Interpreting the role of judicial review on executive policy decisions:

The case of *United Democratic Movement v Eskom*

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Abstract

The South African Constitution, 1996, provides for the separation of powers among the three branches of government (the legislature, the executive, and the judiciary) without definitive contours that define the demarcation features of the doctrine. While each branch is obliged to realise and protect the Bill of Rights, the Constitution equally created obligations for each branch to carry out its duties effectively without unconstitutional restriction. This is a constitutional mechanism that sustains and fuels democracy. Section 85(2)(b) of the Constitution accords the executive branch the power to formulate and develop policy without subjecting such policy to constitutional judicial review unless the policy is inconsistent with the Constitution or violates fundamental rights. Section 172(1) obligates the courts to declare "any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". This means that nothing is beyond the scrutiny of the courts. Section 2 also elevates and affirms the supremacy of the Constitution in that any "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." The courts are therefore permitted to intervene when the policy, the formulation of which is the province of the executive, is inconsistent with the Constitution. Where the policy does not offend the Constitution, the courts are barred from unconstitutional intrusion into the terrain of the other branches.

However, the challenge arises in determining whether a policy is inconsistent with the Constitution, thus allowing the courts to constitutionally interfere with the executive's policy-formulation function.

This research examined whether the North Gauteng High Court acted in line with the separation of powers doctrine when it ordered the executive not to load-shed certain public institutions, declaring such conduct as a violation of fundamental rights. The research used the case of *United Democratic Movement v Eskom* to illustrate that even if a policy appears to be poorly formulated and unpopular, it is not up to the courts to intervene. Rather, it is up to the voters to force policy changes through political and electoral processes. Such judicial intervention, in the absence of constitutional grounds, is an unmandated intrusion. The research recommended judicial caution and restraint when the courts are faced with policymaking cases with budgetary and

resource-allocation implications. The research outlines the critical importance of the separation of powers as a doctrinal hygiene of the Constitution to ensure effective, accountable government and the rule of law. The research posits that there must be clear fundamental rights violation and unconstitutionality to warrant judicial intervention in the executive's policy functions.

Key terms

Separation of powers; judicial review; policy-formulation; Constitutional Court; independent judiciary; executive authority; fundamental rights.

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Contents

Chapter 1. Introduction

1.1 Introduction

South African courts are empowered by the Constitution of the Republic of South Africa 1996, (the Constitution) under the doctrines of constitutional supremacy[1] and constitutional judicial review power[2] to interrogate and review the exercise of power, decisions and conduct of all branches of Government and other entities performing a public function within the purview of an enabling Act or any law.[3] The judiciary is the enforcer and executor of the Constitution, and independent from the other two branches of government.[4] However, the Constitution also subscribes to the doctrine of separation of powers[5], which prevents the courts from encroaching in the executive and legislative domains unless constitutionally permitted to do so.[6] The application of constitutional judicial review and the interpretation of separation of powers doctrines have created tensions between the judiciary and the other branches of government in South Africa, especially in cases that involve the executive's policymaking power.

These tensions highlight longstanding jurisprudential debates regarding the status, power and the role of the judiciary in a constitutional democracy, which are

[1] Sec 2 of The Constitution of the Republic of South Africa, 1996 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005. Hereinafter the Constitution, 1996).
[2].Constitutional judicial review is within the context of Sec 167 of the Constitution, which empowers the courts, especially the Constitutional Court, to interrogate and examine the actions, conduct, powers and decisions of other branches of government.
The Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re: Ex Parte: President of the Republic of South Africa and Others* defined judicial review as control of public power paras 37 to 40.
[3] Sec 172(1) of the Constitution 1996, provides: 'When deciding a constitutional matter within its power, a court—(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'
[4] Sec 165 of the Constitution 1996 provides: (1) The judicial authority of the Republic is vested in the courts; (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice; (3) No person or organ of state may interfere with the functioning of the courts; (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts; (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
[5] The Constitutional Court defines separation of powers as "the division of power among the three pillars of government." https://www.concourt.org.za/index.php/46-what-is-a-constitution/what-is-the-separation-of-powers/109-what-is-the-separation-of-powers (Accessed 12 February 2025).
Montesquieu B The Spirit of the Laws 163 (1748) (translated by Anne Cohler. The doctrine was based on the philosophy of avoiding vesting all power in the same peson or authority.
[6] The doctrine of separation of powers is not mentioned explicitly in the Constitution but is inferred through the separation and allocation of roles, authority and functions of each arm of Government.

reflected upon throughout this research. Hoexter et al described the 'continuous tension' as a battle between 'the ideal of governmental freedom of action, and the ideal of judicial control.'[7]

The purpose of this research is to explore the source of these tensions, which appear to be the contested interpretation of the application of constitutional judicial review and its impact on the doctrine of separation of powers. The research will analyse cases in which the courts, mainly the Constitutional Court,[8] were requested to adjudicate on the executive's (the president and the cabinet) policymaking decisions, specifically regarding allocation of resources. The primary focus is on the case, *United Democratic Movement v Eskom.*[9] This is one of the landmark cases that epitomises the tension between obligations of the courts to apply constitutional judicial review and the executive's power to develop and implement policy as provided by the separation of powers doctrine. In his analysis of the case, de Vos appropriately commented that 'court orders cannot magically fix seemingly intractable governance and management problems.'[10] The case is an inextricable, tangled thread of three cases that can neither be discussed nor analysed in isolation.[11]

1.2 Research objectives

The research will analyse and critically examine challenges faced by the judiciary when reviewing cases that involve the executive policy decisions through focusing on the following objectives to:

1. Interrogate the effects of constitutional review on the executive's policy decisions.

[7] C Hoexter, R Lyster & I Currie The New Constitutional and Administrative Law (Juta 2002). 67.
[8] Most of the cases referred to in this research are Constitutional Court cases given that the apex court is mainly and, in some cases, exclusively charged with application of constitutional judicial review.
[9] *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others [2023] ZAGPPHC 280; 005779/2023 (5 May 2023)* The case had an initial part A (hereinafter referred to as Eskom 1). There was a final determination in Part B (hereinafter referred to as Eskom 2), and the appeal (hereinafter referred to as Eskom 3). This does not include *South African Local Government Association v National Energy Regulation of South Africa*. .
[10] P de Vos 'Eskom ruling is magical thinking – courts cannot fix intractable governance problems', Daily Maverick, 10 May 2023 https://www.dailymaverick.co.za/article/2023-05-10-eskom-ruling-is-magical-thinking-courts-cannot-fix-intractable-governance-problems/ (accessed 2 March 2024).
[11] Chapter 3 explains the origin of the case and the rationale for discussing the three separate cases together.

2. Define the effects of separation of powers as a limitation of judicial review.
3. Determine whether courts can apply constitutional judicial review where there are no clear fundamental rights violation.
4. Determine the constitutional jurisprudence's ability to resolve tensions between the three branches of Government.

1.3 Problem statement

The Constitution does not have clear textual guidelines outlining what the courts can and cannot do, and this remains a grey jurisprudential area despite what appears to be guidance from case law. Courts in the United States (US) attempted to resolve this grey area through what was later defined as classical political questions doctrine. This was established in *Marbury v Madison,*[12] where the Supreme Court held that the judiciary should not question the executive and legislative arms about how they execute 'duties in which they have a discretion' because such inquiry constitutes political questions.

More than 160 years later, the US Supreme Court also reformulated and outlined the guidelines for the political question doctrine in *Baker v Carr.*[13] Hamilton, Jay and Madison argue that the judges must regard the Constitution as the power and the will of the people, superior to the legislative power.[14]

The case of *United Democratic Movement v Eskom* has led to debates that constitutional judicial review is increasingly employed as a tool by the courts to usurp the powers of the other branches in breach of the separation of powers doctrine.[15] As

[12] *5 US (1 Cranch) 137 (1803) at 99.*
[13] *369 US 186 (1962)* at 50 and 51. The court held that there are factors that must be considered to conclude that a matter is a political question. These included: Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
[14] A Hamilton, J Jay, & J Madison The Federalist Papers (Signet Classic 1961) 300.
[15] P de Vos 'Eskom ruling is magical thinking – courts cannot fix intractable governance problems', Daily Maverick, 10 May 2023 https://www.dailymaverick.co.za/article/2023-05-10-eskom-ruling-is-magical-thinking-courts-cannot-fix-intractable-governance-problems/ (accessed 2 March 2024). Balthazar "In times of government failure, the danger of judicial overreach is ever present" Daily Maverick. 07

frustrations with the political leadership of the country intensify over failure to deliver basic services such as power supply, there appears to be a growing tendency to bring political disputes to the courts.[16] However, while there are expectations for the courts to operate within the boundaries of their mandate, South Africa does not subscribe to the classical political questions doctrine or the executive prerogative regime wherein some political issues are totally insulated from judicial review.[17] The Constitution empowers the courts to hear all matters, even if there is a consequential impact on the functions of other branches, and commands the Constitutional Court to apply constitutional judicial review in concretising the values of the Constitution.[18]

However, South Africa's constitutional jurisprudence is still developing, and bound to encounter new problems and tensions as the three branches attempt to navigate the constitutional map. The country's Constitution is 29 years old, and the Constitutional Court is 30.[19] The court has operated on a relatively clean jurisprudential canvass following the departure from the parliamentary to the constitutional supremacy regime. According to Hirschl, the South African 'constitutional rights jurisprudence is still in a formative stage.'[20] This implies that the jurisprudence is continuously tested as the three branches clash and differ on the interpretation of the Constitution. The Constitutional Court emphasised in *National Treasury v Opposition to Urban Tolling Alliance*[21] (hereinafter referred to as the *e-tolling* case) that the separation of powers doctrine is the primary consideration when dealing with policymaking cases, and that policy decisions are pre-eminent domains of the executive.[22] However, Justice O'Regan argues, rightly so, that the 'the contours of the doctrine (of separation of

December 2023. https://www.dailymaverick.co.za/opinionista/2023-12-07-in-times-of-state-failure-danger-of-judicial-overreach-is-ever-present/ (Accessed 20 May 2024).

[16] *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly & Others 2012 (21990/2012) ZAWCHC 189; 2013 (4) SA 243 (WCC) (22 November 2012) 83.*

[17] Sec 2 of the Constitution on Constitutional Supremacy: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' Sec 1(c) 'The Republic of South Africa is one, sovereign, democratic state founded on...Supremacy of the constitution and the rule of law.'

[18] Sec 172(1) of the Constitution, 1996.

[19] The Constitutional Court was officially opened on 4 February 1995. After the certification process, the Constitutional Assembly complied with the Constitutional Court's concerns and the Constitution was therefore adopted on 4 December 1996, taking effect on 4 February 1997.

[20] R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitution*. (Harvard University Press 2017) 108.

[21] *2012 (CCT 38/12) ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012) at 90.*

[22] Sec 85(2)(b): 'The President exercises the executive authority, together with the other members of the Cabinet, by…developing and implementing national policy.'

powers) are uncertain.'[23] This uncertainty is the primary focus of this research as it warrants further exploration and examination.

1.4 Research questions

The following research questions have emerged from the preparatory remarks canvassed thus far:

1. What are the principles governing the exercise and limitations of judicial review power?
2. To what extent does separation of powers insulate policymaking from judicial review?
3. Under what circumstances must the courts acknowledge that policy decisions regarding allocation of resources do not warrant judicial review?
4. Is there a need to review the constitutional mechanism employed by the courts to give expression to separation of powers doctrine in governing the relations between the three arms of government?

1.5 Assumptions

South Africa has adopted the overarching jurisprudential and constitutional principle of constitutional supremacy and an entrenched Constitution with 'a higher status.'[24] The Constitution itself is 'the supreme law of the Republic.'[25] The Constitutional Court in the *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* case[26] held that, 'It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme.' This supremacy is embodied in the Bill of Rights,[27] which serves as a control mechanism to test the constitutionality of any conduct, decision

[23] K O'Regan 'Reflections on the Role and Work of the Constitutional Court', Helen Susman Memorial Lecture, 2011 https://hsf.org.za/publications/lectures/hsf-memorial-lecture-2011 (accessed 12 June 2023).
[24] I Rautenbach & R Venter Rautenbach-Malherbe Constitutional Law (Lexis Nexis 2018) 21.
[25] Sec 2 of the Constitution, 1996.
[26] *1995 (CCT27/95) ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995) para 100.*
[27] Ch 2 of the Constitution, 1996.

and exercise of power. It is accepted that the Bill of Rights and the supremacy of the Constitution are key values and ingredients of constitutionalism and the rule of law.

The new era of constitutionalism eliminated the sovereignty of Parliament as the supreme embodiment of the South African law. In *Pharmaceutical Manufacturers*, Chaskalson CJ, in a radical departure from apartheid's parliamentary supremacy system,emphasised that the role of the court was a reflection of the superiority of the Constitution, trumping parliamentary supremacy.[28] Fundamental rights take centre stage, with constitutional judicial review as the instrument that protects and enforces the Bill of Rights and controls any exercise of public power. The Constitution has provided the Constitutional Court with sweeping powers of constitutional judicial review.[29] This means the court can intervene and overturn any exercise of public power, including decisions of the executive and legislatures, should it find that such decisions were inconsistent with the Constitution.

1.6 Literature review

This section critically explores pertinent literature in the available scholarship canon on the contestations around the doctrine of constitutional judicial review. The structure reflects how the research will be discussed in the subsequent chapters of this thesis, and focuses on the concept of judicial review, separation of powers doctrine, limitation of powers, and constitutional supremacy. This literature review was undertaken with a view to ascertain a research lacunae in the body of knowledge, which this research then seeks to fill.

1.6.1 Defining the concept of judicial review and its constitutional application

Constitutional judicial review is neither defined nor mentioned in the Constitution.[30] Rather, the Constitution outlines the broad characteristics of judicial review at section 167 where it defines the exclusive powers of the Constitutional Court in the following terms:

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[28] *Pharmaceutical Manufacturers Association of South Africa and Another: In re: Ex Parte: President of the Republic of South Africa and Others [2000] ZACC 1 (25 February 2000) para 40.*
[29] Sec 172(1)(a) of the Constitution: 'Courts and Administration of Justice order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'
[30] The Constitution, 1996 defines and scopes the role of the judiciary and the courts.

> Only the Constitutional Court may…decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state.[31]

However, the constitutional judicial review power is a function within the ambit of all higher courts and not just the Constitutional Court.[32] Constitutional judicial review is the constitutional lever used by the judiciary to hold other branches of government to account by limiting their powers where necessary. This, according to Currie and De Waal, is because the harm caused by the violation of fundamental rights

> …is not merely a harm to an individual applicant but a harm to society as a whole and impedes the realisation of the constitutional project of creating a just and democratic society.[33]

Hoexter *et al*'s definition of constitutional judicial review is the most concise and accurate in that it relates to:

> the power of the courts to apply and declare unconstitutional any type of legislation or conduct that infringes on the rights in the Bill of Rights or offends against other provisions of the Constitution.[34]

It is clear that the role and power of the judiciary in the new constitutional dispensation is largely and primarily to enforce compliance with the Constitution and align every action to the values of constitutional supremacy. This in essence encapsulates the pathos of the rule of law in a constitutional democracy. Le Roux et al captured this intrinsic meaning in their explanation that the judiciary employs the power of review by hearing and adjudicating disputes involving infringements of the Bill of Rights and the exercise of public power by branches of government.[35]

Mojapelo defines constitutional judicial review as the 'most conspicuous example of checks' to ensure 'compliance with the Constitution and the Bill of Rights and not necessarily an executive nor judicial function.'[36] It involves forcing other branches to remain loyal to the Constitution. It originates directly from the Constitution, forming the basis of rule of law and constitutionalism in a constitutional state.[37] The

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[31] Sec 167(4)(a) of the Constitution, 1996.
[32] This is with the exceptions of the Magistrates Courts that are precluded by Sec 110 of the Magistrates Act from pronouncing on the conduct of the President or validity of the legislation.
[33] I Currie & J De Waal *The Bill of Rights Handbook* (Juta 2015) 181.
[34] Hoexter et al 66.
[35] W Le Roux et al *Constitutional Law: Only Study Guide for CSL2601* (2011) Department of Public, Constitutional and International Law, University of South Africa 51. 99.
[36] PM Mojapelo 'The Doctrine of Separation of Powers: A South African Perspective' (2013) *Advocate* 26(1).
[37] Rautenbach and Venter 8.

judiciary's powers to interpret and pronounce, protect and enforce the Constitution is perceived by writers such as Pollock as elevating the judiciary as the first among equal branches.[38] The constitutional function of the judiciary must be construed as distinct but not super-important functions. Pollock argues that,

> …although theoretically the three branches of the federal government are equal under the Constitution, the nation's acceptance of judicial supremacy has made the court the final arbiter of the Constitution's interpretation.[39]

Ngoepe also confirms that 'the judiciary has been given ultimate authority to determine or define the limits of the authority of each branch.'[40] As argued above, enforcement of the Constitution does not elevate the judiciary above other branches. Du Plessis points out that the supremacy clause in the Constitution,

> combined with the open texture of the Constitution, results in the exercise of judicial review which is far wider and more powerful than that under a system of parliamentary sovereignty.[41]

The power of such constitutional judicial review is derived from the values of a constitutional democracy. Rautenbach and Venter conversely state that 'the power of the legislature to exclude or limit judicial control has now been restricted by the Bill of Rights.'[42] This makes the Bill the anchor document that cements the supremacy of the Constitution. In their definition, De Vos et al provide that constitutionalism 'prescribes limits on the exercise of state power' and ensures that such exercise of power does not 'exceed the limits set by the Constitution.'[43] This powerful feature of constitutional judicial review is regarded as the essence and pillar of constitutionalism. Mureinik argues that if judicial review reduces the likelihood that important rights will be infringed, then it may enhance, rather than undermine, the executive's overall political legitimacy.[44]

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[38] E Pollock *The Supreme Court and the American Democracy: Case Studies on Judicial Review and Public Policy* (Greenwood 2009) 2.
[39] N above.
[40] B Ngoepe *Rich Pickings Out of the Past* (Juta 2022) 170.
[41] M du Plessis 'Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 227 *Comparative and International Law Journal of Southern Africa*. 33.
[42] Rautenbach and Venter167.
[43] P de Vos et al *South African Constitutional Law in Context* (Oxford University 2020) 29.
[44] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 (31) *South African Journal on Human Rights.*

1.6.2. Judicial review limitations on the executive's policymaking powers

The *Certification of the Constitution of South Africa* case[45] traces the rationale and historical argument behind the justiciability of socioeconomic rights and the fears regarding budgetary and policy implications if the courts were to enforce such rights. In this case, the court gave guidance but did not resolve the tensions of state obligations versus availability of resources as encapsulated in the Constitution. The court's decision in the *e-tolling* case cautioned against 'entering the exclusive terrain of the executive and legislative branches of government.'[46] The Constitutional Court cautioned against any unjustifiable and unmandated interference with policy-making powers of the executive.[47] While the North Gauteng High Court in the *Eskom case* considered separation of powers doctrine, it ventured into policymaking arena by ordering which institutions must not be subjected to the adverse effects of 'loadshedding', a term used in South Africa to describe the rationing of power distribution and supply to protect the grid from national blackout.

The Constitution vests the executive authority of the country in the President of the Republic of South Africa.[48] One of the functions of the executive include 'developing and implementing national policy.'[49] This and other functions are insulated by the doctrine of separation of powers in that the courts cannot interfere as long as there is constitutional and legal compliance. Mogoeng CJ provides, in the minority judgment in *Electronic Media Network Limited v e.tv* (hereinafter referred to as the *e.tv* case) that,

> any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the executive.[50]

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[45] *1996 (CCT 23/96) ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) 78.*
[46] *2004 CCT 12/03) ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) 120*
[47] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012)*
Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014) at 75
Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009) at 60.
[48] Sec 85(1) of the Constitution, 1996.
[49] Sec 85(2)(b) of the Constitution. 1996.
[50] 2017 (CCT140/16; CCT141/16; CCT145/16) ZACC 17; 2017 (9) BCLR 1108 (CC) (8 June 2017).

The role of the courts, argues Syrett, is to assist policymakers 'in carrying out policies in the interests of the community as a whole.'[51] Ideally, the courts should not concern themselves with options or inappropriateness of policy, as that is constitutive of the purview of the political branches of government. This approach was confirmed in *Ferreira v Levin*,[52] in which the court held, 'It is not for the courts to approve or disapprove of such policies.' In *Esau v Minister of Cooperative Governance and Traditional Affairs,* the court held: [53]

> What the separation of powers means in a case such as this, is that a court may not set aside decisions taken and regulations made by the executive simply because it disagrees with the means chosen by the executive, or because it believes that the problems that the decisions or regulations seek to address can be better achieved by other means.[54]

Even when the courts are convinced that the executive's policy direction is wrong and the temptation to assume the role of policymakers is great, they must take a cue from the *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* case.[55] Here, the court held that judges' role is not to 'second guess the executive or legislative.[56] In *Helen Suzman Foundation v President,* the court held that the constitutionally compliant policy choices they make must be respected, even if there are, in the opinion of the judiciary, better options available.'[57] *Mazibuko v City of Johannesburg* goes on to illustrate the court's attitude that the rationale behind the executive and legislature making policy determination is because 'it is their programmes and promises that are subjected to democratic popular choice.'[58] The court went on further to express that the executive still have a responsibility to ensure that whatever measures or decisions they take must be reasonable and the decision must be rational.[59]

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[51] K Syrett 'Revisiting the Judicial Role in the Allocation of Healthcare Resources: On Deference, Democratic Dialogue and Deliberation (2005) 30 *Journal for Juridical Science* 1-29.
[52] *1995 (CCT5/95) ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) at 180.*
[53] *2021 (611/2020) ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021) 6.*
[54] As above.
[55] *1995 (CCT27/95) ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).*
[56] *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa at para 99.*
[57] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014) at 75*
[58] *Mazibuko v City of Johannesburg 2009 (CCT 39/09) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 para 60.*
[59] *Minister of Health & Others v Treatment Action Campaign & Others 2002 (No 2) (CCT8/02) ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) 37, confirming the court's decision*

1.6.3. Judicial review and the separation of powers doctrine

Separation of powers is a doctrine that gives expression and substance to the structure of government and regulates the relationship among the three branches—the legislature, executive and the judiciary. The doctrine separates these branches institutionally by distinguishing and allocating certain functions and responsibilities to each branch. The Constitution defines and vests the specific authority in each branch, thus outlining their porous boundaries.[60] The Constitutional Court in the *Minister of Health v Treatment Action Campaign (hereinafter Treatment Action Campaign)* held that:

> This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.[61]

In laying the foundation of this doctrine, Montesquieu argued that the core principle of the separation of powers is that functions and power must not be concentrated in a single individual.[62]

> 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.[63]

Such distribution of power is a way of instilling a sense of accountability. This is demonstrated through the use of the doctrine's checks and balances principles, which were described in the first *Certification* case as resulting in 'the imposition of restraints by one branch of government upon another.'[64] In *Glenister v President of the Republic of South Africa*, the Constitutional Court held that,

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four years earlier in Soobramoney v Minister of Health (Kwazulu-Natal) 1997 (CCT32/97) ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997). (hereinafter Soobramoney).

[60] Sec 44 of the Constitution vests legislative power in Parliament, sec 85 vests the executive authority in the President, and the judicial authority is vested in the courts in terms of Sec 165(1).

[61] *Treatment Action Campaign at 98.*

[62] AM Cohler, BC Miller & HS Stone (eds) *Montesquieu: The Spirit of the Laws* (Cambridge University Press 1989).

[63] As above.

[64] *Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) at 108.*

> the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another.[65]

This is what Mojapelo defined as internal controls, wherein 'different branches of government control each other internally (checks) and serve as counter weights to the power possessed by the other branches (balances).'[66] Within such internal controls and checks, there is also recognition by the courts that the Constitution 'anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.'[67] The Constitutional Court in the *Certification* case endorsed Principle VI that provides, 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'[68]

In maintaining a delicate balance of power or what this research describes as an equilibrium of arms, the courts have stressed the principle of pre-eminent domain in order to protect 'the core functions and powers of each branch of government against intrusions from outside, while other intrusions are treated as checks and balances.'[69] These core functions and the principle of pre-eminent domain were highlighted in the *Doctors for Life International v Speaker of the National Assembly* case where the Constitutional Court stressed the need for independent functioning of each branch of government without interference by another.[70] Any unconstitutional interference by another branch is treated as an intrusion and not checks and balances.[71] The court cautioned against such intrusion in *Treatment Action Campaign.*[72] The Constitution elevates the doctrine of separation of powers as a distinct characteristic of a

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[65] *2008 (CCT 41/08) ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) 29.*
[66] PM Mojapelo 'The Doctrine of Separation of Powers: A South African Perspective' (2013) *Advocate* 26(1).
[67] *Certification case para*109.
[68] *Certification Case* 106.
The Constitutional Principles were negotiated before 1994 at the Multiparty Negotiation Forum to ensure that the final or any future Constitution adheres to basic framework of principles.
[69] S Seedorf & S Sibanda 'Separation of Powers' in S Woolman et al (eds) Constitutional Law of South Africa (Juta 2008) 39.
[70] *2006 (CCT12/05) ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) at 36-37.*
[71] *De Lange v Smuts NO & Others 1998 (CCT26/97) ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) at 60-61.*
[72] *Treatment Action Campaign* para 199.

democratic system. Mogoeng CJ in *Electronic Media Network Limited and Others v e.tv (hereinafter e.tv)* defined the doctrine eloquently:

> Ours is a constitutional democracy, not a judicatory. …Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.[73]

The doctrine has been adapted to suit the unique requirements of individual countries' constitutional considerations. The Constitutional Court has also acknowledged that there is 'no universal model of separation of powers.'[74] Issacharoff argued that 'separation of powers is not likely to have the same force in parliamentary and presidential systems' but it 'remains a critical protection in preventing the use of extraordinary powers for quotidian political gain.'[75]

In *De Lange v Smuts,* the Constitutional Court reiterated its ruling in the *Certification* case that South Africa's separation of powers doctrine will organically evolve.[76]

1.7 Methodology

This section critically fleshes out the methodological paradigms adopted in the gathering of data and interpretation thereof. The research assumes a qualitative methodology that employs desk research, focusing on sources dealing with separation or powers, judicial review and policymaking decisions. The research relies heavily on case law, especially judgments of the Constitutional Court given its role in dealing with application of judicial review on cases that involve the powers of the executive's policy decisions. It also highlights the history of South Africa's constitutional journey through

[73] *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others (CCT140/16; CCT141/16; CCT145/16) [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) (8 June 2017 PARA 1.*
[74] *Certification Case*108.
[75] S Issacharoff Fragile Democracies: Contested Power in the Era of Constitutional Courts (Cambridge University Press 2015) 116.
[76] *De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998) at* 60. 'I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.'

literature review, and provide plurality of views from academic writing, journals, and books by legal and political scholars.

1.8 Allocation of chapters and outline

Chapter 1 is an Introduction to the research, covering problem statements, research objectives and literature review of the key main concepts, which are judicial review and separation of powers.

Chapter 2 discusses the history of judicial constitutional review in South Africa, spanning from 1652 to the final Constitution of 1996.

Chapter 3 provides a critical analysis of *United Democratic Movement v Eskom,* discussing the three cases together and highlighting the shortcomings of this case.

Chapter 4 analyses the challenges of constitutional judicial review in a democracy, highlighting circumstances under which policymakers are protected by the separation of powers doctrine.

Chapter 5 summarises the findings and concludes the research.

1.9 Conclusion

This chapter discussed key ingredients of the thrust of the research. It introduced the key case to illustrate the central theme of a conflict between policymaking and judicial review, and brought the key ingredients in the form of literature of key concepts such as separation of powers, judicial review and policy-making powers of the executive.

The role of the judiciary in a democracy was also discussed. However, the chapter reflected that this judicial power is not without its limitations, and, like any exercise of power, it must adhere to the principles and values of the same Constitution it purports to uphold. It therefore sought to examine the limitation of judicial review and the constitutional mechanisms available to check its abuse. It has diagnosed this power against the mechanics found in the doctrine of separation of powers, which is the departure and cornerstone of South Africa's democracy; the doctrine seeks harmony but accountability among all arms of government, including the judiciary.

Chapter 2. History of constitutional judicial review in South Africa

2.1. Introduction

This chapter discusses the historical genesis of the South African constitutional system, the evolution of the constitutional judicial review, and the role of the judiciary in South Africa.

South Africa evolved politically and constitutionally throughout history. From the pre-colonial era, Dutch settlements of 1652, to the British colonial periods of the 18th Century, to the South Africa Constitution of 1909 and the Union of 1910,[77] to the Republic and the Constitution of 1961,[78] to the tricameral Parliament and Constitution of 1983,[79] to the interim Constitution of 1993[80] and finally to a democratic era in 1994[81] and the final Constitution of 1996. While a full chronological account of every stage of South Africa's constitutional development is not provided, an overview is presented in order to contrast the application of constitutional judicial review before and after 1994.

This chapter provides background and historical context of the rationale behind the decision to develop a strong Constitution and a powerful Constitutional Court with constitutional judicial review powers in South Africa.

2.2 From Dutch to English Law, 1652–1908

When settler-employees of the Dutch East India Company landed in the Cape of Good Hope in 1652, they brought with them the legal system and jurisprudence from Holland and Batavia.[82] This, according to Rautenbach and Venter, is largely because 'the Dutch Parliament delegated its authority over foreign territories' to the company.[83]

[77] South Africa became a Union on 31 May 1910. This was a Union of two boer republics (the Orange Free State and the Transvaal) and the British colonies of Natal and the Cape. The Union excluded the majority of black people from political participation.
[78] On 31 May 1961, South Africa became a Republic.
[79] Republic of South Africa Constitution Act 110 of 1983.
[80] Constitution of the Republic of South Africa Act 200 of 1993 repealed by Constitution of the Republic of South Africa, [No. 108 of 1996], G 17678, 18 December 1996.
[81] On April 27 1994, the first democratic elections took place.
[82] A Edwards The History of South African Law: An Outline (LexisNexis 1996). 65
[83] Rautenbach and Venter 13.

According to Edwards, 'in the early days of the settlement at the Cape the only court in existence was the one modelled on the pattern of a ship's broad council.'[84] Their source of law at the time was a document called *Artyleckelbrief,* which set rules for employees on the ships.[85] They later established the *Raad van Justitie* in 1685 and 'the courts at the Cape followed the practice of the courts in both Holland and Batavia' and the use of Roman-Dutch law.[86] The jurisprudence underwent gradual changes during the second British occupation in 1827, with the transformation of the *Raad van Justitie* to the Council of Justice, but there was no judicial independence and judges were appointed and removed at the governor's discretion.[87] 'The ultimate court of appeal was the King-in-Council, a court which does not appear to have been resorted to at all, legal costs were no doubt prohibitive.'[88] From Edwards' writing, it can be deduced that judicial review was not the central, strong feature of the jurisprudence. The British preserved Roman-Dutch law and other rights under 'the eighth article of the Articles of Capitulation' while introducing the English jurisdiction in some areas.[89]

Edwards points out that the First Charter of Justice was implemented from 1828 onwards with the Council of Justice replacing the Cape Supreme Court.[90] From then, English law and procedure started creeping in through the introduction of English statutes, with the Judicial Committee of the Privy Council in London serving as the appeal court.[91] Following the migration of the boer settlers into the interior, Roman-Dutch law continued to be the jurisprudential system in the so-called boer republics of the Transvaal and the Orange Free State.[92] Basson and Viljoen state that the constitutions of the two boer republics were 'foreign' to the British system which did not have that kind of executive presidential system.[93] However, some influence of the English jurisprudence from the Cape could still be traced, while the Cape and Natal were under the English rule and legal influence.

[84] A Edwards 67.
[85] As above
[86] A Edwards 73
[87] A Edwards 77
[88] As above
[89] As above
[90] A Edwards 79.
[91] Edwards 79
[92] Note above
[93] D Basson & H Viljoen *South African Constitutional Law* (Juta 1988) 36.

In the Transvaal, a constitutional crisis was created when, in 1892, Chief Justice JG Kotze tried to review and strike down legislation of the legislature (*Volksraad*) on the basis that it 'conflicted with the Constitution.'[94] President Paul Kruger rejected this attempt and fired the Chief Justice.[95] Kruger characterised such constitutional judicial review or what was defined as judicial testing rights as a 'principle of the devil.'[96] Kruger, according to Van der Merwe, believed that only the people could challenge the legislation,[97] an argument still used by politicians to this day, as demonstrated through this research. In an address to judges, Kruger said:

> You, by virtue of your office represent the solidity of the state...it also depends on you that confidence in the country should not be shocked...and if you, honourable judges, in your own judgement, set aside a decree of the Volksraad, then you adopt the right of criticism from the devil.[98]

However, following the South African war between the boer and the British (1899-1902) and annexations of the boer republics, English law significantly penetrated the South African legal system, while Roman-Dutch law remained the country's common law.[99]

2.3 Union of South Africa constitutional structure, 1909–1931

The four republics, Cape, Natal, Transvaal and the Orange Free State, decided to unite through the Union of South Africa Act of 1909 (the South Africa Act), with the Union declared on 31 May 1910.[100] Rautenbach and Venter have written about the South Africa Act mirroring the Westminster government system and institutional structure as the constitutional architecture of the Union of South Africa.[101]

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[94] De Vos *et al* 7 .
[95] As above.
[96] D van der Merwe 'Brown v Leyds No (1897) 4 or 17: A Constitutional Drama in Four Acts. 1 Act four: Kotzé Delivers his Judgement, Kruger Dismisses him, Milner Prepares for War and Brown Seeks International Redress' (2018) 23 Fundamina 2.
[97] As above.
[98] Quoted in R Goldstone 'Do Judges Speak Out?' 36th Alfred and Winifred Hoernle Memorial Lecture, South African Institute of Race Relations, 10 February 1993 https://disa.ukzn.ac.za/sites/default/files/pdf_files/boo19930210.028.058.pdf (accessed 20 January 2024).
[99] Edwards 86.
[100] South African History Online 'The Union of South Africa 1910' https://www.sahistory.org.za/article/union-south-africa-1910 (accessed 20 February 2024).
[101] (n 23) 14.

> British conventions applicable to the relationship between the King, Prime Minister, cabinet, lower and upper houses were followed more or less unchanged in relations to the corresponding South African institutions.[102]

According to the authors, the executive and legislative authority of the Union were not entirely independent and were 'still subject to the legislative and executive authority of the United Kingdom' until 21 years later.[103] In fact, de Vos et al pointed out that the South Africa Act was 'passed through both Houses of the Imperial Parliament in the United Kingdom exactly as it was forwarded after the South African Convention was held.'[104] The King, according to Basson and Viljoen, could 'invalidate an Act of Parliament within a year of its commencement with retrospective effect.'[105] This meant that the South African Constitution at the time was subordinate to its colonial power and did not allow any shred of political and judicial independence for the colonies' jurisprudence.

De Vos et al say the Union could not make laws that were inconsistent with the laws of the United Kingdom[106] as 'all bills passed by the South African Parliament had to be sent to the Governor-General…for assent before they could become law.'[107] This was in line with the Colonial Laws Validity Act of 1865, and is why, according to Van der Schyff, there were statutory provisions which explicitly stated that 'colonial legislation could conflict with Imperial legislation'.[108]

In such a constitutional scenario, parliamentary sovereignty was the foundational feature of the system, and the judiciary had limited constitutional judicial review power. Van der Schyff points out that the Union's constitutional drafters had no intention to include the Bill of Rights 'nor were the courts entrusted with any explicit powers to review compliance with the Constitution':[109] 'Constitution was an instrument that could not be enforced by the judiciary.[110] The legislature was left to decide how the Constitution had to be implemented and respected.'[111] According to Van der Schyff,

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[102] Rautenbach & Venter 14
[103] Rautenbach & Venter Above
[104] De Vos et al 10.
[105] Basson and Viljoen 37
[106] De Vos et al 10.
[107] As above.
[108] G van der Schyff Judicial Review of Legislation: A Comparative Study of the United Kingdom, The Netherlands and South Africa (Springer 2010) 37.
[109] Van der Schyff 35
[110]Van der Scyff 36
[111] Van der Scyff 36.

only common law rights and freedoms were extended but 'could be exercised to the extent that they were not limited by parliament.'[112] The judiciary could not even review the racist Constitution that excluded the majority population of black South Africans from participating in governance processes and denied them fundamental rights. However, de Vos et al contend that the Cape still retained 'its provision for limited voting rights for blacks.'[113] Van der Schyff said 'the quality of the country's democracy was severely hampered by restrictions on the right to vote.'[114] Rautenbach and Venter note that in 1910, administrative issues relating to black South Africans were 'vested in the Governor-General' and later, the Black Administrative Act of 1927 'granted the governor-general full legislative power in respect of black affairs.'[115]

2.4. The Statute of Westminster and fading judicial review, 1931-1947

The Statute of Westminster of 1931 (the Statute) was indirectly a repeal of the Colonial Laws Validity Act of 1865. Rautenbach and Venter argued that the Statute was a catalyst to the British Parliament relinquishing 'all legislative authority over these former colonies.'[116] The Union of South Africa then cemented its independent status by adopting the Status of the Union Act 69 of 1934. Rautenbach and Venter describe this course of events as,

> The last significant constitutional link to the United Kingdom was severed when the right of appeal to the British Privy Council against the decision of the South African supreme court was abolished.[117]

In other words, the Supreme Court in South Africa became the apex court, although its constitutional judicial review was later unceremoniously limited by the other political branches.

The groundbreaking case in 1934 of *Sachs v Minister of Justice*[118] set the tone for the fading of judicial review, whereby then Chief Justice Stratford ACJ stated that

[112] Van der Scyff 36.
[113] De Vos 10
[114] Van der Schyff 38.
[115] (n Rautenbach and Venter 12 and 13.
[116] As above.
[117] Rautenbach and Venter 13.
[118] *1934. A D 11.*

the law gave the executive 'unfettered discretion' and the court had no role to interfere with such discretion.[119]

The executive-minded judicial deference buttressed the parliamentary sovereignty system, making the courts subservient to the legislature. The other headache for the Union Government was the racial discriminatory laws to bar non-Europeans from voting, thereby using the law to separate races. Rautenbach and Venter pointed out that in 1936,

> …provisions were made for the representatives of blacks by white senators and black Cape voters were put on a separate voters roll for the election of white members of the House of Assembly and Senate.[120]

However, this created a crisis for the Government years later, as discussed below.

2.5 The rise of the National Party and the Constitutional Crisis, 1948–1960

The National Party (NP) came to power in 1948 under the ticket of implementing racial segregation it called 'apartheid', disenfranchising the majority of black, coloured and indian South Africans. Racism was already part of the political dogma, but the NP codified it. According to de Vos et al, the system was boosted with the creation of homelands through the Bantu Authorities Act of 1951.[121] However, the NP did not take into consideration the second constitutional crisis (since Kruger) created by its racist laws. The party underestimated the independent mindedness of some judges and the residual traces of the constitutional judicial review power still lingering in the Supreme Court of Appeal.

Even though the courts could not challenge the substantive content of the laws and executive decisions, this was disrupted in 1952 in the *Harris v Minister of Interior*

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[119] *1934 AD 34 at 38.*36-38. 'One further general observation I would make is this: that once we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a Court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its away, and that it is the function of courts of law to enforce its will.'

[120] Rautenbach and Venter 15.

[121] De Vos at al 14.

cases. Here, the Appeal Court challenged and declared invalid laws that disenfranchised coloured voters in the Cape, causing a constitutional crisis.[122] In the first *Harris* case, the court overruled the constitutional convention that provided that the courts could not examine and review the procedure undertaken by Parliament.[123] The court was asked to determine whether the Separate Representation of Voters Act, 46 of 1951 that disqualified voters on the grounds of race or colour was not in 'conformity with sections 35(1) and 152 of SA Act' and therefore declared null and void.[124] The Statute of Westminster had left the entrenched clauses of the South Africa Act intact, which meant that coloured voters were defined as,

> …persons in the Cape Province who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of Union, are capable of being registered as voters.[125]

The court invalidated the Act,[126] and held that 'if the right to vote is regarded, under the Cape laws, race or colour were not factors in such right.'[127] Rautenbach and Venter described the challenge as 'a unique turn of events in the British constitutional world within which Parliament was regarded as sovereign'[128] where 'what Parliament says is law, without the need to offer justification to the courts.'[129]

The unanimous decision of the Appeal Court was probably the major constitutional judicial review to challenge the NP's legislative and political power.[130] The court was reaffirming its constitutional review power, cementing its independence

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[122] *Harris and Others v Minister of Interior and Another 1952 (2) SA 428 (A)*.
[123] *Harris flynote*
[124] flynote above.
[125] As above
[126] *Harris*. The court held that: 'Act 46 of 1951, which provides for the separate representation of European and non-European voters in the Province of the Cape of Good Hope, disqualifies both European and non-European voters and potential voters on the ground of their race or colour within the meaning of G section 35 of the South Africa Act. Accordingly, as it was passed by the House of Assembly and the Senate sitting separately and not in conformitywith the provisions of sections 35(1) and 152 of the South Africa Act, and as it is not possible to separate the good from the bad, it is invalid, null and void and of no legal force and effect.'
[127] *Harris*.
[128] Rautenbach and Venter 15.
[129] Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 31 *South African Journal on Human Rights*
[130] The court held that: 'The Statute of Westminster has left the entrenched clauses of the South Africa Act intact; accordingly, the Courts have the power to declare an Act invalid on the ground that it was not passed in conformity with the provisions of sections 35 and 152 of the South Africa Act. The Court in declaring that such a Statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by Statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging that duty is…controlling the Legislature.' The National Party came to power in 1948 under the Union of South Africa, declared South Africa a Republic in 1961, and ruled until a democratic transition in 1994 that saw South Africa becoming a democracy.

and confirming the separation of powers doctrine. This was a constitutional crisis in the battle between the judiciary and the other political branches. Centlivres CJ, in the ruling that would later pit him against an affronted legislature and executive, declared, 'it is sufficient to say that in my opinion the whole of the (South Africa) Act should be declared invalid.'[131]

In retaliation to what the NP Government believed was the judiciary's challenge of its political power, the Government tried to end the constitutional judicial review. Parliament attempted to establish the High Court of Parliament through Act 35 of 1952, making Parliament the ultimate court of appeal constitutional matters.[132] This meant that legislators wanted to sit as judges and apply judicial review on its decisions and conduct, taking the power from the courts and placing it in their own hands. The matter was brought back to the Supreme Court of Appeal in the second *Harris case* in the latter part of 1952.[133] The court stood its ground and invalidated the Act that established this High Court of Parliament, concerned that it would be 'a new Court with jurisdiction superior to that of the Appellate Division.'[134]

> Act 35 of 1952, which established a High Court of Parliament, consisting of all Senators and Members of the House of Assembly, with power to review decisions of the Appellate Division of the Supreme Court of South Africa, alters section 152 of the South Africa Act; accordingly, as it was passed bicamerally and not in the manner C prescribed by the second proviso to section 152, it is invalid. The High Court of Parliament is not a Court of Law such as was envisaged by section 152 of the South Africa Act; nor, in substance, is it a Court of Law. The decision in the Cape Provincial Division in *Harris and Others v Minister of the Interior and Another*.[135]

Without referring to the doctrine specifically, the Supreme Court of Appeals pointed out that such a High Court of Parliament will offend the separation of powers doctrine in that members of the legislature without judicial power will have to sit to decide the invalidity of their own conduct.[136]

Three years later, the NP Government successfully disenfranchised coloured voters by abusing its majority in the legislature and reconfiguring the Appellate Division.

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[131] *Harris.*
[132] The O'Malley Archive 'The Heart of Hope: South Africa's Transition from Apartheid to Democracy', https://omalley.nelsonmandela.org/index.php/site/q/03lv00000.htm (accessed 29 November 2023).
[133] *Minister of Interior and Another v Harris and Others 1952 (4) SA 769 (A).* Judgment was handed down on 13 November 1952 (hereinafter *Harris 2*) Judgment was handed down on 13 November 1952.
[134] *Harris 2.*
[135] *Harris 2* headnote.
[136] *Harris 2* 116.

It passed the Senate Act of 1955 to meet the required two-thirds threshold,[137] and the Appellate Division Quorum Act, 25 of 1955, which increased the quorum of judges on the Appellate Division from five to 11 to strengthen its judicial hand.[138] Former Chief Justice Corbett described this Act as a political tactic because it allowed a normal quorum of five justices but 'would be eleven in the case of any appeal in which the validity of an Act of Parliament was in question.'[139] The restructured Supreme Court was too weak to fight back and instead defaulted to the parliamentary sovereignty argument.[140] The court ruled that Parliament has the right to legislate.[141] In the 1957 *Collins v Minister of the Interior* case, Chief Justice Centilivres capitulated and held that,

> if the provisions of a law are clear, we, as a court, are not concerned with the propriety of the legislation or policy of the legislature, our duty is to minister and interpret it as we find it.[142]

This was a clear retreat to a parliamentary supremacy regime in which justice and equity were replaced by the enforcement of unjust, positive laws, and judicial review was replaced by a strong legislative and executive domination.

The action of the legislature and its attempt to trump the role of the judiciary was done without regard to the doctrine of separation of powers or any other constitutional structure that respects the roles of other branches. It is clear that under the pseudo-constitutional scheme of the past, power was concentrated in the political arms of Government—the legislative and executive—with a weak, and somewhat powerless judiciary that relied on a positivistic approach as the fundamental essence of the law.

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[137] S Ngcobo 'Why Does the Constitution Matter?' Public lecture series: Human Sciences Research Council, 30 June 2016 https://hsrc.ac.za/uploads/pageContent/7058/HSRC%20Public%20Lecture%20(FINAL)%20-%20Why%20The%20Constitution%20Matters%20(v%2020%20July%202016).pdf (accessed 23 August 2023).

[138] As above and n 116: 'This act enlarged the court from six to eleven judges and provided that all eleven had to sit in cases to determine the validity of a statute.'

[139] MM Corbett 'Political Influences in the Legal Process: Law and Politics in South Africa', March 1993 https://journals.co.za/doi/pdf/10.10520/AJA10128743_645 (accessed 21 February 2024).

[140] *1957 1 SA 552 (A) 567*

[141] *1957 1 SA 552 (A) 567*

[142] 1957 1 SA 552 (A) 567.

2.6 The 1961 Constitution and the ultimate end of constitutional judicial review

South Africa became a republic on 31 May 1961, severed ties with its colonial powers, and promulgated the new Constitution.[143] After the NP exerted its political suppression on the judiciary following the constitutional crisis, the role of the courts was reduced to the application of positive law regardless of its immorality and absurdity. It did this through the 1961 Constitution that did not provide any space for constitutional judicial review,[144] and in fact, explicitly prevented constitutional judicial review. The 1961 Constitution was founded on the pillars of parliamentary sovereignty and elevated the legislature above the other branches, buttressing the power of the executive but diminishing the power of the judiciary. It categorically expressed the importance and presence of a strong parliamentary supremacy regime by stating:

> (1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.
>
> (2) No court of law shall be competent to enquire into or to pronounce upon the validity of an Act passed by Parliament, other than an Act which repeals or amends or purports to appeal the [entrenched language provisions].[145]

The English common law prerogative and unreviewable power of the Crown was transferred to the State President in the 1961 Constitution.[146] The 1961 Constitution also provided no room for a Bill of Rights. Without a Bill, Cameron posited, 'the courts had no power to question what the legislature enacted because Parliament was supreme, and courts had to enforce its will.'[147] Accordingly, it was not up to the court to question the unjust nature of the law. Cameron observed:

> The apartheid legislature could enact any law, no matter how hateful or oppressive or demeaning. And it often did. No provision of the Roman-Dutch common law, no court ruling, no principle of fairness could make the slightest difference. What Parliament enacted was supreme law, and had to be enforced.[148]

[143] Constitution of South Africa Act 32 of 1961.
[144] Constitution of Republic of South Africa, 1961
[145] Sec 59(2) of the Constitution of Republic of South Africa, 1961.
[146] Sec 7(4). These powers were also re-transferred to the 1983 Constitution.
[147] E Cameron 'Legal Chauvinism, Executive-Mindedness and Justice: L. C. Steyn's Impact on South African Law' (1982) 99 South African Law Journal 38. Location 522.
[148] (n 139) location 2339.

The constitutional judicial review was finally suppressed by the 1961 Constitution. Van der Schyff argues that,

> …the bar on judicial review as it was formulated in the 1961 Constitution was qualified though by allowing the courts to test whether an act of parliament had been adopted in accordance with the prescribed legislative procedure.[149]

The 1961 Constitution, according to Van der Schyff, 'left no uncertainty as to the role of the courts, they had to interpret and obey the law and not question it.'[150] Judicial review was mainly confined to the English doctrine of *ultra vires* and administrative law to review the decisions of the common law administrators.[151] It did not limit the powers of the executive and the legislature on substantive content of the law.[152]

2.7 The Tricameral Constitution of 1983

After decades of political unrest, the NP tried to introduce reforms through a new Constitution that extended some separate houses and voters roll of indian and coloured South Africans, excluding the majority black population.[153] The Constitution stated that, 'Parliament shall consist of three Houses, namely, a House of Assembly, a House of Representatives and a House of Delegates.'[154] Black voters remained confined to their homelands' political and legislative systems.[155] De Vos et al said that despite the so-called reforms, the new Constitution ensured that political power and legislative control remained in the hands of the white minority.[156]

During the reform period, the 1983 Constitution did not provide any form of constitutional judicial review despite committing in its preamble 'to uphold the independence of the judiciary and the equality of all under the law.'[157] The Constitution stated unambiguously that 'no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament.'[158] However, the Constitution granted the high courts the testing power 'to inquire into and pronounce' on whether

[149] Van der Schyff 39. 39.
[150] Van der Schyff 39. 38
[151] See more on administrative law v constitutional law judicial review later in this chapter.
[152] Van der Schyff 39. 34.
[153] Republic of South Africa Constitution Act 110 of 1983.
[154] Sec 37(1), Constitution, 1983.
[155] Sec 93, Constitution 1983.
[156] De Vos et al) 15.
[157] Preamble, Constitution, 1983.
[158] Sec 34(3) of the Constitution, 1983.

any law enacted by Parliament, the state President and any house complied with the Constitution.[159] This was, for the first time, the introduction of some form of constitutional judicial review in the South African jurisprudence since the previous constitutional crises. However, it is important to note that this testing of rights was superficial in that the review did not extend to the courts challenging the substance and morality of racist and suppressive laws.[160]

2.8 The Constitutional era: from the 1993 interim to the current Constitution

The interim Constitution was adopted in 1993[161] by the Multi Party Negotiating Forum.[162] It was a transitional Constitution following political discussions regarding the future of a democratic South Africa to end apartheid. After the Forum adopted the interim Constitution, it was ratified by the last illegitimate apartheid Parliament in order to effect its legal status.[163] The 1993 Constitution was specifically and deliberately referred to as interim because it was not drafted, adopted and ratified by a democratic parliament elected through free and fair elections.[164] However, the parties at the Negotiating Forum could appropriately be referred to as the midwives of South Africa's new political and constitutional order. The Interim Constitution contained Constitutional Principles that formed the foundational basis for any future constitutional structure and system. Constitutional Principle VII affirmed the importance of the judiciary as the guardian of the Constitution and introduced constitutional judicial review into the South African jurisprudence:[165] 'The judiciary shall be appropriately qualified, independent

[159] Sec 34(2) of the Constitution, 1983
[160] De Vos et al 15 15. 'Despite these reforms, the African majority continued to be excluded from the constitutional scheme.'
[161] The Constitution of the Republic of South Africa Act 200 of 1993.
[162] The body comprised all parliamentary and extra-parliamentary parties that negotiated for a free and democratic South Africa. It preceded the Convention for a Democratic South Africa forum, which collapsed after the African National Congress (ANC) walked out. The Forum followed years of a violent struggle by liberation movements to liberate South Africa from an oppressive regime. The draconian laws of the apartheid government triggered the liberation movements' military wings, the ANC's Umknonto we Sizwe, the Pan African Congress' Azanian People's Liberation Army, and Azapo's Azanian Liberation Army, to attempt to overthrow the government. This did not yield any meaningful results, but economic sanctions and civil unrest forced the apartheid government to consider negotiations and releasing political prisoners, including Nelson Mandela in 1990.
[163] De Vos et al 19. .
[164] All prior Constitutions prevented the majority of black South Africans from voting.
[165] Schedule 4 Constitutional Principles. Constitution of the Republic of South Africa Act 200 of 1993.

and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.'[166] The 1993 Constitution ushered in a structural, institutional and substantial foundation through which it defined the powers of all arms of government.

As indicated in the introductory remarks above, the interim Constitution existed during a temporary, and undemocratic political environment until the first democratic elections held on 27 and 28 April 1994, heralding the end to an oppressive and racist regime.[167] After the 1994 elections, members of the new democratically elected Parliament, comprising both the National Assembly and Senate,[168] sat to constitute the Constitutional Assembly whose task was to draft the final Constitution.[169] These men and women were the founding fathers and mothers of the current constitutional democracy and constitutional judicial review, the antithesis to all previous jurisprudences.

While the Constitution was born at this time, there was no institutional judicial body to protect and enforce it. Constitutional judicial review was neither part of the jurisprudence nor the institutional culture in South African courts. A decision was taken to create a new, transformed, credible Constitutional Court dedicated to this role, away from the established apartheid judicial institutions that lacked legitimacy.[170]

> The ANC felt that this task would be too difficult and that the new Constitution needed as its protector a new court - one untainted by the past. In this sense, the decision to create a Constitutional Court was a political one. And the process of appointment to the Court - clearly laid down in the interim constitution - was the product of compromise.[171]

The Constitutional Court was unveiled by the first democratically elected President, Nelson Mandela, on 14 February 1995. The core and primary role of the court was to

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[166] As above.
[167] Rautenbach and Venter 17. South Africa held its first democratic elections in 1994, ushering in a new Constitution. For the first time, black people were allowed to cast a vote as free citizens.
[168] It was later changed and reconstituted as the National Council of Provinces. Parliament of the Republic of South Africa 'Evolution of the National Council of Provinces from Senate to its Current Form' no date. https://parliament.gov.za/news/evolution-national-council-provinces-senate-its-current-form (accessed 23 November 2023).
[169] Sec 68 of the Constitution, 1993. The first sitting was convened by the President (Nelson Mandela was the first democratically elected President and the first convenor of this Constitution-making body). Subsequent sittings were convened by the Chairperson of the Assembly, Cyril Ramaphosa (the current South African President).
[170] Constitutional Court of South Africa 'History of the Court', no date https://www.concourt.org.za/index.php/about-us/history (accessed 26 February 2024).
[171] As above.

hear constitutional matters, while the Supreme Court of Appeal remained the apex court on all other matters.[172] This initially appeared to be a hybrid or parallel judicial structural system, as the Chief Justice led the Supreme Court of Appeal while the Constitutional Court was led by the President. However, the Constitutional Court is currently 'the highest court of the Republic' and led by the Chief Justice.[173] The Constitutional Court can decide on constitutional and,

> …any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.[174]

The major case that characterised the importance and unprecedented significance of the Constitutional Court's review power was *S v Makwanyane* in 1995, where the court declared the death penalty unconstitutional.[175] In this case, the court also emphasised the critical role of the constitutional judicial review and the rationale behind the departure from the parliamentary sovereignty system. The court flexed its power by highlighting that it would apply the Constitution even if it meant taking decisions against popular public opinion or the majority in order to protect minorities and fundamental rights.[176] *Ferreira v Levin* in 1995 was another judgment milestone of the newly created Constitutional Court. The court again accentuated the importance of striking a balance between the role of constitutional judicial review and respect for the separation of powers doctrine.[177]

> The protection of fundamental freedoms is pre-eminently a function of the court. We should not, however, construe section 11 so broadly that we overshoot the mark and trespass upon terrain that is not rightly ours.[178]

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[172] However, Sec 167(5) of the Constitution, 1993, states, 'The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.'
[173] Sec 167(3)(a) of the Constitution, 1996.
[174] Sec 167(3)(b)(i)(ii) of the Constitution, 1996.
[175] 1995 (CCT3/94) ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
[176] (n 167) 88. 'The new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.'
[177] 1995 (CCT5/95) ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995).
[178] *Ferreira v Levin* 183 .

The Interim Constitution granted the Constitutional Court immense powers of judicial review. It dictated that one fifth of Constitutional Assembly members could petition their chairperson to refer a proposed draft to the court to 'obtain an opinion' on whether it would comply with the Constitutional Principles.[179] In 1996, the Constitutional Court first applied constitutional judicial review of the final Constitution in the *Certification* case.[180] It tested the provisions of the Constitution against the 34 Constitutional Principles set out in the Interim Constitution,[181] which stated that 'a new constitutional text shall' comply with these principles and 'be passed by the Constitutional Assembly.'[182]

While this displayed the supremacy of the Constitution, it was equally perceived as the beginning of the golden era of immense judicial power. The Constitutional Court's task, recalls Cameron, 'was immensely delicate.[183] It was careful to explain that its job was judicial, not political.[184] It had to certify a constitution.'[185] In the *Certification* case, the court affirmed the role of the constitutional judicial review power as a shield to protect and enforce the Bill of Rights.[186] These principles are permanently entrenched.[187]

The Constitutional Court used its powers to review legislation and executive powers during the *Certification* case. For instance, the court rejected section 64(1) of the Labour Relations Act that insulated the right to strike and employers' right to lock out employees from being subjected to constitutional judicial:[188] 'The section is not in

[179] Sec 71(4) of the Constitution, 1993.
[180] *Certification Case* 1. 'CP VII requires that the judiciary should "have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights," while the requirements of CP II are that the fundamental rights, freedoms and civil liberties be entrenched and justiciable. CP V requires that the legal system ensures the equality of all before the law and an equitable legal process.'
[181] The Interim Constitution referred to such principles as 'a solemn pact.'
[182] Sec 71(1)(a)(b) of the Constitution, 1993. 'The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).'
[183] Cameron (location 1749).
[184] N above.
[185] Cameron location 1749.
[186] *Certification Case* 137 137.
[187] Sec 71(3) of Constitution, 1993. (n 44) 18. 'A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.'
[188] *Certification Case* 149.

compliance with the (Constitutional Principles).'[189] The rejection of judicial review for certain categories of statutes, according to Issacharoff, 'was found to violate the commitment to constitutional supremacy in Principle IV and the jurisdictional guarantees for judicial power contained in Principle VII.'[190] The role of the Constitutional Court's judicial review became critical as it was the first time in the history of South Africa that an institution outside a democratic process was entrusted with so much power. Constitutional judicial review was a jurisprudential revolution. After the certification process, the Constitutional Assembly complied with the Constitutional Court's concerns and the Constitution was adopted on 4 December 1996, taking effect on 4 February 1997.[191] The Bill of Rights and constitutional judicial review were key features that gave the Constitution legal and political teeth and power.

Transforming the entire legal system and jurisprudence was a mammoth and complex task. This is why the new constitutional jurisprudence remains a work in progress. Rautenbach and Venter describe the South African constitutional reform process as an 'evolutionary constitutional development.'[192] 'This means that existing constitutional arrangements continue to exist until lawfully replaced.'[193] The idea, argues Cameron, 'that there would be constitutional review of legislative and executive action, lay at the heart of the new Constitution.'[194] Parliament can pass statutes, Cameron continues, 'but it is the judiciary, and the judiciary alone, that has power to state the law, and say what the Constitution means.'[195] The intention of the legislators is no longer relevant in interpretation of the legislation, but constitutional supremacy becomes an overarching determination of the meaning and values attached to every statute and power. Du Plessis says the supremacy clause in the Constitution,

> …combined with the open texture of the constitution, results in the exercise of judicial review which is far wider and more powerful than that under a system of parliamentary sovereignty.[196]

[189] Such rejections were part of the Constitutional Court's first landmark application of judicial review power.
[190] Issacharoff 184 184.
[191] De Vos at al 26
[192] Rautenbach & Venter 25
[193] As above.
[194] Cameron location 1791.
[195] Cameron 2416.
[196] Du Plessis (n37). 430.

In the *President of the Republic of South Africa v Hugo* case, the Constitutional Court reiterated the meaning of the supremacy of the Constitution in that every power, law and functions are subject to judicial review.[197]

2.9 Conclusion

South Africa's constitutional journey has traversed through diverse legal and jurisprudential systems influenced by different political epochs. The chapter reflects South Africa's transition from a narrow parliamentary sovereignty to the constitutional supremacy jurisprudence, the latter of which is based on the foundation of the Bill of Rights. South Africa emerged from a period in which the courts were powerless to review the substance, decisions and conduct of other branches of government except on narrow procedural grounds.[198]

The colonial governments treated the South African legal system as their satellite and an extension of their jurisprudence. The Dutch initially constructed the legal system around its Dutch East Indian Company's labour rules, and the English exerted its political influence in the courts. The boer republics tried to establish their own distinct constitutional structure and legal systems. The colonial effect on our legal system is still felt 300 years later, with the Dutch-Roman and English laws still influencing the South African jurisprudence.

All these periods did not necessarily reflect a fully independent judiciary. Rather, they reflected a strong executive and an overpowering legislature. With the absence of the universally applicable Bill of Rights and the exclusion of the majority from political participation, the legal system could not be relied upon to protect fundamental rights and limit abuse of power. The political outburst of the Transvaal's President Kruger in 1892 towards the judiciary illustrated the intolerance towards any demonstration of judicial independence.

The establishment of the Union saw an attempt to construct a single legal system and judicial structure. But this legal system still reflected the colonial sources of law, without embracing an independent judiciary that could freely review and

[197] *1997 (CCT11/96) ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) 10–13.*
[198] G Van der Schyff *Judicial Review of Legislation: A comparative study of the United Kingdom, the Netherlands and South Africa. Springer* (2010) 38

overturn the decisions of the executive and legislature. The ascension to power of the NP in 1948 saw the hardening of Government's attitude towards the courts and the codification of discriminatory and suppressive laws against the majority population of black South African citizens.

The courts attempted to use their testing right to question discriminatory legislations in the 1950s and were met by a contemptuously resistant executive and legislature, triggering the 1952 constitutional crisis. This crisis precipitated the explicit total elimination of constitutional judicial review in the 1961 Constitution until two decades later. While the 1983 Constitution allowed narrow testing rights by the then supreme courts on procedural grounds, the courts were still not allowed to challenge legislations and decisions that violated human rights, especially against the majority black population.

South Africa made revolutionary progress from a strong, imposing parliamentary supremacy to constitutional supremacy in 1993 following constitutional and political negotiations. The 1993 and 1996 Constitutions ushered in a democratic age, characterised by constitutional supremacy and values that are underpinned by a strong Bill of Rights. This period is also marked by an empowered Constitutional Court whose primary role is to enforce the Constitution and protect fundamental rights. The court's role was reinforced by a strong constitutional judicial review. The Constitution did not impose an authoritative power or introduce dictatorial restrictions as parameters or commands for judicial review. Rather, it invoked a strong, emotional sense of values in its structural and institutional design, anchoring on three fundamental pillars—human dignity, equality, and freedom—as cornerstones of and critical to judicial review.[199] It enjoins everyone, institution or branch of government, to base their actions, decisions and powers on these values and pillars in pursuit of the establishment 'of a society based on democratic values, social justice and fundamental human rights.'[200] This is a departure from constitutions that were based on the force and the might of the ruling party—dominating the legislature and the executive—where the concept of the rule of law did not exist. The post-1994 jurisprudence is

[199] Ch 1 of the Constitution at Secs 7(1) and 36(1) on the premises of limitation clause, 39(1)(a) on the interpretation of the Bill of Rights.
[200] Preamble to the Constitution, 1996.

characterised by an independent judiciary and a strong Constitution that demands the judiciary control and limit the powers of other branches.

Chapter 3. Critical analyses of the United Democratic Movement v Eskom.

3.1 Introduction

The *Eskom case* demonstrates judicial overreach and the undermining of and disrespect for the doctrine of separation of powers. This chapter analyses the two doctrines—separation of powers and constitutional judicial review—whose application is key to the *Eskom case.* It also gives a critical view of the case through facts, judgment and analysis. It demonstrates how the Constitution entrusts policymaking powers, budgetary priorities and allocation of resources with the executive branch in line with the separation of powers doctrine.[201] The chapter outlines the philosophy behind the doctrine and its application as a determiner of the boundaries separating the three branches. It provides context within which the doctrine allows for the exercise of policymaking power by the executive without any unconstitutional interference. The chapter equally demonstrates that constitutional judicial review empowers the courts to carry out their obligations to examine the executive and legislative decisions where such intervention is constitutionally mandated. It also illustrates the circumstances under which the negative effects of policy on fundamental rights could legitimately invite intervention by the courts and limit the executive's policymaking power.

This chapter also interrogates the principle of reasonable measures test in which the state is constitutionally obliged to take reasonable steps to advance progressive realisation of rights. It examines whether, in the *Eskom case,* the state's measures to implement loadshedding to protect the grid were reasonable or not in terms of the principles laid down by the Constitutional Court in *Government of Republic of South Africa v Grootboom,*[202] *Treatment Action Campaign*[203] and *Mazibuko*.[204] The chapter also provides a counterargument that constitutional judicial review could also be viewed as an impediment to a democratic process if not constitutionally controlled and restrictively applied.

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[201] Sec 85(2)(a) of the Constitution, 1996.
[202] *2000 (CCT11/00) ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) 44.*
[203] *Treatment Action Campaign* 199.
[204] *Mazibuko & Others v City of Johannesburg & Others 2009 (CCT 39/09) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009* 55.

This chapter provides facts and judgment of the three *Eskom cases*[205], as well as critical analysis of the case as a whole, examining whether it was purely a policy matter in the province of the executive, or whether the North Gauteng High Court was constitutionally obliged to intervene and on what grounds.

3.2. Judicial review of policy cases with budgetary implications

Judicial review of policies that involves socioeconomic rights tends to have implications on allocation of resources and budgetary decisions, which are exclusive domains of the executive.[206] The executive, in such circumstances, is expected to prioritise its resources, which could lead to some socioeconomic rights and areas being less prioritised, but not necessarily limited. In such a case, the executive cannot be said to have infringed fundamental rights if limited resources and bad policy choices do not bear immediate results. In the context of the *Eskom case,* electricity represents such scarce resources with budgetary impact, forcing the executive to ration power distribution and supply to protect the grid, commonly known as loadshedding. The Constitutional Court in *Soobramoney v Minister of Health* accepted this practical limitation and acknowledged that 'the guarantees of the Constitution are not absolute but may be limited in one way or another.'[207] The Constitution accepts, says the court in *Soobramoney*, 'that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems.' Scarce resources are a limiting hurdle to achieving socio-economic rights.[208] *Mazibuko* also held that,

> …the Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government.[209]

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[205] *United Democratic Movement & Others v Eskom Holdings SOC Ltd and Others 2023 (005779/2023; 003615/2023; 022464/2023) ZAGPPHC 1949 (1 December 2023); United Democratic Movement & Others v NERSA 2023 003615/2023; and United Democratic Movement v President of the Republic of South Africa & Others (African Christian.*

[206] Sec 85(2)(a) of the Constitution, 1996: The President exercises the executive authority, together with the other members of the Cabinet, by—(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or in national legislation.

[207] *1997 (CCT32/97) ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) para 43.*

[208] As above.

[209] *Mazibuko 161*.

While the Constitution, rightly so, empowered the executive to formulate and execute energy policy to tackle the power crisis, the impact of such policy on fundamental rights was the question before the North Gauteng High Court. However, it is not up to the courts to decide on the best policy options, budget priorities, operational plans, strategic focus or distribution of resources. It is for this reason that any interrogation of the energy strategy and operational plans in *Eskom* borders on intrusion, unless the court showed that its impact on fundamental rights warrants such intervention. The Constitutional Court reiterated this principle in *e-tolling*, where it held that the courts should 'refrain from entering the exclusive terrain of the executive and legislative branches of government.'[210] However, the North Gauteng High Court in *Eskom 2*[211] argues that 'nowhere has it been indicated' that its order in *Eskom 1*[212] directing Government and Eskom not to loadshed public schools, hospitals and police stations 'would cripple the State, its budgets or derail the implementation of the Energy Action Plan (EAP).'[213] However, as the chapter will argue, the results of the order could have been achieved without the court taking this constitutional judicial review route.

The contention in the *Eskom case* is whether the impact of loadshedding can be directly linked to the violation of fundamental rights cited in *Eskom 2 and 3,*[214] of which this research disagrees. In cases where the allocation of resources and policymaking are at the centre of the legal dispute, the violation of fundamental rights are not necessarily key questions for judicial review. Instead, the impact and the consequences of policy decisions on competing rights are often the contested issues, as is the case in *Eskom*. It is the constitutional paradox and political contradictions that make justiciability of socioeconomic rights and executive policy decisions a jurisprudential grey area and a contentious constitutional dilemma. When there are limited resources for far too many people, the decision on the deployment of resources becomes a policymaking role. In this context, the courts are expected to permit a discretionary space for the executive to exercise its decisions based on availability of resources. In *Khosa v Minister of Social Development*, Ngcobo in minority judgment

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[210] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September* 2012) 44.
[211] *2023 (005779/2023; 003615/2023; 022464/2023) ZAGPPHC 1949 (1 December 2023).*
[212] *2023 (005779/2023; 003615/2023; B38/2023) ZAGPPHC 280 (5 May 2023).*
[213] *2023 (005779/2023; 003615/2023; B38/2023) ZAGPPHC 280 (5 May 2023).* 60.
[214] *2023 003615/2023.*

was more sympathetic to policymakers regarding budgetary constraint regarding social grants to non-citizens.[215] The courts' job is not to take the power from hospitals to prescribe medication or from school principals for setting criteria for admission. This belongs in the province of the executive and not the judiciary.

There is no doubt that the fundamental rights in the Bill could be realised easily if there were an abundance of resources. However, the Government has to make tough choices dictated by dwindling revenue and competing demands for finite resources, resulting in an increasing budget deficit.[216] The limitations of these choices are often interpreted by some litigants, and to an extent some courts, as failure by the executive's policies to realise fundamental rights, as was the case in *Eskom*, where the court extended the failure to provide consistent power supply as a fundamental rights issue. The executive might have all the good intentions and political will to achieve the constitutional objectives, but limited resources and political preferences ultimately dictate policy choices.

Therefore, the constitutional judicial review power ought to take into serious consideration the key factor to policy formulation and execution: availability of resources and political choices. This is what Froneman in minority judgment referred to as the remedy found in a 'political process.'[217] Froneman did not mean the courts cannot apply the law and carry out their constitutional obligations. He meant that the courts should understand that these are key performance areas of other political branches, the solution of which might not necessarily require judicial injunctions. Judge O'Regan also cautioned in *Mazibuko* that the court cannot 'determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.'[218] This is critical in terms of the *Eskom* case. Unless there is failure and reluctance to realise

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[215] *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development 2004 (CCT 13/03, CCT 12/03) ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004) 127-228.*

[216]The National Treasury announced that 2023/4 'consolidated budget deficit will narrow to 4 percent of GDP - the lowest since 2019/20' in National Treasury 'Budget 2023: Budget Review', 22 February 2023 https://www.treasury.gov.za/documents/national%20budget/2023/review/FullBR.pdf (accessed 11 January 2024); in his Budget Speech on 21 February 2024, Minister Godongwana said, 'Compared to a year ago, the budget deficit for 2023/24 is estimated to worsen from 4 percent to 4.9 percent of GDP' in National Treasury 2024 Budget: Budget Speech' 21 February 2024 https://www.treasury.gov.za/documents/national%20budget/2024/speech/speech.pdf (accessed 27 February 2024).

[217] *E-tolling* 20.

[218] *Mazibuko* 60.

these rights, the strategic and operational modalities of addressing these issues are off the judicial review limits. This is the approach the court should have followed in *Eskom.* O'Regan said the executive and legislature should make such a determination because 'it is their programmes and promises that are subjected to democratic popular choice.'[219] In such a context, it is up to the voters—and not the courts—to decide on the beneficiation and rewarding nature of the policy. The court in *Mazibuko* held that 'redeeming the constitutional promise of access to sufficient water for all will require careful management of a scarce resource.'[220] Justice O'Regan acknowledged and accepted 'the fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately.'[221] The court in *Eskom* should have applied constitutional judicial review power sparingly as the Constitutional Court did in *Mazibuko.* The court in *Mazibuko* had to determine, among other things,

> …whether the city's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water policy) is in conflict with section 27 of the Constitution or section 11 of the Water Services Act.[222]

The second critical issue the court was asked to interrogate, which was also a policy area, was 'whether the installation of pre-paid water…was lawful.'[223] This is one of the earlier cases in which the court was asked to use its constitutional review power to examine public policy that involved allocations of resources. The court took into consideration policy choices and difficulties facing a city with socioeconomic challenges and population explosion.[224] At least the Constitutional Court understood the responsibilities and obligations of the executive, and that policy issues in such a context cannot be outsourced to the judiciary. The Court held that,

> After careful consideration of the issues, this judgment finds that the City's Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation

[219] As above.
[220] *Mazibuko* 3.
[221] *Mazibuko* 57.
[222] *Mazibuko* 6
[223] As above.
[224] *Mazibuko* 7.

> of pre-paid meters in Phiri is found to be lawful. Accordingly, the orders made by the Supreme Court of Appeal and the High Court are set aside.[225]

This order reflected an appropriate judicial restraint and was one of the cases where the court highlighted the importance of the separation of powers doctrine and appreciated the executive's critical and constitutional role in addressing socioeconomic issues facing post-apartheid South Africa.

3.3 Separation of powers application on policy issues

In its summary in the *Eskom 1* case, the court characterised the case as loadshedding having negative effects and violating the 'rights to health, security and education' and that 'the infringement of these rights justify judicial intervention, but to such a limited extent that the principle regarding the separation of powers is not overstepped.'[226] By its own caution, the North Gauteng High Court was aware of the thin line of separation of powers that could be affected by this case:

> The applicants claim that without such energy sources the Constitutional rights of citizens to healthcare, security and education are infringed upon. The dispute is about how to remedy these infringements and whether it is permissible for a court to order that it be done, having regard to the principle of separation of powers between different spheres of government.[227]

The Government, in its argument in *Eskom 1,* strongly contended that,

> …the courts have also been warned that ours is a democracy and not a "judiocracy" and that courts should "stay in their lane" and not usurp the governance of the country.[228]

This warning by Government respondents was a reminder that the courts should consider the separation of powers doctrine. But the court highlighted the distinction between policy and planning, saying, 'the former clearly fall within the executive sphere of governance, the latter merely deals with emergency relief from loadshedding in limited areas where it is needed the most.'[229] The court added that 'the granting of

[225] *Mazibuko* 9.
[226] *Eskom 1* summary.
[227] *Eskom 1* 2.
[228] *Eskom 1* 47.
[229] As above. 'Similarly, where the former constitute the exercise of public power separated from the powers of the court, the latter relief are aimed at vindicating infringements of Constitutional rights brought about by the respective government respondents' failure to uphold those rights.'

emergency relief, is disconnected from policy-making or executive governmental decisions and is justifiable.'[230]

> We therefore conclude that the applicants have demonstrated that there have been infringements of fundamental Constitutional rights, brought about by failures of organs of state and that appropriate relief is justified and called for and that such relief can be granted without crossing the dividing line indicating where the separation of powers lie. We find that this is the position, irrespective of whether the relief is characterised as interim or final. What then remains, is the formulation of the "appropriate" relief.[231]

This research shows that the nexus drawn by the court to delineate its ruling from the separation of powers doctrine is weak and unjustified. It agrees with the President's submission that,

> **...**the relevant parties could have and still can raise these issues in Parliament and need not have resorted to this Court to obtain relief, simply has to be stated to indicate how inappropriate such a remedy would be.[232]

The research goes further to suggest that if the two branches—executive and legislature—could not resolve the energy crisis, voters have the power to either force them to or vote them out of power. The court conceded in *Eskom 2* that 'going beyond that immediate "humanitarian relief" would cross the boundary of separation of powers.'[233] However, in its order in *Eskom 2,* the court did go beyond the humanitarian relief sought by adding violation of more rights and touching on the failure of policy and plans, thus crossing the line separating powers of the branches.[234]

Separation of powers is a doctrine recognised in the South African constitutional jurisprudence to separate the functions and roles of the three branches to ensure accountability, checks and balances.[235] The doctrine's application in cases that deal with policy or allocation of resources is more critical to restrict judicial overreach but also to ensure that all branches carry out their functions without unconstitutional

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[230] As above.
[231] *Eskom 1*) 48.
[232] *Eskom 1* 52.
[233] *Eskom 2* 62.
[234] *Eskom 2* 120.
[235] The doctrine, as adapted in the South African constitutional structure, forbids any unconstitutional encroachment and permits constitutional intervention only when it enforces accountability and the realisation of fundamental rights. The doctrine entered constitutional jurisprudence through the interim Constitution of 1993. Schedule 4 Constitutional Principles. Constitution of the Republic of South Africa Act 200 of 1993 referred to the foundational pillar is the Constitutional Principle VI of the interim Constitution: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'

interference. The North Gauteng High Court in *Eskom* also accepted its decision was touching on the primary foundation of the constitutional and structural relationship between the branches of government—the separation of powers doctrine: 'This court was from the outset acutely aware of the issue of separation of powers.'[236] This question also arose in the *Eskom 1 case* where the North Gauteng High Court asked 'whether the court, in granting relief in the nature sought by the applicants, would overstep the line delineating the separation of powers.'[237] The Government argued in this case that interrogating its energy policy plans would 'cross the line delineating the separation of powers and would unjustifiably encroach upon the domain of the executive as a separate arm of government from the Courts.'[238] The court however found 'that the granting of such relief would fill a vacuum and would not breach the separation of powers principle.'[239] The court went on further to state that the executive repeatedly breached fundamental rights and failed to carry out its duties to remedy these breaches, which compelled it to come to the conclusion that 'both a "clear right" and sufficient acts of interference have been established by the applicants to satisfy the first of the two requirements for a final interdict.'[240] The Constitutional Court did indicate in the *e-tolling* case that granting such 'interdict has a direct and immediate impact on separation of powers.'[241] But the North Gauteng High Court admitted in *Eskom 2* that it was 'mindful of the arguments relating to the separation of powers and that a Court should not trample on that dividing line nor unduly infringe in another sphere of Government.'[242]

This research argues in Chapter 4 that the conclusion of the North Gauteng High Court did not justify crossing the separation of powers boundaries, even though the court drew its conclusion from the *Treatment Action Campaign* case.[243] However, in the *Treatment Action Campaign* case, the court did indeed intervene in the government policy on the basis that it had fatal effects—literally and figuratively—on fundamental rights.[244] Reacting to the Government's argument that 'under the

[236] *Eskom 1* 46.
[237] *Eskom 1* para 39.
[238] *Eskom 1* para 40.
[239] *Eskom 1* para 47.
[240] As above.
[241] *National Treasury and Others v Opposition to Urban Tolling Alliance* 27.
[242] *Eskom 2* para 60.
[243] *Eskom 2* para 46, quoting paras 98 and 99 of the *Treatment Action Campaign*.
[244] *Treatment Action Campaign:* The court's order at 135.

separation of powers the making of policy is the prerogative of the executive and not the courts', the Constitutional Court in *Treatment Action Campaign* argued strongly that: [245]

> This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.[246]

The court's approach and departure were that the judiciary should respect the doctrine of separation of powers and that the Constitution allocated these distinct functions to enable all branches to operate effectively.[247]

This research has already indicated that the Constitution vested policy formulation with the executive branch in line with the separation of powers doctrine.[248] As part of this doctrine, the courts are equally expected to carry out their obligations and core functions in holding the other branches to account for the public exercise of power. Justice Yacoob agrees that the executive cannot hide behind the separation of powers doctrine to shield itself from judicial scrutiny of its policies.[249] He says:

> As soon as executive policy translates into law or conduct, that law or conduct must be consistent with the constitution. Otherwise, courts have no choice but to do their duty and declare that law or conduct invalid.[250]

The majority in *e.tv* argued that it was the duty and obligation of the court to 'determine the constitutional and legal constraints that govern the making of policy by the executive.'[251] According to the court in *e.tv*, this was to ensure that the executive did not assume that policymaking protection offered by the separation of powers doctrine

[245] *Treatment Action Campaign* 98.
[246] *Treatment Action Campaign* 98.
[247] As above.
[248] Secs 85(2)(b) and 125(2)(d) bestow policymaking and development on the executive authority, led by the President and provincial Premiers respectively.
[249] Z Yacoob 'The Judiciary is the Guardian of the Constitution', *IOL*, 21 May 2017 http://www.iol.co.za/news/opinion/the-judiciary-is-the-guardian-of-the-constitution-9253661 (accessed 14 May 2024).
[250] Note Above
[251] *etv* 94.

granted them an unchallengeable privilege and constitutional cover to ignore the legal limitations of their powers.[252]

This chapter attempts to identify the thin line between the policymaking space of the executive and the court's obligations to adjudicate when asked to interrogate such policies. The line seems to disappear in some cases but gets more pronounced through the separation of powers doctrine. In the *e-tolling* case, the court used the doctrine of separation of powers as a handbrake to the constitutional judicial review power on policy matters.[253] Froneman J, in minority judgment, found that it is a breach of separation of powers doctrine for a court to intrude, by granting an interdict against government regarding formulation and implementation of policy, a matter that resides in the heartland of national executive function.'[254]

Ngcobo J highlighted the risk of overreach by arguing that while the courts are permitted by the power of judicial review,

> …to make decisions that have an impact on the domain of other branches of government[,]…this does not give courts the authority to perform the functions of other branches of government.[255]

In *Ferreira,* Chaskalson J also warned that the courts should not use constitutional clauses to flout the separation of powers doctrine and encroach on the other branches' domain.[256] Hirchl agrees that the courts' participation in policymaking is elevating its status in the separation of powers continuum and that this could hurt the credibility of the judiciary.[257] He says,

> …the abrupt change in the balance of power between the judicial branch and other branches of government may have a negative long-term effect on the popular legitimacy accorded to the courts' decisions.[258]

Mogoeng J, in minority judgment, in *e.tv* confirmed that the judiciary can 'encroach on the policy-determination domain only when it is necessary and unavoidable to do so'[259]

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[252] etv 108.
[253] *e-tolling* 90.
[254] As above.
[255] S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 37 *Stellenbosch Law Review* 22.
[256] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) 183.*
[257] R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitution* (2017) 81.
[258] As above.
[259] *etv* 2.

but he cautioned against any temptation by the judiciary to cross the separation of powers boundaries.[260] He said the grounds to encroach must be exceptional, especially when the principles of legality and rule of law are under threat.[261] The Constitutional Court in *Minister of Defence and Military Veterans v Motau* declared that there were matters that should be under a lesser judicial review microscope 'given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the executive a greater level of deference.'[262] The court in *Motau* laid down the executive functions in the context of policy, which provides some guidelines regarding parameters of the executive power: 'Executive powers are, in essence, high-policy or broad direction giving powers.[263] The formulation of policy is a paradigm case of a function that is executive in nature.'[264]

There are voices whose initial departure is that the voters, and not the courts, have the power to evaluate the policy. This power includes forcing the executive to change the policy direction, consider other policy options or even vote the Government out of power for its poorly executed or unpopular policies. The courts, on the other hand, cannot exercise its preference, choices nor evaluate the execution of such policy unless such policy affects fundamental rights, or it is unlawful. The Constitutional Court again in *Albutt v Centre for the Study of Violence and Reconciliation* reaffirmed that the '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.'[265] Cameron J comments, 'government policy had to be freed of an untenable judicial clog.'[266] His view is that it is not up to the court nor the function of judicial review to evaluate the good and the bad parts of a government policy.[267] Such evaluation of policy is a political process, as pointed out in the critical analysis chapter of this research. Cameron J, in analysing the e-tolling collections policy in the *e-tolling* case, separates what is public and political accountability and judicial function.[268] He says,

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[260] *etv* 26.
[261] *etv* 26.
[262] *2014 (CCT 133/13) ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014) at 43.*
[263] *Minister of Defence and Military Veterans v Motau and Others (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014) at 43*
[264] *Motau* 37.
[265] *2010 ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).*
[266] Cameron location 2455.
[267] Note above.
[268] As above.

evaluation of policy 'belonged–in the domain of politics and public debate, and not inside the courts.'[269]

There is also an argument to the effect that the court's encroachment in policy could undermine the democratic power given to the executive to govern.[270] Former President Jacob Zuma also lamented the courts' interference in policy-formulation function of the executive:[271]

> Our view is that the Executive, as elected officials, has the sole discretion to decide policies for government. I know that the last time we raised this point, we generated a heated debate within the legal fraternity, some of whom did not see that it was actually an affirmation of the doctrine of the separation of powers.[272]

He appealed to the judiciary to allow the executive 'to conduct its administration and policy making work as freely as it possibly can.'[273] Zuma argued that the judiciary's involvement in the policy arena is akin to promoting the courts above the 'mandate given by the people in a popular vote.'[274] Du Plessis argues that the supremacy of the Constitution and the unchecked judicial review can have a subversive effect on the will of the people.[275] However, the executive is still operating under the supervision of Parliament by maintaining 'oversight of the exercise of national executive authority, including the implementation of legislation.'[276] In *Premier Mpumalanga v Association of State-Aided Schools,* the Constitutional Court held that,

> …a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries).[277]

The court said the executive's role is to effect a democratic transformation and efficient government that delivers to the people: 'As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'[278] Sachs appears

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[269] As above.
[270] As bove.
[271] J Zuma 'Judiciary must respect separation of powers', Politics Web, 1 November 2011 https://www.politicsweb.co.za/documents/judiciary-must-respect-separation-of-powers--jacob (accessed 11 March 2021).
[272] As above.
[273] As above
[274] As above
[275] Du Plessis 230
[276] Sec 5(2)(b)(i) of the Constitution, 1996.
[277] *1998 ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) 41.*
[278] As above.

sympathetic to the challenges facing the executive in the context of a society undergoing transformation. He said the courts should be more understanding of the,

> …difficult choices that the government has to make, the more so in a country where the need for transformation is great and the resources available for achieving it are relatively limited.[279]

But he said the courts should still be on the alert for any deviation from the constitutional path.[280]

The Constitutional Court in *Mazibuko* held that the courts must demonstrate 'institutional respect for the policy-making function of the two other arms of government.'[281] But the court also accepted that constitutional judicial review process should be used as 'a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.'[282] The court says this will force Government to 'explain why the policy is reasonable and disclose its policy formulation process and reasons for its choices.'[283] The court, in this instance, expects Government to show that its policy is geared towards realising fundamental rights and that any review of such policy should be aimed at strengthening it to achieve this constitutional goal.[284]

The Constitutional Court in the *Certification* case held that the doctrine 'recognises the functional independence of branches of government.'[285] The court believed that this, together with the checks and balances feature, prevented any unconstitutional overreach while encouraging constitutional intervention wherever warranted, or what it defined as 'unavoidable intrusion of one branch on the terrain of another.'[286]

3.4. Eskom case: Facts

The *Eskom* case, in the context of this research, is a single thread of a case that was initiated by the United Democratic Movement (UDM) when it approached the North

[279] A Sachs *The Strange Alchemy of Life and Law* (Oxford University Press 2009) 147.
[280] As above
[281] *Mazibuko* 65.
[282] *Mazibuko* 160.
[283] *Mazibuko* 161–162.
[284] *Mazibuko* 162.
[285] *Mazibuko* 109.
[286] *Certification Case 106.*

Gauteng High Court to 'seek relief aimed at reducing the prejudicial impact of loadshedding on public health facilities, police stations and schools which do not have sufficient alternative energy sources available to them.'[287] The UDM, a political party represented in Parliament, was joined by civil and community movements, pressure groups, trade unions and individuals.

The court directed that parts of the UDM application be heard separately as Part A (hereinafter referred to as *Eskom 1*).[288] It was also directed to separate Part B of the application (hereinafter referred to as *Eskom 2*).[289] The application for leave to appeal was heard on 7 March 2024 (hereinafter referred to as *Eskom 3).*[290] This does not include *South African Local Government Association v National Energy Regulation of South Africa.*[291] At the time of writing, the Government had not taken the matter on appeal to the Supreme Court of Appeal mainly because supervening events such as continuous supply of electricity since May would render such appeal moot.[292] Nevertheless, this case has so far raised critical legal issues in the ongoing debates and development of South Africa's constitutional jurisprudence.

3.4.1 Facts and judgment in Eskom 1

In Part A of the case, *Eskom 1,* the matter before the court was not about forcing the executive and the power utility to stop loadshedding:

> The applicants seek relief aimed at reducing the prejudicial impact of loadshedding on public health facilities, police stations and schools which do not have sufficient alternative energy sources available to them.[293]

The UDM and other applicants claimed that without continuous supply of power, 'rights of citizens to healthcare, security and education are infringed upon.'[294] The essence of the central questions or inquiry informing the case is well-captured below:

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[287] *Eskom 1* 2.
[288] *Eskom 1.*
[289] *Eskom 2*.
[290] *United Democratic Movement and Others v NERSAa 003615/2023*
[291] *022464/2023.* The North Gauteng High Court refused SALGA leave to appeal to review the approval of a tariff increase for Eskom for the bulk electricity tariffs for the 2023/2024 and 2024/2025 financial years by the National Energy Regulation of South Africa (NERSA) (the tariff determination).
[292] July 5 marked 100 days of no load-shedding.
[293] *Eskom 1* 2
[294] As above.

> The dispute is about how to remedy these infringements and whether it is permissible for a court to order that it be done, having regard to the principle of separation of powers between different spheres of government.[295]

The court defined loadshedding in *Eskom 1* as:

> A process whereby Eskom Holdings SOC Ltd (Eskom) effectively cuts off the supply of electricity to areas of the country on a rotational and scheduled basis. It is done on different levels (currently ranging from level 1 to level 8) and is done to protect the integrity of the national energy grid when the demand for electricity exceeds the capacity generated by Eskom from time to time.[296]

The rationale behind loadshedding is to protect the national grid from total collapse, which would lead to complete national blackouts during which 'the country as a whole would suffer immense human suffering and economic harm.' The Eskom Chief Executive Officer (CEO) at the time, Andre De Ruyter, submitted that loadshedding is 'implemented by disconnecting "certain points" on the transmission and distribution networks on the national electricity grid.'[297] There are public hospitals that were not exempted from the loadshedding,[298] and the Government argued that all hospitals do have backup generators, while some applicants disputed this fact.[299] The court said the generator solution was not adequate because they 'do not nearly replace the electricity needed' and take resources from hospitals to buy diesel.[300] The court concluded that 'the police stations and schools are even worse off, they simply close or shut down during loadshedding.'[301]

Eskom management also argued that loadshedding is a result of lack of investment in 'energy capacity' in the 1990s when only 30% of South Africans were connected to the grid despite the expansion in electrification in the 2000s.[302] It was also heard that tender corruption, incompetence, lack of maintenance, loss of skills and lack of cost-effective tariffs were contributing factors to the energy crisis that led to loadshedding.[303]

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[295] As above.
[296] *Eskom 1* loads-hedding definition and 23.
[297] *Eskom 1* 17.
[298] *Eskom 1* 50. See also (n 200) 50.
[299] *Eskom 1* 51.
[300] As above
[301] As above
[302] *Eskom 1* 26-28.
[303] *Eskom 1* 29-33.

The applicants' argument was that the respondents, Eskom and the Government,[304] have obligations to provide electricity; the consequences of such failure is an infringement on rights.[305] The President however, argued that 'none of the government respondents have a Constitutional responsibility to supply electricity to the people of the Republic.'[306] The applicants listed the consequences on citizens should there be any interruption of power or absence of any alternative power supply:[307]

> The applicants also relied on our courts having recognized that, even if there may not be a right to electricity mentioned in the Constitution in so many words, other fundamental rights such as those mentioned above, can only be exercised or manifested by way of an uninterrupted supply of electricity.[308]

3.4.2 Order in Eskom 1

After interrogating the matter and considering pending issues, the court ruled in *Eskom 1* that:

> Pending the final determination of PART B of the application...the Minister of Public Enterprises shall take all reasonable steps within 60 days from date of this order, whether in conjunction with other organs of state or not, to ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to schools, public health institutions and police stations.[309]

The operation of the order,

> …was suspended by way of applications for leave to appeal…with one of the principal grounds being that the (Department of Public Enterprises) DPE Minister did not have the power to generate electricity.[310]

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[304] *Eskom 1* 5 cited respondents as Eskom, the Minister of Public Enterprises (the DPE Minister), the Director-General: Department of Public Enterprises (DPE), the President of the Republic of South Africa (the President), the Minister of Mineral Resources and Energy (the DMRE Minister), the Director-General of the Department of Mineral Resourcesand Energy (DMRE), the National Energy Regulator of South Africa (NERSA) and the Government of the Republic of South Africa.
[305] *Eskom 1* 12.
[306] *Eskom 1* 36.
[307] *Eskom 1* 13-15.
[308] *Eskom 1* 16.
[309] *Eskom 1* order. All 'public health establishments' as defined in the National Health Act 61 of 2003, including publicly owned hospitals, clinics, and other establishments or facilities; All 'public schools' as defined in the South African Schools Act 84 of 1996; The 'South African Police Service' and 'police stations' as envisaged in the South African Police Service Act 68 of 1995.
[310] *Eskom 2*. See also n 203 on the outcome of leave to appeal applications.

3.4.3 Facts and judgment in Eskom 2

UDM in Part B of the application (referred to as *Eskom 2)* was joined by 18 applications, including new ones from the Democratic Alliance (DA) and Action SA. Government respondents were joined by a newly appointed Minister of Electricity following a cabinet reshuffle. The Minister of Electricity submitted that he was tasked 'with the political responsibility of overseeing the response to the electricity crisis', including the Government's grant plan (EAP), the assessment of the performance of Eskom.[311] He detailed his strategy and short-term execution plans to alleviate loadshedding,[312] even though the court felt he 'underplays the seriousness of the situation.'[313] The court was relying on cabinet's own secret memorandum in which it stated that the impact of loadshedding 'poses both a socio-economic and security risk to the sovereign.'[314]

In this application, the UDM extended the scope of the relief it sought.[315] Remedial relief was also sought to instruct Eskom to,

> …report to the court what steps will be taken to ensure that there is uninterrupted and reliable supply of electricity to eligible users and what steps will be taken in the short and long term to end loadshedding within a reasonable time.[316]

The UDM unilaterally withdrew its application shortly before the hearing with the intention to enrol at a later stage because the party,

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[311] *Eskom 2* 46-47.
[312] *Eskom 2* 50-52.
[313] *Eskom 2* 53.
[314] As above. The cabinet memorandum mentions the critical effect of loadshedding on the country, including: Immediate danger to life, immediate harm to the economy and an immediate threat to the State; Continued disruptions to global and local supply chains, rising food prices and constraint food and energy supply with renewed and uncertain inflationary pressures remain key risks for the South African Economy; The erosion of the purchasing power of South Africans, with food accounting for the biggest driver of inflation …. real take home pay is estimated to be 11.1% lower in January 2023 compared to July 2021; The direct, indirect, induced and total effects of loadshedding determining job losses, forgone tax revenue and household income effects [the GDP loss in 2022 approximately equalled R1 billion per day and the modelling projects R1.3 billion per day for 2023]; The lost to the manufacturing sector alone is R47.3 billion in 2022 and is forecasted to be R59.1 billion in 2023; Loss of R61 billion in tax revenues and in 2023 this may deteriorate to R77 billion.
[315] (n 200) 17: The relief sought included 'a declaration that the President has failed to respect, promote and fulfil the rights in the Bill of Rights as required by Section 7(2) of the Constitution, a declaration that the failure by Eskom and other organs of state has violated the rights of the applicants and the persons who they represent, including the South African public at large to various Constitutional rights including those of equality, dignity, life, freedom of economic activity, healthcare, sufficient food and water, the rights of children and their rights to education.'
[316] *Eskom 2* 17.

> …still wished to take an interlocutory order given by this court on 7 June 2023 in respect of the sufficiency of the records produced by Eskom and NERSA on appeal.[317]

The court declared such removal irregular and proceeded to hear the DA's application instead. Action SA said it only 'sought the "humanitarian relief" claimed in *Eskom 1.*'[318] The relief sought by the DA included reviewing, setting aside and 'declaring the decisions to implement loadshedding inconsistent with the constitution and invalid.'[319] The party also wanted the 'respondents' response to the on-going energy crisis to be declared inconsistent with the constitution and invalid and that this has violated certain fundamental rights.[320] The party argued, citing *Mazibuko,* that once such constitutional breach is established, the declaration must not be discretionary.[321] The court agreed.

The party required the court to direct the President and Minister of Mineral Resources to:

> …file with this court within 30 days of the date of this order a report setting out the Executives' plan to averred the energy crisis, including short-, medium-, and long term steps.[322]

'After the filing of the report in paragraph 5, interested parties may approach this court on supplemented papers for just and equitable relief'.[323] The party also wanted a special master to monitor and evaluate, among other things, the implementation of the government plans to end the energy crisis.[324] Eskom and the Government have

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[317] *Eskom 2* 18.
[318] For Eskom not to loadshed public health facilities, public schools and police stations.
[319] *Eskom 2* 21.
[320] As above. Declaring that the respondents' response to the ongoing energy crises has failed to respect, protect, promote and fulfil the rights in the bill of rights and has unjustifiably limited various constitutional rights, including the right to: human dignity in Section 10(5); life in Section 11; freedom and security of the person in Section 12; an environment that is not harmful to health and wellbeing in Section 24(a); access to healthcare services in Section 27(1)(a); access of sufficient food and water in Section 27(1)(b); basic education in Section 29(1)(a); access of courts in Section 34 of the Constitution.
[321] *Eskom 2* 58.
[322] *Eskom 2* 21.
[323] As above.
[324] *Eskom 2* 22. "Once appointed, the Special Master shall, until otherwise directed by this court, monitor and evaluate – The implementation of the Energy Action Plan of 25 July 2022 and any amendments thereto, including the steps envisaged or taken by Eskom for any competitive bidding process or processes aimed at the procurement of goods, services or other commodities, including steps to amend the procurement policies and individual procurement decisions; The implementation of any recommendations pertaining to Eskom made by the judicial Commission of Enquiry into allegations of State capture, corruption and fraud in the public sector including organs of state other than those recommendations to be implemented or considered by the National Prosecuting Authority; After appointment the Special Master may approach this court for an order authorising the appointment of independent legal practitioners or experts to assist the Special Master in discharging his/her duties. The Special Master shall file reports on affidavit with this court every three months commencing on a date three months after the date of this order or any shorter period as the Special Master may deem necessary, setting out the steps he/she has taken to evaluate the matters referred to in paragraph 7, the result of their evaluations and any recommendations he/she considers necessary. Upon receipt of

objected to the appointment of the special master.[325] The DA also made further allegations that the energy crisis was caused by incompetence, corruption, 'mismanagement of the construction of Medupi and Kusile power stations', Eskom's management not to approve power purchase agreements from independent power producers (IPPs).[326] The party argued that 96 percent of loadshedding could have been prevented, and cited the President's admission that the 'national executive's policy to keep electricity prices artificially low was ill-conceived'.[327] However, the National Energy Regulator of South Africa (NERSA) objected to the latter factor,[328] while Eskom objected to being blamed for the energy crisis.[329] The power utility averred that:

> The core cause of the energy crisis was the failure by the State to authorise energy generation. This power lies in the hands of the DMRE Minister (now the Minister of Electricity) and Eskom can only generate what those Ministers allow it to generate. Similarly the sustainability of Eskom due to lack of sufficient funds to perform maintenance was dependent on NERSA tariff determinations which were also beyond the powers of Eskom.[330]

Counsel for Eskom further argued that the power utility is 'agnostic in respect of that finding and regarding any other declaration of constitutionally invalid conduct but denies that any of Eskom's conduct amounted to such breaches.'[331] Eskom was of the

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any report by the Special Master, this court may make any just and equitable order, including after consideration of the parties' submissions on the Special Master's report. All respondents responsible or otherwise involved in the matters referred to in paragraph 7 shall cooperate or cause a relevant organ of state to cooperate with the Special Master including ensuring that: That the Special Master is provided with all documents (including further documents) and records requested by him/her; That all officials of the organ of state are reasonably available to meet with the Special Master and provide him with such information as he may reasonably require; That all reasonable requests by the Special Master are timeously responded to".

[325] *Eskom 2* 33 and 41-44.

[326] *Eskom 2* 23.

[327] As above.

[328] *Eskom 2* 26-27. 'NERSA opposed the granting of a declaratory relief based on breaches of Constitutional duty against it. The argument was that the DA has not sufficiently identified the duty which rested on NERSA to prevent energy crises but, insofar as NERSA has contributed to the fact that non-cost effective tariffs had been approved in the past which have impacted negatively on Eskom's sustainability, the argument was that this all related to historical conduct and that there is no purpose going forward to make a declaratory order in this regard. NERSA's further argument in opposition was that, as it may exercise some control over the proverbial purse strings, it does not control the spending of what is recovered from that purse and neither does it control the generation of electricity. It argued that the DA had not made out a case on its papers that NERSA had failed in its duties in this regard or alternatively is currently failing in performing its duties. Therefore, no need for a declarator to be issued against NERSA exists and if that is the case, then there is no cause to grant any other relief against NERSA on the loadshedding issue.'

[329] (n 200) 28.

[330] As above.

[331] As above.

view that 'the DA had not shown that Eskom should bear the burden of blame for loadshedding' and objected to being cited as such.[332] Eskom and the Government argued that the court should not grant the DA the declaration because the party couldn't provide sufficient facts to prove breach of the Constitution.[333] This is despite the President acknowledging that the energy crisis was caused by, among others, 'the non-realisation of the Government's intention in the late 1990s to open the energy sector to competition with private actors.'[334] The President also cited delays to build and maintain additional power stations and 'to introduce the renewable energy IPP procurement programme', insufficient revenue and corruption.[335] The court held, however, that all considerations points to a declaratory order be granted[336] but pointed out that it is an 'untenable proposition' to expect Eskom to budget for fraud.[337]

The Minister of Electricity also argued in this case that he has a plan to exempt some hospitals from loadshedding[338] even though the High Court contends that these efforts were 'a false illusion'[339] and that the Minister 'is however significantly silent on any interventions relating to schools and police stations.'[340] The court argued that Government ministers and Eskom were playing a blame game, and thus continuing a 'breach of the rights'.[341]

[332] *Eskom 2* 28, 31-32.
[333] *Eskom 2* 28, 34-38.
[334] *Eskom 2* 37.
[335] As above.
[336] *Eskom 2* 59.
[337] *Eskom 2* 111.
[338] *Eskom 2* 50: Minister of Electricity stated that the Department of Health has identified 213 hospitals for exclusion from loadshedding of which 76 hospitals have been excluded to date (of his affidavit) with work underway to exclude a further 46. He asserted that the remaining hospitals have sufficient backup power supply from generators and uninterrupted power supply. He conceded however that diesel costs for generators remain a 'major expenditure driver.' He explained that the installation of solar plus battery storage as an embedded electricity generation option presented a more cost effective solution, but indicated the magnitude thereof to be R10 billion to cover 137 hospitals. On the other hand, the operating costs represented primarily by diesel purchases would be R3.3 billion annually.
[339] (n 200) 55.
[340] (n 200) 56. The court stated, 'The argument was made that in this fashion the education of learners from poor and previously disadvantaged communities remain as prejudiced and disenfranchised as there had been in a pre-constitutional era. It has previously been conceded that not all South African Police Stations have generator backup systems and definitely not solar power or batteries. The effects of the closure of a police station or its incapacitation during the hours of the night need no explanation. The position is exacerbated in respect of satellite police stations deployed in areas where crime is most rampant during the hours of darkness.'
[341] (n 200) 58.

Some of the factors mentioned by Eskom as contributing to the energy crisis include low tariffs authorised by the energy regulatory body, NERSA.[342] The principles set in the Electricity Pricing Policy, NERSA's Guidelines for Prudency Assessment and Electricity Regulations Act 'not only guide and bind NERSA but are the premises upon which the reviews have been founded.'[343] But NERSA argued and the court accepted that the section of ERA,

> …does not otherwise prescribe the steps or sequence in which NERSA must implement these principles and also does not prescribe the procedure for tariff determination or the stages at which each of the rules should apply.[344]

The DA and the South African Local Government Association (SALGA) wanted the court to review and set aside the tariff approved by NERSA for the 2023/2024 and 2024/2025 financial years.[345] SALGA's contention is corruption[346] and that other factors must be taken into consideration when making a cost-service amount and revenue predictions, while the DA argued that NERSA should have taken into account 'cross-subsidisation during the multi-year price determination (MYPD) phase of the tariff determination.'[347] NERSA argued that a sliding scale 'costs subsidisation for poor

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[342] (n 200) 67: 'Electricity tariffs in South Africa are regulated by a process by which a licensee such as Eskom seeks approval from NERSA to allow it to recover from customers revenues for costs that it expects to incur in a specified financial year in order to provide electricity to those customers. It does so by way of an application to NERSA indicating an estimate of these costs. Should NERSA, after an interrogation of a licensee's application, allow or approve the costs, they are incorporated into the electricity tariffs so that the licensee can recover payment of revenue amounts to cover the approved costs. The regulatory framework for this process provides that a licensee is entitled to recover its 'prudent" costs of service.'

[343] (n 200) 68, 72-73, 112-113. The principles are set in terms of section 15 of the Electricity Regulation Act 6 of 2006 and include, 'A licensee condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues (a) must enable an efficient licensee to recover the full costs of its license activities, including a reasonable margin or return; (b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which the services are to be provided; (c) must give end users proper information regarding the costs that their consumption imposes on the licensees business; (d) must avoid undue discrimination between customer categories; and (e) may permit the costs subsidy of tariffs to certain classes of customers. (2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the regulator as part of its licensing conditions. (3) Notwithstanding sub-section (2), the regulator may, in prescribed circumstances approve a deviation from set or approved tariffs.' The regulator refers to NERSA.

[344] (n 200) 74.

[345] (n 200) 63-65, 94 and 98. SALGA attacks NERSA's decision, arguing that 'NERSA's determinations and ultimate decision is reviewable because relevant considerations were not considered.' SALGA further argues that 'corruption, fraud and wasteful expenditure' at power utility, Eskom overstaffing, impact of consumers who buy electricity from municipalities and cost of diesel must be strongly considered. (n 200) 115 NERSA's response on Eskom's over-staffing issue.

[346] (n 200) 95-96 for SALGA's contention on Eskom corruption.

[347] (n 200) 66, 100-103, 109 for the DA's contention on cross-subsidisation. (n 200) 105-107 on cross-subsidisation and tariffs methodology.

household has been taken into consideration and provided a complex revenue and cost methodology, and other parties did not attack this methodology.'[348] NERSA and Eskom admitted that achieving sufficient revenue was a key challenge because it is critical for financing capital expenditure, maintenance and cash flow for the utility, hence the plea by Eskom to increase the tariffs.[349]

3.4.4 Order in Eskom 2

In its order, the court accepted most of the DA's plea for declaration:

> It is declared that the non-realisation of the Government's intention in the late 1990s to open the energy sector to competition with private actors and to timeously implement the Independent Power Producer procurement programme, the delays in the decisions and implementation to build Medupi and Kusile power stations, the decisions to run power stations beyond their capabilities without proper maintenance, the failure to ensure or approve sufficient revenue for its services and the failure to take adequate steps to protect Eskom from criminal activity, corruption and "state capture", individually and collectively and the resultant energy crisis manifested by loadshedding and the continued failure to remedy the crisis, constituted and still constitute breaches by the respondent organs of state to protect and promote the rights contained the Bill of Rights.[350]

The court also went beyond the breaches of the three fundamental rights stated in *Eskom 1*—the right to health, education and security. It 'specifically declared that these breaches constitute unjustified infringements' of the right to: human dignity, life, freedom and security of the person, an environment that is not harmful to health and wellbeing; access to healthcare services, access of sufficient food and water, and basic education.[351] The court directed the Minister of Electricity to,

> …take all reasonable steps by no later than 31 January 2024, whether in conjunction with Eskom and other organs of state or not, to ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding [to] public health establishments, all public schools [and police stations,] including satellite stations.[352]

[348] *Eskom 2* 77-87 and 97.
[349] *Eskom 2* 90-92.
[350] *Eskom 2* 120.
[351] As above.
[352] As above.

The court also ordered that 'the respective review applications of the tariff determination by the National Energy Regulator of South Africa of 12 January 2023 are dismissed.'[353]

The court held that some public hospitals have not been exempted from loadshedding, which happens when Eskom applied for such.[354] But such exemption,

> …can only occur where such exemption would not compromise the critical load factors referred to above or the stability of the national grid and where embeddedness does not make such exemptions impossible.[355]

The court said any solution needs 'to be devised in instances where the DPE Minister cannot secure exemptions, such as the provision of generators or alternate energy supplies.'[356]

3.4.5 Facts and judgment: Eskom 3

The President, Minister of Public Enterprises, Minister of Mineral Resources and Energy, Minister of Cooperative Government, and Minister of Electricity (hereinafter referred to as the Government) then launched an application for leave to appeal in general terms against the *Eskom 2* order, particularly against the court ordering the Minister of Electricity to ensure uninterrupted power supply to public health facilities, public schools and police stations (which was the initial order but suspended in *Eskom 1)*.[357] Eskom also launched a separate application for leave to appeal that was dealt with in this case.[358]

The Government's grounds for appeal could be crystalised into three categories: that the relief fashioned by the court was impermissible; the evidence of Constitutional breaches was not contained in the applicants' founding papers; and 'the

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[353] As above. This was dealt with as a separate application for appeal which was refused in South African Local Government Association v National Energy Regulator of South Africa & Others 2024 (022464/2023) ZAGPPHC 319 (4 April 2024). This case shall therefore not form part of this research despite some of the issues being raised in the three Eskom cases.
[354] (n 201) 50.
[355] As above. 'Embeddedness will, for example occur, where a healthcare facility is so "embedded" in its surrounding network, that to exclude it would result in a whole network or suburb (or town even) having to be excluded, which would result in no actual "load" being able to be shed, i.e. too much demand would remain, rendering the grid under pressure.'
[356] *Eskom 2* 51.
[357] *Eskom 3* 4.
[358] As above.

relief granted lacked the required specificity.'[359] The Government did not implement the order in *Eskom 1,* which also formed part of the order in *Eskom 2*¸ because it wanted leave to appeal as it believed that Minister of Public Enterprises lacked authority to implement the order.[360] Even though the UDM withdrew its application in *Eskom 2*¸ Action SA persisted with the same relief, or what it termed 'humanitarian relief.'[361] While the relief in *Eskom 1* was rendered moot,

> …it was for this reason that the Government, in its current application for leave to appeal, argued that the same relief could not be granted afresh in the second main application, despite it this time being directed against the Minister of Electricity.[362]

But the court disagreed with this contention, arguing that once a constitutional breach is established, the Constitution has afforded the courts 'wide and flexible' power to grant a just and equitable relief.[363]

The Government also alleged that the court made its declarations based on facts from 'the respondents and not the applicants.'[364] However, the court retorted that the Government had admitted some of the allegations, such as the causes of loadshedding, and these were 'placed beyond dispute and unless withdrawn,'[365] the court held that, in such a case, it is 'binding on a party and prohibits any further dispute thereof' in line with the Plascon-Evans-principle:[366]

> We therefore find no reasonable prospect of success that another court would on appeal find that this court could not have granted orders based on facts conceded by the Government, evidencing Constitutional breaches.[367]

The Government's last ground of appeal was that its EAP 'had not been found to be unreasonable and that the DA's concerns related to the implementation of the plan' and that it was not clear how the DA's relief would be aligned with the plan.[368] The court said the judgment in *Eskom 2* was not 'related to' nor intended to interfere with the plan in line with separation of powers but, the court held, that until the Government's plan to resolve the energy crisis is successfully executed, the order was

[359] *Eskom* 3 5
[360] *Eskom* 3 6.
[361] As above.
[362] *Eskom* 3) 7.
[363] *Eskom* 3) 8-10.
[364] *Eskom* 3 13, 15-17.
[365] *Eskom* 3 14.
[366] *Eskom 3* 14, 18-19.
[367] *Eskom* 3 20.
[368] *Eskom* 3 21.

intended 'to ensure that those identified vulnerable and crucial segments of society dependent on Government services receive uninterrupted supply of electricity.'[369]

The court then turned to Eskom's argument, in which the power utility said,

> …it should never have featured in the order of this court, neither in respect of the declarations of Constitutional breaches, nor as an entity to which the Minister of Electricity could turn to in order to fulfil the 'humanitarian relief'.[370]

While Eskom blamed the executive for failure to supply sufficient power, the court said the power utility was 'an instrument through which the breaches of Constitutional obligations have taken place.'[371] Eskom argued that based on the Plascon-Evans-principle, it should have been exonerated from these breaches, but the court argued,

> …it is difficult to conceive how, despite Eskom protesting its innocence, it can divorce itself from the admitted history of sabotage, corruption and criminal activity which took place 'on its watch' or even by its own employees, which occurred independently from breaches caused by the executive.[372]

Eskom also said the court order would interfere with its responsivity to protect the court, an argument that was dismissed by the court.[373]

3.4.6 Order in Eskom 3

In its ruling, the court said,

> …whilst the national energy crisis is of national interest, the 'humanitarian relief' granted is to address the rights of a small, albeit vulnerable and important, set of segments of society.[374]

The court said the Government's plans and strategy have 'been left untouched by this court's order:'[375]

> It is further trite that, even in matters of public interest, the prospects of success on appeal or, in this case, the lack thereof, remains a weighty factor. We find that, in the circumstances of this case, there are insufficient "compelling reasons" to warrant the granting of leave to appeal.[376]

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[369] *Eskom* 3 22-23.
[370] *Eskom* 3 35.
[371] *Eskom 3* 26.
[372] As above.
[373] *Eskom 3* 28.
[374] *Eskom 3* 30.
[375] As above.
[376] As above.

3.5 Case analysis: Challenges identified in the Eskom case

The court, in the first paragraph of its order in *Eskom 2,* provides a critique of the policy of the executive, performance review of the government of the day and commentary of political decisions.[377] De Vos said the case, referring specifically to *Eskom 1,*

> …will do little to address the fundamental problem, not only because the order is directed at the wrong party, but also because it is vague and practically impossible to implement.[378]

He said it would be 'difficult to determine whether [the order] has been complied with or not as captured hereunder.'[379]

> In most cases where the reasonable standard is used, courts merely declare that an infringement of one or more of the rights in the Constitution occurred and leave it to the executive to address the problem. But here the court ordered the minister to take steps to fix the problem within 60 days.[380]

It is true that all the factors the court cited as causes and reasons for loadshedding triggered a national crisis, adversely affecting realisation of some of the fundamental rights. The power utility in *Eskom 1* also admitted that 'loadshedding causes human suffering and has a detrimental impact on a variety of constitutionally protected rights, including those the applicants identify.' The Government's own plan to resolve the energy crisis was not providing an immediate solution at the time, though this has since changed dramatically.[381]

However, these were policy failures, administrative incompetence, and corruption and not necessarily intentional conduct that 'constitute[s] unjustified infringements' on the right to: human dignity, life, freedom and security of the person,

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[377] *Eskom 1* 120.
[378] P de Vos 'Eskom ruling is magical thinking – courts cannot fix intractable governance problems', Daily Maverick, 10 May 2023 https://www.dailymaverick.co.za/article/2023-05-10-eskom-ruling-is-magical-thinking-courts-cannot-fix-intractable-governance-problems/ (accessed 2 March 2024).
[379] As above.
[380] As above
[381] The plan seems to be bearing fruits as July marked 100 days without loadshedding. See: Business Day 'Eskom celebrates 100 days without load-shedding and smaller diesel bill' 5 July 2024 https://www.businesslive.co.za/bd/national/2024-07-05-eskom-celebrates-100-days-without-load-shedding-and-smaller-diesel-bill/ (accessed 1 August 2024); A Slabbert 'SA close to 100 days of no load shedding' 1 July 2024 https://www.moneyweb.co.za/news/south-africa/sa-getting-close-to-100-days-of-no-load-shedding/ (accessed 15 July 2024); S Burger Burger, S 'Eskom, Minister celebrate 100 days without loadshedding milestone' 5 July 2024 https://www.engineeringnews.co.za/article/eskom-minister-celebrate-100-days-without-loadshedding-milestone-2024-07-05 (accessed 29 July 2024); Eskom, 'Eskom reaches 100 days without loadshedding, signalling marked improvement in Generation and financial performance' 5 July 2024 https://www.eskom.co.za/eskom-reaches-100-days-without-loadshedding-signalling-marked-improvement-in-generation-and-financial-performance/ (accessed 29 July 2024).

an environment that is not harmful to health and wellbeing, access to healthcare services, access to sufficient food and water, and basic education.[382] The court's creation of the nexus between these policy failures, the consequences of which is loadshedding and clear and direct infringement of fundamental rights, amounts to judicial overreach and misdirection. The minority judgment in *e-tolling* cautioned the High Court against overstretching the nexus between bad policy decisions and the violation of fundamental rights because 'No fundamental rights of the respondents beyond that of just administrative action are at stake here.'[383]

The court also admitted in *Eskom 3* that 'care was taken in the formulation of the relief to not interfere with the Government's plans,' but to give relief to the most vulnerable.[384] However, the court spent time entertaining the policy and energy plans in *Eskom 2.*[385] The judgment in all three cases demonstrated interference in the Government's policies, plan and implementation, an encroachment into the executive terrain. The court in *Eskom 1* accepted that the application was,

> …not about the stopping or termination of load-shedding, but…the applicants seek relief aimed at reducing the prejudicial impact of load-shedding on public health facilities, police stations and schools which do not have sufficient alternative energy sources available to them.[386]

However, before the consideration for the resultant effects and consequences of loadshedding, it is critical to analyse and interrogate the primary foundation of which right was violated. The reason to establish this as a primary hypothesis is because it will determine the nature of the application of constitutional judicial review in this context. As the nub of this research seeks to show, the courts should not find it easy to intervene but at least gravitate towards separation of powers doctrine.

The court in *Eskom 1* accepted and allowed the applicants to stretch the 'resultant infringement of fundamental rights'[387] as a springboard for it to intervene, which is an overutilisation of the power of judicial review, as aptly described below:

> The applicants also relied on our courts having recognized that, even if there may not be a right to electricity mentioned in the Constitution in so many words, other fundamental rights such as those mentioned above, can only be exercised or manifested by way of an uninterrupted supply

[382] *Eskom 3*) order.
[383] (n 20) 95.
[384] *Eskom 3* 22.
[385] *Eskom 2* paras 39-45 and order at 120.
[386] *Eskom 2*.
[387] As above.

> of electricity. It has also been held that the state has a positive duty to take reasonable steps to realise those rights.[388]

In this case, the court admitted that the right to electricity is not contained in the Constitution.[389] In *Eskom 2,* the court repeated this notion that,

> …whilst the Constitution does not expressly provide for a right to electricity, it guarantees the right to other aspects of life which cannot be provided or function properly without electricity such as the right to proper healthcare (which sometimes even impacts on the right to life), the right to education, the right to water and sanitation and the right to be protected by the South African Police Services.[390]

The Constitutional Court in the *Joseph v City of Johannesburg* case also confirmed that,

> Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it.[391]

The Constitutional Court also cautioned against reliance on fundamental rights—in the *Joseph* case, the right to adequate housing—to deal with what is a simple administrative action issue.[392] The North Gauteng High Court in *Eskom 2* however said,

> …in terms of Section 7(2) of the Constitution, which, amongst others, provides that the State must respect the rights contained in the Bills of Rights, Eskom (an organ of State) had (and still has) a duty not to conduct itself in a manner that would result in an infringement of those rights.[393]

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[388] *Eskom 2* 16.
[389] *Eskom 2* 12. 'As a starting point, the applicants founded their argument in respect of the respondents' obligation to provide electricity, on the resultant infringement of fundamental Constitutional rights in the event that electricity is not sufficiently or consistently supplied.'
[390] *Eskom 1* summary.
[391] *2009 (CCT 43/09) ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009)39.*
[392] *Joseph and Others v City of Johannesburg paras 34 and 39* 32 held: 'The applicants relied principally on the right of access to adequate housing in section 26(1) of the Constitution. Invoking the decision of this Court in Jaftha, the applicants contended that the termination of electricity supply constituted a retrogressive measure which violated the negative obligation to respect the right of access to adequate housing and which, consequently, materially and adversely affected their constitutional right to housing for the purposes of PAJA. In the view I take of the matter it is not necessary to address this contention. Similarly, it is not necessary to consider the right to human dignity as a self-standing right for the purposes of section 3 of PAJA. I am also not persuaded that any rights which the applicants hold against Mr Nel under their contract of lease have been affected by City Power's decision to terminate the electricity supply to Ennerdale Mansions.'
[393] *Eskom 1* 1.

This does not take into cognisance the court's own admission that loadshedding is implemented in order to protect the collapse of the national grid and not Eskom's intention to violate fundamental rights. Therefore, constitutional judicial review in the *Eskom* cases was interference in policy decisions of the executive.[394]

In *Eskom 2,* the court described the crux of the issue as 'the resultant energy crisis manifested by loadshedding and the continued failure to remedy the crisis.'[395] This is in reference to the broader energy crisis and not just a narrow description of the lack of backup alternative power supply in the cited institutions. By pronouncing on the policies of the government of the day, the court arrogated itself functions, competency and authority not bestowed by the Constitution. The court in *Eskom 2* clearly encroached on government policy options when it analysed the political genesis of the energy policy, such as failure to invest in power stations in the 1990s.[396]

For the North Gauteng High Court appeal in *Eskom 3* to then claim that it steered clear of the substance of the Government's policies and energy plans is not a sustainable argument. Even after the Minister of Electricity outlined his plans on how to deal with the crisis, the court's response and evaluation was that 'it appears from a reading of the Minister's affidavit that he somewhat underplays the seriousness of the situation.'[397] The court made reference to the cabinet memorandum that showed the gravity and magnitude of the crisis.[398] The memorandum outlined the impact of loadshedding on the country's security, economy, businesses, schools, hospitals, and households.[399] Even though the impact is a national threat and concern, this did not warrant a judicial intervention based on the violation of fundamental rights. It represented a policy failure that warranted political intervention by the legislature or voters.

Democratic processes in such a case give electorates—and not the courts—the power to change government through elections or force the current one to change its policies. The electorates, through civil movement participation, political lobbying, pressure groups petitioning, and protest actions, indeed forced the current

[394] Secs 85(2)(b) and 125(2)(d) bestow policymaking and development on the executive authority, led by the President and provincial Premiers respectively.
[395] *Eskom 1* 1.
[396] *Eskom 1* 53-60 and 120. (n 201) 26 and 36.
[397] *Eskom 1* 53.
[398] As above.
[399] As above.

Government to rethink and ultimately change its policies recently.[400] The Government announced the termination of charging motorists from using e-tolls on Gauteng highways because of voters' unhappiness, despite the Constitutional Court defending the Government's funding policy decision.[401]

The Finance Minister, Enoch Godongwana announced in his 2022 Medium Term Budget Policy statement that the Government is prepared to devise plans to settle the road agency's debt as a relief to motorists.[402] The backtracking was largely due to political and popular pressure, despite the Constitutional Court ruling in favour of the Government's right to implement its policies. The Constitutional Court ruled that the North Gauteng High Court in the *e-tolling* case didn't establish enough grounds to intervene on policy decisions and rebuked the court a quo for not considering separation of powers doctrine.[403] Granted, the Constitutional Court in *e-tolling* said policy formulation and implementation are the domain of the executive 'absent any proof of unlawfulness or fraud or corruption.'[404] Even though the exceptions cited in the *e-tolling* case are present in the *Eskom case*, this research still argues that the court could have obtained the same results without exercising constitutional judicial review power.

Cachalia says the courts must take into account 'considerations of democratic accountability' and acknowledge that 'socio-economic rights cases….are potentially

[400] The opposition and outcry over 'the upgrade of roads in the Gauteng province as part of a highway construction project known as the Gauteng Freeway Improvement Project (GFIP)' led to the Government cancelling charging fees to fund this project.
[401] n 20.
[402] n 205. Godongwana said, 'The uncertainty surrounding the Gauteng Freeway Improvement Project continues to have a major negative implication for road construction in the country. We need to move on from the debates of previous years and find solutions to this challenge. To resolve the funding impasse the Gauteng provincial government has agreed to contribute 30 per cent to settling SANRAL's debt and interest obligations, while national government covers 70 per cent. Gauteng will also cover the costs of maintaining the 201 kilometres and associated interchanges of the roads and any additional investment in road will be funded through either the existing electronic toll infrastructure or new toll plazas, or any other revenue source within their area of responsibility. Government proposes to make an initial allocation of R23.7 billion from the national fiscus, which will be disbursed on strict conditions.'
[403] (n 20) 67. The court held, 'The harm and inconvenience to motorists, on which the High Court relied, resulted from a National Executive decision about the ordering of public resources, over which the Executive Government disposes and for which it, and it alone, has the public responsibility. 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.'
[404] As above.

more policy laden and polycentric.'[405] However he cautioned that 'polycentricity cannot be invoked as a threshold question to bar judicial review of decisions, which have financial consequences.'[406] Du Plessis and Scott argue that the polycentric nature and gravity of the decisions go beyond the comprehension and framework of judicial review because they involve technical dimensions and political implications.[407]

The North Gauteng High Court has admitted in *Eskom 3* that this was a 'complex, highly specialised process involving matters of operational, technical and financial nature.'[408] The minority judgment in *e-tolling* contended that,

> The courts of this country do not determine what kind of funding should be used for infrastructural funding of roads and who should bear the brunt of that cost. The remedy in that regard lies in the political process.[409]

Moseneke J, in majority judgment in *National Treasury and Others v Opposition to Urban Tolling Alliance*, said that 'the collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making.'[410] Sachs J said judicial review required caution and modesty when dealing with policy issues.[411] The Constitutional Court in *Bato Star v Minister of Environmental Affairs and Tourism* recognised and emphasised 'the proper role of the executive within the Constitution', and cautioned the judiciary against attributing 'to itself superior wisdom in relation to matters entrusted to other branches of government.'[412] The court in *Bato Star* said 'a court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field' without rubber-stamping 'an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'[413] The North Gauteng High Court in *Eskom 2* did acknowledge that 'If courts could end loadshedding, they would but they cannot and it is not their function.'[414]

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[405] F Cachalia 'Separation of powers, active liberty and the allocation of public resources: the e-tolling case' (2015) 132(2) *South African Law Journal*.
[406] As above.
[407] M Du Plessis & S Scott 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 44 *South African Law Journal* 130.
[408] *Eskpom 1* 83.
[409] *National Treasury and Others v Opposition to Urban Tolling Alliance* 95.
[410] *National Treasury and Others v Opposition to Urban Tolling Alliance* 68.
[411] (n 264) 189.
[412] *2004 (CCT 27/03) ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) 48.*
[413] As above.
[414] *Eskom 1* summary.

The *Eskom* case was equally the matter of allocation of resources and budgetary prioritisation. One of the consequential results of such policy failure are the demands on the national grid versus the capability of Eskom to supply electricity. This forces the current management to reduce supply in the form of loadshedding to protect the national grid from total collapse. This was supported by the evidence of Eskom's Group CEO, Andre De Ruyter, who pointed out in *Eskom 1* that 'loadshedding is the controlled reduction of electricity demand. It is implemented by disconnecting "certain points" on the transmission and distribution networks on the national electricity grid.'[415] Eskom said in its evidence that,

> …the need for loadshedding exists because the demand for electricity currently exceeds Eskom's ability to supply electricity by anything between 4 000 to 6 000 megawatts (mw) at virtually any given time.[416]

Reading this evidence, loadshedding cannot be interpreted as *Eskom* violating fundamental rights, but rather a bad policy choice to save the country from total shutdown. In explaining the history and reasons for insufficient power supply, Eskom explained in its affidavit that 'there has been insufficient investment in new energy capacity' and that that only '35% of South African households had access to electricity' in 1990.[417] This was followed by massive electrification campaign in the mid and late 1990s 'as part of a Reconstruction and Development Programme.'[418] The electrification was not matched with expansion of power generation, thus putting pressure on the grid.

> In 2001 Cabinet took the decision that Eskom was not allowed to invest in new generation capacity "in the domestic market". This resulted in Eskom's surplus generation decreasing over the years to about 8.2% in 2004. Later in that year Eskom was finally permitted to initiate plans for the construction of two new generation units, being Kusile and Medupi.[419]

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[415] *Eskom 2* 23.
[416] *Eskom 1* 24. 'Load shedding is employed when electricity demand exceeds the supply of electricity to avoid a collapse of the electricity grid. Such a collapse would result in a complete lack of supply across the whole country (referred to as a "blackout"). Restoration of the supply of electricity after a blackout could take days or even weeks. During the period of a complete blackout, the country as a whole would suffer immense human suffering and economic harm. It would result in the shutdown of water supply and sewerage treatment, the shutdown of telephone and internet services, payment services, fuel and diesel distribution and impact on food supply and the rendering of medical services.'
[417] *Eskom 1* 25.
[418] This was the ANC's programme to provide basic services to millions of South Africans who were denied these services under the apartheid government.
[419] *Eskom 1* 28.

Eskom attributed its inability to supply sufficient power to policy failures and other factors.[420] In a nutshell, policy disjuncture and failure are the root causes of insufficient power supply to a high consuming household. The results forced Eskom to resort to preserving and protecting the national grid by intermittent and controlled power outages called loadshedding.

3.5.1 Reasonableness measures taken to avoid loadshedding and protect the grid

Eskom admitted to the consequences and implications of loadshedding on South Africans and outlined its plans 'to alleviate and hopefully end loadshedding' in a national EAP.[421] The power utility continued to describe this plan and how it coordinated departments regarding power back up in the *Eskom 2 case,* stating that limited resources are a factor in complying with the court order.[422] Based on this submission, it cannot be deduced that Eskom or any other related department involved in power supply intentionally, unlawfully and irrationally decided to deny, limit or violate fundamental rights.

The court in the *Eskom case* seems to have moved away from the reasonable steps taken contained in the Government's plan, and focused and based its judgment on the causes before the plan. The Government reiterated its stance in *Eskom 3* that its plan was reasonable, and that the relief was against its implementation.[423] The court should have at least considered whether reasonable measures were taken to prevent

[420] *Eskom 3* 2. 'In addition to the historic failure to maintain its power generating fleet and the governmental failure to create new generation capacity, its inability to render sufficient electricity to the country was further hampered by the lack of cost-effective tariffs, the low reliability of the aging generation fleet, the previous management's refusal to conclude renewable energy independent power producer contracts, regulatory obstacles, high municipal debt and alleged state capture, corruption and sabotage damage.'
[421] *Eskom 2* 41.
[422] *Eskom 1* 48 and 51 'The Minister then stated that the Department of Health has identified 213 hospitals for exclusion from loadshedding of which 76 hospitals have been excluded to date (of his affidavit) with work underway to exclude a further 46. He asserted that the remaining hospitals have sufficient back-up power supply from generators and UPS. He conceded however that diesel costs for generators remain a "major expenditure driver". He explained that the installation of solar plus battery storage as an embedded electricity generation option presented a more cost effective solution but indicated the magnitude thereof to be R10.1 billion to cover 137 hospitals. On the other hand the operating costs represented primarily by diesel purchases would be R3.3 billion annually. A rapid deployment of embedded generation solutions would only be possible, the Minister stated, through "aggregated power purchase agreements' which would require '… coordination with the Department of Public Work and Infrastructure and the National Treasury.'
[423] *Eskom 3* 21.

any harm from the impact of the loadshedding or energy crisis. In such instance, the court would have considered budgetary and other resources and efforts taken by Government to minimise the impact of loadshedding by providing alternative power supply. This is what the Constitutional Court considered in the *Mazibuko* and *Soobramoney* cases.[424]

Had the North Gauteng High Court in the *Eskom* cases decided to take this path, it would have understood that the Government was doing everything in its power and taking reasonable steps through its plans to avoid the collapse of the national grid, notwithstanding the root causes of loadshedding. Amid such efforts, loadshedding was an inevitable consequence and a better option than a nationwide blackout.

The North Gauteng Court in *Eskom 1* cited *Mazibuko* to contend that 'It has also been held that the state has a positive duty to take reasonable steps to realise those rights.'[425] The availability of resources is a critical factor to be considered by the courts before pronouncing on the breach of fundamental rights on the part of the executive's policy. While the court acknowledged that 'orders which implicate the National Economy and budgets of organs of state in order to remedy breaches of constitutional rights should be exercised sparingly', it borrowed from *Modder East Squatters v Modderklip Boerdery*[426] to assert that constitutional judicial review should be applied where there is constitutional breaches.[427] The court also quoted a section of the National Energy Act 34 of 2008 to show that the Minister for Mineral Resources and Energy and Eskom are obliged to 'take all reasonable steps to ensure that the State provides "energy services" to "all the people" in the country.'[428]

Eskom also stated factors that contributed to its inability to generate enough electricity, which included failure to maintain some of its aging fleet, 'lack of cost-effective tariffs', corruption and municipality's failure to pay for power supply.[429] With all these obstacles, the Government and Eskom submitted that they were doing their best to remedy the situation through an EAP. The Government argued in *Eskom 2* that its EAP was 'a reasonable governmental response to the crisis' created by its policy

[424] *Soobramoney* 43.
[425] *Eskom* 2 16.
[426] *2004 (187/03, 213/03) ZASCA 47; [2004] 3 All SA 169 (SCA); 2004 (8) BCLR 821 (SCA); 2004 (6) SA 40 (SCA) (27 May 2004) at 42.*
[427] *Eskom 1*.
[428] *Eskom* 2 17.
[429] *Eskom 1* 13.

failures.[430] This plan, according to the Government's affidavits, included dedicating resources and budgets and a team of experts to ensure the execution of the plan to resolve the energy crisis.[431] The Minister of Electricity said his responsibility was to ensure the execution of the plan to resolve the crisis.[432] In addition, the Minister also said the Health Department 'has identified 213 hospitals for exclusion from loadshedding of which 76 hospitals have been excluded to date (of his affidavit) with work underway to exclude a further 46.'[433] Over and above these reasonable measures, he said that 'the remaining hospitals have sufficient back-up power supply from generators and UPS' even though the costs were a major constraint.[434]

These efforts by *Eskom* and the executive ought to be seen within the constitutional criteria and expectations of what reasonable steps and measures are in realising fundamental rights. However, the courts can intervene if it can be shown that the executive did not take these reasonable measures and steps to remedy the situation. The Constitution did not set impossible standards and criteria but took into consideration availability of resources and reasonable efforts made. The Constitution does acknowledge such criterion by qualifying the realisation of certain rights within the capability of the executive. The Constitution says everyone has the right to 'health care, food, water and social security',[435] and 'the right to have access to adequate housing',[436] but at the same time, it also says 'the state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of each of these rights.'[437] The Constitution also makes similar qualification on the right 'to further education, which the state, through reasonable measures, must make progressively available and accessible.'[438] This qualification demonstrates the Constitution's sensitivities to the availability of resources and other limitations that could stand as a hurdle towards realising these socioeconomic rights. If these hurdles, despite the best efforts, prevent the Government from realising fundamental rights, this should not be seen by the courts as a violation of fundamental

[430] *Eskom 1* 40.
[431] *Eskom 1* 42.
[432] *Eskom 1* 46.
[433] *Eskom 1* 51.
[434] As above.
[435] Sec 27(1) of the Constitution, 1996.
[436] Sec 26(1) Everyone has the right to have access to adequate housing.
[437] Sec 26(2) and 27(2) of the Constitution, 1996.
[438] Sec 29(1)(b) of the Constitution, 1996.

rights. Even the courts in *Eskom 1* emphasised 'reasonable steps' taken to 'ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to schools, public health institutions and police stations.'[439] The court was also aware of the implications of expecting the impossible and should have tested the executive's reasonable measures and steps, financial implications, and availability of resources instead of a ruling that appeared to have ignored most of the critical factors. De Vos said the order in *Eskom 1* is meaningless and 'conflates the systemic long-term problems that cannot easily be fixed, with the short-term question of how to limit the impact of load shedding on hospitals, schools and police stations.'[440]

3.5.2 Humanitarian relief required administrative solution

Insofar as the judgments in *Eskom 1* and *Eskom 2* relate to ordering the Government not to loadshed schools, healthcare facilities and police stations, the matter should and could have been addressed by the very same court, but through administrative law. The failure to supply backup power to the cited public institutions—notwithstanding loadshedding's dire consequences—cannot be overextended and snuck in as a matter of constitutional judicial review. In this case, the inquiry would have morphed to reasonable measures taken by technocrats and bureaucrats in averting disastrous consequences in public institutions and other areas that are critical to national security and essential to the lives of South Africans. In such instances, the technocratic managers would have been compelled through Promotion of Administrative Justice Act (PAJA) to take reasonable steps to avert disaster.[441] De Vos said alternatively, they could have considered issuing a 'declaratory order that the relevant rights have been infringed because of the failure to develop a reasonable plan to limit the impact of load shedding on hospitals and schools.'[442]

If the court's argument of fundamental rights violation is accepted, then it would mean any failure of the executive's policies, such as poor roads and potholes, cause fatal accidents and therefore violate the right to life. This will open the sluice gates of

[439] (n 201) ruling.
[440] De Vos.
[441] Act 3 of 200.
[442] De Vos.

constitutional judicial review cases to every policy failure that could easily and indirectly be linked, through the weakest of nexus, to the fundamental rights violation. It is a dangerous precedent in that the courts will be used to challenge any government's policies based on frustration and popular outcry.

This does not mean individuals and groups cannot ask the courts to intervene through delictual action[443] and administrative law processes where government failures affect their rights and interests adversely. The Constitutional Court in *Joseph*, in which termination of electricity was at the heart of the dispute but for different reasons and facts, also rebuked the High Court to have considered the matter in terms of PAJA, as captured below:[444]

> The starting point should therefore be whether any "rights" of the applicants have been affected as that term is understood in PAJA, and if so, whether the relevant municipal by-laws can be read consistently with PAJA. The focus of the enquiry therefore is the relationship, if any, between City Power as a public service provider and users of the service with whom it has no formal contractual relationship.[445]

Providing backup supply to these institutions is a failure to carry out what seems to be daily bureaucratic operational issues, and not necessarily policy, and therefore falls within the purview of administrative law. Eskom rightly argued in *Eskom 1* that providing backup supply fell under respective departments responsible for the identified institutions: schools, police stations and health facilities.[446] The Supreme Court of Appeal in *Grey's Marine Hout Bay* agreed with this approach in its definition of what constitutes administrative action.[447]

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[443] See Lee v Minister of Correctional Services 2012 ZACC 30; 2013 (2) SA 144 (CC) and Minister of Police v K 2020 (403/2019) ZASCA 50; 2020 (2) SACR 1 (SCA); [2020] 3 All SA 38 (SCA) (6 May 2020). These are some of the cases in which ministers were sued for failure to provide necessary safety and protection to individuals. The law of delict jurisprudence also recognises constitutional delict flowing from infringements of fundamental rights.
[444] *Joseph* paras 34 and 39.
[445] *Joseph* 24.
[446] *Eskom* 2 45.
[447] 2005 6 SA 313 (SCA) 24. The court held that 'Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies,[10] nor to the ordinary exercise of judicial powers,[11] nor to the formulation of policy or the initiation of legislation by the executive,[12] nor to the exercise of original powers conferred upon the President as head of state.[13] Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'

The Constitution in this context also gives the remedial action for those whose 'rights have been adversely affected by administrative action.'[448] In the *Eskom* matter, the departments responsible for providing backup power supply would have been qualified to be defined as organs of state in terms of PAJA and the Constitution.[449] The directors-general or other senior officials in departments managing schools, clinics and police stations would have qualified in this definition. Their failure to provide backup power supply, as opposed to executive policy decisions that led to loadshedding, would have qualified as administrative action in terms of PAJA.[450]

In this case, the empowering provisions—which seems to be a condition for action to qualify as administrative in nature—would be all the legislations that provide for the management and smooth operation of the respective institutions.[451] The Constitution in its definition of basic values of public administration states that 'efficient, economic and effective use of resources must be promoted.'[452] With regards to the *Eskom* case, failure to supply backup electricity in the event of loadshedding would have been located in this context. PAJA also adds another element for an action to qualify as an administrative action, that it must 'adversely affect the rights of any person.'[453] The effect of the absence of backup supply on the rights to education, healthcare, and freedom and security would have been more relevant in the context of administrative law than the overstretched approach the court decided to take. Providing backup supply during loadshedding is not an executive function, and this is a fundamental exclusion for the action to qualify as administrative action. Without getting into the merits of whether this action would have succeeded if it was approached with the lens of administrative law, the court in this case has relied on the

[448] Sec 33(2) of the Constitution, 1996.
[449] Sec 1 of PAJA and Sec 238 of the Constitution. The Constitution describes organ of state in Sec 239 as: '(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution—(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'
[450] Sec 1(a) and (b) of PAJA which describes such action as: '[A]ny decision taken, or any failure to take a decision, by –(a) an organ of state, when –(i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.'
[451] In the context of the Eskom case, the empowering provisions would be contained in the National Health Act 61 of 2003, South African Schools Act 84 of 1996, and the South African Police Service Act 68 of 1995.
[452] Sec 195(1)(b).
[453] Sec 1(b) of PAJA.

wrong area of law even though—to emphasise again—the outcome would have been the same.

3.5.3 Citation of wrong parties responsible for the effects of loadshedding

The court also misdirected itself regarding the responsible authority over the generation, distribution, and supply of electricity, the management of power utility and maintenance of the power infrastructure. It is also not clear who is responsible for providing backup energy supply at these cited public institutions in the event of loadshedding. Public schools fall under and are managed by the Department of Basic Education and provincial departments of education respectively. Public clinics and hospitals fall under and are managed by national and provincial departments of health. Police stations fall under the command of the Ministry of Police. These departments should have been taken to task administratively in terms of whether they took reasonable measures to ensure there was backup power supply during loadshedding, but they did not feature as cited respondents. The court in *Eskom 2* said,

> …some time after his appointment, the Minister of Electricity was also joined as the ninth respondent... The Minister of Electricity has reported that he monitors the implementation of the Electricity Action Plan ("EAP") and that updates are made to the Cabinet on a bi-weekly basis.[454]

The court initially targeted the Minister of Public Enterprise because Eskom and energy policy fall under him, adding to the confusion since the appointment of the Minister of Electricity. The court also indirectly admitted to this misplacement of accountability.[455] De Vos agreed that the judgment in *Eskom 1,*

> …ignores complex constitutional questions about who carries the legal obligation to provide an uninterrupted electricity supply to hospitals, schools and police stations, or to mitigate the effects of load shedding for these institutions where the electricity supply is interrupted.[456]

The Minister of Public Enterprises, in his appeal, submitted that,

> …the order was alleged to be vague that it was impossible to implement as the Minister did not have the power to generate and supply electricity, that the order was not competent in law for the same reason and that the order violated the doctrine of separation of powers.[457]

[454] *Eskom 1* 32.
[455] *Eskom 2* 51.
[456] Note above.
[457] *Eskom 1* 16.

This should have been a red flag to the court regarding the appropriate authority responsible for providing relief. The power utility in *Eskom 2* also argued that it should not have been cited as a respondent and denied that its conduct led to a violation of fundamental rights.[458] In *Eskom 3,* the utility also explained at length why it was the wrong institution to provide relief, indicating the Minister of Electricity as the right person to implement the court order.[459] But the court said Eskom was the instrument 'through which the breaches of constitutional obligations have taken place.'[460]

In his affidavit, the Minister of Electricity said he was responsible for supervising the plan to resolve the energy crisis, as articulated below:[461]

> The Minister states that in the exercise of his powers and within the context of the work streams of NECOM (of which he is the Deputy Chairperson), he has a working relationship with Eskom's Board and Executive Management and he has …also established a parallel working relationship with the Minister of Public Enterprises.[462]

However, the Minister of Public Enterprise at the time remained the shareholder of Eskom and appointed its board of directors, meaning he was responsible for its operations, plans and strategy. The confusion between the roles of the two ministries forced the President to, on 5 January 2024—a month after the Eskom 2 ruling—issue and announce a memorandum of understanding to 'better clarify their respective responsibilities with respect to Eskom and the resolution of the electricity crisis.' The memorandum, titled Ministers of Public Enterprises and Electricity agree Memorandum of Understanding to strengthen actions against loadshedding, 'establishes a firm basis for a collaborative approach between the Ministers in exercising their assigned powers

[458] *Eskom 1* 28.
[459] *Eskom 3*(n 203) 25-29.
[460] *Eskom 3* 26.
[461] *Eskom 1* 45.
[462] As above.

and functions.'[463] However, the same memorandum says 'The Minister of Public Enterprises will (r)emain the shareholder representative of Eskom.'[464]

Interestingly, municipalities were not cited as respondents despite a practice in some jurisdictions of buying electricity from Eskom and supplying citizens directly; this appears to be an oversight. Eskom argued that that 'the electricity supply fall[s] within the ambit of provincial or local governments.'[465] The court in *Joseph* outlined the critical function of municipalities and its power utilities.[466] The South Gauteng High Court in *De Koker v Eskom* also described Eskom as a supplier of electricity to municipalities 'that then manage the electricity supply to end users or directly to end users.'[467] Municipalities in major metros such as the cities of Johannesburg, Tshwane, eThekwini, eKurhuleni, and Cape Town supply electricity to residents, hence their role should have been critical in this case. In some cities, the metro established a parastatal—City Power in the case of the City of Johannesburg—to supply and manage electricity.[468] Only where the court was considering the issues relating to challenges against tariffs in *Eskom 2* did the respondents include the SALGA. But none of the major metros, which are proportionally the biggest supplier of electricity given the concentration of the population therein, were cited. The Constitution defines the functions of the municipalities, placing it at the coalface of services to the citizens.[469]

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[463] The Presidency, Republic of South Africa 'Ministers of Public Enterprises and Electricity agree Memorandum of Understanding to strengthen actions against loadshedding', 5 January 2024 https://www.presidency.gov.za/ministers-public-enterprises-and-electricity-agree-memorandum-understanding-strengthen-actions (accessed 8 January 2024). 'The role and responsibilities of the Minister of Electricity included: "Focus full time on all aspects of the electricity crisis and the work of the National Energy Crisis Committee. Exercise authority over the Eskom Board and management on ending loadshedding and ensure that the Energy Action Plan is implemented without delay. Improve generation capacity and the purchase of additional capacity. Oversee implementation of the Eskom Generation Recovery Plan. Ensure that the generation fleet performs optimally and results in security of supply and low level of loadshedding. Ensure that matters dealing with transmission are dealt with, including the issuing of the Requests for Proposals and/or Requests for Information for financing of new transmission lines. Developing and agreeing on financing models and options for transmission together with National Treasury and the Presidency.'

[464] As above.

[465] *Eskom* 2 45.

[466] *Joseph* 47. 'In my view therefore, when City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.'

[467] *2023 (077168/2023) ZAGPJHC 1046 (19 September 2023).*

[468] *Joseph*) 4.

[469] Sec 152(1) of the Constitution, 1996. The court in (n 376) 34 held: 'The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic

In the context of the impact of loadshedding, the court should have considered this critical sphere of government in its application of PAJA as well as the individual departments responsible for the public institutions that were supposed to be exempted from loadshedding. Discounting the misdirection of the court, the *Eskom* cases were basically simple: Provide backup supply of power in the event of loadshedding to these public institutions to avoid unnecessary disruptions.

3.6 Conclusion

The *Eskom cases* highlighted the collision between constitutional judicial review and the separation of powers doctrine. It revived the tensions between the judiciary and the executive on the sanctity and reviewability of policy decisions. The cases also highlighted how far the courts can stretch the consequences of policy decisions on the realisation of fundamental rights.

Even though the court used procedural fairness in the *Joseph* case as a basis to find against the City of Johannesburg for making such a decision without following due process, in the *Eskom* cases the court would have had sufficient grounds to intervene but from an administrative law point of view. The *Eskom* cases overstepped their mark by entertaining policy issues that did not have any bearing on the direct violation of fundamental rights. The Constitution and the South African constitutional jurisprudence do not allow the judiciary to enter policy turf.

In the *Eskom* cases, the Government—local, provincial or national—was unable to provide backup electricity supply in the event of loadshedding, considering budgetary and other measures. The North Gauteng High Court should have used administrative law to force bureaucrats to provide alternative power supply to these cited institutions. The court would have arrived at relatively the same decisions and minimised the adverse effect of loadshedding. Using constitutional judicial review was encroachment on the policy arena, though this research does acknowledge that

needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider.' The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In Mkontwana v Nelson Mandela Metropolitan Municipality, Yacoob held that 'municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty. Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.' 2004 (CCT 57/03) ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004).

loadshedding was a result of bad policy choices. As argued throughout this research, it is not up to the courts to make a value judgment on the success or failure of policy; it was a judicial kneejerk reaction to a national outcry, which should not be the function of the court. The court entered a political ring with judicial gloves, thus offending the separation of powers doctrine and abusing constitutional judicial review.

Chapter 4. Analysing challenges brought in terms of the judgment in *United Democratic Movement v Eskom*

4.1 Introduction

The courts, especially the Constitutional Court, were given powers to protect fundamental rights, especially socioeconomic rights. This poses a challenge in a country that rose from a socioeconomic crisis,[470] a democratic state that sought to transform society, a new Constitution that sought to change the status quo by elevating the importance of improving 'the quality of life of all citizens,'[471] and the judiciary that sees its role as enforcing the Constitution.[472]

In response to these obligations and justiciability of these rights, the executive found itself having to juggle priorities and formulate policies aimed at equitable, rationing and reasonable allocation of limited resources and competing fundamental rights.[473] This juggling task is neither an arbitrary process nor dependent on discretionary whims of the executive. It requires taking reasonable measures, having clear criteria, and making rational decisions that can be justified and are within the confines of the law. The executive branch is empowered by the Constitution to lead and chart the strategic direction of the country by, among other things, 'developing and

[470] The Presidency, Republic of South Africa 'President Cyril Ramaphosa: 2024 State of the Nation Address', 9 February 2024, https://www.gov.za/news/speeches/president-cyril-ramaphosa-2024-state-nation-address-08-feb-2024 (accessed 11 February 2024): "In 1993, South Africa faced a significant poverty challenge, with 71.1% of its population living in poverty."; Department of Planning, Monitoring and Evaluation 'Twenty Year Review: South Africa 1994–2014' https://www.dpme.gov.za/news/Documents/20%20Year%20Review.pdf (accessed 20 August 2023): Headcount poverty in 1995 among Africans was at 63%. The World Bank estimated that South Africa's "poverty rate was estimated at 62.6 percent in 2022, with about 1.5 million more people living in poverty compared to 2019". World Bank 'Macro Poverty Outlook: South Africa', April 2021 https://pubdocs.worldbank.org/en/828221492188176117/mpo-zaf.pdf (accessed 11 November 2023).
[471] Preamble to the Constitution, 1996.
[472] Sec 7 of the Constitution, 1996 states that '1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. 2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. 3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.' Sec 8: The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
[473] 47% of the population relies on a monthly grant, according to a study. Patel, L '47% of South Africans rely on social grants - study reveals how they use them to generate more income', *The Conversation*, 3 May 2023 https://theconversation.com/47-of-south-africans-rely-on-social-grants-study-reveals-how-they-use-them-to-generate-more-income-203691 (accessed 26 November 2023).

implementing national policy.'[474] In adopting the Constitution, the people of South Africa committed and commanded their representatives to, among other things, 'improve the quality of life of all citizens and free the potential of each person.'[475] This powerful statement of the Constitution points to the scheme of a democratic project in which all branches are expected to be part of and play their distinct roles. In the context of the executive, such a democratic project is ultimately achieved through policies as guiding principles, as alluded by Mogoeng in minority judgement in *e.tv*.[476]

4.2. Limited resources and budgetary constraint challenges

The *Eskom case* highlights the judiciary's approach to dealing with cases involving matters that impact limited resources and budgetary challenges and policy options. The Constitutional Court in the *Certification Case* ruled that budgetary consequences were not reason enough to object to the justiciability of socioeconomic rights.[477] The *Certification* case acknowledged that socioeconomic rights will indeed 'give rise to similar budgetary implications without compromising their justiciability.'[478] Cameron J also challenges the notion that the courts' rulings on socioeconomic rights have dire implications on budgetary allocations, arguing that the concerns 'about judges meddling with budgets is real, but overstated.[479] Every court order affects budgets in some way.'[480] He said the court orders are not necessarily 'directed at rearranging the budgets,'[481] however, reasonableness stood the test of time as criteria to evaluate the executive's constitutional obligations given the multiplicity and competing interests and rights.[482] He argued that this standard of reasonableness 'also imposes limits on how far the courts can tread into interfering with government's policies.'[483] Courtis argues that these are a standard test applied 'when the challenge to general norms is based on the alleged infringement of any of the rights included in the Bill of Rights.'[484]

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[474] Sec 85(2)(b) of the Constitution, 1996.
[475] Constitution, 1996. Preamble.
[476] *etv* 30.
[477] (n 44) 76,77 and 78.
[478] *Certification Case* 78.
[479] Cameron location 3293
[480] Cameron location 3293.
[481] Cameron location 3298–3299.
[482] Cameron location 3577.
[483] As above.
[484] C Courtis 'Rationality, Reasonableness and Proportionality. Testing the Use of Standards of Scrutiny in the Constitutional Review of Legislation' (2011) *Constitutional Court Review* 4(1).

In *Mazibuko*, the Constitutional Court stressed that 'the concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.'[485]

> 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. This case provides an excellent example of government doing just that.[486]

Soobramoney provided a landmark interpretation and analysis for the courts to consider when applying constitutional judicial review of policy and applying reasonableness test.[487] Here, the court acknowledged that budgets and resources were critical dependencies and conditions upon which the state is able to meet its constitutional obligations and be held accountable.[488] The court put it succinctly that,

> …given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.[489]

Faced with the devastating pandemic and a Government policy that violated the rights of pregnant women and children, the Constitutional Court in *Treatment Action Campaign* acknowledged with caution that,

> …such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[490]

The court stressed the obligations of the state, competing demands and other socioeconomic rights, but noted that,

> …the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task.[491]

In this context, interpretation of taking reasonable measures depends on the attitude and efforts of the state given the available resources. The concept could also mean pushing the Government to do its very best under the circumstances, as was the case

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[485] *Mazibuko* 59.
[486] *Mazibuko* 71.
[487] *Soobramoney* .
[488] *Soobramoney* 11.
[489] *Soobramoney* 11.
[490] *Soobramoney* 38.
[491] *Treatment Action Campaign* 58.

in *Treatment Action Campaign* and the *Government of the Republic of South Africa v Grootboom,*[492] or that the state cannot be expected to do more than the available resources, as was the case in *Soobramoney* and *Mazibuko.*

Given competing rights and limited budgets, the executive is forced to triage when making critical choices on how to allocate scarce resources to realise fundamental rights. In *Soobramoney,* Chaskalson J referred to an English authority where it was held that,

> … [d]difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage to the maximum number of patients. This is not a judgment a court can make.[493]

The courts do not expect the executive to perform policy miracles beyond the state's capacity and available resources. The Constitutional Court in *Grootboom* and *Treatment Action Campaign*[494] agreed that to demand a minimum core or threshold to meet requirements of fundamental rights might not consider the intricacies of policymaking and other budgetary granular considerations.[495] In *Treatment Action Campaign,* the Constitutional Court considered the availability of resources and reasonable measures as factors that should guide the Government's policy approach.[496] Sachs J in minority judgment in *Soobramoney* put it aptly that, given limited resources, 'I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made.'[497] His remarks echo the Constitutional Court's concessions in *Mazibuko* that courts should retreat where the Government has shown its best efforts and overstretched resources to meet its obligations. Cameron J seemed to agree with this approach, stressing that 'the prerogative to formulate and implement policy on how to finance public projects was in the exclusive domain of the executive.'[498]

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[492] *2000 (CCT11/00) ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) 31.*
[493] *Soobramoney* 73.
[494] *Treatment Action Campaign* 34.
[495] (n 55) 52. In this case, the court referred to and quoted General Comment 3 (1990) of the United Nations Committee on Economic, Social and Cultural Rights: '[it] is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant.'
[496] *Treatment Action Campaign* 58.
[497] *Soobramoney* 59.
[498] Cameron location 2450.

> Courts must thus refrain from entering the exclusive terrain of the executive and legislative branches unless the Constitution demands that they do. The duty of determining how public resources are to be drawn upon and re- ordered lies in the heartland of the executive's function and domain.[499]

However, in *Grootboom*, the Constitutional Court said for the reasonable measures to succeed, they must be accompanied by the executive's concrete policies.[500] This should have been followed in *Eskom* where the Government demonstrated its energy policy and plans.[501] As indicated above in *Grootboom,* the court was not content with 'mere legislation,' but it expected 'well-directed policies and programmes implemented' to their full completion.[502] The measure and barometer for full completion means achieving and realising the contested fundamental rights to the benefit of the recipients, and not just intentions on paper. Failure to fully execute these policies, 'will not constitute compliance with the State's obligations' even if the programme and strategy were well formulated.[503] The corollary of this approach is that if the executive illustrates this full implementation to the best of its ability and as allowed by the available resources, this will be regarded as taking reasonable measures to meet the obligations, as was acknowledged in *Soobramoney and Mazibuko.* The court's approach in *Grootboom* contended that while reasonableness must take into account the context of the Bill of Rights and restrictions of resources, it must not ignore those who do not fall within the ambit of specific socioeconomic rights.[504] The court in *Eskom 3* emphasised that it 'did not prescribe to government' the budgetary spending but as long as the Minister of Electricity ensured that 'uninterrupted electricity is to be supplied in South Africa.'[505]

4.3 Challenges of judicial restraint to avoid interference with executive decisions

It is essential to trace the genesis of policymaking in the democratic transformation process to provide a clear picture and understanding of the rationale behind the

[499] As above.
[500] *Grootboom* 42.
[501] The Government's national EAP is outlined throughout Eskom 2 and 3.
[502] *Grootboom* 42.
[503] As above.
[504]*Grootboom* 44.
[505] *Eskom 3* 23

Constitution conferring policymaking power to the executive, which is essentially the governing party. Policies are oftentimes encapsulated in the form of party manifestos promoted as marketing campaigns for voters to elect such parties to government.[506] These manifestos mostly contain a list of promises to attract voters[507] which are (in theory) translated into government policy once the party is voted into power. O'Regan J in *Mazibuko* says the Constitution requires 'a form of ... democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.'[508] The *Mazibuko* judgment was a practical expression of the doctrines of separation of powers and constitutional judicial review. It points to the fact that while the people elect a government of their choice to make policies in realisation of fundamental rights, the same people can hold the same government accountable for its policy decisions through—among other instruments—constitutional judicial review.

Therefore, policymaking in this context is a political strategy conceptualised and honed at party political level. Translating the politically inspired strategy into policy requires the governing party, in the form of the executive, to find the budget to fund and execute the policy. Policies are multifaceted in that some of them affect more than the realisation of fundamental rights and have effects on other technical, policy and political centres. This is what is defined as the polycentricity. In *Mazibuko,* the Constitutional Court accepted that,

> …the concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved.[509]

The court again was cognisant of the enormous responsibilities of the executive and the need to provide space to this branch to fulfil its obligations. This is why the Constitution's conferment of policymaking functions on the executive[510] is interpreted

[506] South Africa has a party system whereby voters elect a political party to the provincial and national legislatures. These legislatures vote for the president and premier respectively, who then form the executive at national and provincial level to implement policy.
[507] S Mpofu, T Matsilele & T Nyawasha 'The Iconography of Persuasion: An Analysis of Political Manifestos and Messaging of Top Three Parties in South Africa's 2019 Elections', (2022) *Communicare: Journal for Communication Studies in Africa* 40(1).
[508] *Mazibuko* para 160.
[509] *Mazibuko* 40.
[510] Sec 85 (2) of the Constitution says: 'The President exercises the executive authority, together with the other members of the Cabinet, by a. implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; b. developing and implementing national policy; c. co-ordinating the functions of state departments and administrations; d. preparing and initiating legislation;

by some academics, such as Mhango, as a form of an insulating cover against constitutional judicial review.[511] Mhango argues that while the courts must 'exercise judicial authority,' they must leave 'political, policy, executive and administrative decision-making processes to the executive arm of government.'[512] He argues that the separation of powers doctrine enjoins the judiciary to respect the mandate of the executive.[513] Cameron J is aligned to this approach, arguing that the Constitutional Court 'seeks to leave the details of policy formulation and its implementation strictly to the executive and legislative branches.'[514] Allowing the executive this policymaking freedom is not tantamount to policymaking fiefdom. It is the essence of understanding that all branches deserve space to realise and enforce fundamental rights.

The courts are positioned as arbiters and a forum to adjudicate disputes from interested parties who believe the executive is not meeting its obligations to realise fundamental rights. The Constitution provides a list of those who have,

> …the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.[515]

This requires the courts to consider their own obligations and limitations, while balancing the need to realise socioeconomic rights, budgetary implications, and the reality of limited resources. Hoexter's approach regarding the policymaking function as a constitutionally protected executive arena is a caution to the judiciary:

> 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 fact 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.[516]

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and e. performing any other executive function provided for in the Constitution or in national legislation.' S125(2) also gives similar executive powers and functions to the provincial premiers and their executive.

[511] Mhango, M *Justiciability of Political Questions in South Africa: A Comparative Analysis* (Eleven International Publishing 2019).

[512] As above.

[513] Mhango

[514] Cameron location 3577.

[515] Sec 38 of the Constitution lists: 'The persons who may approach a court are a. anyone acting in their own interest; b. anyone acting on behalf of another person who cannot act in their own name; c. anyone acting as a member of, or in the interest of, a group or class of persons; d. anyone acting in the public interest; and e. an association acting in the interest of its members.'

[516] C Hoexter 'The Future of Judicial Review in South Africa Administrative Law' (2000) 484 *South African Law Journal* 501–502.

Hoexter is not necessary arguing against the role of the judiciary in intervening in policy, rather he locates constitutional judicial review as the last interventionist escalation when the other branches have failed to perform their constitutional duties.[517] The starting point is to allow these branches to carry out their programmes that are primarily informed by available resources.

When not constitutionally mandated, constitutional judicial review interferes with the decision-making processes and powers of a democratically elected government. The health and the pulse of any democracy is founded on its people's ability to freely and fairly elect the government of their choice. The scheme of the constitutional values recognises that the representatives so elected will be accountable to the people through regular elections and other parliamentary processes to enable citizens to participate in law making and policy decisions.[518] Flowing from these democratic principles, the government must be free to make decisions and policies without judicial hindrance. Constitutional judicial review, unless constitutionally permissible, can be seen as undermining these pillars of democracy and insidiously erode the authority of these branches to govern effectively. The executive and legislative branches derive their powers and functions from the Constitution through electoral processes.[519] These processes have their own accountability mechanisms that are also derived from the doctrine's features of checks and balances. The accountability features include the legislature being able to remove the president,[520] the National Assembly can declare a vote of no confidence in the president or/and their cabinet,[521] the National Assembly can vote for the removal of a judge and the president can suspend a judge,[522] and the executive accounts to various parliamentary committees for their policies and use of public funds.[523] These processes are a demonstration that judicial review is not the only mechanism to strengthen constitutional democracy and achieve compliance with the Constitution.

[517] As above.
[518] Sec 72(1)(a) and 118(1)(a) of the Constitution, 1996.
[519] Secs 85, 125, 44 and 104 provides for the executive and legislative authority nationally and in provinces and allocations of functions of these branches.
[520] Sec 89 of the Constitution, 1996.
[521] Sec 102 (1) and (2) of the Constitution, 1996.
[522] Sec 177 of the Constitution, 1996.
[523] Parliament of the Republic of South Africa 'Role of parliamentary committees' no date https://www.parliament.gov.za/role-of-parliamentary-committee (accessed 23 August 2024).

However, the Constitutional Court in *Doctors for Life* interpreted the exclusive jurisdiction of the court[524] to mean that matters that 'relate to the sensitive areas of separation of powers must be decided by this Court only.'[525] The court said the disputes that fall in its exclusive jurisdiction include 'crucial political question and thus intrude into the domain of Parliament.'[526] While this could be misconstrued as the court being a player and a referee at the same time, its interpretation flows from its distinct and exclusive role as enforcer and interpreter of the Constitution. Secondly, the absence of insulated political questions doctrine in South Africa means that once a dispute is placed before the court, it is bound to hear it even if it has to declare that the matter belongs to the other branches. There is no procedural barrier that prevents the courts from hearing such disputes. The only difficulty arises when the courts are asked to interfere with matters and functions that are constitutionally allocated to the executive and legislature. The court in *Doctors for Life* drew the distinction between 'ascertainable' constitutional provisions and disputed ones.[527] While this might sound simple, in practice such disputes are the subject of current tensions between the judiciary and other branches, and a contentious debate regarding the South African version of the separation of powers doctrine. The court in *Doctors for Life* said it is not encroachment when it decides on clear obligations that other branches are constitutionally required to meet.[528] There is no dispute that in such a case, the court is enforcing the Constitution and not offending the doctrine. It is a different matter when the court is asked to interrogate an area that is clearly demarcated by the Constitution as a domain of the executive, such as policy. The court should employ the doctrine of separation of powers to determine its obligations and limitations. It takes strict discipline, self-restraint and the embracement of the spirit of the doctrine for the courts to know and stay in their constitutional lane.

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[524] Sec 167(4) of the Constitution provides that 'Only the Constitutional Court may a. decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; b. decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121; c. decide applications envisaged in section 80 or 122; d. decide on the constitutionality of any amendment to the Constitution; e. decide that Parliament or the President has failed to fulfil a constitutional obligation; or f. certify a provincial constitution in terms of section 144.'

[525] *Doctors for Life* 24.

[526] As above.

[527] *Doctors for Life* 35.

[528] As above.

4.4 Challenges of the misuse of judicial review and judicial activism

Former Chief Justice Ismail Mohamed observed that 'judicial power is potentially no more immune from vulnerability to abuse than legislative and executive power.'[529]

> The difference is that there is no constitutional mechanism to police the abuse of judicial power. It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breadth of judicial power is matched by the real depth of judicial responsibility.[530]

Invalidation of legislation or policy, on the face of it, is a direct challenge to the separation of powers doctrine, and a confrontation with a democratically elected government, unless there can be a constitutionally permissible basis to do so. The assumption from this argument is that that policymaking power of the executive should be seen as people's choices and not be interrogated by the courts. Klare agreed that 'a core principle of modern democracies is that legitimately contestable matters of public policy should be determined by representatives and officials responsive to electoral majorities.'[531] Democracy vests decision making in majorities, argues Issacharoff, while 'constitutionalism removes from immediate popular control certain significant realms of politics.'[532] This is what pits judicial review against democratic power and creates tensions between the judiciary and other political branches. These tensions have been a feature of the South African constitutional jurisprudence since the birth of the constitutional democracy as pointed out by Botha: 'there is a still a lingering tension between the testing right of the judiciary and the will of the people.'[533] Botha describes this as a tightrope requiring a delicate judicial walk.[534] Issacharoff explains the necessary tension 'between political democracy and constitutional constraints…requires a mediating institution capable of imposing that restraint.'[535]

While there is much contestation regarding the role of elected representatives and unelected judges in a democracy, the Constitutional Court in several cases has propagated for maximum judicial restraint unless fundamental rights are at risk. In

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[529] I Mohamed 'The independence of the judiciary : address by the Hon Mr Justice I Mahomed Chief Justice of the Supreme Court of Appeal, to the International Commission of Jurists in Cape Town on 21 July 1998' (1998) 115 South African Law Journal 658; E Surty & Q Patel *Ismail Mahomed: Liberating the Law* (The Project Justice Trust 2020)
[530] As above.
[531] K Klare 'Self-Realisation, Human Rights, and Separation of powers: A Democracy-seeking Approach' (2015) 26 *Stellenbosch Law Review* 445-470.
[532] Isaacharoff 20.
[533] C Botha *Interpretation of Statutes: An introduction for Students* (Juta 2013) 199.
[534] As above.
[535] Issacharoff 48.

Economic Freedom Fighters v Speaker of the National Assembly (EFF), the Constitutional Court reaffirmed the importance of limitation of judicial review.[536] It held that the judiciary did not hold special powers in the realm of the doctrine of separation of powers:

> The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.[537]

The tensions that characterise constitutional democracy give rise to questions of legitimacy between the elected branches representing the majority, and the unelected judicial branch that is not seen to be representing anyone. While the judges might not have a political constituency, the Constitution and the doctrine have placed them in a critical role to protect the principles and values of democracy that could be eroded in the political jungle of democratic supremacy. However, this judicial role has never meant that judges cannot account nor align their philosophies to a democratic constitutional process that requires political context of South Africa's painful history. Judge Dennis Davis also asked that while constitutional review is conducted by unelected judges, the crux of the question should be 'how to account for and justify the curtailment of the operation of a democratic political system by an unaccountable Institution.'[538] The answer should be found in the principles of the doctrine and the values of the Constitution. Du Plessis warned that when 'unelected judges take over the democratic role, a legitimacy problem emerges' where the outcomes seem to be a subversion of democracy.[539] His argument is only valid when the judicial review is applied to matters that ought to be in the domain of other branches and there is no justification of judicial intervention.

While the judiciary's role in a constitutional democracy is entrenched in the Constitution, the democratic programmes of the Government must be carried out unhindered but within the confines of the law and the Constitution. Navigating such dilemmas has been a difficult part of our constitutional jurisprudence. Waldron said,

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[536] *2016 ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at paras 92-3.*
[537] As above.
[538] DM Davis 'Transformation and The Democratic Case for Judicial Review: The South African Experience', (2007) *Loyola University Chicago International Law Review* 5(1).
[539] Du Plessis 230.

> …by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.[540]

Waldron and Du Plessis elevate this as the battle between the elected representatives and the unelected judges, but it is arguably actually the battle of interpretation of the Constitution and the correct application of the doctrine of separation of powers. If it is understood within this context, then the elected branches will remember that the unelected judges were allocated their roles by the elected drafters of the Constitution, who were complying with the will of the people.

It is when the crisis of political leadership arises, that the judiciary is seen as assuming the powers of other branches, thus circumventing democracy. It is what O'Regan defined as jurisprudence of exasperation, meaning 'decisions that express judges' exasperation with the state of affairs in the country.'[541] Some judges have also expressed frustration with the courts immersing themselves in political matters. Davis J in *Mazibuko v Sisulu* cautioned that 'courts do not run the country, nor were they intended to govern the country.'[542] He expressed his concerns regarding delegitimisation of the judiciary by meddling in affairs that must be left to political spheres. His concerns are worth quoting extensively:

> There is a danger in South Africa however of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with a political impasse relating to policy , or disputes which clearly carry polycentric consequences beyond the scope of adjudication .In the context of this dispute, judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business, matters…… I regret the need to emphasise this point, but it appears to me to be vital to the future integrity of the judicial institution. An overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state to deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model.[543]

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[540] J Waldron 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Review.* 1346.
[541] O'Regan 'Reflections on the role and work of the Constitutional Court'. The Helen Suzman Memorial Lecture. 2011. https://hsf.org.za/events/lectures/hsf-memorial-lecture-2011 (Accessed 12 April 2022)
[542] 2012 (21990/2012) ZAWCHC 189; 2013 (4) SA 243 (WCC) (22 November 2012).
[543] As above. Quoted again by Justice Jafta in minority judgment in Mazibuko v Sisulu & Another 2013 (CCT 115/12) ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (27 August 2013) 83.

Judge Davis' concerns regarding the creation of juristocracy were echoed by Hirschl, who said, the 'transition to juristocracy—serves as a rather grim testament to the real nature of twenty-first-century constitutional democracy.'[544] Hirschl cautioned that courts' independence is historically guaranteed and protected from 'political interference,' but they must not become or be seen as political actors 'to forward their own political agendas, rather than neutral arbiters.'[545]

The judicial legitimacy crisis could attract attacks against the judiciary as both an institution and as individual judges by political leaders who believe the courts undermine their legitimately acquired political power. In 2011, then ANC Secretary-General, Gwede Mantashe, labelled some judges as counter-revolutionaries.[546] Zuma, shortly after being elected ANC President in 2007—and a month before assuming the presidency of the country in 2009—questioned the powers of the Constitutional Court and said, justices 'are not God.'[547] In an interview with The Star newspaper, Zuma said, 'we don't want to review the Constitutional Court, we want to review its powers.'[548] Then South African Communist Party General Secretary, Blade Nzimande, said, 'liberals' have misconstrued the Constitution and elevated constitutional supremacy and other fundamental pillars to undermine the will of the people.[549] Nzimande stated that the current constitutional features designed to check and balance the powers of arms of government are 'an attempt to subvert the basis of our democracy'.[550] Former President, Thabo Mbeki, during the opening of the Constitutional Court, sent a tacit warning that the court, 'a product of bitter struggles waged by millions of people,' cannot 'define itself as an institution outside the transformation process that is taking place in our country.'[551] The transformation process means allowing the ruling party,

[544] (n 19) 70.
[545] (n 19) 70.
[546] M Mkhabela 'ANC's Mantashe lambasts judges', Sowetan Live, 18 August 2011 https://www.sowetanlive.co.za/news/2011-08-18-full-interview-ancs-mantashe-lambasts-judges/ (accessed 19 November 2023).
[547] SAPA 'Zuma Just Wants Neutral Judges – Phosa' Polity, 15 April 2009 https://www.polity.org.za/article/zuma-just-wants-neutral-judges-phosa-2009-04-15 (accessed 12 October 2023).
[548] M Monare 'Concourt is not God, says Zuma', *The Star*, 9 April 2008. 9.
[549] B Nzimande 'The Ideological Third Force', Politics Web, 13 April 2012, https://www.politicsweb.co.za/news-and-analysis/the-ideological-third-force--blade-nzimande (accessed 22 August 2023).
[550] As above.
[551] Mbeki T 'Mbeki: Opening of New Building for Constitutional Court', Polity, 21 March 2004 https://www.polity.org.za/article/mbeki-opening-of-new-building-for-constitutional-court-21032004-2004-03-21 (Accessed 23 February 2023).

the majority in the legislature and who forms the executive, space to implement policies and legislation that responds to people's aspirations. Most of these aspirations relate to socioeconomic rights.[552]

Another politician, Sihle Zikalala, accused the judiciary of wielding too much power and using it to frustrate the Government's transformative policies to the extent of suggesting a return to parliamentary sovereignty system.[553] He wants laws passed by Parliament to be above judicial scrutiny to avoid the 'will of the people get[ting] undermined by one arm of the state, possibly making a mockery of the idea of democracy itself.'[554] Zikalala misunderstood the scheme and structure of the Constitution, not understanding that he can achieve his ambitions through the separation of powers doctrine without destroying the foundation of the Constitution.

Some consider judicial review as a counter-majoritarian weapon in the hands of unelected judges. When the crisis of political leadership arises, the judiciary is seen as assuming the powers of other branches, thus circumventing democracy. Other scholars such as Seedorf and Sibanda are of the view that there must be transparent principles in the limitation of judicial power: 'It is necessary that the courts themselves formulate, articulate and apply principles for guiding the limits of their own powers and prevent their abuse.'[555] Tsele described the judicial review of matters under the executive purview as 'a government by the judiciary.'[556] This was echoed by Roux who said it is the courts that determine 'not just the permissible degree of legislative intrusion…but also the extent of its own power to intrude into the other branches' domains'. He says the courts develop their own view on how to apply the separation

[552] ANC's manifesto before the 1994 and subsequent elections were focused on providing housing, education, primary healthcare and jobs. African National Congress 'National Election Manifesto: Together we have won the right for all South Africans to vote', 15 March 1994 https://www.anc1912.org.za/manifestos-1994-national-elections-manifesto/ (accessed 20 November 2023).
[553] Zikalala S. 'Premier Sihle Zikalala during Human Rights Day commemoration', South African Government, 21 March 2022. https://www.gov.za/speeches/premier%C2%A0sihle-zikalala-during-human-rights-day-commemoration-21-mar-2022-0000 (accessed 26 April 2022).
[554] As above.
[555] Seedorf, S & Sibanda, S 'Separation of Powers' in Woolman S et al (eds) *Constitutional Law of South Africa* (Juta 2008
[556] M Tsele 'Coercing Virtue in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem' (2016) *Constitutional Court Review* 193–220.

of powers doctrine and often misunderstand 'the requirements of the separation of powers.'[557]

However, there are those who believe that the courts are the guardians of the Constitution, even if they must be bold and take a position against the majority whenever necessary. Mojapelo J says the courts are the 'ultimate guardian of our Constitution, they are duty bound to protect it whenever it is violated.'[558] Moseneke argues that the Constitution 'conferred on the courts full powers to police the democratic project and the transformation of our land.'[559] He defined constitutional judicial review as the Constitution requiring 'the judiciary ultimately to determine the limits and regulate the exercise of public power.'[560] He said the fact that the judiciary made rulings concerning other branches of government did not mean judges automatically overstep their jurisdictional boundaries or are biased.[561] It would be unreasonable, he argues, to expect the courts never to rule against other branches of government for fear of 'rocking the boat.'[562] Burns and Beukes also argued it did not mean the courts, where the rights and constitutional questions are raised, cannot intervene simply because the question has political ramifications.[563]

Moseneke argues that the Constitution has installed the courts 'to be the ultimate referees on whether the Constitution or any other law has been breached.'[564] This is a distinct but not superior role. Roux also views the judiciary as an independent referee.[565] The regulator and referee role of the judiciary elevate the courts to a critical constitutional watchdog role, even though it is supposed to be constitutionally equal in stature and status with the other branches. It is a constitutional structural design that locates and allocates the courts these critical functions without the Constitution upgrading the judiciary to a higher status above other arms of government. However, Dube believes that,

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[557] Roux, T *The Politics of Principles: The First South African Constitutional Court 1995-2005* (Cambridge University Press 2015) 386.
[558] Mojapelo P M 'The Doctrine of Separation of Powers: A South African Perspective' (2013) *Advocate* 26(1):37-46
[559] D Moseneke, D *All Rise: A Judicial Memoir* (Picador Africa 2020) 93.
[560] Note above.
[561] Note above.
[562] Note Above.
[563] Y Burns & M Beukes *Administrative Law* (LexisNexis 2019) 35.
[564] n 36.
[565] Roux, T *The Politics of Principles: The First South African Constitutional Court 1995-2005* (Cambridge University Press 2015)

> …the powers and authority of the Constitutional Court place it at the apex of the legal and political order such that from a conceptual and practical view, the Court is constitutionally superior to Parliament and the executive.[566]

Klare argues from the extreme opposite side, saying that 'the elected branches are hierarchically superior to the judiciary.'[567] The two seem to confuse the distinct roles of each branch for superiority on the hierarchical scale. All branches are supposed to have equal constitutional status but play different roles. If constitutional supremacy is placed as the apex philosophy, then no branch is less important as they were created to support constitutional democracy in a different way. It is for this reason that the doctrine of separation of powers was meant to amplify and insulate these distinct roles.

4.5 Recommendations

Based on these findings and the interrogation and critique of the *Eskom* case, the research recommends that the courts' first kneejerk reaction should be deference towards the executive by referring policy disputes to the executive to remedy the flaws. The order in *Eskom 2* indirectly deferred the matter to the executive even though it should not have interrogated policy. Secondly, there should be guidelines that outline the process and modalities of how to tackle disputes regarding powers and functions that belong to the executive. The research acknowledges that some of the Constitutional Court judgments provided some direction and approach on how to handle such cases. However, these guidelines should be codified as peremptory jurisprudential guidelines to avoid other courts straying and going off the judicial rail, as this research noted happened in the *Eskom* cases. These are detailed further below.

4.5.1 Deference and dialogue

The research recommends deference and dialogue as the form of application of judicial review in pursuit of a higher constitutional goal instead of an unhealthy tension between the branches of government. This should be the first step in achieving equitable and

[566] F Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' in Sibanda, S (eds) *Separation of Powers, the Judiciary and the Politics of Constitutional Adjudication* (Routledge 2023) 6.
[567] Klare, K 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy-seeking Approach' (2015) 26 *Stellenbosch Law Review* 445–470.

just outcomes. The process involves a conversation and dialogue among branches. The court in *Eskom 1* also tried to defer to the executive when it stated that,

> …any compelling order should be couched wide enough to provide for different permutations and also be wide enough to leave it in the hands of the DPE Minister as to how he is going to rectify the situation...The formulation of the relief should also allow the DPE Minister the freedom to enlist other organs of state to assist him in complying with the order of this court, without prescribing or shackling the Minister. Such enlistment would be a simple consequence of the "inter-relatedness" of organs of state, all who have the duty to promote the Constitution and to prevent infringements of Constitutional rights.[568]

The judicial whip must be a last resort in cases where the other branches fail or refuse to comply. The Constitution itself codified judicial deference by prescribing it to the Constitutional Court and providing space for the other branches to take remedial action.[569]

Even though this form of codified deference was primarily aimed at judicial review of legislations, it should be codified and applied even in the executive policy formulation space. The Constitutional Court implemented this deference approach in the *Lesbian and Gay Equality Project v Minister of Home Affairs* by ruling that,

> …the omission from section 30(1) of the Marriage Act 25 of 1961 after the words "or husband" of the words "or spouse" is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.[570]

The technique also included the severance of the offensive part of legislation and still left the legislation intact. The Constitutional Court in *Coetzee* explained this process,

> …if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute."[571] The aim is that "what remains is the valid rule.[572]

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[568] *Eskom* 53.
[569] Sec 172(1 of the Constitution, 1996: 'When deciding a constitutional matter within its power, a court: a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and b. may make any order that is just and equitable, including i. an order limiting the retrospective effect of the declaration of invalidity; and ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'
[570] *2005 (CCT 10/05) ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).*
[571] *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth* Prison and Others 1995 (CCT 19 of 1994, CCT 22 of 1994) ZACC 7 (22 September 1995.
[572] *Coetzee 189.*

The court can also read in missing words to the legislation as it did *in Hassam v Jacobs*[573] or read down to give a narrow interpretation of the statute to avoid invalidity. But Botha cautioned, rightly so, that the 'remedy of reading in ought not to be granted where this would result in an unsupportable budgetary intrusion.'[574] In striving for a just and equitable outcome, deference should be a mechanism of making sure that while enforcing their decisions, the other arms of government are able to affect the rulings without undesirable consequences. Deference is the judiciary being considerate, self-aware, and alert to the gravity of its own power. The drafters of the Constitution expected transparent communication to avoid the judiciary usurping the functions and arrogating itself the powers of other branches, but without abdicating its role to protect and enforce the Constitution. This was also confirmed in *e.tv v Minister of Communications and Digital Technologies* in which it was held that 'appropriate judicial deference should therefore be shown by this court.'[575] Brand says deference is when the courts 'recognise the fact that the issue before the court is complex.'[576] Belzer agrees, adding that the judiciary's deference to other branches is because the other branches are 'more capable of making informed determinations within their areas of expertise' but less deferential when coming to fundamental rights.[577] In *Kaunda v President of Republic of South Africa,* the court accepted that they need to 'exercise discretion and recognise that government is better placed than they are to deal with such matters'—this was a form of 'deference to which the government is entitled.'[578]

The court in *Bato Star* dealt at length with the question of deference and answered why the courts owed it to another branch, in respect to the doctrine of separation of powers, to enforce the Constitution without confrontation and arrogance.[579] Deference in this instance amounts to providing guidance and a support system by the judiciary to other branches of government with the sole aim of enforcing

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[573] *2009 (CCT83/08) ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (15 July 2009*). The court said, 'the word "spouse" as it is used in the Act is not capable of being understood to include more than one partner to a marriage. In consequence, we must read in words to cure the defects.'
[574] (n 517) 196.
[575] *e.tv (Pty) Limited v Minister of Communications and Digital Technologies & Others; Media Monitoring Africa & Another v e.tv (Pty) Limited and Others 2022 (89/22;CCT 92/22) ZACC 22 (28 June 2022) at 36.*
[576] D Brand 'Judicial Deference and Democracy in Socio-economic Rights cases in South Africa' (2011Stellenbosch Law Review 22(3): 614-638. (accessed 20 December 2023).
[577] A Belzer, 'Putting the Review Back in Rational Basis Review' (2014) *41 Western State University Law Review.*
[578] *2004 (CCT 23/04) ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); 2005 (1) SACR 111 (CC) (4 August 2004) at 67.*
[579] *Bato Star.*

the Bill of Rights and staying within their constitutional lane. Judge O'Regan also said in *Bato Star* that:

> 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 constitutional principle of the separation of powers itself.[580]

O'Regan J continued that such deference,

> …does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law.[581]

Fowkes agrees, arguing that the court's deference is not out of 'political fear or institutional caution' but because they know that they cannot or 'need not intervene because the other branches are also doing important constitutional work, and might be doing it better than the Court could.'[582] Ferejohn says any limitation and deference 'arise from judicially developed and judicially enforced ideas of justiciability, precedent, and whatever policies of deference to other governmental departments courts have decided to follow.'[583] In the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* case, it was said that the court should take into consideration 'the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case.'[584]

The court at times employs what Cameron[585] and Ngcobo describe as a constitutional dialogue to attempt to modify traditional conceptions of 'checks and balances' 'while allowing necessary intrusions in each other's domains in the light of

[580] *Bato Star*) 46.
[581] As above.
[582] Fowkes, J *Building the Constitution: The Practice of Constitutional Interpretation in Post Apartheid South Africa* (Cambridge University Press 2016) 4.
[583] J Ferejohn 'Judicializing Politics, Politicizing Law Author(s): Law and Contemporary Problems' (2002) 65 *Duke University School of Law* 433.
[584] 1999 (CCT10/99) ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) at 66. The court said at 67, such deference 'involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.' 'It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.'
[585] Cameron location 2459.

modern government's complexities.'[586] The Supreme Court of Canada in *Vriend v Alberta* said the dialogue meant that,

> …in reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches ... By doing this, the legislature responds to the courts; hence the dialogue among the branches.[587]

Sachs J introduced and elucidated the idea of dialogues in *Mhlungu* when he said interpretation of the Constitution,

> …will always take the form of a principled judicial dialogue, in the first place between members of this court, then between our court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.[588]

Cameron says dialogue is another way the Constitutional Court displays its sensitivity towards 'the separation of powers' doctrine.[589] Sachs J argues that there were assumptions 'that there will be civilised conversation rather than rude discourse between the three branches.'[590] He said the Constitution is designed in a way that calls for a civil conversation rather than confrontation: 'the notion of a dialogue or conversation with Parliament is therefore built into the very determination of our jurisdiction.'[591]

4.5.2 Jurisprudential guidelines

The research recommends that the Constitutional Court should further develop the jurisprudence by providing solid guidelines over and above the constitutional clauses to guide where the lines of separation of powers starts and ends. The rationale for the codification of such guidelines is to also manage increasing tensions among the three branches as political matters are brought to the courts.

Ngcobo J tacitly calls for the prudential political question theory in the form of jurisprudential guidelines to facilitate justification of the employment of judicial review power.[592] But as with the prudential question theory, he wants such guidelines to be

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[586] Ngcobo, S 'Why Does the Constitution Matter?
[587] *1998 1 SCR 493 at para 138.*
[588] *S v Mhlungu & Others 1995 (CCT25/94) ZACC 4; 1995 (3) SA 867 ; 1995 (7) BCLR 793 (CC) (8 June 1995) 129.*
[589] Cameron location 254.
[590] A Sachs *The Strange Alchemy of Life and Law* (2009) 147.
[591] As above.
[592] Ngcobo, S 'Why Does the Constitution Matter?

'deeply rooted in the doctrine of separation of powers as provided for in our Constitution.'[593]' Mhango commented that currently the guiding principles are uncertain and unclear, and that so far there 'is no rule of law' developed for judges to be cautious and conscious of their limitations.[594] Tsele defined it as 'a government by the judiciary.'[595] This was echoed by Roux who said it is the courts that determine 'not just the permissible degree of legislative intrusion…but also the extent of its own power to intrude into the other branches' domains.'[596] He goes on to say the courts develop their own view on how to apply the separation of powers doctrine and often misunderstand 'the requirements of the separation of powers.'[597]

Mhango has gone to the extent of calling for South Africa to adopt the American-style classical political questions doctrine in which there are matters that must never be examined by the courts solely because of the political nature of the issues falling in the province of other branches of government. He referred to such questions as 'constitutionally allocated to the discretion of elected branches of government for resolution' and 'non-justiciable and require the judiciary to back off.' Mhango is correct only to the extent that in such dispute, the matters he referred to as political questions do not have implications for the violation of the Constitution. If such matters touch on the constitutionality or violate fundamental rights, then Mhango is wrong to use American classical political question doctrine to slip in another version of the royal prerogative powers.

[593] As above.
[594] Mhango 44.
[595] n 540.
[596] Tsele, M 'Coercing Virtue in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem' (2016) *Constitutional Court Review* 193–220.
[597] Tsele.

Chapter 5. Summary of findings and conclusion

Constitutional judicial review and separation of powers are two entwined doctrines and powers that determine the justiciability of socioeconomic rights and the justifiability of the executive's policy decisions. The research showed that the two doctrines provide distinct powers to the courts and the executive to fulfil their constitutional obligations and account for their decisions. The doctrines provide restraint to the powers of the two branches and align them to the Constitution, while compelling them to discharge their constitutional duties. The courts use their independence and judicial review power to enforce the Constitution, while the executive uses its political mandate to fulfil its constitutional obligations. This is the scheme of the constitutional democracy.

The separation of powers doctrine is an enabler for the executive to fulfil its obligations to realise socioeconomic rights in response to its democratic mandate. Constitutional judicial review is an enabler for the courts to intervene where such policies violate human rights or are not in line with legal norms and the Constitution. While the courts should show strong cause and reason for intervening in the policy decisions of the executive, the latter must do its best to realise fundamental rights. However, the Constitution expects the courts to use the reasonableness test to acknowledge and appreciate limited resources before compelling the executive to realise fundamental rights. The executive's policy decisions are also expected to be rational and in sync with the principle of legality in that they must be explained, reasoned, derive their power from the law, and not arbitrary.

Once the executive meets the constitutional requirements and criteria, their formulation and execution of policy cannot be questioned by the courts unless they violate fundamental rights. In this context, the content of the policy should not be subjected to constitutional judicial review. Failure or success of policy should be a political evaluation and left to the voters to decide. This is how democracy works. The judiciary does not have the power to veto or interrogate policy choices and the execution thereof. The Constitution and the courts offer the executive enough room to work out policy modalities and gather enough resources to realise fundamental rights. The executive is expected to answer and account for their decision-making process, criteria, reasons for their decisions, and demonstrate reasonable steps taken.

Therefore, constitutional judicial review is not an instrument for the courts to flex their power. It is an order, directive and authoritative instruction of the Constitution, which is itself a product of a democratic process. Both the judges and politicians ought to see judicial review as a political lady justice, balancing the scales of democracy and the constitutional principles without undermining the will of the people and constitutionalism. This is the gravitational force of the separation of powers doctrine. The Constitution, judicial review and separation of powers doctrine all recognise the role of a constitutional democracy to give space to government to realise fundamental rights. They are not mutually exclusive, but complementary constitutional concepts of power. But at the centre between the elected majority and unelected courts is constitutional supremacy. The majority, through elected representatives, must achieve their policies and programmes but within constitutional parameters, while the courts must examine these programmes and policies within a constitutionally permitted mandate. The research showed that the courts can also carry out their constitutional mandate without encroaching in other branches' political programmes by deferring and giving space to other branches to remedy the constitutional defects of the policy.

The research outlined the importance of the two most critical doctrines in our constitutional jurisprudence—separation of powers and constitutional judicial review. They are the two most critical constitutional pedals: Constitutional judicial review power is an accelerator that triggers the court to intervene to stop violation of the Constitution and its Bill of Rights. The separation of powers doctrine applies breaks to unmandated judicial encroachment into the functions and powers of other branches. In the context of policy decisions of the executive, which is at the centre of this research, it has been demonstrated that the separation of powers doctrine should be the dominant and determinant consideration unless other compelling factors dictate otherwise. Using *Eskom* as the case study, the research argued that not applying the doctrine of separation of powers as the primary departure risks unconstitutional judicial intrusion into the executive domain.

Chapter 2 provided the historical context of South Africa's constitutional jurisprudence and constitutional judicial review journey. It captured the role and the stature of the judiciary throughout different political periods, from the colonial, the Union, Republic and apartheid years, to the new democratic dispensation. The absence of constitutional judicial review gave rise to fundamental rights violations over

the years, and the failure of impotent courts to protect the majority of South Africans. Constitutional judicial review was finally and firmly introduced in the 1993 interim and 1996 final Constitutions. These Constitutions bestowed on the courts, especially the Constitutional Court, the power to protect fundamental rights and enforce the Constitution. This Chapter also demonstrated that the South African people, through their representatives in the Constitutional (National) Assembly, made a deliberate decision to create an unelected judicial structure and institution of the Constitutional Court to check the powers of and hold accountable other elected branches. In essence and simple terms, it means the people gave unelected judges the power to overturn the decisions of the elected representatives of the majority of voters. The primary role of the constitutional judicial review power was to ensure that no decision, power and conduct of those exercising public power can violate fundamental rights or offend the Constitution. It is also the power that forces everyone to act rationally within the law. It is a power that epitomises the rule of law in a constitutional democracy. Constitutional judicial review embodies the intrinsic nature of constitutionalism.

Chapter 3 encapsulated and captured the granular elements and practical application of the constitutional judicial review and the role of the separation of powers doctrine in policymaking cases. It illustrated that the South African constitutional jurisprudence does not subscribe to the political questions doctrine in which some matters are insulated from the courts' review. The Constitutional Court indirectly rejected the classical political question doctrine when it accepted the Constitutional Principle II that guaranteed justiciability of the Bill of Rights and the invalidation of any legislation that is inconsistent with the Constitution.[598] Whatever the court refuses to tackle as a political matter or policy issue, it is not necessarily as a result of the American-style political question doctrine, but the application of the separation of powers doctrine that restrains judicial power. The chapter also showed that the jurisprudence does not subscribe to the British Parliamentary sovereignty system in which the courts cannot review legislations. The traditional prerogative powers of the Crown have been trumped by what can loosely be referred to as the constitutional fundamentalist nature of South Africa's constitutional tradition, which has now been integrated into the country's judicial DNA. These constitutionalist characteristics are

[598] *Certification Case* 99-101.

premised on the overarching principle of Constitutional supremacy, in which no institution, body or law can be beyond the clutches of the Constitution.

The research however shows that constitutional judicial review power has its own limitations and cannot be evoked by the judiciary without any grounds, especially if applied to policymaking cases. The chapter focused on this limitation and self-restraint of the judiciary. It showed that with the enormous constitutional judicial review power, comes great responsibility for self-judicial control.

Chapter 3 also demonstrated that the Constitution and the Constitutional Court affirmed that policymaking power is the province of the executive and the courts should not readily intervene without cause. This is also affirmed by the principle of the separation of powers doctrine that does not allow any intrusion into the functions of other branches unless constitutionally mandated. The chapter showed that the Constitution also acknowledges limited resources and qualified some rights to the extent that the executive and legislature were expected to take reasonable measures in order to progressively realise them.

The research demonstrated through case law, the Constitution and established jurisprudence that the courts must stay away from policy decisions, regardless of whether such decisions were deemed ‘bad’ or poorly executed. This must be an established jurisprudential departure and culture. Separation of power doctrine must be the operative and primary consideration. The courts’ first approach should be an acknowledgement that policy decisions, budgets prioritisation and allocation of resources are not within the judicial realm. The chapter showed that the executive must be accorded the space to exercise its power, consider policy options, and discharge its duty to meet constitutional obligations. Where the executive does not have financial and other resources to meet these obligations, and after taking reasonable measures at their disposal, the judiciary must not see such constraints as violation of fundamental rights. Even where the executive’s policy decisions lead to poorly executed or failed programmes that trigger national frustration—as is the case with loadshedding in the *Eskom* cases—the judiciary must not be tempted to interfere. These are matters that must be left to the voters to decide and choose which government can develop and execute best policies. The research also showed how government policies evolve from party political manifestoes and therefore must be treated as political decisions protected by the Constitution.

Notwithstanding the above judicial restraint, Chapter 3 also showed that the executive doesn't have free reign to formulate and implement policy. It demonstrated that there are factors and requirements embedded in the rule of law that require policymakers to consider. The absence of these two principles can vitiate a policy decision regardless of the protection provided by the separation of powers doctrine.

Chapter 3 also unpacked and critiqued the three *Eskom* cases and demonstrated that the North Gauteng High Court encroached in the policymaking space by going the constitutional law route instead of tackling the consequences of loadshedding as an administrative law matter. The chapter shows that the results could have been relatively the same if this matter was attacked using the PAJA approach. Inasmuch as this research was not about administrative law and PAJA, the research demonstrated how the court misguided itself by resorting to constitutional judicial review. It illustrated how the Constitutional Court protected the policymaking powers of the executive and how similar matters were dealt with through the administrative law path.

Chapter 4 dealt with the challenges that the courts faced when dealing with policy decisions of the executive that involve socioeconomic rights with budgetary implications. It showed the approach the Constitutional Court took when it was forced to interfere in policy decisions, as was the case in *Treatment Action Campaign* and *Grootboom,* and when it respected the separation of powers doctrine in *Soobramoney* and *e-tolling* cases. The chapter also dealt with judicial activism in which judges believe that they can play politics where they strongly feel that there is a vacuum of leadership in the executive and legislature. It showed such activism can erode the legitimacy of the judiciary and invites unnecessary attacks on judicial independence and the integrity of the courts.

Lastly, the research has concluded that the courts should approach policy cases as political provinces of the executive. This requires caution and restraint in line with the separation of powers doctrine. Only when there is a clear fundamental rights violation, should the courts be allowed to interrogate such violation with deference on policy. It should be possible for the courts to decouple and separate the actual violation and still allow the executive to continue with a bad or poor policy.

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