type of separation of powers with its accompanying system of checks and balances that is found in the Constitutions of the United States of America and the French Republic has not been a feature of Westminster-based constitutional arrangements. Indeed, it would be more apt to speak of a “balance of powers” in the latter cases. At the same time, it would be wrong to describe the exercise of power in pre-democratic South Africa as being characterised by anything other than increasingly lawless executive discretion, with judicial review of administrative action at common law being hopelessly overextended as a potential inhibitor of such conduct, and its limitations cruelly exposed.

Thus, it was that the negotiators of South Africa’s transitional constitutional arrangements were determined to require some measure of separation of powers and checks and balances in any future, more lasting constitution. The Interim Constitution provided for the various branches of government in separate...
chapters, the power of judicial review of both legislative and executive action and the supremacy of the Constitution — the last element being a key to the process of political transition. As is well known, the transition occurred in two stages where the first freely elected Parliament was responsible for drafting the “final” Constitution in the years 1994–1996.\footnote{Ibid., s.73(1).} This Constitution begins with an entrenched statement\footnote{Ibid., s.1. Notably, this can only be amended with a 75 per cent majority of the National Assembly.} of the values underlying the form of democracy which it seeks to express, including the primacy of human dignity, equality, rights and freedoms, the rule of law, constitutional supremacy and multiparty government “to ensure accountability, responsiveness and openness”. These values summarise many of the Constitutional Principles\footnote{Ibid., as contained in Sch.4. These Principles were drawn from the series of negotiating meetings which took place from 1991 to just before the first free election for Parliament in April 1994.} which comprised the framework agreed to in the negotiations and which had to be respected in the final Constitution, as certified by the Constitutional Court (CC).

There is no express reference to the separation of powers in the text itself, although the authority of the three branches of government is once again detailed in separate chapters,\footnote{Chapter 4 sets out the Legislative, Ch.5 the Executive and Ch.8 the Judicial authority in the State, and each chapter contains a provision vesting such authority in bodies which are subsequently established.} and various means of checking and balancing such authority are to be found, most important among them is judicial review as the final guarantor of constitutional supremacy.\footnote{Various aspects of this power are provided for in several places in Constitution 1996 (n.4). See ss.1(d), 165, 167(5) and 172.} Significantly, the Constitution also provides expressly for legislative “oversight” of the Executive\footnote{Ibid., s.55(2), which sets out this responsibility for Parliament, and the equivalent provision at provincial government level is to be found in s.114(2).} and a series of “State Institutions Supporting Constitutional Democracy”\footnote{Ibid., Ch.9.} — among them a Human Rights Commission, a Commission for Gender Equality and a Public Protector (the national ombudsman). The existence of this range of constitutional mechanisms has of late led to discussion about a “fourth branch of government”,\footnote{See, for example, Timothy Fish Hodgson, “The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution” (2018) 34(1) SAJHR 1, 13–14.} sometimes called the “integrity branch”, in line with scholarly comment internationally.\footnote{See, for example, JJ Spigelman, “The Integrity Branch of Government” (2004) 78 ALJ 724; Chris Field, “The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability” (2013) 72 AIALF 24.} I will not pursue this line of discussion in this article, but it remains of some significance.

However, if there was any doubt about the inclusion of the separation of powers as a constitutional requirement, it was laid to rest relatively early in the life of the CC in a case where Parliament purported to delegate too much of its legislative power in respect of a specific matter to the executive — in the form of
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In several other early judgments, the CC explored the practical limits of the separation of powers, for example, in defining the circumstances in which delegated legislation may be made by the executive and those in which judicial officers may perform non-judicial functions.

In general, the approach of the Court can be characterised as essentially principled but pragmatic. It recognises that a complete separation of personnel between the executive and legislative bodies was neither necessary nor intended. It is also not the practical expression of the doctrine in most Commonwealth countries. Nonetheless, the independence of the judicial branch of government was sacrosanct and to be defended at almost any cost. This is the constitutional background against which I will consider three particular aspects of the relationship between the courts on the one hand and the other two branches of government on the other:

1. the manner in which the judiciary sought for the first 15 years of democratic rule to be sensitive to the demands and constraints placed on the government. Due regard was given by the judiciary to the government in the latter’s mandated attempts to begin the construction of a more equitable distribution of power and resources, while nevertheless establishing a climate of accountability to the requirements of the Constitution;
2. the rapid escalation in litigation over the past decade which has raised squarely the necessity for the judiciary to explore and define properly the limits of the mutual deference owed appropriately by each branch of government to the other; and
3. simultaneously, to assess the responses of politicians and commentators, especially those of the governing party, and the growth of popular perceptions of the nature of the Court’s constitutional task.

III. The Judicial Record: 1994–2009

Judicial politics in South Africa before 1994 were cast into stark relief by the courts having to implement fundamentally unjust statutes and in having to interpret the rules of the common law. The courageous stance of the Appellate Division in resisting early apartheid measures was, by the early 1960s, a distant memory. Yet,

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20 Executive Council of the Western Cape Legislature v President of the RSA 1995 (4) SA 877 (CC) (Western Cape Legislature).
21 Such as Ymico Ltd v Minister of Trade and Industry 1996 (3) SA 989 (CC).
22 For example, see De Lange v Smuts NO 1998 (3) SA 785 (CC) and South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC).
23 See paras. 55 and 60 in the judgment of Chaskalson P in Western Cape Legislature (n.20).
24 Van Rooyen v S 2002 (5) SA 246 (CC); S v Mamabolo 2001 (3) SA 409 (CC), [16].
the judiciary continued to trade on credit, so to speak, until a series of studies in the late 1970s and through the 1980s brought a degree of realism to bear on this question. The legacy of this record was visibly expressed in the court structure and jurisdiction in the Interim Constitution, and the discussion which follows must be read against that background. The most significant institutional changes were to be seen in the creation of the CC and of the Judicial Service Commission, responsible for the appointment and discipline of judges. Functionally, the judiciary was challenged by its new role, which came to be described as the pursuit of “transformative constitutionalism”. I consider the judicial record in the following three subsections.

A. The "easy" cases

Much of the early work of the CC, which in other circumstances and at a different juncture might have thrown it into conflict with the executive and legislature, was almost completely uncontroversial. So the Court struck down many of the most obviously unjust procedural and evidentiary rules such as the presumptions that an accused’s confession was lawfully obtained, that an accused was “dealing” in a drug if found to be in possession of more than a certain quantity of it and so on. Potentially more controversial decisions were the outlawing of the death penalty and corporal punishment, confirming the reviewability of the former prerogative powers, abolishing the crime of sodomy and affirming the constitutionality of a ban on the sale of liquor on Sundays and Christian holidays. However, none of these issues stirred the pot of public controversy unduly or called into question the propriety of the judicial role under the separation of powers.

In this early period, perhaps the most clear “political” decision was the CC’s refusal to upset the constitutionality of the Truth and Reconciliation Commission

25 Although there had been critical articles published before, the literature in this field was led externally by Albie Sachs, *Justice in South Africa* (Berkeley and Los Angeles: University of California Press, 1973), and internally by Dugard, *Human Rights and the South African Legal Order* (n.6).
26 Most particularly in that the Appellate Division, formerly the highest court in the land, was excluded from exercising constitutional jurisdiction: see Interim Constitution (n.1) s.101(5).
27 Ibid., s.98.
28 Ibid., s.105.
30 *S v Zuma* 1995 (2) SA 642 (CC).
31 *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC).
32 For example, see *S v Coetze* 1997 (3) SA 527 (CC) in which a “reverse onus” under the Criminal Procedure Act was held to be unconstitutional.
33 *S v Makwanyane* 1995 (3) SA 391 (CC).
34 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), which dealt with corporal punishment in schools.
35 President of the RSA *v Hugo* 1997 (4) SA 1 (CC).
36 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
37 *S v Lawrence* 1997 (4) SA 1176 (CC).
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(TRC). In all societies in transition from unjust repression towards their aspirations and progress, the question of what to do about those who have perpetrated evil deeds and those who have been their victims must be addressed. To this end, the following provision had appeared in what became known as the “postamble” of the Interim Constitution:

“National Unity and Reconciliation

In order to advance … reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date … and providing for mechanisms, criteria and procedures, including tribunals … through which such amnesty shall be dealt with at any time after the law has been passed … .”

The critical element of the Promotion of National Unity and Reconciliation Act\textsuperscript{38} (which established the TRC) which was challenged by the political party, whose ideology most closely matched that of the late Steve Biko,\textsuperscript{39} was the complete relief available to those granted amnesty, that is, absolution from both criminal prosecution and civil suit. The applicants challenged the constitutionality of such a provision on the grounds of unjustifiable infringement of their constitutional rights to life and dignity. They also relied on the principles of customary and treaty-based international law.

Significantly, the leading judgment for the CC was written by its most senior Black member, Justice Ismail Mohamed, who went on to become Chief Justice a few years after. His anxiety about the stance taken by the Court is clear, for he and the Court realised that there was great force in law in the arguments raised by the applicants, but equally that such arguments were trumped in the greater scheme of things. In his words:\textsuperscript{40}

“If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened … might never have been forthcoming, and … the bridge itself [between the past and the present] would have remained wobbly and insecure … It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization.”

\footnotesize{\textsuperscript{38} Act 34 of 1995.}

\footnotesize{\textsuperscript{39} Azanian Peoples Organisation (AZAPO) v President of the RSA 1996 (4) SA 672 (CC). Promotion of National Unity and Reconciliation Act (n.38), s.20(7) provided for such amnesty.}

\footnotesize{\textsuperscript{40} Azanian Peoples Organisation (AZAPO) v President of the RSA (n.39), [19].}
This outcome shows less about the Court’s relationship with the other branches of government than about the Court’s recognition of the greater political forces which had conspired to produce a political settlement, and what was needed for its survival. In this way, much as in its declaration of the unconstitutionality of the death penalty, the Court acted to resolve an impasse which the politicians were unwilling to confront. In the process, the Judiciary grew in stature as a governmental mechanism which enjoyed both the confidence of the rest of government and a growing measure of popular legitimacy. Having considered the broader field of the judiciary establishing its capacity and willingness in exercising the power of judicial review generally, we must now pay closer attention to the narrower enquiry of the judicial approach to the law-making and law-implementing powers of the other two branches of government.

B. More difficult: interacting with Parliament

The courts’ decisions naturally have an effect on their relationship with Parliament each time that a legislative provision is found to be unconstitutional. In this respect, the CC initially displayed a keen sensitivity to the limitations inherent in a political leadership almost totally new to governing. It also understood the difficulties of a state bureaucracy in transition, beset by a legacy of administrative secrecy, inefficiency and lack of accountability, with a fair dose of corruption thrown in. The courts’ relationship with Parliament can be usefully analysed in three areas.

First, judicial concern was most clearly manifest in the crafting of remedies consequent on findings of unconstitutionality of Acts of Parliament and subordinate legislation. The typical order here tends to be an injunction to the lawmaker to remedy the defects within a realistic period of time, pending which the offending legal rule would remain formally in place. So, we see cases where Parliament was given 12 months to legislate for same-sex marriages and to remedy the defects in the State Liability Act, while the Court was also prepared to “read words into” an Act in some instances — to give relief to the surviving partner of a Muslim “marriage”, or to revise the African customary law of succession so as to remove its male-centredness. The Court has usually laid down guidelines for Parliament to assist with the drafting of the legislative amendments deemed necessary to render the law constitutional.

42 Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC).
43 Nyathi v MEC for Department of Health, Gauteng 2008 (5) SA 94 (CC).
44 Daniels v Campbell NO 2004 (5) SA 331 (CC).
45 Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC).
46 See Minister of Home Affairs v Fourie (n.42); Nyathi v MEC for Department of Health, Gauteng (n.43); Daniels v Campbell NO (n.44); Ibid., in which the Court has given full expression to its expectations about the type of amendments needed to remedy the defects identified, thus alerting Parliament to what is required of it.
Parliament has generally complied, within the period stipulated, although on a few occasions it has come back to court to seek an extension of time, which the CC has mostly agreed albeit grudgingly. By 2009, however, the Court became more assertive in its attitude in relation to the reforms needed in the area of enforcement of liability of civil damages against the State. Faced with Parliament’s failure to comply with its earlier order with sufficient expediency and to its satisfaction, the CC agreed to an extension of time for legislative changes but ordered in the interim that the relevant section of the Act be read in a manner which gave litigants against the State some effective means of executing the judgments that they had obtained in their favour.

Second, the Court has been willing, from the outset, to confine the legislative authority of Parliament to its constitutional bounds. This was most clearly to be seen in the Western Cape Legislature case. Despite the serious practical consequences of its ruling, the CC held that Parliament had exceeded the limits of its powers to delegate its law-making function to the executive, and it has continued to hold it to such limits in subsequent cases.

Third, and perhaps most controversially, the CC began even in this first period to explore the meaning of the concept of a democracy characterised by responsive, accountable and open government. More specifically and as far as Parliament is concerned, the Constitution requires the two Houses of Parliament to “… facilitate public involvement in the legislative and other processes of the [houses] and [their] committees; and … conduct [their] business in an open manner and hold [their] sittings … in public”. In Doctors for Life International v Speaker of the National Assembly, a non-governmental organisation which opposes choice on the termination of pregnancy challenged an Act amending South Africa’s relatively permissive legislation in that area. It appeared that, although there had been some opportunities for the public to register their comments on the proposed amendments, such consultations had been insufficient in the view of the Court. The CC thus set aside the Sterilisation Amendment Act concerned, and Parliament had to go through the legislative process again. Although the Court was not unanimous in its judgment, a weighty majority was willing to hold Parliament to its constitutional mandate in this respect; this was not necessarily a popular stance.

47 See, for example, Zondi v MEC for Traditional and Local Government Affairs 2006 (3) SA 1 (CC).
48 See Minister for Justice and Constitutional Development v Nyathi 2010 (4) SA 567 (CC); see also the Orders of the Court in Minister of Home Affairs v Fourie (n.42) and in Bhe v Magistrate, Khayelitsha (n.45).
49 Western Cape Legislature (n.20).
50 Such as Ynuico Ltd v Minister of Trade and Industry (n.21) and Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development 2000 (1) SA 661 (CC).
51 Constitution 1996 (n.4) ss.59(1) and 72(1) for the National Assembly and National Council of Provinces, respectively.
52 2006 (6) SA 416 (CC).
53 Act 3 of 2005.
54 Ngcobo J spoke for the majority, while Van der Westhuizen and Yacoob JJ wrote separate dissenting opinions.
Thus, it can be seen that the judiciary proved itself willing from the outset to engage with the legislature on those occasions when it deemed Parliament to have failed to meet its constitutionally proper mandate. However, in an era of increasing social complexity and popular expectation of the delivery of goods and services by the State, the balance of power has shifted inexorably towards the executive. As such, the better test of the judiciary’s determination to preserve its independence and hold the rest of government to account is to be found in the courts’ approach to regulating executive authority below.

C. Checking the executive

In reviewing the jurisprudence since 1994, the judicial record in the decade immediately preceding should not be ignored. Its near-captitulation to executive will during the successive states of emergency from mid-1985 scarred the judicial image deeply in the eyes of the general public. As a result, the judicial approach to the review of executive authority was keenly monitored by scholars and commentators. It is appropriate again to survey the judgments in three groups.

First, the Court had the opportunity to establish the principle that the Constitution was supreme, no matter how high the office-bearer and how weighty and controversial the decision made or action taken. President Nelson Mandela had announced at his inauguration an amnesty for prisoners who fell within a certain class both of person and criminal acts. He confined his pardon to women with young children, exercising the power given to him as Head of State which was not previously subject to review at common law. A male prisoner, Hugo, who in all other respects would have qualified for such amnesty, challenged this presidential action alleging discrimination on the ground of sex — an attribute expressly outlawed as the basis of unfair discrimination in the Interim Constitution. A majority of the CC upheld this discrimination as fair in the circumstances, but the important point for present purposes is that the Court ruled unanimously and with no hesitation that it had the authority to review this exercise of power. This was even though it was a decision infused with political and discretionary considerations.

Two further decisions of this type reached the Court at the turn of the century: President of the RSA v South African Rugby Football Union (SARFU), where the issue at stake was the appointment by the President of a Commission of Inquiry into the affairs of the rugby football union; and Pharmaceutical Manufacturers Association of SA: Re ex p President of the RSA (Pharmaceutical Manufacturers Association), where the Court reviewed the President’s exercise of his formal

56 *President of the RSA v Hugo* (n.35).
57 2000 (1) SA 1 (CC).
58 2002 (2) SA 674 (CC).
authority as Head of State in giving his assent to the entering into force of an Act of Parliament, both being assessed against the standard required by the principle of legality. In both these cases, the CC clearly demonstrated its resolve to ensure that no governmental action could claim exemption from judicial review under the Constitution, even though the intensity of the scrutiny would be determined by the extent to which policy and discretion lawfully influenced such action.

A counterweight, however, was added later as can be seen in Glenister v President of the Republic of South Africa. In this case, a businessman given standing to act in the public interest sought to stop the President from signing into law draft Bills approved by Parliament. These Bills would have had the effect of transferring the elite corruption- and crime-fighting body from the independent National Prosecuting Authority (NPA), and incorporating it into the police service. This application, based on non-compliance with the principle of legality, confronted the Court squarely with the limits of its authority under the separation of powers. Accepting, without deciding, that it was possible in law for a court to intervene in principle at this stage of the legislative process, Chief Justice Langa held for a unanimous court that it would only be appropriate to do so when the “resultant harm [of the signing into law of the Bills] will be material and irreversible”. He held further that this approach “takes account of the proper role of the courts in our constitutional order: while duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature”. On the facts as presented to the Court, the applicant failed to discharge this “formidable burden”, and his application was dismissed.

The second area in which the Court held the executive to account related to the remedies ordered by the Court to make good the conduct found to be unconstitutional. Three examples serve amply to demonstrate the Court’s approach. In its very first decision, the Court declared the death penalty to be unconstitutional. The case is significant for all sorts of reasons, both narrowly legal and broadly symbolic; most importantly for present purposes, it required the executive to initiate a process to resentence the hundreds of prisoners languishing on death row in Pretoria. This was not to be done with one rule to govern all cases, but with a degree of individual attention. The State moved very tardily in this matter, and when the issue was raised again before the CC a full 10 years later, the Court did not hesitate to speak critically about the failure to bring certainty to the life circumstances of all such prisoners.
The second example of the Court’s creative approach to constitutional remedies is to be found in President of the RSA v Modderklip Boerdery (Pty) Ltd,65 which resulted from thousands of people erecting informal dwellings on a private farm adjacent to a large town east of Johannesburg. For a complex set of reasons, the local authority was neither able nor willing to provide formal housing to such people nor was it willing to expropriate the land and pay compensation as the land was unsuitable for permanent human settlement. Having found that the State had failed in its constitutional duties to protect the property rights of the land owner, but recognising that the eviction of more than 40,000 people was inappropriate to say the least, the Court ordered the payment of “constitutional damages” to the farmer for the loss of the use of his land.66 In doing so, the Court relied on the constitutional provision which authorises it to make any order which is “just and equitable”.67

The final example saw the Court coming close to fashioning a “structural interdict” to remedy a particular constitutional shortcoming. This arose in a decision68 involving the language policy of a high school which argued that it was entitled to refuse to introduce parallel classes in English. This almost inevitably had the effect of preserving it informally as a “whites-only” institution where the vast majority of the scholars were native Afrikaans speakers. The Court held both the school governing body and the provincial Department of Education to be in default of their constitutional obligations, and sets out a series of steps and time periods within which the parties had to report back to the Court to demonstrate that they were remedying the defects identified in the judgment. This shows to some extent that the Court is sensitive to the criticism levelled at it that its orders, especially in socioeconomic matters, are sometimes not carried out,69 not through government intent, but rather through inefficiency and careless omission.

I would argue that these three instances show that the Court was both aware of the constraints under which the executive operates and of the many conflicting and urgent demands on it. However, they also demonstrate that its patience was beginning to wear a little thin, as early as 2009, in the face of such intransigent inefficiency.

Third, and most relevantly, the leading judgments concerning socioeconomic rights need to be surveyed, through the lens of the respective constitutional roles attributed to the judiciary and the executive. It must be noted that the grant of such rights differs from that in respect of the first generation, or civil or political rights, in that the latter are typically given in unrestricted terms while socioeconomic rights

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65 2005 (5) SA 3 (CC).
66 Ibid., [53]–[61].
67 Constitution 1996 (n.4) s.172(1)(b).
68 Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC).
69 The aftermath of the decision in Government of the RSA v Grootboom 2001 (1) SA 46 (CC) has become notorious. The named litigant, Mrs Irene Grootboom, died in the course of 2008, still without a house of her own, a full seven years after her victory in court.
are hedged about with qualifications. So, the right to housing\textsuperscript{70} reads as follows: “Everyone has the right to \textit{have access to adequate} housing \ldots \text{. The State must take reasonable} legislative and other measures \textit{within its available resources}, to achieve the \textit{progressive} realisation of this right.” So too the rights to healthcare, food, water and social security.\textsuperscript{71} Significantly, however, the grant of similar rights to children\textsuperscript{72} uses the unrestricted language more typically to be found in the first-generation rights.

The first substantive occasion on which such rights came before the CC\textsuperscript{73} did not permit detailed and measured consideration and disposal. At stake was the appellant’s right to regular access to a dialysis machine provided by the public health system. This was a scarce resource, and the relevant provincial Department of Health had devised a detailed set of criteria according to which access to dialysis was to be granted. Given the criteria, he was placed insufficiently high on the priority list to justify granting him treatment. The Court reviewed the reasonableness of the policy and criteria, and its manner of implementation, and decided that it passed constitutional muster.

Within two years, the most detailed consideration of a socioeconomic right was issued from the Court.\textsuperscript{74} Under review was the right of access to adequate housing of 900 adults and children living in dire informal accommodation near Cape Town, suffering the effects of a typically cold, wet and windy winter. At first instance, the Cape High Court\textsuperscript{75} had relied on the fact that the majority of those affected were children to invoke the direct claim to shelter accorded to them by the Bill of Rights. On this basis, it awarded the whole group appropriate relief since the children could clearly not manage without their parents. The CC was not so constrained.\textsuperscript{76} It interrogated the government’s policy and plans for the provision of basic housing to the vast numbers of mainly urban poor who needed it and concluded that it was constitutionally reasonable save that it failed to deal adequately with those who, while waiting for such housing, needed emergency shelter of some kind in order to survive the elements. Thus, the CC relied directly on the right to housing, and unanimously found the State liable for the immediate amelioration of the applicants’ circumstances, in a judgment which was greeted with approval even from sceptics about the inclusion of socioeconomic rights in a constitution.\textsuperscript{77}

Just two years later, the right to healthcare was again before the Court.\textsuperscript{78} Questions were heard here on the government’s extraordinary policy response to the HIV/AIDS pandemic which threatened the lives of millions in southern Africa,
and in particular its slow and patchy delivery of anti-retroviral treatment to combat mother-to-child transmission of the virus. After massive public mobilisation by the most effective non-governmental organisation since the end of apartheid, the Treatment Action Campaign (TAC) turned to the courts. Their application for the immediate extension of anti-retroviral treatment to new-born children relied on the right to have access to basic healthcare, and the rights of all children to such care, and met with success in the High Court.

On appeal by the Minister of Health, who argued that there was no constitutional obligation on the State to provide an “effective, comprehensive and progressive programme”, the CC signalled its unanimity in politically contested terrain by giving judgment in the name of “the Court”. It dismissed the appeal, affirmed the justiciability of socioeconomic rights and characterised the government’s policy as unreasonably inflexible. The CC acknowledged that:

“... [c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences [and that the] Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation …”

Nonetheless, the Court refused to confine itself to a declaration of rights and ordered the Minister to extend treatment beyond the few “pilot-sites” which had been identified before. Such an order had clear and immediate financial implications for government, which makes this an extremely significant case regarding the judicial–executive relationship.

Another important dispute in the socioeconomic arena shows the CC’s willingness to come to the assistance of those more at the margins of South African society. There are many migrants, mainly from other African countries, living and, in many cases, working in South Africa. Some are there illegally, while others have the status of “permanent resident”. The latter group took the Constitution at its word in seeking the payment of social assistance grants to its members as if they were citizens of the country. The Bill of Rights generally grants its benefits to “everyone”, and that there is a right to “have access to … appropriate social assistance”. In ruling in favour of a group of destitute Mozambicans, the CC relied on the innate link between the fundamental civil rights to life, equality and human dignity on the one hand, and socioeconomic rights on the other. It insisted on “reasonableness” as the benchmark against which it would measure state policies and efforts, rather

79 Ibid., [51], which sets out the programme in summary.
80 Ibid., [38].
81 Khosa v Minister of Social Development 2004 (6) SA 505 (CC).
82 Constitution 1996 (n.4) s.27(1)(c).
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than using arguments about the “minimum core” approach to the latter rights. In the result, the CC ordered the reading-in of the words “permanent resident” into the legislation to cure the defect identified.

Towards the end of this first period under review, the Court was faced with several challenges concerning the provision of housing and municipal services within the Johannesburg metropolitan municipality. Their judgments in such matters display a nuanced balancing of civic rights with constraints on local government capacity, and an emphasis on procedural fairness. For instance, in Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg, roughly 400 poor people living in the inner city had sought and obtained an interim interdict from the CC, ordering the parties to engage in “meaningful discussions” about how to resolve the dispute between them. The parties were also to report back to the Court by a specific date. In doing so, Yacoob J (who had written the judgment in Grootboom) was careful to emphasise the balance between the municipality’s obligations to recognise the rights to life and dignity in the socioeconomic context and the availability of its resources, with the watchwords in respect of the intended eviction of the occupiers being the reasonableness of such a step and the meaningfulness of the engagement between the parties.

This approach was then strongly reinforced in cases concerned with the provision of electricity and water. The main issue in Joseph v City of Johannesburg was the relationship between private law rights and obligations arising from the contract of lease, and public law rights and obligations arising out of the fact that the applicants were tenants who could expect the provision of basic municipal services. The Court held that the “broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights” which attracted the procedural fairness obligations specified in the Promotion of Administrative Justice Act. As a consequence, the municipality was not lawfully able to terminate such services which the applicants were already receiving as a “matter of right” without a measure of procedural fairness. The Court declared as unconstitutional part of a provision in the Electricity By-laws, which stipulated that notification of intended termination was not necessary, and ordered the reconnection of power to the block of flats concerned.

83 This is a long-running dispute both in academic writing and in litigants’ arguments before the courts. Amici curiae in the TAC case (n.78), for example, raised these arguments but they were rejected by the Court at [26ff]. See also: David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19(1) SAJHR 1; Dennis M Davis, “Socio-Economic Rights in South Africa: The Record after Ten Years” (2004) 2(1) NZJPIL 47.
84 2008 (3) SA 208 (CC).
85 Ibid., [16]–[18].
86 2010 (4) SA 55 (CC).
87 Ibid., [33].
88 Ibid., [43].
89 Ibid., [71].
The outcome in the water services case was less positive for the residents concerned, and perhaps amounted to the Court indirectly balancing its own expectations of local government. In *Mazibuko v City of Johannesburg*, the right of “access to sufficient water” was in dispute. The applicants, who were once again extremely poor, challenged two aspects of the municipal policy on water provision: the adequacy of the amount of water supplied free on a monthly basis to each “accountholder” in the city, and the policy of installing pre-paid water metres. Both challenges failed. Again, in relation to the adequacy of the amount of water provided, the CC took “reasonableness” to be its guiding standard, which implied a judicial rejection of the concept of a “minimum core” approach to socioeconomic rights. Indeed, even though the applicants had linked this entitlement to the necessity for a dignified life, the Court had expressly rejected any reliance on the “minimum core” notion. In any event, the CC held that it would be inappropriate for a court to make such an order, but summed up its approach thus:

> “Thus the positive obligations imposed upon government by the social and economic rights in the Constitution will be enforced in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness … A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy.”

As to the policy of installing pre-paid water metres which allowed an automatic cut-off of their water supply if no payment was made, the applicants had argued non-compliance with constitutional rights (such as the right to equality) and with an obligation on the part of the municipality for procedural fairness. These arguments were rejected by the Court. Largely on the basis of the record before it, which showed insufficient evidence of unfair discrimination or unfair administrative process.

**D. Lessons from and reactions to the record**

At the conclusion of this cursory overview of the first phase of the judicial record in a democratic society, it seems fair to conclude that the CC was more than willing to engage with the scope and enforceability of such rights. It did not shy away from

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90 2010 (4) SA 1 (CC).
91 *Ibid.*, [56] and [61].
92 *Ibid.*, [67] and [71].
93 *Ibid.*, [84]–[104].
requiring action from the executive. Against the background of a rising tide of disenchantment with the will and capacity of government at all levels to deliver required services to the people, the apparently deferential note struck throughout *Mazibuko* seems at odds with precedent. Whether such a sense of deference was caused by judicial perceptions of threats to their independence from the other branches of government is worth considering briefly, given the rising tide of public criticism of such socioeconomic rulings and calls for “accountability” by party politicians at that time.

Accountability is not necessarily a limitation of judicial independence. It is a necessary counter-balance to such independence, lest the judiciary exceeds its constitutional mandate. However, under the guise of accountability, a curtailment of judicial authority can be threatened, and the most intrusive means through which this can potentially be achieved are executive influence on judicial appointments, providing budget for the daily operations of the courts, and through formal amendments to the Constitution and relevant legislation governing the administration of the courts.

The South African situation is almost inevitably infused with further exceptional elements: it is an emerging democracy trying to recover from centuries of autocratic government, and one which seeks to treat equitably all elements of an extraordinarily diverse population characterised by racial, gender and class divisions often to an extreme degree. The Constitution recognises this in several places and generally pursues a “transformative” agenda, while simultaneously strongly endorsing judicial independence.

It is fair to say that the first 15 years of constitutional democracy in South Africa assumed something of a golden hue, within which the CC rapidly established itself as an institution worthy of respect. This was aided by two factors: first, the composition of the first Bench, containing as it did a range of remarkable lawyers — many of whom had courageous records of resistance to injustice in the past, and all of whom proved extraordinarily perceptive social observers and servants of the Constitution. As a unit, their jurisprudence has been admired by many apex courts elsewhere in the world. Second, the person of President Mandela, who unequivocally endorsed the notion of judicial independence and who unhesitatingly complied with judgments of the Court. In fact, President Mandela sometimes publicly expressed his willingness to do so even where this was not necessary.

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94 From about 2006, there were increasing protests by poor people at the failure of “service-delivery” by government at all levels. Some of these became violent, and these protests in general were a major issue during the general election campaign of early 2009.

95 See generally, Constitution 1996 (n.4) s.165.

96 Among them, the first President of the CC, Arthur Chaskalson, who had been defence counsel to Nelson Mandela and many other opponents of apartheid, and who had founded the first public-interest law practice in the country; Pius Langa, who succeeded Chaskalson as head of the CC, who had been the President of the National Association of Democratic Lawyers; Albie Sachs, an exiled lawyer and academic who had been the victim of an attempted assassination by car bomb as recently as 1988.
In contrast to this generally positive thrust, several legislative initiatives were launched in the period from 2005 to 2009, much of which seemed intent on bringing the judiciary to heel so to speak. The background to all these proposals was a section in the ANC’s “anniversary statement” of January 2005, which highlighted the perceived need to change the “collective mindset” of the courts and make judges more sensitive — indeed accountable — to the needs and aspirations of the vast majority of the population. This is a deeply ironic statement of intent in the light of the events of the next 10 years, as will be seen below.

At the time, however, the reaction of the legal profession, led by a unanimous judiciary, was an angry, if not outraged, rejection of much of what had been proposed. Significantly, there was no division along racial lines among the opponents of the proposed changes. The media duly raised public awareness of the controversy, and it became clear that the amendments could not be sustained politically. This led to the withdrawal of the entire package of legislative reforms which most observers welcomed. However, it was simultaneously noted and lamented in particular that rules and mechanisms to deal with judicial misconduct, as well as a code of ethics for judges as agreed to before 2004, continued to be absent. Again, given the subsequent controversy about isolated instances of alleged judicial misconduct which have dragged on unresolved for a decade, this aspect has harmed the general reputation of the courts, making it less difficult for politicians hostile to the judiciary to express their critical views.

IV. The Judicial Record: 2009–2018

This second phase of development of the doctrine of the separation of powers has been nothing short of explosive. The pursuit of socioeconomic rights to be enforced through the courts has taken a relative backseat in this phase, giving way to what has become known as “lawfare”. Throughout, Parliament and the Executive have frequently been found to have acted unlawfully and unconstitutionally, which has inevitably led to heightened tension between the judiciary and the other two branches of government. This has, in turn, impacted the understanding of the doctrine of the separation of powers, and has drawn attention to the question of what the appropriate level of deference mutually between the branches of government should be. I will first list briefly some of the leading cases which have effectively pitted the judiciary against the other branches of government, and then consider the engaged and constructive academic debate which it has sparked.

97 For details of these incidents, see Hugh Corder, “Judicial Accountability”, in Cora Hoexter and Morne Olivier (eds) The Judiciary in South Africa (Cape Town: Juta & Co Ltd, 2014) Ch.7.
98 I have recently completed an article with Cora Hoexter on this topic, not yet published, and part of what follows draws on this work. See Hugh Corder and Cora Hoexter, “Lawfare’ in South Africa and Its Effects on the Judiciary” (2018) African Journal of Legal Studies, in press.
99 Indeed, the leading member of the “fourth branch”, the Public Protector, has played a critical role in the development of standards of accountability in public life.
A. The judgments

In *NSPCA v Minister of Agriculture*, the CC provided a useful summary of its view regarding the model which judicially engineered separation of powers had adopted by 2013. However, the decision of the CC which triggered the strongest response from critics was the judgment of the majority in *National Treasury v Opposition to Urban Tolling Alliance (OUTA)*. In a high-profile political battle, a civic organisation had successfully sought a temporary interdict in the High Court against the implementation of an electronic tolling system by the National Roads Agency in the most populous province, Gauteng. As this levying of tolls was part of government policy to pay for the substantial and costly upgrading of the national roads system in preparation for hosting the FIFA World Cup tournament in 2010, the National Treasury appealed against this decision. It argued strongly that the High Court had crossed the legitimate boundary of its authority in making such an order. The majority in the CC upheld this argument in no uncertain terms. Moseneke DCJ stated as follows:

“There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In *ITAC* we followed earlier statements in *Doctors for Life* and warned that: ‘Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.’

In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control … .

When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and

100 *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries* 2013 (5) SA 571 (CC), [13].
101 2012 (6) SA 223 (CC).
102 Ibid., [63ff] (footnotes omitted).
thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases …

Thus, the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament.

Another consideration is that the collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of Government must have the separation of powers consideration at the very forefront …

Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of Government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present case, a state functionary is restrained from exercising statutory or constitutionally authorised power. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrants otherwise.”

I have set the view of the CC out at some length, given the clarity and weight of this authority, as well as the fact that it led to substantial critical engagement. It may be that the deferential tone of this judgment should be confined to the type of urgent proceedings which it sought to regulate, but there can be no doubt that it serves appropriately to dampen the temptation of any judge subsequently to intervene too readily in polycentric decisions such as this.

Having said that, I would argue that the rash of subsequent cases in which the courts have found for political parties and civic organisations who have challenged any number of executive and legislative actions (in the latter usually through citing the Speaker of Parliament as respondent) gives reason to believe that the strength of the OUTA precedent has been diluted. Additionally, the same cases serve to broaden the sphere in which the courts may appropriately and deferentially find
against the other branches of government. It is here that the notion of “lawfare” becomes germane to this analysis.

In its primary meaning, Comaroff characterises lawfare as “the effort to conquer and control indigenous peoples by the coercive use of legal means”.103 The use of the term in this sense is particularly apposite here. Over the last few years, lawfare has come to describe the use of litigation to resolve contentious political disputes: the phenomenon of asking courts to rule on problems that would tend to be resolved by political means in more mature jurisdictions, or that might not even be regarded as justiciable.104

There are too many relevant cases even to begin to elaborate satisfactorily on the details within the scope of this article. Suffice to say that they fall broadly into the following categories:105 first, litigation concerning the decisions of the Speaker of Parliament in scheduling (or failing to schedule) a debate on a motion of no confidence in the President, as requested by the opposition parties in parliament; second, in such a debate, whether voting should be by secret ballot or not; third, the dropping of corruption charges against President Zuma by the National Director of Public Prosecutions just before the general election of 2009, when he was elected to office and the ensuing challenges to that decision; fourth, questioning the lawfulness of several executive appointments to high public office; and fifth, the scandal surrounding the multimillion dollar reconstruction of President Zuma’s rural compound at Nkandla and even his decisions to reshuffle the members of the Cabinet.

Almost every single one of these challenges has succeeded in the courts, some at several levels of the court hierarchy as the President had used state resources to appeal almost every unfavourable decision. Such successes in litigation encouraged the political parties and civil society to go to court more frequently and sooner, without first bothering to fully exploit political processes before doing so. Inevitably, such judgments were greeted both approvingly by the opponents of the government and those active in civil society, but with cynical critiques from government and the ruling party. This trend has fuelled controversy about the proper role of the courts, and about appropriate levels of judicial deference. Individual judges have been attacked in public, and the judiciary as a whole has felt the wrath of the political elite — both in public and private. There are well-founded fears that the “legalisation of politics and the politicisation of the law” may already have taken hold, and that this might in due course have devastating effects on the courts and their independence.

Doubtless, the limits of the doctrine of the separation of powers have blurred and divisions of opinion on this issue have appeared even in the CC. This was

105 Ibid.
graphically illustrated in the recent case of Economic Freedom Fighters v Speaker of the National Assembly,\textsuperscript{106} where the court was split over whether it could require Parliament to make rules relating to the process for removing a sitting President on impeachment. The majority held that it was within the CC’s constitutional mandate so to require; the minority disagreed. But it was less the difference of views than the manner of their expression which drew most adverse comments, for on oral delivery of the judgments the Chief Justice intervened in an intemperate manner to castigate the position of the majority. He stated as follows:\textsuperscript{107}

“I have read the first and the second judgments and concur in the first. The second judgment is a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament. The extraordinary nature and gravity of this assertion demands that substance be provided to undergird it, particularly because the matter is polycentric in nature and somewhat controversial.”

Jafta J for the majority countered as follows:\textsuperscript{108}

“But what is unprecedented is the suggestion that the construction of the section embraced by the majority here constitutes ‘a textbook case of judicial overreach.’ The suggestion is misplaced and unfortunate … Conceptually it is difficult to appreciate how the interpretation and application of a provision in the Constitution by a court may amount to judicial overreach … The order proposed does not involve the exercise by this Court of the Assembly’s powers. On the contrary, it requires the Assembly itself to exercise those powers and perform its constitutional functions without delay. This cannot be and is not a breach of the principle of separation of powers but consists in no more than the Court fulfilling its constitutionally assigned duty.”

Justice Froneman, who was part of the majority, wrote a separate concurrence\textsuperscript{109} to take issue expressly with the Chief Justice’s remarks exemplified by the above quotation. Interestingly, in a very recent case before the CC, Mogoeng CJ and Froneman J differed respectfully once again in their respective stances to the implications of the doctrine. This was in relation to what would be required from Parliament in regard to monitoring and publishing details of the funding of political parties.\textsuperscript{110}

\textsuperscript{106} 2018 (2) SA 571 (CC).
\textsuperscript{107} Ibid., [223].
\textsuperscript{108} Ibid., [218]-[220].
\textsuperscript{109} Ibid., [279ff], concurred with by the rest of the majority.
\textsuperscript{110} My Vote Counts NPC v Minister of Justice and Correctional Services [2018] ZACC 17 (High Court of South Africa, Western Cape Division, Cape Town), [77]-[80], [94].
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This somewhat unseemly public “spat”, which shows amply the divisions which are present in judicial ranks, received due attention in the media and fuelled public interest. It not only drew much adverse comment but also received approval from some political quarters. Whether it signals a turning point in the trend of judicial decision-making remains to be seen, but it certainly places squarely on the agenda the meaning to be given to the appropriate level of judicial deference within the courts’ exceptional interpretation of the separation of powers.

B. The commentators

The judicial activity centred on separation of powers over the past five years has led to a substantial growth in publications which engage critically with the concept. Notable among them are contributions from Sibanda and Seedorf,111 Swart and Coggin,112 Cachalia,113 Davis114 and Fish Hodgson.115 Former Chief Justice Ngcobo116 and former Deputy Chief Justice Moseneke117 have also entered the list, and the attacks on the courts prompted the Chief Justice to seek a high-level meeting with the executive leadership in government in August 2015.118

The judgment in OUTA caused Cachalia to propose an approach to the separation of powers termed as functionalist rather than formalist. This is informed substantially by American practice and theoretical approaches. Cachalia notes the trend towards the judicialisation of politics and the reviewability by the courts of the exercise of almost all political power. Davis not only responds to this with appreciation but also approaches the issue critically. While noting the ever-expanding scope of judicial review, he laments a lack of clarity from the courts as to where the court may appropriately intervene, or be otherwise accused of “untoward activism”. He concludes that this can be remedied by resorting not only to the democratic objectives of the Constitution but also its normative framework. In turn, Fish Hodgson argues that “all separation of powers doctrines are a practical matter of constitutional design underpinned by political theory and a theory of

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114 Dennis Davis, “Separation of Powers: Juristocracy or Democracy” (2016) 133(2) SALJ 258.
115 See Fish Hodgson, “The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers” (n.18).
118 K O’Reilly, “Meeting between the President and the Chief Justice” De Rebus (30 September 2015).
state”. Like Davis, he stresses the necessity for the development of a clearer doctrine to “reduce reasonable speculation … that the doctrine is merely appealed to at a court’s convenience”. Hogdson also advocates similarly that “constitutional dialogue” between the “branches … of government, constitutional institutions and civil society about the nature of South African constitutional democracy”.

This body of work is to be welcomed and certainly emphasises the urgent need to reach greater certainty and clarity on the meaning of the doctrine. It is hoped that such literature can afford a predictable set of guidelines at some sort of remove from the frenetic level of litigious activity generated by current political conditions in the country. I attempt to formulate a modest contribution to this debate in the final section of this article.

V. Towards Understanding the Separation of Powers in the South African Constitution

Granting judges the authority to review the actions of politicians brings with it a guarantee of controversy, even in the most stable of democracies and in the most propitious of circumstances. South Africa’s choice of limited government under law, regulated by the courts, was in reality an absolutely key element of the relatively peaceful transition from apartheid to something better — with the ultimate goal of establishing a functioning constitutional democracy. The historical burden and the economic and social conditions in which this has been implemented are hardly promising, if not directly hostile in some senses. The general picture presented above indicates a measure of progress towards the goal of a stable acceptance of the role of judicial review under the Constitution, and a degree of restored legitimacy of the judicial process.

As indicated at the outset, the South African judiciary clearly has a central role to play in ensuring that the transformative goals of the constitution are achieved. As Klare has argued:

“An opening to transformation requires South African lawyers to harmonise judicial method and legal interpretation with the Constitution’s substantively progressive aspirations. The burden of my argument is that law and legal practice can be a foundation of democratic and responsive transformation, but that this requires us to evolve an updated, politicised account of the rule of law.”

120 Ibid.
Writing in 2000, Klug was of the view\(^\text{122}\) that the CC had, in general, succeeded in steering a “judicious” course, combining an assertion of its rightful role as the ultimate arbiter of constitutionality with a respectful deference to the legislative and executive spheres of influence. In a much more extensive and recent review,\(^\text{123}\) Roux remarks that the CC had not adhered to “a fully principled doctrine, but instead alternated between two rival understandings of its legitimate role in enforcing constitutional rights depending on the threat posed … to its institutional independence”.

It is abundantly clear that the events surrounding the trials and tribulations of President Zuma and his allies over the past nine years present direct and unsettling challenges to and threaten to derail the substantial progress towards realising the constitutional project, which were made earlier through the efforts of the CC. A further area of concern is rooted precisely in the relative strength of the Court’s socioeconomic rights jurisprudence. The executive branch of government in particular has been found wanting in its effective achievement of much of the promise of the Constitution in this sphere, and the politicians resent judicial censure of the type which has become common. Some of this is to be expected and is certainly not unique to South Africa, as the trenchant criticism of the English courts by government ministers in the last years of the John Major and Tony Blair regimes amply demonstrates. On the other hand, the recent accession to power of the faction of the ANC inimical to Zuma ought to calm the waters and lead to more settled and defensible relations between the courts and the other branches of government.

Nevertheless, much hard work remains to be done to meet these serious challenges. Legal and popular education have a potentially critical role to play in inculcating in its recipients both the values of the Constitution and the need to transform the legal process and social relationships to better reflect such ideals. Strong and sensitive leadership is required from both politicians and judges, if this goal is to be reached. Commitment to constitutional values should be required of all, and the race of a participant is not necessarily a determinant of such commitment. All in all, I would argue that this makes for an exceptional set of circumstances, requiring an exceptional response by all concerned to the doctrine of the separation of powers.

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